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CRL. M.C.

NARCOTICS CONTROL BUREAU ....PETITIONER

VERSUS

ASHOK MITTAL & ANR. ....RESPONDENTS

(SHIV NARAYAN DHINGRA, J.)

CRL. M.C. NO. : 435/2009 DATE OF DECISION: 04.01.2011

Code of Criminal Procedure Act, 1973—Section 167(2)—Right to bail—Narcotics Drugs Psychotropic Substances Act, 1985—Accused caught with 125 packets of hashish weighing 32 kgs in his car—Trial Court allowed application for bail since chargesheet not filed within 180 days—Held, Magistrate wrongly calculated period of 180 days from the date of incident instead of from the date of production of the accused before the Magistrate—Jurisdiction of Magistrate to detain accused in judicial custody arises only when accused is produced before him—Magistrate has power of detention of 180 days in respect of offence under NDPS Act—Beyond prescribed period of 180 days in case of an offence under NDPS Act the Magistrate has no power to extend detention unless challan is filed—Power to authorize detention extinguishes on 180th day and Magistrate has to pass an order releasing accused on bail—In case challan filed, the undefeatable right to bail of accused does not servive—After filing charge-sheet power to remand to Judicial Custody for unlimited period i.e. till trial is over, starts and the accused can be released on bail only if he deserves bail on merits—Order of Trial Court set aside—Petition Allowed.

The criminal justice system cannot be made subservient to

the wishes of an investigating officer who, for some or the other reasons, may choose to delay filing charge-sheet for 2/3 days to ensure that the accused gets bail even in a most heinous crime. In the present case, the charge sheet was filed on 9th September 2008 itself i.e. on the date when bail application was made. Once charge sheet had been filed, the Magistrate was not supposed to consider the bail application under Section 167(2) Cr.P.C. Moreover, in this case, Magistrate has counted 180 days from 10th March 2008 i.e. from the date of incident. Section 167(2) envisages powers of Magistrate from the date of production of accused before the Magistrate and not from the date of incident.

(Para 7)

Important Issue Involved: Under Section 167 CrPC time period commences from the date the accused is produced before Magistrate and not from the date of incident.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. Satish Aggarwala, Advocate.

FOR THE RESPONDENTS : Mr. Yogesh Saxena, Advocate.

CASES REFERRED TO:

1. *Uday Mohan Lal Acharya* vs. *State of Maharashtra,* AIR 2001 SC 1910.
2. *Sanjay Dutt* vs. *State* 1994(5) SCC 410.

RESULT: Petition allowed.

1. This petition under Section 482 Cr.P.C has been preferred by the petitioner assailing an order dated 28th January 2009 passed by learned Special Judge, NDPS Act of releasing the accused on bail under Section 167(2) Cr.P.C.

2. A perusal of order of learned Special Judge would show that the incident had taken place on 10th March, 2008 and the chargesheet in the case was filed on 9th September 2008. The accused filed an application

for bail on 9th September 2008 under Section 167(2) Cr.P.C and the learned Special Judge issued notice of the application to the prosecution for 17th September 2008. Reply to the application was filed and ultimately vide order dated 28th January 2009, the learned Sessions Judge under Section 167(2) Cr.P.C directed release of the accused/ respondents from whose car 125 packets of hashish weighing 32 kg were recovered.

3. The issue raised by way of this petition is whether the respondents had an undefeatable right to be released on bail under Section 167(2) since the chargesheet was not filed within 180 days of the incident.

4. Section 167(2) Cr.P.C reads as under:

> "(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole ; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that-
>
> 1*[(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days ; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-
>
> (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;
>
> (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

> (b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;
>
> (c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorize detention in the custody of the police.

5. A perusal of above provision would show that the jurisdiction of the Magistrate to detain the accused in judicial custody arises only when the accused is produced before him. One time detention which the Magistrate can authorize is of 15 days and the total detention varies according to the nature of offence. The Magistrate has power of detention of 180 days in respect of an offence under NDPS Act. Beyond the prescribed period of 180 days in case of an offence under NDPS Act the Magistrate has no power to extend detention unless challan is filed. The power to authorize detention by the Magistrate extinguishes on 180th day and the law provides that he shall pass an order of ˇhis release on bail and on accused furnishing bail bond as per order, he shall be released on bail. The power of Magistrate to authorize detention again starts when challan is filed and cognizance of the offence is taken by the Magistrate. Thus, after expiry of 180 days, the Magistrate has not to wait for bail application but has to pass an order for bail and ask the accused to furnish bail bonds so that he can be set at liberty. However, if before the accused furnishes the bail bonds, the investigating agency files challan, the Magistrate per se has to take cognizance of the offence and take cognizance of the facts and circumstances under which the offence was allegedly committed by the accused and the investigating agency can very well press that since the bail bond of the accused has not been furnished, he be not released on bail under Section 167(2) Cr.P.C. and the accused be kept in custody and his bail application be decided on merits. While the accused has a right to be released on bail after 60,90 or 180 days, as the case may be, the State also has a right to detain the accused on filing of challan and accused is entitled to bail only on merits. This position was clarified by the Supreme Court in **Sanjay Dutt v State** 1994(5) SCC 410 whereby the Supreme Court observed that undefeatable right of the accused to be released on bail arising from the default in not producing the challan continues till filing of challan but does not survive thereafter and after filing of challan, grant of bail has to be decided on merits.

6. The respondent has relied upon **Uday Mohan Lal Acharya v State of Maharashtra,** AIR 2001 SC 1910 which is a judgment by three Judges Bench of Supreme Court and by a majority of 2::1, the Supreme Court observed that **Sanjay Dutt's** case (supra) has to be understood in the manner that Magistrate has to dispose of such application made by accused forthwith if the accused has been in custody without filing of charge sheet within the specified period and that accused was prepared to furnish bail bonds. If after filing of application by the accused, the charge sheet has been filed, still the right of the accused under Section 167(2) Cr.P.C shall continue. **Uday Mohan Lal ˇAcharya's** case (supra) does not overrule **Sanjay Dutt's** case (supra) nor the smaller Bench of Supreme Court could overrule law laid down by Constitutional Bench. The judgment given by the Constitutional Bench of Supreme Court (Five Judges) in **Sanjay Dutt's** case (supra) is very clear that this right of being released on bail without merits is available only after statutory period as given under Section 167(2) Cr.P.C for extending remand has expired till the charge sheet is filed by prosecution. It is not the right of accused which is defined in Section 167(2), it is the authority of the Magistrate to extend remand which is defined in Section 167(2). The authority of Magistrate to extend remand of such an accused is up to 180 days in NDPS cases, in absence of filing of charge sheet, but once the charge sheet is filed this authority again gets vested in the Magistrate and after filing of charge sheet, the Magistrate can decide the bail application only on the basis of merits i.e. facts and circumstances of the case. **Uday Mohan Lal Acharya's** case (supra) is not in consonance of provisions of Section 167(2) Cr.P.C and its understanding of **Sanjay Dutt's** case (supra) is contrary to provisions of Section 167(2) Cr.P.C.

7. The criminal justice system cannot be made subservient to the wishes of an investigating officer who, for some or the other reasons, may choose to delay filing charge-sheet for 2/3 days to ensure that the accused gets bail even in a most heinous crime. In the present case, the charge sheet was filed on 9th September 2008 itself i.e. on the date when bail application was made. Once charge sheet had been filed, the Magistrate was not supposed to consider the bail application under Section 167(2) Cr.P.C. Moreover, in this case, Magistrate has counted 180 days from 10th March 2008 i.e. from the date of incident. Section 167(2) envisages powers of Magistrate from the date of production of accused before the Magistrate and not from the date of incident.

8. I consider that the trial court did not realize the extent of its powers under Section 167(2). If the trial court had to pass an order under Section 167(2), it has to pass it on 61st, 81st or 181st day, as the case maybe, on production of accused as its power of remanding accused to judicial custody extinguishes, either on an application from the accused or suo moto and the accused has to be granted bail as if the offence was bailable. If powers are not exercised on 61st, 81st or 181st day, as the case may be, and is exercised on a day subsequent to which charge sheet has been filed, such an exercise of powers under Section 167(2) is illegal since after filing charge-sheet, power to remand the accused to judicial custody for unlimited period i.e. till trial is over, starts and the accused can be released on bail only if he deserves bail on merits and not otherwise. I find that the order of learned trial court is bad in law and is liable to be set aside. The petition is therefore allowed. The order of the trial court is hereby set aside. The accused be taken in custody. The accused shall be at liberty to make an application before the trial court for grant of regular bail on merits.

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CRL A.

CHATTAR SINGH ....APPELLANT

VERSUS

SUBHASH & ORS. ....RESPONDENTS

(BADAR DURREZ AHMED & MANMOHAN SINGH, JJ.)

CRL. A. NO. : 443/2010 DATE OF DECISION: 07.01.2011

Code of Criminal Procedure, 1973—Section 372—Maintainability of Appeal—Trial Court acquitted respondent nos 1 to 4 for offences u/s 120B, 364 r/w sec 120B, 302 r/w sec 120B and 201 r/w sec 120B IPC—Appeal filed by father of deceased—Held, u/s 8 & 9 of

the Hindu Succession Act, appellant being Class II heir, would not inherit anythhing from his deceased son—Since widow and children of the deceased who were class I heirs would inherit to the exclusion of the class II heirs and appellant not entitled to property of victim, he would not fall within expression of 'legal heir' in relation to his deceased son—Appeal not maintainable as it is not by a victim as contemplated in Section 372 because appellant does not qualify as victim as defined in Section 2(wa) of the Code—Appeal dismissed.

In view of the provisions of sections 8 and 9 of the HSA, the appellant being a Class II heir would not inherit anything from his deceased son Satish in the presence of Satish's Widow and children who, being Class I heirs, inherit to the exclusion of Class II heirs and agnates and cognates. Thus, strictly speaking, the appellant is not entitled to the property of the victim under the applicable law of inheritance i.e., the HSA. Consequently, again strictly speaking, the appellant would not fall within the expression "legal heir" in relation to his deceased son - Satish. **(Para 12)**

At this juncture, Mr Kirpal contended that the expression "legal heir" has reference to all heirs specified in the HSA be they Class I heirs or Class II heirs or agnates or cognates. He submitted that the appellant being the father of the deceased victim and a Class II heir could surely file an appeal in respect of the murder of his said son. This, very emotive argument, appears to be reasonable and also appeals to our sensibilities but, our job as judges is to interpret the statute and, in doing so, to find out the intention of the legislature. The use of the expression "legal heir" as distinct from "heir" is deliberate. And, therefore, the expression "legal heir" would have to be given its meaning in law of referring to a person who is entitled to the property of the victim under the applicable law of inheritance. We have seen that the appellant is not such a person. As such, he cannot be regarded as a "legal heir" of the victim and,

consequently, he does not come even within the "includes" part of the definition of "victim" in section 2(wa) of the Code. **(Para 13)**

Important Issue Involved: Where person is not a 'victim' within meaning of Section 2(wa) of CrPC he cannot file appeal under Section 372 CrPC.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Mr. Saurabh Kirpal with Mr. B.B. Bhatia, Mr. Navjot Kumar and Ms. Rashmi Sharma.

FOR THE RESPONDENTS : Mr. K.B. Andley, Sr. Advocates with Mr. Mohd. Shamikh, Ms. Richa Kapoor.

CASES REFERRED TO:

1. *N.D.P. Namboodripad* vs. *Union of India:* (2007) 4 SCC 502.
2. *Bay Berry Apartments (P) Ltd.* vs. *Shobha:* (2006) 13 SCC 737.
3. *Black Diamond Beverages* vs. *CTO:* (1998) 1 SCC 458
4. *P. Kasilingam* vs. *P.S.G. College of Technology:* 1995 Supp (2) SCC 348.
5. *Punjab Land Development and Reclamation Corpn. Ltd.* vs. *Presiding Officer, Labour Court* [(1990) 3 SCC 682, 717]).
6. *Mahalakshmi Oil Mills* vs. *State of A.P.*[(1989) 1 SCC 164, 169].
7. *N. Krishnammal* vs. *R. Ekambaram:* (1979) 3 SCC 273.
8. *Angurbala Mullick* vs. *Debabrata Mullick:* 1951 SCR 1125.
9. *Dilworth* vs. *Commissioner of Stamps* [1899 AC 99, 105-

106](Lord Watson).

10. *Gough* vs. *Gough* [(1891) 2 QB 665].

RESULT: Appeal dismissed.

BADAR DURREZ AHMED, J.

1. Mr Chattar Singh has filed this appeal under the proviso to section 372 of the Criminal Procedure Code, 1973 (hereinafter referred to as 'the Code'), claiming himself to be a .victim.. The appeal is directed against the judgment dated 06.01.2010 delivered by the learned Additional Sessions Judge, North East, Karkardooma Courts, Delhi whereby the respondent nos. 1 to 4 who had been charged under sections 120-B, 364 r/w 120-B, 302 r/w 120-B and 201 r/w 120-B IPC, were acquitted.

2. The primary question which arises in this case is with regard to the maintainability of the appeal. Can Mr Chattar Singh, the father of the deceased Satish, be regarded as a .victim. for the purposes of the proviso to section 372 of the Code? Who is a =victim' for the purposes of the proviso to section 372 of the Criminal Procedure Code, 1973?

3. The proviso to section 372 of the Code stipulates that a .victim. shall have a right to prefer an appeal against any order passed by the court whereby :-

(a) the accused is acquitted; or

(b) the accused is convicted for a lesser offence; or

(c) inadequate compensation is imposed.

The word "victim" is defined in section 2(wa) of the Code as under:-

> "2. Definitions.—In this Code, unless the context otherwise requires,—
>
> xxxxx xxxxx xxxxx xxxxx
>
> (wa) "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir;.

A victim of crime is a person who suffers any loss or injury as a result

of the crime. Although the expression "any loss or injury" is an expansive expression, it appears that it has been used in the context of the person whose suffering is the direct and most proximate result of the crime. Let us take the case of theft. The person whose suffering is the direct and most proximate result of the crime is the person whose property is stolen. Surely, that person's wife, children or parents would also suffer some mental pain and anguish and may even suffer financially but, the real victim is that ˇperson, that is, the owner of the property stolen. In the case of grievous hurt also, the victim would be the person on whom the hurt was inflicted although, there would be other family members and friends who may also indirectly suffered the trauma. The victim of rape is the woman or girl who has been raped. Although her parents and other family members must have also suffered to some extent, it is only she who could be regarded as the victim. Of course, where the person on whom the crime is committed loses his or her life, his or her "heirs" would fall within the meaning of "victim". Similar is the case of a minor or a person of unsound mind. It is his or her guardian who would also be regarded as a "victim". This is clear from the 'means ... and includes' definition found in section 2(wa) of the Code.

4. Mr Kirpal, the learned counsel for the appellant, referred to **Black Diamond Beverages v. CTO**: (1998) 1 SCC 458 wherein the definition of 'sale-price' in section 2(d) of the West Bengal Sales Tax Act, 1954, which employed a "means ... and includes" definition, was considered. The Supreme Court observed that the first part of the definition defined the meaning of the word 'sale price' and ought, therefore, be given its ordinary, popular or natural meaning and that the interpretation thereof was in no way controlled or affected by the second part which "includes" certain other things in the definition. The Court recognised this as a well-settled principle of construction. In other words, the "means" part of the definition was taken as its ordinary and natural meaning and the "includes" part was considered to extend the word to something it would not ordinarily cover.

5. Another decision referred to by Mr Kirpal was that of **P. Kasilingam v. P.S.G. College of Technology:** 1995 Supp (2) SCC 348, where, at pages 355-356, the Supreme Court observed as under:-

> …. It has been urged that in Rule 2(b) the expression .means

and includes. has been used which indicates that the definition is inclusive in nature and also covers categories which are not expressly mentioned therein. We are unable to agree. A particular expression is often defined by the Legislature by using the word "means" or the word "includes". Sometimes the words "means and includes" are used. The use of the word "means" indicates that "definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition.. (See : **Gough v. Gough** [(1891) 2 QB 665]; **Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court** [(1990) 3 SCC 682, 717]). The word 'includes' when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. The words .means and includes., on the other hand, indicate "an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions". (See : **Dilworth v. Commissioner of Stamps** [1899 AC 99, 105-106](Lord Watson); **Mahalakshmi Oil Mills v. State of A.P.**[(1989) 1 SCC 164, 169]."

Of course, the definition in **Kasilingam** (supra) was one where the expression employed was "means and includes" whereas in section 2(wa) of the Code the expression is "means ... and includes" which is in the form "means A and includes B".

6. Finally, as regards the meaning to be ascribed to the word .includes., Mr Kirpal referred to the Supreme Court decision in **N.D.P. Namboodripad v. Union of India:** (2007) 4 SCC 502. After referring to Justice G.P. Singh's treatise - Principles of Statutory Interpretation (10th ˇEdn., 2006) – the Court noticed that where a word defined is declared to "include" such and such, the definition is prima facie extensive, but the word "include" when used while defining a word or expression, may also be construed as equivalent to "mean and include" in which event, it will afford an exhaustive explanation of the meaning which for the purposes of the Act in question must invariably be attached to the word or expression. The Supreme Court further observed that it is evident that the word 'includes' can be used in interpretation clauses

either generally in order to enlarge the meaning of any word or phrase occurring in the body of a statute, or in the normal standard sense, to mean "comprises" or "consists of" or "means and includes" depending on the context.

7. These decisions make it abundantly clear that a definition which solely uses the word "means" is a "hard and fast" definition. A definition which uses the word 'includes' alone is not an exhaustive one but an extensive and expansive one. A definition which employs the expression "means and includes." is an exhaustive definition and, a definition which has the expression "means"... and includes' and which is in the form "means A and includes B" usually refers to the ordinary and natural meaning but with an extension of the "includes" portion. In the present case, Section 2(wa) would refer to a crime victim in the natural and ordinary sense as the person who directly and most proximately suffered the loss or injury but it would also include -- (a) his or her heirs in case he or she was dead; or (b) his or her guardian if he or she was a minor or of unsound mind or under some other disability.

8. The word "victim" as defined in section 2(wa) of the Code is not only to be found in the proviso to section 372. It also finds mention in (i) the proviso to section 24(8); (ii) the second proviso to section 157(1); (iii) section 164-A; (iv) section 265-B(4)(a); (v) section 265-C; (vi) section 265-E; (vii) section 357-A; (viii) proviso to section 372; (ix) reference to section 228-A in the First Schedule to the Code. The word "victim" in all these provisions would have to be given the meaning ascribed to it in section 2(wa), unless, of course the context otherwise requires. In the second proviso to section 157(1), for example, the reference to "victim" is only to the rape victim herself (and not to her guardian etc) as the said provision relates to the recording of her statement at her place of residence. Here, the context requires that the "includes" part of the definition be discarded. In section 357-A (1), which relates to the victim compensation scheme, the expression used is "the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation". This provision also indicates that the word "victim" primarily refers to the person who suffers direct loss or injury because his "dependants" have been separately mentioned, though they may also have suffered loss or injury or be in need of rehabilitation. Another thing which comes to notice is the use of the word 'or' in the

expression "victim or his dependents", which suggests that compensation is either for the victim or for his/her dependents, in case the victim is no longer alive. This also illustrates the point that "victim" refers to the crime victim in the natural and direct sense and not to the "dependents" etc. Of course, the expression "dependent" is different from "legal heir" which appears in the "includes" part of the definition in section 2(wa), but we need not go into this discussion for the present.

9. In the case at hand, the appellant - Mr Chattar Singh, is the father of Satish who was murdered and who was the "victim" of the crime in the natural and ordinary sense. Satish also left behind his widow and children. They, however, have not come forward for filing any appeal as "victims". The question which now arises is – whether the appellant can be regarded as a "victim" within the meaning of section 2(wa) of the Code. In the view we have taken, he can only be regarded as a "victim" if he is covered by the "includes" part of the definition by falling within the expression "legal heir".

10. The word "heirs" as used in a will was considered by the Supreme Court in **Angurbala Mullick v. Debabrata Mullick:** 1951 SCR 1125. The Supreme Court was of the view that the word 'heirs' cannot normally be limited to issue only and that it must mean "all persons who are entitled to the property of another under the law of inheritance". Again in a similar context, the Supreme Court in **N. Krishnammal v. R. Ekambaram:** (1979) 3 SCC 273, held that it was well settled that legal terms such as .heirs., used in a Will must be construed in the legal sense, unless a contrary intention is clearly expressed by the testator and, consequently, as pointed out in **Angurbala Mullick v. Debabrata Mullick** (supra) it must mean "all persons who are entitled to the property of another under the law of inheritance". The same view was also taken in **Bay Berry Apartments (P) Ltd. v. Shobha:** (2006) 13 SCC 737. These decisions relate to the expression "heirs" as appearing in a Will. The Supreme Court has interpreted the word "heirs" in the legal sense unless a contrary intention of the testator is discernible. In the case of section 2(wa), since the word 'heir' is preceded by the word "legal", it must be construed in the legal sense as that is the clear intention of the legislature. The expression "legal heir" in relation to a victim, therefore, clearly refers to a person who is entitled to the property of the victim under the applicable law of inheritance.

11. Undoubtedly, the law of inheritance applicable to the victim Satish is the Hindu Succession Act, 1956 (hereinafter referred to as 'the HSA'). Section 8 of the HSA sets out the general rules of succession in the case of a male Hindu dying intestate. It stipulates that the property would devolve, firstly, upon the heirs specified in Class I of the Schedule; secondly, if there is no heir of Class I, then upon the heirs specified in Class II of the Schedule; thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and lastly, if there is no agnate, then upon the cognates of the deceased. Section 9 of the HSA provides the order of succession among heirs in the Schedule. Those in Class I take simultaneously and to the exclusion of all other heirs; those in the first entry in Class II are preferred to those in the second entry and so on, in succession. Section 12 prescribes the order of succession among agnates and cognates but that does not concern us in the facts of the present case inasmuch as it is an admitted position that the "victim" (Satish) left behind his widow and children (Class I heirs) and his father (Chattar Singh – the appellant) who is a Class II heir.

12. In view of the provisions of sections 8 and 9 of the HSA, the appellant being a Class II heir would not inherit anything from his deceased son Satish in the presence of Satish's Widow and children who, being Class I heirs, inherit to the exclusion of Class II heirs and agnates and cognates. Thus, strictly speaking, the appellant is not entitled to the property of the victim under the applicable law of inheritance i.e., the HSA. Consequently, again strictly speaking, the appellant would not fall within the expression "legal heir" in relation to his deceased son - Satish.

13. At this juncture, Mr Kirpal contended that the expression "legal heir" has reference to all heirs specified in the HSA be they Class I heirs or Class II heirs or agnates or cognates. He submitted that the appellant being the father of the deceased victim and a Class II heir could surely file an appeal in respect of the murder of his said son. This, very emotive argument, appears to be reasonable and also appeals to our sensibilities but, our job as judges is to interpret the statute and, in doing so, to find out the intention of the legislature. The use of the expression "legal heir" as distinct from "heir" is deliberate. And, therefore, the expression "legal heir" would have to be given its meaning in law of referring to a person who is entitled to the property of the victim under the applicable law of inheritance. We have seen that the appellant is not such a person. As

such, he cannot be regarded as a "legal heir" of the victim and, consequently, he does not come even within the "includes" part of the definition of "victim" in section 2(wa) of the Code.

14. The result of this discussion is that the present appeal is not maintainable inasmuch as it not an appeal by a "victim" as contemplated in section 372 of the Code because the appellant does not qualify as a "victim" as defined in section 2(wa) of the Code. The appeal is dismissed as such. All pending applications also stand disposed of.

ILR (2011) DELHI II 479
CS (OS)

B.B. SABHARWAL & ANR. ....PLAINTIFF

VERSUS

M/S SONIA ASSOCIATES ....DEFENDANT

(V.K. JAIN, J.)

CS(OS) NO. 998/1998 DATE OF DECISION: 14.01.2011

Specific Relief Act, 1963—Section 16(c)—Defendant agreed to sell first floor of a property to plaintiff for Rupees 40 lakhs by an agreement to sell dated 20.1.1997—Rupees 5 lakhs paid towards earnest money—Balance to be paid in 15 days—Defendant was required to get Income Tax clearance certificate, before execution of sale deed—Further sum of Rupees 15 lakhs paid to defendant on 20.05.1997—Alleged defendant neither applied for Income Tax clearance certificate nor for necessary permission from Land and Development Officer—Suit filed for specific performance of agreement to sell or in the alternative for recovery of Rupees 40 thousand as damages—Defendant denied having received Rs. 15 lakhs and

therefore earnest money made by the plaintiff stood forfeited.

Held:

(A) Contracts can be divided into three categories—

(i) Where the sum mentioned is strictly a penalty-a sum named by way of securing the performance of the contract, as the penalty is a bond:

(ii) Where the sum named is to be paid as liquidated damages for a breach of the contract:

(iii) Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.

Where the stipulated payment comes under either of the two first mention heads, the Court enforces the contract, but where it comes under the third head, the Court is satisfied by payment of money and there is no ground to compel the specific performance of the other alternative of the contract.

(B) Person who comes to Court seeking specific performance of a contract must show and satisfy the Court that his conduct having been blemishless he is entitled to grant of specific performance of the contract—There is a distinction between readiness to perform the contract and willingness to perform the same—By readiness is meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price.

In **Man Kaur (dead) by LRS. Vs. Hartar Singh Sangha** 2010 (9) UJ 4569 (SC), one of the terms of the agreement for sale of immovable property provided that if the vendor committed a default, he was to pay the double of the earnest money to the purchaser and if the purchaser

committed any default, the sum of Rs 10 lacs paid as earnest money would be forfeited. The contention of the appellant before the Supreme Court was that since the agreement of sale only provided for damages in the event of breach by either party and did not provide for specific performance in the event of breach of by the vendor, their intention was that in the event of breach by the vendor, the purchaser will be entitled to double the earnest money and nothing more and, therefore, the vendee was not entitled to specific performance of the contract. Repelling the contention, the Supreme Court held that for a plaintiff to seek specific performance of a contract of sale relating to immovable property and for a Court to grant such specific performance, it is not necessary that the contract should contain a specific provision that in the event of breach, the aggrieved party will be entitled to specific performance. It was further held that if the legal requirements for seeking specific performance of a contract are made out, it could be enforced even in the absence of a specific term for specific performance in the contract. Legal position was clarified by the Supreme Court giving the following illustrations (not exhaustive):

> "(A). The agreement of sale provides that in the event of breach by the vendor, the purchaser shall be entitled to an amount equivalent to the earnest money as damages. The agreement is silent as to specific performance. In such a case, the agreement indicates that the sum was named only for the purpose of securing performance of the contract. Even if there is no provision in the contract for specific performance, the court can direct specific performance by the vendor, if breach is established. But the court has the option, as per Section 21 of the Act, to award damages, if it comes to the conclusion that it is not a fit case for granting specific performance.
>
> (B). The agreement provides that in the event of the vendor failing to execute a sale deed, the purchaser will not be entitled for specific performance but will only be entitled for return of the earnest money and/ or payment of a sum named as liquidated damages. As the intention of the parties to bar specific performance of the contract and provide only for damages in the event of breach, is clearly expressed, the court may not grant specific performance, but can award liquidated damages and refund of earnest money.
>
> (C). The agreement of sale provides that in the event of breach by either party the purchaser will be entitled to specific performance, but the party in breach will have the option, instead of performing the contract, to pay a named amount as liquidated damages to the aggrieved party and on such payment, the aggrieved party shall not be entitled to specific performance. In such a case, the purchaser will not be entitled to specific performance, as the terms of the contract give the party in default an option of paying money in lieu of specific performance."

Noticing that in the case before it, the agreement did not specifically provide for specific performance nor did it bar specific performance and it provided for payment of damages in the event of breach by other party, Supreme Court was of the view that the provision for damages in the agreement was not intended to provide the vendor an option of paying money in lieu of specific performance and, therefore, the plaintiff was entitled to seek specific performance even in the absence of a specific provision therefor, subject to his proving breach by the defendant and that he was ready and willing to perform his obligation on the contract in terms of the contract. **(Para 7)**

In **M.L. Devender Singh and Ors. Vs. Syed** 1973 (2) SCC 515, the terms of the contract between the parties provided that in case of failure to comply with the terms of the agreement, the vendor shall be liable not only for the refund of the advance received by him, but also to pay a similar

amount as damages to the vendee. There was no mention anywhere in the contract that a party to it will have the option either to fulfil the contract or pay the liquidated damages stipulated for a breach, as an alternative to the performance of the contract. The Supreme Court divided the contracts into the following three classes:

(i) Where the sum mentioned is strictly a penalty-a sum named by way of securing the performance of the contract, as the penalty is a bond :

(ii) Where the sum named is to be paid as liquidated damages for a breach of the contract :

(iii) Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.

It was held that where the stipulated payment comes under either of the two first-mention heads, the Court enforce the contract, but where it comes under the third head, the Court is satisfied by payment of money and there is no ground to compel the specific performance of the other alternative of the contract.

In the case before this Court, the contract between the parties would fall either under category (i) or category (ii) and, therefore, the Court is required to enforce the contract if the plaintiff is otherwise entitled to such a relief in law.

(Para 9)

Section 16(C) of Specific Relief Act provides that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms, the performance of which has been prevented or waived by the defendant.

Explanation (i) provides that where the contract involves payment of money it is not essential for the plaintiff to actually tender the money to the defendant or to deposit it in the Court unless so directed by the Court.

The philosophy behind the aforesaid statutory provision is that a person who comes to the Court seeking specific performance of a contract to which he is a party must show and satisfy the Court that his conduct having been blemishless he is entitled to grant of specific performance of the contract. There is a distinction between readiness to perform the contract and willingness to perform the same. By readiness is meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price.

In **Ardeshir H Mama Flora Sassoon** (supra), Privy Council held that in a suit for specific performance of a contract, the plaintiff has to allege and if the fact is traversed also to prove a continuous readiness and willingness from the date of the contract to the time of hearing, to perform the contract on his part and failure to make good that averment brings with it and leads to inevitable dismissal of the suit. The view taken by the Privy Council was approved by Supreme Court in **Premraj vs. DLF Housing and Constriction Pvt. Ltd.** AIR 1968 SC 1355. **(Para 20)**

[An Ba]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Sandeep Sethi, Sr. Advocate with Mr. Nikhil Bhalla.

FOR THE DEFENDANT : Mr. Girdhar Govind, Advocate.

CASES REFERRED TO:

1. *Man Kaur (dead) by LRS.* vs. *Hartar Singh Sangha* 2010 (9) UJ 4569 (SC).
2. *P. D'Souza* vs. *Shondrilo Naidu* (2004) 6 SCC 649.
3. *M.K. Mokbool Khan* vs. *Smt. Shamsunnisa & Ors.* AIR

2002 NOC 87.

4. *Manzoor Ahmed Margray* vs. *Gulam Hassan Aram & Ors.* 1997 (7) SCC 703.

5. *S.V.R. Mudaliar (Dead) by Lrs. and Ors.* vs. *Rajabu F. Buhari (Mrs) (Dead) by Lrs. and Ors.* AIR 1995 SC 1607.

6. *Bishwanath Mahto* vs. *Srimati Janki Devi,* AIR 1978 Patna, 190.

7. *M.L. Devender Singh and Ors.* vs. *Syed* 1973 (2) SCC 515.

8. *Kommisetti Venkatasubbayya* vs. *Karamestti Venkateswarlu* AIR 1971, Andhra Pradesh, 279.

9. *Premraj* vs. *DLF Housing and Constriction Pvt. Ltd.* AIR 1968 SC 1355.

10. *Gomathinayagam Pillai* vs. *Pallaniswami Nagar,* AIR 1967 SC 868.

11. *Butchiraju* vs. *Sri Ranga,* AIR 1967 Andra Pradesh 69.

12. *Sobharam* vs. *Totaram* AIR 1952 Nagpur, 244.

13. *Subarayudu* vs. *Tatayya,* 1937 Mad. WN 1158.

14. *Ardeshir H. Mama Flora Sassoon,* AIR 1928 PC 208.

15. *Rustomali* vs. *Ahoider Rahaman* 45 CWN 837.

RESULT: Suit Decreed.

V.K. JAIN, J.

1. This is a suit for specific performance of Agreement to Sell dated 20th June, 1997 or in the alternative for recovery of Rs.40,00,000/- as damages.

2. The case of the plaintiffs is that on 20th June, 1997, the defendant agreed to sell the entire first floor of property No.D-144, New Rajinder Nagar, New Delhi to them for a consideration of Rs.40,00,000/-. A sum of Rs.5,00,000/- was paid to the defendant towards earnest money and the balance amount of Rs.35,00,000/- was agreed to be paid within 15 days from the date of the agreement. The defendant was required to obtain NOC as also Income Tax Clearance certificate required for execution

and registration of the sale deed in favour of the plaintiff. According to the plaintiffs, the balance sale consideration was to be paid after the defendant had obtained necessary sale permission, Income Tax Clearance etc., had presented the sale deed for registration and delivered possession of the property to the plaintiff. A further sum of Rs.15,00,000/- is alleged to have been paid by the plaintiffs to the defendant on 25th June, 1997. The case of the plaintiffs is that despite receiving the aforesaid sums from them, the defendant did not apply for Income Tax Clearance Certificate and necessary permission from Land and Development Office for execution and registration of the sale deed in their favour.

3. It is also alleged that the amount of Rs 15 lacs, which the defendant took from the plaintiffs on 25th June, 1997, was invested by her in purchasing a shop where she is running business under the name and style of M/s Tilak Exclusif. The plaintiff has accordingly sought specific performance of the agreement dated 20th June, 1997. It is further prayed that if on account of any unavoidable circumstance the sale of the aforesaid property is not admissible and performance of the agreement dated 20th June, 1997 is not permissible, a decree for damages to the tune of Rs 40 lacs be passed.

4. The defendant has contested the suit. He has admitted having entered into an agreement dated 20th June, 1997 to sell the first floor with roof rights of Property No. D-144, New Rajinder Nagar, to the plaintiffs, for a sale consideration of Rs 40 lacs and receipt of Rs 5 lacs as the earnest money. It is claimed in the written statement that the agreement provided that in case of failure of the defendant to execute the sale deed or hand over vacant possession of the property or to get NOC or Income-tax Clearance Certificate from the Competent Authority, the plaintiffs were to get double the amount of earnest money and in the case of failure of the plaintiffs to make the balance payment of the sale consideration, the earnest money was to stand forfeited. It is also alleged that the plaintiffs failed to make payment of the balance sale consideration within the time stipulated in the agreement in this regard and, therefore, the earnest money paid by them stood forfeited. It is also claimed that since the suit property was a freehold plot, no permission from Land & Development office was required for its sale. The defendant has denied receiving a sum of Rs 15 lacs from the plaintiffs and has claimed that she is not the owner of the shop Tilak Exclusif which was taken on lease

by her husband in the year 1984-85. It is further stated that the plaintiff No.1 had also entered into an agreement with the defendant in the name of their daughters in respect of the basement and store of D-144, New Rajinder Nagar vide Agreement dated 20th June, 1997 and the sale in respect of the aforesaid portion was concluded on 04th July, 1997.

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

1. Whether the plaintiff is entitled to a decree for specific performance of the agreement dated 20.06.1997, directing the defendant to execute the sale deed in respect of first floor and the roof rights of the first floor of the property bearing No. D-144, New Rajinder Nagar, New Delhi, as prayed in the suit? OPP

2. Whether the plaintiff was always ready and willing to perform his obligations under the agreement? OPP

3. Whether the defendant purchased the shop "Tilak Exclusif" for Rs 15 lakh paid by the plaintiff to the defendant on 25.06.1997? OPP

4. Whether in the alternative plaintiff is entitled to the damages of Rs 40 lakh due to non-performance of the agreement dated 20.06.1997 by the defendant? OPP

5. Whether the plaintiff failed to pay the balance consideration, as per the agreement and defendant was entitled to forfeit the earnest money? OPD.

6. Relief

Issue No. 1

6. It was contended by the learned counsel for the defendant that since clause 4 of the agreement stipulated refund of the earnest money of Rs 5 lacs to the plaintiffs alongwith penalty of Rs 5 lacs in case of the failure of the defendant to complete the sale transaction, the plaintiff, at best, is entitled to an amount of Rs 10 lacs from the defendant and specific performance of the contract cannot be granted to them. I, however, find no merit in this contention. Payment of Rs 10 lacs to the plaintiffs, including the amount of earnest money, was only an alternative remedy made available to the plaintiffs, which they could avail at their

option, but it does not disentitle them from seeking specific performance of the contract if it is otherwise made out in the facts and circumstance of the case.

7. In **Man Kaur (dead) by LRS. Vs. Hartar Singh Sangha** 2010 (9) UJ 4569 (SC), one of the terms of the agreement for sale of immovable property provided that if the vendor committed a default, he was to pay the double of the earnest money to the purchaser and if the purchaser committed any default, the sum of Rs 10 lacs paid as earnest money would be forfeited. The contention of the appellant before the Supreme Court was that since the agreement of sale only provided for damages in the event of breach by either party and did not provide for specific performance in the event of breach of by the vendor, their intention was that in the event of breach by the vendor, the purchaser will be entitled to double the earnest money and nothing more and, therefore, the vendee was not entitled to specific performance of the contract. Repelling the contention, the Supreme Court held that for a plaintiff to seek specific performance of a contract of sale relating to immovable property and for a Court to grant such specific performance, it is not necessary that the contract should contain a specific provision that in the event of breach, the aggrieved party will be entitled to specific performance. It was further held that if the legal requirements for seeking specific performance of a contract are made out, it could be enforced even in the absence of a specific term for specific performance in the contract. Legal position was clarified by the Supreme Court giving the following illustrations (not exhaustive):

> "(A). The agreement of sale provides that in the event of breach by the vendor, the purchaser shall be entitled to an amount equivalent to the earnest money as damages. The agreement is silent as to specific performance. In such a case, the agreement indicates that the sum was named only for the purpose of securing performance of the contract. Even if there is no provision in the contract for specific performance, the court can direct specific performance by the vendor, if breach is established. But the court has the option, as per Section 21 of the Act, to award damages, if it comes to the conclusion that it is not a fit case for granting specific performance.

(B). The agreement provides that in the event of the vendor failing to execute a sale deed, the purchaser will not be entitled for specific performance but will only be entitled for return of the earnest money and/or payment of a sum named as liquidated damages. As the intention of the parties to bar specific performance of the contract and provide only for damages in the event of breach, is clearly expressed, the court may not grant specific performance, but can award liquidated damages and refund of earnest money.

(C). The agreement of sale provides that in the event of breach by either party the purchaser will be entitled to specific performance, but the party in breach will have the option, instead of performing the contract, to pay a named amount as liquidated damages to the aggrieved party and on such payment, the aggrieved party shall not be entitled to specific performance. In such a case, the purchaser will not be entitled to specific performance, as the terms of the contract give the party in default an option of paying money in lieu of specific performance."

Noticing that in the case before it, the agreement did not specifically provide for specific performance nor did it bar specific performance and it provided for payment of damages in the event of breach by other party, Supreme Court was of the view that the provision for damages in the agreement was not intended to provide the vendor an option of paying money in lieu of specific performance and, therefore, the plaintiff was entitled to seek specific performance even in the absence of a specific provision therefor, subject to his proving breach by the defendant and that he was ready and willing to perform his obligation on the contract in terms of the contract.

8. In **P. D'Souza Vs. Shondrilo Naidu** (2004) 6 SCC 649, the relevant clause in the agreement of sale read as under:

"7. That if the vendor fails to discharge the mortgage and also commits any breach of the terms in this agreement and fails to sell the property, then in that event he shall return the advance of Rs. 10,000/- paid as aforesaid and shall also be liable to pay a further sum of Rs. 2,000/- as liquidated damages for the breach of the agreement."

It was held by Supreme Court that it was for the plaintiff to file a suit for specific performance of a contract, despite having an option to invoke the option provision and it would not be correct to contend that only because such a clause exists a suit for specific performance of a contract would not be maintainable.

9. In **M.L. Devender Singh and Ors. Vs. Syed** 1973 (2) SCC 515, the terms of the contract between the parties provided that in case of failure to comply with the terms of the agreement, the vendor shall be liable not only for the refund of the advance received by him, but also to pay a similar amount as damages to the vendee. There was no mention anywhere in the contract that a party to it will have the option either to fulfil the contract or pay the liquidated damages stipulated for a breach, as an alternative to the performance of the contract. The Supreme Court divided the contracts into the following three classes:

(i) Where the sum mentioned is strictly a penalty-a sum named by way of securing the performance of the contract, as the penalty is a bond :

(ii) Where the sum named is to be paid as liquidated damages for a breach of the contract :

(iii) Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.

It was held that where the stipulated payment comes under either of the two first-mention heads, the Court enforce the contract, but where it comes under the third head, the Court is satisfied by payment of money and there is no ground to compel the specific performance of the other alternative of the contract.

In the case before this Court, the contract between the parties would fall either under category (i) or category (ii) and, therefore, the Court is required to enforce the contract if the plaintiff is otherwise entitled to such a relief in law.

10. In **Manzoor Ahmed Margray Vs. Gulam Hassan Aram & Ors.** 1997 (7) SCC 703, the default clause provided for payment of Rs 10,000/- as penalty in case of violation of the terms and conditions of

the agreement by either party. It was held that this was a penalty clause for securing performance of the contract and would not mean that the contract is not to be performed. I, therefore, hold that the penalty clause contained in the agreement does not by itself disentitle the plaintiffs from claiming specific performance of the contract, provided they were always ready and willing to perform their part of the contract. The issue is decided accordingly.

Issue No. 3

11. As regards the alleged payment of Rs 15 lacs, the case of the plaintiffs, as set out in the plaint, is that the defendant approached them, claimed to be in financial problems and sought money to obtain Income-tax Clearance certificate and permission from Land & Development office for the purpose of execution and registration of sale deed and, therefore, they paid the aforesaid sum to him on 25th June, 1997. This is also the case of the plaintiffs that the aforesaid sum of Rs 15 lacs was invested by the defendant for purchasing a shop at Azmal Khan Road, Karol Bagh, New Delhi under the name and style of Tilak Exclusif.

12. In his affidavit by way of evidence, plaintiff No.1 stated that within a couple of days of execution of the agreement, Sonia Ahuja approached him, represented that she was in urgent need of funds and did not have money to arrange the requisite permissions required for the sale and requested him to pay her a further sum of Rs 15 lacs out of the balance sale consideration.

He also stated that the defendant used the aforesaid amount for renovation of a shop under the name and style of Tilak Exclusif. The plaintiff further stated that to enable the payment of the balance sale consideration, he entered into an agreement for sale of a factory which he had in Noida and that property was eventually sold and the sale proceeds kept with the bank with the object of encashing it, as and when required for payment to the defendant.

13. In her affidavit by way of evidence, the defendant stated that no further payment was made to her by the plaintiff after payment of earnest money amounting to Rs 5 lacs on 20th June, 1997. She has also stated that the shop in question was purchased by them from their own resources in the year 1994-95.

14. There is no receipt of the alleged payment of Rs 15 lacs and no convincing reason has been given by the plaintiffs for not obtaining the receipt of the payment, alleged to have been made by them to the defendant on 25th June, 1997. This is not as if the deal between the parties was oral, based on mutual trust. The Agreement to Sell between the parties was in writing and, therefore, in the normal course of human conduct, the plaintiffs would have obtained a written acknowledgement of the payment alleged to have been made to the defendant or would have made the payment by way of a payees account cheque/bank draft/pay order so as to have a documentary proof of the payment.

15. There is contradiction in the pleading and evidence of the plaintiffs as regards the utilization of the amount of Rs 15 lacs alleged to have been paid by them to the defendant. The case, set up in the plaint, is that the aforesaid amount was utilized by the defendant for purchase of the shop, whereas in his affidavit by way of evidence, the plaintiff No. 1 has stated that the aforesaid amount was utilized for renovating the shop.

16. The plaintiff claims to have sold a property in Noida in order to arrange funds for payment of the balance sale consideration to the defendant. In his cross-examination, plaintiff No. 1 stated that the amount of Rs 15 lacs which he paid to the defendant was received by him by sale of a property in Noida which he sold in the month of June, 1997. He stated that under an Agreement to Sell, executed by him in respect of Noida property, he had received Rs 15 lacs in cash from one Mr Umesh Kapoor and that amount was forfeited by him and the property was later sold to one Mr Rajiv Kapoor. However, no document has been filed by the plaintiffs to prove the receipt of Rs 15 lacs from Mr Umesh Kapoor nor have they produced the purchaser Mr Umesh Kapoor in the witness-box to prove that he had paid Rs 15 lacs to the plaintiff in June, 1997. In fact, there is no documentary proof of any such transaction. Mr Umesh Kapoor, according to the plaintiff No.1, is distantly related to him. Hence, there could have been no difficulty in the plaintiffs producing him in the witness-box. Even the date of the alleged receipt of money by the plaintiffs from Mr Umesh Kapoor has not been stated in the affidavit of the plaintiff No.1. In fact, even the name of Mr Umesh Kapoor did not find mention in the affidavit and it was only during his cross-examination that the plaintiff No. 1 came out with the name of Mr Umesh Kapoor. Though plaintiff No.1 has claimed that the sale consideration received by

him on sale of the property in Noida was kept by him in his bank, no documentary proof such as bank statement has been filed by the plaintiffs to prove any such receipt by plaintiff No. 1. Though the plaintiffs claim that the defendant had utilized the amount of Rs 15 lacs received from him in connection with the shop at Ajmal Khan Road, Karol Bagh, New Delhi, there is no proof of the defendant having purchased that shop or having spent a sum of Rs 15 lacs on its renovation in or around June, 1997. In his affidavit by way of evidence, DW-2 Shri Dinesh Ahuja, husband of the defendant has stated that the shop named "Tilak" was taken on lease by him in the year 1984-85 and, thereafter shop No. 6/64, Ajmal Khan Road, Karol Bagh, New Delhi, whereas building in which the aforesaid shop was situated was purchased by Dinesh & Associates, of which he was a partner, in the year 1996 much before the deal between the plaintiffs and defendant. The copy of the Partnership Deed of M/s Dinesh & Associates is Ex.DW-2/1, whereas the copy of the sale deed of property No.6/64, Ajmal Khan Road, New Delhi is Ex.DW-2/2. A perusal of the Partnership Deed dated 22nd December, 1995 would show that Shri Dinesh Ahuja and Shri Dinesh Wadhwa had entered into a partnership to carry business under the name and style of Dinesh & Associates at 15A/64 WEA, Karol Bagh, New Delhi. A perusal of the Sale Deed dated 22nd March, 1996 executed by Shri Rajinder Singh Lamba and Shri Pritam Singh Lamba in favour of Dinesh & Associates, through its partner Shri Dinesh Wadhwa would show that Property No.6/64, WEA, Karol Bagh was sold by them to Dinesh & Associates vide that sale deed. These documents leave no reasonable doubt that no money was taken by the defendant from the plaintiffs for purchase of a shop in Property No.15A/64 WEA and the plea taken by the plaintiffs in this regard is totally false. Also, there is absolutely no evidence of the defendant having even carried out renovation in the aforesaid shop in and around June, 1997 when the deal was struck between the plaintiff and the defendant.

17. As noted earlier, the case of the plaintiffs is that the defendant had sought further payment from them in order to enable her to obtain Income-tax Clearance Certificate and permission from Land & Development office so that she could execute the sale deed in their favour and get the same registered. It has come in the evidence that the property subject matter of the agreement is a freehold property. No one can expect that a sum of Rs 15 lacs would be required for obtaining

Income-tax Clearance certificate and/or permission from Land and Development office, assuming that the plaintiffs did not know on 25th June, 1997 that the suit property was a freehold property and no permission from Land & Development office was required for its sale to them. It is, therefore, difficult to accept that the plaintiffs would have paid a sum of Rs 15 lacs to the defendant on 25th June, 1997 (i) without obtaining any receipt from her; (ii) without ensuring that the defendant had actually applied for grant of Income-tax Clearance and; (iii) without obtaining possession of the suit property or even a part of it. No buyer is likely to make payments in the manner stated by the plaintiffs without at least obtaining a written acknowledgment of the payment and/or possession of a part of the property subject matter of the agreement. In these circumstances, I hold that the plaintiffs have failed to prove the alleged payment of Rs 15 lacs to the defendant on 25th June, 1997. The issue is decided against the plaintiffs and in favour of the defendant.

Issue No. 5

18. The case of the defendant is that since the balance sale consideration amounting to Rs.35 lakhs was required to be paid by the plaintiffs within 15 days from the date of the agreement and the plaintiffs failed to pay that amount, the earnest money of Rs.5 lakhs paid by them stood forfeited. The main question which, therefore, comes up for consideration is as to whether the balance payment of Rs 35 lacs was required to be made to the defendant within 15 days from the date of the agreement even if the defendant had not obtained Income Tax Clearance certificate. The following clauses of the agreement between the parties are relevant in this regard:-

> "3. That the SECOND PARTY undertakes to make payment of the balance sale consideration on Rs 35,00,000/- (Thirty Five Lacs Only) to the First Party ON OR BEFORE 15 days (fifteen days) from the date of this agreement which has been settled between the parties.
>
> 4. That the first party fails to complete the terms of this sale transaction in time i.e. fails to execute the sale papers in favour of the second parties or fails to hand over the vacant peaceful possession of the aforesaid property in time or fails to get the NOC or ITC from competent office/authorities connected with

the aforesaid property in time then the second party shall have right to get the earnest money of Rs 5,00,000/- (Rs.Five Lacs) alongwith it.s equal penalty of Rs 5,00,000/- total amounting to Rs 10,00,000/- (Rs. Ten Lacs) from the FIRST PARTY, and if the SECOND PARTY fail to make the balance payment of this transaction in time, then their earnest money shall stand forfeited with the FIRST PARTY and this sale transaction shall be deemed as cancelled.

5. That the vacant and peaceful possession of the aforesaid property shall be handed over by the FIRST PARTY to the SECOND PARTY within fixed time as above, after the FIRST PARTY has received the full & final payment of the sale consideration, as mentioned above from the SECOND PARTY."

Clause 3 thus envisaged payment of the balance sale consideration to the defendant within 15 days from the date of the agreement and this clause contains no reference to the Income-tax clearance and/or NOC. Clause 4 on the other hand stipulated that if the defendant failed to execute the sale deed in favour of the plaintiffs or hand over peacefully possession of the property to them or to get the NOC or ITC from competent authorities "in time", the plaintiffs would have right to get a sum of Rs 10 lacs, being the earnest money of Rs 5 lacs alongwith the penalty of the same amount. This clause, however, did not stipulate any particular time for the defendant to obtain Income-tax Clearance and/or NOC from the competent authorities. Similarly, clause 5, which provided for possession of the property being handed over to the plaintiff within fixed time, did not by itself stipulate any particular time period for this purpose.

19. All the clauses contained in the agreement need to be given a harmonious construction and a workable meaning. If clause 3 of the agreement alone is given effect without any reference to clause 4, the terms requiring the seller to obtain the NOC/Income-Tax Clearance, execute the sale deed and give possession of the property subject matter ˇof the agreement would become meaningless and cannot be given effect to. If clause 4 and 5 of the agreement are read without aid of clause 3, there would be no time limit to complete the transactions by obtaining NOC/ Income-Tax Clearance, executing the sale deed and for handing over the possession of the property to the vendee, despite the clause requiring the vendor to do the same "in time./fixed time". Therefore, in my view the

only harmonious and meaningful construction which can be given to clauses 3, 4 and 5 of the agreement is that the vendor was required to obtain the NOC/Income-tax Clearance and execute the sale deed in favour of the vendee within 15 days from the date of the agreement, the vendee had to make balance payment of Rs.35 lacs to the vendor at the time of execution of the sale deed, after she had obtained the Income Tax Clearance and informed them of the same and the possession of the property subject matter of the agreement was to be simultaneously given by the vendor to the vendees, immediately on receiving the balance consideration. The obligation of the plaintiffs to pay the balance amount of Rs.35 lacs to the defendant, therefore, did not arise till the time income tax clearance was obtained by the defendant ˇand they were informed of the same. There is no documentary proof of the defendant having applied for grant of income tax clearance within 15 days of the agreement or even thereafter. In her cross-examination, the defendant stated that she had already applied for permission required under Section 230A of the Income Tax Act in Form 34A. However, neither she has filed the copy of Form 34A in the Court nor has she produced any official from the Income Tax Department to prove that she had applied for the requisite clearance. In her cross-examination, the defendant stated that the plaintiffs had refused to sign the proposed sale deed and, therefore, she did not pursue the permission already applied to the Income Tax Department. However, admittedly, the defendant did not write to the plaintiffs, at any point of time, asking them to sign the proposed sale deed. In fact, there is no documentary proof of the defendant having even got any draft sale deed prepared and provided the same to the plaintiffs. When the defendant was asked as to whether she could produce any document to show that she had applied for permission under Section 230 A of the Income Tax Act, she gave an evasive reply and stated that she would have to check and was not very sure. She, thereafter, stated that whatever permissions required to be sought, were to be obtained by her lawyer and she was not aware whether her lawyer had obtained permission under Chapter XXII of the Income Tax Act. It is, thus, quite obvious that the defendant did not apply for requisite income tax clearance under Section 230A of the Income Tax Act at any point of time. Consequently, the plaintiffs were not obliged to pay the balance sale consideration to the defendant. Since the defendant herself committed breach of the agreement by not applying for income tax clearance, she

could not have forfeited the earnest money paid to her by the plaintiffs. The issue is decided against the defendant and in favour of the plaintiffs.

Issue No. 2

20. Section 16(C) of Specific Relief Act provides that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms, the performance of which has been prevented or waived by the defendant.

Explanation (i) provides that where the contract involves payment of money it is not essential for the plaintiff to actually tender the money to the defendant or to deposit it in the Court unless so directed by the Court.

The philosophy behind the aforesaid statutory provision is that a person who comes to the Court seeking specific performance of a contract to which he is a party must show and satisfy the Court that his conduct having been blemishless he is entitled to grant of specific performance of the contract. There is a distinction between readiness to perform the contract and willingness to perform the same. By readiness is meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price.

In **Ardeshir H Mama Flora Sassoon** (supra), Privy Council held that in a suit for specific performance of a contract, the plaintiff has to allege and if the fact is traversed also to prove a continuous readiness and willingness from the date of the contract to the time of hearing, to perform the contract on his part and failure to make good that averment brings with it and leads to inevitable dismissal of the suit. The view taken by the Privy Council was approved by Supreme Court in **Premraj vs. DLF Housing and Constriction Pvt. Ltd.** AIR 1968 SC 1355.

21. In his affidavit by way of evidence, plaintiff No.1 Shri B.B. Sabharwal has stated that at the relevant time he held 240 equity shares of Larsen and Turbro Ltd., 300 equity shares of BSES Ltd. and 169 shares of TISCO Ltd., all of which were quoted at various stock exchanges and were sealable at short notice. The shares are stated to have been sold in July, 1999 vide sale voucher, which is Ex.7. He has further stated that

he had applied for a loan of Rs.20 lakhs to M/s Bathla & Co. Ltd. and the letter conveying the approval for grant of loan is Ex.13. He also stated that he was holding 2000 units of Growing Monthly Income Unit Scheme of the Unit Trust of India and the amount covered by those units was Rs.20,000/-. The certificate purporting to be issued by the UTI in this behalf is Ex. 23. He also stated that his mother Smt. Savitri Sabharwal was also holding 2000 units of the aforesaid scheme vide certificate Ex. 24. He also claimed that his mother Smt. Savitri Sabharwal owned and possessed jewellery of the value of Rs.4.54 lakhs and the jewellery was valued by M/s Bagga Jewellers Pvt. Ltd. vide Ex. 6. Ex. 27, according to the plaintiff, are 50 Non-convertible Debentures of Atlas Cycle Industries Ltd. which were issued to him whereas Ex. 27A is the certificate whereby 25 bonus shares of Atlas Cycle Industries Ltd. were allotted to him. Ex. 28 purport to be share certificates in respect of 200 equity shares of Essar Gujarat Ltd allotted to plaintiff No.1. He also claimed that he along with his wife Ratna Sabharwal was holding 100 equity shares of Lan Eseda Steels Ltd vide certificate Ex. 30. Ex. 32 is the share certificate whereby his mother Savitri Sabharwal was holding 32 equity shares of Lakhanpal National Ltd. Ex. 33 are the certificates whereby plaintiff No.1 held 11 equity shares of Phillips India Ltd. Ex. 35 is the certificate whereby he held 33 master shares of Unit Trust of India and Ex. 36 is the certificate whereby he was allotted 2 bonus shares by the Unit Trust of India. Ex. 38 are the share certificates whereby the plaintiff purchased 300 shares of Indian Acrylics Ltd.

22. In her affidavit by way of evidence, Smt. Ratna Sabharwal, wife of the plaintiff stated that at the relevant time, she owned jewellery worth Rs.4.24 lakhs which was valued by Bagga Jewellers Pvt. Ltd. vide Ex. P-2/1. She also claimed that she had about Rs.15,720/- in her account with Indian Overseas Bank, New Rajinder Nagar and Ex.P2/2 is the certificate issued by the bank in this regard. Ex. P2/3 purports to be the Fixed Deposit Receipt of Rs.34,428/- in the name of Smt. Ratna Sabharwal in Standard Chartered Bank, New Delhi Metro Main Branch whereas Ex. P2/4 is the FDR of Rs.30,000/- in her name in the Standard Chartered Bank, Sansad Marg, New Delhi. She further stated that at the relevant time, she was holding 2000 units of Growing Monthly Income Unit Scheme of Unit Trust of India for Rs.20,000/- vide certificate Ex. P2/5, 200 equity shares of Mangalore Refinery and Petro-Chemicals Ltd. vide certificates Ex. P2/6 and 17 shares of Tata Iron and Steel Company

Ltd. vide certificate Ex. P2/8. She also claimed that she was jointly holding 100 equity shares of Lan Eseda Steels Ltd and 50 equity shares of Jai Prakash Industries Ltd. She further stated that she was holding 50 debentures of Mangalore Refinery and Petro-Chemicals Ltd. vide certificate Ex. P-2/9. According to her, all her movable properties could be sold immediately in the market and proceeds thereof could be headed over to her husband for completing the transaction in respect of first floor and roof rights of property D-144, New Rajinder Nagar, New Delhi.

23. Ms. Heena Sabharwal, daughter of plaintiff No.1 stated that at the relevant time she was having about Rs.1.65 lakhs in her bank account with Indian Overseas Bank, New Rajinder Nagar and the certificate issued to her in this regard is Ex. P4/1. She further stated that she had fixed deposit of Rs.1,00,656/- with Bathla and Company Ltd. vide certificate Ex. P4/2 and FDR of Rs.30,000/- with Standard Chartered bank, Sansad Marg, New Delhi vide Ex. P4/3 in addition to 2000 units of Growing Monthly Income Unit Scheme of Unit Trust of India covering a sum of Rs.20,000/- vide certificate Ex. P-4/4.

24. Ms. Jolly Sabharwal is the other daughter of plaintiff No.1. In her affidavit by way of evidence, she has stated that at the relevant time, she was having Rs.1.54 lakhs in her bank account with Indian Overseas Bank, New Rajinder Nagar as shown in the certificate Ex. P4/1. She further stated that she was having Rs.34,208/- in her account with Punjab National Bank, New Rajinder Nagar Branch and a copy of the certificate issued by the bank in this regard is Ex.P.4/2. She also claimed to have an FDR of Rs.34,428/- with Standard Chartered Bank, New Delhi Metro Main Branch vide certificate Ex.P4/3 and a fixed deposit of Rs.1,13,428/- with Bathla & Company Ltd. vide certificate Ex. P4/5. She further claimed FDR of Rs.30,000/- with Standard Chartered Bank, Sansad Marg, New Delhi vide certificate Ex. P4/6.

25. PW2 Shri Sudhir Bhathla, director of Bathla & Company Ltd. has stated that in June, 1997 they had approved loan application of Mr. B.B.Sabharwal and had agreed to finance him for Rs.20 lakhs. Ex. P5/1 is the copy of the application approved by them in this regard. He further stated that Heena Sabharwal, daughter of Mr. B.B. Sabharwal had deposited a sum of Rs.1,00,656/- with them whereas his other daughter Jolly Sabharwal had deposited Rs.1,13,428/- with them on which interest amounting to Rs.16,035/- and Rs.18,222/- respectively was paid by them

in the year 1997-98.

26. PW-6 Ramesh Chander, clerk, Punjab National Bank, New Rajinder Nagar, New Delhi has proved the certificate Ex. PW-6/1 whereas PW-7 Suresh Chand, Clerk Cashier, Indian Overseas Bank, New Rajinder Nagar, New Delhi has proved certificates Ex. 9 and 10 pertaining to saving bank account Nos.9298 and 12983 respectively.

27. The voluminous documentary evidence produced ˇby the plaintiffs, coupled with the depositions of plaintiff No.1, his wife, his daughters and the depositions Mr Sudhir Bhathla, director of Bhathla and Company Ltd. does show that the plaintiff possessed requisite means to pay the balance sale consideration to the defendant at the time balance sale consideration was agreed to be paid by them. The plaintiffs need not necessarily have the entire balance consideration lying with them in cash or in their banks. It is sufficient if they had the capacity to pay the balance sale consideration to the defendant. Bhathla and Company Limited had approved a loan of Rs 20 lacs to the plaintiffs, the mother of the plaintiff possessed jewellery worth Rs 4.54 lacs, whereas his wife possessed jewellery worth about Rs 4.24 lacs at the relevant time. It is true that the plaintiffs have not produced the jeweller, who is alleged to have issued valuation certificates to plaintiff No.1, but, that, in my view, would not be necessary since I see no reason to disbelieve the oral evidence produced by the plaintiffs in this regard. One daughter of the plaintiff had a deposit of Rs 1 lac with Bhathla and Company, whereas the other daughter at about Rs 1,13,000/- with them. One daughter of the plaintiff Ms Heena Sabharwal had about Rs 1.65 lacs in her ˇbank account, whereas his other daughter Ms Jolly Sabharwal had Rs 1.54 lacs in her bank account with Indian Overseas Bank, New Rajinder Nagar. All these deposits could have been cancelled and the amount of the deposits could have been made available to plaintiff No. 1 at a short notice. Ms Heena Sabharwal had an FDR of Rs 35,000/- with Standard Chartered Bank, whereas Ms Jolly Sabharwal had two FDRs of Rs 64428/- with that bank. His wife had also had an FDR of Rs 34428/- with Standard Chartered Bank, New Delhi, Main Branch and Rs 13,000/- with its Sansad Marg Branch. This money also could have been made available to plaintiff No.1 for payment of the balance sale consideration to the defendant. Plaintiff No.1 was holding 240 equity shares of Larsen and Turbro Ltd., 300 equity shares of BSES Ltd.m 169 shares of TISCO

Ltd., and 200 shares of Essar Gujarat Ltd. at the relevant time. Though value of these shares had not been proved by the plaintiffs, these being the shares of reputed companies which are listed on Stock Exchange. It was possible for plaintiff No. 1 to sell them at a short notice and utilize the sale proceeds for the payment of the balance sale consideration to the defendant. Plaintiff No. 1 as well as his wife and his daughter Ms Heena Sabharwal had 2000 unites each of Growing Monthly Income Unit Scheme of UTI, covering a sum of Rs 20,000/- each. The wife of plaintiff No.1 also had some shares at the relevant time. It is, therefore, difficult to dispute that the plaintiffs possessed sufficient means and, therefore, were in a position to pay the balance sale consideration to the defendant at the time they had agreed to pay the same to her.

28. For determining the willingness of the plaintiff to perform his part of the contract, his conduct needs to be scrutinized by the Court. Grant of specific performance of an agreement is an equitable relief and the Court may in its discretion, in appropriate cases, refuse to grant this relief, if it comes to the conclusion that by his conduct, the plaintiff has disentitled himself from grant of such relief. Equity demands that a person approaching the Court must come with true facts and should not have conducted himself in a manner which would indicate that he at any point of time was unwilling to perform his contractual obligation, as agreed with the defendant. This principle finds statutory recognition in Section 16(C) of Specific Relief Act and, therefore, is back by force of law. If a person, sets up a plea which is false to his knowledge, the Court will not be justified in coming to his rescue, even if he later on is agreeable to make amends this regard.

29. In **Sobharam vs. Totaram** AIR 1952 Nagpur, 244, the allegation of the purchaser was that he had paid Rs 15 to the vendor after execution of the agreement. This averment was found to be false. Relying on the decision in **Rustomali vs. Ahoider Rahaman** 45 CWN 837, it was held that making a false plea that a certain obligation under the contract had been discharged shows an unwillingness on the part of the transferee to abide strictly by the contract entered into between him and the transferer. It was held that the vendee was not willing to perform his part of the contract and, therefore, could not be allowed the benefit of Section 53A of Transfer of Property Act. In **Bishwanath Mahto vs. Srimati Janki Devi,** AIR 1978 Patna, 190, the plaintiff had alleged a part payment of

Rs 200/- which was denied by the defendant. Referring to the provisions contained in clause (c) of Section 16 of Specific Relief Act and relying on the decision of Privy Council in **Ardeshir H. Mama Flora Sassoon,** AIR 1928 PC 208 and decision of Supreme Court in **Gomathinayagam Pillai vs. Pallaniswami Nagar,** AIR 1967 SC 868, it was held that since the plaintiff had sent a notice to the defendants before filing the suit falsely asserting payment of a sum of Rs 200/- and showing readiness to pay only a sum of Rs 7,000/- out of the agreed sale consideration of Rs 7,200/-, the Court was of the view that the plaintiff was ready and willing to pay only a sum of Rs 7,000/- as the consideration for the Sale Deed when he sent a notice and when he filed the suit. The Court was, therefore, of the view that the plaintiff was not willing to perform the terms of the agreement which was to be performed by him. In **Kommisetti Venkatasubbayya vs. Karamestti Venkateswarlu** AIR 1971, Andhra Pradesh, 279, the plaintiff paid Rs 50 on the date of the execution of the agreement and claimed payment of a further sum of Rs 1500/- thereafter. It was found that his claim of having paid Rs 1500/- subsequent to the agreement was not true and, therefore, he was not ready and willing to perform his part of the contract since he was willing to pay only Rs 272.50/- though he was required to pay Rs 1,772.50/-. The Court was of the view that unless the readiness and willingness of the plaintiff was to pay the entire balance of the purchase money, he was not entitled to a decree for specific performance. It was held that irrespective of any other fact, the averment in the plaint and in the notice with respect to payment of Rs 1,500/- was sufficient to hold that he was not ready and willing to perform his part of the obligation. In taking this view, the High Court relied upon the decision of a Division Bench of Madras High Court in **Subarayudu vs. Tatayya,** 1937 Mad. WN 1158, where it was held that if the plaintiff seeking relief of specific performance puts forth a false plea, he would be disentitled to an equitable and justifiable relief of specific performance. The High Court also relied upon its earlier decision in **Butchiraju vs. Sri Ranga,** AIR 1967, Andhra Pradesh 69, which case was carried to Supreme Court, and noted that the Supreme Court in that case, noticing that the plaintiff had set up a false case that they had offered on June 04, 1953 to the first defendant, the balance of the purchase price due and had sought to support that case by leading evidence which was false to their knowledge and that having regard to their contract, the Trial Court and the District Court had held that the

plaintiffs were not entitled to a decree for specific performance, held that exercise of discretion by the Trial Court and the District Court against the claim made by the plaintiffs was not arbitrary, but was reasonable and guided by judicial principles.

30. In **M.K. Mokbool Khan vs. Smt. Shamsunnisa & Ors.** AIR 2002 NOC 87 (Karnataka), the plaintiff was to pay the balance sale consideration in four instalments of Rs 6250 each. The plaintiff paid a sum of Rs 4,000/- towards the last instalment and regarding the balance amount of Rs 2250, he stated that he had incurred expenditure for repair of the house and payment of house tax which was more than the amount of Rs 2,250/- withheld by him. It was held that from the conduct of the plaintiff in non-payment of the instalment amount towards the consideration as per stipulation under the agreement, it could not be said that he was ready and willing to perform his part of the contract all through. The High Court was of the view that the expenditure incurred by the plaintiff for repair of the house in the absence of any stipulation in the agreement could not be recovered from the landlord.

31. In the case before this Court, the plaintiffs set up a false plea of the payment of Rs 15 lacs to the defendant on 29th June, 1997. This plea was set up in the notice sent by them to the defendants on 12th November, 1997. Obviously, the notice indicated willingness of the plaintiff to pay only a sum of Rs 20 lacs to the defendant as the balance sale consideration. The payment of Rs 15 lacs was denied by the defendant in the reply sent by her through her counsel on 29th November, 1997. Despite that, no offer was made by the plaintiff to pay the entire balance consideration amounting to Rs 35 lacs to the defendant. In para 6 and 7 of the plaint, the alleged payment of Rs 15 lacs was reiterated by the plaintiffs. They came out with a false plea that aforesaid amount of Rs 15 lacs was utilized by the defendant for purchasing a shop under the name and style of "Tilak Exclusife" at Ajmal Khan Road, Karol Bagh, New Delhi. The plaintiffs persisted with the allegation of payment of Rs 15 lacs in the affidavit of plaintiff No. 1 Mr B.B. Sabharwal and took a plea that the aforesaid amount was utilized by the defendant for renovation of the shop at Ajmal Khan Road, New Delhi. It is, thus, quite clear that the plaintiffs were not willing to pay Rs 35 lacs to the defendant and wanted to pay only Rs 20 lacs to her. The plaintiffs, therefore, have failed to prove that they had all along been willing to perform their part

of the contract.

32. It was contended by the learned counsel for the plaintiffs that since the defendant herself had not applied for Income-tax Clearance and, therefore, had not performed her part of the contract, the plaintiffs were not obliged to tender the balance sale consideration to her and consequently, their offer to pay only a sum of Rs 20 lacs to the defendant would be of no consequence and would not disentitle them from seeking specific performance of the agreement. In my view, the contention is devoid of merit. The obligation of the plaintiffs to aver and prove his readiness and willingness to perform his part of the contract is a statutory obligation incorporated in Section 16(C) of Specific Relief Act, based though it is on the principle of equity and fairplay and this statutory obligation is required to be performed by the person who is seeking specific performance of the contract to which he is a party, irrespective of any default on the part of the other party to the agreement. This, in my view, is no defence for the plaintiffs to say that since the defendant herself was in breach of the agreement, they also were not required to prove their willingness to perform the essential terms of the contract which were required to be performed by them. The person who invokes jurisdiction of the Court in seeking specific performance of a contract must plead as well as prove that he has been ready and willing to perform those terms of the contract which were required to be performed by him and this readiness and willingness must be shown to exist not only from the date of agreement till the filing of the suit, but also thereafter. If the Court finds that the person coming to the Court seeking specific performance of a contract was not ready and willing to perform his part of the contract at any point of time, it would not be justified in directing specific performance of the contract at his behest.

This is not a case where the plaintiffs had not offered to pay the balance sale consideration to the defendant on the ground that she had not performed her part of the contract by not applying for Income-tax Clearance. Here, the plaintiffs made a false averment of payment of Rs 15 lacs to the defendant and they persisted with that false averment even throughout trial of this case.

33. It was contended by the learned counsel for the plaintiffs that if a person has not been able to prove a plea set up by him that, by itself, would not disentitle him from grant of specific relief of the contract to

which he is otherwise entitled as a contractual obligation of the defendant. In the case before this Court, the plaintiff set up a plea of payment of which never made to the defendant. The plea, obviously, was false to their knowledge and, therefore, clearly demonstrated their unwillingness to pay the balance sale consideration of Rs 35 lacs to the defendant. This false averment indicates that the plaintiffs wanted to pay only Rs 25 lacs for the property which they had contracted to purchase for Rs 40 lacs and, therefore, leaves no reasonable doubt that they were not willing to perform the terms which they had agreed with the defendant.

34. The learned counsel for the plaintiff has also referred to **S.V.R. Mudaliar (Dead) by Lrs. and Ors. Vs. Rajabu F. Buhari (Mrs) (Dead) by Lrs. and Ors.** AIR 1995 SC 1607. However, I find no such proposition in this case which would support the plaintiff in any manner. In fact, it is the plaintiffs who have played foul with equity by setting up a false plea of payment of Rs 15 lacs to the defendant.

35. The learned counsel for the plaintiff has referred to the decision of Supreme Court in **P. D'Souza Vs. Shondrilo Naidu** (2004) 6 SCC 649. In that case, a suit for specific performance of an agreement for sale of an immovable property was filed by the respondent against the predecessor in interest of the appellant and the parties were required to perform their respective part of the contract within a period of 18 months expiring on 05th December, 1978. The suit property had been mortgaged by the defendant/appellant in favour of LIC and the defendant had not produced the original documents, title deeds and encumbrance certificate, despite assurance given by the plaintiff in this regard. Some part payments were made to the vendor from time to time. The defendant demanded some more payment and also wanted extension of time for registration of sale deed. The plaintiff called upon the defendant to execute the sale deed and conveyed her readiness and willingness to perform her part of the contract. In response to the letter of the vendor, the vendee cancelled the agreement and sought to forfeit the amount of Rs 35,000/- which she had paid. The High Court recorded a finding of fact that the plaintiffs had all along been ready and willing to perform their part of the contract. The requisite averment in terms of Section 16 (C) of the Specific Relief Act was also made in the plaint. It was contended by the learned counsel for the appellant before Supreme Court that since the plaintiff did not perform her part of the contract by 05th December, 1978 which was the date by

which the contract was to performed, she was not ready and willing to perform her part of the contract. Noticing that the defendant herself did not produce the original documents nor redeemed the mortgage, Supreme Court observed that if the mortgage was not redeemed and the original documents were not produced, the sale deed could not have executed and in that in view of the matter the question of plaintiff's readiness and willingness to perform his part of the contract would not arise. However, the case before this Court is not a case merely of the plaintiffs failing to pay or tender the balance sale consideration to the defendant. In the case before this Court the plaintiffs have set up a false plea alleging payment of Rs 15 lacs to the defendant and by doing so they expressed their willingness to pay only Rs 25 lacs to the defendant as against the agreed sale consideration of Rs 40 lacs. Moreover, in the case before Supreme Court, the defendant had accepted a sum of Rs 20,000/- from the plaintiff in August, 1981, whereby he himself had revived the contract at a later stage and he had also sought extension of time for registering the sale deed till 31st December, 1981. The Supreme Court, therefore, felt that it was too late in the day for the defendant to contend that it was obligatory on the part of the plaintiff to show readiness and willingness as far back as on 05th December, 1978. This was not the position in the case before the Supreme Court. Therefore, the reliance on this judgment is wholly misplaced. Since the plaintiffs were not willing to perform their obligations under the agreement, they are not entitled to its specific performance. The issue is decided against the plaintiffs and in favour of the defendant.

Issues No. 4 and 6

36. In view of my finding on issues No. 2 and 3, the plaintiffs are not entitled to specific performance of the agreement dated 20th June, 1997. As noted earlier, in the event of her failure to complete the sale transaction in time, the defendant was required to refund the earnest money of Rs 5 lacs to the plaintiffs alongwith penalty, amounting to Rs 5 lacs, thereby making a total sum of Rs 10 lacs. Since the defendant did not even apply for grant of Income Tax Clearance within 15 days from the date of the agreement or even thereafter, she failed to complete the sale transaction and, therefore, is liable to pay a sum of Rs 10 lacs to the plaintiffs. This obligation on the part of the defendant arises, irrespective of the false plea of payment of Rs 15 lacs set up by the

plaintiffs, based since this is on the contractual obligations between the parties. It would be pertinent to note here that the plea of payment of Rs 15 lacs was set up by the plaintiffs much after the time stipulated in the agreement for completion of the transaction had expired.

Though the plaintiffs have claimed damages to the tune of Rs 40 lacs, no case for grant of damages to this extent has been made out by them and in any case in view of the provisions contained in clause 4 of the agreement to sell dated 20th June, 1997, they are not entitled to recover more than Rs 10 lacs from her. The issues are decided accordingly.

ORDER

In view of my findings on the issues, a decree for recovery of Rs 10 lacs with proportionate cost and interest on that amount at the rate of 9% per annum from the date of filing of the suit till the date of decree and at the rate of 6% per annum thereafter, is hereby passed in favour of the plaintiffs and against the defendants.

Decree sheet be prepared accordingly.

ILR (2011) DELHI II 507
CS (OS)

BOOTS PHARMACEUTICALS LTD. ....PLAINTIFF

VERSUS

RAJINDER MOHINDRA & ANR. ....DEFENDANTS

(MANMOHAN SINGH, J.)

CS (OS) NO. : 705/1994 DATE OF DECISION: 17.01.2011

Specific Relief Act, 1963—Section 10, 20—Suit filed for specific performance of Agreement to Sell dated 20.11.1989 executed between plaintiff and defendant—Defendant owner of property—Plaintiff already a lessee in the property since 1986—Defendants acquired citizenship of USA—RBI directed them to dispose of property as policy did not allow foreign nationals of Indian origin to own/hold commercial properties—Also threatened to prosecute the defendants under the provisions of FERA if the demised premises was not sold to an Indian national resident—By agreement dated 20.11.1989 defendants agreed to sell property to plaintiff—A demand draft of Rs. 3 lakhs sent to defendants by plaintiff after being informed of the necessary approval being granted by RBI—Though no approval had been granted by DDA by that time—Defendants rescinded the agreement through letter dated 28.12.1993 by exercising option as given in clauses VI of the agreement on the ground that RBI had granted permission to NRIs for retaining properties in Indian and therefore they did not wish to enforce the agreement - Bank draft was also returned to plaintiff—Suit was filed by plaintiff on 24.03.1994—Inter alia submitted on behalf of the defendant that the suit was barred by limitation—The defendants were pressurized to sell off the property for fear of being prosecuted under FERA—Defendants were forced to sell the properties to plaintiff because there were few prospective buyers who too were disuaded by the plaintiff 's officials from buying the property as they had been spreading stories that the plaintiff is having a permanent lease in his favour—On the other hand, it was submitted on behalf of plaintiff that it was ready and willing to perform the contract and therefore entitled to decree of specific performance—Held, Article 54 of the Limitation Act provides to limitation of three years from the date fixed for performance or from the date when the plaintiff notice that performance is refused—No date for performance fixed in agreement—In a writ petition filed by plaintiff against the order of Income Tax Appellate Authority, defendant had filed a counter affidavit wherein it was inter alia

stated that for the execution of the agreement defendants are obliged to obtain various approvals—In reply to the interim application also defendants had prayed for status quo order till the decision of the Writ petition which was disposed of on 22.2.1993—Thus till disposal of the interim application defendant's consent for continuation of interim order existed—Thus the suit which was filed on 24.03.1994 was within a period of limitation—To prove coercion and fraud there should be clear pleadings the plea their mother was under pressure of FERA to dispose of the property—Compulsion of law cannot amount to coercion—A decree of specific performance cannot be passed merely because the plaintiff has been able to prove "readiness and willingness to perform contract"—Clause 6 of the agreement with other facts showed that the contract between the parties was determinative in nature—According to Section 14(c), determinable contracts cannot be enforced cannot be decree of specific performance inequitable relief—Judicial discretion to grant specific performance is preserved in Section 20—Court not bound to grant decree of specific performance merely because it is lawful to do so—Motive behind litigation needs to be examined—Court also to examine whether it would be just and equitable to grant such relief—For this purpose, conduct of parties and their interest under contract is also to be examined—"Conduct of the parties" and "circumstances" to be considered from the time of agreement till final hearing of the suit to exercise Court's jurisdiction under the said provisions—Examination of fact reveal that if discretion is exercised in favour of plaintiff it would give plaintiff an unfair advantage over defendants—Plaintiff not parted with any money—Plaintiff enjoyed property despite lapse of lease—These circumstances show it was not equitable to grant relief to the plaintiff under Section 20(2)(c)—Also found that if agreement

is enforced defendants will have to pay unearned increase to the DDA which came to be more than the total consideration resulting in hardship to the defendant within the meaning of Section 20(2)(b).

[An Ba]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Neeraj Kishan Kaul, Sr. Advocate with Mr. Darpan Wadhva, Mr. R.N. Karanjawala, Mr. Akhil Sachar, Ms. Simran Brar and Mr. Abhishek Roy Advocates.

FOR THE DEFENDANT : Mr. S. Vaidialingam, Advocate.

CASES REFERRED TO:

1. *Ahmad Shaab Abdul Mulla (2) (Dead) By Proposed LRS* vs. *Bibijan and Others,* (2009) 5 SCC 462.
2. *Inderchand Jain* vs. *Motilal,* (2009) 14 SCC 663.
3. *Gulzar Singh* vs. *Harbans Kaur & Ors.,* 2008 (146) DLT 725.
4. *Balkrishna* vs. *Bhagwan Das,* (2008) 12 SCC 145.
5. *Ahmadsahab Abdul Mulla* vs. *Bibijan & Ors.,* (2008) 5 SCC 361.
6. *Brokers & Brokers Pvt ltd* vs. *Om Prakash Bhola & Anr* 2007 (98) DRJ 315.
7. *Gunwantbhai Mulchand Shah and Ors.* vs. *Anton Elis Farel and Ors.* (2006) 3 SCC 634.
8. *Vinod Singh* vs. *Smt. Phutori Devi (since deceased) through her LRs* 2006 (87) DRJ 567.
9. *Randhir Singh Chandok* vs. *Vipin Bansal & Anr.* 135 (2006) DLT 56.
10. *Pukhraj Jain* vs. *G. Gopalakrishna,* (2004) 7 SCC 251.
11. *Siddheshwar Sahakari Sakahar Karkhana Ltd.* vs. *CIT,* (2004) 12 SCC 1.

12. *P.D'Souza* vs. *Shondrilo Naidu* (2004) 6 SCC 649.
13. *Manjunath Anandappa* vs. *Tammanasa,* AIR 2003 SC 1391.
14. *Pushparani S. Sundaram* vs. *Pauline Manomani James,* (2002) 9 SCC 582.
15. *Nirmala Anand* vs. *Advent Corporation (P) Ltd. & Ors.* (2002) 5 SCC 481.
16. *Motilal Jain* vs. *Ramdasi Devi (Smt.) and Ors.,* 2000 (6) SCC 420.
17. *Syed Dastgir* vs. *Gopalakrishna Setty,* (1999) 6 SCC 337.
18. *Dadarao & Anr* vs. *Ramrao & Ors.* (1999) 8 SCC 416.
19. *Abdul Khader Rowther vs. P.K. Sara Bai & Ors.,* (1989) 4 SCC 313.
20. *R.C. Chandiok vs. Chunilal Sabarwal* 1970 (3) SCC 140.
21. *Ouseph Varghese* vs. *Joseph Aley,* (1969) 2 SCC 539.
22. *Andhra Sugars Ltd. and Anr.* vs. *State of Andhra Pradesh,* AIR 1968 SC 599.
23. *Chandnee Widya Vati Madden* vs. *C.L. Katial,* (1964) 2 SCR 495.
24. *Ladli Prasad Jaiswal* vs. *Karnal Distillery Company Ltd.* AIR 1963 SC 1279.
25. *New Zealand Shipping Co. Ltd.* vs. *Societe Des Ateliers Et Chantiers De France* [1919] A.C. 1.

RESULT: Suit dismissed.

MANMOHAN SINGH, J.

1. The present suit has been filed by the plaintiff for specific performance of Agreement to Sell dated 20.11.1989 executed between the plaintiff and the defendants. The prayers sought in the present suit are as under:

> "a) Pass a decree for specific performance of the Agreement dated 20th November, 1989 in relation to property No.E/44-10, Okhla Industrial Area, Phase II, New Delhi-110020 in favour of the Plaintiff, directing the Defendant Nos.1 and 2, their servants, agents successors and assignees to sell, transfer assign and convey the property to the Plaintiff;
>
> b) alternatively pass a decree for recovery of Rs.23 lakhs against the Defendant Nos. 1 and 2 in case this Hon'ble Court comes to the conclusion that the Plaintiff is not entitled to specific performance;
>
> c) award cost of the suit; and
>
> d) pass such other and further decree as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

2. The brief facts leading up to the filing of this suit are that the plaintiff company was a lessee of property no. E-44/10 Okhla Industrial Area (Phase I), New Delhi – 110020 measuring approximately 501.67 square meters (hereinafter referred to as the "demised premises") and the defendants were owners thereof, having purchased the demised premises at a bid. The lease deed dated 08.04.1986 between the parties was for a period of five years, initially renewable by the lessee for two successive periods of five years at an enhanced rate each time of 25% and thereafter on mutually agreeable terms.

3. The thrust of the plaint is that when the demised premises were bought the defendants were Indian citizens but by virtue of staying abroad for very long, they both acquired the citizenship of the United States of America. At this juncture, the defendants were directed by the Reserve Bank of India to dispose of the demised premises as the policy as it stood then did not allow foreign nationals of Indian origin to own/ hold any commercial property for investment purposes like earning rental income etc.

4. Being unable to find any buyers for the demised premises, the defendants approached the plaintiff and after negotiations and discussion it was agreed that the said premises would be sold to the plaintiff for a total sale consideration of Rs.23 lac and agreement to sell dated 20.11.1989 was executed between the parties. Various permissions were to be obtained by the parties from different departments and authorities including the Appropriate Authority under Chapter XX-C of the Income Tax Act, 1961, DDA and the RBI for enforcement of the agreement to sell.

5. The above-said Appropriate Authority i.e. the Income Tax Department by order dated 19.01.1990 decided to acquire the property stating that under sub-section (1) of section 269 UE the right over property vests in the Central Government from 19.01.1990 which was challenged by the plaintiff before this Court in WP (C) No. 310/1990. The order of acquisition was set aside by the Court and thereafter the appropriate authority granted the 'no objection' certificate permitting the defendants to sell the demised premises.

6. The plaintiff was informed in June, 1993 that the necessary approvals have been granted vide RBI's letter dated 10.05.1993. The plaintiff thereafter sent the amount of Rs. 3 lac vide demand draft no. 298670 dated 08.06.1993 along with letter dated 09.06.1993 to the defendants.

7. Admittedly, the approval of the DDA was not granted to the defendants and they were not interested to go ahead with the agreement as pointed out by the plaintiff in its letter dated 04.12.1993. However, the defendants rescinded the agreement dated 20.11.1989 through their letter dated 28.12.1993 stating that they were using the option given to them in Clause 6 of the said agreement as the RBI had granted permission to NRI's to retain/hold property in India and the defendants did not wish to enforce the agreement to sell in view of the same. The bank draft of Rs.3 lac was returned to the plaintiff. The present suit was filed on 24.03.1994.

8. The suit was listed before court on 25.03.1994 when this Court directed the parties to maintain status quo with regard to the possession as well as the title of the demised premises. The plaintiff was also directed to continue paying rent to the defendants. This interim order of the Court was made absolute on 27.11.1997.

9. The written statement was filed by the defendants taking many defences inter alia that the plaintiff's suit was barred being contrary to the public policy of the Government of India which had clearly permitted non-resident Indians to hold, acquire and dispose of immoveable property in India. It was further stated that the agreement dated 20.11.1989 was entered into under great pressure and fear of prosecution under the Foreign Exchange and Regulation Act, 1973 (in short 'FERA') and was an act of taking advantage on the plaintiff's part, amounting to coercion

and undue influence.

10. As per the defendants, the demised premises were admittedly bought by their father at a bid on 26.05.1972 in the name of the defendants i.e. his sons and at this time both defendants held Indian passports. Defendant no. 1 left for the United States of America in 1967 to pursue studies. Defendant nos. 1 and 2 became Unites States' citizens in February, 1976 and March, 1984 respectively by which time FERA, 1973 had come into force, being notified in the Official Gazette on 20.09.1973.

11. The lease deed dated 08.04.1986 has been admitted by the defendants. However, the defendants raised doubt as to whether the said lease deed was permissible under the perpetual lease deed drawn by the DDA in favour of the defendants as the plaintiff was using the demised premises for the purposes of manufacturing medicines.

12. It is admitted by the defendants that they had made an application dated 04.04.1987 to the RBI seeking information whether they could continue to hold the demised premises in India despite acquiring US citizenship as law abiding persons although Section 31 (1) of FERA prohibited foreign nationals from owning/ holding property in India without the RBI's permission.

13. The defendants' application was disallowed and Reserve Bank of India (in short RBI) stated that it would prosecute the defendants under the provisions of FERA if the demised premises were not sold to an Indian National Resident. Thus the defendants' General Attorney i.e. their mother started looking for prospective buyers. However, there were few prospective buyers and as per defendants even these were dissuaded by the plaintiff's officials on misrepresented/fabricated stories about the plaintiff having a permanent lease in its favour etc., but the suit property was agreed to be sold to the plaintiff vide agreement dated 20.11.1989. According to the defendants, the said document included Clause 6 which was specially incorporated into the agreement to sell so that the defendants had an option to withdraw from the agreement at any stage with the only liability of refunding the amount received by them from the plaintiff. On the date of execution of agreement, admittedly no earnest or advance amount was received by the defendants from the plaintiff.

14. The defendants have averred in the written statement that the

reason for rescinding the agreement was that the RBI, by a Notification dated 26.05.1993 granted permission to foreign citizens of Indian origin to hold/acquire immoveable properties in India provided the entire purchase consideration is paid out of foreign exchange brought into India through normal banking channels or out of funds held in Non-Resident (External) Rupee Account or Foreign Currency Non-Resident Account maintained by purchaser in India.

15. In the replication, it was contended by the plaintiff that the notification of the RBI was a general permission and the plaintiff enquired of the RBI in letter dated 28.07.1994 whether under the said policy the defendants were generally or specifically allowed to retain or hold the demised premises. In reply the RBI conveyed to the plaintiff through its letter dated 03.10.1994 that the notification was vis-à-vis acquisition of Indian property by a foreign citizen of Indian origin after the date of the notification and the same had no retrospective effect. The defendants being Indian citizens when the demised premises were bought and sale consideration for the same not having been paid out of foreign exchange, the situation as far as the defendants were concerned had not changed and they were still obliged to dispose of the premises.

16. The plaintiff has also alleged that the lease deed between the parties dated 08.04.1986 was duly registered on the same date with the Sub-Registrar of Assurances under Sr. No. 562 at Asaf Ali Road, New Delhi and was renewed from time to time under the provisions of the perpetual lease in favour of the defendants.

17. It is averred by the plaintiff in its replication that the sale of the demised premises by way of agreement was voluntary and without any coercion/ influence at the prevalent market rate at that time. The return of the earnest money amounting to Rs. 3 lac is admitted by the plaintiff.

18. The following Issues were framed vide order dated 22.04.1999:

"1. Whether the defendants were coerced to execute the agreement of sale dated 29th November, 1989?

2. Whether the plaintiff has been and is willing and ready to perform his part of the contract?

3. Whether the defendants rescinded the contract in terms of the agreement dated 20.11.1989?

4. Whether the contract stood frustrated on the grounds stated in the written statement?

5. Whether the suit is barred by time?

6. Relief and costs."

19. The parties were directed to file their list of witnesses and evidences. An affidavit Ex. PW1/A was filed by way of evidence in lieu of examination-in-chief on behalf of the plaintiff by Mr.N. Gopal Krishnan (PW-1), Depot Manager of the plaintiff company. The affidavit reiterated the statement made in the plaint. On behalf of the defendants an affidavit Ex.DW1/A in evidence of Mr. Ranvir Mohindra (DW-1) was filed and then he was called for further examinations on various dates. During the pendency of the Suit, the name of the plaintiff was changed to Abbot India Ltd. Copy of fresh certificate of incorporation dated 01.07.2002 was produced and necessary order dated 07.03.2005 was passed in I.A. No. 1813/2005.

20. Firstly this Court inclines to decide the issue No. 5 of limitation which had been framed at the instance of the defendants.

Issue No.5

Whether the suit is barred by time?

21. The agreement Ex DW1/38 is dated 20.11.1989. The suit was filed on / about 20.03.1994. Admittedly, no date for performance was fixed in the agreement. As per defendants the limitation has to be reckoned from the date when the plaintiff had notice that specific performance is refused. The defendants on this issue have referred the statement in para 7 and para 15 of the written statement in the following terms:

"7. The suit is clearly barred by limitation having been filed on or about 24th March 1994, seeking specific performance of an alleged agreement dated 20th November, 1989."

"15. The contents of paragraph 15 are incorrect and denied. The suit is hopelessly barred by time."

22. The submission of the defendants is that the relevant date for commencement of limitation is 05.07.1990 (when the defendants who were respondents 6 & 7 in CWP 310/1990 of the plaintiff against the

decision of the Income Tax Appropriate Authority (AA) filed/served copy of their counter affidavit on the petitioner/plaintiff (Ex DW 1/60). In the counter affidavit, the defendants had put the plaintiff on notice and made him aware that specific performance was refused and not being agreed to and questioned the validity/enforceability of the agreement, thereby resulting in commencement of the period of limitation. The suit filed beyond 3 years thereafter i.e. on 24.03.1994 is barred by time.

23. In support of his submission learned counsel for the defendants has referred the two cases:

(i) In the case titled as **Gunwantbhai Mulchand Shah and Ors. v. Anton Elis Farel and Ors.** (2006) 3 SCC 634 the Hon'ble Supreme Court held that the Court has to determine the date of notice of refusal and see whether the suit is filed within 3 years of such date.

(ii) In the case titled as **Ahmadsahab Abdul Mulla v. Bibijan & Ors.,** (2008) 5 SCC 361 the Hon'ble Supreme Court held that the word 'date' in Article 54 is suggestive of a definite date for both parts thereof.

24. The submission of the plaintiff is that the relevant date for refusal is 28.12.1993 (Ex DW 1/37) and not 05.07.1990 when the counter affidavit was served.

The plaintiff has referred to the defendants' letter dated 28.12.1993 addressed to the plaintiff. The relevant extracts are reproduced below-:

"We are hereby exercising the option given to us to treat the agreement as closed and inoperative, under clause 6 of the said agreement You are also informed that even otherwise the said clause (6) of the agreement has taken effect. That apart, even your letter dated 4.12.93 confirms that clause (6) is liable to take effect".

"It may also be noted that the said agreement was entered into apparently pursuant to an order of the Reserve Bank of India and was subject to Reserve Bank approvals/decisions. Subsequently, with effect from 26.5.93 the Reserve Bank has granted permission for retention of the subject property. Accordingly, the agreement has also been rendered non-est by the Reserve Bank decision as follows :

"The Bank Draft No, 298670 dated 8.6.93 on ANZ Grindlays Bank, PLO for Rs 3 lakhs sent by you is returned herewith. You are kindly requested to acknowledge".

25. It is necessary to refer the cross-examination of DW-1 recorded on 19.11.2008 wherein the defendants were unable to prove their case that the relevant date of refusal of specific performance is 05.07.1990 and not 28.12.1993 when the defendants issued letter to the plaintiff by rescinding the agreement and returned back the bank draft dated 08.06.1993 amounting to Rs. 3 lacs. The relevant portion of the cross-examination of DW-1 who is defendant no.2 in the matter is reproduced as under:

"Q. I put to you that the appropriate authority of income tax department after the directions were passed by the Hon'ble High Court of Delhi in Writ Petition 310/1990 on 22.2.1993, examined the matter and gave permission for the sale of the property to the plaintiff. What have you to say?

Ans. The date of 1993 was already 36 months or more from the original order of the appropriate authority. But that time we have decided to exit the agreement and some time during that time frame we advised Boots of our decision. So, the further continuation of correspondence was not of interest to us.

Q. How many months prior to passing of the order did you decided to exit from the agreement?

Ans. The decision was not made on any single day but over a period of time in 1993. There is a letter on record from us in late 1993 advising Boots of this decision.

Q. The order was passed in February 1993 and you have stated in the earlier question that by that time you had decided to exit the agreement. My question is how many months prior to February 1993 did you decide to exit the agreement?

Ans. I do not remember as to how many months prior to February 1993 we had taken the said decision. It was some time during the 36 months between 1990 and 1993."

26. The period of limitation for filing a suit for specific performance of contract as provided under Article 54 of the Limitation Act, 1963 is three years which is to be calculated from the date fixed for the performance, or, if no such date is fixed, it would be the date when the plaintiff has noticed that performance is refused. So far as the present "Agreement to Sell" is concerned, no date was fixed for performance.

27. In **Ahmad Shaab Abdul Mulla (2) (Dead) By Proposed LRS v Bibijan and Others,** (2009) 5 SCC 462, in a reference made to a three-judge bench whether the use of the expression 'date' used in Article 54 of the Schedule to the Limitation Act 1963 is suggestive of a specific date in the calendar in the affirmative, the Supreme Court at Para 11 and 12 of the reference has observed the following-:

> "11. The inevitable conclusion is that the expression 'date fixed for the performance' is a crystallized notion. This is clear from the fact that the second part "time from which period begins to run" refers to a case where no such date is fixed. To put it differently, when date is fixed it means that there is a definite date fixed for doing a particular act. Even in the second part the stress is on when the plaintiff has notice that performance is refused here again, there is a definite point of time, when the plaintiff notices the refusal. In that sense both the parts refer to definite dates. So, there is no question of finding out an intention from other circumstances".
>
> 12. Whether the date was fixed or not the plaintiff had noticed that performance is refused and the date thereof are to be established with reference to materials and evidence to be brought on record. The expression 'date' used in Article 54 of the Schedule to the Act definitely is suggestive of a specified date in the calendar."

28. In the instant case, no doubt, the defendants in their counter affidavit filed in W.P.(C) No. 310/1990 has specifically stated that the agreement was contingent agreement and was entered into under mistaken belief and under the fear of FERA, however it was also stated that the defendants were obliged to obtain various approvals. In reply to the interim application being C.M. No. 419/1990, the defendants had prayed that the status quo order already granted be maintained till the decision

of the writ petition. The writ petition was disposed of on 22.02.1993. Thus, it is clear that till the disposal of the petition, the defendants consent for continuation of interim order was there. Thus, the later part of Article 54 shall govern the period of limitation. The suit was filed on 24.03.1994 and the same is on the face of it within the period of limitation. Issue No.5 is accordingly decided in favour of the plaintiff and against the defendants.

Issue No.1

Whether the defendants were coerced to execute the agreement to sell dated 20.11.1989?

29. The onus of proof of issue No.1 is on the defendants. The Defendants in para 4, of written statement alleged that the suit is based upon documents and actions that were undertaken by the Defendants through their mother and General Attorney under fear of prosecution under the provisions of Foreign Exchange Regulation Act 1973 (FERA). The Defendants have contended that the transaction was done under immense pressure and fear and the plaintiff had taken advantage of it. There was also pressure from the officials of the plaintiff to sell the property to the plaintiff. The stringent and statutory provisions of FERA amounted to coercion and undue influence and under pressure from the plaintiff, the transaction was done by the defendants. 30. The plaintiff on the other hand denied the argument of the defendants and has referred following documents in support of its submissions:-

(i) Letter dated 29.10.1988 (Ex. PW-1/D5) on behalf of the defendants to the plaintiff clearly states that they had given priority to the plaintiff with respect to the sale of the property. The defendants had also stated that they would not consider any other offer and were looking forward to hear from plaintiff with respect to the transaction.

(ii) Defendants have in the letter dated 02.02.1989 (Ex. DW1/42) addressed to the plaintiff further averred that the sale transaction was pending since October 1988 and they would like to finalize it without further delay.

(iii) The defendants in their letter dated 01.03.1989 (Ex. DW1/ 43) addressed to the plaintiff have further averred that three year

period allowed by DDA to sub-let the property was about to expire on 31.03.1989 and it was in the mutual interest of both the parties to commence negotiations early so as to finalize the sale of the property before that date. This in fact showed that the defendants were trying to unduly use an incorrect interpretation of the DDA permission, which only gave the fees payable to it for three years. this permission did not affect or limit the lease in any way. After the three year period, the fresh fee schedule, if any, was to be applied by the DDA. This did not meant that the valid and registered lease of the plaintiff was shortened to three years as was being unfairly urged by the defendants to pressurize the plaintiff into purchasing the property soon.

(iv) In its letter dated 25.03.1989 (Ex. DW1/44) addressed to the plaintiff, the defendants have stated that in view of the plaintiff's interest in buying the property, the defendants were not giving consideration to any other offers.

(v) The defendants have also in their letter dated 25.03.1989 (Ex. DW1/45) addressed to the plaintiff reiterated the fact that it was in the mutual interest of both the parties to finalize the sale of the property without any further delay.

(vi) The defendants have in their letter dated 30.03.1989 (DW1/46) addressed to the plaintiff again reiterated the fact that it was imperative for both the parties to finalize as soon as possible the sale of the suit property.

31. It is a settled law that there should be clear pleadings pertaining to coercion and fraud and it must be specifically pleaded i.e. the names, date, time, etc. so that the party who is required to answer, must have the full details. The plea of the defendants that their mother was feeling the pressure of FERA was without any substance in view of the correspondence exchanged between the parties after execution of the agreement, even the mother was never brought in as a witness. The general allegations are insufficient about an averment of fraud unless specific allegations are made against a particular person.

32. In the instant case, in his cross-examination DW-1 was not able to prove the case of the defendants on the issue of coercion. The details

of few answers given by DW-1 in his cross examination are referred as under:

"Q. I put to you that your assertion that there was any duress is absolutely false. Can you tell me that if there was any truth in the said assertion why was a letter dated 2.12.1998 i.e. Ex. DW1/41, letter dated 2.2.1989 i.e. Ex. DW1/42, Ex. DW 1/43 i.e. letter dated 1.3.1989, Ex. DW1/45 i.e. letter dated 25.3.1989, Ex. DW 1/46 i.e. letter dated 30.3.1989 written by the defendants. What have you to say?

Ans. I do not need to see the letters. All these letters are dated after we got the order from the Reserve Bank of India and the learned counsel is welcome to check the dates of the order from the Reserve Bank of India.

Q. You have stated that you were under duress and as such Boots knew that you would be forced to cooperate with them. Was there any pressure being exerted on you by Boots doing the proceedings before the Hon'ble High Court of Delhi whereby Boots had challenged the acquisition of the property by the appropriate authority ?

Ans. Yes, there was a pressure on me."

33. In **Ladli Prasad Jaiswal Vs. Karnal Distillery Company Ltd.** AIR 1963 SC 1279, the Supreme Court has observed that:

"O.6 r.4 of the Code of Civil Procedure provides that in all cases in which the party pleading relies on any misrepresentation, fraud breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms in the Appendix particulars (with dates and items if necessary) shall be stated in the pleading. The reason of the rule is obvious. A plea that a transaction is vitiated because of undue influence of the other party thereto, gives notice merely that one or more of a variety of insidious forms of influence were brought to bear upon the party pleading undue influence, and by exercising such influence, an unfair advantage was obtained over him by the other. But the object of a pleading is to bring the parties to trial by concentrating their attention on

the matter in dispute, so as to narrow the controversy to precise issues, and to give notice to the parties of the nature of testimony required on either side in support of their respective cases. A vague or general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other. This rule has been evolved with a view to narrow the issue and protect the party charged with improper conduct from being taken by surprise. A plea of undue influence must, to serve that dual purpose, be precise and all necessary particulars in support of the plea must be embodied in the pleading : if the particulars stated in the pleading are not sufficient and specific the Court should, before proceeding with the trial of the suit, insist upon the particulars, which give adequate notice to the other side of the case intended to be set up."

34. In **Andhra Sugars Ltd. and Anr. Vs. State of Andhra Pradesh,** AIR 1968 SC 599, the Supreme Court has observed that the Compulsion of Law is not coercion as defined in Section 15 of the Contract Act, 1872.

35. In **Siddheshwar Sahakari Sakahar Karkhana Ltd. Vs. CIT,** (2004) 12 SCC 1, the Supreme Court observed that:

"The mere fact that the contract has to be entered into in conformity with and subject to restrictions impose by law does not per se impinge on the consensual element in the contract. Compulsion of law is not coercion and despite such compulsion in the eyes of law the agreement is freely made."

36. In view of the aforesaid settled law and correspondence exchanged between the parties prior to and after the execution of an agreement to sell it appears to the court that the plea of the defendants is without any force, even otherwise, it is settled law that "compulsion of law cannot amount to coercion."

Thus, Issue no.1 is decided against the defendants.

37. I shall now take up issue No.2 for consideration.

Issue No.2

2. Whether the Plaintiff has been and is willing and ready to perform his part of the contract?

38. On issue No.2, it is submitted by the defendants that the plaintiff has not only failed to aver but also failed to prove the readiness and willingness as per Section 16 (c) read with Expl. (i) & (ii) of the Specific Relief Act, 1963.

39. In support of his submissions, the learned counsel for the defendants has referred the following decision:

(i) In **Abdul Khader Rowther Vs. P.K. Sara Bai & Ors.,** (1989) 4 SCC 313, the Supreme Court while relying on **Ouseph Varghese Vs. Joseph Aley,** (1969) 2 SCC 539 held that a plaint in a suit for specific performance has to conform to the requirements of Forms 47 and 48 Schedule I CPC and that a plaintiff has to aver that he has applied to the defendant to perform the agreement and that the defendant has not done so as also that he has been and is still ready and willing to perform his part.

(ii) **In Pukhraj Jain Vs. G. Gopalakrishna,** (2004) 7 SCC 251, it was held that apart from the averment in the plaint the surrounding circumstances must also indicate that the readiness & willingness continue from the date of the contract till the hearing of the suit. It was held as settled law that the equitable remedy of specific performance cannot be had on the basis of pleadings which do not contain averments of readiness and willingness to perform his contract in terms of said Forms 47 and 48.

(iii) In **Umabai & Anr. Vs. Nilkanth Dondiba Chavan & Anr.,** (2005) 6 SCC 243, it was held a bare averment in the plaint or a statement made in the examination-in-chief would not suffice and the entire attending circumstances must be given regard for determining whether the plaintiff was all along and still are ready and willing to perform their part of the contract.

It was further held that in terms of Forms 47 and 48 of Appendix A to the Code, the plaintiff must plead that .he has

been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice "or" the plaintiff is still ready and willing to pay the purchase money of the said property to the defendant.

(iv) In **Manjunath Anandappa Vs. Tammanasa,** AIR 2003 SC 1391, the Supreme Court considered even categorical statements in evidence as not amounting to compliance with Section 16(c) as it was incumbent on the plaintiff both to aver and prove that he had all along been ready and willing to perform.

(v) In **Syed Dastgir Vs. Gopalakrishna Setty,** (1999) 6 SCC 337, the Supreme Court construed a plea of readiness and willingness to sub serve to the requirement of section 16(c) of the Specific Relief Act. 1963 and the interpretation of its Explanation and it was held that Explanation (i) does not mean that unless the court directs the plaintiff cannot tender the amount to the defendant or deposit in Court. It was held that the plaintiff can always tender the amount to the defendant or deposit into court towards performance of its obligation and that such tender exhibits the willingness of the plaintiff to perform his part of the obligation. This view was reaffirmed in **Manjunath Anandappa Vs. Tammanasa** (supra) and in other following cases:

(a) **Balkrishna Vs. Bhagwan Das,** (2008) 12 SCC 145.

(b) **Inderchand Jain Vs. Motilal,** (2009) 14 SCC 663.

(c) **Pushparani S. Sundaram Vs. Pauline Manomani James,** (2002) 9 SCC 582.

40. The case of the plaintiff is that the plaintiff has always been ready and willing to perform its part of agreement and is awaiting conveyance / assignment in its favour with respect to the suit property. It is stated that the averments about the readiness and willingness are specifically mentioned in para 14 of the plaint which have been evasively denied by the Defendants in their written statement. The overall conduct of the Plaintiff shows that the Plaintiff has been and shall continue to be willing and ready to perform its part of the contract.

41. In order to determine as to whether the plaintiff was ready and willing to perform its part of the contract, the sequence in which the

obligation under the contract are to be performed are required to be taken into consideration. While examining the requirement of Section 16 (c), the Supreme Court in **Syed Dastagir Vs. T.R. Gopalakrishna Setty,** 1999 (6) SCC 337 held as follows:

"So the whole gamut of issue raised is, how to construe a plea specially with reference to Section 16(c) and what are the obligations which the plaintiff has to comply with reference to his plea and whether the plea of the plaintiff could not be construed to conform to the requirement of the aforesaid Section, or does this section require specific words to be pleaded that he has performed or has always been ready and is willing to perform his part of the contract. In construing a plea in any pleading, Courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. Such an expression may be pointed, precise, some times vague but still could be gathered what he wants to convey through only by reading the whole pleading, depends on the person drafting a plea. In India most of the pleas are drafted by counsels hence aforesaid difference of pleas which inevitably differ from one to other. Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. But to test, whether he has performed his obligations one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded may be in any form. Same plea may be stated by different persons through different words then how could it be constricted to be only in any particular nomenclature or word. Unless statute specifically require for a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of 'Readiness and willingness' has to be in spirit and substance and not in letter and form. So to insist for mechanical production of the exact words of an statute is to insist for the form rather than essence. So absence of form cannot dissolve an essence if already pleaded."

Again in **Motilal Jain Vs. Ramdasi Devi (Smt.) and Ors.,** 2000 (6) SCC 420, it was held:

> "The other contention which found favour with the High Court, is that plaint averments do not show that the plaintiff was ready and willing to perform his part of the contract and at any rate there is no evidence on record to prove it. Mr. Choudhary developed that contention placing reliance on the decision in **Varghese** case (1969) 2 SCC 539. In that case, the plaintiff pleaded an oral contract for sale of the suit property. The defendant denied the alleged oral agreement and pleaded a different agreement in regard to which the plaintiff neither amended his plaint nor filed subsequent pleading and it was in that context that this Court pointed out that the pleading in specific performance should conform to Forms 47 and 48 of the First Schedule of the Code of Civil Procedure. That view was followed in **Abdul Khader** case (1989) 4 SCC 313 AIR 1990 SC 682."

It was further held in **Motilal Jain** (supra)

> "9. That decision was relied upon by a three-Judge Bench of this Court in Syed Dastagir case wherein it was held that in construing a plea in any pleading, Courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. It is pointed out that in India most of the pleas are drafted by Counsel and hence they inevitably differ from one to the other; thus, to gather the true spirit behind a plea it should be read as a whole and to test whether the plaintiff has performed his obligations, one has to see the pith and substance of the plea. It was observed—
>
> 'Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16 (c) of the Specific Relief Act, 1963 does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of 'readiness and willingness' has to be in spirit and substance and not in letter and form.'

42. Readiness and willingness cannot be treated as a Strait-jacket formula and that had to be determined from the facts and circumstances which are relevant to the intention and conduct of the parties concerned and upon a consideration of the entire material placed before the court.

43. The burden of issue No.2, no doubt, was upon the plaintiff who has given the following reasons in order to satisfy the condition of Section 16 (c) of the Act:

(a) In pursuance of the agreement to sell, a joint application was moved by the Plaintiff and the Defendants for permission from the Appropriate Authority under Chapter XX-C of the Income Tax Act, 1961. The filing of joint application proves the fact that the Plaintiff was ready and willing to perform its part of the contract.

(b) The Appropriate authority decided to acquire the suit property vide its order dated 19.1.90 (exhibit DW-I/53). The plaintiff challenged the acquisition order by filing a Civil Writ Petition No. 310/1990. The said Writ Petition was pursued by the Plaintiff and the order of acquisition was set aside by this Court by order dated 22.2.1993 and the matter was referred back to the Appropriate Authority who vide its order dated 24.03.93 (exhibit DW-1/57) granted the No Objection Certificate to the Defendants.

(c) The Plaintiff's readiness and willingness to perform its part of the contract could be further substantiated by the fact that it forwarded a sum of Rs. 3 lakhs (Vide DD No. 298670 dt. 8.6.93) as earnest money. This fact has been admitted by the Defendants at Para 8, of their Written Statement. The Plaintiff had also written various letters to the DDA requesting it to grant permission to Defendants to sell/ transfer/assign the suit property at the earliest.

(d) The fact that the Plaintiff has been ready and willing to perform its part of the agreement has been admitted by the Defendants in their cross examination dated 24.02.09 where DW-1 has admitted the fact.

44. In paras 8 and 9 of the plaint, it is averred by the plaintiff that after obtaining the necessary permission from the Appropriate Authority,

the matter was pursued by the plaintiff with Reserve Bank of India who informed that the defendants have been granted permission for sale of the said property vide their letter dated 10.05.2003. Upon coming to know this the plaintiff by its letter dated 09.06.1993 forwarded a sum of Rs. 3 lac to the defendants as earnest money in terms of the agreement to sell. The defendants were making an excuse to resile from their obligation by not pursuing the matter with the DDA for getting the approval despite of reminders issued by the plaintiff. The defendants rather by their letter dated 28.12.1993 exercised their option under Clause 6 of the said agreement to treat the agreement as closed and inoperative.

45. The defendants in their written statement have denied para 14 of the plaint and have also denied the fact that the plaintiff was not aware of the RBI communication dated 10.05.1993. It was stated in para 8 of the written statement that the alleged demand draft dated 08.06.1993 for Rs. 3 lac and letter dated 09.06.1993 was returned to the plaintiff along with their letter dated 28.12.1993.

46. Admittedly, no offer was made in the affidavit of PW-1 either to tender or to deposit the earnest money or total consideration of the money in court in order to show its bona fide.

47. It is true that the specific performance of the contract cannot be enforced in favour of the person who fails to aver and prove his readiness and willingness to perform essential terms of the contract. Exp. ii to Clause (c) of Section 16 makes it clear that the plaintiff must have readiness and willingness to perform the contract according to its true construction. The compliance of requirement of Section 16 (c) is mandatory and in the absence of proof of the same the suit cannot succeed.

48. The readiness and willingness of the plaintiff to perform the essential part of the contract would be required to be demonstrated by the plaintiff from the institution of the suit till the final determination of the suit. If the plaintiff has failed to establish that he is ready and willing to perform its part of the contract strictly as per terms of the agreement, the relief sought by the plaintiff for specific performance cannot be granted.

49. The basic principle behind Section 16 (c) read with explanation (ii) is that any person seeking relief of the specific performance of the

contract must manifest that his conduct has been unblemished throughout entitling him to the relief claimed. The provision imposes a personal bar. Section 16 (c) of the Act mandates the plaintiff to aver in the plaint and establish evidence that it has always been ready and willing to perform its part of the contract.

50. In the present case, the plaintiff has averred in the plaint that the plaintiff has always been ready and willing to perform its part of the agreement, although there is no specific statement in the plaint that the plaintiff has performed and was still ready to perform. Even in evidence, no specific statement was made or proved. The objection about the readiness and willingness has been seriously argued by the learned counsel for the defendants during the hearing of the case. But it is also a matter of fact that in the written statement the defendants have merely denied para 14 of the plaint. It is also a settled law that denial of the averment in the plaint is deemed admission of the averment made by the other side.

51. No doubt, it was incumbent upon the plaintiff both to aver and prove that it had all along been ready and willing to perform and it has to conform to the requirements of Forms 47 and 48 of Appendix-A CPC. It is also true that apart from the averment in the plaint the surrounding circumstances have also to be considered by the court. No doubt, the learned counsel for the defendants has made very serious and valid submissions in this regard. But at the same time, there are no pleadings about the objection raised during the course of hearing, rather in the cross-examination of the defendants DW-1 has admitted the said fact in favour of the plaintiff. The relevant portion of the cross examination of DW-1 is reproduced hereunder:

> .....It is correct that after we obtained the permission from Reserve Bank of India the plaintiff was to pay us a sum of Rs. 3 lacs as earnest money. It is correct that we did not inform the plaintiff regarding the obtaining of the permission from the Reserve Bank of India. It is also correct that the plaintiff on learning about the grant of the permission from the Reserve Bank of India had sent a sum of Rs. 3 lacs to us by a bank draft. It is correct that in the portion underlined red and side marked C1C1 there is only reference to approvals. Vol. there is also mention regarding payment. It is correct that the plaintiff was all along

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ready and willing to perform its part of the contract. It is correct that for the first time we wrote to the plaintiff vide letter dated 28.12.1993 which is Ex. PW1/D6 and returned the bank draft to the plaintiff."

52. In view of the admission made by DW-1, this court has no option but to decide the issue No.2 in favour of the plaintiff.

53. The issue Nos. 3 and 4 are taken together along with the issue of reliefs and costs.

Issue No.3

Whether the defendants rescinded the contract in terms of the agreement dated 20.11.1989?

Issue No.4

Whether the contract stood frustrated on the grounds stated in the written statement?

54. Before any further discussions thereon and in order to arrive at a finding on these issues, it is necessary to refer the relevant dates and events as well as the details of relevant exhibited documents, the same are:

27.09.1944	Date of birth of Defendant No.1 in Delhi.
12.10.1948	Date of birth of Defendant No.2 in Delhi.
1967	Defendant No.1 as an Indian citizen went to the U.S.A.
1970	Defendant No.2 also as an Indian citizen went to the U.S.A.
26.05.1972	Father of the Defendants bids for a plot at DDA auction and allotted plot No.E-46/10 measuring about 501.67 sq.mt. (DW1/3). At the time of purchase, the defendants were Indian citizens.
Feb. 1976	Defendant No.1 became a U.S. citizen.
03.01.1983	DDA executes perpetual lease in favour of the Defendants. (DW1/39)
March, 1984	Defendant No.2 became a U.S. citizen.
Sept.83–June.86	Building of approx. 6869 sq.ft. Constructed on the plot by the Defendants.

02.01.1986	Letter from Plaintiff for taking property on lease for a total period of 15 years subject to the defendants obtaining the requisite permission from the DDA. (DW1I4)
07.03.1986	Permission for sub-letting was granted by DDA for 1 year (DW1/5)
10.03.1986	Sub-letting charges paid to DDA (DW1/6).
30.03.1986	Defendants inform Plaintiff of DDA's subletting permission (DW 1/7).
08.04.1986	Registered lease executed between Plaintiff and Defendants for 5 years and 2 renewal options of 5 years each. Plaintiff occupied the property as a tenant.
08.05.1986	Office copy of letter from Deputy Director (Indl.) DDA regarding subletting permission for packing/re-packing finished goods and intimating that it was for a maximum of 3 years (DW1/8).
29.04.1987	Defendant No.1 writes to Reserve Bank of India (R.B.I.) to inquire if any permission was required to hold the property in view of the change in citizenships of the Defendants (DW1/10).
08.02.1988	R.B.I. replies informing that provisions of FERA are being violated and that the property should be transferred within 6 months failing which action under FERA would be attracted as Bank does not permit non-resident foreign nationals of Indian origin to acquire any commercial property for investment purpose. (DW1/11).
26.03.1988	Defendants inform the plaintiff that the lease would have to be pre-maturely terminated by 31.3.1989 as DDA's sub-letting permission was granted only for a maximum of 3 years (DW1/14) also (PW1/D3).
28.03.1988	Office copy of the letter on behalf of defendants to the DDA requesting for revalidation permission for the period 01.11.1988 to 30.03.1989.
05.07.1988	Plaintiff responds and rejects the request and insists on a 15 years lease (DW1/17).
21.07.1988	An Extension Application by way of letter was made by the

Defendants informing to RBI that buyers were scarce as the property was under a long lease (DW1/40).

31.08.1988 R.B.I. granted time till end Dec., 1988 to dispose the property and stated that on failure to comply the Defendants would render themselves liable under FERA (DW1/18).

27.09.1988 Defendants by referring to the letter dated

20.07.1988 asked the Plaintiff to respond to DDA response (DW1/19 also PW1/D4).

21.10.1988 Plaintiff informs Defendants that they would revert on the above request in a months time with regard to purchase the property (DW1/20).

29.10.1988 Defendants inform the Plaintiff that they would not consider any offer and await the decision of the Plaintiff on the above request and would give priority to the plaintiff (DW1/21).

02.12.1988 Second Extension Application to RB.I. again stating scarcity of Buyers and that in the absence of others, the Defendants were talking to the plaintiff (DW1/41).

24.12.1988 R.B.I. grants extension (second extension) till 30.6.1989 for disposing of the property (DW1/22)

01.02.1989 Offer of Aryan Builders to purchase the said property of Rs. 25 lac exclusive of the unearned increase which will be payable by the defendants Ex. DW1/23.

02.02.1989 Defendants reminder to the plaintiff stating that the three year old period granted by the DDA was about to expire on 31.03.1989. Thus, it was required that the Plaintiff Company executes the agreement to sell with the Defendants. It was also assured that when an agreement to sell shall be executed no further permission will be required from the DDA and the issue will be automatically resolved. (DW1/42).

01.03.1989 Defendants inform the plaintiff that it is futile to seek DDA permission to sublet beyond 3 years. It was also stated that the three year period was about to expire therefore it was in their mutual interest to finalize the sale of the property. (DW1/43).

03.03.1989 Letter on behalf of the Defendants to the DDA stating that the sub-letting charges paid for 01.04.1989 to 31.03.1990.

15.03.1989 Plaintiff informs Defendants that it would enforce its 15 years lease and to take the permission from DDA and also that it would consider purchase (DW1/25). Original Valuation report of M/s. Sahni Deshraj Associates (Value of Construction – Rs. 16,65,000/-)

25.03.1989 Defendants inform the plaintiff to indicate their view on purchase as RB.I had granted time till 30.6.1989 (DW1/44).

25.03.1989 Another letter from the Defendants to the plaintiff regarding the purchase of the property by the plaintiff (DW1/45).

30.03.1989 Another letter from the Defendants to the plaintiff informing that DDA has refused further permission to sublet (DW1/46).

29.04.1989 Defendants apply to the RBI for permission to retain the property in view of changing policies regarding N.R.Ls (DW1/26).

30.05.1989 RBI reminded by Defendants of above request (DW1/27).

16.06.1989 R.B.I. responds and grants 3rd extension of 2 months i.e. till 15/8/89 and threatens to take a serious view of the matter advising them to transfer the property in favour of Indian National. (DW1/28).

07.08.1989 R.B.I. grants 4th extension of 6 months (DW1/29).

09.08.1989 Plaintiffs letter to the Defendants setting out the terms and conditions on which it was ready to purchase the property (DW1/30).

30.08.1989 Plaintiffs letter to the Defendants enclosing the Agreement and valuation reports and advising regarding the manner in which valuation should be made to the Appropriate Authority LT. Act 61 to avoid under valuation (DW1/47): Valuation of only building at RS.16,65,000/- Valuation of only land @ DDA rate RS.23,82,933 DW 1/49 Valuation of entire property (land and building) at Rs.8,66,7801---Wealth Tax Act valuation (DW1/49).

20.11.1989	Agreement executed (DW1/38).
24.11.1989	Appropriate Authority under the Income Tax Act, 1961 seeks various information (DW1/50).
04.12.1989	Defendants submit information to the Appropriate Authority (DW1/51).
29.12.1989	R.B.I. asks for valuation of property and an NOC from the I.T. Department (DW1/52).
19.01.1990	Appropriate Authority decides to purchase the property under sub-section (1) of Section 269 UE. (DW1/53).
	Appropriate Authority directs the taking of possession (DW1/54).
25.01.1990	Certified copy of the W.P.(C) No. 310/1990 filed by the Plaintiff for setting aside the order dated
19.01.1990	passed by the Appropriate Authority.
27.01.1990	Defendants apply to R.B.I. seeking approval to sell the property to the Appropriate Authority and receive the payment from them (DW1/55).
30.01.1990	Plaintiff files CW.P. 310/1990 in this Hon'ble Court (DW1/59).
31.01.1990	Court grants stay of the order dated 19.01.90 of the Appropriate Authority. Deposit of the sale consideration by the Appropriate Authority also suspended.(DW1/58).
08.02.1990	Defendants informed by the Plaintiff of the order and asked to maintain status quo. Plaintiff also informs that it will continue payment of rent and asks defendants to take steps with DDA for their consent to them continuing as tenants. (DW1/31).
15.02.1990	Counterfoil of the Application form with copy of the banker's cheque. 26-02-1991 Stay order confirmed till disposal with added stipulation that Petitioner (Boots) will not encumber the property.
11.04.1990	R.B.I. declines to grant sale approval and returns the application (DW1/33).
23.04.1990	R.B.I. informed of Appropriate Authority developments &

	that it is for the AA to seek RBI approval and letter on behalf of the defendants to the RBI with original receipt (DW1/34).
25.06.1990	Defendants filed counter affidavit in the said writ petition in which they question the enforcement of the agreement to sell and its validity and claim that they could not be deprived of their rights in the intervening case period (DW1/60).
05.07.1990	Certified copy of the counter affidavit of defendants (Respondents Nos. 6 and 7 in W.P.(C) No. 310/1990).
04.09.1990	Counter affidavit filed by Respondent Nos.1 to 5 in W.P.(C) No. 310/1990.
24.10.1990	Plaintiffs filed rejoinder Ex. DW1/62 in the said writ petition to the counter affidavit filed by the defendant and also filed Rejoinder to the reply of R-1 to 5. (DW1/63)
22.02.1991	Reply on behalf of R-1 to 5 to the counter affidavit on behalf of Respondent Nos. 6 and 7 was filed. (DW1/64).
22.02.1993	The final decision of CWP 310/1990 till 22-02-93 when it was allowed and the matter was remanded to the Appropriate Authority to take a decision after affording an opportunity to the plaintiff (DW1/58)
01.03.1993	Plaintiff directly submitted its explanations to the Appropriate Authority with a copy to the defendants to proceed with sale and transfer of property (DW1/56).
24.03.1993	Appropriate Authority grants no-objection (DW1/57).
22.07.1993	Plaintiffs letter to the Defendants regarding DD of Rs.3 lakhs, which was sent on 8th June, 1993 requesting them to fulfill their obligations wit respect to the property (DW1/35).
04.12.1993	Plaintiffs issued notice take legal action (DW1/36).
28.12.1993	Defendants informed plaintiff that the Agreement is closed and inoperative and return un-encashed DD (DW1/37).
24.03.1994	Suit filed.

55. The onus of proof of issue No.3 as to whether the defendants rescinded the contract is upon the defendants. The issue has been framed

on the basis of the defendants' pleading in the written statement at para 5 which reads as under:

> "5. The Agreement to sell dated 20th November 1989 in Clause 6 thereof granted a complete option and discretion to the defendants to opt out of the agreement in which even both parties had specifically contemplated that the only consequence would be that any money paid by the plaintiff either to the defendants or to the D.D.A. would be returned. This option was incorporated because both the parties were aware that governmental policies were changing towards liberalization of holdings in India of Non Resident Indians. The defendants exercised the option and duly notified the plaintiff. No monies having been paid by the plaintiff, the question of any refund did not arise and the matter stood closed. The plaintiff has then no cause of action in its favour."

56. The plea of the plaintiff is that there is no evidence from the defendants as to how Clause 6 was incorporated in the Agreement to Sell. It was averred that the defendants' reliance on Clause 6 of the Agreement to Sell is not correct. The defendants rescinded the agreement to sell (Ex. DW1/38) by wrongly relying upon Clause 6 in their letter dated 28.12.1993 to resile from their obligations. The interpretation / construction of Clause 6 of the said agreement does not permit any option to the defendants to treat the agreement as closed and inoperative. It was also submitted that the RBI had not granted any permission to the defendants for retention of the said property. The RBI had merely issued a notification dated 26.05.1993 granting general permission to foreign citizens of Indian origin to acquire and dispose off any immovable property subject to the terms and conditions of the said notification. Even otherwise the requirement for obtaining permission from the Government Authority is not a condition precedent for passing a decree for specific performance of the contract. The Court has power to enforce the terms of the contract in case the defendants have willfully refused to perform their part of the contract. The following decisions have been referred in support of its submissions:

(i) **Chandnee Widya Vati Madden Vs. C.L. Katial,** (1964) 2 SCR 495.

(ii) **R.C. Chandiok Vs. Chunilal Sabarwal** ˇ1970 (3) SCC 140.

(iii) **Nirmala Anand Vs. Advent Corporation (P) Ltd. & Ors.** (2002) 5 SCC 481.

(iv) **Vinod Singh Vs. Smt. Phutori Devi (since deceased) through her LRs** 2006 (87) DRJ 567.

57. Learned Senior Counsel for the plaintiff has also argued that any self serving interpretation which either destroys the binding nature of contracts or allows a party to take advantage of their own wrong, cannot be applied. He also referred the case of **New Zealand Shipping Co. Ltd. Vs. Societe Des Ateliers Et Chantiers De France** [1919] A.C. 1 wherein Lord Atkinson speaking for the House of Lords has observed that-:

> "(v)…… But if the stipulation be that the Contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings about that event, cannot be permitted either to insist upon the stipulation himself, or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrongs, in the one case directly, and in the other case indirectly in a round about way, but in either way putting an end to the contract. The application to contract such as these of the principle that a man shall not be permitted to take advantage of his own wrong thus necessarily leaves to the blameless party an option whether he will or will not insist on the stipulations that the contract shall be void on the happening of the named event. To deprive him of that option would be but to effectuate the purpose of the blameless party."

58. The stand in the written statement of the defendants was that the RBI policy was liberalized in 1993. The agreement was entered into apparently pursuant to an order of the RBI. Since the RBI had granted permission for retention of the property, therefore, the defendants exercised their right under Clause 6 to close the contract.

59. Let me now consider the submissions of the parties on these

issues. It is not in dispute that the plaintiff company was the lessee of the suit property which culminated into an agreement to sell dated 20.11.1989. The salient features of the said agreement are reproduced below:

a. Clause 1 of the said agreement – According to Clause 1 it was agreed that Defendant Nos.1 and 2 would sell, transfer and assign and the Plaintiff would purchase and acquire from Defendant Nos. 1 and 2 the said premises at a consideration of Rs. 23 lakhs only.

b. Under Clause 2 of the said agreement, the Plaintiff was to pay to the Defendant Nos. 1 and 2, an earnest money of Rs. 3 lakhs after the Defendant Nos. 1 and 2 obtained the necessary permission from Reserve Bank of India. The said earnest money was to be adjusted against the total consideration to be paid by the Plaintiff to the Defendant Nos. 1 and 2 at the time of completion of the sale, assignment and transfer of the suit property.

c. As per Clause 3 of the said agreement, it was the obligation of Defendant Nos. 1 and 2 to obtain all approvals and permission as provided in the said Clause. Clause 3 envisaged—

i. Approval of RBI under the Foreign Exchange Regulation Act, 1973 (FERA).

ii. Permission from the Appropriate Authority under Chapter XX-C of the Income Tax Act, 1961.

iii. Income Tax Clearance Certificate under Section 230 – A of the Income Tax Act, 1961.

iv. Approval of the Delhi Development Authority and

v. Approval of any other local bodies or Authorities such as the Urban Land Ceiling Regulation Act, 1976 as may be necessary.

60. The following permissions/approvals were sought and/or granted:

(i) Appropriate Authority – In pursuance of the agreement to sell, a joint application was made by the Plaintiff and Defendant Nos. 1 and 2 for permission from the Appropriate Authority under Chapter XX-C of the Income Tax Act. The Appropriate

Authority however vide its order dated 19.1.1990 (DW-1/53,) ordered for the purchase of the suit property by the Central Government. The order dated 19.01.1990 was challenged by the plaintiff in W.P.(C) No. 310/1990.

The order of acquisition of the suit property by the Appropriate Authority was set aside by this court vide its order dated 22.02.1993 (DW-1/58). Thereafter, the Appropriate Authority duly granted the 'No Objection Certificate' vide its order dated 24.03.1993. The requisite permission was obtained from the Appropriate Authority under Chapter XX-C of the Income Tax Act.

(ii) Permission from RBI – On 29.04.1987, an application was made by the defendants to the RBI under Section 31(1) of the FERA, 1973 wherein the defendants inquired whether they could hold the suit property in India as they had acquired US citizenship (DW-1/10). The RBI vide its letter dated 08.02.1988 (DW-1/11) advised the defendants that they were not eligible to acquire/hold an immovable property in India. Thereafter, various correspondence were exchanged between the defendants and the RBI during the period 21.07.1988 to 11.04.1990.

The RBI vide its letter dated 10.05.1993 addressed to the defendants granted the permission for sale of the suit property to the plaintiff. The defendants had applied for such permission after the order of the Appropriate Authority, on 09.04.1993 seeking for permission in favour of the plaintiff. The letter dated 10.05.1993 and the fact that RBI granted the requisite permission to the defendants has been admitted by the defendants at para 8 of the written statement.

(iii) The approval of the DDA was not granted.

61. Pursuant to the requisite permission granted by the RBI the plaintiff forwarded a sum of Rs. 3 lac (vide DD No. 298670 dated 08.06.1993) as earnest money. Although, the demand draft was returned by the defendants. The plaintiff later on addressed a letter dated 04.12.1993 (DW-1/36) to the defendants wherein the plaintiff pointed out that deliberate default had been committed by the defendants in obtaining the

requisite permission from the DDA.

62. The main argument of the defendants is that Clause 6 of the agreement allowed a complete option and discretion to the defendants to opt out of the agreement. The only consequence would be that any money paid would be refunded and the said clause introduced into the agreement by the plaintiff company who suggested the terms and conditions mentioned in its letter dated 09.08.1989 Ex. PW-1/30.

The said clause 6 reads as under :

> "6. Mohindras shall within 30 days from the date of receipt of all approvals, including Income Tax, Reserve Bank of India, DDA and their requisite stamp paper from Boots, execute a deed of conveyance / assignment in favour of Boots and had over possession of the said premises. Failure to obtain any of the approvals shall make this agreement inoperative. Upon failure by Mohindras to obtain all or any of the necessary approval or to execute the deed of conveyance / assignment as above after obtaining the necessary approvals within the time specified or such extended time as mutually agreed, Mohindras shall forthwith refund to Boots all the monies pay to Mohindras and paid on their behalf to DDA. In the event of Mohindras failing to repay / refund the monies, Boots shall be entitled to adjust and Appropriate the same against any other sums payable by Boots to Mohindras. Upon failure by Boots to make the payment to DDA or the balance consideration as provided in this agreement, the earnest money paid by Boots shall be forfeited."

63. In support of his submissions, the learned counsel for the defendants has relied on the following judgments:

1. **Randhir Singh Chandok vs Vipin Bansal & Anr** 135 (2006) DLT 56 where while interpreting an agreement to sell immoveable property, it was held that a document has to be construed meaningfully and every attempt has to be made to give meaning to every phrase and every sentence in a written document.
2. **Brokers & Brokers Pvt ltd vs Om Prakash Bhola & Anr** 2007 (98) DRJ 315 wherein this Court while referring

to (1999) 8 SCC 416 **Dadarao & Anr vs Ramrao & Ors** held that the clause involved in the said case providing for both parties to agree to terminate the agreement to sell was not a bar to a suit. This Court noted that in Dadarao, the agreement was very specific and itself provided as to what is to happen if either the seller refuses to sell or the purchaser refuses to buy.

3. In **Dadarao** (supra) the Hon'ble Supreme Court held that the relationship between the parties has to be regulated by the terms of the agreement between them and that it was important to note that the agreement itself provided as to what is to happen if either the seller refuses to sell or the purchaser refuses to buy. It was further held that in case the agreement had not stipulated as to what is to happen in the event of the sale not going through, then perhaps the purchaser could have asked for specific performance and proceeded to decline the relief. In Dadarao's case the agreement provided not only for refund but also for damages as such it was a case to which Section 23 was attracted. Subsequently in **P.D'Souza vs Shondrilo Naidu** (2004) 6 SCC 649 it was clarified that since Dadarao did not discuss Section 23 and its effect, it was a decision per incuriam, but the decision was not considered either as wrongly decided nor was it overruled. In fact in **P. D'Souza** (supra), the clause in Dadarao was referred to and held on facts as not creating a binding precedent. It appears that Dadarao though restricted to its facts has not been overruled. It is submitted that on facts the reasoning in Dadarao's case is binding on this Hon'ble Court.

64. No doubt, the relief sought by the plaintiff for specific performance may not be denied simply because sanction was not granted from any of the authorities. Even the contract cannot be frustrated in case a party tries to give its own self serving interpretation to close the agreement in order to take advantage, it is also not permissible for a party to take the ground of non approval of the permission by the Authorities, thus it is not necessary to discuss the judgments referred by the plaintiff in this regard. But, in order to come to the final finding of the case, it

is the duty of the court to examine each and every term agreed upon by the parties in the agreement to sell which has to be construed in a very careful and meaningful manner. The meaning of every sentence in a written document is to be examined.

65. I feel that it is necessary to refer few facts and circumstances in order to discuss the issue further:-

(i) The defendants, on their own, through their father sent a letter to the RBI enquiring about the formal permission of retention of property being foreign citizen. The RBI vide letter dated 08.02.1988 Ex. DW1/11 directed the defendant to transfer the property in favour of Indian citizen residing in India permanently within the period of six months from the date of the said letter. The plaintiff herein was already a tenant under a lease deed from April 1986 to 2001 and the defendants also had a problem on losing the lease deed rights from DDA in view of sub-letting violation beyond three years of lease in favour of the plaintiff.

(ii) Thereafter the property was offered to the plaintiff by the defendants by way of a letter Ex. DW1/42. The plaintiff after the expiry of 13 months sent the terms and conditions which were accepted by the defendant by letter dated 09.08.1989 Ex. DW-1/30. The said terms and conditions suggested by the plaintiff were incorporated into the final agreement to sell and purchase dated 20.11.1989 Ex. DW-1/38.

(iii) The agreement did not contemplate any amount as advance or earnest. All payments were to be made on the happening of the event. The unearned increase amount payable to the DDA i.e. more than Rs. 10 lacs was included in the total price of Rs. 23 lacs.

(iv) Clause 6 of the agreement contemplates that in the event of failure to obtain any of the approvals, the agreement would become 'inoperative'. It was also mentioned in the said clause that on failure by the defendants to execute the sale deed, even after obtaining approvals, any money paid to the DDA would be refunded. The manner of recovery was also contemplated.

(v) By order dated 19.01.1990 Ex. DW-1/53 the Appropriate

Authority desired to acquire the property under Section 269 UE 1 of the Income Tax Act, 1961. The defendants on 27.01.1990 applied to RBI seeking approval to sell the property to the Appropriate Authority and received the payment from them.

(vi) By letter dated 08.02.1990 Ex. DW1/31 the plaintiff informed the defendant about the filing of writ petition before the High Court and also obtaining a stay of the operation of the order dated 19.01.1990.

(vii) On 11.04.1990 the RBI declined to grant sale approval and returned the application to the defendant.

(viii) In June 1990 the defendants filed the counter affidavit and in the counter the defendants questioned the enforcement of agreement to sell and its validity. The writ petition W.P.(C) No. 310/1990 was finally decided on 22.02.1993 wherein the order of the Appropriate Authority dated 19.01.1990 was set aside.

(ix) By letter dated 01.03.1993 the plaintiff directly submitted its representation to the Appropriate Authority with a copy to the defendant to proceed with the sale and transfer of the property. On 24.03.1993 Appropriate Authority granted no objection. Thereafter the plaintiff sent the letter dated 22.07.1993 Ex. DW-1/35 to the defendants informing about the fulfillment of their obligation in respect of the suit property and finally the notice was issued on 04.12.1993 Ex. DW-1/36.

(x) As the RBI policy was liberalized in 1993, the ˇdefendants had exercised their right under Clause 6 by closing the agreement as per information given to the plaintiff vide letter dated 28.12.1993 Ex. PW-1/D6.

66. The said clause was admittedly incorporated with the agreement of the plaintiff as it is evident from the plaintiff's letter dated 09.08.1989 (Ex.DW1/30) addressed to the defendants. It is also a matter of fact that the said clause has not been challenged by the plaintiff. The plaintiff has not produced any material or proved in evidence contrary to Clause 6. In fact, the plaintiff has not filed any original documents in the matter, even the plaintiff failed to file the original/signed copy of agreement to

sell although it was the admitted document between the parties. The plaintiff has examined one witness namely Mr. N. Gopal Krishnan, Depot Manager of the plaintiff company whose affidavit has been filed Ex. PW-1/A as evidence. The statement made in the affidavit is almost the same as mentioned in the plaint.

67. In his cross examination PW-1 Mr. N. Gopal Krishnan has admitted to the affidavit PW-1/A filed as evidence on behalf of the plaintiff, that late Mr. D.M. Raja had signed the Plaint, after the death of Late D.M. Raja in the year 2004 Mr. K. M. Marfatia was working as President in the corporate office of the plaintiff company and Mr. G.S. Kurmi was working as Company Secretary in the Corporate Office. Late Mr. D.M. Raja was to appear as a witness on behalf of the company however, he was instructed to file his affidavit in evidence of the plaintiff company. He has also admitted that he has not signed any document or any paper which has been filed in the present suit on behalf of the plaintiff company. His name is not mentioned in the list of witnesses and his affidavit was filed as per the information given by the plaintiff company. He is not aware that the plaintiff company has not filed even a single original document in the present suit. He admitted in the cross-examination that it was not in his jurisdiction to know anything relating to the proposal to purchase the suit property nor about the details of negotiation between the parties and copies of the correspondence or the agreement reached between the parties were also not sent to him. His affidavit has been filed on the basis of the records being maintained by the plaintiff company in its corporate office in Mumbai where the original documents relating to the present suit are also lying. He also admitted that he was never authorized to represent the plaintiff company, before RBI, Income Tax Department as well as before the D.D.A. He is also not aware how much was the unearned increase which was to be paid to the D.D.A. in the year 1993. He has filed his affidavit of evidence as per orders received from the corporate office of the plaintiff company. Further after the conclusion of the cross-examination of PW-1 the plaintiff sought leave of this court by filing of I.A. NO. 10132/2007 to produce an additional witness viz. Mr. K.M. Marfatia, Vice President, which was dismissed by the court vide order dated 06.11.2007 on the ground that the plaintiff was attempting to cover up the lapse in the evidence of its witness.

68. The clause 6 of the agreement consists of two parts. (i) The first part states that failure to obtain any of the approvals shall render the agreement 'inoperative'. (ii) The second part deals with the consequences of failure by the defendants to execute the deed of conveyance / assignment even after the clearances are obtained within the time specified in the agreement or such extended time as mutually agreed, the defendants shall forthwith refund to the plaintiff all the monies paid to the defendants and paid on their behalf to the DDA.

69. Clause 6 contemplates that failure to obtain any permission will render the agreement inoperative is applicable to both parties. There is also a provision for refund and forfeiture and are applicable to both the vendor and vendee. It is also stipulated that in the event of defendants failing to repay / refund the money the plaintiff would be entitled to adjust the same.

70. It appears to this court that it is a rare clause which is usually not incorporated in most of the agreements of this nature, since it is available in the present agreement, it has to be construed meaningfully. Therefore, a decree for specific performance cannot be passed merely because the plaintiff has been able to prove its .readiness and willingness, in presence of the said clause.

The plaintiff in its letter dated 10.01.1994 Ex. DW1/P1 sent to the defendants through Advocates and Solicitors had also relied upon the said Clause 6 in the following manner:

> "On a careful reading of the said Clause 6, it would be clear that by reason of the default on the part of the said Mohindras our clients can claim back from the said Mohindras the amount that the said Mohindras may have received prior to such default."

71. The first submission of the plaintiff is that the notification dated 25.05.1993 does not permit the defendants to retain the property as it was a general permission granted under the notification to the foreign citizens of Indian origin to acquire and dispose of the immovable property subject to certain conditions and, therefore, the defendants cannot take advantage of the same as it is not applicable in the facts and circumstances of the present case. It is further alleged that the defendants have not produced any evidence to prove the same and, therefore, reliance on

Clause 6 by the defendant in order to resile the agreement was not correct. The relevant extract of the said notification reads as under:-

> "In terms of A.D. (M.A Series) Circular No.3 dated 20.1.1992, general permission under section 31(1) of the Foreign Exchange Regulation Act, 1973, has been granted to foreign citizens of Indian origin whether resident in India or not to acquire, hold, transfer or dispose of by sale or inheritance, immoveable properties situated in India subject, interalia, to the condition that the sale proceeds of such properties and income accruing thereon will not be eligible for repatriation outside India."

72. As far as the retention of the property is concerned, after having gone through the notification it is clear that the said notification allows the foreign citizens of Indian origin to acquire, hold, transfer or dispose of the property by sale or inheritance subject to certain conditions. The submission made by the plaintiff that after the said notification a party cannot retain the property has no force. In the present case, no doubt, it appears from the notification that the defendants can retain the property.

73. As regards the second submission of the plaintiff that the defendants in order to opt Clause 6 have not produced any evidence and reliance of the said Clause was not correct, the said submission also has no force because of the reasons that as far as the pleadings of the defendants are concerned, paras 2 and 5 of the preliminary objections and paras 2,5,11 and 12 of the written statement are very clear in this regard. As regards the evidence, the defendants have filed the affidavit exhibit DW-1/A and the reliance on Clause 6 is mentioned in paras 26, 32 and 35 of the affidavit and supported documents have been proved. Even in the cross-examination of DW-1, the stand of the defendants remains the same. Thus, it is not correct to say that the defendants cannot rely upon Clause 6 which is obviously an essential Clause of the agreement.

74. The notification was admittedly issued after the grant of permissions by the Appropriate Authority on 24.03.1993 and RBI on 10.05.1993. The defendants opted for Clause 6 of the agreement after the notification and they had not shown any interest to obtain the approval from the DDA after the notification.

The plaintiff has argued that after obtaining the permission from the Appropriate Authority and RBI, the plaintiff wrote letters dated 02.04.1993, 08.06.1993 and 06.09.1993 to the DDA requesting therein to allow the parties to execute the agreement as there was no intention by the defendants to execute the sale deed. As already discussed, the plaintiff has not challenged Clause 6 of the agreement, further the alleged letters dated 02.04.1993, 08.06.1993 and 06.09.1993 to the DDA, office copies and postal receipts have not been produced and proved by the plaintiff.

75. PW-1 in his cross-examination has admitted the fact that the plaintiff has not filed a single original document before the court. It was not within his jurisdiction to know anything relating to the proposal of purchase of the suit property nor about the details of negotiation between the parties and copies of the correspondence and agreement were not sent to him. He has filed the affidavit as per orders received from the plaintiff company. Thus in the absence of evidence, the contention of the plaintiff cannot be accepted.

76. The third submission of the plaintiff that the construction of Clause 6 of the said agreement does not give any option to the defendants to treat the agreement as closed is also without any substance as both the parties themselves devised a mechanism for exiting from the agreement, the details of which can be gathered from the agreement to sell and the same are summarized as under:

(a) No advance amount was contemplated to be paid. It was specifically contemplated that an amount of Rs. 3 lac would be paid as earnest money only after obtaining permission from the Reserve Bank of India for the transfer and assignment of the premises.

(b) It was also stipulated that failure to obtain any of the necessary approvals from Delhi Development Authority, Income Tax Department, Reserve Bank of India or any other Authority(s) would make the proposed agreement inoperative.

(c) The parties themselves had agreed that if the sellers failed to execute the conveyance/assignment sale document(s) even after obtaining ˇnecessary approvals, the consequence would only be that any money paid to them or paid on their behalf, would be refunded.

(d) The parties clearly agreed that if the buyer (the plaintiff herein) failed to make payment to the Delhi Development Authority or the balance consideration, earnest money, if paid shall be forfeited.

77. In view of the above, there is also no force in the submission made by the plaintiff that the construction of Clause 6 does not permit the defendants to exercise their option to close the agreement.

78. After considering Clause 6 of the agreement coupled with entire facts of the matter and the evidence produced by the parties, this Court is of the view that the contract between the parties was determinative in nature. The provisions of Section 14 (c) of the Specific Relief Act, 1963 provides that the determinable contracts cannot be enforced by decree of Specific Performance. In Pollock & Mulla's Indian Contract and Specific Relief Acts 12th Edition Vol. 2 page No.2499 Clause (c) of Section 14 of the Specific Relief Act, 1963 has been dealt with which reads as under :

> "Clause (c) of sub-s (1) corresponds with s 21(d) of the repealed Act. The word "revocable" in the repealed s 21(d) was inaccurate and at the suggestion expressed in earlier edition of the book, the word "determinable" has been substituted.
>
> A contract, which is in its nature revocable, or determinable as described in this Act, is not enforceable by specific performance. Specific performance is not decreed if the defendant would be entitled to revoke or dissolve a contract when executed, as in the case of a contract containing an express power of revocation, since it would be idle to do that which might instantly be undone by one of the parties.
>
> ……Where the contract allows the defendant to terminate the contract without notice and without assigning any reason, the contract is not specifically enforceable."

It appears from the reading of the Contract that the said Clause operates unconditionally and can relieve either party from its obligation and put the parties in the same position as if the Contract was never entered into. Thus, the defendants have been able to prove their burden of issue No.3 coupled with overall facts and circumstances of the matter which allow the defendants to close the contract in terms of the agreement

dated 20.11.1989. The issue Nos. 3 and 4 are accordingly decided. 79. Let this court may also examine as to whether even otherwise, on the basis of facts and circumstances of the present case, the plaintiff is entitled to the relief of Specific Performance under Section 10 and under Clause (a) (b) and (c) of Section 20 of the Specific Relief Act, 1963.

80. Section 20 of the Specific Relief Act, 1963 reads as under:

> **"20. Discretion as to decreeing specific performance.-** (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.
>
> (2) The following are cases in which the court may properly exercise discretion not to decree specific performance:--
>
> (a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or
>
> (b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non- performance would involve no such hardship on the plaintiff;
>
> (c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance. Explanation 1.- Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b). Explanation 2.- The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

Explanation 1. – Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation 2. – The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract."

81. It is settled law that the specific performance is an equitable relief. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion. The court is not bound to grant specific relief merely because it is lawful to do so. The motive behind the litigation is to be examined. The court while granting or refusing the relief has to consider whether it would be fair, just and equitable. In case, where any circumstances under Section 20(2) are established, the relief is to be declined. Section 20 shall be at the forefront in the mind of the Court, the relief sought under this section is not automatic as the court is required to see the totality of the circumstances which are to be assessed by the court in the light of facts and circumstances of each case. The conduct of the parties and their interest under the contract is also to be examined.

82. The .conduct of the parties. and "circumstances" are the main factors from the time of agreement till the final hearing of the Suit in order to exercise courts jurisdiction under the said provisions of the Act. The following are the relevant circumstances which are to be considered in this regard:-

(a) It is the admitted position that the writ petition was pending for more than 3 years and by virtue of interim order, the defendants could not have received the money from Appropriate Authority in February, 1990. Due to pending writ petition, admittedly unearned amount payable to the DDA was increased heavily.

(b) The plaintiff also continued to occupy the property despite of expiry of the lease.

(c) It is also a matter of fact that on the first date of hearing when the matter was listed the plaintiff took the stand before the court that the plaintiff is not liable to pay rent. However, directions were issued by the court to pay the rent without prejudice. The plaintiff did not offer to deposit the amount of Rs. 3 lac before the court nor offered to deposit the sale consideration though the plaintiff wanted to treat the agreement as alive and subsisting. Even during the pendency of the suit the plaintiff has not shown any interest to deposit the said amount.

(d) As lease between the parties was extended till the year 2001, there seems to be a force in the submission of the defendants that in view of the occupancy of the property by the plaintiff, there were no buyers who were ready to purchase the suit property from the defendants.

(e) Since this property was on a perpetual lease, no sale or transfer of the property was permitted except with the prior permission of the Delhi Development Authority and on payment of 50% of the unearned increase i.e. the appreciation in the market rate, as fixed by the Government. At the relevant time the rate fixed by the Delhi Development Authority for the subject area for the purpose of unearned increase was Rs. 4,750/- per sq. mtr., which for 501.67 sq. mtr. worked out to a value of Rs. 23,82,933/- and 50% of the same being the amount payable to the Delhi Development Authority was Rs. 11,73,016/-.

The plaintiff made an offer of Rs. 23 lac for purchase of the property inclusive of the unearned increase payable to the Delhi Development Authority. The amount of unearned increase payable as per the rates fixed by the Delhi Development Authority was Rs. 11,73,016/- which means that what was being received by the defendants was the balance namely approx. 11-12 lacs.

(f) It is clear that at the time of agreement dated 20.11.1989 plaintiff was aware of the fact that the defendants were under the mandate of Reserve Bank of India and threat of action under FERA against the defendants.

(g) When the Appropriate Authority desired to acquire the property by order dated 19.01.1990 and the defendants applied before the Reserve Bank of India seeking approval to sell the property to the Appropriate Authority vide letter dated 27.01.1990 Ex. DW1/55 the plaintiff instead of allowing the defendant to receive the money from the Appropriate Authority obtained the stay order which continued for more than three years. On the other hand the plaintiff did not vacate the property despite of lapse of lease period without investing any amount for 21 years neither deposited any amount in the court.

83. The circumstances referred in para 82 of this judgment indicates that if the discretion of the relief of Specific Performance is exercised in favour of the plaintiff, it would give the plaintiff an unfair advantage over the defendants within the meaning of Section 20 (2) (a) of the Act.

84. It is also a matter of fact that Appropriate Authority by order dated 19.01.1990 desired to acquire the property. The defendants sought approval from the RBI to receive the money from the Authority in January, 1990. It did not make any difference to the defendants as to from whom they received the sale consideration, the plaintiff on the other hand after the expiry of more than 15 years wants to enforce the agreement on its original terms. It is the admitted fact that the plaintiff has not parted with any amount nor the plaintiff has disclosed in the plaint or mentioned in the evidence about the return of earnest money from the defendants rather the plaintiff enjoyed the property despite of lapse of lease under the conservative terms of 1986. Thus these circumstances show that it is not equitable to grant the relief to the plaintiff in the present case under Section 20 (2) (c) of the Specific Relief Act, 1963.

85. Further in case the said agreement in question is enforced, it would cause great hardship to the defendants at present because of the reason that they shall have to pay towards unearned increase to the DDA which has now become due more than the total consideration. Thus the performance of the contract would tantamount to hardship to the defendants within the meaning of Section 20 (2) (b) of the Act, on the other hand there would be no such hardship to the plaintiff which is a multinational company who did not invest even a single paisa from the date of agreement till the hearing of the suit.

86. No doubt, this Court is conscious about the law that the grant of relief of specific performance is a rule and it is for the defendants to demonstrate as to how his case would fall with the exception carved out under the Sub-Section 2 of Section 20 of the Act. In support of this proposition, the learned counsel for the plaintiff has referred the following two decisions:

(i) **Gulzar Singh Vs. Harbans Kaur & Ors.,** 2008 (146) DLT 725.

(ii) **Nirmala Anand** (Supra).

87. In the case of **Nirmala Anand** (supra) the facts were that the plaintiff entered into an agreement with the defendant for purchase of flat at Mumbai. The sale consideration under the agreement was payable at Rs.60,000/-. The agreement stipulated that the building was to be completed and the possession of the flat was to be delivered to the plaintiff by 30.6.1969. The plaintiff paid sum of Rs.35,000/- out of sale consideration leaving a balance of Rs.25,000/-. Just a few days before the date fixed for completion and the possession, the lease of the plot of the land on which the flats were being constructed was cancelled by the Bombay Municipal Corporation. It was also a matter of fact that similar agreements in respect of different flats were entered into by the seller with the other flat purchasers. The sellers were able to settle their case with the others during the pendency of the pendency of the suit. However, there was no settlement between the plaintiff and defendant in that case. Therefore, the Supreme Court had exercised its discretion in favour of the plaintiff under the peculiar circumstances of the case. It was a matter of fact in that case that the plaintiff was prepared and willing to take the possession of the incomplete flat without claiming any reduction in the purchase price and was also agreeable that the defendant would not be held responsible for any incomplete in the building.

Under these circumstances, the discretion was exercised in favour of the plaintiff and the relief for specific performance was granted with certain condition. There was no similar clause 6 as available in the present case, thus it is quite evident that the facts in the case were materially different.

88. In the case of **Gulzar Singh** (supra), also the factual position

of the matter was different. Some of the admitted facts between the parties were mentioned in para 13 of the judgment which reads as under:

> "13. From what is narrated above and after taking note of the facts on which there is a dispute, we may first list those facts which are not in dispute as that would be of some help to take decision on the disputed aspects of the case. The admitted factual position is as under:-
>
> (a) Agreement of sale dated 13.10.1972 entered into between the plaintiff and the defendant is not in dispute.
>
> (b) As per this agreement, the defendant agreed to sell house No.24/72, West Patel Nagar for a total consideration of Rs.80,000/-. A sum of Rs.5,000/- was paid as earnest money at the time of signing the agreement.
>
> (c) Though the balance amount was to be paid at the time of registration of the sale deed and delivery of vacant possession, some further amounts were paid by the plaintiff to the defendant. According to the plaintiff, he paid an additional amount of Rs.15,600/- (Rs.5,000/- on 31.10.1972, Rs.10,000/- on 4.12.1972 and Rs.600/- on 18.12.1972), whereas the defendant alleges that an additional of Rs.15,000/- was only paid. However, it is not in dispute that further amounts were paid by the plaintiff to the defendant.
>
> (d) Part possession of the house in question was given by the defendant to the plaintiff.
>
> (e) At the time of execution of the agreement to sell, suit property was mortgaged with the Delhi Administration, which was to be redeemed. For redemption, the defendant was to take further advance payment from the plaintiff.
>
> (f) As per the agreement, the period of sale was two months within which the registered sale deed was to be executed by the defendant in favour of the plaintiff on receipt of balance price and the defendant was to deliver vacant possession of the remaining property and clear title deeds of the property."

The Court passed the decree for specific performance while considering the admitted facts between the parties. The period of sale was also agreed by the parties. The facts and circumstances in the present case are materially different. Therefore, the said decision was at its own facts and is not applicable to the facts of this case.

89. For the aforesaid reasons this court is also not inclined to exercise its discretion to grant the relief for Specific Performance under the facts and circumstances of the present case as Clause 6 of the Contract is hit by Section 14(c) of the Specific Relief Act, 1963. The prayer sought by the plaintiff in the present suit to pass a decree for specific performance of the agreement in relation to property no. E-44/ 10 Okhla Industrial Area (Phase I), New Delhi – 110020 is declined.

90. As regards the alternative prayer to pass a decree for recovery of Rs. 23 lac is concerned Clause 6 of the agreement did not stipulate damages and it only contemplates refund of monies paid by the plaintiff and not any amount by way of liquidated damages/ compensation/penalty. Though Section 23 of the Specific Relief Act, 1963 provides that liquidation of damages is not a bar to specific performance. The plaintiff has not produced and proved any evidence against the relief claimed. Alternative relief claimed by the plaintiff is also rejected.

91. The suit is accordingly dismissed with costs.

ILR (2011) DELHI II 556
CS (OS)

SUNIL MITTAL PROPERTIES OF M/S SHREE SHYAM PACKAGING INDUSTRIES **....PLAINTIFF**

VERSUS

M/S LML LTD. **....DEFENDANT**

(V.K. SHALI, J.)

IA NO. : 7089/2009 IN CS (OS) NO. : 2449/2008 **DATE OF DECISION: 17.01.2011**

Sick Industrial Companies (Special) Provisions Act, 1985—Section 22(1)—Plaintiff filed suit for recovery—Defendant raised objection—Suit cannot proceed as defendant was a sick company—On merits denied liability to pay—Defendant filed application for adjourning suit sine die by virtue of Section 22(1), on the ground suit cannot be continued without permission from BIFR, as reference registered with BIFR in 2006 and suit filed on 2008—Held, Section 22 enacted with a view to prevent strain on already scarce resources or creating any obligations or impediments in restoring a sick company to normal health—This, however, needs to be examined on case to case basis—Proceeding for recovery simplicitor need not be stayed until amount sought to be recovered is reckoned or taken into consideration in rehabilitation scheme before BIFR—In instant case, defendant neither admitted this liability to pay the amount nor such amount reckoned or taken into account by any scheme of rehabilitation of sick defendant company—Proceedings of suit cannot be adjourned sine die.

[An Ba]

APPEARANCES:

FOR THE PLAINTIFF **:** Mr. Dinesh Goyal, Advocate.

FOR THE DEFENDANT **:** Mr. R. Singh, Advocate.

CASES REFERRED TO:

1. *Intercraft Limited* vs. *Cosmique Global and Anr.* in W.P.(C) No. 8803/2009 dated 30.09.2010.
2. *Saketh India Limited* vs. *W. Diamond India Ltd.* in RFA(OS) No.114/2009.
3. *Jay Engineering Works Ltd.* vs. *Industry Facilitation Council* AIR 2006 SC 3252.
4. *Modi Stone Ltd.* vs. *State of Kerala* (2004) 6 COMPLJ 184 (Ker) DB.
5. *Rishab Agro Industries Ltd.* vs. *P.N.B. Capital Services* AIR 2000 SC 1583.
6. *Real Value Appliances Ltd.* vs. *Canara Bank* AIR 1998 SC 2064.
7. *Tata Devy Ltd.* vs. *State of Orissa* 1997 (94) ELT 477 (SC).
8. *Dy. Commercial Tax Officer* vs. *Corromandal Pharmaceuticals* AIR 1997 SC 2027.
9. *Maharashtra Tubes Ltd.* vs. *State Industries and Investment Corporation of Maharashtra Ltd. and Anr.* MANU/SC/0427/1993 : [1993] 1 SCR 340.
10. *Shree Chamundi Mopeds Ltd.* vs. *Church of South India Trust Association* AIR 1992 SC 1439.
11. *Gram Panchayat* vs. *Shree Vallabh Glass Works Ltd.* AIR 1990 SC 1017.

RESULT: Application dismissed.

V.K. SHALI, J.

IA No. 7089/2009

1. This order shall dispose of IA bearing no. 7089/2009 under Section 22(1) of the Sick Industrial Companies (Special) Provisions Act, 1985 (hereinafter referred as 'the Act').

2. Briefly stated the facts of the case are that the plaintiff had filed a suit in the month of November 2008 for recovery of a sum of Rs.44,05,803.47 against the defendant. It was alleged in the plaint that the plaintiff is a proprietor of M/s Shree Shyam Packaging Industries, Gulshan Park, Opposite Rajdhani Dal Mill, Main Rohtak Road, Nangloi, Delhi-110041 and is engaged in the business of manufacturing and selling packaging material. The defendant is a company engaged in the business of manufacturing and selling of two-wheeler scooters in the domestic as well as in foreign market. In the course of its business activities, the defendant required wooden crates for packaging of its scooters meant for the purpose of export. On account of the said crates having been supplied by the plaintiff, it was alleged that the defendant on account of non-payment of various bills starting from 26.11.2005 to 31.01.2006 owed a sum of Rs.24,83,409.27. In respect of the aforesaid amount, the plaintiff filed a suit along with the interest @ 24% per annum because of the default on the part of the defendant to clear the payment within 45 days for which the credit was given to the defendant. The interest component which was calculated was to the tune of Rs.15,39,714.20 starting from 01.04.2006 till the filing of the present suit i.e. 31.10.2008 and that is how a sum of Rs.44,05,803.47 was claimed.

3. The defendant filed its written statement and contested the claim of the plaintiff. The preliminary objection was raised regarding the maintainability of the plaint itself on the ground that the defendant was a sick company and the present suit could not be proceeded. The jurisdiction of the Court was also challenged as it was alleged that the Court in Kanpur has the exclusive jurisdiction. On merits, the defendant denied the liability to pay the aforesaid amount to the plaintiff.

4. After completion of the pleadings, the defendant filed an application raising a plea that the proceedings of the suit be adjourned sine die on account of the fact that the defendant was a sick company and by virtue of Section 22 (1) of the Act, the suit for recovery could not be continued for want of permission by the BIFR. In order to support its contention, the defendant along with the application had placed on record the photocopy

of the letter dated 15.09.2006 written to the whole-time Director of the defendant company, by the Registrar, BIFR, intimating that its reference dated 08.09.2006 was registered as a case no. 80/2006 with the BIFR on appeal to the Secretary, BIFR. A copy of the order dated 17.05.2007 in Case no. 80/2006 by the BIFR was also annexed wherein it was observed as under:

> "(ii) The secured/unsecured creditors are not permitted to file/ pursue suits already filed at this stage. The bench, however, would reconsider its decision if the direction/guidelines issued are not complied with by the company within the given time frames."

5. On the basis of these orders having been passed by the BIFR, the contention of the learned counsel for the defendant, is that as the defendant being a sick industrial company within the definition of Section (3) (1) (o) of the Act, and as there are orders passed by the BIFR on 15.09.2006 and 17.05.2007, by virtue of Section 22 of the Act, the proceedings of the present suit be adjourned sine die, awaiting the final decision of the BIFR. In order to support its contention, the defendant in para 5 of the application has referred to various judgments of the Apex Court as well as of the High Courts although they are not cited.

6. The plaintiff in its reply to the application took a plea that the defendant had not admitted its liability to pay the suit amount and the dues are not reckoned in the scheme of rehabilitation, consequently the proceedings cannot be stayed. It was stated that since the defendant has denied its liability, therefore, in the light of the pronouncement of the Hon'ble Supreme Court in case titled **Dy. Commercial Tax Officer Vs. Corromandal Pharmaceuticals** AIR 1997 SC 2027, the suit must continue, notwithstanding that the defendant being a sick company.

7. During the pendency of the suit, the defendant also purported to have filed an affidavit dated 01.05.2010 of Mr. D. R. Dogra wherein a statement of accounts of M/s Shree Shyam Packaging Industries, the proprietary concern of the plaintiff, as on 31.03.2006 has been enclosed. It has been stated that in the statement defendant is shown to have been owing a sum of Rs.21,70,490.88 to the plaintiff as on 31.03.2006 and this was supported by the auditor's certificate annexed along with the affidavit. However, it was contended that the said statement shows that

the debit notes which were duly issued by the defendant, have not been considered by the plaintiff. It has also been alleged that there was a difference in the opening balance as on 01.04.2005 reflected in the accounts of the two parties and this was on account of certain bills not taken into account in the statement. It is alleged that once the statement of accounts is reconciled then the plaintiff could apply to the BIFR and claim the amount due and payable to him as an unsecured creditor. It has also been contended that the plaintiff has not refuted the contention of the defendant with regard to the averments made in the affidavit.

8. I have heard the learned counsel for the parties and perused the record. The main contention of the defendant is, since the reference of the defendant, has been registered on 15.09.2006 with the BIFR, the present suit for recovery filed by the plaintiff in the year 2008, ought not to be continued in the absence of a specific permission obtained from the BIFR in this regard. Reliance in this regard was placed on the order dated 17.05.2007 of the BIFR, relevant portion of which has been reproduced hereinabove in para 3. It was also contended that the plaintiff is an unsecured creditor, and therefore, once the accounts were reconciled he could stand in the queue along with the other unsecured creditor and retrieve the amount which may be payable to him on the direction of the BIFR. The learned counsel for the defendant has not cited any specific judgment in order to support his submission although a number of judgments have been mentioned in the application itself and a couple of photocopies of the Apex Court judgment have been given.

9. The learned counsel for the plaintiff refuted this contention with regard to adjourning the proceedings of the case sine die, on account of pending reference on the ground that the debt of the plaintiff was neither reckoned nor admitted by the defendant, and therefore, in terms of the judgment of Apex Court in **Corromandal Pharmaceuticals** case (Supra) the suit must continue till the time the liability of the defendant is determined. With regard to the non filing of the reply to the affidavit of Mr. D. R. Dogra, it was contended by the learned counsel for the plaintiff that the entire effort on the part of the defendant is to mislead the Court by taking contrary stand thereby ensuring that the proceedings of the present suit for recovery gets delayed. It was urged that apart from preliminary objections, the defendant in its written statement has specifically denied the liability to pay any amount to the plaintiff. It was

only during the course of pendency of the suit that the present affidavit of Mr. D. R. Dogra was filed wherein a reference has been made to the effect that according to the statement of account duly audited by the auditors, only a sum of Rs. 21 lakhs or so was shown to be owed by the defendant to the plaintiff but even this admission by the defendant against its own interest is not without any condition. It has been contended by the learned counsel for the plaintiff that the defendant has taken the plea that while calculating this amount as an outstanding amount, the plaintiff has not taken into account various debit notes which were issued by the defendant, and therefore, the accounts need to be reconciled. So indirectly the admission which is purported to have been made by the defendant is withdrawn by the said defendant or it could at its best, be a conditional admission of its liability which is no admission in eyes of law. In the absence of unambiguous admission by the defendant, it will not be feasible to stay the proceedings of the present suit.

10. I have carefully considered the submissions of the respective sides and have also gone through the record as well as through the judgments referred to by the learned counsel. Before dealing with the facts of the case, it would be worthwhile to reproduce the Section 3(1)(o) of the Act which defines the sick company and the Section 22 of The Industrial Companies (Special Provisions) Act,1985.

"Section 3(1) (o)

sick industrial company" means an industrial company (being a company registered for not less than five years) which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth."

"22. Suspension of legal proceedings, contracts, etc—(1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding

> up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof (and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company) shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority."

11. A perusal of the said two provisions clearly shows that there is no dispute about the fact that the defendant is a sick company and a reference registered by the BIFR vide case no. 80/2006 is pending for consideration. Although the said reference is pending with the BIFR for the last more than five years, the defendant has not been able to place on record any document to show as to what is the present status of the said reference, as to whether the BIFR has declared that the defendant company cannot be revived or whether it can be revived and in case, it can be revived, whether any scheme of rehabilitation has been formulated. Therefore, in the absence of this information the only thing which is to be assumed is that the reference is still pending for final disposal in respect of the defendant company.

12. Section 22 of the Act which prohibits the filing or continuing of the legal proceedings and contracts, has been a subject matter of intense consideration and exhaustive examination by the Apex Court and by the other High Courts including that of our own High Court. The following propositions broadly emerged from the analysis of Section 22 of the Act. The object of Section 22(1) of the Act is essentially to protect the sick companies against the proceedings for winding up or for execution or distress or for enforcement of any security or guarantee against the said company on account of the fact that the company in question is a sick company and is already under consideration of an appropriate forum that is BIFR or AAIFR as to whether it be restored back to its financial health so as to make it a viable functioning unit or whether it should be wound up for the good. Section 22 of the Act has been enacted by the legislature also with a view to prevent any strain on the resources of the already scarce resources of the sick company or from creating any obligation or impediment in restoring it back to its normal health.

13. It is in this backdrop of aforesaid object of Section 22 of the Act that the Courts have come to the rescue of the sick company to restrain recovery proceeding on account of various statutory liabilities like sale tax, income tax, octroi, house tax and other liabilities, sought to be affected against the sick company.

14. The Division Bench of our own High Court in case titled **Intercraft Limited Vs. Cosmique Global and Anr.** in W.P.(C) No. 8803/2009 dated 30.09.2010 has set aside the confirmation by the appellate forum of the sale and the auction of the property in favour of the respondent no. 1. Similarly, in case titled **Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association** AIR 1992 SC 1439, the Apex Court did not stay the eviction of the sick company from a tenanted premises as it does not put any strain on its financial resources. It was observed that there should be no impediment on account of Section 22 of the Act in continuing with the eviction proceedings against the sick company. Thus, a pragmatic and practical view was taken by the Court in continuing with the eviction proceedings against the sick company as it did not put any strain on the financial resources of the sick company, and therefore, did not create any impediment.

15. This case by case approach is also dealt with by another Division Bench of our own High Court in case titled **Saketh India Limited Vs. W. Diamond India Ltd.** in RFA(OS) No.114/2009, where it has practically analyzed almost all the judgments of importance on the subject and observed as under:

> "Courts, however, have always been alive to the possible mischief that invocation of SICA can lead to. In a nutshell, where the net worth of a company is reduced to a negative, and the amelioration that is sought is for reviving the company rather than winding it up, the recourse to the Act would be legitimate. There is no justifiable reason, therefore, for all legal proceedings to be immediately even held in abeyance, if not dismissed. We are mindful of the fact that Parliament has incorporated an amendment in the Section with effect from 1.2.1994 in these words - "no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company - shall lie or be proceeded with further, except with the consent

of the Board, or as the case may be, the Appellate Authority". It appears to us that the phrase "recovery of money" must be construed ejusdem generis and accordingly recovery proceedings in the nature of execution or any other coercive enforcement that has been ordained to be not maintainable. We do not find any logic in holding legal proceedings to be not maintainable, or to be liable to be halted unless, even if the debt sought to be proved in the Plaint has not been admitted."

16. Obviously the Division Bench have echoed observation of the Apex Court in **Dy. Commercial Tax Officer Vs. Corromandal Pharmaceuticals** AIR 1997 SC 2027 wherein the following observations were made

"Any step for execution, distress or the like against the properties of the industrial company other of similar as steps should not be pursued which will cause delay or impediment in the implementation of the sanctioned scheme. In order to safeguard such state of affairs, an embargo or bar is placed under Section 22 of the Act against any step for execution, distress or the like or other similar proceedings against the company without the consent of the Board or, as the case may be, the appellate authority. The language of Section 22 of the Act is certainly wide. But, in the totality of the circumstances, the safeguard is only against the impediment, that is likely to be caused in the implementation of the scheme. If that be so, only the liability or amounts covered by the scheme will be taken in, by Section 22 of the Act. So, we are of the view that though the language of Section 22 of the Act is of wide import regarding suspension of legal proceedings from the moment an inquiry is started, till after the implementation of the scheme or the disposal of an appeal under Section 25 of the Act, it will be reasonable to hold that the bar or embargo envisaged in Section 22(1) of the Act can apply only to such of those dues reckoned or included in the sanctioned scheme. Such amounts like sales tax, etc, which the sick industrial company is enabled to collect after the date of the sanctioned scheme legitimately belonging to the Revenue, cannot be and could not have been intended to be covered within Section 22 of the Act. Any other construction will be unreasonable and unfair

and will lead to a state of affairs enabling the sick industrial unit to collect amounts due to the Revenue and withhold it indefinitely and unreasonably. Such a construction which is unfair, unreasonable and against spirit of the statute in a business sense, should be avoided.

The situation which has arisen in this case seems to be rather exceptional. The issue that has arisen in this appeal did not arise for consideration in the two cases decided by this Court in **Gram Panchayat and Anr. v. Shree Vallabh Glass Works Ltd. and Ors.** MANU/SC/0188/1990 : [1990] 1 SCR 966 and **Maharashtra Tubes Ltd. v. State Industries and Investment Corporation of Maharashtra Ltd. and Anr.** MANU/SC/0427/1993 : [1993] 1 SCR 340. It does not appear from the above two decisions of this Court nor from the decisions of the various High Courts brought to our notice, that in any one of them, the liability of the sick company dealt with therein itself arose, for the first time after the date of sanctioned scheme. At any rate, in none of those cases, a situation arose whereby the sick industrial unit was enabled to collect tax due to the Revenue from the customers after the 'sanctioned scheme' but the sick unit simply folded its hands and declined to pay it over to the Revenue, for which proceedings for recovery, had to be taken. The two decisions of this Court as also the decisions of High Courts brought to our notice are, therefore, distinguishable. They will not apply to a situation as has arisen in this case. We are, therefore, of the opinion that Section 22(1) should be read down or understood as contended by the Revenue. The decision to the contrary by the High Court is unreasonable and unsustainable. We set aside the judgment of the High Court and allow this appeal. There shall be no order as to cost."

17. Thus, the aforesaid judgments clearly lays down that the proceedings of a recovery simplictor need not be stayed unless and until the amount sought to be recovered by the defendant is reckoned or taken into consideration in the rehabilitation scheme before BIFR. The judgment of **Corromandal** case (supra) has been referred to in the application by the defendant but in my view on account of the observations quoted above, it does not support the case of the defendant.

18. It may be pertinent here to refer to some of the judgments which find mention in the application of the defendant for staying the proceedings. The judgments of Apex Court in **Jay Engineering Works Ltd. Vs. Industry Facilitation Council** AIR 2006 SC 3252, **Gram Panchayat Vs. Shree Vallabh Glass Works Ltd.** AIR 1990 SC 1017, **Real Value Appliances Ltd. Vs. Canara Bank** AIR 1998 SC 2064 have been considered by the Division Bench of this Court in **Saketh's** case (supra) and despite this, it has affirmed the principles of law laid down in **Corromandal's** case (supra) and therefore, these judgments are of no help to the defendant.

19. Some of the other judgments which have been relied upon by the plaintiff are dealing with the recovery of statutory dues or recoveries like Octroi, sales tax, Municipal Tax, etc. There also the Court has drawn a distinction between the process of assessment and the quantified recoveries while as in the former only a process of finalization of liability has arisen, which has not been stayed but in the latter case where the recovery is actually sought of the quantified amount under any statutory dues that has to be stayed. Reliance in this regard has been placed on **Rishab Agro Industries Ltd. Vs. P.N.B. Capital Services** AIR 2000 SC 1583, **Tata Devy Ltd. Vs. State of Orissa** 1997 (94) ELT 477 (SC), **Modi Stone Ltd. Vs. State of Kerala** (2004) 6 COMPLJ 184 (Ker) DB. Some of the other judgments which find mention in the application are of different High Courts which are not referred in view of the repeated pronouncements of the Apex Court laying down the law clearly.

20. In the instant case, admittedly the defendant has denied its liability to pay the principle amount as well as the interest thereon in the written statement. During the pendency of the suit an affidavit of Mr. D.R. Dogra has been filed on 01.05.2010 wherein the reference is made by the defendant to the statement of accounts as on 31.03.2006 along with the auditor's report to urge that the statement shows an amount of Rs.21 lakhs or so due and payable to the plaintiff but in the same breath the defendant again has disputed the sanctity, validity and the correctness of the said statement by urging that certain debit notes issued by the defendant have not been taken into account, and therefore, till the time the statement is reconciled it cannot be assumed to be correct. In effect

it only shows that the defendant has still not admitted its liability to pay the amount to the plaintiff but has tried to add to the confusion regarding the maintainability of the suit of the plaintiff.

21. In view of the aforesaid facts and circumstances of the case, I feel as the defendant has not admitted its liability to pay the amount to the tune as claimed by the plaintiff nor such an amount has been reckoned or taken into consideration by any scheme of rehabilitation ˇof the sick defendant company, therefore, the proceedings of the present suit cannot be adjourned sine die. As a matter of fact the defendant has not placed on record any documentary evidence to show that any such scheme has been formulated as yet and if formulated whether the said amount has been taken care of allegedly being owed to the plaintiff.

22. For the aforesaid reasons, I feel that the application of the defendant totally misconceived and accordingly, the same is dismissed.

23. List for further proceedings on 24.03.2011.

ILR (2011) DELHI II 568
FAO

PRAN MOHINI **....APPELLANT**

VERSUS

SHEELA VERMA & ORS. **....RESPONDENTS**

(MOOL CHAND GARG, J.)

FAO NO. : 175/1990 **DATE OF DECISION: 20.01.2011**

Code of Civil Procedure, 1908—Order 21, Rule 90—Whether auction sale can be confirmed by executing Court executing an ex parte decree which was obtained by fraud and has been set aside—Held—Ex parte decree which is basis of auction sale itself vitiated on

account of fraud played on the Court as held by lower court setting aside ex parte decree—Auction sale ought to be set aside—Sale without notice to judgment debtor is a nullity—Unless application under Order 21 Rule 90 is disallowed auction sale cannot be confirmed.

Applying the aforesaid principles in this case it is apparent that the ex-parte decree which is basis of the auction sale itself is vitiated on account of fraud played on the Court as held by the lower Court while setting aside the ex-parte decree vide order dated 23.5.83. Thus on that basis alone the auction sale ought to have been set aside. **(Para 46)**

Hence in such circumstances I may observe that the procedure which the Additional District Judge ought to have followed was to serve a notice to the judgment-debtor/ appellant under Order 21 Rule 54 or Rule 66 for proclamation of the auction sale and also in compliance to Order 21 Rule 68 was suppose to obtain consent in writing of the sale from the judgment-debtor/appellant but unfortunately neither notice was served upon appellant nor consent was obtained from her about the alleged sale. Even if it is presumed that a notice was sent to the appellant but it was not sent to her Madras address about which the decree-holder was aware of, rather it had been sent to the Delhi address where the appellant no longer stayed. It is also surprising to note that after the final decree(ex-parte) confirming the ex-parte preliminary decree was passed on 02.05.1980, the auction sale took place on 30.05.1980 i.e. in a gap of twenty eight days which in normal circumstances, if the above procedure would have been followed would have taken many more days. Hence it cannot be said that the required procedure was followed by the Learned Additional District Judge while confirming the auction sale. **(Para 49)**

It is well-settled law that a sale without notice to the judgment debtor is a nullity. The following observations in **Mahakal Automobiles Vs. Kishan Swaroop Sharma** AIR 2008 SC 2061 may be referred to:

"6. When a property is put up for auction to satisfy a decree of the Court, it is mandatory for the Court executing the Decree, to comply with the following stages before a property is sold in execution of a particular decree:

(a) Attachment of the Immoveable Property:

(b) Proclamation of Sale by Public Auction;

(c) Sale by Public Auction

7. Each stage of the sale is governed by the provisions of the Code. For the purposes of the present case, the relevant provisions are Order 21 Rule 54 and Order 21 Rule 66. At each stage of the execution of the decree, when a property is sold, it is mandatory that notice shall be served upon the person whose property is being sold in execution of the decree, and any property which is sold, without notice to the person whose property is being sold is a nullity, and all actions pursuant thereto are liable to be struck down/quashed." **(Para 50)**

It is also pertinent to mention that when the application of the appellant under Order 9 rule 13 was allowed by the Ld. Additional District Judge vide order dated 02.05.1980, the respondents/auction purchasers became aware of the fact that the decree which was obtained by the decree-holder was vitiated by fraud, hence having not challenged the said order dated 02.05.1980 passed by the Ld. ADJ in favour of the appellant, respondents/auction purchaser have become a party to the fraud. The appellant is also not required to make a deposit of five percent of the purchase amount in order to pursue her application for setting aside the sale, as appellant has not made an application under Order 21 Rule 89 rather preferred an application under Rule 90 and perusal of sub clause (2) of Rule 89 goes to show that unless and until appellant withdraws her application under

Rule 90 she cannot move an application under Rule 89. Hence the ground taken by the respondents that appellant is suppose to make a deposit of five percent of the purchase money in order to prefer her application for setting aside the sale also goes in vain. **(Para 52)**

The appeal also lies because there is nothing to show that Objections were withdrawn and I am not satisfied that they would have been withdrawn. I would treat it as an order refusing to set aside the sale under Rule 92 of Order 21 and, therefore, appealable under clause (j) of Rule 1 of Order 43 CPC. Even if I were to treat it as not appealable, the facts of this case warrant exercise of jurisdiction under Article 227 of the Constitution of India to set aside such an order. In this case, I find that the decree was obtained by fraud and then the sale in execution, carried out within a 28 days period without serving a notice under Rule 66 of Order 21, was another fraud and therefore the sale has to be set aside on that ground alone. Even if I were to assume that there was no fraud, in the auction sale the mortgage having been discharged in 1983 keeping in view the judgment in **U. Nilan Vs. Kannayyan** (1999) 8 SCC 511 the court has power in this appeal to permit deposit of 5% under Order 35 Rule 5 and set aside the sale. This is only way of additional ground and the sale is set aside on the ground of fraud and non service of notice. **(Para 55)**

More so, the reason given by the Ld. ADJ for confirming the auction sale was that the application under Order 21 Rule 90 had not been pressed, however a glance at Rule 92 clears the position wherein it has been mentioned that unless an application made under Rule 89 or Rule 90 or Rule 91 is disallowed, the Court shall not make an order confirming the sale. The said rule nowhere mentions the fate of an application which has not been pressed hence what could be concluded from the said rule is that the Court has to first decide the application made under Rule 90 and then should confirm the auction sale. However, in the instant case the ADJ had not decided the application under Order

21 rule 90 and had proceeded with the auction sale. Hence in such circumstances the auction sale cannot be said to have been conducted in good faith. The sale is inchoate till appeal is decided. **(Para 56)**

Consequently, for the reasons as discussed above and considering the factual matrix of this case, the impugned order dated 10.05.1989 is set aside. The auction sale dated 30.05.1980 of property No. J-3/39 Rajouri Garden, New Delhi is declared a nullity and is also set aside. The Sale Certificate dated 7.07.1989 is also cancelled. The auction purchasers shall file the original Sale Certificate in Court within two weeks. Thereafter the amount deposited by the auction purchasers along with all interest accrued thereon can be withdrawn by the auction purchasers. The appellant shall deposit of 5% of the auction sale amount in Court within two weeks from today which can be withdrawn by the auction purchasers. With these observations, the appeal is allowed with no orders as to cost. TCR be sent back forthwith along with a copy of this order. **(Para 65)**

Important Issue Involved: Auction sale based on a decree which has been set aside for fraud, ought to be set aside.

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. K.T. Anantraman, Advocate.

FOR THE RESPONDENT : Mr. A.K. Sakhuja, Mr. Sunil Dwivedi, Mr. Puneet Saini, Advocates.

CASES REFERRED TO:

1. *Jharu Ram Roy* vs. *Kamjit Roy* (2009) 4 SCC 60.
2. *Mahakal Automobiles* vs. *Kishan Swaroop Sharma* AIR 2008 SC 2061.
3. *T.Vijenderadas & Anr.* vs. *M. Subramanian & Ors.,* (2007)

8 SCC 751.

4. *A.V. Papayya Sastry* vs. *Govt of Andhra Pradesh* (2007) 4 SCC 221.

5. *Jai Narain Parasrampuria* vs. *Pushpa Devi Saraf* (2006) 7 SCC 756.

6. *Sheo Narayan Mandal* vs. *Mangal Sah* AIR 2005 Patna 149.

7. *Kharaiti Lal* vs. *Raminder Kaur* AIR 2000 SC 1148.

8. *U. Nilan* vs. *Kannayyan* AIR 1999 SC 375.

9. *A. Mariammal* vs. *V.S. Balasubramaniam* CRP 847 / 1998.

10. *S.P. Chengalvaraya Naidu* vs. *Jagannath* AIR 1994 SC 853.

11. *Desh Bandhu Gupta* vs. *N.L. Anand & Rajinder Singh* (1994) 1 SCC 131.

12. *Maganlal* vs. *Jaiswal Industries* AIR 1989 SC 2113.

13. *V.A. Narayana Raja* vs. *Renganayaki Achi,* AIR 1984 Madras 27.

14. *Mallika* vs. *Ayyappy Karunakaran,* AIR 1981 Kerala 236.

15. *Pandurangan* vs. *Dasu Reddy* AIR 1973 Madras 107.

16. *Ram Chandra Arya* vs. *Man Singh* AIR 1968 SC 954.

17. *Bhojai* vs. *Salim Ullah* AIR 1967 AII 221.

18. *Janak Raj* vs. *Gurdial Singh and Anr.* 1967 SC 608.

19. *Mahipali Haldar* vs. *Atul Krishna Maitra* AIR 1949 Cal 212.

20. *Jagdeo* vs. *Ujiyari Kunwar* MANU/UP/0051/1928 : AIR 1928 All 354.

21. *Bhagwan Das* vs. *Suraj Prasad* MANU/UP/0074/1924 : AIR1925 All146.

22. *Mahabir Ram* vs. *Rambahadur Dubey* AIR 1923 Patna 435.

23. *Bipin Behari Bejali* vs. *Kanthichandra Mandal* (1913) 18 IC (Cal) 715.

RESULT: Appeal allowed.

MOOL CHAND GARG, J.

1. This is an appeal by a mortgagor, who, in a suit for sale by the mortgagee, suffered a fraudulent ex-parte decree (since set aside). The appeal is resisted by the auction-purchasers, who are Respondents No.2 & 3 before this Court.

2. The final decree for sale was passed ex-parte on 2.05.1980 and the court auction sale is said to have been held on 30.05.1980, i.e., within a period of 28 days. From 30.05.1980, we have, per force, to go back by 15 days because Rule 68 of Order 21 CPC requires a period of at least 15 days after publication. This brings us to 15.05.1980. The auction-purchasers, without any proof of service of notice on the record, want the Court to believe that the whole process of filing the execution; serving the notice for settling the sale proclamation on the judgment-debtor who was admittedly in Madras; actually settled the sale proclamation; and then publishing its notice, was carried out just in a period of only 13 days between 2.05.1980 and 14.05.1980.

3. The background facts are, that on the basis of a simple mortgage of property No. J-3/39 Rajouri Garden, New Delhi, Suit No. 183/75 for sale was instituted on 21.07.1975 by the first respondent (plaintiff Sheela Verma) against the appellant (defendant Pran Mohini) for recovery of Rs. 39,849.80. The address of the defendant Pran Mohini was given in the plaint as "2A/71, Ramesh Nagar, Delhi".

4. Summons could not be served, and publication was done in the Hindustan Times (Delhi Edition) on 21.11.1975. This publication was done with the address as 2A/71, Ramesh Nagar, Delhi. Though as established in the evidence recorded during the proceedings for setting aside the ex parte decree, the plaintiff was aware since 1970 of the Madras address of the defendant where she was residing, but this address was not disclosed to the Court and proceedings were taken ex parte. Preliminary decree under Rule 4 of Order 34 CPC was passed ex parte on 15.01.1976 by Shri H.K.S.Malik, ADJ.

5. On 31.07.1979, application for final decree was filed by plaintiff Sheela Verma. Here too, as noted in the order dated 27.08.1983 setting aside the ex parte decree, the plaintiff was corresponding with the defendant

at the Madras address, but neither disclosed to the Court the Madras address of the defendant nor disclosed to the defendant the pendency of the court proceedings in Delhi.

6. An application for substituted service in the final decree proceedings was moved on 19.12.1979. Again, there was no reference to the Madras address. A final decree for sale under Rule 5 of Order 34 CPC was passed ex parte on 2.05.1980 by Shri Jagdish Chandra, as the then ADJ, Delhi.

7. No one knows what exactly transpired in the period after 2.05.1980 as the record of the Execution proceedings is said to have been destroyed. But the mortgaged property is stated to have been sold in court auction on 30.05.1980, and purchased by Respondents No.2 & 3 Devinder Singh and Erika for Rs. 1,29,000/-, who are the Germany based son and daughter-in-law of the tenant Mohinder Kaur in the property.

8. Thereafter, the defendant Pran Mohini filed an application under Order 9 Rule 13 CPC on 19.07.1980 and also moved an interim application for stay of confirmation of sale. By order dated 4.08.1980, confirmation of sale was stayed by the ADJ till the disposal of the application and it is not clear if it was vacated, and when. Objections to the sale under Order 21 Rule 90 CPC also are said to have been filed simultaneously in 1980.

9. The application under Order 9 Rule 13 CPC for setting aside the ex parte decree was allowed and the decree was set aside by a detailed order on 27.08.1983 by the ADJ. There is also an order dated 7.10.1983, which records that the auction purchasers (Respondents 2 & 3 before this Court) sought time to file an appeal against the order dated 27.08.1983 setting aside the ex parte decree. However, it is not known whether any appeal was filed, and if so, what happened to it.

10. On 28.11.1983, there was an out of court settlement between the appellant Pran Mohini (defendant-mortgager) and the Respondent No.1 Sheela Verma (plaintiff-mortgagee) whereby the claim of the DH was satisfied for Rs. 50,000/-. Money was paid. In fact, a re-conveyance deed was also executed and registered in favour of the appellant on 30.11.1983. Since nobody appeared for the plaintiff-mortgagee, the 1975 mortgage suit (where the preliminary and final decrees had been set aside on 27.08.1983) was dismissed in default on 14.12.1983.

11. Vide impugned order dated 10.05.1989, the subject matter of the present appeal, Shri G.S. Dhaka, ADJ, passed an order confirming the sale of the mortgaged property in favour of the auction purchasers being respondent Nos. 2 and 3. It was observed that the application filed by the appellant under Order 21 Rule 90 CPC was not pressed by her. It is against the aforesaid order that the appellant Pran Mohini has filed the present appeal.

12. On 7.07.1989, a Sale Certificate was issued. On 11.09.1990, the present appeal was filed against the order dated 10.05.1989 confirming the sale. The delay in filing the appeal was condoned by this court by order dated 16.11.1999 passed in CM No 439/1998.

13. It is the case of the appellant that the ex-parte Decree in this case was obtained by the Mortgagee/DH by playing a fraud on the Court inasmuch as no effort was ever made by the Mortgagee/DH to serve the appellant in the suit or in respect of other proceedings at her correct address at Madras despite the decree holder having knowledge about it. As such said ex-parte decree as well as all other proceedings arising therefrom including auction sale are void ab-initio and are liable to be set-aside. While setting aside the ex-parte decree her allegations that the said decree was obtained by the DH by playing a fraud upon the Court without serving notice upon the appellant at her correct address, has been accepted by the Court. In that view of the matter, it is submitted that the auction sale should also have been set aside rather having confirmed. Moreover, when application filed by the appellant under Order 21 Rule 90 CPC for setting aside the sale on the ground of material irregularity and fraud was pending. It is stated that the impugned order without disposing of her aforesaid application is bad in law.

14. It will not be out of place to mention that besides these objections the appellant also filed a suit for cancellation of the sale document registered as Suit No.3099/1990 after setting aside of the ex-parte decree which has been dismissed in default. According to the appellant this is of no consequence in view of pendency of her application under Order 21 Rule 90 CPC.

15. To appreciate the mind of Ld. ADJ who passed the impugned order, it would be appropriate to take note of the relevant portion of the order:

"In that suit a final decree was passed on 02.05.80 by Shri Jagdish Chandra, the then Addl. District Judge, Delhi and the mortgaged property was put to auction. This property was actually sold in auction on 30.05.80 by the Court auctioneer and the applicant/ auction purchaser purchased this property for Rs. 1,29,000/- in said auction and deposited the amount as per rules. Thereafter, the JD filed an application under Order 9 Rule 13 CPC on 19.07.80 and also moved an interim application for stay of confirmation of sale and the confirmation sale was accordingly stayed till disposal of the application. The ex-parte final decree was however, set aside by order dated 27.03.83 and thereafter as a result of compromise, the plaintiff did not proceed with the suit. *Application under Order 21 Rule 90 CPC was not pressed by the JD at that time except for interim stay.* Hence, now the auction purchasers have prayed that the sale be confirmed and a certificate to this effect may be granted to them.

3. Ld. counsel for the applications has contended that since application under order 21 Rule 90 CPC was not pressed by the JD, therefore, the sale has become absolute and needs to be confirmed. *He also contended that any objections, if any under Order 21 Rule 90, stood waived when no issue was claimed by the JD on this point and, hence, the Court cannot refuse to confirm a sale on the plea of the JD that the suit amount stood paid to the decree holder.* He has cited before me AIR 1967 SC 608.

4. I have gone through the record in the light of the submissions made before me and I find force in the contentions of counsel for the appellant/auction purchasers. *It cannot be denied that objections under Order 21 Rule 90 CPC were not pressed by the JD at any stage after obtaining interim stay against confirmation of sale till now nor the JD get the auction sale set aside as per rules.* I agree with Ld. Counsel for the applicants that simply because the JD subsequently paid the decreetal amount to the decree holder does not affect the confirmation of sale because it became absolute from the date of auction and was not get set aside.

5. In AIR 1967 Supreme Court 608, the question before Hon'ble Judge was that whether a sale of immovable property in execution of a money decree ought to be confirmed when it is found that the ex-parte decree which was put into execution has been set aside subsequently, and the answer of the Hon'ble Judge was in affirmative and it was held as under:

> "…..it must be held that the applicants-auction purchaser was entitled to a confirmation of the sale notwithstanding the fact that after the holding of the sale the decree had been set aside. The policy of the legislature seems to be that unless a stranger auction purchaser is protected against the vicissitudes of the fortunes of the suit, sales in auction would not attract customers and it would be to the detriment of the interest of the borrowers and the creditor alike if sales were allowed to be imputed merely because the decree was ultimately set aside or modified."

The sale in that appeal was accordingly confirmed.

6. The above-said authority applies fully to the facts of the present case.

8. In the present case, as already observed, the objections were not pressed by the JD and, hence, circumstances, the sale has become absolute and court cannot refuse to confirm the same.

9. As a result of above discussions I allow the application of the respondent No. 2 and 3 under ex-parte decree which has been decided and confirm the sale of property No.33/39, Rajouri Garden, New Delhi dated 30.05.1980. A certificate to this effect be accordingly issued to the applicants/ auction purchasers."

16. It is the submission of the appellant that the observation made in the aforesaid order, that the appellant had not pressed the application under Order 21 Rule 90 CPC are contrary to record inasmuch as the appellant never made such statement, rather she had been continuously fighting the battle. Her application under Order 9 Rule 13 CPC based upon her allegations that an ex-parte decree was obtained by the respondent by playing a fraud upon the Court has been accepted by the Court. There is nothing on record to show that either a notice of attachment of the

suit property or for proclamation of sale was ever served upon the appellant. The appellant had been opposing the sale confirmation throughout on all subsequent dates. In this regard reference has also been made to the various orders passed by the executing court in execution case No.42/81 dealing with the issue of confirmation of the sale. The order passed on this application on 04.08.1980, 29.08.1980, 10.09.1980 which are relevant as well as the order dated 30.08.1983, 07.10.1983 are reproduced hereunder:

"Pr. Shri M.L.Khattar, Adv. for applicant (0.9 R.13 CPC)

Sh. Promod Ahuja, Adv. for respondent-D.H.

Reply not filed. Now the reply be filed to the main application as also to the stay application on 29.08.1980. In the meantime confirmation of the sale shall not take place.

Announced.

4.8.1980

Addl. District Judge: Delhi

Pr: Sh. S.C.Kumar, S.A. of applicant

Sh. Promod Ahuja, Adv. for respondent – D.H.

Sh. H.K. Sakhuja, Adv. for auction purchaser.

Reply not filed by the respondent – D.H. It be filed on 10.09.1980.

Copy of the stay application be also given to the counsel for auction purchaser who shall file reply thereto on the date fixed. In the meantime auction sale shall not be confirmed.

ADJ/29.08.1980

Pr. Sh. S.C.Kumar, Special Attorney of the applicant None for the D.H.

Shri H.K. Sakhuja, Adv. for auction purchaser

Now for filing of reply by the respondent-decree holder as also for reply to the stay application by the auction purchaser to come up on 1.10.1980.

ADJ/10.09.1980.

Pr. Shri K.L. Sharma, Adv. for plaintiff who has filed his vakalatnama today.

Shri M.L.Khattar, Adv. for JD/deft.

Previous costs of Rs. 300/- as demanded on 27.08.53 be paid by the deft/JD to plaintiff/DH which shri K.L. Sharma has accepted under protest. As the costs has been paid, ex-parte decree already stands set aside. Registered. Deft. Is allowed to file w/s and to come up for the same on 7.10.83.

Regarding the proceedings for confirmation of sale in execution proceedings on 1.9.81 I had fixed 17.9.81 and had ordered to put up the file along with the connected misc. case No. 42/81 but after that due to slackness of concerned staff, it was not done. He is warned for future. As the suit has already been restored, proceedings regarding sale/confirmation are also to be done. Now, to come up on 7.10.83 for hearing regarding sale/confirmation of sale.

ADJ/30.08.83

Pr: Shri P. Ahuja, Adv. for plaintiff.

Sh. M.L. Khattar, Adv. for deft.

Sh. H.K. Sakhuja, Adv. for auction purchaser

Deft. Counsel wants time for w/s as same is not ready. Strongly opposed. To come up for w/s on 14.12.83 on payment of ` 100/- as costs to plaintiff by deft.

ADJ/7.10.83

Counsel for auction purchaser wants some date regarding hearing and the confirmation matter because he wants to file appeal against the order dt. 27.08.83. Not opposed by plaintiff but opposed by counsel for deft. In the interest of justice, to come up for hearing regarding sale/confirmation of sale on 14.12.83 on payment of Rs. 30/- as costs to deft. by auction purchaser.

ADJ/7.10.83"

17. The above orders show that the plaintiff, auction purchasers and the appellant were all present before the Court below. Thus the question of the appellant having not pressed her application under Order 21 Rule 90 does not arise. There is also no record to show if any appeal was filed by the auction purchasers against the order setting aside the ex-parte decree in the suit. It appears that on 14.12.1983 nobody appeared for the DH/plaintiff and therefore the suit itself was dismissed in default probably because the DH having received the payment of decretal amount lost interest in the suit. However the appellant who wanted to oppose the sale confirmation caused appearance on 20.07.1984 when the matter was fixed for hearing arguments on the issue of sale confirmation. This shows that the appellant/ judgment debtor never wanted auction sale to be confirmed. At this stage it would be relevant to take note of the order dated 12.01.1984 which reads as under:

"Pr: Sh. M.L. Khattar, Adv. for deft.

Sh. H.K. Sukhija, Adv. for auction purchaser.

Suit has already been dismissed in default on 14.12.83. Counsel for deft. wants date because he wants to seek further instructions from his client regarding confirmation of sale. Strongly opposed. In the interest of justice, case is adjourned on payment of Rs. 100/- as costs to auction purchaser by deft and to come up for payment of costs and hearing as regarding confirmation of sale and for further proceedings on 2.3.84.

ADJ/12.01.84."

18. Even after this date the appellant had been appearing on each and every date of hearing to oppose the sale confirmation which is evident even from her written arguments filed by her opposing the sale confirmation vide impugned order.

19. In fact, after the tenant in the suit premises, namely, Smt. Mohinder Kaur, mother and mother in law of the auction purchasers, stopped tendering the rent to the appellant, the appellant came to know about the ex-parte preliminary decree as well as the final decree. On her application the confirmation of the impugned auction sale was stayed as aforesaid. The ex-parte proceedings were also set aside vide order dated

27.08.1983. The appellant thereafter also entered into an out of Court settlement with the decree holder on 28.11.1983 and paid a sum of Rs. 50,000/- to the said decree holder. The appellant and DH then submitted an application dated 28.11.1983 informing the Executing Court that they had settled the matter out of Court and that the decree holder also executed a re-conveyance deed on 30.11.1983. It is submitted that the order dated 27.08.1983 was never challenged by the auction purchaser and thus it became final. It is submitted that in view of the aforesaid the confirmation of the sale could not have been granted. However the request of the auction purchasers has been allowed by the Executing Court vide order dated 10.05.1989 which is the subject matter of this appeal. It is submitted that the Executing Court has taken an erroneous view that the appellant had not pressed her application under Order 21 Rule 90 CPC despite the fact that no such request was ever made by the appellant. In the facts of this case, reliance by the Executing Court upon a judgment of the Hon'ble Supreme Court in the case of **Janak Raj Vs. Gurdial Singh and Anr.** 1967 SC 608 is misplaced. Rather para 6 of that Judgment comes to the rescue of the appellant which has been simply ignored by the ADJ. It is stated that once the ex-parte decree against the appellant was set aside on the ground of fraud, there is no reason for her to have withdrawn her application, more so when no such order is available on record reflecting withdrawal of her application under Order 21 Rule 90 CPC. It is submitted that while the first respondent had no interest left in the matter and therefore is not contesting the appeal, but the auction purchasers namely respondent No.2 & 3 alone are contesting the appeal. It is submitted that para 6 at page 610 of the aforesaid judgment recognizes setting aside of a mortgage decree due to lack of notice or where no valid decree was in existence on the date of sale.

20. According to the appellant both the preliminary decree as well as final decree passed by the Trial Court in this case were void ab-initio and were a nullity since they were passed without notice to the appellant without any opportunity of being heard and therefore voilative of Section 27 read with Order 5 and Rule 1 & 20, and that of Order 21 Rule 54 and 66 of the CPC.

21. It may also be observed that the ground taken for setting aside the ex-parte decree was that the service of the plaint was not effected upon the appellant/ judgment debtor inasmuch as a false address was

given by the decree holder of Delhi knowing fully well that the Delhi house had been sold by her as far back as in 1965 and she had started residing in Madras and her address at madras was also known to the decree holder. The aforesaid case of the JD was accepted by the Court while setting aside the ex-parte decree. Some observations made by the Addl. District Judge in the order allowing the application relevant for appreciating the contentions of the JD about practicing fraud on the Court as mentioned in para 9 & 12 are being reproduced hereunder:

> "9. According to the defendant-applicant she came to know regarding the decree on 19.07.80. According to the plaintiff –DH the defendant was properly served before the preliminary decree and before final decree and she had knowledge of the decree and the proceedings and the application is time barred. Marked 'A' is the notice dated 27.07.72 purported to have been issued by Shri K. Rajendra Chowdhary, Advocate, Supreme Court of India, New Delhi, on behalf of Shiela Verma and in it address of Pran Mohini is written of Madras. As this document has only been marked and has not been exhibited I am ignoring this document. Ex.AW2/A is the air mail envelope on which address of Mrs. P.M. Arora (defendant) is written of Madras. The seal of the post office is there. It shows that this envelope was sent to the defendant on her Madras address. Ex.PW2/B is the letter dated 29.04.70 written by Shiela Verma plaintiff to the defendant. This is a letter on the pad of Cambridge Foundation School – This letter bears the signatures of Shiela Verma at point 'B'. This letter Ex.AW2/B coupled with the envelope Ex.AW2/A shows that plaintiff was knowing Madras address of the defendant on 29.04.1970 and was having correspondence Ex.PW2/C is another letter dated 12.11.1979 written by the defendant to the plaintiff in which she had written that she was surprised to receive registered envelope from her which contained only blank sheets of paper. That registered envelope has also been filed by the defendant-applicant which is marked 'X'. Ex.AW2/F is the letter dated 19.11.1979 written by Shiela Verma plaintiff to the defendant Pran Mohini at her Madras address. Ex.AW2/G is another letter dated 11.12.1979 written by the defendant to the plaintiff in which she has mentioned in addition to other facts also her Madras address. This letter shows that the letter was sent to the

plaintiff by the defendant from her Madras address. The evidence of AW.2 Pran Mohini and Ex.AW2/B, AW2/C, AW2/F, AW@/G and other evidence on record clearly show that the plaintiff was knowing the address of the defendant since 1970 as of Madras and plaintiff was having correspondence with the defendant at her Madras address.

12. Before the preliminary decree, summon was ordered to be issued to the defendant for 25.08.75. Unfortunately, it appears that no summon was issued to the defendant for 25.08.75. On the contrary, a show-cause notice was issued due to slackness of the Ahlmad and he only issued show cause notice to the defendant for 25.08.75. The report on the show-cause notice shows that the process-server was informed on the spot that the defendant had sold the house and was not living in house No. 2A/71, Ramesh Nagar, Delhi. In the plaint, the address of the defendant is mentioned as house no. 2A/71, Ramesh Nagar, Delhi. According to the report of the process-server, referred above, it is quite clear that in the year 1975 the defendant was not living at the address given in the plaint and the house had been sold by the defendant. Further the court ordered for issuing of the summon to the defendant for 25.09.75 but unfortunately again due to negligence of the Ahlmad, proper summon was not issued and only show-cause notice was issued. This show-cause notice was also received back unserved by the court and the report of the process server shows that he went on the spot on 22.09.75 and he found the house locked. When the defendant was not served on the address mentioned in the plaint, the plaintiff moved an application u/o 5 R.20 Cpc in which it is alleged that in the mortgage deed the address of the defendant is given as 2A/71, Ramesh Nagar, New Delhi and this is her last known address and at present Pran Mohini defendant in the suit is not living in the aforesaid address and the present postal address of the defendant is not known to the plaintiff. An affidavit was also filed in support of the application and ultimately under the orders of the Court, publication was done, in the Hindustan Times on 21.11.75. This publication was done at the address of house No. 2A/71, Ramesh Nagar, Delhi and it was done for 24.11.75. The Court accepted the service by publication and passed ex-parte

decree on 15.01.76. From the evidence of AW.2 Pran Mohini and from the documentary evidence on record, it is quite clear that the plaintiff was knowing the Madras address of the defendant since 1970. It appears that in the year 1975 when the application for substituted service was moved by the plaintiff, the plaintiff was knowing the Madras address of the defendant but intentionally she suppressed this material fact and got the publication done of the defendant on her Ramesh Nagar address which house the defendant had already sold and where the defendant was not residing at the time of institution of the suit and also at the time of the publication in the newspaper. Under Rule, the newspaper is also sent under certificate of posting to the party concerned but in the file there is no such U.P.C. to show that the paper was sent to the defendant. The newspaper was published in New Delhi and the defendant was residing at Madras, In the circumstances of this case, the possibility that the defendant might not have read the newspaper cannot be ruled out."

22. Further observations which are also relevant are also reproduced:

"Plaintiff in her affidavit dated 20.01.1980 stated that she had gone through and understood the contents of the application u/o 5 R 20 CPC and the contents of the same are correct to her knowledge and belief. In this way on 20.01.80 Shiela Verma, prima facie gave a wrong affidavit. She was knowing Madras address of the defendant on 20.01.80 and also prior to it but appears that she intentionally concealed this fact so that the defendant could not be served on her correct address. According to the case of the plaintiff herself, the son of the defendant had come to her in the year 1979. It appears highly improbable that in case defendant's son had come to her in the year 1979 and had discussed regarding the property in dispute, she was not having Madras address of the defendant. The evidence on record clearly shows that house No. 2A/71, Ramesh Nagar, Delhi was sold by the defendant in the year 1965 and she shifted to Madras in the year 1965 and since then she along with her husband are practicing at Madras. In this case it has not been proved that the defendant was having knowledge of the proceedings of the suit. The case of the defendant that she came to know regarding the

ex-parte decree on 19.07.80 appears to be probable and reliable."

23. From the aforesaid order, it becomes apparent that the decree holder was fully aware about the appellant having shifted to Madras. He had been corresponding with the appellant at Madras address. In this regard letters Ex. AW 2/B, envelope Ex.AW 2/A, another letter Ex.PW2/C have been proved on record by the appellant. During the proceedings undertaken under Order 9 Rule 13 CPC. The record also goes to show that the appellant even received blank envelope from the decree holder at her Madras address and that the decree holder also wrote another letter dated 19.11.1979 to the appellant at her Madras address. Once the four letters dated 29.04.1970; 12.11.1979; 19.11.1979 and 11.12.1979 were exchanged, for the decree holder to still not give the details of the appellant.s Madras address to the court, to not inform the appellant of the pendency of the suit and, to top it all, make a prayer to the court in application dated 20.01.1980 that the address is not known and there should be substituted service, was an outright fraud. It was a fraud that goes to the root of the matter. It is, thus, clear that the decree holder ˇknowing fully well that the appellant had left Delhi and was residing at Madras filed an application under Order 5 Rule 20 CPC for effecting service upon the appellant at her Delhi address i.e. the address given as 2A/71, Ramesh Nagar, New Delhi as her last known address even though, the respondent/DH knew fully well that the appellant had shifted to Madras and, therefore, the obtaining of an order for effecting service on the appellant by way of publication at Ramesh Nagar, Delhi address was a fraud played upon the Court which resulted in passing of the impugned ex parte decree and continuation of other proceedings against the appellant which are all vitiated in view of the fraud played upon her. Thus, the decree dated 2.05.1980 would fail not only for want of service but also because of fraud. It would be a nullity. Therefore, on the facts of this case, it is not only the ex-parte decree that was set aside but a decree that was obtained by fraud and any court auction in pursuance thereof has to be considered in that light.

24. It is also submitted that their intention to oppose the sale confirmation is writ large in view of the presence of the appellant before the Court on various dates even after setting aside the decree, right from 20.07.1984 till the date of passing the impugned order. This shows that there was no occasion for her to withdraw her application filed under

order 21 Rule 90 CPC to go as not pressed, the only reason given by the Addl. District judge in the impugned order.

25. In her written arguments, the appellant has thus pleaded that the auction sale which has been confirmed by the Addl. District Judge vide impugned order ought to have been set aside, more so because:-

(i) That there is a judicial finding in this case the appellant (defendant/JD) was never served with the summons in the suit either in person or by a valid substituted service. Thus there is ex-facie violation of the mandatory provisions of Section 27, Order V Rules 1 and 20, O21 rule 54 and 66 of CPC besides the principles of natural justice *'Audi Altrem Partem'*

(ii) It is impermissible in law to pass any order affecting the civil rights of a person behind his/her back i.e. without notice and an opportunity to be heard, and any order to the contrary would be a nullity.

(iii) No notice was given to the defendant (appellant herein) either before the passing of the preliminary decree or the final decree, attachment of the property, proclamation of the sale and of the Auction sale of the property/ fixing of the reserve price etc. These are mandatory requirements and their non compliance will amount to material irregularities vitiating the auction sale ab initio.

(iv) When the decree is a nullity, no one including the auction purchaser, is protected. It is significant that the respondent No.2 & 3, being aware of this position had got themselves imp leaded and resisted the challenge to the ex-parte decree and ultimately accepted the Trial Court.s order dt. 27.08.1983.

(v) Any claim based on a void sale can be resisted even without having the sale set aside. When there is a proven fraud in the matter of obtaining the decree/ order of auction sale even an application under Order 21 Rule 90 is not required and the court can set aside the sale under its inherent powers. In any case the filing of such an application on behalf of the appellant has not been disputed by the respondents.

(vi) It is the submission of the appellant that any decree including any consequential action obtained by playing fraud on the Court vitiates all the proceedings which results in the decree and its execution. Such decree would not even protect a bona fide auction purchaser. Reference has been made to the following judgments:

(i) **Mahabir Ram Vs. Rambahadur Dubey** AIR 1923 Patna 435

(ii) **Bipin Behari Bejali Vs. Kanthichandra Mandal** (1913) 18 IC (Cal) 715

(iii) **Bhojai Vs. Salim Ullah** AIR 1967 AII 221

(iv) **T.Vijenderadas & Anr. Vs. M. Subramanian & Ors.,** (2007) 8 SCC 751.

26. It is also stated that in the instant case even otherwise there was a collusion between the decree holder and the auction purchaser inasmuch as the auction purchaser are the daughter and son-in-law of the tenant in the impugned property who were at all times aware of the fact that the appellant/defendant were proceeded ex-parte on the basis of a wrong address.

27. It is stated that once the application of the appellant was pending under Order 21 Rule 90 CPC it was impermissible in law to deal with the application of respondents No.2 & 3, the auction purchasers, for confirmation of the auction sale without disposing of the aforesaid application. This is clear by reading of Order 21 Rule 90 CPC. It is submitted that the impugned order itself records the factum of the pendency of the application under Order 21 Rule 90 read with Section 151 CPC. The pendency of the application was also acknowledged by the auction purchaser in their objections to the application filed by the appellant.

28. It is also stated that when an ex-parte decree is set aside parties stands relegated to the position that prevailed prior to the passing of the said decree. In such circumstances, the auction sale will be liable to be set aside without resort to provisions of Order 21 Rule 89-92. It is further submitted that even otherwise the recovery of the suit amount

through the sale of mortgaged property which is governed by the provisions of Order 34 was not in accordance with law inasmuch as the Trial Court had failed to specify and communicate to the Appellant herein (Mortgagor/ defendant/judgment debtor) in terms of Order 34 Rules 2 & 4 CPC either the amount or the time limit by which she was required to deposit in the Court the decretal amount and incidental amount to save her property from being sold, which vitiates all further actions.

29. It is submitted that if time would have been granted by the Court for deposit of decretal amount in Court in terms of Order 34 Rule 3 & 4, it was open for the appellant to comply with those directions and to protect her property as this right was available to her till confirmation of the auction sale. It is submitted that by refusing to set aside the sale, this legal option available to the appellant has been nullified. It is also submitted that at the most the appellant was required to deposit 5% of the purchase money for pursuing his application for setting aside the sale. In this case, the tenant in possession of the suit property since the year 1980 is the mother and mother in law of the auction purchasers who is enjoying the same without payment of any money, whereas the appellant has already paid a sum of Rs. 50,000/- towards settlement of the decretal amount to the DH in 1983 itself and as such even that condition on behalf of the appellant stood virtually satisfied and in any case she is always ready and willing even to deposit a further sum of 5% of the sum equivalent to the purchase money for which she has also made an application in this court.

30. Respondents have also filed written submissions. They have submitted that:

(i) The appeal filed by the appellant under Order 43 Rule 1 CPC is not maintainable. Reliance is placed upon a judgment of this Court reported as 16 DLT (1979) 109 DB. Reference has also been made to orders passed by this Court on 22.11.2010 in this case which order is as follows:

"…That going through the provisions of the order 43 Rule

1. The appeal filed by the appellant in so far as the order in question confirming the sale is not maintainable, whereas the appeal would have been maintainable in case there is

an order passed against the appellant dismissing his petition under Order 21 Rule 90 CPC which appears to have not been decided by the ADJ though according to the appellant the order tantamount to deciding his objections also."….

(ii) The entire order sheet of the Trial Court does not show that the application filed by the appellant under Order 21 Rule 90 CPC was kept pending. On the contrary there is a clear finding by the Trial Court as recorded in the order dated 10.05.1989 that the appellants had not pressed their application under Order 21 Rule 90 CPC.

(iii) The impugned order passed by the Trial Court is not in accordance with the judgment delivered by the Hon'ble Supreme Court in AIR 1967 SC 608 as well as the judgment of this Court in 1987 (1) CSC 146 and 153 (2008) DLT 418. It is submitted that the sale of property by Court auctioneer cannot be negatived after the lapse of 30 years of the auction.

31. It is submitted that after the aforesaid order as many as 48 hearings were conducted but at no stage the appellant ever pressed her application under Order 21 Rule 90. It is submitted that despite orders passed by the Trial Court dated 07.04.1989 giving an opportunity to the parties to file written arguments on 24.04.1989 nothing has been stated by the counsel for the appellant regarding her application under Order 21 Rule 90 CPC.

32. It is also the case of the respondent that right from beginning the appellant has been conducting the proceeding fraudulently and dishonestly inasmuch as:

(i) She filed this appeal after a gap of 16 months of the impugned order.

(ii) She filed a civil suit no. 3099/90 seeking a declaration to the effect that the sale certificate dated 07.07.1989 be declared as null and void. He also claimed that the auction dated 30.05.1980 be also declared as nullity. It is stated that while obtaining the stay order in this appeal the factum of filing the civil suit was not disclosed.

(iii) The appellant claiming himself as the owner of the property

filed a petition under Section 14(1)(e) and 14(1)(a) of the Delhi Rent Control Act against the tenant knowing fully well that the suit property has been sold in auction.

(iv) The appellant is guilty of forum shopping inasmuch as he has approached to different for a for virtually the same relief without revealing the facts of this case and as such the conduct of the appellant amounts to forum shopping and cannot be permitted. Reference has been made to a judgment of the Hon'ble Supreme Court reported in 2009 (2) SCC 784 and 140 (2007) DLT 790. It is, thus, prayed that the present appeal be dismissed with heavy costs.

33. In these circumstances, the issues which requires consideration by this Court would be:

(i) The factum of pursuing of the application under Order 21 Rule 90 CPC by the appellant or its withdrawal or its not being pressed by them as observed by the Trial Court.

(ii) The effect of pronouncement of the judgment of the Hon'ble Supreme Court in the case Jana**k Raj Vs. Gurdial Singh and Anr.** 1967 SC 608 in the facts of this case.

(iii) The effect of the order setting aside the ex-parte proceedings against the appellant and to appreciate his contentions that the ex-parte decree was set aside by holding that a fraud was played upon the Court and thereby the entire proceedings were void ab-initio and its effect on the auction sale.

(iv) The effect of filing a civil suit for similar relief which stands dismissed.

(v) The effect of filing eviction suit against the tenant in 1984.

34. At the outset, I may refer to the judgment of the Hon'ble Supreme Court in the case of **Janak Raj Vs. Gurdial Singh and Anr.** AIR 1967 SC 608. The facts of that case as noted by the Apex Court are:

"2. The question involved in this appeal is, whether a sale of immovable property in execution of a money decree ought to be

confirmed when it is found that the ex parte decree which was put into execution has been set aside subsequently.

3. The facts are simple. One Swaran Singh obtained an ex parte decree on February 27, 1961 against Gurdial Singh for Rs. 519/-. On an application to execute the decree, a warrant for the attachment of a house belonging to the judgment-debtor was issued on May 10, 1961. At the sale which took place, the appellant before us became the highest bidder for Rs.5,100/- on December 16, 1961. On the 2nd of January 1962, the judgment-debtor made an application to have the ex parte decree set aside. On January 20, 1962 he filed an objection petition against the sale of the house on the ground that the house which was valued at Rs. 25,000/- had been auctioned for Rs. 5,000/- only and that the sale had not been conducted in a proper manner inasmuch as there was no due publication of it and the sale too was not held at the proper hour. By an order dated April 19, 1962, the executing court stayed the execution of the decree till the disposal of the application for setting aside the ex parte decree. On October 26, 1962 the ex parte decree against the defendant-judgment-debtor was set aside. On November 3, 1962 the auction purchaser made an application for revival of the execution proceedings and for confirmation of the sale under O. XXI, r. 92 of the Code of Civil Procedure. On November 7, 1962 the judgment-debtor filed an objection thereto contending that the application for revival of execution proceedings was not maintainable after setting aside the ex parte decree and that the auction purchaser was in conspiracy and collusion with the decree-holder and as such not entitled to have the sale confirmed. It is to be noted here that the case of collusion was not substantiated. On August 31, 1963 the executing court over-ruled the objection of the judgment-debtor and made an order under O. XXI, r. 92 confirming the sale. This was affirmed by the first appellate court. On second appeal to a single Judge of the Punjab High Court, the auction purchaser lost the day. An appeal under Clause 10 of the Letters Patent in the Punjab High Court met the same fate. Hence this appeal."

35. It would now be also relevant to take note of paragraph 4 & 5 of this judgment:

"4. Before referring to the various decisions cited at the Bar and noted in the judgment appealed from, it may be useful to take into consideration the relevant provisions of the Code of Civil Procedure. So far as sales of immovable property are concerned, there are some special provisions in O. XXI beginning with r. 82 and ending with r. 103. If a sale had been validly held, an application for setting the same aside can only be made under the provisions of Rules 89 to 91 of O. XXI. As is well-known, r. 89 gives a judgment-debtor the right to have the sale set aside on his depositing in court a sum equal to five per cent, of the purchase money fetched at the sale besides the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of sale, have been received by the decree-holder. Under sub-r. (2) of r. 92 the court is obliged to make an order setting aside the sale if a proper application under r. 89 is made accompanied by a deposit within 30 days from the date of sale. Apart from the provision of r. 89, the judgment-debtor has the right to apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it provided he can satisfy the court that he has sustained substantial injury by reason of such irregularity or fraud. Under r. 91 it is open to the purchaser to apply to the court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. Rule 92 provides that where no application is made under any of the rules just now mentioned or where such application is made and disallowed the court shall make an order confirming the sale and thereupon the sale shall become absolute. Rule 94 provides that where the sale of immovable property has become absolute, the court must grant a certificate specifying the property sold and the name of the person who at the time of sale was declared to be the purchaser. Such certificate is to bear date of the day on which the sale becomes absolute. Section 65 of the Code of Civil Procedure lays down that where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when it is sold and not from the time when the sale becomes absolute. The result is that the

purchaser's title relates back to the date of sale and not the confirmation of sale. There is no provision in the Code of Civil Procedure of 1908 either under O. XXI or elsewhere which provides that the sale is not to be confirmed if it be found that the decree under which the sale was ordered has been reversed before the confirmation of sale. It does not seem ever to have been doubted that once the sale is confirmed the judgment-debtor is not entitled to get back the property even if he succeeds thereafter in having the decree against him reversed. The question is, whether the same result ought to follow when the reversal of the decree takes place before the confirmation of sale.

5. There does not seem to be any valid reason for making a distinction between the two cases. It is certainly hard on the defendant-judgment-debtor to have to lose his property on the basis of a sale held in execution of a decree which is not ultimately up-held. Once however it is held that he cannot complain after confirmation of sale, there seems to be no reason why he should be allowed to do so because the decree was reversed before such confirmation. The Code of Civil Procedure of 1908 contains elaborate provisions which have to be followed in cases of sales of property in execution of a decree. It also lays down how and in what manner such sales may be set aside. Ordinarily, if no application for setting aside a sale is made under any of the provisions of Rules 89 to 91 of O. XXI, or when any application under any of these rules is made and disallowed, the court has no choice in the matter of confirming the sale and the sale must be made absolute. If it was the intention of the Legislature that the sale was not to be made absolute because the decree had ceased to exist, we should have expected a provision to that effect either in O. XXI or in Part II of the Code of Civil Procedure of 1908 which contains Sections 36 of 74 (inclusive). "

36. The aforesaid case was not a case of fraud in obtaining the ex-parte decree. There was no allegation of fraud before the Supreme Court. The Supreme Court itself recognized this in para 6, which reads as under:

"6. It is to be noted however that there may be cases in which, apart from the provisions of Rr. 89 to 91, the court may refuse

to confirm a sale, as, for instance, where a sale is held without giving notice to the judgment-debtor, or where the court is misled in fixing the reserve price or when there was no decree in existence at the time when the sale was held. Leaving aside cases like these, a sale can only be set aside when an application under R. 89 or R. 90 or R. 91 of O. XXI has been successfully made. The court may refuse to confirm a sale where the sale is held without giving notice to the judgment-debtor. Therefore, this case is clearly distinguishable. This ˇcase related to a simple money decree and not a mortgage decree where provisions of Order 34 of CPC apply."

37. In **Ram Chandra Arya Vs. Man Singh** AIR 1968 SC 954 where reliance was sought to be placed on **Janak Raj Vs. Gurdial Singh's** (supra) case, the Supreme Court held:

"4. Learned counsel appearing on behalf of the appellant contended that this proposition should not be accepted by us in view of the decision of this Court in **Janak Raj v. Gurdial Singh** [1967] 2 SCR 77: AIR 1967 SC 608. The decision of that case is, however, not applicable to the case before us at all. In that case, a stranger to the suit was the auction-purchaser of the judgment-debtor's immovable property in execution of an ex parte money decree. Before the sale could be affirmed, the ex parte decree was set aside and the question arose whether the auction-purchaser was entitled to a confirmation of the sale under O. 21, R. 92, C.P.C. The Court held that the sale should be confirmed. The law makes ample provision for the protection of the interests of the judgment-debtor, when his property is sold in execution. He can file an application for setting aside the sale under the provisions of O. 21, Rr. 89 and 90 C.P.C. If no such application was made, or when such an application was made and disallowed, the Court has no choice but to confirm the sale. This principle can be of no assistance to the appellant in the present case, because, in that case, when the sale was actually held, a valid ex parte decree did exist. The sale, having been held in execution of a valid existing decree, was itself valid; and the only question that came up for decision was whether such a valid sale could be set aside otherwise than by resort to the provisions of Rules 89 and

90 of Order 21, Civil Procedure Code. In the present case, the decree, being a nullity, has to be treated as nonest and, consequently, the sale, when held, was void ab initio. In such a case, there is no question of any party having to resort to the provisions of Rr. 89 and 90 of O. 21, C.P.C. to have the sale set aside. Any claim based on a void sale can be resisted without having that sale set aside. …

4. … This Court, thus, in that case, clearly recognised that, if there be no decree in existence at the time when the sale is held, the sale can be ignored and need not be set aside under the provisions of Rr. 89 to 91, C.P.C. In the present case, as we have held, the decree passed against Ram Lal was void and has to be treated as non-existent and consequently, the sale must be held to be a nullity."

38. Thereafter, the Hon'ble Court held in para 8 "A sale is void ab initio if it is held in execution of a decree which is nullity and, consequently, to be treated as non-existent." The court dismissed the appeal and upheld the decision that the decree was a nullity and the sale held in execution of that decree was, therefore, void.

39. In this regard I may also take note of the observations made by the Apex Court in the case of **T. Vijenderadas & Anr. Vs. M. Subramanian & Ors.** (supra) where the Apex Court having taken note of fraud being played upon the Court has refused granting relief as claimed by the party who wanted to take advantage of the fraud. Relevant observations appear in para 33 & 34 of the judgment which reads as under:

"33. Appellants and their predecessors, therefore, are also guilty of *suppressio veri.* Ordinarily a statute shall prevail over the common law principle. However, in a case of this nature, in the event of any conflicting interest, this Court in exercise of its equity jurisdiction under Article 142 of the Constitution of India is to weigh the effect of a fraud and the consequence of non-impleadment of a necessary party. We would hold that the scale of justice weighs in favour of the person who is a victim of fraud and, thus, we should not refuse any relief in his favour, only because he might have been wrongly advised. The purport

and object for which Order XXI, Rule 92(5) was enacted furthermore would be better subserved if it is directed that the respondents shall pay the amount which the Court paid to the Municipality out of the amount of auction.

34. We have noticed hereinbefore that one of the objects sought to be achieved in amending Order XXI, Rule 92 was to do complete justice to the parties so as to enable the auction purchaser to get back the amount from the decree-holder and revive the execution proceedings so that the decree-holder may proceed against the judgment-debtor for realisation of the decretal amount. In this case, the plaintiffs-respondents had not claimed any relief against the Municipality. The Municipality's right to realise the amount of property tax together with interest, if any, is not in dispute. Although the liability of Venugopal in terms of the 1920 Act to pay the property tax continued, it has been accepted at the Bar that the plaintiffs-respondents was also liable to pay the amount of property tax after the date of sale. In a case of this nature, therefore, the plaintiffs-respondents can be directed to pay the amount of property tax by way of redemption of mortgage in favour of the Municipality."

40. In the case of **Bhojai Vs. Salim Ullah** (supra), it has been held that "In setting aside on the ground of fraud an auction sale in execution of the decree, the Court does not enforce a statutory remedy having its scope and effect fixed by the terms of a statutory provision, but administers relief on principles of equity, justice and good conscience, and in doing so it is naturally called upon sometimes to balance conflicting claims to its help and protection and then to adopt its decision to the demands of the situation. Which of the two innocent persons, the victim of a fraudulent decree or the bona fide purchaser at an auction sale held in pursuance of the decree, should be allowed or left to suffer cannot be determined by the Court in consonance with equity, justice and good conscience, without taking into account the extent of their respective sufferings, their conduct, and other relevant considerations. A suit to set aside a decree and a sale on the ground of fraud covering a wider grounds than those mentioned in Order 21 Rule 90(1) of the CPC is maintainable and is not barred by Order 21 Rule 92(3) of the CPC. Some observations made by the Court where also an ex parte decree was obtained by decree holder

by playing fraud on the Court and on that basis, the suit property was sold in public auction and where the ex parte decree were set aside on account of fraud in service, the court has made the following observations which are relevant for the controversies involved in this case also:

"9. Much need not be said about the second point. The final decree in dispute is being impeached not on the ground of mere irregularity in the service or want of service of notice, but on the ground that a false report of service on the plaintiff was fraudulently secured by defendant No. 2 and the decree passed by the Court was based on that false report. It is well settled that when there is a deliberate suppression of summons or notice issued to a person on a false report relating to service of summons or notice upon him is secured from the process-server, and the Court is thus led to pass an ex parte decree or order against such person without his acquiring know ledge of the suit or proceeding against him, the decree or order must be regarded as vitiated by fraud. This is particularly so when the suppression of the summons or notice or the securing of a false report of service from the process server, is found to be part of a larger plan of deceit which has for its object something more than merely obtaining an ex parte decree or order."

41. Some more observations made by the Court in the judgment quoted above are also relevant and are reproduced as under:

"13. Even if it is assumed that the appellant was not a party to the fraud and was a bona fide purchaser, the auction sale cannot, in the circumstances of the case, be upheld and left intact. The reason why I emphasis the circumstances of the case is this. It cannot be laid down as an inflexible rule of law holding good in all situations that an auction sale in favour of a bona fide purchaser would remain unaffected even if the decree on which it is based is found to have been fraudulently obtained, just as it cannot be stated as a broad proposition that an auction sale must invariably fall with the decree on which it is based and No. protection can ever be claimed even by a bona fide purchaser if the decree which led to the auction sale is found vitiated by fraud.

In setting aside on the ground of fraud a decree and an auction

sale in execution of the decree, the Court does not enforce a statutory remedy having its scope and effect fixed by the terms of a statutory provision, but administers relief on principles of equity, justice and good conscience, and in doing so it is naturally called upon sometimes to balance conflicting claims to its help and protection and then to adopt its decision to the demands of the situation. Which of the two innocent persons, the victim of a fraudulent decree or the bona fide purchaser at an auction sale held in pursuance of the decree, should be allowed or left to suffer cannot be determined by the Court in consonance with equity, justice and good conscience, without taking into account the extent of their respective sufferings, their conduct, and other relevant considerations. The Court has, there fore, to decide in the context of the facts and circumstances of each case whether or not a bona fide purchaser at an auction sale should be permitted to retain the benefit of the sale when it is found that the decree which forms its basis had been obtained by fraud.

14. It may be pointed out in this connection that, where a sale is set aside under O. XXI, Rule 90 of the C.P.C on the ground of fraud in publishing or conducting it. the question whether the auction purchaser is a party to the fraud or is a bona fide purchaser is not a relevant consideration. Order XXI, Rule 90 of the C. P. C provides a statutory remedy and there is nothing in its terms to exclude from its operation bona fide auction purchasers or restrict its application to those auction sales in which the auction purchaser was not a party to the fraud: vide **Mahabir Ram v. Ramhahadui Dubey** AIR 1923 Patna 435, **Jagdeo v Ujiyari Kunwar** MANU/UP/0051/1928 : AIR1928All354 and **Mahipali Haldar v Atul Krishna Maitra** AIR 1949 Cal 212 But as I have said above, a suit to set aside, on the ground of fraud a decree and an auction sale held in execution thereof is not a statutory remedy and the kind of decree that the court will pass in suits of this nature will vary with what equity, justice and good conscience demand in varying circumstances.

17. The fifth and the last point remain to be considered. If the present suit had been merely for setting aside the auction sale in favour of the appellant on the ground of fraud in publishing or

conducting the sale there is No. doubt that the suit would have been barred by Order XXI, Rule 92 (3) of the C. P. C. What is, however, sought to be set aside by means of this suit is not merely the auction sale but also that decree itself in execution of which the auction sale was held, and as such the suit is outside the bar of Order XXI, Rule 92 (3) of the C. P. C. In **Bhagwan Das v. Suraj Prasad** MANU/UP/0074/1924 : AIR1925 All146 it was held by a Division Bench of this Court that a suit to set aside a sale on the ground of fraud covering wider grounds than those mentioned in Order XXI, Rule 90 (1) of the C. P. C. is maintainable and is not barred by Order XXI, Rule 92 (3) if the C. P. C. The fraud proved in this case was not confined to the publication and the conducting of the auction sale but also covered and vitiated the decree upon which the auction sale was founded. In such circumstance Order XXI, Rule 92 (3) of the C. P. C. has application."

42. In **S.P. Chengalvaraya Naidu Vs. Jagannath** AIR 1994 SC 853 the Supreme Court observed:

> "1. … It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non-est in the eyes of law. Such a judgment/decree - by the first court or by the highest court - has to be treated as anullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

43. The observations in **Sheo Narayan Mandal Vs. Mangal Sah** AIR 2005 Patna 149 which are relevant are also reproduced below:

> "9. … I find that Title Suit No. 10/1972 was decreed ex parte on 3.8.1978 whereafter Misc. Case No. 27/1978 was filed for setting aside the ex parte decree on the ground of fraud and deceit etc. but the question of the validity of service of notices or the question of fraud and deceit played upon the petitioner was decided neither in the said Misc. Case nor in the petition for its restoration as the former was dismissed for default whereas the latter was dismissed merely on the ground of limitation. In the said circumstances, the question of fraud and deceit were neither considered nor decided by any of the aforesaid Courts

and hence the case laws relied upon by the learned counsel for the opposite parties as detailed above are not applicable to the facts and circumstances of this case …

… But here the matter is completely different as no Court has upheld the validity of summons nor any Court has rejected the petitioner's claim of fraud and deceit. Furthermore, the question of fraud, if not rejected earlier, clearly cuts at the very root of any legal proceeding and hence in my view, a fresh Title Suit challenging the ex parte decree in the earlier suit on the ground of fraud is clearly maintainable in the instant case. This aspect of the matter has been completely overlooked by the learned Court below while passing the impugned order."

44. In the absence of any record of the Execution proceedings, one has no option but to go by certain inferences and presumptions. In the suit, for the preliminary decree and the final decree (which were set aside on 27.08.1983), the plaintiff, despite knowing the Madras address of the defendant, gave the defendant's previous address of Ramesh Nagar, Delhi, even when she knew that the defendant was no longer living there. From this, an inference can be drawn that the same address must have been given in the Execution proceedings for issue of notice for settlement of sale proclamation. Otherwise, in the proceedings to set aside the decree, the decree-holder and the auction-purchaser would have pointed out the service of notice in the execution proceedings at the Madras address. This further establishes that there was no service of notice in the Execution proceedings.

45. An ex parte decree can be set aside or refused to be set aside. Even if I assume that it was refused to be set aside, that does not mean notice in the Execution proceedings need not be served or the validity of the proceedings cannot be looked into. If notice was served in Execution, then other factors may have to be looked into. If no notice is served, that by itself makes the sale a nullity. In execution there is no service of notice before settling sale proclamation. This fundamental shortcoming in the execution renders the sale, even if the decree was proper, a nullity.

46. Applying the aforesaid principles in this case it is apparent that the ex-parte decree which is basis of the auction sale itself is vitiated on account of fraud played on the Court as held by the lower Court while

setting aside the ex-parte decree vide order dated 23.5.83. Thus on that basis alone the auction sale ought to have been set aside.

47. The question of the appellant having withdrawn her application under Order 21 Rule 90 CPC in the facts of this case does not arise as the appellant had been contesting the proceedings for confirmation of auction sale throughout and had been opposing the same. Thus observation made by the lower Court in the impugned order that the said application was not pressed amounts to the dismissal of that application and thus furnishes a ground of appeal before this court.

48. Interestingly, while going through the various Rules under order XXI, it seems that the impugned order passed by the Ld. ADJ confirming the auction sale is in complete ignorance of the procedure that was to be followed before the auction sale as the appellant had not withdrawn the application moved under Order 21 Rule 90 CPC. The appellant's stand is further fortified by the fact that moment an ex-parte order was passed against her, appellant had moved an application under Order 9 Rule 13 CPC pleading that the decree obtained by the respondent was vitiated by fraud. The LD. ADJ also while hearing the application under Order 9 Rule 13 had observed that,

"From the evidence of AW.2 Pran Mohini and from the documentary evidence on record, it is quite clear that the plaintiff was knowing the Madras address of the defendant since 1970. It appears that in the year 1975 when the application for substituted service was moved by the plaintiff, the plaintiff was knowing the Madras address of the defendant but intentionally she suppressed this material fact and got the ˇpublication done of the defendant on her Ramesh Nagar address which house the defendant had already sold and where the defendant was not residing at the time of institution of the suit and also at the time of the publication in the newspaper. Under Rule, the newspaper is also sent under certificate of posting to the party concerned but in the file there is no such U.P.C. to show that the paper was sent to the defendant. The newspaper was published in New Delhi and the defendant was residing at Madras, In the circumstances of this case, the possibility that the defendant might not have read the newspaper cannot be ruled out……"

49. Hence in such circumstances I may observe that the procedure which the Additional District Judge ought to have followed was to serve a notice to the judgment-debtor/appellant under Order 21 Rule 54 or Rule 66 for proclamation of the auction sale and also in compliance to Order 21 Rule 68 was suppose to obtain consent in writing of the sale from the judgment-debtor/ appellant but unfortunately neither notice was served upon appellant nor consent was obtained from her about the alleged sale. Even if it is presumed that a notice was sent to the appellant but it was not sent to her Madras address about which the decree-holder was aware of, rather it had been sent to the Delhi address where the appellant no longer stayed. It is also surprising to note that after the final decree(ex-parte) confirming the ex-parte preliminary decree was passed on 02.05.1980, the auction sale took place on 30.05.1980 i.e in a gap of twenty eight days which in normal circumstances, if the above procedure would have been followed would have taken many more days. Hence it cannot be said that the required procedure was followed by the Learned Additional District Judge while confirming the auction sale.

50. It is well-settled law that a sale without notice to the judgment debtor is a nullity. The following observations in **Mahakal Automobiles Vs. Kishan Swaroop Sharma** AIR 2008 SC 2061 may be referred to:

> "6. When a property is put up for auction to satisfy a decree of the Court, it is mandatory for the Court executing the Decree, to comply with the following stages before a property is sold in execution of a particular decree:
>
> (a) Attachment of the Immoveable Property:
>
> (b) Proclamation of Sale by Public Auction;
>
> (c) Sale by Public Auction
>
> 7. Each stage of the sale is governed by the provisions of the Code. For the purposes of the present case, the relevant provisions are Order 21 Rule 54 and Order 21 Rule 66. At each ˇstage of the execution of the decree, when a property is sold, it is mandatory that notice shall be served upon the person whose property is being sold in execution of the decree, and any property which is sold, without notice to the person whose property is being sold is a nullity, and all actions pursuant thereto are liable to be

> struck down/quashed."

51. In **Desh Bandhu Gupta Vs. N.L. Anand & Rajinder Singh** (1994) 1 SCC 131 the Supreme Court held:

> "9. … The compulsory sale of immovable property under Order 21 divests right, title and interest of the judgment debtor and confers those rights, in favour of the purchaser. It thereby deals with the rights and disabilities either of the judgment debtor or the decree holder. A sale made, therefore, without notice to the judgment debtor is a nullity since it divests the judgment debtor of his right, title and interest in his property without an opportunity. The jurisdiction to sell the property would arise in a court only where the owner is given notice of the execution for attachment and sale of his property. It is very salutary that a person's property cannot be sold without his being told that it is being so sold and given an opportunity to offer his estimate as he is the person who intimately knew the value of his property and prevailing in the locality, exaggeration may at time be possible. … …
>
> 10 Above discussion do indicate discernible rule that service of notice on the judgment debtor is a fundamental part of the procedure touching upon the jurisdiction of the Execution Court to take further steps to sell his immovable property. Therefore, notice under Order 21 Rule 66(2), unless proviso is applied (if not already issued under Order 21 Rule 22), and service is mandatory. It is made manifest by Order 21 Rule 54(1A) brought on statute by 1976 Amendment Act with peremptory language that before settling the terms of the proclamation of sale. The omission thereof renders the further action and the sale in pursuance thereof void unless the judgment debtor appears without notice and thereby waives the service of notice.
>
> 12 … Since the court had not given any notice to the appellant which is mandatory, the need to submit his valuation did not arise. Order 21 Rule 54 Sub-rule (1A) brought by 1976 Amendment Act mandates that the court should require the judgment debtor to attend the court on a specified date to take notice of the court to be fixed for settling the terms of

proclamation of sale. Form 24 of Appendix 'E' second para and the court Rules also envisage the mandate. It is a reminder to the court that it has a statutory duty to issue notice to JD before settlement of the terms of proclamation of sale. Then only the proviso to Rule 66(2) comes into play dispensing with multiplicity of notices and not dispensation of mandatory compliance of notice to the JD. Had it been a case where notice was served and the appellant lay by, without objecting to the valuation given by the decree holder, certainly that would be put against the appellant to impugn the irregularities after the sale or the under-valuation settled by the court in the proclamation of sale …"

52. It is also pertinent to mention that when the application of the appellant under Order 9 rule 13 was allowed by the Ld. Additional District Judge vide order dated 02.05.1980, the respondents/auction purchasers became aware of the fact that the decree which was obtained by the decree-holder was vitiated by fraud, hence having not challenged the said order dated 02.05.1980 passed by the Ld. ADJ in favour of the appellant, respondents/auction purchaser have become a party to the fraud. The appellant is also not required to make a deposit of five percent of the purchase amount in order to pursue her application for setting aside the sale, as appellant has not made an application under Order 21 Rule 89 rather preferred an application under Rule 90 and perusal of sub clause (2) of Rule 89 goes to show that unless and until appellant withdraws her application under Rule 90 she cannot move an application under Rule 89. Hence the ground taken by the respondents that appellant is suppose to make a deposit of five percent of the purchase money in order to prefer her application for setting aside the sale also goes in vain.

53. The law is settled that the sale in terms of a mortgage for purposes of paying 5% to the purchaser does not become absolute or irrevocable merely on passing an order confirming the sale, but it would attain finality on the disposal of the appeal, if any, filed against an order refusing to set aside the sale. Vide **Maganlal Vs. Jaiswal Industries** AIR 1989 SC 2113, **U. Nilan Vs. Kannayyan** AIR 1999 SC 375 and **Kharaiti Lal Vs. Raminder Kaur** AIR 2000 SC 1148.

54. A. Mariammal Vs. V.S. Balasubramaniam CRP 847 / 1998 decided by the Madras High Court on 3.10.2005 (MANU/TN/2185/2005), held:

"26. Thus, it is well settled that during the pendency of the Appeal, the Mortgagor is entitled to make the deposit under Order 34 Rule 5 CPC. In the case in hand, when the Appeal C.M.A. No. 33 of 1991 was pending, the confirmation of the sale and issuance of the Sale Certificate were only in nebulous state, it cannot be said that merely because of confirmation of sale, the Judgment Debtor was not entitled to deposit the amount."

55. The appeal also lies because there is nothing to show that Objections were withdrawn and I am not satisfied that they would have been withdrawn. I would treat it as an order refusing to set aside the sale under Rule 92 of Order 21 and, therefore, appealable under clause (j) of Rule 1 of Order 43 CPC. Even if I were to treat it as not appealable, the facts of this case warrant exercise of jurisdiction under Article 227 of the Constitution of India to set aside such an order. In this case, I find that the decree was obtained by fraud and then the sale in execution, carried out within a 28 days period without serving a notice under Rule 66 of Order 21, was another fraud and therefore the sale has to be set aside on that ground alone. Even if I were to assume that there was no fraud, in the auction sale the mortgage having been discharged in 1983 keeping in view the judgment in **U. Nilan Vs. Kannayyan** (1999) 8 SCC 511 the court has power in this appeal to permit deposit of 5% under Order 35 Rule 5 and set aside the sale. This is only way of additional ground and the sale is set aside on the ground of fraud and non service of notice.

56. More so, the reason given by the Ld. ADJ for confirming the auction sale was that the application under Order 21 Rule 90 had not been pressed, however a glance at Rule 92 clears the position wherein it has been mentioned that unless an application made under Rule 89 or Rule 90 or Rule 91 is disallowed, the Court shall not make an order confirming the sale. The said rule nowhere mentions the fate of an application which has not been pressed hence what could be concluded from the said rule is that the Court has to first decide the application made under Rule 90 and then should confirm the auction sale. However, in the instant case the ADJ had not decided the application under Order 21 rule 90 and had proceeded with the auction sale. Hence in such circumstances the auction sale cannot be said to have been conducted in good faith. The sale is inchoate till appeal is decided.

57. In **Mallika Vs. Ayyappy Karunakaran,** AIR 1981 Kerala 236, the Court held:

> "8. The legal position that emerges from the foregoing discussion is that where an application to set aside a sale is filed under Rule 89 or Rule 90 or Rule 91 of Order 21 C.P.C., and the decision thereon is carried in appeal, generally speaking, there was no finality in regard to the same until the litigation was finally determined by the appellate court. Any order of confirmation passed before the sale became absolute on the termination of the proceedings before the appellate or the revisional authority, would only be inchoate in nature and no finality could be attached to it. … "

58. Reference can also be made to **Pandurangan Vs. Dasu Reddy** AIR 1973 Madras 107; and **V.A. Narayana Raja Vs. Renganayaki Achi,** AIR 1984 Madras 27.

59. The delay in filing the application stood condoned and the said order has not been challenged. As far as the filing of a suit by the JD for declaration of the sale certificate is concerned that was an unnecessary exercise in view of the pendency of the objections of the JD to the auction sale and thus dismissal thereof is of no consequence. In any case the said suit was filed after issuance of the sale certificate for cancellation of the documents executed in favour of the auction purchasers illegally.

60. As far as filing of the civil suit by the appellant is concerned, dismissal thereof in default makes no difference in view of the pendency of the application under Order XXI Rule 90 CPC filed by the appellant.

61. Admittedly, Smt. Mahinder Kaur who is the mother of the second respondent and mother-in-law of the third respondent was a tenant inducted in the suit premises by the appellant. In 1984 when eviction suit was filed by the appellant, the property had not been conveyed to the decree holder. Proceedings for sale confirmation were pending and were being opposed to by the appellant. Thus, filing of the eviction suit against the tenant does not amount to forum shopping but was a right available to the appellant in law.

62. It is been held in several decisions that fraud unravels all. In **Jharu Ram Roy Vs. Kamjit Roy** (2009) 4 SCC 60 the Supreme Court

observed:

> "15. Fraud vitiates all solemn acts. … "

63. In **Jai Narain Parasrampuria Vs. Pushpa Devi Saraf** (2006) 7 SCC 756:

> "28. It is now well settled that fraud vitiated all solemn act. Any order or decree obtained by practicing fraud is a nullity. … "

64. The latest trend is indicated in judgment of **A.V. Papayya Sastry Vs. Govt of Andhra Pradesh** (2007) 4 SCC 221 where even the SLP had been dismissed and then on account of fraud, the proceedings were reopened. Supreme Court held:

> "38. … Suppose, a case is decided by a competent Court of Law after hearing the parties and an order is passed in favour of the applicant plaintiff which is upheld by all the courts including the final Court. Let us also think of a case where this Court does not dismiss Special Leave Petition but after granting leave decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. All orders passed by the courts/authorities below, therefore, merge in the judgment of this Court and after such judgment, it is not open to any party to the judgment to approach any court or authority to review, recall or reconsider the order.
>
> 39. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practicing or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as nullity, whether by the court of first instance or by the final court. And it has to be treated as non est by every Court, superior or inferior."

65. Consequently, for the reasons as discussed above and considering the factual matrix of this case, the impugned order dated 10.05.1989 is

set aside. The auction sale dated 30.05.1980 of property No. J-3/39 Rajouri Garden, New Delhi is declared a nullity and is also set aside. The Sale Certificate dated 7.07.1989 is also cancelled. The auction purchasers shall file the original Sale Certificate in Court within two weeks. Thereafter the amount deposited by the auction purchasers along with all interest accrued thereon can be withdrawn by the auction purchasers. The appellant shall deposit of 5% of the auction sale amount in Court within two weeks from today which can be withdrawn by the auction purchasers. With these observations, the appeal is allowed with no orders as to cost. TCR be sent back forthwith along with a copy of this order.

C.M.Nos.438/1998 & 16179/2008

In view of the orders passed above, the applications stand disposed of.

ILR (2011) DELHI II 609
CUSAC

RAHULJEE & COMPANY LTD. ....APPELLANT

VERSUS

COMMISSIONER OF CUSTOMS, NEW DELHI ....RESPONDENT

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

CUSAC NO. : 2/2010 AND CUSAA NOS. 4, 5 & 6/2011 **DATE OF DECISION: 07.02.2011**

Custom Act, 1962—Circumstantial evidence—Penalty—Adjudicating authority—Custom Excise & Service Tax Appellate Tribunal (CESTAT)—Appellant importer—Got goods cleared on the basis of advanced licences purchased through one Sh. Gautam Chatterjee—Licence found to be forged—Purported to be issued in name of different licence holders—Custom

department Initiated proceedings against Sh. Gautam Chaterjee and other associates—Also, initiated proceedings of levy of duty and penalty against Appellants—Adjudicating authority imposed penalties on the Appellants—Appeal filed before Custom Excise & Service Tax Appellate Tribunal (CESTAT)—Dismissed—Appeal filed before High Court—Contended: Bonafide purchaser of advanced licences—Obligatory on the custom house before issuing Transfer Release Advise (TRA) to verify the genuineness—TRA issued by custom house—Appellant had no reason to doubt the genuineness of advanced licences and TRA—Entire deal materialised through Sh. Gautam Chaterjee—Represented to Appellant—The licences earlier transferred to UNO Enterprises—The demand draft representing the commission made in the name of UNO Enterprises—Based on the inquiries by custom department statement of Sh. Gautam Chaterjee and others—adjudicating authority opined—Appellant had knowledge about forged advanced licences at the time of purchase—The order of adjudicating authority upheld by Appellate Tribunal—Court observed—Difficult to appreciate as to why appellant chose not to verify from the conerned department the names and particulars of licence holder—Unbelievable that they would have bonafidely chosen to strike a deal of lakhs with small time employee Sh. Gautam Chaterjee—Bonafides become doubtful in view of the fact that if the licenses were in the name of others whereas payment of huge amount were made by draft in the name of UNO Enterprises with whom they were having no dealing—Draft of payment also given to Sh. Gautam Chaterjee—Licence premium in these cases was 50%-75% as against normal premium of 98%—Being importer, supposed to be knowing prevailing normal premium in the market—Held—No illegality or perversity in the findings recorded by Adjudicating Authority and Appellate Authority and Appellate Tribunal—The

question framed about legal sustainability of impugned order of Adjudicating Authority and Appellate Tribunal answered in affirmative—Appeal dismissed.

After considering the submissions of the learned counsel for the appellant and the entire material on record, we do not find any illegality or perversity in the findings recorded by the Adjudicating Authority or by the Tribunal. All these findings which have been recorded are based on the inquiry conducted by the department. We cannot appreciate as to why the appellants chose not to verify from the concerned department as regard to the names and particulars of the licence holders. It was also unbelievable that they would have bonafidely or ignorantly chosen to strike a deal with small-time employee, Gautam Chaterjee, who involved in lakhs of rupees. Their bona fides become doubtful in view of the fact that they knew that the licences were in the names of others, whereas the payments were made by drafts of huge amounts representing purchase prices of the advance licences in the name of Uno Enterprises with whom admittedly they had no dealing of any kind whatsoever. Not only this, the payments by way of drafts, cheques, etc. in the name of Uno Enterprises were given to the same person, Gautam Chaterjee who had arranged for purchase of advance licences for them. Further, the Adjudicating Authority and the Tribunal had rightly recorded that the licence premium paid in these cases was 50%–75% as against the normal premium of around 98% of the duty forgone. The fact that no enquiry regarding the normal premium was made by the Department cannot justify the appellant.s stand of having purchased the advance licences bonafide at such a low price. They being the importers are supposed to be knowing about the prevailing normal premium of such licences in the market. Above all, the premium on goods were also paid after clearance of the goods. That itself would have been enough for them to doubt the genuineness of the deals being arranged by Gautam Chaterjee. The importers

are invariably supposed to be knowing that the licence premiums are paid in the trade before the clearance of the goods, and that it may be otherwise in some exceptional cases where the parties may be knowing each other or having business dealings, which is not in the case of the appellants. **(Para 12)**

Important Issue Involved: (i) A person who is regularly dealing in the imports is supposed to know the prevailing premium on the licenses, the payment below the premium would show that deal was not bonafide (ii) Whether the buyer had made any inquiry as to genuineness of license is within his special knowledge, he has to establish that he made inquiry and took requisite precaution to find out about the genuineness of licence which he was purchasing.

[Gu Si]

APPEARANCES:

FOR THE APPELLANT : Mr. C. Hari Shankar, Advocate.

FOR THE RESPONDENT : Mr. Mukesh Anand, advocate.

CASES REFERRED TO:

1. *H. Kumar Gadecha* vs. *C.C. Ahmadabad* 2009 (243) ELT 248.
2. *CC (P)* vs. *Aaflot Textiles (I) P. Ltd.* reported in 2009 (235) E.L.T. 587-S.C.
3. *Commissioner* vs. *Birla VXL Ltd.* 2008 (227) ELT (A 29).
4. *CC, Amritsar* vs. *ATM International* reported in 2008 (222) E.L.T. -194 (P&H).
5. *Commissioner, Customs* vs. *Leader Values Ltd.* 2007 (218) ELT 349.
6. *ICI India Limited* vs. *CC, Calcutta* reported in 2005 (184) E.L.T. -339 (Cal.).
7. *Afloat Textiles (India) Ltd.* vs. *Union of India* 2004 (170)

ELT 138 Bombay.

8. *East West Exporters* vs. *AC, Customs* reported in 1993 (68) E.L.T. – 319 (Mad.).

M.L. MEHTA, J. (Oral)

1. By this common order, the aforementioned four appeals are being disposed. At the outset, it may be noted that in the case of Rahuljee & Company (CUSAA No.2/2010), the appeal was admitted on 10th November, 2010, but the substantial question of law remained to be framed. The question of law, as framed in the remaining three appeals as noted hereinafter, shall also be the same in the appeal filed by Rahuljee & Company.

2. It is this question of law which arises in these appeals:

(i) In the facts and circumstances of the case, whether the impugned order dated 30th March, 2010 passed by CESTAT confirming the order in Original of the Adjudicating Authority imposing the penalty upon the appellants is sustainable in law?

3. All these four appeals are filed by the importers who got the goods cleared on the basis of licences purchased by them through one, Gautam Chaterjee and these licences had ultimately turned out to be forged and fabricated licences purported to be issued in the names of different licence holders. Therefore, the Department initiated the proceedings against Gautam Chaterjee and his other associates including initiation of proceedings of levy of duty with interest and penalty against the appellants.

4. It was admitted by all the appellants that the advance licences against which they got their goods released were bogus. Consequently, appellant Rahuljee and Company paid the liable duty in respect of the goods imported. However, the liable duty was not paid by the other appellant. Vide the order dated 17th March, 2009, the Adjudicating Authority imposed penalty on the appellants and also other perpetrators.

5. The appellants had filed appeals against the order of the Adjudicating Authority before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) (hereinafter referred as Tribunal). The

Tribunal dismissed the appeals of the appellants vide the impugned order of CUSAA No.6/2011.

6. It is against this order of the Tribunal that the appellants have preferred the present appeals. No one appeared for the appellants, Ashok Metal Industries, Kavery Enterprises and R.S. Trade Link. Mr. C. Hari Shankar, learned counsel appeared for the appellant, Rahuljee & Company whereas none appeared for other appellants despite the matter was kept in waiting and called repeatedly during the day. Since the question involved in all these appeals is common, with the consent of the counsel present, we proceed to dispose of the appeals finally.

7. The learned counsel present for the appellant, Rahuljee & Co., has pressed the challenge only in respect of the penalty imposed on the appellant. The main contention of the learned counsel was that appellant was a bona fide purchaser of the advance licence which was issued in the name of Vindas Chemicals Industries Pvt. Ltd. (hereinafter referred as "Vindas"). Further, he submitted that it was also registered with M/s Nhava-Sheva Custom House, and that before issuing Transfer Release Advice (TRA) by the Customs House, it was obligatory upon them to have verified the genuineness of advance licences. He submitted that since TRA was issued by the Customs House for permitting duty free import of goods under the said advance licence, appellant had no reason to doubt the genuineness of the advance licence and the TRA. Thereafter, he submitted that entire deal was materialized through Gautam Chaterjee who had represented the appellant that the licence had earlier been transferred to Uno Enterprise and therefore at the instance of Mr. Chaterjee, the demand draft representing the commission was made in the name of Uno Enterprise. The additional ground of challenge in the other three appeals is also regarding liability to demand import duty.

8. The learned counsel relied upon the cases of **Commissioner, Customs v. Leader Values Ltd.** 2007 (218) ELT 349, **Commissioner v. Birla VXL Ltd.** 2008 (227) ELT (A 29), **H. Kumar Gadecha v. C.C. Ahmadabad** 2009 (243) ELT 248 and **Afloat Textiles (India) Ltd. v. Union of India** 2004 (170) ELT 138 Bombay.

9. We have gone through the record including the grounds of the appeals filed by the appellants. We have seen that cases of all the appellants were decided by the Adjudicating Authority and also by the Tribunal by

a common order. The grounds of appeal as taken by the appellants are also common and mainly based on the fact that they were all bona fide purchasers of their respective advance licences through Gautam Chaterjee for consideration which was admittedly paid in the name of Uno Enterprises.

10. It is an admitted case of the appellants that the advance licences in pursuance of which they got TRAs through Gautam Chaterjee were all forged and bogus. We have perused the detailed order of the Adjudicating Authority and also the impugned order of the Tribunal. It is a matter of record that, Manikchand Lalchand Tarker alias Raju and Gautam Chaterjee were apprehended by the officers of the DRI at the Customs House on 1st February, 2000. Their statements were recorded on different dates. However, Gautam Chaterjee stated that the licences were given to him by one, Manoj Shah and Bipin Shah, and that all these licences are forged and he was aware about these being bogus and since importers were getting benefited because of releasing of the goods without payment of basic Customs duty and he was also benefited, so he acted as a middle-man.

11. Based on the enquiries as conducted by the Department and also the statements of Manikchand Lalchand Tarker and Gautam Chaterjee and others, the Adjudicating Authority came to the conclusion that there were as many as 12 bogus advance licences registered at the Custom House against which TRAs had been issued in favour of number of importers including the appellants. The submission of the learned counsel for the appellants that the appellants had no reason to suspect the genuineness of the licences inasmuch as the TRAs were issued by the Custom House was rightly considered and rejected by the Adjudicating Authority, as also by the Tribunal. Before the Tribunal also, while not disputing that the advance licences were forged, counsel for the appellants submitted that the appellants had no reason to suspect the genuineness of the licences. The Adjudicating Authority rightly relied upon the un-retracted statement of Gautam Chaterjee under Section 108, Customs Act which was duly corroborated by the statements of Manikchand Lalchand Tarker and also Bipin Shah. The learned Tribunal after discussing the entire factual matrix and the findings of the Adjudicating Authority, in the light of the laws laid down by different judgments, held as under :

> **"6.1.3** In this case, not only M/s Ashoka Metal Industries, M/s Rahuljee & Co., M/s R.S. Trade Links and M/s Kaveri Enterprises did not take the precaution of ascertaining the genuineness of the advance licence from DGFT's licence bulletin or DGFT's website, the following facts indicate that they were aware of the forged nature of the licences –
>
> (a) The import licences have been purchased through Shri Gautam Chatterjee, an employee of a CHA. No prudent importer would purchase such high value advance licences through a petty employee of a CHA instead of a regular licence broker ;
>
> (b) Licence premium was paid by demand draft in favour of M/s Uno Enterprises, while the licence holder were different persons – like M/s Super Abrasive Tooling, M/s Supric Chemicals, M/s Oriental Containers etc. which should have raised suspicion.
>
> (c) The licence premium in these cases is 50% to 75% as against normal premium of around 98% of the duty foregone. The premium was payable only after the clearance of the goods.
>
> In view of the above, we hold that not only extended period under proviso to Section 28(1) is available to the Department for recovery of duty, the importers being guilty of deliberate evasion of duty, are also liable for penalty under Section 114(A) of the Customs Act."

12. After considering the submissions of the learned counsel for the appellant and the entire material on record, we do not find any illegality or perversity in the findings recorded by the Adjudicating Authority or by the Tribunal. All these findings which have been recorded are based on the inquiry conducted by the department. We cannot appreciate as to why the appellants chose not to verify from the concerned department as regard to the names and particulars of the licence holders. It was also unbelievable that they would have bonafidely or ignorantly chosen to strike a deal with small-time employee, Gautam Chaterjee, who involved in lakhs of rupees. Their bona fides become doubtful in view of the fact that they knew that the licences were in the names of others, whereas

the payments were made by drafts of huge amounts representing purchase prices of the advance licences in the name of Uno Enterprises with whom admittedly they had no dealing of any kind whatsoever. Not only this, the payments by way of drafts, cheques, etc. in the name of Uno Enterprises were given to the same person, Gautam Chaterjee who had arranged for purchase of advance licences for them. Further, the Adjudicating Authority and the Tribunal had rightly recorded that the licence premium paid in these cases was 50%–75% as against the normal premium of around 98% of the duty forgone. The fact that no enquiry regarding the normal premium was made by the Department cannot justify the appellant's stand of having purchased the advance licences bonafide at such a low price. They being the importers are supposed to be knowing about the prevailing normal premium of such licences in the market. Above all, the premium on goods were also paid after clearance of the goods. That itself would have been enough for them to doubt the genuineness of the deals being arranged by Gautam Chaterjee. The importers are invariably supposed to be knowing that the licence premiums are paid in the trade before the clearance of the goods, and that it may be otherwise in some exceptional cases where the parties may be knowing each other or having business dealings, which is not in the case of the appellants.

13. We have considered the aforementioned judgments cited by the learned counsel for the appellant. It may be noted that the cases of **Commissioner v. Birla VXL Ltd.** (supra) and that of **Commissioner, Customs v. Leader Values Ltd.** (supra) are entirely distinguishable from the present case inasmuch as those cases related to purchases of licences from the open market on full price in bonafide belief of these being genuine. In these cases both the authorities below had recorded, as a matter of fact, that there was nothing to suggest the purchasers having purchased in any manner other than bonafide. Similarly, the case of **Afloat Textiles (India) Ltd.** (supra) was also entirely distinguishable and not applicable to the facts of the present case. This case related to fulfilling of certain export obligations under the licence and it was recorded, as a matter of fact, that the raw materials imported by the licence holders were sold before fulfilling the export obligations under the licence and that even the export proceeds had not been realized. That was a case based on its own facts. Likewise, the case of **H. Kumar Gadecha**

(supra) is also entirely distinguishable from the present case inasmuch as in that case the importers had verified about the licences from the website of the department which appeared as valid thereon and also that they had purchased the licences on the market price. In these circumstances, it was held that the purchasers were bonafide. That being so, we do not see that the learned counsel for the appellant Rahuljee and Company and for that matter other three appellants can derive any benefit from these authorities.

14. With regard to the challenge to this order of Tribunal regarding liability to pay duty by other three appellants, we may note that in the given facts and circumstances as discussed above this cannot be disputed that these appellants were liable to pay import duty as per law.

15. We do not find any illegality in the reasoning recorded by the Tribunal in this regard which is as under :-

> "6.1.1 As regards the duty liability, since there is no dispute about the fact that the advance license against which duty fee imports of copper/brass scrap have been made by these importers, are forged and had never been issued by DGFT, in view of –
>
> (a) Hon'ble Madras High Court.s judgment in case of **East West Exporters vs. AC, Customs** reported in 1993 (68) E.L.T. – 319 (Mad.)
>
> (b) Hon'ble Calcutta High Court.s judgment in case of **ICI India Limited vs. CC,** Calcutta reported in 2005 (184) E.L.T. -339 (Cal.), the SLP to Hon'ble Supreme Court against which has been dismissed vide order reported in 2005(187) E.L.T.A-31(S.C), and
>
> (c) Judgment of Hon'ble Punjab & Haryana High Court in case of **CC, Amritsar vs. ATM International** reported in 2008 (222) E.L.T. -194 (P&H), the imports would have to be treated as if made without any advance licence and accordingly the customs duty exemption would not be available and since the goods had been cleared by availing full duty exemption, the imports would be liable to pay the duty.
>
> 6.1.2 As regards the applicability of extended period for recovery

of duty under proviso to Section 28(1) of the Customs Act, 1962, the legal position on this point is now very clear in view of Hon'ble Supreme Court's judgment in case of **CC (P) vs. Aaflot Textiles (I) P. Ltd.** reported in 2009 (235) E.L.T. 587-S.C. wherein invoking the principle of Caveat Emptor the Apex Court has held that in such cases the extended period for recovery of duty under Section 28 (1) of the Customs Act would be applicable. In this regard, para 23, 24, 25, 26, 27, 28 and 29 of this judgment are reproduced below:-

"23. Caveat emptor, qui ignorare non debuit quod jus alienum emit. A maxim meaning "Let a purchaser beware; who ought not to be ignorant that he is purchasing the rights of another.

24. As the maxim applies, with certain specific restorations, not only to the quality of, but also to the title to, land which is sold, the purchaser is generally bound to view the land and to enquire after and inspect the title deeds; at his peril if he does not.

25. Upon a sale of goods, the general rule with regard to their nature or quality is caveat emptor, so that in the absence of fraud, the buyer has no remedy against the seller for any defect in the goods not covered by some condition or warranty, expressed or implied. It is beyond all doubt that, by the general rules of law there is no warranty of quality arising from the bare contract of sale of goods, and that where there has been no fraud, a buyer who has not obtained an express warranty, takes all risk to defect in the goods, unless there are circumstances beyond to mere fact of sale from which a warranty may be implied.

26. No one ought in ignorance to buy that which is the right of another. The buyer according to the maxim has to be cautious, as the risk is his and not that of the seller.

27. Whether the buyer had made any enquiry as to the genuineness of the licence within his special knowledge. He has to establish that he made enquiry and took requisite precautions to find out about the genuineness of the SIL which he was purchasing. If he has not done that, consequences have to follow. These aspects do not appear to have been considered by the CESTAT in coming

to the abrupt conclusion that even if one or all the respondents had knowledge that the SIL was forged or fake that was not sufficient to hold that there was no omission of commission on his part so as to render silver or gold liable for confiscation.

28. As noted above, SILs were not genuine documents and were forged. Since fraud was involved, in the eye of law such documents had no existence. Since the documents have been established to be forged or fake, obviously fraud was involved and that was sufficient to extend the period of limitation"

16. In view of the above discussion, we do not find any infirmity or perversity in the findings of the learned Tribunal. Consequently, the question as framed is answered in the affirmative in favour of the Department and against the appellants.

17. These appeals are being decided accordingly.

ILR (2011) DELHI II 620
IA

SARDAR VALLABHBHAI PATEL SMARAK TRUST **....PLAINTIFF**

VERSUS

SAMARTH NANGIA **....DEFENDANT**

(V.K. JAIN, J.)

IA NO. : 16386/2010, 16007/2010, 1679/2011 IN CS (OS) NO. : 727/2010 **DATE OF DECISION: 07.02.2011**

Code of Civil Procedure, 1908—Suit—Order 8, Rule 1—Service of Summon—Written Statement to be filed within 30 days from the service of summon—Extendable upto 90 days—Striking off defence—Order 8 Rule 10—

Pronouncement of judgment—Plaintiff filed an application for pronouncement of judgment—Defendant having failed to filed written statement after service of summons within prescribed period—Defendant sought extension of time and condonation of delay alleging notice not served—Admitted during the arguments receipt of summons by registered post and suit summons in time—Observed—Ordinarily the time schedule prescribed has to be honoured—The defendant should take steps of filing written statement on the appointed date—The extension of time within 30 days or 90 days should not be granted as a matter of routine when the period has expired—Extension can be granted by way of exception for the reasons assigned by defendant and recorded in writings by the Court as to its satisfaction—It must be spelt out that departure from the time schedule allowed because the circumstances were exceptional occasioned by reasons beyond control of the defendant—Extension required in the interest of justice and grave injustice would occur if not extended—Held—No Court would be justified in exercising a discretion in favour of a person who has openly perjured himself instead of coming clean by disclosing full facts and then seeking exercise of discretion in his favour—For this reason alone defendant is not entitled to extension of time beyond 90 days—Right of defendant to file written statement closed—Defence struck off—Application Allowed.

The proposition of law which emerges from this case is that despite use of the word 'shall' therein though the provisions contained in Order VIII Rule 1 of CPC are not mandatory in nature, the time beyond 90 days is not automatic to be granted in course, merely on asking. Filing written statement preferably within 30 days and on reasons being given, within 90 days from the date of service of summon is the rule and extension of time beyond 90 days is the exception to be allowed only where the Court is satisfied that refusal to

extend time is likely to result in miscarriage of justice.

The Court needs to guard themselves against misuse of an unduly liberal approach in extending time beyond 90 days, lest such an approach is misused by unscrupulous litigants to deliberately withhold filing of written statement with a view to delay progress of the trial and then come out with an application for extension of time for the purpose. There is no dearth of litigants who would not hesitate in adopting dilatory tactics so as to postpone the outcome of a civil litigation, wherever they find the law and rules of procedure to be excessively soft and prone to misuse.

The defendant seeking extension of time beyond 90 days is required to disclose cogent and convincing grounds which would entitle him to invoke the inherent power of the Court for extension of time, beyond the prescribed period of 90 days. The Court needs to be satisfied that the case before it was a genuine case and refusal to grant extension of time is likely to cause grave hardship to the defendant which, in the facts and circumstances of the case, he ought not to suffer.

It is also evident from the above-referred decisions of Supreme Court that extension of time beyond 90 days cannot be granted as a matter of course and the discretion vested in the Court needs to be exercised with due care and caution so as to ensure that an unscrupulous litigant is not able to circumvent the time limit fixed by the Legislature, unless he was prevented, on account of reasons beyond his control, from filing written statement within the prescribed period of 90 days. **(Para 9)**

More importantly, it has clearly been established that the defendant has made a false averment in IA No. 16386/2010 dated 25.11.2010, seeking two weeks' time to file written statement. In para 3 of the application, the defendant categorically stated that he had never been served with any notice from this Court. This statement, contained in the

application, is, obviously, false since it has been admitted by him during the course of arguments that he had personally received the summon issued by this Court on 03rd July, 2010. Since IA No. 16386/2010 was supported by an affidavit dated 29th November, 2010, it is also evident that a false affidavit has been filed by the defendant in support of this application. In fact, even in IA No. 1679/2011, the defendant did not clearly admit receipt of summon by him on 3rd July, 2010 and claimed that in the previous application he had stated that he had not been served with any notice from the Court, because he could not recollect any such summon being received by him. It is patently absurd even to suggest that the defendant had forgotten the receipt of an important document such as the summon, issued by this Court, despite his having acknowledged the receipt of the summon in writing. The endorsement dated 03rd July, 2010 made by the defendant on the summon dated 04th June, 2010 issued by this Court contains admission of the receipt of notice along with copy, meaning thereby that the copy of the plaint was also received by him along with the summon. In any case, this is not the plea of the defendant that he had received the summons without copy of the plaint. The report of the process server also shows that the copy of the plaint was delivered to the defendant along with the suit summon on that date. **(Para 11)**

For the reasons given in the preceding paragraphs, IA Nos 16386/2010 & 1679/2011 are dismissed. In the facts and circumstances of the case, the right of the defendant to file written statement is closed and his defence is struck off. I, however, do not deem it appropriate to pronounce judgment under Order VIII Rule 10 of CPC. The plaintiff, therefore, is directed to file affidavit by way of evidence, in order to satisfy the Court about the merits of its case. The affidavit be filed within four weeks from today.

The plaintiff are directed to appear before the Joint Registrar on 14th March, 2011 for exhibiting the documents of plaintiff.

The matter be listed before the Court on 17th March, 2011 for arguments. **(Para 14)**

Important Issue Involved: (i) The word 'shall' used in Order 8 Rule 1 CPC is not mandatory, however, the time beyond 90 days is not automatically granted for filing of written statement, (ii) the extension of time can be given only in exceptional circumstances recording the reasons for the justification of the same, (iii) a party to the litigation before a Court is not entitled to discretion if the favourable order is sought on the basis of misrepresentation.

[Gu Si]

APPEARANCES:

FOR THE PLAINTIFF : Mr. V.P. Choudhary, Sr. Advocate with Mr. G. Tushar, Advocate.

FOR THE DEFENDANT : Mr. Rajiv Kumar Garg, Advocate.

CASES REFERRED TO:

1. *Dalip Singh* vs. *State of Uttar Pradesh and Others,* (2010) 2 SCC 114.
2. *Mohammed Yusuf* vs. *Faij Mohammad and Ors.* (2009) 3 SCC 513.
3. *K.D. Sharma* vs. *Steel Authority of India Ltd.*, (2008) 12 SCC 481.
4. *Zolba* vs. *Keshao and Ors.* 2008 (11) SCC 769.
5. *Aditya Hotels (P) Ltd.* vs. *Bombay Swadeshi Stores Ltd. and Ors.* (2007) 14 SCC 431.
6. *Shaikh Salim Haji Abdul Khayumsab* vs. *Kumar and Ors.* 2006 (1) SCC 46.
7. *Salem Advocate Bar Association, Tamil Nadu* vs. *Union of India*, 2005 (6) SCC, 344.
8. *Kailash* vs. *Nanhku and Ors.* (2005) 4 SCC 480.
9. *Rani Kusum* vs. *Kanchan Devi and Ors.*, 2005(6) SCC

705.

10. *Vijay Kumar Kathuria* vs. *State of Haryana,* (1983) 3 SCC 333.

RESULT: Application allowed.

V.K. JAIN, J.

1. Vide IA No. 18634/2010, the plaintiff has sought recall of the order dated 26th August, 2010, whereby this Court noting that though as per affidavit of service the defendant was stated to have been served, the ordinary process, had been received with the report 'defendant is out of station', and further noting that Registered A.D. cover had not been received back, directed issue of fresh process to the defendant for 02nd November, 2010. It is alleged that on 03rd July, 2010, the defendant was personally served at his residence at A-7, NDSE, Part-II, New Delhi, on identification by Shri S.S. Mishra, representative of the plaintiff. It is further alleged in the application that Senior Superintendent of Post Offices, vide his letter dated 22nd September, 2010 sent to the counsel for the plaintiff, has confirmed that Registered Letter No. 9163 received from Delhi High Court on 06.06.2010 was delivered to the addressee on 07.06.2010. In view of personal service as well as service by registered post, the plaintiff has sought recall of the order dated 26.08.2010.

2. Vide IA No. 16007/2010, the plaintiff has sought pronouncement of judgment against the defendants on the ground that despite service of summons on him, he had filed failed to file written statement within the time prescribed in this regard.

3. Vide IA No. 16386/2010, the defendant had sought two weeks. time to file the written statement. It is alleged in this application that the defendant has never been served with any notice from the Court. It is further that nobody was residing at the address given in the notice for last 8 months and the said house was later vacated by the father of the defendant on 27.09.2010. On that day, the brother of the defendant went to the above-referred place for vacating the premises and at that time, the guard handed over to him a bulk of mails and couriers, wherein a summon of the above case was found along with a copy of the plaint. It is further alleged that on enquiry, the defendant came to know that the matter was fixed for 22.11.2010. Since he was not aware that the

statement was required to be filed within prescribed time, he did not engage a counsel up to 20.11.2010 and, therefore, the written statement could not be filed within the stipulated period of 30 days which expired on 26.10.2010.

4. IA No. 1679/2011 has been filed by the defendant seeking condonation of delay in filing the written statement. It is alleged in the application that on account of downfall in his business, the defendant was not residing in the premises and a guard used to collect the mails. It has been requested that even if there is some delay in filing the written statement, the same may be condoned in the interest of justice.

5. During the course of arguments, it was expressly admitted by the learned counsel for the defendant that the summon sent to the defendant by registered post was actually received at A-7, NDSE Part-I, New Delhi on 07th June, 2010. He also admitted that the suit summon was also received by the defendant personally on 03rd July, 2010.

6. Order VIII Rule 1 of the Code of Civil Procedure to the extent it is relevant provides that the defendant shall within 30 days from the date of service of summons on him, present a written statement of his defence. It provides that where the defendant fails to file the written statement within the period of 30 days, he shall be allowed to file the same on such other day as may be specified by the Court, for reasons to be recorded, but, which shall not be later than 90 days from the date of service of summon.

7. It was thus to be seen that as per the statutory provision, the normal period prescribed for filing written statement is 30 days from the date of receipt of summon though for reasons to be recorded into writing, the Court can allow the written statement to be filed at a later date, which is not beyond 90 days from the date of service of summon by the defendant. Written statement has been filed on 08th December, 2010, i.e., more than 6 months after receipt of summon by Registered Post and more than 5 months after receipt of summon through process server.

8. In **Kailash vs. Nanhku and Ors.** (2005) 4 SCC 480, Supreme Court, inter alia, observed as under:

> "Three things are clear. Firstly, a careful reading of the language in which Order VIII, Rule 1 has been drafted, shows that it

casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Secondly, the nature of the provision contained in Order VIII, Rule 1 is procedural. It is not a part of the substantive law. Thirdly, the object behind substituting Order VIII, Rule 1 in the present shape is to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases much to the chagrin of the plaintiffs and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried.

It is also to be noted that though the power of the Court under the proviso appended to Rule 1 of Order VIII is circumscribed by the words – "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

Considering the object and purpose behind enacting Rule 1 of Order VIII in the present form and the context in which the provision is placed, we are of the opinion that the provision has to be construed as directory and not mandatory. In exceptional situations, the court may extend the time for filing the written statement though the period of 30 days and 90 days, referred to in the provision, has expired. However, we may not be misunderstood as nullifying the entire force and impact – the

entire life and vigour – of the provision. The delaying tactics adopted by the defendants in law courts are now proverbial as they do stand to gain by delay. This is more so in election disputes because by delaying the trial of election petition, the successful candidates may succeed in enjoying the substantial part, if not in its entirety, the term for which he was elected even though he may loose the battle at the end. Therefore, the judge trying the case must handle the prayer for adjournment with firmness. The defendant seeking extension of time beyond the limits laid down by the provision may not ordinarily be shown indulgence.

Ordinarily, the time schedule prescribed by Order VIII, Rule 1 has to be honoured. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defence and filing the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the Court. The extension of time sought for by the defendant from the court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for asking more so, when the period of 90 days has expired. The extension can be only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the Court to its satisfaction. It must be spelled out that a departure from the time schedule prescribed by Order VIII, Rule 1 of the Code was being allowed to be made because the circumstances were exceptional, occasioned by reasons beyond the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended."

(emphasis supplied)

In **Salem Advocate Bar Association, Tamil Nadu v. Union of India,** 2005 (6) SCC, 344, Supreme Court, inter alia, observed as under:

"It has been common practice for the parties to take long adjournments for filing written statements. The legislature with a view to curb this practice and to avoid unnecessary delay and

adjournments, has provided for the maximum period within which the written statement is required to be filed. The mandatory or directory nature of Order VIII Rule 1 shall have to be determined by having regard to the object sought to be achieved by the amendment. It is, thus, necessary to find out the intention of the legislature. The consequences which may follow and whether the same were intended by the legislature have also to be kept in view."

The following view was taken by the Court with respect to extension of time beyond the prescribed period of 90 days:

"In construing the provision of Order VIII Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 of Order VIII, the court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided in Order VIII Rule 1. There is no restriction in Order VIII Rule 10 that after expiry of ninety days, further time cannot be granted. The Court has wide power to 'make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of Order VIII Rule 1 providing for upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time limit of 90 days. The discretion of the Court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order VIII Rule 1."

(emphasis supplied)

In **R.N. Jadi & Brothers and Ors vs. Subhashchandra** (2007) 6 SCC 420 which is a judgment relied upon by the learned counsel for the defendant, referring to its earlier decisions in the case of **Salem Advocate Bar Association, Tamil Nadu** (supra), **Kailash (supra)**, **Rani Kusum v. Kanchan Devi and Ors.,** 2005(6) SCC 705 and **Shaikh Salim Haji Abdul Khayumsab v. Kumar and Ors.** 2006 (1) SCC 46, Supreme Court reiterated that the provisions of Order VIII Rule 1 of the Code of

Civil Procedure are directory in nature. The Court (Hon'ble Mr. Justice P.K. Balasubramanyan), however, cautioned as under:

"A dispensation that makes Order 8 Rule 1 directory, leaving it to the courts to extend the time indiscriminately would tend to defeat the object sought to be achieved by the amendments to the Code. It is, therefore, necessary to emphasise that the grant of extension of time beyond 30 days is not automatic, that it should be exercised with caution and for adequate reasons and that an extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of the justification for granting such extension, the court being conscious of the fact that even the power of the court for extension inhering in Section 148 of the Code, has also been restricted by the legislature. It would be proper to encourage the belief in litigants that the imperative of Order 8 Rule 1 must be adhered to and that only in rare and exceptional case, will the breach thereof will be condoned. Such an approach by courts alone can carry forward the legislative intent of avoiding delays or at least in curtailing the delays in the disposal of suits filed in courts."

In the case before Supreme Court, there was delay of two days beyond 90 days from the date of service of summon. The Trial Court had accepted the written statement, whereas the High Court had taken a view that the provisions of Order VIII Rule 1 of CPC being mandatory, the Trial Court could not have accepted the written statement filed beyond 90 days from the date of service. It was also found that the Trial Court had granted time to the defendant up to 08.06.2004 to file written statement and written statement was actually filed on 08.06.2004. The judgment of the High Court was, therefore, set aside.

In **Aditya Hotels (P) Ltd. Vs. Bombay Swadeshi Stores Ltd. and Ors.** (2007) 14 SCC 431, the Trial Court had extended the time for filing written statement without recording any reasons. The petition filed against the order of the Trial Court was dismissed by the High Court. The matter was remitted by the Supreme Court to the Trial Court to consider it afresh in the light of the observations made by it in the case of **Kailash** (supra), wherein it was observed that extension can be only by way of

an exception and for the reasons assigned by the defendant and also recorded in writing by the Court to its satisfaction.

In **Zolba Vs. Keshao and Ors.** 2008 (11) SCC 769, a judgment relied upon by the learned counsel for the defendant, Supreme Court found that the appellant under a bona fide plea and on instructions of his counsel in the Trial Court could not file written statement as he was advised by his counsel that the written statement could be filed after the decision of appeal pending before the District Court. However, when advised by the counsel, he filed an application for accepting the written statement on condonation of delay. Considering the above noted facts and circumstances, Supreme Court was of the view that it was not in a position to hold that the appellant was not entitled to file written statement even after expiring of the period mentioned in the proviso to Order VIII Rule 1 of CPC and was of the view that it would be open to the Court to permit ˇfiling of the written statement if exceptional circumstances have been made.

In **Mohammed Yusuf Vs. Faij Mohammad and Ors.** (2009) 3 SCC 513, the application filed by the defendant/appellant for condonation of delay in filing the written statement was rejected by the High Court. The defendant in that case was served on 06th July, 2002 and appeared through counsel on 19th July, 2002. He filed applications for extension of time for filing written statement a number of times. On 31.01.2005, the plaintiff/appellant also filed an application for pronouncement judgment in terms of Order VIII Rule 10 on the premise that the defendant did not file any written statement. On the same date, the defendants filed an application for written statement without filing an application for condonation of delay in filing written statement. The application was rejected by the Trial Court. The High Court, however, permitted the defendant to contest the matter on merits subject to payment of costs of Rs 10,000/-. Referring to the observations made by it in the case of R.N. Jadi (supra), wherein it was observed that extension of time beyond 90 days was not automatic and the Court for reasons to be recorded had to be satisfied that there was sufficient justification for departing from the time limit fixed by the Code and invoking the inherent power of the Court and that its earlier decisions in the case of **Kailash** (supra) was no authority for receiving the written statement after the expiry of the period permitted by law in a routine manner, Supreme Court was of the

view that the High Court could not have allowed the writ petition, particularly when the Trial Judge as well as the Divisional Court had assigned sufficient and cogent reasons for in support of their orders .

9. The proposition of law which emerges from this case is that despite use of the word 'shall' therein though the provisions contained in Order VIII Rule 1 of CPC are not mandatory in nature, the time beyond 90 days is not automatic to be granted in course, merely on asking. Filing written statement preferably within 30 days and on reasons being given, within 90 days from the date of service of summon is the rule and extension of time beyond 90 days is the exception to be allowed only where the Court is satisfied that refusal to extend time is likely to result in miscarriage of justice.

The Court needs to guard themselves against misuse of an unduly liberal approach in extending time beyond 90 days, lest such an approach is misused by unscrupulous litigants to deliberately withhold filing of written statement with a view to delay progress of the trial and then come out with an application for extension of time for the purpose. There is no dearth of litigants who would not hesitate in adopting dilatory tactics so as to postpone the outcome of a civil litigation, wherever they find the law and rules of procedure to be excessively soft and prone to misuse.

The defendant seeking extension of time beyond 90 days is required to disclose cogent and convincing grounds which would entitle him to invoke the inherent power of the Court for extension of time, beyond the prescribed period of 90 days. The Court needs to be satisfied that the case before it was a genuine case and refusal to grant extension of time is likely to cause grave hardship to the defendant which, in the facts and circumstances of the case, he ought not to suffer.

It is also evident from the above-referred decisions of Supreme Court that extension of time beyond 90 days cannot be granted as a matter of course and the discretion vested in the Court needs to be exercised with due care and caution so as to ensure that an unscrupulous litigant is not able to circumvent the time limit fixed by the Legislature, unless he was prevented, on account of reasons beyond his control, from filing written statement within the prescribed period of 90 days.

10. Applying the aforesaid proposition of law to the facts of this

case, I find that there is absolutely no explanation from the defendant as to why he did not file written statement within 30 days of receipt of summon from the process server on 03rd July, 2010 along with a copy of the plaint. The plea taken by the defendant that he was not aware of the requirement to file written statement within 30 days is devoid of any merit since the summon issued by the Court expressly directed him to file written statement within 30 days from the date of service and this is not the case of the defendant that he is an illiterate person or that he was not conversant with English language. This is the position if I accept the plea of the defendant that the summon received by registered post on 07th June, 2010 was lying with the guard and was given to his only in the month of September, 2010, though prima facie this does not appear to be correct since the defendant personally received summon from the process server at the very same place on 03rd July, 2010. I, therefore, hold that the defendant had failed to make out a case for extension of time beyond 90 days, for filing written statement. Neither any exceptional circumstance justifying invoking of inherent power of the Court for extension of time beyond 90 days has been made out by him nor do I find it to be a case of genuine hardship, where a defendant, despite due diligence, was prevented by reasons beyond his control from filing written statement within the prescribed time.

11. More importantly, it has clearly been established that the defendant has made a false averment in IA No. 16386/2010 dated 25.11.2010, seeking two weeks. time to file written statement. In para 3 of the application, the defendant categorically stated that he had never been served with any notice from this Court. This statement, contained in the application, is, obviously, false since it has been admitted by him during the course of arguments that he had personally received the summon issued by this Court on 03rd July, 2010. Since IA No. 16386/2010 was supported by an affidavit dated 29th November, 2010, it is also evident that a false affidavit has been filed by the defendant in support of this application. In fact, even in IA No. 1679/2011, the defendant did not clearly admit receipt of summon by him on 3rd July, 2010 and claimed that in the previous application he had stated that he had not been served with any notice from the Court, because he could not recollect any such summon being received by him. It is patently absurd even to suggest that the defendant had forgotten the receipt of an important document such

as the summon, issued by this Court, despite his having acknowledged the receipt of the summon in writing. The endorsement dated 03rd July, 2010 made by the defendant on the summon dated 04th June, 2010 issued by this Court contains admission of the receipt of notice along with copy, meaning thereby that the copy of the plaint was also received by him along with the summon. In any case, this is not the plea of the defendant that he had received the summons without copy of the plaint. The report of the process server also shows that the copy of the plaint was delivered to the defendant along with the suit summon on that date.

12. In **K.D. Sharma v. Steel Authority of India Ltd.,**(2008) 12 SCC 481, the appellant had sought to crate an impression as if no notice was ever given to him nor was he informed about the consideration of cases of eligible and qualified bidders, in pursuance of the orders passed by the High Court in review, which had been confirmed by the Supreme Court. The true facts were found to be contrary to what the appellant had sought to be placed before the Court. Notice had been issued to him by SAIL and he had also responded to in writing. The Court felt that the appellant had not placed all the facts before the Court clearly, candidly and frankly. The Court was of the view that a person approaching the Court must disclose all material facts without any reservation even if they are against him, because "the court knows law but not facts". It was held that if the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the court, the court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merit. If the court does not reject the petition on that ground, the court would be failing in its duty. During the course of judgment, Supreme Court observed as under:-

> **"36.** A prerogative remedy is not a matter of course. While exercising extraordinary power a writ court would certainly bear in mind the conduct of the party who invokes the jurisdiction of the court. If the applicant makes a false statement or suppresses material fact or attempts to mislead the court, the court may dismiss the action on that ground alone and may refuse to enter into the merits of the case by stating, "We will not listen to your application because of what you have done.". The rule has been evolved in the larger public interest to deter unscrupulous litigants

from abusing the process of court by deceiving it."

In **Vijay Kumar Kathuria v. State of Haryana,** (1983) 3 SCC 333, it was found that provisional admissions of the petitioners had been cancelled long ago, to their knowledge and they had obtained a favourable order by making a false representation. Deprecating the conduct of the petitioners as also their counsel, the Supreme Court, inter alia, observed as under:-

> "1….. But for the misrepresentation this Court would never have passed the said order. By reason of such conduct they have disentitled themselves from getting any relief or assistance from this Court and the special leave petitions are liable to be dismissed."

In **Dalip Singh v. State of Uttar Pradesh and Others,** (2010) 2 SCC 114, it was found that the appellant while approaching the High Court had made misleading statement in para 3 of the writ petition by giving an impression that the tenure holder did not know of the proceedings initiated by the prescribed authority and by doing to, he succeeded in persuading the High Court to pass an interim order. Finding that it was an effort to mislead the authorities, which had transmitted to the Court, Supreme Court was of the view that the petitioners belong to category of person, who had succeeded in polluting the course of justice and, therefore, there was no justification for interfering with the order, which had been passed against them.

13. Extension of time for filing written statement, particularly beyond the period of 90 being absolute discretion of the Court, to be exercised only in exceptional and unavoidable circumstances, the Court must refuse to exercise discretion in favour of a person, who does not come to the Court with clean hands and goes to the extent of on making a false averment, denying receipt of summon personally by him. No Court would be justified in exercising a discretion in favour of a person who has openly perjured himself, instead of coming clean, disclosing full facts and then seeking exercise of discretion in his favour. For this reason alone, the defendant is not entitled to extension of time for filing the written statement, beyond the period of 90 days.

14. For the reasons given in the preceding paragraphs, IA Nos 16386/2010 & 1679/2011 are dismissed. In the facts and circumstances of the case, the right of the defendant to file written statement is closed

and his defence is struck off. I, however, do not deem it appropriate to pronounce judgment under Order VIII Rule 10 of CPC. The plaintiff, therefore, is directed to file affidavit by way of evidence, in order to satisfy the Court about the merits of its case. The affidavit be filed within four weeks from today.

The plaintiff are directed to appear before the Joint Registrar on 14th March, 2011 for exhibiting the documents of plaintiff. The matter be listed before the Court on 17th March, 2011 for arguments.

ILR (2011) DELHI II 636
CRL. APPEAL

VIKAS BANSAL ....APPELLANT

VERSUS

STATE (NCT OF DELHI) ....RESPONDENT

(S. RAVINDRA BHAT & G.P. MITTAL, JJ.)

CRL. A. NO. : 457/2008 DATE OF DECISION: 09.02.2011

Indian Penal Code, 1860—Section 302—Circumstantial Evidence—Prosecution case that PW 17 received information vide DD regarding theft and murder—On reaching spot PW17 and PW15 found household articles scattered and deadbody of wife of appellant with ligature marks on neck—The marriage of deceased with appellant was her second marriage—Appellant started suspecting character of deceased—In the evening of incident as per PW3, the accused and the deceased went to rented godown of the deceased and quarreled there—Deceased collected Rs.13000/- from godown and returned along with appellant—At about 10 p.m., appellant left house on motorcycle—

Trial Court convicted accused u/s 302—Held, from evidence, evident that appellant and deceased sometimes had differences and used to quarrel—Trial Court wrongly, while relying on disclosure statement, came to conclusion that appellant suspected character of deceased and therefore murdered her—Prosecution failed to establish motive set up against appellant—Prosecution failed to prove beyond reasonable doubt that accused present in premises at around time of incident—Trial Court wrongly disbelieved alibi of appellant—Contradictions in testimonies of recovery witnesses makes it unsafe to rely on recoveries made post disclosure of appellant—Prosecution unable to establish conclusively each circumstance alleged against accused and to prove beyond reasonable doubt that every link to each such circumstance had been established in turn beyond reasonable doubt so as to point only to guilt of accused and rule out any hypothesis pointing to his innocence—Appellant acquitted—Appeal Allowed.

Summing up on the question of motive, it was urged that the trial court, on being presented with conflicting versions – on the one hand, one set of witnesses deposing that quarrels took place between the couple on the question of transfer of Dayal Pur property and on the other, the version being the alleged infidelity of the deceased, suspected by the accused, the trial court ought not to have rendered the findings as it did, holding that the appellant suspected his wife's conduct and character. **(Para 19)**

Important Issue Involved: In a case based on circumstantial evidence, the prosecution has to establish conclusively each circumstance alleged against the accused and to prove beyond reasonable doubt that every link to each such circumstance had been established in turn beyond reasonable doubt so as to point to guilt of accused and rule out any hypothesis pointing to his innocence.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Mr. D.B. Goswami, Advocate with Mr. S.S. Gaurav Sasan Advocate.

FOR THE RESPONDENT : Mr. Lovkesh Sawheny, APP for the State.

CASES REFERRED TO:

1. *Tanviben Pankajkumar Divetia* vs. *State of Gujarat,* (1997) 7 SCC 156:
2. *Tarseem Kumar* vs. *Delhi Admn.,* 1994 Supp (3) SCC 367.
3. *Jaharlal Das* vs. *State of Orissa,* 1991 (3) SCC 27:
4. *Mohmed Inayatullah* vs. *State of Maharastra,* 1976 (1) SCC 828
5. *Ram Gopal* vs. *State of Maharashtra,* AIR 1972 SC 656.
6. *Awadhi Yadav and Anr.* vs. *The State of Bihar,* AIR 1971 SC 69.
7. *Bakhshish Singh* vs. *State of Punjab,* AIR 1971 SC 2016
8. *Udai Bhan* vs. *State of Uttar Pradesh* (1962 Supp 2 SCR 830 : AIR 1962 SC 1116 : (1962) 2 Cri LJ 251)).
9. *Palukuri Kotayya* vs. *Emperor* (74 IA 65 : AIR 1947 PC 67 : 48 Cri LJ 533).

RESULT: Appeal allowed.

S. RAVINDRA BHAT, J.

1. This appeal is directed against a judgment and order dated 24th April, 2008, whereby the accused was convicted by the learned Additional Sessions Judge, under Section 302, IPC, and sentenced to undergo life imprisonment, with fine of Rs. 5,000/- on the charge of murdering his wife, Radha (hereafter "the deceased").

2. The prosecution case was that on 22.10.2005 PW-17, SI Rajesh Dogra received intimation (DD No.7A, PS Khajoori Khas) regarding a

theft and murder at House No.10/21, Gali No.10, Dayal Pur, A Block (hereafter "the premises"). He, along with PW-15 ASI Rajender Singh, Head Constable Keshav and Constable Jeet Pal reached the premises, and found it open. On inspection of the premises, inside, he found that the household goods were scattered; in the inner room he discovered the dead body of a lady (the deceased), the accused's wife. There was a ligature mark on the deceased's neck; an orange coloured chunni was lying on the bed. He did not find any eye witness on the spot. A First Information Report (FIR) was registered through Constable Jeet Pal, under Section 302 IPC and investigation was handed over to Station House Officer, (SHO), P.S. Khajoori Khas, viz. Inspector P.S. Chahal, who reached the spot and drew the site plan, seized the exhibits viz. bed sheet, pillow and chunni, and recorded the statement of witnesses. It was learnt, during investigation that the marriage (between the appellant/ accused and the deceased) was the second marriage -of the deceased, who had married the accused in 2003; she had secured divorce from her earlier husband. The deceased and the Appellant knew each other for a long time prior to their marriage. They had independent businesses; but the Appellant used to help the deceased, in her work. The prosecution alleged that the Appellant started suspecting the deceased's character. As a result, the two started quarrelling. According to the prosecution, which relied on the testimony of one Pradeep (PW-3), in the evening of the incident, (i.e. in the evening of 21.10.2005), the couple went to the deceased's rented godown and quarreled there. It was also alleged that after that, the deceased collected Rs. 13,000/-from the godown and returned home, with the Appellant. After that at about 10 PM, the Appellant left the house on his motor-cycle. The Appellant was subjected to sustained interrogation when he allegedly admitted to his guilt and was therefore arrested, and his disclosure statement was recorded. In this statement he disclosed that in order to mislead everyone, he gave the incident, the colour of loot and removed some jewelry and cash and kept it in his father's house (at Kanti Nagar). He then went to Meerut in the night. It was alleged that the Appellant's statement also led to seizure, (from his father's house) of jewelry, a mobile phone (make Nokia 1100) and cash worth Rs. 12,850/-.

Evidence led before the trial court

3. In support of its case the prosecution examined 19 witnesses.

PW-1 Chanderwati, the deceased's mother deposed with regard to marriage of couple in 2003. She stated that accused and the deceased quarreled with each other; and that the house at Bhajan Pura was in the name of the deceased; the accused wanted to get that house transferred to himself, to which the deceased did not agree. She was cross examined by the prosecution, as she did not state anything with regard to the accused doubting the deceased's character; she however maintained that she did not give any such statement to the police and she did not state that the Appellant suspected the deceased's character. According to her, on 22.10.2005 the appellant informed her on telephone that theft had taken place in his house and the deceased was murdered.

4. PW-2 Bhagwan Das, is a brother of the deceased. He testified that the accused suspected the deceased's character, and that the deceased used to confide in him about this. He stated that SI Rajesh Dogra had informed at the Police Station that the Appellant had confessed his guilt, and on the next day, i.e. 23.10.2005, when he went to the Police Station and inquired from the Appellant, he told him that the deceased used to receive telephone calls, and therefore, he had murdered her; and that the house-key and the deceased's chunni were taken into possession on 22.10.2005; he also identified the dead body of the deceased at GTB Hospital but he could not recollect about other articles, which were taken into possession by the police. He was, therefore, cross-examined by the prosecution with the Courts' permission. He deposed during cross examination trying to support the prosecution case and proved the relevant documents viz. seizure memo of the chunni as Ex. PW2/A, seizure memo of bed sheet and pillow as Ex. PW2/B, seizure memo of articles recovered at behest of the accused by Ex. PW2/C, seizure memo of a key bunch, as Ex. PW2/D, inquest form as Ex.PW2/E, arrest and personal search memo of accused as Ex. PW2/F&G and the dead body identification statement as Ex. PW2/H. He identified the case property as Ex. P1 to P19. Ex. P1 was a Velvet Purse, six "pajeb"(ankelets) were Ex. P2/1 to 6, 13 bichuve are Ex. P3/1 to 13, 4 rings-silver type-as Ex. P4/1 to 4, 2 tagrinuma guchcha being Ex. P5, gold chain Ex.P6, mangal sutra, silver type as Ex. P7, 3 Silver Bichuve as Ex. P8/1 to 3, a plastic box with two karas as Ex. P9, a chain as Ex. P10, three pair of tops as Ex. P11, one polythene with 2 necklace as Ex. P12, 14 ear rings as Ex. P13/1 to 14, 24 bangles of yellow metal as Ex. P14/1 to 24 (artificial jewelry); a mobile phone make Nokia 1100 as Ex. P15, cash ` 12,850/

-as Ex. P16 (Collectively), a bed sheet as Ex. P17, a pillow as Ex. P18 and a chunni as Ex. P19.

5. PW-3 Pradeep, testified about working in the deceased's ice-cream godown, and about frequent quarrel between the deceased and the accused since they got married. He deposed that on 21.10.2005 he had seen the appellant quarreling with the deceased in the godown with heated arguments on account of labour and learning the next day that the deceased had been murdered. According to him the deceased had taken Rs. 30,000/-from him on 21.10.2005. He was also cross-examined by the prosecution with permission of the Court where he stated that Rs30,000/-were the godown sale proceeds. He denied having stated to the police that the deceased had taken Rs. 13,000/-as godown sale proceeds and that he went away after locking the godown. In his cross-examination he stated that the deceased was his paternal Aunt (Bua). PW-4 Khem Chand, brother of deceased, testified about the accused suspecting the deceased's character. He stated that the Appellant used to keep a track of the deceased's activities. He also added that the appellant used to pressurize the deceased to get his name also included in the property ownership documents as co-owner. In the cross-examination he stated that the deceased had earlier married Kishan Singh in 1991 and about two months after marriage a quarrel started between the couple on account of dowry and a case of dowry harassment was filed against Kishan Singh and the couple were divorced in 2002. He also admitted that the appellant knew the deceased since 1993 and that he (PW-4) along with the deceased and accused had gone to Vaishno Devi. PW-5, Tulsi Prasad, was the Appellant's neighbor. He stated that the couple (i.e. Appellant and the deceased) used to have scuffles. He could not give the reason for their altercations. According to him, on 22.10.2005 at about 9.20 AM, he saw the lock hanging outside the gate of the Appellant's house in an unlocked position, whereas usually the gate remained open at that time. He placed a call on the deceased's mobile number but without any response. According to him at about 11 AM, the Appellant came to him and asked for keys to his house, when he (PW-5) told him that he did not have the keys and that the house lock was in unlocked position. Thereafter, the Appellant opened the door of the premises, and entered there; he (PW-5) went inside his house. After about 1-2 minutes he heard the Appellant screaming "Main Lut Gaya, Barbad Ho Gaya". On hearing this he (PW-5) went out and learnt that somebody had murdered the

deceased after committing theft. On the appellant's request PW-5 informed the police's 100 telephone number. He was also told by the appellant that he had gone to Meerut the previous night. This witness was cross-examined by the prosecution, without much effect. PW-6 is Jeet Pal Singh, stated having accompanied SI Rajesh Dogra and others during the investigation. He also got the FIR registered and got the post mortem examination conducted on the dead body.

6. PW-7 Prabhat Kumar, did not support the prosecution version despite cross-examination by the Learned APP. He testified about receiving a call on 21.10.2005 from Meerut at about 3.30 PM, at his shop at Nabi Karim that his father was ill and his blood pressure had shot up. He therefore made a telephone call to the Appellant to reach his shop, as he (the Appellant) had a motor-cycle. The Appellant asked him to go to his house; therefore, at about 5.30 PM, PW-7 reached the Appellant's house, where he was served tea by the deceased. In the meanwhile PW-2 Bhagwan Das, the deceased's brother also reached there. At about 6/6.15 PM he, along with the Appellant, left for Meerut on his motor-cycle and on next day at about 10.30/10.45 PM, he along with the Appellant returned to the latter's house and found it locked. The appellant, on enquiry told him that the deceased might have gone to her brother and that he would collect the house-key from Tulsi Prasad (the neighbour's) house. Tulsi Prasad said that keys were not with him and that the door was closed but the lock was hanging in the door in the unlocked position. The Appellant opened the door and went inside and cried out, since he found household articles lying scattered and the deceased was lying dead. PW-8, HC Ravinder Kumar, was the duty officer who recorded DD No.7A on 22.10.2005 and proved it as Ex. PW8/A. He also proved the rukka as Ex. PW8/B and FIR as Ex. PW8/C. PW-9, Constable Sanjeev was from the mobile crime team. He deposed photographing the spot from different angles; the photos were proved and marked as Ex. PW9/19-36; their negatives were marked Ex. PW9/1-18. PW-11 SI Mukesh prepared the scaled site plan Ex. PW11/A. PW-12 Dr. S. Lal, had conducted the deceased's postmortem and proved the Postmortem report as Ex. PW12/A. While describing seven injuries on the deceased's person, he mentioned that there was no ligature mark seen around the neck. The cause of death was given as asphyxia as a result of ante-mortem manual strangulation and sufficient to cause death in ordinary course of nature. The time since death was about 2½ days. PW-13 HC Rishi Pal, was posted in the PCR

on 22.10.2005; he said that at about 11.30 AM he received a wireless call about a theft and probable murder at the spot, upon which he reached the site and saw the dead body of the deceased and scattered household articles. PW-14, Ct. Luv Kesh Kumar, had received a telephonic message regarding incident and conveyed it on the PCR network and proved the endorsement in this regard as Ex. PW14/A and Ex. PW13/DA.

7. PW-15 ASI Rajinder Singh, had accompanied SI Rajesh Dogra during investigation. He supported the prosecution version and referred to the documents already exhibited by other prosecution witnesses and also identified the case property. He proved disclosure statement of accused as Ex. PW15/A. PW-16 Inspector M.S. Shekhawat, had conducted the part investigation and got the scaled site plan prepared by SI Mukesh Jain. He recorded the statement of ASI Rajinder and SI Mukesh Jain and after collecting the postmortem report, filed the charge sheet. PW-17 SI Rajesh Dogra, supported the prosecution version. According to him apparently there was ligature mark around the neck of the deceased and it appeared as if she was strangulated to death. He has also referred to the documents exhibited by the other Prosecution Witnesses and identified the recovered case property. He admitted the defence' suggestion that in the disclosure statement he did not mention that the accused got the mobile phone recovered, and that it also did not reflect how much cash was kept at the appellant's father's residence, nor were the details of the jewelry items mentioned in his disclosure statement. PW-18, Inspector P.S. Chahal, had investigated the case as he held additional charge of SHO, PS, Khajoori Khas. He proved the site plan Ex.PW18/A. He has supported the prosecution version.

8. After closure of prosecution evidence, the appellant/ accused was examined under Section 313 Cr.P.C; he pleaded innocence and claimed that the deceased's brothers and her other family members wanted to get the house at Dayal Pur transferred in their name. He stated that on 21.10.2005 he had gone to Meerut as the father of his uncle Prabhat Kumar (PW-7) was unwell and a telephone call, in this regard was received by the said Prabhat Kumar. He stated having gone there on 21.10.2005 along with Prabhat Kumar on his own motor-cycle. He further stated that at the time of leaving his house, the deceased's brother, i.e. Bhagwan Das was present in his house and that the deceased was all right and on returning from Meerut he learnt about the incident. He relied

on the testimony of Vishan Pal, DW-1; who sought to confirm the appellant's defense regarding his visit to Meerut on the night intervening 21-22.10.2005 to attend PW-7's ailing father i.e. Parmeshwar Dayal. According to him on 21.10.2005 Prabhat's mother asked him to call him (Prabhat) intimating telephonically about the serious condition of his father, on account of high blood pressure. At about 3.30 PM he had called Prabhat Kumar, and informed him of the situation. At 8-8.30 PM Prabhat along with the Appellant reached Meerut and left the next morning at 8.30 PM and that he had particularly enquired from the appellant why he did not bring his wife since DW-1 has not seen her but was aware that he (the Appellant) had a love marriage. The appellant had told him that due to the two of them, i.e. Prabhat and he (the appellant) being in a hurry on hearing the news of PW-7's father's illness, there was no chance to bring his wife at that time. He further stated that on 31.12.2006 upon the death of PW-7's father, i.e. Parmeshwar Dayal, when the appellant did not come, he learnt (through Prabhat) that he had been implicated in the case. He proved the death certificate of Parmeshwar Dayal as DW1/1.

9. The prosecution moved an application Under Section 311 Cr. P.C. to examine Dharamvir Singh and Suraj Pal as court witnesses, claiming their testimony being essential for a just decision of the case. A similar request had been declined earlier; the later application was allowed. Dharamvir Singh was examined as Court Witness No. 1 while Suraj Pal was examined as Court Witness No. 2. CW-1 Dharamvir Singh testified that he used to sell ice-cream on commission basis, from the deceased's agency from March 2005. For this, he was provided with an ice-cream Rehdy by the deceased. His daily routine was that he used to collect ice-cream from her agency at D-43, Gali No.4, Sanjay Mohalla, Bhajan Pura, Delhi between 3-4 PM; and between 10 PM and 12 midnight he used to go to the deceased's agency, to hand over the daily sale accounts. They were handed over, sometimes to one Pradeep, the deceased's employee and sometimes to the appellant. On one or two occasions during his visit there between 3-4 PM he heard, a conversation between the deceased and the appellant when the deceased was telling her husband to do (mind) his business and that she would (mind) her ice-cream business herself. This, she used to say sometimes cordially and sometimes in anger (*Kabhi Raji Main Kahti Thi, Kabhi Gusse Main Kahti Thi*). He stated that on 21.10.2005 at 7.30 PM the deceased and

the appellant went to his rehdy at Yamuna Vihar C-9, near Aggarwal Dharam Shala to check, and after checking it (his rehdy) they left from there. On that day (21.10.2005) at about 11.30 PM he had gone to the deceased's godown to park his rehdy when the appellant alone met him, as the deceased was not there. This witness identified the accused in the Court. On that day he handed over the sale proceeds to the appellant, and returned home. The next day when he went to the godown it was closed. On 22.10.2005 he learnt through Pradeep about the deceased's death. After 4-5 days (of the death), Bhagwan Das her brother inquired from him if he had seen anything during his work (of ice cream sales from the deceased's agency) upon which, he narrated these facts and on the asking of Bhagwan Das, he agreed to testify these facts to ACP. After two months he then went to ACP's office along with Bhagwan Das and got his statement recorded, which he proved in the Court as CW1/A. In his cross-examination he stated that Bhagwan Das met him 3-4 times after the incident and before his statement recorded before the ACP; that Bhagwan Das met him about 4-5 months after the incident; that he never came to the Court prior to recording his evidence in the Court; that he did not visit the police station on his own to make a statement with regard to the case; that Pradeep met him for 2-3 times after the date of occurrence. He denied the suggestion that he was not selling ice cream on rehdy as an agent of the deceased or that he was a procured witness, testifying at the instance of Bhagwan Das. He admitted that in his statement before the ACP he told that Bhagwan Das had informed him that somebody had falsely deposed in the Court about the appellant's absence in Delhi on 21.10.2005 and that he was in Meerut on that day. He denied the suggestion that he was identifying the accused in the Court as he (the accused) had been shown to him by Bhagwan Das during the Court proceedings prior to recording his statement in the Court.

10. CW-2 Suraj Pal, testified that the ground floor of his house at D-43, Gali No.4, Sanjay Mohalla, Bhajan Pura, Delhi was rented by his wife to the deceased by an agreement/rent deed Ex. CW-2/B. According to him, on 21.10.2005 at about 8-8.30 PM, when he was present in his house the deceased and her husband (whom he identified in the Court), were present at the godown and they had wished him and thereafter, they left. After 3-4 days he learnt through the newspaper about the deceased's death. According to him no police official visited him at that time nor did he visit any police official but after 3-4 months of the

incident, a police official came to his house and thereafter, he went to P.S. Seelam Pur and got his statement recorded through Ex.CW2/A. In his cross-examination, he revealed that he was a property dealer by profession for the last 10-12 years. He admitted that agreement Ex. CW2/B was up to 3rd November 2006 but the godown let out to the deceased was vacated about 4-5 months prior to his statement to the police, (his statement was recorded before the ACP Seelam Pur, North East District on 26.06.2006). He stated having asked Pradeep to get the godown vacated, which he got done through Bhagwan Dass. The godown was vacated 2-3 months prior to November 2006, therefore, balance amount was adjusted in the rent. He admitted the suggestion that Bhagwan Dass had taken rehdies from the godown but he did not know where they were taken to. He also stated that Pradeep kept operating the godown for about 2-3 months after the incident and that he had arranged a meeting of this witness with Bhagwan Das for vacating the godown. He also stated that Pradeep did not tell him about recording the statement before the police but it was police who visited his godown a number of times and he had then told the entire facts to the police. According to him, when his statement was recorded, Bhagwan Das was present in the Police Station. He denied the suggestion that he had seen the couple at 4-4.30 PM, in the godown or that he agreed to give statement to the police only on the condition of Bhagwan Das' vacating the godown. He denied the suggestion he was testifying at the instance of Bhagwan Das.

11. After recording the statement of court witnesses, the trial court felt that in view of the incriminating facts coming on the record a statement of accused under Section 313 Cr. P.C was required; it was further recorded on 16.11.2007. He denied any acquaintance with Dharamvir and stated that he was not working with any agency of the deceased at any point of time. He claimed having seen the court witness Dharamvir twice or thrice along with Bhagwan Das prior to recording his (Dharmvir's statement); that court witness Suraj Pal sent a message through Bhagwan Das in the Jail to him in the month of March 2006 for vacating godown but he stated that he would talk to Suraj Pal when he would come out from Jail. According to him, Suraj Pal had testified at the instance of Bhagwan Das who got the godown vacated without his permission.

Trial court's findings

12. The trial court, in the impugned judgment held that the accused used to quarrel with the deceased; the learned Judge relied upon the evidence of PW-2, 4 and 5. The Court did not believe the version of PW-3, who had deposed that the couple had cordial relations. It was held that the said deposition was an important one which did not shake the consistent version of the other witnesses material to this aspect, i.e. PWs 1 to 5. The Court similarly discounted the discrepancy in deposition of PW-3, about the deceased having taken-away Rs. 30,000/-from him, that day. It noted that PW-3 had not specified the time when the accused had visited the deceased's godown and believed the earlier version recorded by PW-3 that the deceased had taken-away Rs. 13,000/-as sales proceeds from the godown, did not matter in view of the phonetic similarity between the words "Thirteen" and "Thirty", and the testimony of PW-13. The trial court explains this reasoning in the following terms:

"XXXXXX XXXXXX XXXXXX

……When PW13 reached at the spot on receipt of wireless call at 11.30 a.m. regarding the incident, obviously this information would have been given to him in normal course of human conduct by Vikas who was present when police reached there. So this also lend support to the claim of PW3 that Rs. 30,000/- were taken by Radha and not Rs. 13,000/- and this discrepancy might have crept in due to phonetic similarities in words. On what basis Vikas told PW13 regarding missing of Rs. 25,000/-, Mangal Sutra and ear ring from purse of victim is only within the knowledge of Vikas and it cannot be said that such information was conveyed by PW13 to Head Quarter from Vaccum……..

XXXXXX XXXXXX XXXXXX"

13. The trial court disbelieved the appellant's version of having left for Meerut along with PW-7 on the evening of 21.10.2005. The trial court, on this score noted that PW-7 had recorded in his version under Section 161 Cr. PC that the accused had visited him at 11.00 PM that night. However, the trial court was of the opinion that the defense put forward (about the accused's absence from the site) was unbelievable because PW-5 Tulsi Prasad had deposed about the house being unlocked despite which the appellant went and asked for the key. The trial court

noted that PW-5 nowhere mentioned the presence of PW-7 at the time, i.e. 11.00 AM, on 22.10.2005. The Court concluded that being a relative of the accused, PW-7 endeavored to support the defense by stating that the appellant had left Delhi at 06.30 PM. The Court also disbelieved PW-7's version about having left for Meerut around 06.30 PM, observing that such conduct was strange since he was informed about his father's illness at 3.30 PM. The trial court observed that PW-7's version amounted to new story as regards presence of PW-2 Bhagwan Dass in the deceased's house, in order to extricate the appellant. The trial court also held as follows:

"XXXXXX XXXXXX XXXXXX

…….PW5 is hostile otherwise so there is no reason as to why he will be silent as regards presence of Prabhat Kumar with accused when accused came to his house at about 11 am on 22.10.05. In his (PW5) cross examination deliberately, accused did not refer to presence of PW7 with him otherwise, PW5 would have revealed the facts of non-accompanying of PW7 with accused. This omission is to be read adversely against the accused more so when he is endeavoring to introduce a new fact that PW7 accompanied him on return from Meerut. It seems that accused had gone to the house of PW5 just to create evidence. It is highly unlikely that accused would not have noticed the lock lying in unlocked position and door being closed in bright sun light. The key of the house were finally handed over by accused to police. The conduct of accused Vikas becomes highly suspicious in the obtaining facts and circumstances and notwithstanding the hostility of PW5 with regard to his having not heard couple quarelling in the night at their home and accused leaving his house on motor cycle, a question is whether accused can be fastened with the next chain so as to link him till the conclusion of the crime.

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The trial court relied upon the appellant's statement to the following effect:

"XXXXXX XXXXXX XXXXXX

……"*Main Apni Marji se Zindagi ZiyuGee, Tujhe Jo Karna Hai Kar Ley Main Aaj Bhi Bahar Kar Ke Ayee Hoo Tu Rok Sakta Hai To Rok Ley*"……

XXXXXX XXXXXX XXXXXX"

14. It was held in this regard that when this statement was recorded, the police was unaware about PW-3's role or that he was an employee of the deceased, who witnessed the quarrel of the couple on 21.10.2005. The Court, therefore, was of the view that there was no prohibition from looking into that part of the statement, holding as follows:

"XXXXXX XXXXXX XXXXXX

…….In my considered view ld. Defence counsel is misconstruing the judgment relied on by him. Whatever incriminating which is by way of admission or confession of accused as mentioned in disclosure statement is not admissible. In this case he is mentioning about the conduct of his wife and not his own involvement in commission of crime, so this much of disclosure made regarding presence of Pardeep in the godown on 21.0.05 and regarding the remarks of his wife to accused at home as referred above is admissible in law……

XXXXXX XXXXXX XXXXXX"

The trial court did not doubt the seizures of articles effected from the accused's father and overruled the appellant's objection regarding lack of specificity or details in regard to individual jewelry articles of the deceased, the cash amount or the Nokia phone.

15. The trial court thereafter went to find as follows:

"XXXXXX XXXXXX XXXXXX

……This is a case where both the material prosecution witnesses and defence witnesses when appeared before the court subsequently after the occurrence, at a much space of time, their mind sets changed due to availability of time at their disposal in the intervening period. The material witnesses who are relations of deceased, in their statement before the police claimed that motive was accused doubted the character of his wife (deceased) but in their testimony before the court PW1 mother, PW2 and

PW4 brothers of deceased introduced a new story in addition to the motive of character doubting by accused to the effect that accused wanted to get the house of deceased transferred to his name which being a new case cannot be believed and is not being accorded any credence. As such the arguments of ld. Defence Counsel to the effect that it is improbable that deceased would purchase the house herself when on record the financial condition of her parental side was dim is of no avail to either side and is not being accorded any credence. The conduct of PW2 in going to jail to meet the accused as admitted by him in court questioning also falls in the same parameter as referred above and it does not ennure to the benefit of either side. Rather in his statement under section 313 Cr.P.C subsequently recorded accused has claimed that PW2 visited him in jail to talk about vacation of godown of deceased which claim was not put to PW2 in his cross examination. It is logical and understandable that when any event takes place contemporaneously PWs do not get time for contemplation to make statements to suit them for all the purposes. That is why in their initial statements to police, PW1, PW2 and PW4 have stated on the same line that accused doubted the character of his wife. PW2 and PW4 have fully supported these line of prosecution, before the court. Accused in his disclosure statement referred to remarks of his wife *"Main Apni Marji Se Zindagi Ziyu Gee, Tujhe Jo Karna Hai Kar Ley Main Aaj Bhi Bahar Kar Ke Ayee Hoo Tu Rok Sakta Hai To Rok Ley"*. Such remarks are sufficient for a husband to loose his temper as it reflects to breach of matrimonial obligation by his spouse (here deceased wife). The conduct of wife as referred in above disclosure statement of accused lends support to prosecution version that accused had suspicion over character of his wife more so when his wife was unfaithful to her first husband during the subsistence of her marriage as she had courtship with accused himself.

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16. The Court noted that some of the witnesses, who were relatives of the deceased, had sought to introduce a new fact to show another motive on part of the appellant, i.e. to secure transfer of the property.

It was held that though this attempt was palpably discernable, but that itself could not falsify the prosecution version. The Court was of the opinion that the solitary defense witness was unreliable since he belonged to the PW-7's village, and PW-7 was the accused's relative. In these circumstances, the Court felt that the appellant's version with regard to illness of PW-7's father, and his visit to Meerut could not be believed. The trial court's findings in regard to the credibility of the seizure of articles and presented before it are as follows:

"XXXXXX XXXXXX XXXXXX

42. Now the question is whether recovery effected from the house of father of accused at later instance is believable or not. To my mind recovery is believable when case is viewed as a whole for the reasons that just after seeing the dead body telephone call was made to PCR. In his cross-examination PW13 HC Rishi Pal had given the information from wireless to head quarter, from the spot itself woman is lying dead at the spot. At 12.10 pm he further gave information to Head Quarter that Radha wife of Vikas Bansal is lying dead. Vikas Bansal had gone to Meerut yesterday, when he came back to Delhi he found a chunni lying tied around the neck of Radha lying on the floor. Rs. 25,000/- from her purse, ear rings and Mangal Sutra is missing. Other articles are lying scattered (Ex. PW13/DA). It is to be seen that when HC Rishi Pal reached there he was not knowing the name of deceased and that is why he gave the information as woman is lying dead. At 12.10 pm the information became clear this time name of deceased, name of her husband and articles missing were indicated in the message to Head Quarter. A stranger or a neighbourer who happens to be present at the spot would not be knowing as to what articles were missing from the house or from the dead body. The inference can be drawn from the common course of human conduct that this information was developed from accused Vikas who happened to be present there as he was the only relation of deceased about whom prosecution witnesses including police official state that he was present at the spot when police arrive there. Obviously, it was accused who disclosed about the missing of Rs. 25,000/-from purse of deceased, ear ring and Mangal Sutra and there cannot be any

other hypothesis other than this. This Mangal Sutra and ear tops were got recovered by the accused from the house of his father in pursuance of his disclosure statement. The arguments has been advanced by ld. Defence counsel that I.O. has intentionally not taken details of the individual jewellery items or the number of mobile and cash amount so that he could fabricate the same later on by planting the articles. To my mind if accused does not come out with details of such articles despite asking by the police or police commits some irregularity in not seeking the details of such articles from the accused while recording his disclosure statement, it does not mean that any recovery effected pursuant to such disclosure statement would be no recovery in the eyes of law……

XXXXXX XXXXXX XXXXXX"

On this basis of the above findings, the Court convicted the accused and sentenced him to undergo Life Imprisonment with fine of Rs. 5,000/-.

Appellant's contentions

17. The learned counsel for the appellant argues that the Trial Court findings are unsustainable on all the counts. It is submitted that the trial court failed to appreciate that the prosecution was unable to establish any clear motive. Elaborating on this, learned counsel submitted that the finding that the appellant and the deceased had a strained relationship due to which they used to frequently quarrel and that on the fateful day, she had even said, *"Main Apni Marji se Zindagi Ziyu Gee, Tujhe Jo Karna Hai Kar Ley Main Aaj Bhi Bahar Kar Ke Ayee Hoo Tu Rok Sakta Hai To Rok Ley"* is unbelievable. Learned counsel highlighted that there was a material contradiction in the prosecution witnesses' depositions, with regard to the appellant's suspecting his wife's character. He urged that the evidence of PW-2 Bhagwan Dass had been relied upon by the trial court whereas the deposition of PW-3 and PW-4, read together clearly showed that the latter two witnesses did not support it. The appellant argued that even though PW-2, a relative of the deceased and PW-4 mentioned about the quarrel which broke-up between the couple on 21.10.2005, he was specific that the subject matter was regarding labour. He was confronted on the other aspect since in his earlier version recorded with the Appellant, there was no mention about any quarrel since marriage.

Similarly, PW-4 had deposed in Court in his examination-in-chief that the accused used to keep track of the deceased's activities-which was, however, not recorded in his statement made under Section 161. So far as the evidence of PW-5 is concerned, all that was deposed against the appellant was about the alleged scuffle between the couple for unknown reasons.

18. It was urged that the appellant was known to the deceased for more than a decade and had supported her during trying times when her previous marriage was on the rocks and she was facing hardship. He was well-known to members of the deceased's family as was evident from the circumstance that he was invited for the marriage of the deceased's elder brother, admittedly, as per PW-2 in 1996. Learned counsel pointed-out to the cross-examination of PW-2 and PW-4 to say that the deceased's family used to make frequent demands for financial assistance from him, and that this sometimes led to quarrel between the couple. Other than that, said the counsel, there was no credible material or evidence to suggest that the appellant used to suspect his wife's conduct as was found by the trial court. It was submitted that the reliance upon the evidence of PW-2 in this regard was unsafe because his motive for deposing in Court required close scrutiny. Learned counsel pointed-out that PW-2 had moved the Court after recording his statement under Section 161 Cr.PC that two persons had seen the appellant later than 6.30 PM; this was after the entire prosecution evidence had been led and even Section 313 Cr. PC questions had been put to the accused. The initial application moved in this regard was rejected by the Court on 20.08.2007. Subsequently, another application was moved and was allowed on 13.09.2007 as a result of which CW-1 and CW-2 were permitted to be examined. It was contended that before this, PW-2 had visited the accused in March 2006 with a view to secure the transfer of the Dayal Pur property on condition that he would not depose against him in Court in case the said property were transferred to him. However, not receiving a positive response, he went back and moved an application for release of keys in respect of that property which is a matter of record. It is urged that this conduct is also corroborated by PW-2's admission, in the cross-examination that he had visited the accused. For these reasons, states the counsel, PW-2's deposition is untrustworthy on the question of alleged motive of the appellant. It was also stated that PW-1 Chanderwati, the deceased's mother did not support the prosecution

version about the appellant suspecting his wife's character. Learned counsel submitted that furthermore, if there were any truth in this regard, it would have been natural for the deceased to share it with her mother rather than PW-2, who was staying away from her family with his in-laws, for more than four years.

19. Summing up on the question of motive, it was urged that the trial court, on being presented with conflicting versions – on the one hand, one set of witnesses deposing that quarrels took place between the couple on the question of transfer of Dayal Pur property and on the other, the version being the alleged infidelity of the deceased, suspected by the accused, the trial court ought not to have rendered the findings as it did, holding that the appellant suspected his wife's conduct and character.

20. Learned counsel for the appellant next submitted that the trial court ought not to have, under the circumstances, and the evidence presented before it, accepted the prosecution version and disbelieved the appellant's defense about the facts surrounding the incident. He argued that the evidence of PW-3, 5 and 7 read together cumulatively, clearly pointed to the deceased and the accused returning on 21.10.2005 to their matrimonial home. PW-3 had spoken about heated arguments between the couple on account of labour and that the deceased had taken Rs. 30,000/from him on 21.10.2005. PW-5 corroborated the appellant's version as well as that he returned from Meerut at 11.00 AM and asked for the key to the premises upon which he was informed that the premises were lying unlocked. PW-5 even called the appellant when the appellant was asked to see the deceased's dead body and the house in disarray. PW-7 completely supported the appellant's version of the latter going-away to Meerut around 6.15 and 6.30 PM on 21.10.2005 with him (i.e. PW-7), to see his ailing father. Relying upon the evidence of PW-7, it was submitted that this witness also established that having accompanied the accused when he returned back to Delhi to his house at 11.00 AM and having approached PW-5 for the keys to the house and subsequently discovering the murder and theft in the house.

21. It was next argued that the prosecution version which found favor with the trial court about recovery of articles and Rs. 12,850/-cash is unbelievable. To substantiate the submission, learned counsel relied

upon Ex. PW-13/DA. The intimation received by the Police Control Room (PCR) at 11.30 AM had recorded that Rs. 25,000/-, along with a pair of ear-rings and mangalsutra was missing from the crime scene. The appellant had informed the police at that stage; this, submitted the counsel, found corroboration in the deposition of PW-17, who claimed to be on the spot. Learned counsel relied upon the cross-examination of this witness to say that according to PW-2, he (PW-17) was present and remained as the Investigating Officer (IO) of the case till 12.30 AM. Although he had mentioned about the recovery of a polythene bag containing the jewellery articles, Rs. 12,850/- in cash and Nokia phone, which was allegedly identified by PW-2, there was material contradiction with his previous statement. It was argued that PW-3 had clearly deposed in Court about having settled the accounts and given Rs.30,000/- to the deceased. Thus, though the appellant mentioned that Rs. 25,000/-was missing, what was allegedly recovered was far less. Furthermore, submitted the counsel, the description of the articles, allegedly recovered, i.e. Ex. P-1, Ex. P-15 were all artificial jewelry. In this respect, learned counsel relied upon the description of articles found in Ex. PW-2/C.

22. Learned counsel further submits that the entire story about the recoveries alleged to have been made from the appellant's father's house at his behest is unbelievable. In this regard, he relied upon the depositions of PW-2 who nowhere mentioned about recovery of any such article; particularly, the deposition that he remained on the spot with the police for about 2-2 ½ hours, after which he went to the police station with the accused and remained there up to 8.30 PM, has been relied on. It is argued that PW-2 nowhere mentioned about the visit to the accused's father's house or even disclosure statement made by him which led to the alleged discoveries. It is argued that there are material contradictions between depositions of PW-15, PW-17, PW-18, as well as PW-2 on the question whether the appellant made any disclosure statement at all that led to the seizure of the articles which were allegedly recovered.

23. Learned counsel also emphasized that the prosecution witnesses, particularly, PW-17 had admitted to being present at the time of recovery of the articles and also that family members of the accused were present and yet no attempt was made to associate them to witness the recoveries. It was also pointed-out that PW-7 contradicted PW-2 as to till what time latter was present with the police party and further that PW-2 nowhere

mentioned visiting the accused's house when the recoveries are said to have taken place. Learned counsel also stated that the accused never made a disclosure statement as was found by the trial court and for this purpose relied upon the contradiction between PW-15 and PW-2. PW-15 had stated that the appellant was interrogated only at the spot by PW-17, at the direction of PW-18. On the other hand, PW-2 deposed that PW-17 allegedly informed him in the police station that the accused had confessed to his guilt. It is also highlighted that even PW-18 admitted that the disclosure statement was not recorded that the accused had kept the articles allegedly in his father's house and further stated that the same could be recovered. Learned counsel also pointed-out that PW-18 denied the suggestion about presence of PW-2 in the police station till 8.30 PM.

24. It was argued on the basis of these discrepancies that the prosecution story about the alleged recovery of Rs. 12,850/- with jewelry articles is unbelievable and could not be made the basis for convicting the accused/appellant.

25. Lastly, it was argued that the prosecution story was unbelievable and full of material contradictions. The accused appellant knew the deceased since 1993 and had also stayed by her for nearly a decade, supporting her through rough times when she was facing dowry harassment and cruelty in her previous marriage. During that time, he became close to her as well as her family and was invited to functions such as marriages and other occasions. The appellant had even purchased the Dayal Pur property in 1996 in the deceased's name. Eventually, when the deceased was divorced from her previous husband, the accused married her. Both had separate businesses independent of each other. Learned counsel emphasized that like any other family, the deceased and the appellant could have quarreled at times for various reasons. PW-3's deposition that on the fateful day, about a quarrel which occurred regarding labor ought not to have been brushed-aside by the trial court which relied upon the depositions of PW-2 -an untrustworthy witness, to conclude erroneously that the appellant doubted his wife's character. Learned counsel further stated that the trial Court should not have rejected the defense version of a visit by the accused along with PW-7 to Meerut at 6.30 PM on 21.10.2005 and his return only the next morning at 11.00 AM. These facts were proved by the depositions of PW-5, 7 and DW-1. It was finally stated that the so-called recovery pursuant to a statement which

was never proved to be a disclosure statement ought not to have been taken into consideration by the trial court.

26. Learned counsel relied upon the decision of the Supreme Court reported as **Ram Gopal v. State of Maharashtra,** AIR 1972 SC 656; **Awadhi Yadav and Anr. v. The State of Bihar,** AIR 1971 SC 69 and **Bakhshish Singh v. State of Punjab,** AIR 1971 SC 2016, to submit that being a case of circumstantial evidence, it is incumbent upon the prosecution to fully establish all facts beyond reasonable doubt and link them so strongly that the entire story ought to inevitably and strongly point only to the hypothesis of the accused's guilt and further that the circumstances ought to be conclusive in nature and tended to exclude every hypothesis but the one proposed to be proved. In such case, argued the counsel, many findings were returned on the basis of surmises without credible proof of the facts and to cap it, the chain of evidence was incomplete, rendering the impugned judgment open to attack.

Prosecution's argument

27. The prosecution argues that the trial court's findings about motive, are sound, and based on proven facts. It relies heavily on the testimony of PW-2, and also says that PW-4 has supported the prosecution version that the accused used to doubt the deceased's character, even though the precise import about doubting the character did not come out in the Section 161 Cr.P.C statement. PW-2 stated that accused suspected on the deceased's character and when he enquired from the Appellant, after his confession before the police why he murdered his wife, he (the Appellant) said that she used to receive telephone calls and therefore, he murdered her. PW4 deposed that the appellant used to keep a track on the activities of the deceased, and was suspecting her of having some affairs with others. It was also submitted that even PW-3 mentioned about quarrels between the couple, in his testimony, and PW-5 mentioned about scuffles between them. Cumulatively, these depositions proved the motive for the murder, i.e. that the appellant suspected his wife's fidelity.

28. The learned APP argued that too much cannot be made of the other motive, sought to introduced by the prosecution witnesses regarding the appellant's intention for the murder, i.e. getting the house of his wife transferred to himself, in his name, as it was not projected at the relevant

time when police recorded their statements, during investigation. The trial court therefore, correctly regarded that part of their depositions, as unbelievable. The APP highlighted that while whereas the deceased's mother PW-1, denied the prosecution version, yet it was confirmed by the two brothers i.e. PW-2 and PW-4, who withstood cross examination on the point, and established it. It was also argued that the trial court's finding that the motive-of doubting the character of the appellant's wife not being beyond comprehension, as she had an affair with him (the appellant) despite her subsisting previous marriage cannot be faulted. It was urged that the improvements made by PW-2 and PW-4 were explanations, as correctly deduced by the trial court, about this aspect of motive. Counsel also submitted that even PW-1, the deceased's mother did mention about quarrel between the couple. She and PW-2 deposed having advised the couple to live peacefully, without quarreling.

29. It was argued that the Appellant cannot fault the trial court judgment on the ground that PW-2 had sought to meet him before recording of evidence, in March, 2006. It is submitted that often, relatives of deceased, in such circumstances may be driven to act and say something in the course of a trial, with a view to acquire his or her property, or other belongings. Such versions may not be accurate, or trustworthy. Yet, the testimonies of those witnesses, to the extent they support the prosecution story, (in this case, the prosecution story consistently being that the Appellant suspected his wife's character) have to be believed, as was done by the trial court, with which no exception can be taken or found.

30. The learned APP argued next that the trial court correctly rejected the defense version that the Appellant went to Meerut, visiting PW-7's ailing father. It is submitted that this was not believed by the trial court, because all indications pointed to this being a false story, created for the purpose of furnishing an alibi to the Appellant. It was urged that PW-7, whose deposition is relied upon, admitted to being the Appellant's relative; even the incident of his father's alleged illness was sought to be supported by reliance on the testimony of an interested witness, DW-1, who worked with PW-7's father. PW-7, in his deposition, was cross examined by the prosecution, with leave of court, since he contradicted the statement given to the police, under Section 161 of the Criminal Procedure Code; in that previous statement, he had mentioned about the

Appellant approaching him (PW-7) at 11:00 PM, at night, on the fateful day, and nervously mentioning about a fight with his wife. It was also urged that PW-5 never deposed about the presence of PW-7 with the Appellant. He was not cross examined on this aspect. Therefore, the Appellant sought to bolster his case, by ensuring that his relative, PW-7, supported the alibi, in this regard.

31. The learned APP submitted that the testimonies of PW-15, 17, 18 and PW-2 have to be read together, and minor discrepancies cannot be blown out of proportion. So viewed, their depositions established that the Appellant had made a statement, which led to discovery of articles from his father's residence. The evidence of what was found was consistent with the reporting of articles that were missing. On this aspect, it was submitted that PW-13 had contradicted himself while deposing that the deceased had taken Rs. 30,000/- on the day of the incident, whereas in the Section 161 statement he had stated that the amount of `Rs. 13,000/-had been taken. On this aspect, the prosecution cross examined him. If these circumstance were to be taken note of, as was done by the trial court, the recovery of Rs. 12,850/- and the jewelry articles could not be doubted, and stood established. As regards recovery of the Nokia mobile phone, the accused had not mentioned it in his statement to the police; yet, having regard to the totality of circumstances, that fact could not be doubted.

32. It was urged that the trial court's findings are unexceptionable and do not call for interference, since the prosecution was able to prove the case beyond reasonable doubt. It was urged that the Court should not be swayed by minor discrepancies in the testimony, particularly about motive of the accused, since the post death behavior of the parties or a witness, particularly a member of the deceased's family, pertaining to succession to assets, or in respect of property, might be an entirely unrelated factor, which should be viewed and judged independently of the other facts which may point to a strong motive.

Analysis and Findings

33. In this case, the first question to be addressed, is the relevance and importance of motive. As is apparent, the prosecution story is dependent on circumstantial evidence. The absence of ocular and other direct evidence means that existence of motive assumes importance. This

aspect was highlighted by the Supreme Court decision, in **Tarseem Kumar v. Delhi Admn.,** 1994 Supp (3) SCC 367, where it was held that:

> "6. The case of the prosecution solely rests on circumstantial evidence. As the case is based solely on the circumstantial evidence, the court has to be satisfied that: (i) The circumstances from which conclusion of guilt is to be drawn has been fully established. (ii) All the facts so established are consistent only with the hypothesis of guilt of the appellant and they do not exclude any other hypothesis except the one sought to be proved. (iii) The circumstances on which reliance has been placed are conclusive in nature. (iv) The chain of the evidence in the present case is such that there is no scope for any reasonable ground for a conclusion consistent with the innocence of the accused.
>
> …….
>
> …….
>
> 8. Normally, there is a motive behind every criminal act and that is why investigating agency as well as the court while examining the complicity of an accused try to ascertain as to what was the motive on the part of the accused to commit the crime in question. It has been repeatedly pointed out by this Court that where the case of the prosecution has been proved beyond all reasonable doubts on basis of the materials produced before the court, the motive loses its importance. But in a case which is based on circumstantial evidence, motive for committing the crime on the part of the accused assumes greater importance. Of course, if each of the circumstances proved on behalf of the prosecution is accepted by the court for purpose of recording a finding that it was the accused who committed the crime in question, even in absence of proof of a motive for commission of such a crime, the accused can be convicted. But the investigating agency as well as the court should ascertain as far as possible as to what was the immediate impelling motive on the part of the accused which led him to commit the crime in question."
>
> (emphasis added)

34. The undoubted facts are that the deceased and the Appellant,

were acquainted with each other for over a decade. He knew her, even during the subsistence of her troubled previous marriage. After she secured divorce, the couple got married. Both of them carried on their separate and individual businesses independently. The deceased's business was that of an ice-cream vending agency; this was done from a godown where she had employed some people, including her nephew PW-3. The prosecution had alleged that the couple had strained relationship, and used to quarrel often. The quarrels between the two have been spoken of generally by PW-3, PW-1 and PW-5. PW-3 mentioned about a quarrel, on the fateful day regarding some labor issues, between the husband and wife; PW-1, the mother, mentioned about some friction between the couple, and how they were counselled to resolve their differences. Both PW-1 and PW-3 differed in their depositions from the police statements, where they had apparently said about the nature of quarrels between the couple, and that the appellant had suspected the deceased's fidelity. However, they did not support that, and mentioned about quarrels generally; PW-3 said that the quarrel pertained to labour, on the fateful day. PW-5 deposed about scuffles between the couple. PW-2 and PW-4's testimony, on this aspect is relevant. It is only PW-2 who mentions about the Appellant suspecting the deceased's conduct. PW-4 no doubt, deposed that the Appellant used to keep track of the deceased's movements; yet this was an improvement, from his police statement; that part of the previous statement was confronted to him.

35. Some of the witnesses (PW-1 and PW-4) have talked about the reason for the quarrel between the couple being the ownership of the property, purchased in her name in 1996. PW-4 had admitted to the property being purchased by the Appellant in the deceased's name, in 1996 (during the subsistence of her previous marriage); he later clarified, volunteering, and deposed that the property was purchased with his father's money. PW-2 admitted visiting the Appellant in March 2006. The appellant had argued that this coincided with the date when the witness moved an application for release keys to the property, which had been sealed after the incident. It was suggested that the witness had his eye on the property, and had sought to persuade the Appellant that in case he gave up his claim for it, he (PW-2) would not depose against him. Although the date on which his application coincides with the visit, the Court is of opinion that this aspect alone could not have weighed against the said witness, whose deposition had to be considered in its

terms.

36. Now, it has come on record that PW-2 was married and had being living away from his parents, and with his in-laws for about four and a half years before the incident. Even though PW-1, Chandrawati, the deceased's mother, contradicted her previous statement recorded under Section 161, the court is of opinion that her version could not have been discarded, as was done by the trial court, in this case. This is because being the deceased's mother, there was more probability of the former confiding in her, rather than in a brother who had moved away from the family, to reside with her in-laws. Furthermore, PW-3 was the deceased's nephew, the son of another brother. Even though he did not support the previous statement made under Section 161, there was no reason why this aspect ought to have rendered his testimony unworthy of acceptance. He did mention about some quarrel between the couple, and yet clarified that it pertained to (handling) labour. All that PW-5 mentioned in his deposition was that the couple sometimes had scuffles. Even PW-4 (who mentioned that the appellant used to keep track of his wife's movements) admitted to improving upon his version recorded in the police statement, where he was silent about this aspect of motive; he also deposed that the quarrel between the husband and wife related to ownership of the Bhajanpur property.

37. The overall impression which one gathers from the evidence, on the question of motive is that at the highest, the Appellant and the deceased sometimes had differences, and used to quarrel; they were counselled, by family members (PW-1) to live peacefully. The conclusion of the trial court that the accused, (was incensed about his wife's behavior) and in his disclosure statement referred to her remarks *"Main Apni Marji Se Zindagi Ziyu Gee, Tujhe Jo Karna Hai Kar Ley Main Aaj Bhi Bahar Kar Ke Ayee Hoo Tu Rok Sakta Hai To Rok Ley"* and that

> "Such remarks are sufficient for a husband to loose his temper as it reflects to breach of matrimonial obligation by his spouse (here deceased wife). The conduct of wife as referred in above disclosure statement of accused lends support to prosecution version that accused had suspicion over character of his wife more so when his wife was unfaithful to her first husband during the subsistence of her marriage as she had courtship with accused himself…"

are incomprehensible, to say the least. The Court here had to see whether the material evidence could establish that the husband had suspected his wife's fidelity. Instead of directing the enquiry to this aspect, the trial court surmised, (on the assumption that the wife had openly dared the husband to do what he pleased, and mentioned about her supposed escapade) that it was not unnatural for the husband to suspect the deceased, since he had courted her during the subsistence of her previous marriage. Such conjecture, in this Court's view, amounted to taking a leap from suspicion to proof, to bolster speculation into an established fact. The prosecution had not leveled any such allegation, about the theory that the appellant suspected the deceased, since he had wooed her during her previous marriage. In these circumstances, in the absence of any supporting material save the allegedly confessional statement of the Appellant, it was unsafe to arrive at such a conclusion. The trial court also improperly relied on the said alleged statement, which was inadmissible. In this context, it would be necessary to quote the relevant discussion as to admissibility of such statements, made by the Supreme Court, in the judgment cited in this case, before the trial court, i.e. **Mohmed Inayatullah v. State of Maharastra,** 1976 (1) SCC 828:

> "…it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see **Palukuri Kotayya v. Emperor** (74 IA 65 : AIR 1947 PC 67 : 48 Cri LJ 533); **Udai Bhan v. State of Uttar Pradesh** (1962 Supp 2 SCR 830 : AIR 1962 SC 1116 : (1962) 2 Cri LJ 251)).
>
> 14. Before proceeding further, it is necessary to be clear about the precise statement which had been made by the appellant to the police officer. This statement finds incorporation in the panchanama, Ex. C, and we have reproduced an English rendering of the same earlier in this judgment. While considering this statement, the High Court observed that the accused had stated that "he had kept them (drums) there". We have perused the original record of the statement which is in Hindi, and we are of opinion that they no stretching of the words this statement can be so read or construed as has been done by the High Court. The copy Ex. C of the panchanama, in the paper book contains a

> correct English rendering of the same. What the accused had stated was : "I will tell the place of deposit of the three chemical drums which I took out from the Haji Bunder on first August". It will be seen that he never said that it was he who had deposited the drums at the place from which they were produced. It seems the latter part of the statement which was an outright confession of the theft, was not completely rules out of evidence and something of it was imported into and superimposed on the firstpart of the statement so as to fix the responsibility for deposit and possession of the stolen drums there, on the accused.
>
> 15. Having cleared the ground, we will now consider, in the light of the principles clarified above, the application of Section 27 of this statement of the accused. The first step in the process was to pinpoint the fact discovered in consequence of this statement. Obviously, in the present case, the threefold fact discovered was : (a) the chemical drums in question, (b) the place, i.e. the musafirkhana, Crawford Market, wherein they lay deposited, and (c) the accused's knowledge of such deposit. The next step would be to split up the statement into its components and to separate the admissible from the inadmissible portion or portions. Only those components or portions which were the immediate cause of the discovery would be legal evidence and not the rest which must be excised and rejected. Thus processed, in the instant case, only the first part of the statement, viz., "I will tell the place of deposit of the three chemical drums" was the immediate and direct cause of the fact discovered. Therefore, this portion only was admissible under Section 27. The rest of the statement, namely, "which I took out from the Haji Bunder on first August", constituted only the past history of the drums or theirtheft by the accused; it was not the distinct and proximate cause of the discovery and had to be ruled out of the evidence altogether…"

38. The result of the above discussion is that the Court is of the view that the prosecution could not establish the motive set up against the Appellant, i.e. that he suspected the deceased's fidelity and character, and therefore, planned her murder.

39. The next aspect which has to be considered is whether the

prosecution proved, beyond reasonable doubt, that the Appellant accused was present in the premises, at around the time of the incident. The prosecution version was that the Appellant was last seen with the deceased, and the needle of suspicion pointed to his involvement in the crime. For this, they had apparently relied on the testimony of PW-5 and PW-7. PW-5 had stated, previously, under Section 161, before the police, that he had witnessed the couple coming home at 8:30 in the evening. However, he did not support this version. PW-7 mentioned about leaving the Appellant's house in the evening of 21st October, 2005, with him, after having a cup of tea served by the deceased to the two of them, and PW-2, around 6:15 PM. He stated that they went to visit Meerut, to see his ailing father, and further that they returned on the morning of 22nd October, 2005, to the Appellant's house, around 11:00 AM, when he found the dead body of the deceased and the house in disarray. PW-7 was confronted with his previous statement, where he had apparently stated that the appellant had visited him at 11:00 PM on the night of 21.10.2005, displaying nervousness and mentioned about a quarrel with the deceased. The trial court, on these facts, ignored the testimonies of the witnesses, and preferred to rely on the statements recorded during the police investigation. Interestingly, the trial court relied on a part of the testimony of PW-5, to the effect that the couple used to have scuffles.

40. The Court at this stage notes that the duty of the prosecution is to establish that the guilt of the accused is proved beyond reasonable doubt. Here, the case is dependent on circumstantial evidence. The prosecution witnesses have not supported its version that the accused was present at the time of the incident, and was seen by others, much later to the time he claimed to have left for Meerut (6:15 PM). The trial court has discarded the versions of PW-5 and PW-7, to the extent they support the Appellant's alibi of having left the premises in the evening of the fateful day, with PW-7. It has, on the other hand, chosen to rely on the statements recorded by those witnesses, under Section 161. Now, one singular feature of the case is that on the question of the accused's presence, at the relevant time (of the incident) there is no clear testimony. The findings rendered are based on Section 161 versions, and not on the depositions recorded during the trial. On the other hand, a part of PW-5's deposition was accepted, as regards scuffle by the couple, and that the accused asked him about the position of the house lock, at 11:00 AM on 22nd October, 2005.

41. The Court disbelieved the Appellant's explanation that he left for Meerut, along with PW-7, at about 6:15 PM. It went on to hold, on the basis of inference drawn from a reading of depositions of PW-5 and PW-7, that his alibi was unbelievable. It is no doubt true that PW-2 does not mention having visited the Appellant's house on the date of incident, and being present at 6:15 PM. This aspect was highlighted during the prosecution's argument, before this court. However, it is to be remembered that the prosecution has the primary obligation to establish its case, by leading evidence, and cannot expect the defense to cross examine its witnesses on aspects which they (the witnesses) may not make any assertion. The silence of PW-5 about the presence of PW-7, and the defense's lack of cross examination on this score, is, similarly, of not much assistance to the prosecution. PW-5's deposition established that the Appellant had visited him on the morning of 22nd October, 2005, enquiring about the key to the premises; shortly before that, at 9:20 he found the lock in an unlocked position. It was sought to be argued that the accused could easily have found out that the gate was unlocked, visually, and that he went to PW-5 to ask for the key, intentionally to create the impression that he reached the spot at that time, and that his version is unbelievable, since PW-5 neither deposed about the presence of PW7 (who had stated having accompanied the appellant, and described the latter having secured the key from him) nor was PW-5 cross examined on this aspect. PW-5's omission no doubt results in a suspicion about the Appellant's version. At the same time, the two witnesses who mention about the time, to be later than 6:15 PM, in their previous statements under Section 161, resiled from that version, during the trial. Undoubtedly, there is some suspicion about this aspect. Yet, it would be relevant here to remember that in a criminal trial, the court has to be – at all times – mindful of the prosecution's obligation to cross the barrier between "may be so" as is inevitable in cases where there is no direct, or ocular evidence, to "must be so", as observed by the Supreme Court in **Jaharlal Das v. State of Orissa,** 1991 (3) SCC 27:

> "…the Court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and legal proof. It has been indicated by this Court that there is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions."

It would also be useful to extract the observations in this regard, in **Tanviben Pankajkumar Divetia v. State of Gujarat,** (1997) 7 SCC 156:

> "46. We may indicate here that more the suspicious circumstances, more care and caution is required to be taken otherwise the suspicious circumstances may unwittingly enter the adjudicating thought process of the court even though the suspicious circumstances had not been clearly established by clinching and reliable evidences. It appears to us that in this case, the decision of the Court in convicting the appellant has been the result of the suspicious circumstances entering the adjudicating thought process of the Court."

In view of the above discussion, and having regard to the material evidence, the court is of the view that the prosecution was unable to prove that the accused Appellant was present at the time of the incident, or he did not go to Meerut around 6:15 (at 8:30 or around 11 PM) as held by the trial court. PW-7 and PW-5's evidence, viewed cumulatively, disclose that the accused was last seen at the place of occurrence at 6:15 PM, after which he left for Meerut, with PW-7.

42. The next question is the one pertaining to recoveries said to have been made, pursuant to the appellant's disclosure statement. The prosecution version is that PW-17, PW-15, PW-13 and Constable Jeet Paul, reached the premises as soon as the wireless message was relayed about the incident. PW-17 deposed that he was the IO till 12:30, after which PW-18 took over the investigation. The version of these witnesses is that investigation continued at the spot, and the accused/Appellant was questioned. PW-17 says that after sustained questioning, the appellant confessed, and made a disclosure statement Ex. PW-15/A. The time when this happened has, however not been disclosed. PW-18 mentions that the disclosure statement was recorded at 6:45 PM on the day of the incident itself. PW-2 however, contradicts this, saying that he was at the spot with the police for 2 – 2-1/2 hours after reaching there soon after the incident, after which the accused was taken to the police station; he too went there and remained there till 8:30 PM. PW-2 does not mention anything about learning of the disclosure statement, except saying that PW-17 Rajesh Dogra had mentioned that the Appellant confessed to the

crime. The evidence of all the prosecution witnesses establishes that when the alleged recovery was made of the articles marked as exhibits, members of the Appellant's family were present, in his father's house. None of the police witnesses state that the interrogation or investigation shifted to the police station, as is deposed to by PW-2. Ex. PW-2/F the arrest memo contradicts PW-2's version that the interrogation scene shifted to the police station, where he remained till 8:30 PM. He is a witness to the arrest memo; yet he did not speak about it in the first instance, in his examination in chief, and exhibited the document, in the cross examination by the prosecution with leave of the Court. The arrest memo states that the accused was taken into custody at 5:30 PM, at the place of incident. PW-17, also contradicted himself as to what was recovered from the Appellant's father's house. Moreover, significantly, no TIP in respect of the articles was carried out, as conceded by PW-17.

43. As far as the recovery of articles itself goes, PW-17 does not recollect what were precisely found in the Appellant's father's house. The amount said to have been recovered is Rs. 12,850/-. The earliest intimation of the theft, even as per PW-13/A was the statement that besides jewellery, Rs. 25,000/-was missing from the crime scene. This was apparently intimated by the Appellant, as is evident from the deposition of PW-13. However, PW-15 mentions that the figure stated by the appellant's brother in law, as well as himself (the accused) was Rs. 13,000/-. On this aspect, PW-3 had deposed in his examination in chief that the deceased had collected Rs. 30,000/from him, on the day of the incident, when she went to the godown with the accused. However, he was confronted with his previous Section 161 statement where he had mentioned the figure as Rs. 13,000/-. These differing versions were papered over by the trial court, in its judgment, as an error, since Rs. 13,000/-and Rs. 30,000/-were phonetically similar. This Court is unpersuaded by such reasoning. The Appellant's consistent version was that the sum of Rs. 25,000/-was missing. This was corroborated by PW-13, and the intimation received and recorded by the PCR flash. The deposition of PW-3 in court also supports that the figure (Rs. 30,000/-) was closer to what was reportedly lost or missing (Rs.25,000/-). In these circumstances, the prosecution was unable to satisfy why only ` 12,850/-was found, and what happened to the rest of the amount. Similarly, the articles of jewelry found show that they were generally "silver type"

or silver plated articles, and not of gold. There is clear mention of some of them being artificial. It was sought to be proved that a mobile phone of Nokia make was also recovered. If indeed, the prosecution's story was that the phone belonged to the deceased, it is also a matter of record that no attempt was made by them to recover the call history, which could have corroborated the version of PW-5 that he had tried to contact her around 9:20 AM on the day of the incident, when he discovered that the house was unlocked. The personal search memo of the accused Ex. 2/G included a Nokia 2100 make mobile phone. The prosecution has not made any attempt to establish its case, through call tracing history on that mobile phone, which could have established, precisely, his whereabouts.

44. In the light of the above discussion, this Court is of the opinion that the prosecution version about the seizure of articles pursuant to a disclosure statement allegedly made by the appellant and the lack of any independent witness corroborating these facts, is unbelievable.

45. For the above reasons, this Court is of the view that the prosecution was unable to discharge the burden imposed upon it, i.e. to establish conclusively each circumstance, alleged against the accused, and also to prove beyond reasonable doubt that every link to each such circumstance had been established in turn beyond reasonable doubt, so as to point only to the guilt of the accused, and rule out any hypothesis pointing to his innocence. The appeal therefore has to succeed. The impugned judgment and order is hereby set aside; the appellant is acquitted and shall be set free forthwith; the bail bonds furnished in this case are hereby discharged. The appeal is consequently allowed.

ILR (2011) DELHI II 669
CRL. APPEAL

BRAHAM PARKASH @ BABLOO ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S. RAVINDRA BHAT & G.P. MITTAL, JJ.)

CRL. APPEAL NO. : 830/2001 DATE OF DECISION: 09.02.2011

Indian Penal Code, 1860—Section 302—As per prosecution case, appellant was neighbour of deceased—One month prior to the incident, appellant started teasing and following daughter of deceased who made complainant to father—Deceased reprimanded appellant—On day of incident when deceased accompanying his daughter for fetching water from municipal tap, appellant caught hold of daughter's hand and asked her to accompany him—Deceased and his daughter reprimanded appellant—Appellant attacked deceased with sharp edged weapon—Appellant managed to escape after brandishing knife—Appellant on arrest, got recovered dagger—Appellant convicted by trial Court u/s 302—Held, evidence of three eye-witnesses relied upon makes their presence at the spot doubtful—Unlikely that, 14 injuries could have been inflicted on deceased in the presence of eye-witnesses without their intervention—None cited as witness from the public—Eye-witness daughter did not even describe weapon of offence used for inflicting injuries in FIR—Despite claim of PW1 that she helped in the process of putting deceased in the Jeep for his removal to hospital, her clothes were not blood stained—None of the three eye-witnesses despite being family members,

accompanied deceased to hospital—Site of injuries on the body of deceased wrongly described by PW1—Rukka sent to P.S. after 5 hours of the incident—After clothes of appellant were seized and converted into sealed parcel, seal not handed over to any witness—As per record, recovered dagger was never deposited in the P.S.—Not known where dagger was kept by IO—Although recovered weapon was single edged as per opinion of autopsy surgeon, some injuries could be caused by doubled edged weapon or weapon having curve, clearly showing that two weapons were used by assailants—Testimony of eye-witnesses suspect in view of opinion of doctor indicating that in all probability two weapons had been used to inflict the injuries—Prosecution story belied by medical opinion—Appeal allowed—Appellant acquitted.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Mr. Vikas Yadav, Advocate with the Appellant in person.

FOR THE RESPONDENTS : Jaideep Malik, APP.

CASES REFERRED TO:

1. *State of Rajasthan* vs. *Teja Singh*, 2001 (3) SCC 147.
2. *Solanki Chimanbahi Ukabhai* vs. *State of Gujarat*, AIR 1983 SC 484.

RESULT: Appeal allowed.

G.P. MITTAL, J.

1. This is an Appeal against the judgment dated 22.09.2001 whereby the Appellant was held guilty of the offence punishable under Section 302 of the Indian Penal Code ('the Code') and order of sentence dated 25.09.2001 whereby the Appellant was sentenced to undergo imprisonment for life.

2. This case was registered on the basis of the statement of Ms.

Seema, daughter of the deceased Suraj Mal. According to the prosecution version Seema (PW-1) was a student of 10th standard. Braham Prakash @ Babloo (the Appellant) was her neighbour, living in a rented room. For about a month prior to the incident the Appellant started teasing Seema and would also follow her. The Appellant also expressed his desire to marry Seema as he was in love with her. According to the prosecution in spite of refusal by Seema, to agree to such expression of love by the Appellant, he persisted with the same. Seema accordingly made a complaint to her father Suraj Mal. The deceased reprimanded the Appellant and advised him not to harass Seema. The appellant took ill of advice given.

3. On 18.07.1995 at about 6:00 A.M. as usual, Seema accompanied the deceased to fetch water from the municipal tap in the DDA park near their house. The Appellant, who was sitting on a cot in the street, followed them and caught hold of Seema.s hand and asked her to accompany him. Seema declined to follow his dictates. At the same time deceased and Seema reprimanded the Appellant and freed her hand. 4. The Appellant took out a sharp edged weapon from his pocket and attacked her father on his chest, abdomen and arm. Seema raised an alarm as a result of which people from the street gathered. Her father was removed to the hospital, whereas the Appellant escaped brandishing his weapon and threatening if anybody approached him would be killed.

5. The Appellant pleaded not guilty to the charge framed under Section 302 of the Code. Consequently, the prosecution examined as many as 30 witnesses in order to bring home the guilt of the Appellant.

6. In his examination under Section 313 of the Code of Criminal Procedure (for short 'Cr.PC'), the Appellant denied that he would tease or chase Seema or that he had caused injuries with any dagger on the person of Suraj Mal. The Appellant denied that he got recovered dagger Ex.P1 from the bushes near railway lines, Patel Nagar. He took the plea that he was known only by the name of Braham Prakash and not as Babloo, that the dagger was planted on him and he has been falsely implicated in the case.

7. During the course of trial the arguments; i.e. that the so called eye witnesses had not seen the Appellant inflicting any injury; they were introduced later, simply to implicate the Appellant; there were contradictions between the ocular and medical evidence; the bloodstained

apparels of the Appellant seized at the time of his arrest, the dagger alleged to be recovered at the instance of the Appellant were found to be not containing "O" group blood of the deceased and thus were of no consequence, - did not find favour with him. The Trial Court took the view that preference had to be given to the ocular evidence vis-à-vis the medical evidence. The relation witnesses are the most natural and trustworthy who would not allow the real culprit to go scot free and would also not falsely implicate any innocent person. The contentions thus raised on behalf of the Appellant were rejected and he was convicted as aforesaid.

8. We have heard Mr. Vikas Yadav learned counsel for the Appellant and Mr. Jaideep Malik, learned Additional Public Prosecutor for the State and have perused the record.

9. In order to establish its case the prosecution produced three types of evidence; (i) Ocular evidence in the shape of testimony of PW-1 Seema, PW-2 Savita and PW-5 Muninder Singh; (ii) Link evidence in the shape of recovery of bloodstained trousers Ex.P6 and T-shirt Ex.P5 from the Appellant's person at the time of his arrest, disclosure statement of the Appellant, recovery of dagger Ex.P1 from the bushes near the Railway line Patel Nagar in pursuance to disclosure statement Ex. PW-10/A and the report of the Forensic Science Laboratory Ex. PX and PY. On this aspect, the prosecution examined PW-14 Ct. Ramesh Kumar, PW-13 Rakesh Gupta, PW-21 Suresh Chander, PW-28 SI Surinder Kumar Gulia, apart from PW-30 Inspector Ved Prakash, Investigating Officer of the case; and (iii) Medical evidence in the shape of testimony of PW-12 Dr. L.K. Barwa who had conducted the postmortem examination on the dead body of Suraj Mal and Post Mortem Report Ex.PW-12/A, PW-18 Dr. Deepak Verma who proved the MLC Ex.PW-18/A by which Suraj Mal was admitted to the casualty of Deen Dayal Upadhyay hospital and on medical examination was declared brought dead by the doctor.

10. First of all, we shall deal with the ocular evidence produced by the prosecution. As per PW-1 Seema when the Appellant had caught hold of her hand and had proposed to marry her, she as well as her father Suraj Mal reprimanded him which angered the Appellant. The Appellant took out a knife from his pocket and stabbed Suraj Mal on his chest, hand and abdomen. She raised an alarm which attracted persons from

the street. The Appellant, however, managed to escape brandishing his knife threatening members of the public that if anybody approached him, he would be stabbed to death. Seema was categorical that nobody dared to apprehend the Appellant who merrily escaped.

11. The Postmortem report Ex.PW-12/A coupled with testimony of PW-12 Dr. L.K. Barwa would show that there are as many as 14 injuries on various parts of the body of Suraj Mal. It is quite natural that as soon as the knife is taken out by the assailant and first blow is given any close relation and in this case, daughter of the deceased Seema, would immediately raise an alarm. It would definitely take some time in inflicting 14 injuries on the person of Suraj Mal when the attack is single handed. It is obvious that people from the street would immediately get attracted, particularly, in an unauthorized locality like Prem Nagar where this incident had taken place people stay in small houses and fetch water from the public tap in the morning at 6:00 AM during the hot and humid weather of July.

12. None has been cited as a witness from the public not only on the actual incident of stabbing but even immediately thereafter before escape of the Appellant except the sister and brother-in-law of PW-1 Seema. There is no gainsaying that many a time persons of the public even immediate neighbours as in the instant case where such incidents occur, in the same street, where the deceased was residing with his family, would not come forward in order to avoid going to the police and Courts. Witnesses related to the victim, therefore, cannot be disbelieved simply on the ground that they are interested in the success of the case or the punishment to the culprit. But, at the same time, the Court has to be convinced about the presence of such a witness at the spot and the witness is truthful and found to be reliable in the circumstances of the case.

13. When we turn to the facts of the instant case, we find that there are number of circumstances which would lead us to believe that the cited witnesses were not present at the spot at the time the injuries were inflicted on the person of Suraj Mal.

14. This case was registered on the basis of statement Ex.PW-1/A made by PW-1 Seema to Inspector Ved Prakash. A perusal of the statement would show that Seema had not even described the weapon

which had been used for inflicting injuries on the person of Suraj Mal. She was content to tell Inspector Ved Prakash that the injuries were inflicted with some sharp edged weapon. As per the prosecution, Suraj Mal and PW-1 Seema were going together to fetch water. The entire incident right from the catching the hand of Seema upto the fleeing of the Appellant had taken place in her presence. As stated earlier, as many as 14 injuries were inflicted on the person of Suraj Mal. Seema could have seen that the injuries were inflicted with a knife or a dagger or any other sharp weapon. Not describing the weapon would show that till that time the prosecution was in doubt as to what exactly was the weapon used for inflicting the injuries.

15. There were no less than 14 injuries on the person of Suraj Mal and as admitted by PW-1 Seema during her cross examination he was bleeding profusely (after injuries were inflicted). The report under Section 174 Cr. P.C. Ex.PW-10/C (Page 1 Column 11) would reveal that blood was oozing from the wounds. PW-1 Seema says that she had helped her father being put in the jeep, (for his removal to the hospital). Yet she stated that her clothes were not stained with blood. PW-2 Savita another daughter of Suraj Mal also similarly stated during her cross examination that when she reached the spot lot of people had gathered there, her father was lying on the ground and her sister Seema was lying on her father and was crying. At the same time, she added that there were no bloodstains on the clothes of Seema.

16. PW-30 Inspector Ved Prakash had returned to the spot from the hospital at about 9:00 AM and had met PW-1 Seema, PW-2 Savita and PW-5 Muninder Singh. He did not ask them as to why they had not accompanied the injured to the hospital. A perusal of Ex.PW-1/A reveals that the statement of Seema was recorded before 11:15 AM and rukka was sent to the Police Station at 11:15 AM. Obviously, Inspector Ved Prakash would have seized the clothes of Seema, if the same had been found to be smeared with blood.

17. In similar circumstances, in **State of Rajasthan vs. Teja Singh,** 2001 (3) SCC 147, it was held by the Supreme Court that the absence of blood on the clothes of the witness who had lifted the body of the deceased which was bleeding would make the presence of such witness to be doubtful.

18. In her statement Ex.PW-1/A as well as in the statement as PW-1 in the Court, Seema described the site of injury to be chest, abdomen and arm of Suraj Mal whereas according to the postmortem report Ex.PW-12/A there were number of injuries near the neck, clavicle and thighs of Suraj Mal. It is true that every witness cannot have a photographic memory of the scene of occurrence and this circumstance by itself may not have been of much significance yet this fact coupled with other circumstances would point out that perhaps Seema had just seen the deceased lying injured and not the actual incident.

19. PW-1 Seema stated in her examination-in-chief that she raised alarm when her father was being stabbed and people from the street had gathered there. The Appellant, however, escaped brandishing his knife threatening the persons of the public that they will be killed if any of them came near him. Admittedly, no member of the public was cited as a witness in this case. The incident had taken place in the street where PW-1 was residing along with other members of the family. According to the prosecution, the Appellant was also staying in a rented room nearby. PW-1 Seema would have recognized most of the persons of the street and would also have known many of them by name. Not joining any such person from the street in the circumstances would lead us to infer that the incident had not taken place in the manner as alleged by the prosecution.

20. Similarly when we turn to testimony of PW-2 Savita another daughter of Suraj Mal it is revealed that she and her brother-in-law Muninder Singh were attracted to the spot on account of the shouts of her sister Seema. She corroborated PW-1 that the Appellant had given knife blows to her father and then escaped brandishing the knife. During cross examination this witness deposed that when she reached the spot lot of people had already gathered there, meaning thereby that there were other people of the locality who had seen the incident as they had reached the spot prior to her reaching there. Inspite of this, not joining of any neighbour or citing anyone else as a witness makes the testimony of this witness suspicious. Moreover, Savita saw injuries being inflicted on her father but could not notice her father being removed to the hospital which is highly improbable. Being a close relation her priority would be to save the life and manage removal of her father to the hospital without any loss of time.

21. PW-2 Savita stated during her cross examination that when she reached the spot …… she found her father lying on the ground and her sister Seema lying over her father and crying. If this is so, PW-2 Savita had not seen the actual incident.

22. PW-5 Muninder Singh also claims to be a witness to the incident of stabbing of Suraj Mal by the Appellant. According to him he reached the spot on hearing an alarm by PW-1 Seema. It can be understood that PW-1 and PW-2 being young girls did not accompany their father to the hospital. Yet it is quite strange that PW-5 Muninder Singh did not accompany his father-in-law to the hospital. He stated that he did not even assist the police in keeping him (his father-in-law) in the van. He says that he did not go to the hospital on that day. It is highly improbable that such a close relation would neither accompany his injured father-in-law to the hospital nor would follow him to ensure proper medical assistance to him.

23. According to the prosecution PW-2 Savita and PW-5 Muninder Singh are the witnesses of the occurrence. Recording of the statement Ex.PW-1/A of PW-1 Seema was completed at 11:15 A.M. by Inspector Ved Prakash and then rukka was sent to the Police Station. From this, it can be inferred that Inspector Ved Prakash might have started taking down the statement of Seema at about 11:00 A.M. i.e. after about five hours of the incident, despite the fact that DD No.42-A in respect of incident was recorded in the Police Station Patel Nagar at 6:32AM. It is not believable that she would not even disclose the names of her sister and brother-in-law as eye witnesses to the incident.

24. All the circumstances coupled with the fact that the rukka was sent to the Police Station after about five hours of the incident would make us believe that in all probability the incident was not witnessed by any of the three eye witnesses cited by the prosecution and the FIR was lodged after due deliberation naming the Appellant as the assailant only on suspicion.

25. Learned counsel for the Appellant has drawn our attention to the various contradictions and discrepancies in the case of the prosecution which would further show that the investigation was not fairly conducted by Inspector Ved Prakash. The Appellant was arrested at Vijay Enclave, Dabri on the late evening of 18.07.1995, his clothes having washed

bloodstains were seized by the Investigating Officer at that time and sealed at the spot with the seal of 'VP'. It is, however, quite strange that the seal after use was not handed over to any witness and thus, the entire sanctity of sealing and depositing the case property with the MHC in Police Station loses credibility.

26. According to the prosecution the dagger Ex.P-1 was recovered at the instance of the Appellant in pursuance of the disclosure statement Ex.PW-10/A on 19.07.1995. But, as per the record, it was never deposited in the Police Station. We do not know where the dagger Ex.P-1 was kept by the Investigating Officer. The opinion Ex.PW-12/B of PW-12 Dr. L.K. Barwa that the injuries could be caused by the dagger Ex.P-1 loses any significance. The alleged recovery of the dagger Ex. P-1 at the instance of the Appellant itself becomes inconsequential.

27. Admittedly, this dagger Ex.P-1 is a single edged weapon. However, as per PW-12 Dr. L.K. Barwa all injuries except injuries No.3,6,8,10 and 11 could be caused by a double edged weapon. Dr. L.K. Barwa further opined that injuries no.3,6,9 and 10 were caused by a weapon having some bend or breakage or curve on the sharp side of the weapon; the prosecution, however, is unable to show any such weapon was used as dagger Ex.P-1 is not the kind of this weapon. This would clearly show that at least two weapons were used by the assailants / assailant in causing injuries on the person of Suraj Mal.

28. This contention raised on behalf of the defence was rejected by the Trial Court on the ground that when ocular evidence is cogent and clear much importance cannot be given to the medical evidence. In our view, the Trial Court fell into grave error in not appreciating the contention in the right perspective. The prosecution ought to have obtained a clarification from PW-12 Dr. L.K. Barwa that the injuries were possible from a single edged weapon, if the same are inflicted in a particular manner.

29. The testimony of eye witnesses itself becomes suspect in view of the opinion of the doctor which is indicative of the fact that in all probability two weapons had been used to inflict the injuries.

30. It is true that the medical evidence is generally of corroborative nature unless it completely rules out the possibility of the injury being

inflicted in the manner as deposed by the witnesses. In "**Solanki Chimanbahi Ukabhai vs. State of Gujarat,** AIR 1983 SC 484 it was observed as under:-

> "Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence."

31. In the instant case the prosecution story is completely belied by the medical opinion which makes the presence of three eye witnesses very doubtful.

32. We are of the view that there are grave doubts in the case of the prosecution. The impugned order therefore cannot be sustained; it is accordingly set aside. The Appeal is allowed and the Appellant is hereby acquitted. The bail bond is cancelled and sureties are therefore discharged.

ILR (20011) DELHI 679
CRL.

ROHTASH **....APPELLANT**

VERSUS

STATE **...RESPONDENT**

(MUKTA GUPTA, J.)

CRL. APPEAL NO. 359/1999 **DATE OF DECISION: 15.02.2011**

Indian Penal Code, 1860—Section 307—As per case of prosecution, accused poured kerosene oil on Samay Singh (complainant) when he was sleeping in his jhuggi and thereafter set him on fire as the appellant wanted to get jhuggi vacated because of which they had number of quarrels—Trial Court convicted appellant u/s 307—Held, prosecution case solely based on testimony of complainant, contradictions in statements of complainant before Court and his initial statement make prosecution case doubtful—Defence of accused that complainant (PW1) on day of incident was over-drunk and made nuisance which was resented by neighbours and it was under influence of liquor that he poured kerosene oil on himself and set himself on fire to threaten accused and his family members probable—Despite incident having taken place at 2.30 a.m. in thickly populated area, nobody brought injured to hospital, nor informed police—Complainant himself went to P.S. at 9.05 a.m. and got statement recorded after which he was taken to hospital—Enough time from 2.30 a.m. to 9 a.m. for complainant to reflect on statement to be made particularly in light of fact that if case of defence being proved, then complainant inflicted burn injuries on himself which would make him liable for offence u/s 309—In order to avoid himself from prosecution, complainant having implicated complainant who was objecting to his drunken behaviour cannot be ruled out—Statement of doctor PW6 in cross-examination that if person pours kerosene oil on himself, he can sustain injuries as mentioned in MLC makes defence case probable—Trial Court wrongly inferred that since MLC did not observe smell of alcohol, it was not a case of appellant pouring kerosene at 11.30 a.m. smell of alcohol would have gone—Defence of appellant that complainant under influence of alcohol, himself poured kerosene oil and set himself on fire proved by preponderance of probability—Appellant entitled to benefit of doubt—

Appeal Allowed.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Ms. Charu Verma, Advocate Along with Appellant.

FOR THE RESPONDENT : Mr. Pawan Bahl, APP for the State.

RESULT: Appeal allowed.

MUKTA GUPTA, J.

1. By the present appeal the Appellant challenged his conviction for offence punishable under Section 307 IPC and sentence of Rigorous Imprisonment for a period of five years and a fine of Rs. 5,000/- and in default of payment of fine to further undergo Simple Imprisonment for five months.

2. Briefly the prosecution case is that one Samay Singh admitted in the Safdarjang Hospital gave the statement that he has two brothers of which one Ram Kishan lives with his father and he along with the other brother Rohtas lives in Jhuggi at Mehram Nagar. Rohtas, the Appellant wanted to get the Jhuggi vacated from him and thus, used to quarrel a number of times. At about 2.30 a.m. when Samay Singh was sleeping in his Jhuggi his brother Rohtas poured kerosene oil over him. He woke up and asked his brother as to what he was doing on which Rohtas said that today he would die and set him ablaze by lighting a match stick. On his raising an alarm some tenants came and extinguished the fire. Samay Singh/Complainant then went to PS Palam Airport and lodged a report from where he was removed to Safdarjung Hospital by the police. On the statement of the Complainant case FIR No. 95/1996 under Section 307 IPC was registered at PS Delhi Cantt. After completion of investigation a charge sheet was filed. After recording the prosecution evidence and statement of the Appellant, he was convicted as above.

3. Learned counsel for the Appellant challenging the conviction contends that the statement of PW1 Samay Singh, the complainant suffers from contradictions. After putting himself on fire and extinguishing the same the ˇComplainant/Samay Singh went on his own to the police station and the said information given by him was recorded as DD No.

6 vide Ex.PW4/A. In the said statement the complainant/Samay Singh has attributed no reason for setting him ablaze by his brother Rohtas. As per the said statement the complainant only came to know when his body started burning. Though he stated that the neighbours extinguished the fire, nobody from the neighbourhood was examined except PW2 Mithlesh Kumar who turned hostile and has not supported the prosecution case. The doctor Mahesh Vyas PW6 in his testimony has stated that the injury on the Complainant could be self inflicted. Thus, in view of the contradictions in the statement of the complainant before the Court and his initial statement, the Appellant is entitled to be acquitted by giving him the benefit of doubt.

4. Learned APP for the State on the other hand contends that the incident took place around 2.30 a.m. at night. PW1 Samay Singh in his statement has clearly stated that while he was sleeping the Appellant poured kerosene oil over him. Even as per the suggestion given on behalf of the Appellant his presence on the spot is proved. In the MLC the Appellant has been named. The material witnesses have not been cross-examined and thus, by the testimony of PW1 duly corroborated by the testimony of PW6 the doctor, it has been proved beyond reasonable doubt that the Appellant committed the offence punishable under Section 307 IPC.

5. I have heard learned counsel for the parties and perused the record. The prosecution case is based on the sole testimony of PW1 Samay Singh. He has stated in his testimony that about 2.00-2.30 a.m. while he was sleeping the Appellant poured kerosene oil upon him and set him ablaze. PW1 Samay Singh had two Jhuggis and the Appellant had put him on fire because he was not agreeing to give him one Jhuggi. After he was put on fire he became unconscious and on regaining conscious he went to the police station and thereafter he was shifted to the hospital by the police officials. He remained in the hospital for about 20-22 days and he has exhibited his complaint Ex.PW1/A made by him to the police on 22nd February, 1996. PW1 in his cross-examination has been confronted with his earlier statements and it is also suggested to him that at that day he was over drunk and made nuisance which was resented by the neighbours and it is under the influence of liquor that he poured kerosene oil upon himself and put on fire to threaten the accused and his family members. PW2 Mithlesh Kumar a neighbour has not

supported the prosecution case. PW4 Constable Ombir Singh is the officer to whom PW1 Samay Singh first went on 22nd February, 1996 at about 9.05 a.m. and gave his statement Ex.PW4/A. According to PW4 in the said statement the complainant/Samay Singh stated that he was burnt by his brother Rohtas without any reason when he was sleeping and he had recorded his statement vide DD No. 6. A perusal of the Ex.PW4/A would show that though PW1 had named his brother however, the version given in it is totally contrary to his statement in EX.PW1/A and made in the court. As per him there was no reason why he poured kerosene oil and burnt him and secondly, he got to know only after his body was burnt. On confrontation it is clear that each statement made by PW1 in the court except naming the Appellant, is contrary to his previous statements.

6. PW6 Dr. Mahesh Vyas is yet another material witness. He has stated that this witness was admitted in the Hospital vide MLC Ex.PW6/A and he had received 30% deep burns. In the cross-examination he has stated that the history given was as told by the injured and the duration of injuries sustained was not more than 24 hours. According to the PW6 Dr. Mahesh Vyas if a person pours kerosene oil on himself he can sustain injuries as mentioned by him in the MLC.

7. The most material aspect in the present case is that the incident took place at 2.30 A.M. in the thickly polluted area, however, nobody brought the injured PW1 Samay Singh to the hospital nor informed the police. PW1 at 9.05 a.m. himself goes to the police station when his statement which is the first statement Ex. PW4/A was recorded and thereafter he was taken to the hospital by the police. Thus, there was enough time from 2.30 A.M. to 9.A.M. for PW1 to reflect on the statement to be made particularly in the light of the fact that if the case of the defence is true then PW1 inflicted burn injuries upon himself and he would have been liable for an offence punishable under Section 309 IPC. Thus, in order to avoid himself from prosecution the fact that he would have implicated his brother who was admittedly objecting to his drunken behavior as he was creating nuisance with the neighbours cannot be ruled out. This defence of the Appellant is further fortified by the statement of PW6 Dr. Mahesh Vyas who in cross examination has stated that if a person pours kerosene oil upon himself he can sustain injuries as mentioned by him in the MLC. The finding of the learned trial court that

the defence version that PW1 was overdrunk and made nuisance which was resented by the neighbours and the Appellant and so he poured kerosene oil upon himself and set ablaze under the influence of liquour cannot be believed as the MLC did not observe smell of alcohol is erroneous. The MLC did not even observe smell of kerosene though the admitted case of both the sides is that PW1 suffered burn injuries after pouring of kerosene oil. The injured reached the hospital at about 11.30 a.m. and by that time the smell of alcohol, which he would have consumed would have been washed out and thus gone unnoticed at the time of preparation of MLC. It is for this reason the fact that nobody informed the police, nor extinguished fire and PW1 went to the police station on his own after nearly 6½ hours assumes importance.

8. In view of the material contradictions in the testimony of PW1 which is not corroborated by any independent witness and in view of the evidence of PW6 that the injury could have been caused if a person pours kerosene oil on himself, thus proving the defence of the Appellant by preponderance of probability, I am of the opinion that the Appellant is entitled to the benefit of doubt.

9. Accordingly the appeal is allowed. The impugned judgment of conviction and order on sentence are set aside. Bail bond and the surety bond are discharged.

ILR (2011) DELHI II 684
LPA

MAJ. R.K. SAREEN ....PETITIONER

VERSUS

UOI & ORS. ....RESPONDENTS

(PRADEEP NANDRAJOG & SURESH KAIT, JJ.)

LPA NO. : 603/2002 DATE OF DECISION: 17.02.2011

Constitution of India, 1950—Writ Petition—Letters Patent Appeal—Army Act, 1950—Army Rule, 1954—R. 180-184—Appellant a 'Major'—Appointed as presiding officer in May 1992 of Board of Officers—To take over possession of building constructed by contractor for Army Aviation Corps at Jhansi—Got adverse ACR for the year 1991-92—Non-statutory representation rejected—ACR for 1992-93 graded as "high average officer"—Made statutory petition against the reviewing officer inter-alia alleging that Reviewing officer taken bribe from contractor—Wanted Appellant not to report deficiencies—Upon refusal out of vengeance, given low grading for 1992-93—Demanded initiating of inquiry against senior officer—Inquiry against senior failed to prove the allegation—Notice of censure given to Appellant—Filed reply to the notice—Minor penalty of censure given—Not promoted to next higher rank of Lt. Colonol—Filed writ petition on the three grounds—1. Grading in ACRs required to be communicated being below bench mark could not be considered by selection board—2. The finding of Court of inquiry and punishment as illegal, as was held in violation of Rule 180 which requires that in an inquiry affecting character or military reputation of an officer opportunity must be given to such officer to represent himself throughout the enquiry, cross-examining the witnesses which was not granted—3. Not supplied findings and directions of Court of Enquiry resulted in violation of principles of natural justice—Ld. Single Judge held—Adverse remark in the ACRs of 1992-93 expunged on statutory complaint of the Appellant—Not required to be communicated—Court of enquiry against senior filed on his complaint; not necessary to give opportunity of hearing; the appellant was given due opportunity of remaining present and cross-examining the witnesses when his character and military reputation likely to be adversely affected—Not entitled to be supplied with findings under R.184—Filed Letters Patent Appeal—

Held—As conceded by counsel for appellant, in view of law laid down by Supreme Court below bench mark ACR gradings of the members of Armed Force are not to be conveyed—Agreed with single judge R, 180 is to be applied in respect of a person in an enquiry only from the time such enquiry affects or is likely to affect the character or military reputation of said person—iii. Following judgment of *State of Orissa vs. Dr. Binapani Dei* AIR 1967 SC 1267 an administrative decision or order to be made consistent with rule of principles of natural justice—Rule of natural justice required 1. to give all information as to the nature of case which the party has to meet 2. To supply all information, evidence or material which the authority wishes to use against the party 3. To receive all relevant material which the party wishes to produce in support of his case 4. To given an opportunity to party to rebut adverse information, evidence or material appearing against such party—Award of punishment of censure an administrative action, GOS required to observe the rule of natural justice—Order of censure quashed—Respondents given liberty to proceed further in accordance with law—Appeal allowed in these terms.

The aforesaid decision, particularly the observations emphasized by us, brings out that Rule 180 is to be applied in respect of a person in an inquiry only from the time such inquiry affects or is likely to affect the character of military reputation of said person. **(Para 24)**

In the backdrop of aforesaid anvil of law, we proceed to examine that whether the Court of Inquiry was required to apply Rule 180 qua the appellant throughout the inquiry? **(Para 25)**

In the instant case, the Court of Inquiry was convened to investigate into the allegations leveled by the appellant against the respondent No.6. The main allegation leveled by the appellant against the respondent No.6 was that the

respondent No.6 had taken bribe from the contractors who had constructed the buildings for the defence personnel and wanted the appellant to not to report the deficiencies in the construction of the said buildings and that upon the appellant refusal to do so out of vengeance the respondent No.6 gave low grading to the appellant in his ACR for the year 1992-1993 as also influenced the respondent No.5 to give low grading to the appellant in his ACR for the period for the year 1991-1992. Thus, the primary task of the Court of Inquiry was to probe whether the respondent No.6 had indulged in corrupt practices by taking bribe from the contractors. While probing the same, some material came to the knowledge of the Court of Inquiry pointing towards the fact that the appellant had leveled false allegations against the respondent No.6 with an ulterior motive and to harass the respondent No.6. In that view of the matter, the inquiry conducted by the Court of Inquiry can be divided into two distinct periods. During the first period, the Court of Inquiry was probing into the allegations of acceptance of bribery leveled against the respondent No.6. During that period, the inquiry only affected the character and military reputation of the respondent No.6 and in no way whatsoever, whether directly or indirectly, affected or was likely to affect the character or military reputation of the appellant and thus the Court of Inquiry was not required to apply Rule 180 qua the appellant. During the second period, the inquiry invariably was likely to affect the character or military reputation of the appellant thus the Court of Inquiry was duty bound to apply Rule 180 qua the appellant during that period of the inquiry and the needful was done by the Court of Inquiry.

(Para 26)

In view of the above discussion, we find no merit in the ground No. (ii) advanced by the learned counsel for the appellant. **(Para 26)**

Rules of "natural justice" are not embodied rules. The phrase "natural justice" is also not capable of a precise definition. The underlying principle of natural justice evolved

under the common law, is to check arbitrary exercise of power by the State and its functionaries. Therefore, the rules of natural justice imply a duty to act fairly i.e. fair play in action. Initially, it was the general view that the rules of natural justice would apply to judicial or quasi-judicial proceedings and not to an administrative action. However, in the decision reported as **State of Orissa v Dr. Binapani Dei** AIR 1967 SC 1267 the distinction between quasi-judicial and administrative decisions was perceptively mitigated and it was held that even an administrative order or decision in the matters involving civil consequences, has to be made consistent with rules of natural justice. Since then the concept of natural justice has made great strides and is invariably read into administrative actions, involving civil consequences. **(Para 33)**

Rules of natural justice require that an adjudicating/ administrative authority should afford a reasonable opportunity of being heard to a party. The expression "reasonable opportunity of being heard" implies that the authority should: - (i) give all information as to the nature of the case which the party has to meet; (ii) supply all information, evidence or material which the authority wishes to use against the party; (iii) receive all relevant materials which the party wishes to produce in support of its case and (iv) give an opportunity to the party to rebut adverse information, evidence or material appearing against such party.

(Para 33)

In the instant case, in view of the fact that the award of punishment is an administrative action it was incumbent upon the GOC to observe the rules of natural justice while awarding said punishment to the appellant. A bare reading of the show cause notice dated 28.04.1995 and the order dated 25.08.1995, extracted in foregoing paras, shows that the findings, directions and recommendation of the Court of Inquiry weighed heavily with the GOC in awarding punishment of censure to the appellant. In such circumstances, the rules of natural justice require that the GOC ought to have

supplied the findings, directions and recommendations of the Court of Inquiry to the appellant along with the show cause notice dated 28.04.1995. The non-supply of the said documents to the appellant implies that the appellant has not been granted a reasonable opportunity of being heard and has resulted in violation of rules of natural justice.

(Para 35)

Important Issue Involved: (i) Award of punishment by way of censure is an administrative action (ii) In the administrative action principles of natural justice must be followed (iii) expression 'reasonable opportunity of being heard' means giving all information as to the nature of case which the party has to meet, supply all information, evidence or material to be used against party, to receive all relevant material which party wishes to produce in support of his case and an opportunity to rebut adverse information, evidence or material.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Ms. Rekha Palli, Advocate.

FOR THE RESPONDENTS : Ms. Jyoti Singh, Advocate.

CASES REFERRED TO:

1. *Major General B.P.S. Mander* vs. *Union of India & Ors.* W.P.(C) No.4393/2007.
2. *Lt.Gen.Surender Kumar Sahni* vs. *Chief of Army Staff & Ors.* W.P.(C) No.11839/2006.
3. *Major General Inder Jit Kumar* vs. *Union of India* (1997) 9 SCC 1.
4. *Union of India & Ors* vs. *Brigadier J.S. Sivia* 1996 MLJ SC 3.
5. *Brigadier J.S. Sivia* vs. *Union of India & Ors* (1994) 1 LLJ 906.

6. *State of Orissa* vs. *Dr. Binapani Dei* AIR 1967 SC 1267.

PRADEEP NANDRAJOG, J.

1. By May 1992 the appellant had earned promotion as a Major in the Indian Army and was appointed as Presiding Officer of a Board of Officers constituted to take over the possession of buildings constructed by contractors for the Army Aviation Corps at Jhansi.

2. In June 1992 the Initiating Officer of the appellant initiated the recording of the Annual Confidential Report (hereinafter referred to as the "ACR") of the appellant for the year 1991–1992 and graded the appellant 'Above Average Officer'. The problem started for the appellant when Brig.R.Gopal, respondent No.5, the Senior Reviewing Officer of the appellant, downgraded the appellant to „High Average Officer. and recorded following adverse remarks in the ACR:-

> "Inflated report by the IO and RO. Sareen is an high average officer. He is excessively obese and must reduce his over weight."

3. Aggrieved by the downgrading of his ACR grading and recording of adverse remarks in the ACR, the appellant made a non-statutory representation before the competent authority, which was rejected by the General Officer Commanding-in-Chief, Central Command by the order dated 20.03.1993.

4. In June 1993 Colonel M.Madhubani, respondent No.6, the Reviewing Officer of the appellant initiated the recording of the ACR of the appellant for the year 1992-1993 and graded the appellant as a 'High Average Officer'. Aggrieved by the grading given to him by respondent No.6, the appellant made a statutory petition dated 23.09.1993 against the respondent No.6 before the competent authority inter-alia primarily alleging that the respondent No.6 had taken bribe from the contractors who had constructed the buildings in question and wanted the appellant not to report the deficiencies in the construction of the said buildings and that upon the refusal of the appellant to do so, out of vengeance the respondent No.6 gave low grading to the appellant in the ACR for the year 1992-1993 as also influenced respondent No.5 to give low grading to the appellant in the ACR for the year 1991-1992. Furthermore, the appellant demanded the initiation of an inquiry against respondent No.6.

5. On 25.05.1994 the appellant wrote a letter to the Secretary,

Ministry of Defence, inter-alia, leveling the same allegations against respondent No.6 as contained in the afore-noted statutory complaint dated 23.09.1993 and demanding the initiation of an inquiry against respondent No.6.

6. On the basis of the afore-noted complaint dated 23.09.1993 made by the appellant against respondent No.6 and the letter dated 25.05.1994 written by the appellant to the Secretary, Ministry of Defence, the competent authority convened a Court of Inquiry to investigate into the allegations leveled by the appellant against respondent No.6.

7. The Court of Inquiry assembled for first time on 20.10.1994, on which date the appellant was examined as witness No.1. Thereafter the witnesses No.2 to 6 were examined before the Court of Inquiry on various dates.

8. On 27.10.1994 the appellant wrote a letter to the Presiding Officer of the Court of Inquiry, the relevant portion whereof reads as under:-

> "With due respect the witness requests to the Court that his reputation in the Army has been drastically affected due to the acts of Col M Madhubani and hence he be allowed to read his statement and then cross-examine him as per AR 180. Similarly the same procedure may please by allowed for other witnesses whose statements might lead to miscarriage of Justice.
>
> ….."

9. In response thereto, the Presiding Officer of the Court of Inquiry wrote a letter dated 28.10.1994 to the appellant, relevant portion whereof reads as under:-

> "….You have already been informed that provisions of AR 180 will be applied whenever applicable. Same has been done where essential.
>
> …."

10. On 21.01.1995 the Court of Inquiry invoked Rule 180 of the Army Rules, 1954. On the said date i.e. 21.01.1995, the Court of Inquiry handed over a copy of the statement of respondent No.6 who was examined as witness No.3 to the appellant and allowed the appellant to cross-examine respondent No.6. Thereafter the statements of witnesses

Nos.7 and 8 were recorded in the presence of the appellant who was allowed to cross-examine the said witnesses.

11. After considering the statements of the witnesses as also other facts and circumstances of the case, the Court of Inquiry came to the conclusion that there is no substance in the allegations leveled by the appellant against respondent No.6.

12. Vide Office Order No.36501/510/Arty/93/MS Compl/42/D (MS) dated 04.01.1995, Ministry of Defence, Government of India rejected the statutory complaint dated 23.03.1993 made by the appellant however it expunged the assessment made by respondent No.6 in the ACR of the appellant for the year 1992-1993 on the ground that the same was based on the subjectivity of respondent No.6.

13. On 28.04.1995 the GOC, Army Headquarters issued a show cause notice to the appellant and the same reads as under:-

> "SHOW CAUSE NOTICE
>
> 1. A staff C of I was ordered vide this HQ investigate into the allegations leveled by you against IC-19622W Col M Madhubani ex Co of 664 R & O Sqn in your statutory complaint dated 23 Set. 93 and complaint to Secy Boot of India (Min. of Def.) forwarded vide 4 Fd Regt letter No.27350/RKS/SC/22 dated 20th May 94.
>
> 2. The proceedings of the staff C of I were placed before GOC 1 Corps, who after having perused the same and after due consideration found you blameworthy of having leveled the following false allegation against your then CO, Col M. Madhubani:-
>
> (a) Pressurized you, as Presiding Officer of bd of offrs, to take over buildings of Army Avn Base, Jhansi with no obsn.
>
> (b) The CO having taken undue favors from the civ contractors.
>
> (c) The CO having denied you annual/casual/ lve to look after your handicapped mother.
>
> (d) On 29 Oct 92, out of vengeance CO raised an incident report in violation of paras 19 and 21 of SAO4/S/87.

(e) CO is anti national, above the law and that he has falsified documents.

3. You have also leveled following unfounded allegations:-

(a) letters with your forged signatures have been sent to various places, to defame you.

(b) Laid down procedures to process statutory complaint were flouted.

(c) That you were not ex for comd criterion report.

4. Accordingly, in pursuance with the directions of GOC 1 Corps, you are asked to show cause as to why administrative action by way of award of an appropriate censure by him, should not be taken against you for the aforesaid lapses, on your part.

5. Your reply, to this show cause notice, should this HQ within 30 days of receipt of this letter, failing which it shall be presumed that you have nothing to urge in your defence against the proposed actions an ex-parte decision will be taken.

6. A copy of the ibid C of I proceedings less findings, recommendations and directions is forwarded herewith for your perusal. The same may please be returned to this HQ along with your reply.

7. Please acknowledge receipt." (Emphasis Supplied)

14. In response thereto, the appellant submitted his reply. Vide Office Order 22500/16/A1 (PC) dated 25.08.1995 the GOC rejected the reply of the appellant and awarded the punishment of 'severe displeasure (recordable)' upon the appellant. The Office Order dated 25.08.1995 reads as under:-

"CENSURE

I have considered the reply to show cause notice submitted by you vide your letter NO 37350/RKS/SC/29 dated 11 Jun 95. You have merely confined your reply to tech aspects of the C of I and have apparently preferred yourself to the lapses mentioned in the show cause notice, despite the opportunity having been provided to you.

2. Being dissatisfied about the substantial compliance of AR 180 and other technical aspects of the C of I, I find you blameworthy for the lapses as mentioned in the show cause notice.

3. I, therefore, hereby convey to you my "Severe Displeasure (To be recorded") for the same." (Emphasis Supplied)

15. After the penalty was levied, at three consecutive selection boards, where the ACRs of the petitioner were considered and the penalty inflicted was taken note of, appellant could not earn a promotion to the next higher rank of Lt.Colonel.

16. Aggrieved by the action of the Selection Board of not promoting him to the rank of Lt. Colonel, the appellant filed a writ petition which was registered as W.P.(C)No.463/1998, inter-alia praying that: - (i) the appellant be promoted to the rank of Lt.Colonel from a retrospective date; (ii) the order dated 25.08.1995 awarding punishment of severe displeasure upon the appellant be quashed or not looked into by the Selection Board while considering the appellant for promotion to the rank of Lt.Colonel; and (iii) ACRs of the appellant for the years 1991-1992 and 1992–1993 be quashed or not looked into by the Selection Board while considering the appellant for promotion to the rank of Lt.Colonel.

17. A perusal of the impugned judgment passed by the learned Single Judge evidences that three grounds were advanced on behalf of the appellant before the learned Single Judge:- (i) The grading awarded in the ACRs to the appellant being below benchmark were required to be communicated to the appellant and being not communicated could not be considered by the Selection Boards; (ii) the findings and directions of the Court of Inquiry is illegal for the reason the proceedings of the Court of Inquiry were held in violation of Rule 180 of Army Rules 1954 which mandatorily requires that whenever any inquiry affects the character or military reputation of an officer, full opportunity must be given to such officer of being present throughout the inquiry and of cross-examining any witness whose evidence affects his character and military reputation; while in the instant case the statements of the witnesses Nos.2 to 6 were recorded by the Court of Inquiry in the absence of the appellant and that the Court of Inquiry did not give an opportunity to the appellant to cross-examine witnesses Nos.2,3,4 and 6 and as consequence thereof the show cause notice dated 28.04.1995 issued to the appellant as also the

order dated 25.08.1995 awarding the punishment of severe displeasure upon the appellant is also illegal inasmuch as the findings and directions of the Court of Inquiry formed the very basis of the said show cause notice and the order; (iii) while issuing the show cause notice dated 28.04.1995 it was incumbent upon GOC to have supplied the findings and directions of the Court of Inquiry to the appellant as the said documents formed the very basis of the case set up against the appellant; that the non-supply of said documents to the appellant has resulted in violation of rules of natural justice and thus the order dated 25.08.1995 awarding punishment of severe displeasure by way of censure to the appellant is liable to be quashed.

18. Vide judgment dated 15.02.2002 the learned Single Judge dismissed the petition filed by the appellant. With respect to ground (i), it was held by the Single Judge that in view of the fact that the department allowed the statutory complaint dated 23.09.1993 made by the appellant to a limited extent and expunged the adverse remarks contained in the ACR of the appellant for the year 1992-1993 the question of communication of adverse remarks contained in the ACR to the appellant does not arise at all in the present case. With respect to ground (ii), it was held by the Single Judge that the Court of Inquiry was held to inquire into the conduct of respondent No.6 and not the appellant and thus it was not necessary to give an opportunity to the appellant to remain present throughout the inquiry or to cross-examine all the witnesses examined before the Court of Inquiry. However when the witnesses made statements which had a tendency to affect the character or military reputation of the appellant it was obligatory on the part of the Court of Inquiry to give an opportunity to the appellant to cross-examine the said witnesses, which opportunity was given and availed by the appellant. In such circumstances, it cannot be held that the proceedings of the Court of Inquiry were held in violation of Rule 180 of Army Rules 1954. With respect to ground (iii), it was held by the Single Judge that Rule 184 of Army Rules 1954 when read in light of dictum of law laid down by Supreme Court in the decision reported as **Major General Inder Jit Kumar v Union of India** (1997) 9 SCC 1 shows that the appellant was not entitled to be supplied with the findings, recommendations and directions of the Court of Inquiry along with the show cause notice dated 28.04.1995 and thus there is no violation of the rules of natural justice. In any case, the order dated 25.08.1995 awarding punishment of severe displeasure upon the appellant

was not "merely" based on the findings of the Court of Inquiry; the appellant was given a full opportunity to defend himself and put forward his case before the competent authority and the order dated 25.08.1995 was passed by the competent authority after due consideration of the reply submitted by the appellant in response to the show cause notice dated 28.04.1995.

19. Aggrieved by the judgment dated 15.02.2002 passed by the Single Judge the appellant has filed the present appeal.

20. During the hearing of the appeal, learned counsel appearing for the appellant challenged before us the decision of the Single Judge with respect to grounds nos. (ii) and (iii). As regards ground (i) leaned counsel conceded that as regards members of the Armed Forces the law laid down by the Supreme Court is that below benchmark ACR gradings have not be conveyed to the officer concerned. With respect to ground (ii), it was urged by learned counsel for the appellant that the Single Judge failed to appreciate that since the Inquiry in question was conducted to investigate into the allegations leveled by the appellant against respondent No.6, in was implicit that if the allegation was held to be without any basis the effect thereof would have been affecting the military reputation of the appellant, wherefrom adverse consequences could flow; and indeed subsequent events have shown that adverse consequences did flow and thus counsel urged that qua the appellant Rule 180 of the Army Rules 1954 was liable to be fully complied with. In support of the said plea, particular emphasis was placed by the learned counsel on the decision dated 3.9.2007 of a Division Bench of this Court in W.P.(C) No.4393/2007 '**Major General B.P.S. Mander v Union of India & Ors.'** With respect to ground (iii), learned counsel for the appellant urged that the learned Single Judge has not correctly appreciated the tenor of Rule 184 of Army Rules 1954 and the dictum of law laid down by Supreme Court in **Major General Inder Jit Kumar's** case (supra) and has wrongly come to the conclusion that the petitioner was not entitled to be supplied with the findings, recommendations and directions of the Court of Inquiry along with the show cause notice dated 28.04.1995.

Ground No. (ii)

21. As evident from the foregoing paras, the ground (ii) advanced by the learned counsel for the appellant is predicated upon Rule 180 of

the Army Rules, 1954, which reads as under:-

> **"180. Procedure when character of a person subject to the Act is involved –** Save in the case of a prisoner of war who is still absent whenever any inquiry affects the character or military reputation of a person subject to the Act, full opportunity must be afforded to such person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence in his directions, affects his character or military reputation and producing any witnesses in defence of his character or military reputation.
>
> The presiding officer of the court shall take such steps as may be necessary to ensure that any such person so affected and not previously notified receives notice of and fully understands his rights, under this rule."

22. A bare reading of Rule 180 shows that the sine qua non for application of Rule 180 in respect of a person in an inquiry is that the inquiry must affect or likely to affect the character or military reputation of that person. The necessary corollary thereof is that Rule 180 should be applied from the time when the inquiry affects or is likely to affect the character or military reputation of a person. Where an inquiry is directed against a specific person Rule 180 should be applied in respect of said person from the very inception of the inquiry for in such a case the character or military reputation of the said person would be affected or likely to be affected from the very inception of the inception of the inquiry. However where an inquiry is a general inquiry and not directed against any individual but affects or likely to affect character or military reputation of a person Rule 180 should be applied in respect of such person from the time the inquiry affects or is likely to affect his character or military reputation for in such a case the character or military reputation of the said person would be affected or likely to be affected only during the course of the inquiry and not from the very inception of the inquiry. Similarly where an inquiry is directed against a person but affects or is likely to affect the character or military reputation of another person Rule 180 should be applied in respect of such other person from the time the inquiry affects or likely to affect his character or military reputation.

23. In W.P.(C) No.11839/2006 **'Lt.Gen.Surender Kumar Sahni v Chief of Army Staff & Ors.** decided on 11.01.2007 a general Court of Inquiry was convened to investigate into the irregularities committed in the procurement of rations for the army. The petitioner who was working as Director General of Supply and Transport Service of Army Corps was summoned as a witness in the said inquiry. The Court of Inquiry recommended the initiation of the disciplinary proceedings against the petitioner. The petitioner filed a petition under Articles 226 and 227 of Constitution of India before a Division Bench of this Court challenging the recommendations of the Court of Inquiry primarily on the ground that the Court of Inquiry did not apply Rule 180 qua the petitioner. It was held by the Division Bench that the Court of Inquiry committed an illegality in not applying Rule 180 in respect of the petitioner during the inquiry even though the inquiry in question affected the character and military reputation of the petitioner. While interpreting Rule 180, the Division Bench observed as under:-

> "26. Holding of a court of enquiry may not be essential and would be at the discretion of the competent authority but once the authority exercises its powers to hold such an enquiry and where the enquiry affects or is likely to affect the character or military reputation of a person subject to the Act, then compliance to the requirements of Rule 180 would be mandatory. The language of the Rule is certain and unambiguous, capable of only one interpretation i.e. that to afford a full opportunity in terms of this provision is the responsibility of the competent authority. This obligation and burden is incapable of being shifted at the initial stage. Once an opportunity is afforded at the initial stage then it is for the concerned Officer whose character or military reputation is being affected or is likely to be affected, to exercise the option in regard to what evidence he wishes to give, which witnesses he wishes to cross-examine and what defense, if any, he wishes to lead. These are the matters which squarely fall for decision within the domain of the concerned person subject to the Act. The arguments advanced on behalf of the respondents that the obligation and onus lies upon the delinquent to ask for the protection or opportunity in terms of the provisions is ex facie contrary to the spirit of the provision. Neither the Rule does attempt such an interpretation nor does it suggest such a

course of action. Even in normal course such an approach is incapable of being implemented in actual practice. Initiation of an enquiry as contemplated under Rule 180 lies in the discretion of the competent authority and there would be no occasion for an Officer to ask for a protection or rights available to him under this rule, without notice. Thus, to notify the officer concerned of initiation of such proceedings or the likelihood of his reputation or character being affected in the process of the enquiry would undoubtedly be the duty of the competent authority.

27. The language used by the framers of the Rule in no way supports the contention raised on behalf of the respondents that on its correct dissection, the Rule places a mandatory obligation upon the person subject to the Army Act to ask for the grant of protection specified in the Rule. The Rule enjoins upon the concerned authorities an unequivocal duty to give notice and provide full opportunity to the person whose character or military reputation is likely to be affected by the enquiry in terms of Rule 180. Of course, it also places a burden upon such an officer as to what extent and how he wishes to exercise the opportunity provided to him. The option to cross-examine the witnesses produced, which witnesses he wishes to examine and what evidence he wishes to lead as defense, are the basic features in relation to which he has to exercise his choice and to that extent the Rule does place an obligation upon the delinquent person. This burden no way displaces or reduces the significance of the duties of the authorities and protections available to the Officer. The one in no way destroys or diminishes the obligatory value of the other. Whatever be the stage of the proceedings and whenever the enquiry is likely to affect or affects the character or military reputation of a person, at that very moment, it is required of the authority to sincerely and objectively comply with the requirements of the Rule." (Emphasis Supplied)

24. The aforesaid decision, particularly the observations emphasized by us, brings out that Rule 180 is to be applied in respect of a person in an inquiry only from the time such inquiry affects or is likely to affect the character of military reputation of said person.

25. In the backdrop of aforesaid anvil of law, we proceed to

examine that whether the Court of Inquiry was required to apply Rule 180 qua the appellant throughout the inquiry?

26. In the instant case, the Court of Inquiry was convened to investigate into the allegations leveled by the appellant against the respondent No.6. The main allegation leveled by the appellant against the respondent No.6 was that the respondent No.6 had taken bribe from the contractors who had constructed the buildings for the defence personnel and wanted the appellant to not to report the deficiencies in the construction of the said buildings and that upon the appellant refusal to do so out of vengeance the respondent No.6 gave low grading to the appellant in his ACR for the year 1992-1993 as also influenced the respondent No.5 to give low grading to the appellant in his ACR for the period for the year 1991-1992. Thus, the primary task of the Court of Inquiry was to probe whether the respondent No.6 had indulged in corrupt practices by taking bribe from the contractors. While probing the same, some material came to the knowledge of the Court of Inquiry pointing towards the fact that the appellant had leveled false allegations against the respondent No.6 with an ulterior motive and to harass the respondent No.6. In that view of the matter, the inquiry conducted by the Court of Inquiry can be divided into two distinct periods. During the first period, the Court of Inquiry was probing into the allegations of acceptance of bribery leveled against the respondent No.6. During that period, the inquiry only affected the character and military reputation of the respondent No.6 and in no way whatsoever, whether directly or indirectly, affected or was likely to affect the character or military reputation of the appellant and thus the Court of Inquiry was not required to apply Rule 180 qua the appellant. During the second period, the inquiry invariably was likely to affect the character or military reputation of the appellant thus the Court of Inquiry was duty bound to apply Rule 180 qua the appellant during that period of the inquiry and the needful was done by the Court of Inquiry.

27. In view of the above discussion, we find no merit in the ground No. (ii) advanced by the learned counsel for the appellant.

Ground No. (iii)

28. Whether the non-supply of the findings, recommendations and directions of the Court of Inquiry to the petitioner along with the show cause notice dated 28.04.1995 has resulted in the violation of rules of

natural justice and vitiated the said show cause notice?

29. The punishment of censure by way of severe displeasure has not been prescribed as a punishment in the Army Act. The source of punishment of censure by way of severe displeasure is to be found in the instructions contained in the letter No.32908/AG/DV-1 dated 05.01.1989 issued by the Adjunct General, the relevant portion whereof reads as under:-

> "2. The award of censure to an Officer or JCO is an administrative action, in accordance with the customs of the service. It takes form of "Severe Displeasure (either recordable or otherwise) or "Displeasure" of the officer awarding the censure, as specified in the succeeding paragraphs.
>
> ….
>
> 5. Censure is awardable where the act, conduct or commission is of minor nature, both in nature and gravity. An offence of serious nature under the Army Act will not be disposed of by award of censure but will be dealt with by initiating a disciplinary action. Attention, in particular, is invited to para 432 of the Regulations for the Army, 1962, which stipulates that persons committing offences involving moral turpitude, fraud, theft, dishonesty and culpable negligence involving financial loss to public or regimental property must be tried by a court martial or prosecuted in a Civil court. Such cases will not be disposed summarily or by administrative action. In view of the foregoing, there should be no occasion for offences involving moral turpitude, misappropriation, financial or other offences of serious nature being dealt with by award of censure when disciplinary action is feasible/possible. If for some reason, a case of this nature does come across, where trial is inexpedient or impracticable, administrative action for termination of service of the delinquent person should be initiated.
>
> 6. Cases which are not of minor nature and which do not involve moral turpitude, fraud, theft and dishonest and where trial by GCM is either not practicable either being time-barred or is not expedient due to other reasons may in appropriate cases at the discretion of the GOC-in-C be forwarded to Army Headquarters

> for consideration to award of censure by the COAS, so as to avoid resorting to the extreme step of action under the provisions of Army Act Section 19 read with Army Rule 14." *(Emphasis Supplied)*

30. The validity of the afore-noted letter dated 05.01.1989 came up for consideration before a Division Bench of Himachal Pradesh High Court in the decision reported as **Brigadier J.S. Sivia v Union of India & Ors** (1994) 1 LLJ 906 HP wherein it was held that the aforesaid letter has no legal sanction and thus Chief of Army Staff or other senior officers has no power to award punishment of censure to any officer or Junior Commissioned Officer.

31. The correctness of the afore-noted decision of Himachal Pradesh High Court came up for consideration before Supreme Court in the decision reported as **Union of India & Ors v Brigadier J.S. Sivia** 1996 MLJ SC 3. After examining various provisions of Army Act, 1950 and Army Rules, 1954, it was held by the Court that the view taken by the Himachal Pradash High Court that the aforesaid letter dated 05.01.1989 issued by Adjunct General is incorrect. The relevant observations of Supreme Court are being noted herein under for a ready reference:-

> "8. It is obvious from various documents mentioned above that the award of censure is being regulated by "Customs of the service." The Army Order dated January 24, 1942 takes us to August 26, 1927 and as such there is reasonable basis to assume that the award of censure is being governed by the "Customs of the service" right from the inception of the Indian Army. That being the position the award of censure is the binding rule of the army service. Section 3(v) of the Act and Regulations 9 of the Regulations recognize the existence of "customs of the service". The definition of "Commanding Officer" clearly says that in the discharge of his duties as a Commanding Officer, he has to abide by the "customs of the service". Similarly Regulation 9 which lays down the duties of the Commanding Officer, specifically says that the Commanding Officer has to discharge his functions keeping in view the regulations and the 'customs of the service'. From the scheme of the Act, Rules, Regulations and the various Army orders issued from time to time, it is clearly beyond doubt that the award of censure is a part of the

custom of the Army and has the binding force." (Emphasis Supplied)

32. From the aforesaid, it is clear beyond doubt that the award of punishment of censure by way of severe displeasure to an officer or Junior Commissioned Officer is an administrative action.

33. Rules of "natural justice" are not embodied rules. The phrase "natural justice" is also not capable of a precise definition. The underlying principle of natural justice evolved under the common law, is to check arbitrary exercise of power by the State and its functionaries. Therefore, the rules of natural justice imply a duty to act fairly i.e. fair play in action. Initially, it was the general view that the rules of natural justice would apply to judicial or quasi-judicial proceedings and not to an administrative action. However, in the decision reported as **State of Orissa v Dr. Binapani Dei** AIR 1967 SC 1267 the distinction between quasi-judicial and administrative decisions was perceptively mitigated and it was held that even an administrative order or decision in the matters involving civil consequences, has to be made consistent with rules of natural justice. Since then the concept of natural justice has made great strides and is invariably read into administrative actions, involving civil consequences.

34. Rules of natural justice require that an adjudicating/administrative authority should afford a reasonable opportunity of being heard to a party. The expression "reasonable opportunity of being heard" implies that the authority should: - (i) give all information as to the nature of the case which the party has to meet; (ii) supply all information, evidence or material which the authority wishes to use against the party; (iii) receive all relevant materials which the party wishes to produce in support of its case and (iv) give an opportunity to the party to rebut adverse information, evidence or material appearing against such party.

35. In the instant case, in view of the fact that the award of punishment is an administrative action it was incumbent upon the GOC to observe the rules of natural justice while awarding said punishment to the appellant. A bare reading of the show cause notice dated 28.04.1995 and the order dated 25.08.1995, extracted in foregoing paras, shows that the findings, directions and recommendation of the Court of Inquiry weighed heavily with the GOC in awarding punishment of censure to the appellant. In such circumstances, the rules of natural justice require that

the GOC ought to have supplied the findings, directions and recommendations of the Court of Inquiry to the appellant along with the show cause notice dated 28.04.1995. The non-supply of the said documents to the appellant implies that the appellant has not been granted a reasonable opportunity of being heard and has resulted in violation of rules of natural justice.

36. Before proceeding further, let us analyze Rule 184 of Army Rules relied upon by the Single Judge to justify non-supply of the findings, recommendations and directions of the Court of Inquiry to the appellant. Rule 184 of the Army Rules reads as under:-

> **"184. Right of certain persons to copies of statements and documents –** (1) Any person subject to the Act who is tried by a court-martial shall be entitled to copies of such statements and documents contained in the proceedings of a court of inquiry, as are relevant to his prosecution or defence at his trial.
>
> (2) Any person subject to the Act whose character or military reputation is affected by the evidence before a court of inquiry shall be entitled to copies of such statements and documents as have a bearing on his character or military reputation as aforesaid unless the Chief of Army Staff for reasons recorded by him in writing, orders otherwise." (Emphasis Supplied)

37. As noted in foregoing paras, clause (1) of Rule 184 was read by the Single Judge to mean that a person is not entitled to receive the findings/recommendations of the Court of Inquiry. In this regards, suffice would it be to state that the learned Single Judge failed to note that Rule 184 is applicable in cases where a person is tried by the Court Martial, which was not the position in the instant case.

38. The sum and substance of the above discussion is that the order dated 25.08.1995 passed by the GOC awarding punishment of censure by way of severe displeasure to the appellant is liable to be quashed as the same is violative of rules of natural justice. Ordered accordingly.

39. It would be open to the respondents to take corrective action by supplying to the appellant the findings, recommendations and directions of the Court of Inquiry including the evidence recorded during the Court

of Inquiry and thereafter permit the appellant to file a response to the show cause notice issued to him and in light of the response filed to pass a fresh order.

40. Should the respondents choose to proceed ahead as aforesaid, depending upon the final order passed further action would be taken. If the final order inflicts an administrative punishment upon the appellant, that would be the end of the matter as regards the respondents. But, should the respondent choose not to proceed ahead or after proceeding ahead inflict no administrative punishment upon the appellant, Review Selection Board be constituted to consider the candidature of the appellant for promotion to the rank of Lt.Colonel and needless to state the Review Selection Board would not consider the penalty imposed upon the appellant.

41. The appeal is allowed in terms of paras 38 to 40 above.

42. There shall be no order as to costs.

ILR (2011) DELHI II II 705
FAO

WING COMM. S. SAWHNEY ....APPELLANT

VERSUS

UNION OF INDIA ....RESPONDENT

(MOOL CHAND GARG, J.)

FAO NO. : 143/1997 DATE OF DECISION: 17.02.2011

Railways Act, 1989—Section 124 A—Claim petition—Fatal Accident—Grant of Compensation—Appellant dependent of deceased Sub-Lt. Samir Sawhney. Naval Officer—While travelling in a train died in untowards accident—Appellant contended: Death had taken place because of accidental fall from train on 16.10.1994—

Deceased sustained head injuries resulting in his death—Appellant bonafide passenger having valid ticket—Respondent denied the claim—Ground—Deceased was standing on the foot board and excessively leaning outside when hit by signal post—Relied upon the report of superintendent—No evidence led by respondent—Observed—It was not a case of railway death, a suicide or result of self inflicted injury—Also not their case, died due to his own criminal act or in the state of intoxication or he was insane or died due to any natural cause or disease—Only in such eventualities Section 124 A bar the payment of compensation—Criminal act envisaged under Clauses C. of Section 124 A must have an element of malicious intent or mens rea—Standing at the open door compartments of a running train may be negligent act—It is certainly not a criminal act—Held—The appellant entitled to compensation fixed as per scheduled Rs.4 lakhs with interest @ 9% per annum—Appeal allowed.

Important Issue Involved: Under Section 124 A, Railways Act in case of untowards accident person is entitled to compensation even if the same has resulted in on account of his own negligence.

[Gu Si]

APPEARANCES:

FOR THE APPELLANT : Ms. Kamini Jaiswal Mr. Divyesh Pratap Singh, Advocates.

FOR THE RESPONDENT : Mr. Kumar Rajesh Singh, Advocate.

CASES REFERRED TO:

1. *Smt. Vidyawati* vs. *Union of India,* FAO No. 418/2008 decided on 12.01.2011.
2. *Jameela & Ors.* vs. *Union of India,* 2010 ACJ 2453.

MOOL CHAND GARG, J. (Oral)

1. This is an appeal filed by the appellant who are dependents of the deceased Sub-Lt. Samir Sawhney, a Naval Officer, posted at Cochin who died in an untoward accident as claimed by the appellants while travelling from train No. 2625 (Kerala Express) from Cochin to New Delhi. According to the appellants the death has taken place because of the accidental fall from the train on 16.10.94. The deceased sustained head injuries leading to death. The appellant was a bona fide passenger inasmuch as there is no dispute that he was having a valid ticket.

2. The case of the respondent in having denied the claim was that the deceased after getting down near Manikgarh station when the train stopped for signal to watch a crane, went upto Guard's brake and attempted to board the train when the train started and was standing on the footboard and excessively leaning outside and was hit by the signal post. In support of the aforesaid plea, they have relied upon the report of the Superintendent. However, admittedly, no evidence has been led by the respondent.

3. The case of a person who might have been standing on the footboard, may be negligently, has been dealt with by the Hon'ble Supreme Court in the case of **Jameela & Ors. Vs. Union of India,** 2010 ACJ 2453. In that case taking note of a similar fact with respect to a passenger who was travelling on a valid ticket, the Apex Court has interpreted provisions of Section 124A along with the explanation attached thereto and have observed as follows:

> "5. We are of the considered view that the High Court gravely erred in holding that the applicants were not entitled to any compensation under Section 124A of the Act, because the deceased had died by falling down from the train because of his own negligence. First, the case of the Railway that the deceased M. Hafeez was standing at the open door of the train compartment in a negligent manner from where he fell down is entirely based on speculation. There is admittedly no eyewitness of the fall of the deceased from the train and, therefore, there is absolutely no evidence to support the case of the Railway that the accident took place in the manner suggested by it. Secondly, even if it were to be assumed that the deceased fell from the train to his

death due to his own negligence it will not have any effect on the compensation payable under Section 124A of the Act.

6. Chapter XIII of the Railways Act, 1989 deals with the Liability of Railway Administration for Death and Injury to Passengers due to Accidents. Section 123, the first section of the Chapter, has the definition clauses. Clause (c) defines "untoward incident" which insofar as relevant for the present is as under:

> 123 (c) untoward incident means-
>
> (1) (i) xxxxxxxx
>
> (ii) xxxxxxxx
>
> (iii) xxxxxxxx
>
> (2) the accidental falling of any passenger from a train carrying passengers.

Section 124A of the Act provides as follows:

> 124A. Compensation on account of untoward incident. - When in the course of working a railway an untoward incident occurs, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitle a passenger who has been injured or the dependant of a passenger who has been killed to maintain an action and recover damages in respect thereof, the railway administration *shall, notwithstanding anything contained in any other law, be liable to pay compensation* to such extent as may be prescribed and to that extent only for loss occasioned by the death of, or injury to, a passenger as a result of such untoward incident:
>
> Provided that no compensation shall be payable under this section by the railway administration if the passenger dies or suffers injury due to -
>
> (a) suicide or attempted suicide by him;
>
> (b) self-inflicted injury;
>
> (c) his own criminal act;
>
> (d) any act committed by him in a state of intoxication or insanity;

(e) any natural cause or disease or medical or surgical treatment unless such treatment becomes necessary due to injury caused by the said untoward incident.

Explanation - For the purposes of this section, "passenger" includes:–

(i) a railway servant on duty; and

(ii) a person who has purchased a valid ticket for travelling by a train carrying passengers, on any date or a valid platform ticket and becomes a victim of an untoward incident.

(emphasis added)

xxx xxx xxx

7. It is not denied by the Railway that M. Hafeez fell down from the train and died while travelling on it on a valid ticket. He was, therefore, clearly a "passenger" for the purpose of Section 124A as clarified by the Explanation. It is now to be seen, that under Section 124A the liability to pay compensation is regardless of any wrongful act, neglect or default on the part of the railway administration. But the proviso to the Section says that the railway administration would have no liability to pay any compensation in case death of the passenger or injury to him was caused due to any of the reasons enumerated in Clauses (a) to (e)

8. Coming back to the case in hand, it is not the case of the Railway that the death of M. Hafeez was a case of suicide or a result of self-inflicted injury. It is also not the case that he died due to his own criminal act or he was in a state of intoxication or he was insane, or he died due to any natural cause or disease. His falling down from the train was, thus, clearly accidental.

9. The manner in which the accident is sought to be reconstructed by the Railway, the deceased was standing at the open door of the train compartment from where he fell down, is called by the railway itself as negligence. Now negligence of this kind which is not very uncommon on Indian trains is not the same thing as a criminal act mentioned in Clause (c) to the proviso to Section 124A. A criminal act envisaged under Clause (c) must have an

element of malicious intent or mens rea. Standing at the open doors of the compartment of a running train may be a negligent act, even a rash act but, without anything else, it is certainly not a criminal act. Thus, the case of the railway must fail even after assuming everything in its favour."

4. The case of the appellant is squarely covered by the aforesaid judgment. This Court has also taken a similar view in the case of **Smt. Vidyawati Vs. Union of India,** FAO No. 418/2008 decided on 12.01.2011.

5. In these circumstances, the appellants are entitled to compensation which in a case of death is fixed as per the schedule at Rs. 4,00,000/- along with interest w.e.f. 30 days of the death of the deceased along with interest which is fixed at 9% per annum from the date the compensation becomes payable.

6. The amount payable by the respondent shall be deposited within three months from today with the Railway Claims Tribunal. However, if the deposit is not made then the entire amount i.e. the principal amount and interest will carry further interest @ 12 % per annum. The Tribunal will release the aforesaid amount to the appellants.

7. With these observations the appeal is allowed and the judgment of the Railway Claims Tribunal dated 11.02.97 is set aside. There shall be no orders as to costs.

ILR (2011) DELHI II 710
IA

DEEPALI DESIGNS & EXHIBITS PRIVATE LIMITED **....PETITIONER**

VERSUS

PICO DEEPALI OVERLAYS CONSORTIUM & ORS. **....RESPONDENTS**

(GITA MITTAL, J.)

IA NOS. : 16915-16916/2010 & 1218/2010 IN CS
(OS) NO. : 2528/2010

DATE OF DECISION: 21.02.2011

Code of Civil Procedure, 1908—Order 38, Rule 5 & Order 39—Rule 1, 2—Plaintiff filed suit for recovery, declaration, dissolution, rendition of accounts and mandatory injunction with application seeking interim reliefs and attachment before judgment—On other hand, defendants preferred application praying for vacation of ex-parte interim order—As per plaintiff, defendants siphoned off money owed to plaintiff by transferring same for their own use so as to defeat claims of plaintiff—Also, unless plaintiff is secured, defendant no.1 to 3 would withdraw amounts given to them which were for satisfaction of claims of plaintiff—Ad interim injunction granted restraining defendants from operating their accounts, withdrawing any amount to extent of suit claim—As per defendants, contention raised by plaintiff misplaced that they had intention to abscond from justice or to evade due process of law—They placed material with regard to their standing and assets—Held:- The power under Order 38 Rule 5 CPC is a drastic and extraordinary power—Such power should not be exercised mechanically or merely for the asking—It should be used sparingly and strictly in accordance with the Rule—The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt—Defendant No.1 shall not withdraw the amount lying in Fixed Deposit Account with defendant no.4 Bank.

For the purposes of passing an order of attachment before judgment under Order 38 Rule 5 of the CPC, in AIR 2008 SC 1170 **Rajendran & Ors. Vs. Shankar Sundaram & Ors.,** it was held that the court is required to form a prima facie opinion at the stage of consideration of the prayer by the plaintiff. It was observed that the court need not go into the correctness or otherwise of all the contentions raised by the parties. **(Para 64)**

It is well settled that the mere fact that a party to a suit is a foreign litigant without anything more, would ipso facto not entitle the other side to an order of injunction or attachment before judgment. It is trite that no order of injunction or attachment would be granted unless there is a real danger that assets would be disposed of before the judgment is passed so as to defeat any decree in the case.**(Para 67)**

Important Issue Involved: The power under Order 38 Rule 5 CPC is a drastic and extraordinary power—Such power should not be exercised mechanically or merely for the asking—It should be used sparingly and strictly in accordance with the Rule—The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Sandeep Sethi, Sr. Advocate with Mr. Rakesh Mukhija, Advocate.

FOR THE RESPONDENTS : Mr. V.P. Singh, Sr. Advocate with Mr. Dharmendra Rautra, Advocate and Ms. T. Shahani Advocate, Mr.

Saumyen Das, Advocate for defendant no.4/HSBT.

CASES REFERRED TO:

1. *Raman Technology and Process Engineering Co. & Anr.* vs. *Solanki Traders,* (2008) 2 SCC 302.
2. *Rajendran & Ors.* vs. *Shankar Sundaram & Ors.*, AIR 2008 SC 1170.
3. *Rite Approach Group Ltd.* vs. *Rosoboron export* 139 (2007) Delhi Law Times 55 (DB).
4. *Uppal Engineering Limited Pvt. Ltd.* vs. *Cimmco Birla Limited* 2005 (2) ARBLR 404 (Delhi).
5. *Uppal Eng. Co. (P) Ltd.* vs. *Cimmco Birla Ltd.* reported in 121(2005)DLT539.
6. *Formosa Plastic Corporation Ltd.* vs. *Ashok Chauhan* reported in 76(1998) DLT 817.
7. *Global Co.* vs. *National Fertilizers Ltd.* reported in 76(1998) DLT 908 = AIR 1988 Delhi 397.
8. *Gurmukh Singh* vs. *M/s Inderprasth Finance Co.*, reported at 1976 RLR 1.
9. *Gopal Krishan Kapoor* vs. *Ramesh Chander,* 1973 reported at 1973 RLR 542.
10. *Prem Raj Mundra* vs. *Md. Maneck Gazi* MANU/WB/0033/1951.

RESULT: All the three applications disposed of.

GITA MITTAL, J.

1. The plaintiff has filed the above suit for recovery, declaration, dissolution & rendition of accounts and mandatory injunction. Alongwith the plaint, the application seeking interim reliefs being IA No.16915/2010 has been filed under Order 39 Rules 1 & 2 CPC seeking the following ad interim ex-parte injunction orders:-

> "i. Thereby directing the defendant no.5 not to release any payment in favour of defendant no.1 till the pendency of the present suit;

> ii. Restraining the defendant No.1 and 2 or their agents, servants, representatives, etc. from operating the bank account bearing no.166189464001, with the Barakhamba Road Branch of H.S.B.C. Bank, till the final disposal of the accompanying suit.
>
> iii. Restraining defendant No.3 or their agents, servants, representatives etc. from operating the bank account bearing no.051-827889-001, with the Barakhamba Road Branch of H.S.B.C. Bank, till the final disposal of the accompanying suit.
>
> iv. Restraining Defendant No.1 from transferring any amount to the account of Defendant No.3.
>
> v. Restraining Defendants from opening any other bank account in the name of Defendant No.1;
>
> vi. Restraining defendants from remitting any amount overseas directly or indirectly, from any of their bank accounts in India."

2. IA no.16916/2010 has been filed under Order 38 Rule 5 CPC praying for an order of attachment before judgment in the following terms:-

> "(A) Direct the defendant to furnish security as deem fit by this Hon'ble Court to secure the suit amount with interest;
>
> (B) If the Defendants fails to furnish the security then following bank accounts of the defendants may be attached:
>
> i. Money lying in Defendant No.1's bank account bearing no.166189464001, with the Barakhamba Road Branch of HSBC Bank.
>
> ii. Money lying in Defendant No.3's bank account bearing no.051-827889-001, with the Barakhamba Road Branch of HSBC Bank."

3. As against this, the defendants have filed IA No.1218/2011 under Order 39 Rule 4 of the CPC praying for vacation of the order which was passed on 14th December, 2010.

4. These applications raise similar, almost identical, questions of law and fact and are accordingly taken up together for disposal by this

order.

5. The PICO Deepali Overlays Consortium, the first defendant (hereinafter referred to as "PDOC" for brevity) is a compendium of the PICO Hong Kong Limited-defendant no.2 herein (hereinafter referred to as "PHK" for brevity) and PICO Event Marketing (India) Private Limited-defendant no.3 herein (hereinafter referred to as "PEMI" for brevity).

6. The defendant no.2 is a company incorporated under the laws of Hong Kong having its registered office at Hong Kong while the defendant no.3 is a company incorporated under the provisions of the Indian Companies Act, 1956.

7. The Pico Event Marketing (India) Pvt. Limited-defendant no.3 herein is stated to be a subsidiary of the Pico India Exhibits Contractor Pvt. Ltd. (PIEC), which is a Singapore based company. The defendant no.3, is stated to have been incorporated in November, 2009 under the Indian Companies Act, 1956.

8. So far as the relationship between the plaintiff and the defendants is concerned, the plaintiff relies on a Consortium Agreement dated 19th December, 2009 in terms whereof it was agreed to incorporate a joint venture company in which the plaintiff and the defendant nos.2 & 3 would have shareholdings percentage ratio of 20%, 60% and 20% respectively. It is the case of the plaintiff that it was agreed that all profits and losses would be shared by the parties in such ratio.

9. It is an admitted position that the first defendant was specifically incorporated in terms of the said compendium for the purposes of bidding and execution of the overlays tenders floated by the Organising Committee, Common Wealth Games 2010 Delhi. It is the plaintiff's stand that though the defendant no.1 has been styled as a consortium and incorporated as a company under the Companies Act, 1956, but in terms of operations, it is really in the nature of an unregistered partnership between the plaintiff, defendant no.2 and the defendant no.3.

10. On the 29th December, 2009, this consortium of the plaintiff and defendant nos.2 & 3 submitted its Expression of Interest (EOI) under the name of PICO Deepali Overlays Consortium-defendant no.1 to the Organising Committee Commonwealth Games arrayed as defendant no.5 in these proceedings. This was followed with a Request of Proposal

(ROP. hereafter) submitted on 5th February, 2010 under the name of the defendant no.1. In the first week of March, 2010, the defendant no.1 was declared to be the lowest bidder in respect of cluster nos.1 to 6 in which the EOI has been invited.

11. The consortium is maintaining an account in the name of the defendant no.1 with the Hongkong Shanghai Banking Corporation (`HSBC. hereafter), Barakhamba Road, New Delhi arrayed as the defendant no.4 herein.

12. The plaintiff has pointed out that on 1st June, 2010, the Addendum to the Consortium Agreement was executed between the parties to the suit which provided that in case of inconsistency between the Consortium Agreement and the Addendum, the provisions of the Addendum would prevail. In the Consortium Agreement and the Addendum, the plaintiff is referred to as the `Deepali' whereas the defendant nos.1 to 3 are referred to as `JV., „PHK. & 'PEMI' respectively. Inasmuch as the instant case relates to the claim by the plaintiff against the defendants in respect of work undertaken by it pursuant to the said Consortium Agreement and the Addendum, reference requires to be made to the scope of plaintiff's work which was outlined in para 2.1 & 2.2 of the Addendum which reads as follows:-

"2. Scope of Work

(1) After the assignment of the works to each member if there are any profits and assets earned and retained in the JV, Deepali shall not be entitled to any share of such profits and assets.

(2) Each party shall participate in the works tendered to the CWGOC Delhi 2010. The scope of work are assigned to members as follows:

Deepali: Works confirmed by CWGOC Delhi 2010, listed in Appendix 2

PHK & PEMI: All other works confirmed by CWGOC Delhi 2010, listed in Appendix 3.

(3) Amount received by the JV on contracts with the CWGOC Delhi 2010 in respect of work performed by Deepali, within the scope of work described in Appendix 2 (including any variations), minus 23% shall be paid to Deepali and the remainder shall

belong to PHK. The net amount after deduction of the 23% is inclusive of the 10.3% service tax but excludes any tax deducted at source, Deepali shall provide PHK on demand any tax certificates reasonably required by PHK (including but not limited to anything related to the 10.3% Service Tax)."

13. So far as the payments are concerned, Clause 2(3) aforenoticed sets out that the plaintiff would be entitled to the work performed by it within the scope of work described in Appendix 2 (including any variations) minus 23% while the remainder would belong to defendant no.2. The net amount after deduction of 23% was inclusive of 10.3% service tax but excluded any tax deducted at source. The plaintiff was also required to provide the defendant no.2 on demand any tax certificates which may be required including but not limited to anything related to the 10.3% Service Tax. The manner in which the consortium would work was set out in clause 2.4 wherein the full and sole authority was vested in the defendant no.2 with regard to all several important facets of the working of the consortium.

14. The payment was to be effected on these terms with the stipulations contained in appendix 3.3 Article 8.2 which reads as follows:-

"8.2 The invoiced amount shall be paid to the relevant JV member by the JV after each respective payment by Delhi 2010 and within ten (10) days after the aforementioned payment is effected by Delhi 2010 and deposited into the JV bank account"

The parties acted in terms of the said Addendum. It is also admitted by all parties that these terms bind their dealings.

15. The defendants have disclosed that a contract was awarded by the defendant no.5 to the defendant no.1 on the 2nd June, 2010 which was to commence with effect from the same date and was required to be completed on 10th September, 2010 with the total value of Rs.209,052,790/- crores. The defendant no.1 is stated to have executed works worth Rs.172,75,96,635/- (certified value of Rs.173 crores) under the tender awarded to it by the Organising Committee-defendant no.5.

The defendants have further disclosed that this amount of Rs.172,75,96,635/- had been based on quantities duly certified by it which included 10.3% service tax after deduction of TDS.

16. It is the plaintiff's contention that the defendants have siphoned off money owed to the plaintiff by transferring the same for their own use and that the defendants were intending to siphon off the funds lying in the bank account of the defendant no.1 with the HSBC Bank-defendant no.4 so as to defeat the claims of the plaintiff. It has been suggested that the defendants would try and remit the amount overseas as well as to the accounts of Indian subsidiaries to defeat the plaintiff's claim. The plaintiff claims entitlement to the amount of Rs.6,99,24,861/- out of moneys already received from the defendant no.5. The plaintiff has expressed an apprehension that if the money is remitted outside India and siphoned off, the tax authority may recover the tax amount from the plaintiff company.

17. In the suit, the plaintiff has made the following prayers:-

"(i) Pass a decree of recovery of money of Rs.6,99,24,861/- in favour of the plaintiff company and against the defendant no.1 to 3;

(ii) Pass a decree of declaration that the defendant no.1 was formed for the specific purposes and the compendium/ consortium/Partnership Concern of the plaintiff, defendant no.2 and 3 have come to an end from the date of filing of the present suit before this Hon'ble Court;

(iii) Pass a decree of dissolution thereby dissolving the defendant no.1;

(iv) Pass a decree of mandatory injunction thereby directing the defendant no.4 to provide the entire details of the bank account having No.166189464001, with the Barakhamba Road Branch, H.S.B.C. Bank;

(v) Pass a decree of mandatory injunction thereby directing the defendant No.5 to provide the details of total payments made by the defendant no.5 in favour of the defendant no.1 along with the bills/details for respective payment;

(vi) Pass a decree of mandatory injunction thereby directing the defendant No.3 to provide the details of payments received by defendant No.3 from defendant No.1;

(vii) Pass a decree for rendition of accounts in favour of the plaintiffs and against defendant no.1;

(viii) Pass order awarding costs of the present suit in favour of the plaintiff company and against the defendants."

18. Along with the suit, the plaintiff filed the applications seeking interim reliefs which included IA No.16915/2010 and IA No.16916/2010. The plaintiff has also filed IA No.16917/2010 under Order 40 of the CPC seeking appointment of a receiver. These applications were considered by the court on 14th December, 2010 when it was urged that defendant no.2 was not based in India and was operating accounts and receiving amounts from the Organising Committee-defendant no.5 in India. The plaintiff had also contended that unless the plaintiff's interest was secured, the defendant no.1 to 3 would withdraw amounts given to them to satisfy its claims. In this background, the following ex-parte order of injunction dated 14th December, 2010 was passed:-

"xxx

I.A. Nos.16915/2010 (Under Order 39 Rule 1 & 2), 16916/2010 (Under Order 38 Rule 5) & 16917/2010 (Under Order 40)

Issue notice to the defendants, returnable on 10.02.2011; service through Regd. Post and e-mail as well, if the plaintiffs provide the same within two days.

The plaintiff seeks recovery of Rs. 6,99,24,861/- with interest. It is claimed that the plaintiff entered into a Consortium Agreement with the Defendant Nos. 2 and 3 on the one hand and Defendant No.5 (Organizing Committee of the Commonwealth Games referred to as the ?Organizing Committee?). Initially, the plaintiff was entitled to amounts in proportion to what was defined in the original Consortium Agreement dated 19.12.2009. It is submitted that the parties entered into a subsequent addendum which redefined the scope of the plaintiff's work, on 01.06.2010; a copy of the addendum has been placed on record as also the copy of the original agreement. In these, the plaintiff's scope of work was confined to what was outlined in paras 2.1 and 2.2. In terms of this agreement, the plaintiff was entitled to receive the entire proceeds of the consideration payable as part

of its scope of work and was obliged to release 23% to the Defendant Nos. 2 and 3, inclusive of taxes. The plaintiff contends that the defendants have received about Rs. 90 crores, of which it is entitled to Rs.30,35,40,044/- to the first defendant on account of the scope of work for which the payment has to be received by it (the plaintiff). The plaintiff contends that it is entitled to, under the said terms of 01.06.2010 Rs. 23,37,25,833/-. It is further stated that the plaintiff has till date received Rs.16,38,00,972/- and, therefore, is entitled to the amount of Rs. 6,99,24,861/-.

The plaintiff submits that unless its interests are secured, Defendant Nos. 1 to 3 would withdraw the amounts given to them which have to satisfy its claims. It, therefore, seeks appropriate injunctive relief.

The Court has considered the materials on record, which include copies of the original agreement of 19.12.2009 as well as the addendum dated 01.06.2010. Clauses 2.1 and 2.2 clarify that the plaintiff's scope of work as well as the share or proportion of consideration payable to it. The plaintiff has placed reliance on e-mail communication exchanged with the defendants by which clarity is sought as to the amounts received but the latter have apparently not disclosed details and particulars. Having regard to the circumstances that the Defendant No.2 is not based in India and is operating accounts and receiving amounts from the Organizing Committee in India, it would be appropriate that this Court, in order to secure the interests of justice, makes and interim order. Accordingly, the first three defendants are hereby restrained from operating the accounts, withdrawing any amount received by them to the extent of the suit claim. The defendants are also hereby restrained from operating further amount without permission of the Court in order to receive the amounts disbursed hereafter by the Organizing Committee in satisfaction of any bills which form part of the scope of work and Appendix-II dated 01.06.2010, till the next date of hearing.

Provisions of Order 39 Rule 3 shall be complied within seven days.

Order and notice dasti."

19. Aggrieved by this order of injunction, the defendants have filed IA No.1218/2011 under Order 39 Rule 4 praying for vacation of the order of injunction. The pleadings of the parties in this application have been treated as their pleadings in the two other applications. The parties have respectively pressed the applications under consideration.

20. Mr. Sandeep Sethi, learned senior counsel for the plaintiff has strongly urged that the plaintiff has sought a decree and order for rendition of accounts. It is submitted that the plaintiff strongly apprehends that the defendants have not met the statutory liabilities and that they would flee the boundaries of the country in order to avoid not only liability to the plaintiff but also escape criminal action for failure to meet statutory dues including income tax dues. It has been urged that the defendants have not deposited the tax deductible at source by the defendant no.1. The contention is that with this intent, the monies would be remitted oversees bank accounts of the defendants or accounts of other Indian affiliates or defendants.

21. Unfortunately, these assertions are not substantiated by any material pleadings.

22. The percentage value of the payment and deductions in terms of payments which the plaintiff is entitled to in terms of the Consortium Agreement dated 19th December, 2009 and the Addendum dated 1st June, 2010 are undisputed.

23. On the issue of the receipt of payments, defendant no.1 has disclosed receipt of Rs.943,574,429 (Rs.94.35 crores) against the said works till date. It is also stated on affidavit that the defendant no.1 has lastly received a payment on 18th October, 2010 of Rs.119,603,838/- including 10.3% service tax but excluding TDS of 2% which was deducted by the defendant no.5. A tabulation of the payments which have been received has been placed on record. The plaintiff admits that the defendant has received payment of an amount of Rs.943,574,429/- only and also of the fact that after 18th October, 2010, no payment has been received.

24. The defendants have contended that therefore only 55% of the total billed amount has been received by it from the defendant no.5 till

date. The plaintiff has also stated the same to be equivalent to 60% of the scope of work.

25. The plaintiff has filed a reply on affidavit vaguely disputing the assertions by the defendants. In para 6 of IA No.1218/2011 of the reply filed by it, the plaintiff has replied as follows:-

> "6. However it is submitted that to the information and knowledge of the plaintiff company the Consortium/Compendium/defendant no.1 has received approximately total of Rs.94,35,74,431/- out of total payment of about Rs.180 Crore from the Commonwealth Games Organizing Committee. That out of the said amount of Rs.94,35,74,431/- an approximate amount of Rs.30,35,40,044/- has been paid by the Organizing Committee to the defendant no.1 on account of the work falling within the scope and ambit of the plaintiff company, which was duly completed by it. After deducting 23%, the total amount payable to the Plaintiff Company would be Rs.23,37,25,833. Till date, the total payment received by the Plaintiff Company in respect of the Commonwealth Games project is Rs.16,38,00,972. Therefore, as on date, the total amount due to the plaintiff company from the defendants is to the tune of Rs.6,99,24,861/ The Defendants are jointly and severally liable to pay the aforesaid amount to the Plaintiff Company."

26. In the first year of the operation of the Pico Event Marketing (India) Pvt. Ltd.-defendant no.3 in the financial year ending on 31st October, 2010 it had a turnover of approximately Rs.8.8 crores. The defendant no.3 has further disclosed that it is currently executing contracts worth approximately 1.7 crores. It is stated that the defendant no.3 is currently working in several projects in India some of which are Aero India-2011 (Bangalore), TV Today, Siat India (Pune), Rubber Expo (Chennai), IRAI Expo-2011, EFY Expo-2011 etc.

The defendants have disclosed that defendant no.3 had an Indian presence for more than 15 years it had been carrying on business in India through a franchisee. The defendant no.3 was incorporated to take over the Indian business of the franchises under Indian laws. So far as the shareholding of defendant no.3 till 4th December, 2010 is concerned, apart from the 4.23% shareholding held by the franchisee, PICO Event

Marketing (India) Pvt. Ltd.-defendant no.3 owns the remaining shareholding.

27. The plaintiff has itself stated that the defendant no.3 is having its registered office at the PICO Bhawan, A 27/15, Khanpur Extension, New Delhi. The defendants have submitted that it is operating from a leased factory premises in Faridabad of a total space of 35000 sq. ft. since January, 2010.

28. The defendants have further stated that Pico Far East Holdings Limited (hereinafter referred to as "PFE" for brevity) is the holding company of the defendant no.3 which is a listed company in Hong Kong with an annual turnover of HK$ 2.226 billion and profit of HK$ 124 billion for the year 2009. The annual turnover of the Pico Far East Holdings Limited for the current financial year ending 31st October, 2010 has been disclosed to be of the tune of Rs.HK$3.075 billion with a profit of HK$192 million.

The Organising Committee of the Commonwealth Games-defendant no.5 is stated to have relied on the track record and financial strength of PEE the said holding company of the defendant no.3 in assessing the credibility of and for award contract to defendant no.1.

29. The defendant no.2 and other subsidiaries of the Pico Far East Holdings Limited are stated to have successfully completed overlays work for the Commonwealth Game at Melborne; the Olympics Games in Athens, the Olympics Games in Beijing and many other world events. An audited financial result of the PICO Far East Holding for the year ending 31st October, 2010 has been placed before this court. In fact, the said Pico Far East Holdings Limited has furnished an undertaking to the defendant no.5 to ensure completion of the project work on behalf of the consortium.

30. The defendants have also disclosed ownership of assets in India. It is stated that the defendant no.3 has assets consisting of fixed assets, motor vehicles, office furniture, fixtures and equipments and operating supplies worth Rs.2,55,40,361.82 within India and an office in Mumbai as well.

31. It is important to note that the plaintiffs have not disputed these assertions of the defendants. It has been stated that these submissions by

the defendants "need no reply being matter of records".

32. The extensive averments by the defendants with regard to their financial status remain uncontroverted. The only basis for the plaintiff's apprehensions is premised on the fact that the defendant no.2 is a foreign company. On the other hand, the defendants have urged that a decree passed by this court could be executed against the defendant no.2 even in Hong Kong. Even otherwise, it has been pointed out that the defendants are financially sound. As noticed above, the defendant no.3 has an extensive Indian presence.

33. Coming to the allegations with regard to payments to foreign parties are concerned, the defendants have stated that to ensure completion of the works contracted to the defendant no.1 by the defendant no.5, within the scheduled date of completion on 10th September, 2010, suppliers in foreign jurisdiction were engaged which included the Asia Tent International Sdn. Bhd (Malaysia) and Pakar Trading (Malaysia) through the defendant no.2. It is pointed out that against the total contract value of Rs.209 crores approximately, the total payments to these parties minuscule. Invoices in this regard have been placed on record. Nothing has been placed by the plaintiff on record to enable this court to arrive at a contrary conclusion.

34. So far as the payments to defendant no.2 are concerned, details thereof have been placed in para 14 of the IA No.1218/2011. The defendant no.2 is stated to have issued the bonds towards the 10% bid security money, 10% of the of the first Advance Performance Bond and 10% of the Second Advance Performance Bond on behalf of the Consortium-defendant no.1 which was required by the defendant no.5 under the tender documents. It has been explained that an amount of USD 6,928.81 and USD 51,732 has been reimbursed to the defendant no.2 towards bank charges/fees paid to the HSBC Hong Kong for issuance of such bonds in favour of the Overseas Committee-defendant no.5. The averments in respect of these payments are supported with documents placed on record. There is no denial by the plaintiff to specific averments in IA No.1218/2011 made by the defendants. No challenge is laid to the annexure placed by the defendants on record.

35. It is stated by the defendants in IA No.1218/2011 that the defendant no.2 does not have any bank account in its name in India.

36. So far as the payments of the plaintiff are concerned, the defendants submit that under the Consortium Agreement and the practice followed by the parties, until final accounting, the plaintiff's work was deemed to be 20% of the certified value while the defendant's work was deemed to be 80% of the certified value. On this basis, out of the total billing claim of Rs.1,727,596,635/-, the value of the plaintiff's work assessed at 20% of the certified value would be worth Rs.345,519,327/- whereas the value of the defendant's work at 80% of the certified value would be equivalent to Rs.1,382,077,308/-. Out of the amount of Rs.94,35,74,429/- received from the defendant no.5, value of the 20% work executed by the plaintiff has been computed by the defendants at Rs.188,714,886/-. The defendants have contended that upon deduction of management fee of 23% of the amount received from the defendant no.5 in terms of the agreement between the parties, the plaintiff was entitled to payment of only Rs.145,310,462/-.

37. It is an admitted position before this court that the plaintiff had addressed e-mails dated 31st October, 2010; 22nd November, 2010 and 1st December, 2010 to the defendant no.1 seeking payment. The defendant no.1 has admittedly responded to the same by way of e-mail dated 31st October, 2010 pointing out that the defendant no.5 had so far paid only about 50% to 60% to it till date. This e-mail also records that there are many suppliers and contractors whose payments are to be settled. The plaintiff was called upon to work with the representatives of the defendants to impress upon the defendant no.5 to make the balance payment.

38. The defendants have complained that faced with harassment and pressure from the plaintiff by e-mails and communications demanding more payments, even though no amounts had been released by the defendant no.5 after 18th October, 2010, the defendants were pressurised into releasing an additional amount of Rs.2.00 crores to the plaintiff on 26th December, 2010 with the understanding that the same would be adjusted in the future payments with the plaintiff. It is the submission of thedefendants that this amount is excess payment having regard to the fact that the defendants have not received any such payment from the defendant no.5.

39. It is noteworthy that in an e-mail sent as late as on 22nd November, 2010, the plaintiff has nowhere suggested that the defendants were siphoning off funds or were running away with monies to avoid

making payment to the plaintiff.

On the contrary, the plaintiff admits a second e-mail dated 1st December, 2010 that as late as on 1st December, 2010, it has received payment of a sum of Rs.2.00 crores from the defendant no.1. While aknowledging the receipt of the said amount, the plaintiff makes not even a remotest suggestion that the defendants are siphoning off funds or are running away from this country. Merely because the plaintiff has expressed urgency for its claimed payments would not ipso facto manifest any mala fide on the part of the defendants.

40. Perusal of the Consortium Agreement dated 19th December, 2009 and the Addendum dated 1st June, 2010 would show that the plaintiff and defendant nos.2 & 3 were entitled to the stated amounts in the shareholdings/percentage/ratio of 20%, 60% and 20% respectively. The plaintiff has admittedly received amounts towards its share, though there is a dispute on totals. The plaintiff does not state that defendant nos.2 & 3 would not be entitled to their percentage share out of the amount received from defendant no.5.

41. Apart from a bald allegation that sums of money have been transferred from the bank account of the defendant no.1 to the account of defendant no.3, no details at all have been furnished by the plaintiff on record. The plaintiff has nowhere stated that amounts paid to defendant nos.2 & 3 from the account of defendant no.1 are beyond their entitlement under the Consortium Agreement dated 19th December, 2009 and the said Addendum.

42. In any case, the plaintiff in para 7 of IA No.16916/2010 has stated that the amounts have been paid by the plaintiff and defendant no.1 to the defendant no.3- a company incorporated under Indian laws.

43. It is an admitted position that the plaintiff has received the amount of Rs.165,310,467/-. The defendants have submitted that based on the above accounting, the plaintiff has already been overpaid to the extent of Rs.20,000,005/- (being a sum of Rs.2.00 crores).

44. The suit claim is premised on calculations effected by the plaintiff and a decree for recovery of the amount of Rs.6,99,24,861/- has been sought.

45. The defendants have contended that the plaintiff has no absolute

entitlement to the suit claim or to the claim of further amounts from the defendants. The plaintiff was required to satisfactorily execute the work which was assigned to it. It has been vehemently urged that plaintiff has failed to complete the work successfully and that the defendant no.5 has not made further payments to the defendants on account of complaints with regard to the generators supplied by the plaintiff having been faulty which it has alleged has caused loss and damage to the lighting equipment and installations supplied by third party. It is submitted that in this background, an amount of Rs.7,84,022,206/- has been withheld by the defendant no.5 of which 80% would be falling within the defendant's scope of work.

Apart from the complaint with regard to the quality of work performed by the plaintiffs, the defendants have urged that the plaintiff is also in breach of Section 13.3 of the Consortium Agreement which prohibits the members of the consortium in terms that "No JV member will be permitted to negotiate directly or indirectly with Delhi 2010 without the prior written consent of the members of the board of the JV. Such negotiations to be solely carried out by the Common Representatives, who shall have to report to the Board of JV". The plaintiff is stated to have ignored this restriction and has contracted directly with the defendant no.5 for tentage in August & September and entered into a contract for the value of Rs.5.00 crores. The defendants have contended that as a result of the contract bid by the plaintiff, it had undercut the defendant no.1 in its bid for obtaining such contract.

47. A grievance has been made on behalf of the defendants that despite the admitted non-receipt of a large trench of over Rs.78 crores from the defendant no.5; amounts admittedly being due to third parties; complaints against the plaintiff's work by the defendant no.5, the plaintiff was still paid the sum of rupees two crores which it was not entitled to. It is urged that on 1st of December, 2010, the present suit was filed by the plaintiff on 10th December, 2010 on vague and unsubstantiated pleas without any cause to do so. The defendants have expressed strong grievance in respect of filing of the present suit by the plaintiff on the 10th December, 2010 even though there is no variation in position with regard to receipt of payments from the defendant no.5.

48. As on date the plaintiff claims the amount of Rs.6,99,24,861/- while the defendants are claiming excess payment to the plaintiff of

Rs.2.00 crores and are disputing its entitlement to the suit claim. The plaintiff is entitled to receipt of payment only upon and out of payments being made to the defendant no.1 by the defendant no.5.

49. Mr. Sandeep Sethi, learned senior counsel for the plaintiff, however, submits that the defendant no.1 has huge liability of tax. It is contended that the order dated 14th December, 2010 requires to be confirmed.

50. In regard to the tax liability, the defendants have stated that they have duly paid service tax on 10.3% on the total amount received from the defendant no.5. It has also been stated that the TDS which was deducted on payments made to the plaintiff by the defendants stands deposited with the Government authorities. The tax receipt/challans, showing payment of the service tax and deposits of TDS have been placed on record which supports the deposits. The plaintiff has generally denied these averments and challenged documents on the plea that they are specious and incorrect. It is vaguely stated that tax has "not been paid in toto" without stating as to what is the payable tax liability.

51. The plaintiff has placed a statement of what it considers to be total liabilities of the defendant no.1. The information set out by the plaintiff notices that tax stands deducted at source by the CWGOC-defendant no.5 herein, to the extent of Rs.2.00 crores before its payments to the plaintiff. The plaintiff pleads that the consortium was in the nature of a partnership, does not dispute active involvement with its business and affairs, yet all its pleadings are eloquent by their silence on all material and essential details. No basis or details to support the contention that amounts are due from the defendant no.1 towards Income Tax or Advance Tax is disclosed.

52. On the contrary, the defendant no.3 have placed before this court documentation to support payment of Rs.1.00 crore towards advance tax in December, 2010. It is stated that further advance tax would be payable on 15th March, 2011 and the income tax return as per law would require to be filed in October, 2011. It is explained that in case the balance amount of Rs.78.00 crores is not received from the defendant no.5, the defendant no.1 would have suffered a loss of Rs.78.00 crores. The submission is that in such an eventuality, the defendant no.1 would be filing a loss return. Then, instead of tax liability even the advance tax

which has been deposited, would be required to be refunded to the defendant no.1.

53. So far as dues of income tax authorities are concerned, the plaintiff is stated to have informed the Income Tax department by letter dated 16th November, 2010 that the plaintiff company should not be made liable for tax liability on account of profits made by the defendant no.1 consortium. No action by the tax authorities despite receipt of this communication is pointed out.

54. The plaintiff has also made a bald statement that certain payments are expected to be made towards vendors and sub-contractors. There is not even a whisper to suggest specific dues on this count anywhere in the plaint. The plaintiff has also not placed a single claim on record.

It is admitted that an amount of Rs.78.00 crores of the defendant no.1 is lying in the hands of defendant no.5. The defendants state that this amount could be utilised to discharge any liability qua third parties.

55. I also find substance in the contentions of Mr. V.P. Singh, learned senior counsel on behalf of the defendant nos.1 & 3 that their bona fide are made out from the fact that they have made payments of Rs.14.00 crores and odd as well as the payment on 1st December, 2010 to the tune of Rs.2.00 crores to the plaintiff from the amounts received so far from the defendant no.5. So far as the suit claim is concerned, the same is yet to be adjudicated upon.

56. So far as the grant of injunction is concerned, the principles thereof are well settled. Three essential ingredients have to be satisfied for grant of ad interim injunction under Order 39 of the CPC. The plaintiff is required to establish a prima facie case; that grave and Irreparable loss and damage would enure to it in case interim protection was not granted and that balance of convenience, interests of justice and equity are in its favour.

57. The term “prima facie case”, is not statutorily defined. The same, however, has been construed by this court in authoritative and judicial pronouncements. In the pronouncements of H.L. Anand, J on 23rd May, 1973 reported at 1973 RLR 542 **Gopal Krishan Kapoor Vs. Ramesh Chander,** the court considered several prior judicial pronouncements and observed as follows:-

> “9. The terms "prima facie" and "prima facie case" are not defined in any statute and although no attempt has been made to encase these terms within the confines of a judicially evolved definition or to evolve an inflexible formula for universal application, the terms have been judicially interpreted to mean a case which is not bound to fail on account of any technical defect and needs investigation.
>
> xxx xxx xxx
>
> 18. On a consideration of the ordinary meaning of the term 'prima facie' and the trend of judicial pronouncement it appears to me that "prima facie case" would mean a case which is not likely to fail on account of any technical defect and is based on some material which if accepted by the tribunal would enable the plaintiff to obtain the relief prayed for by him and would, therefore, justify an investigation.
>
> 19. The function of the Court when called upon to consider if the plaintiff has a prima facie case for the ˇgrant of an interim protection or not is to determine the limited question if the material placed before the Court would require investigation but it is not open to the Court to either subject the material to closer judicial scrutiny for the purpose of deciding if on account of any inherent characteristics of the situation or the probabilities, the plaintiff may not succeed in his contention. Such an investigation would be clearly a transgression of the limits of the functions of the Court and would be both unreasonable and unfair because the suit being at a preliminary stage, the plaintiff has had no opportunity to support his contention by evidence and reinforce the material brought by the plaintiff to the Court by additional evidence and to do that would amount to pre-judging the case of the plaintiff.”

58. The question of balance of convenience and equity were considered by the learned Judge in a later pronouncement reported at 1976 RLR 1 **Gurmukh Singh Vs. M/s Inderprasth Finance Co.,** in which the court observed that:-

> “11. xxx The proceedings in the court of law do not merely involve the high sounding principles and provisions of law but

human element as well and such an element must be given its due weight in considering the question of balance of convenience and equities."

59. The only premise for the reliefs of injunction in the present case as well as the order of attachment before judgment prayed for by the plaintiff is that it has "reason to believe" and "apprehension that the defendants would siphon off funds" without anything more.

60. The claim of the plaintiff so far as the payment already received from the defendant no.5 is concerned, the same is determinate. The plaintiff has prayed for a determined sum of money. In this background, it is not possible to hold that the plaintiff shall suffer irreparable loss and damage in case interim protection was not granted.

61. It is also trite that a suit cannot be decreed by an interim order. As noticed above, no cause of action qua amount not received by the defendant no.1 has arisen and obviously cannot form the subject matter of the present suit. I, therefore, find substance in the contentions of Mr. V.P. Singh, learned Senior Counsel for the defendants that the plaintiff has failed to make out any of the requirements for grant of an order of interim injunction.

62. It is now necessary to consider the prayer made by the plaintiff for the order of attachment of the defendant's assets before judgment. An order of attachment before judgment is a serious matter and is not to be lightly made. Mr. V.P. Singh, learned senior counsel for the defendants has in this regard, placed reliance on the pronouncement in 2005 (2) ARBLR 404 (Delhi) **Uppal Engineering Limited Pvt. Ltd. Vs. Cimmco Birla Limited** wherein the following principles have been laid down:-

"12. Now coming to the question as to whether the petitioner has been able to make out a prima facie case entitling him for relief claimed by him it may be noticed at once that the relief sought by the plaintiff is in the nature of attachment before judgment or pre-award attachment. No doubt that such a pre-award attachment in arbitration is common to many legal systems. In French law it is known as saisie conservatoire which literally means a 'conservative seizure' or 'a seizure of assets so as to conserve them for the creditor in case he should afterwards get judgment.' In UK, Lord Denning gave this procedure a fashionable

name- Mareva injunction. In the parlance of arbitration law, it is usually called 'pre-award attachment.' This remedy has been available in India from the inception of the Code of Civil Procedure 1908. The order of attachment, before judgment, is passed to ensure the availability of such property at the time of execution of a decree. The procedure relating to 'attachment before judgment' is contained in Order 38, Rule 5 to 13 in the First Schedule to the Code of Civil Procedure. Before a person is entitled to an order of attachment before judgment Rule 5 requires the plaintiff to prove that the following circumstance exists:

(i) the defendant is about to dispose of the whole or any part of his property.

(ii) the defendant is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court;

(iii) the defendant is intending to do so to cause obstruction or delay in the execution of any decree that may be passed against him. Vague and general allegations that the defendant is about to dispose of the property."

13. It is well led that an order of attachment before judgment is a drastic remedy and the power has to be exercised with utmost care and caution as it may be likely to ruin the reputation of the parties against whom the power is exercised. The Court must act with utmost circumspection before issuing an order of attachment and unless it is clearly established that the defendant, with intent to obstruct or delay the execution of the decree that my be passed against him, is about to dispose of whole or any part of his property. An attachment before judgment is not a process to be adopted as a matter of course because the suit is yet to be tried and the defense of the defendant is yet to be tested. At that juncture the relief which is extraordinary, could be granted only if the conditions for its grant stands satisfied."

63. On the issue of an order of attachment before judgment under Order 38 Rule 5 of the CPC, in (2008) 2 SCC 302 **Raman Technology and Process Engineering Co. & Anr. Vs. Solanki Traders,** the Supreme Court has held as follows:-

"4. The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and appointment of receivers) is to prevent the ends of justice being defeated. The object of Order 38 Rule 5 CPC in particular, is to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The Scheme of Order 38 and the use of the words 'to obstruct or delay the execution of any decree that may be passed against him' in Rule 5 make it clear that before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied that the plaintiff has a prima facie case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 CPC. It is well-settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case.

5. The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs, by obtaining orders of attachment before judgment and

forcing the defendants for out of court settlements, under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bonafide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 3 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment (See -- **Prem Raj Mundra v. Md. Maneck Gazi** MANU/WB/0033/1951 : AIR1951Cal156 , for a clear summary of the principles.)"

64. For the purposes of passing an order of attachment before judgment under Order 38 Rule 5 of the CPC, in AIR 2008 SC 1170 **Rajendran & Ors. Vs. Shankar Sundaram & Ors.,** it was held that the court is required to form a prima facie opinion at the stage of consideration of the prayer by the plaintiff. It was observed that the court need not go into the correctness or otherwise of all the contentions raised by the parties.

65. It is, therefore, well settled that the order for attachment for judgment is not to be made simply because a suit is filed. The present case is also not one in which the defendants are not raising issues which would require adjudication. In any case, there would be no warrant for attachment of the bank accounts of defendant nos. 2 & 3 inasmuch as the plaintiff is seeking relief of payments from the defendant no.1.

66. The expressed apprehensions of the plaintiff are based on the solitary plea that the defendant nos.2 & 3 are foreign companies and are siphoning of monies abroad. In this regard, a reference can usefully be made to the pronouncement of this court reported at 139 (2007) Delhi Law Times 55 (DB) **Rite Approach Group Ltd. Vs. Rosoboronexport** relevant paras whereof read as follows:-

"4. Learned Single Judge has noted that the number of helicopters and their models and that the supplies made to the Ministry of Home Affairs did not tally with the agreement between the appellant and M/s Russian Technologies, which was in respect of 16 helicopters to be supplied to Ministry of defense. Moreover, the Ministry of defense had in the agreement specifically stipulated that there shall be no agent for the purpose of intercession, facilitation or for in any way recommendation to the Government of India or any of the functionaries of the Government. Learned Single Judge further noticed that the respondent is a State owned undertaking of the Government of Russia and therefore has sufficient assets to satisfy any decree in favor of the appellant. Lastly, it was observed that provisions of Order 38 Rule 5 of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code, for short) or conditions stipulated therein can be read into Section 9 of the Act but the strict preconditions specified in the said provision were not satisfied in the present case. Learned Single Judge relied upon the case of **Global Co. v. National Fertilizers Ltd.** reported in 76(1998) DLT 908 = AIR 1988 Delhi 397 and an unreported judgment of the Bombay High Court in the case of **National Shipping Co. v. Sentrans Industries Limited,** in Appeal No. 852/2003.

xxx xxx xxx

6. The appellant is based in Singapore and Austria. The respondent is a company operating and having its registered office in Russia. Without examining and going into the question whether injunction can be issued on an application under Section 9 of the Act by the Courts in India, it may be noticed that the Court of Appeal in the case of **Mareva v. International Bulkcarriers** (supra) had held that freezing injunction should not be granted unless a person has a legal or equitable right, it appears that a debt is due and owed and there is danger that the debtor may dispose of his assets before the judgment is passed so as to defeat the decree which may be passed. Injunction order even as per the Court of Appeal can be issued in extraordinary circumstances. Mareva or freezing injunction is passed when there is evidence or material to show that the debtor is acting in a manner or is likely to act

in a manner to frustrate subsequent order/decree of the court or tribunal. The Court thereforee freezes the assets of the debtor to prevent the assets from being dissipated, to prevent irreparable harm to the creditor. It prevents a foreign defendant from removing his assets from the jurisdiction of the court. It is like and akin to "attachment before judgment" and conditions mentioned in the said provision should be satisfied before freezing junction order is passed. (See **Formosa Plastic Corporation Ltd. v. Ashok Chauhan** reported in 76(1998) DLT 817 and **Uppal Eng. Co. (P) Ltd. v. Cimmco Birla Ltd.** reported in 121(2005)DLT539. The respondent-company is owned by Russian Government and there is no such allegation that the respondent company is trying to defeat and play a fraud by moving/transferring its assets. We agree with the reasoning given by the learned single judge."

67. It is well settled that the mere fact that a party to a suit is a foreign litigant without anything more, would ipso facto not entitle the other side to an order of injunction or attachment before judgment. It is trite that no order of injunction or attachment would be granted unless there is a real danger that assets would be disposed of before the judgment is passed so as to defeat any decree in the case.

68. The IA No.16917/2010 filed by the plaintiff seeking appointment of a receiver with the direction to take over the custody, possession, management and affairs of the defendant no.1 does not disclose any substantive material other than a plea that defendant no.1 was liable to be dissolved. On the other hand, the plaintiff itself has admitted that these amounts are yet to be received by the defendant no.1 from the defendant no.5.

69. In this background, it is apparent that the question of dissolution would arise after settlement of accounts between the defendant no.1 and defendant no.5 and clearance of liabilities claimed by the defendant no.1 from the defendant no.5. Merely because the prayer for dissolution has been made, the same would by itself not entitle the plaintiff to any such relief.

70. In **Raman Technology and Process Engineering Co. & Anr.** (supra), the Supreme Court has held that merely having a just or valid claim or a prima facie case would also not entitle the plaintiff to an order

of attachment before judgment unless he also establishes that the defendants are attempting to remove or dispose of its assets with the intention of defeating the decree that may be passed. It is equally well settled that even where the defendants are removing or disposing its assets, an order of attachment before judgment will not necessarily be passed.

71. The defendants have complained that the order dated 14th December, 2010 is being treated by their bankers as an order prohibiting them from operating their bank accounts. Given the nature of claim of the plaintiff and the rival contentions, coupled with the fact that payments have been received by the plaintiff barely a week before filing of the suit and large amounts are yet to be received by the defendant no.1 from the defendant no.5, it has to be held that the plaintiff has also failed to make out a case for an order of attachment before judgment.

72. At this stage, the plaintiff has quantified its claim against the defendants at Rs.6,99,24,861/-. No cause of action has accrued in respect of any other amount which have not been received by the defendant no.1 from the defendant no.5. No court fee on any such claim has been affixed on the plaint.

73. Even with regard to the amount which the plaintiff is claiming and payable from the payment already received, the defendants have pointed out that disputes have been raised by the defendant no.5 with regard to the nature of the work which was the responsibility of the plaintiff and payments are blocked.

74. The Consortium Agreement and the Addendum certainly does not permit the plaintiff to be a beneficiary of only payment without sharing any of the liabilities.

75. The defendant nos.2 & 3 have urged at length that they have no intention of absconding from justice or evading due process of law. These defendants have placed material with regard to their standing and assets. There is nothing to support the bald and vague averments in this regard ˇset up by the plaintiff.

76. The plaintiff has also not been able to support its allegations to the effect that the defendants are likely to siphon off with funds or transfer their assets with the intention of frustrating or defeating any decree which may be passed by this court.

77. Undoubtedly, disputes have arisen and large sums of monies are involved. A quantified amount cannot be asserted as irreparable loss and damage justifying an interim injunction. Equities are required to be balanced. While balancing the interest of the plaintiff, the functioning of the defendants cannot be brought to a halt

78. It is noteworthy that so far as the suit claim is concerned, the plaintiff does not even make a prayer for grant of interest on the amounts claimed.

79. The defendants have placed before this court statement of account of the defendant no.1 maintained by the HSBC Bank-defendant no.4 herein as on 31st December, 2010 which shows that the defendant no.1 had the following holdings with the HSBC Bank:-

Deposits & Investments	Curr-ency Unit	Account Number	Credit Limit	Balance (DR-Debit)	INR Equivalent (DR-Debit)
Current Account	INR	166-189464-001		183,222,009.71	183,222,009.71
Fixed Deposits	INR	166-189464--060		45,262,510.18	45,262,510.18
TOTAL DEPOSITS AND INVESTMENTS					228,484,519.89

80. The defendant no.4-HSBC has filed communication dated 3rd January, 2010 disclosing the following amounts:

Account Name	**Account Number**	**Available Balance (INR)**
M/s Pico Deepali Overlays Consortium	166-189464-001	69,924,861.00
M/s Pico Event Marketing Ind. Pvt.Ltd.	051-827889-001	22,271,941.92

81. The defendants have vehemently opposed grant of any interim order in favour of the plaintiff. It has however been submitted by Mr. V.P. Singh, learned senior counsel for the defendants on instructions that without prejudice to their rights and contentions, the defendants are willing to suffer an injunction to the extent that fixed deposit receipt in their account with the defendant no.4 would not be encashed without

further orders of this court.

82. In view of the above discussion, it is directed as follows:-

(i) The defendant no.1 shall remain bound by the statement made on its behalf and shall not withdraw the amount lying in the Fixed Deposit Account No.166-189464—060 with the H.S.B.C. Bank-defendant no.4 herein with all accruals thereon till further orders of this court.

(ii) The order of injunction dated 14th December, 2010 shall stand modified in terms of the direction at serial no.(i) above.

(iii) IA Nos.16915-16916/2010 & IA No.1218/2011 shall stand disposed of in terms of the above directions.

ILR (2011) DELHI II II 739
RFA

D.N. KALIA **....APPELLANT**

VERSUS

R.N. KALIA **....RESPONDENT**

(P.K. BHASIN, J.)

RFA NO. : 72/2008 **DATE OF DECISION: 21.02.2011**

Code of Civil Procedure, 1908—Order 22, Rule 12—Blending of self acquired property with other properties of Joint Hindu Family—Benami transactions (Prohibition) Act 1988—Section 4(3)(b)—Plaintiff filed suit against his brother (defendant) for possession and mesne profits—Defendant filed counter claim for seeking partition on the ground, property was joint family property—According to plaintiff he was remitting money in the account of his mother—Prior to execution of sale deed Agreement to Sell executed between vendor and plaintiff—Signed by defendant as attorney of plaintiff—Defendant claimed though house was purchased in the name of plaintiff but subsequently thrown into hotch potch of joint family—Thus, property ceased to be separate property of plaintiff—Counter claim of defendant was objected on the ground that defendant was debarred from raising the plea of benami in view of Section 4 of Act—Existence of Joint Hindu Family also denied by him—Suit decreed in favour of plaintiff—Challenged in first appeal—Held—Evident from record that house was personal acquisition of plaintiff—There was no joint family property in existence at the time of alleged throwing of house into common hotch potch—To attract the rule of blending of separate property of a coparcener with joint family property there has to be in existence some coparcenery property as well as some separate property of coparcener—Plea raised on behalf of defendant that plaintiff stood in a fidiciary capacity and also as a trustee qua the mother while holding the property in his own name, thus falling in exception clause sub-section 3(b) of Section 4 of the Act, was not accepted. On the ground that the plaintiff had not asked the mother to buy the property in her name—Decree in respect of mesne profits however set aside for no enquiry having been held to determine mesne profits under Order 22 Rule 12 CPC.

Important Issue Involved: To attract the rule of blending of separate property of a coparcener with joint family property there has to be in existence some coparcenery property as well as some separate property of a coparcener.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. D.N. Goburdhan, Advocate.

FOR THE RESPONDENT : Mr. Nishant Datta, Advocate.

CASES REFERRED TO:

1. *Anil Bhasin* vs. *Vijay Kumar Bhasin & Ors.* 2003 (67) DRJ 174.
2. *Kewal Krishan Mayor* vs. *Kailash Chand Mayor and Ors.*, 95 (2002) DLT 115.
3. *C. Narayan* vs. *Gangadharan* (1989) 180 ITR 503.
4. *Pushpa Devi* vs. *The Commissioner of Income-tax,* New Delhi MANU/SC/0378/1977 : [1977]109ITR730(SC).
6. *K.V. Narayanan* vs. *K.V. Ranganadhan and Ors.* MANU/SC/0528/1976 : [1976]3SCR637.
7. *Goli Eswariah* vs. *Commissioner of Gift Tax, A.P.* MANU/SC/0258/1970 : [1970]76ITR675(SC)
8. *Mallesappa Bandeppa Desai* vs. *Desai Mallappa,* MANU/SC/0377/1961 : [1961]3SCR779.
9. *Mallesappa Bandeppa Desai and Anr.* vs. *Desai Mallappa alias Malesappa and Anr.* MANU/SC/0377/1961 : [1961]3SCR779.
10. *Privy Council in Rajanikantha Pal* vs. *Jagmohan Pal* AIR 1923 PC 57.

RESULT: Appeal partly allowed.

P.K. BHASIN, J

1. The present appeal is filed by the appellant for setting aside the judgment dated 27th October, 2007 passed by the learned Additional District Judge whereby the suit filed against him by his brother(the respondent herein) for a decree of possession and mesne profits in respect of one room and a bathroom on the ground floor of house no. E-28, Greater Kailash-II, New Delhi (hereinafter to be referred to as 'the house in dispute' and which house was claimed by the respondent to be his self-acquired property) has been decreed and the counter-claim of the appellant-defendant for a decree of partition of the house in dispute on the ground that it was a joint family property has been rejected.

2. The respondent-plaintiff (who shall hereinafter be referred to as 'the plaintiff') had filed the suit against his brother, the appellant herein

and who shall hereinafter be referred to as 'the defendant', alleging that he was the owner of the house in dispute having purchased the same vide registered sale deed dated 14.11.1979. Regarding the sale consideration he had pleaded that since he was living abroad he had been remitting money from abroad in the bank account of his mother and with that money the house in dispute was purchased in his name. The plaintiff claimed that he remitted US $ 10,000, 11000, 31231 and 15000 on 19/12/77, 02/08/78, 07/04/79 and 14/09/79 respectively. Prior to the execution of the sale deed an agreement to sell was executed between the vendor and the defendant on whose behalf that agreement dated 5th September, 1979 was signed by the defendant as the attorney of the plaintiff. After the purchase of the house in dispute the plaintiff had allowed the defendant to live in one portion of that house comprising of one room and a bath room on the ground floor temporarily as a bare licensee without claiming any charges. The defendant was married in the year 1982 and then his wife also started living with him in the one room accommodation. However, when the plaintiff asked the defendant to vacate the said accommodation in his possession when some disputes arose between the two brothers in 1998 the defendant refused to vacate and that necessitated initiation of legal proceedings by the plaintiff for getting back the premises in occupation of the defendant. In the suit filed by the plaintiff he had claimed a decree of possession as well as mesne profits @ Rs.5,000/- p.m. for a period of three months prior to the filing of the suit and also for the subsequent period till the delivery of possession to him.

3. The defendant contested the suit and claimed that even though the house in dispute was purchased in the name of the plaintiff and he (the defendant) had acted as his attorney at that time but subsequently in January, 1980 it was thrown in the hotch potch of the joint family of Kalias by the plaintiff by making a declaration to that effect which was re-affirmed also on the occasion of Rakhi in the same year when also he had visited India and with that declaration the house in dispute had ceased to be the separate property of the plaintiff. The joint family according to the defendant at that time comprised of their father (who subsequently died in the year 1981), mother, married sister and another brother Virender Nath. The defendant also pleaded that in the ground floor portion their mother was also living with him and the other brother Virender Nath was living on the first floor. Regarding the money which the plaintiff claimed to have remitted from abroad the defendant pleaded

that he did not have details of those remittances but it was claimed while admitting that for the purchase of the house in dispute the plaintiff had contributed in good measure that their father had also contributed money (In the memorandum of appeal however the appellant-defendant admitted the remittance of U.S. $ 10,000 and 11,000 by the plaintiff in the bank account of the mother). It was also pleaded that the plaintiff had filed the suit only as a counter blast to the petition filed by the defendant for dissolution of his marriage with his wife on the ground that she was having adulterous relationship with the plaintiff. The defendant thus while praying for the dismissal of the plaintiff's suit sought a decree of partition of the house in dispute by presenting a counter-claim claiming 1/4th share therein. The mother and the sister of the original parties to the suit, who had also been subsequently ordered by the trial Court to be impleaded in the suit as well as in the counter-claim, supported the original defendant (the appellant herein) by adopting the defence raised by him in his written statement. Third brother Virender Nath was also impleaded but he did not participate in the trial and remained ex parte.

4. The plaintiff in his reply to the counter-claim took a preliminary objection that the suit (counter-claim) was not maintainable and the defendant was debarred from raising the plea of benami in view of Section 4 of the Benami Transactions (Prohibition) Act, 1988. On merits, the plaintiff denied that anybody except him had contributed money for the purchase of the house in dispute or that he had thrown that property into the hotch potch of the joint family. He also denied the very existence of any Joint Hindu Family. The plaintiff also denied that he had visited India in January, 1980 or on the Rakhi day in August,1980, as had been claimed by the defendant.

5. Following issues were framed by the trial Court for trial:-

"(1) Whether this suit is not properly valued for the purposes of Court fee and jurisdiction as alleged in the written statement? OPD

(2) Whether the suit building after its purchase in the name of the plaintiff was thrown into the hotchpotch of joint family pool and was treated as a joint family property as alleged in the counter claim filed on behalf of the defendant? OPD

(3) Whether defendant no. 1 is a licensee in respect of suit

premises as alleged in the plaint and if so to what effect? OPP

(4) In case issue no. 2 is decided in the affirmative, whether the plaintiff is entitled to recover mesne profits from the defendant and if so at what rate and for which period? OPP

(5) Relief."

6. The learned trial Court decided issues no. 2, 3 and 4 against the defendant-appellant and passed a decree of possession and mesne profits also @ Rs. 5000/- per month w.e.f. 01.05.1999 till the vacation of the licensed premises by the defendant-appellant. The decision of the trial Court is now under challenge before this Court at the insistence of the defendant.

7. I have heard Shri D.N.Goburdhan, learned counsel for the appellant and Shri Nishant Datta, learned counsel for the respondent and have also examined the evidence adduced during the trial. The admitted position that emerges is that the house in dispute was purchased in the name of the respondent and that the agreement to sell prior to the execution of the sale deed was signed on behalf of the plaintiff by the defendant as his attorney. Thus, the presumption is that the plaintiff was the exclusive owner of the house in dispute. Regarding the payment of sale consideration the defendant himself had claimed that the plaintiff had paid in good measure which showed that the defendant was not disputing the plaintiff's claim that the money which he had been remitting in the bank account of his mother was used to purchase the house in dispute in his name. Even though in the written statement it had been claimed by the defendant that their father had also contributed some money towards the sale consideration of the house in dispute and in evidence it was suggested to the plaintiff in cross-examination that their father had paid a sum of Rs.50,000/- to the property dealer as advance and another sum of Rs.1,50,000/- in cash to the builder at the time of execution of agreement to sell and then in his own evidence also the defendant took that stand but except for his own ipse dixit there is no other evidence adduced to substantiate that plea and, therefore, the learned trial Court has rightly not accepted the same. In fact the defendant-appellant had admitted in his written statement, though not very clearly, that the house in dispute was the personal property of the plaintiff. That admission is evident from the averments made by the defendant in his written statement-cum-counter

ˇclaim that the plaintiff had made a solemn declaration that he was throwing into the hotch potch of the Joint Hindu Family the house in dispute which had been purchased in his name and that " With the solemn declaration having being made by the plaintiff, the suit property ceased to be the separate property of the plaintiff and became the Joint Hindu Family property of the plaintiff, the defendant, their brother, Group Caption Virender Nath, their late father Sh. Shankar Das Kalia (who died on 5th May,1981), mother and sister……". From this portion extracted from the written statement of the defendant it is more than clear that even according to the case of the defendant and other members of Kalia family the house in dispute was the personal acquisition of the plaintiff.

8. Now I come to the plea of the defendant- appellant that in the year 1980 the house in dispute, which I have held to be the personal property of the plaintiff, was thrown into the hotch potch of the Joint Hindu Family (Kalia family) and as a result of that the house in dispute became the Joint Family Property in which every member of Kalia family acquired equal share and the same, therefore, became liable to be partitioned because of the disputes between the plaintiff and other family members. In my view, this defence taken by the defendant is without any merit since it was not his case and not even that of his mother and married sister that at any time Kalia family had any ancestral property in their hands. If there was no joint family property or coparcenery property in existence at the time of alleged throwing of the house in dispute by the plaintiff into the common hotch potch there could be no question of applicability of the rule of blending self-acquired property of a member of coparcenery with the properties of the coparcenery or undivided Hindu family. For this view I am fortified by a Division Bench judgment of this Court in **"Kewal Krishan Mayor v. Kailash Chand Mayor and Ors.",** 95 (2002) DLT 115 wherein this very question had cropped up for consideration and after noticing some judgments of the Hon'ble Supreme Court on the same point the Division Bench had come to the conclusion that to attract the rule of blending of separate property of a coparcener with joint family property there has to be in existence some coparcenery property as well as some separate property of a coparcener. It would be profitable to extract below the relevant paragraphs from the said judgment of the Division Bench of this Court:

"24. As regards the other point about the deceased having thrown

his two properties in common pool of the alleged joint Hindu family, learned Judge proceeded on the assumption that the law does not lay down that a separate property could not be impressed with the character of joint Hindu family in the absence of the existence of joint family or coparcenery property. He further proceeded on the assumption that the existence of joint family property is not necessary before a member of the family throws his self acquired property in the joint stock. It is this erroneous assumption of law by the learned Single Judge, which in our view led him to incorrect conclusions.

25. Under the Hindu Law property may be divided under the two classes, namely, (a) Joint family property and (b) separate property. Joint family property may be further sub divided according to the source for which it comes into, namely, (a) ancestral property (b) separate property of co-parceners thrown into the common coparcenery stock and (c) property joint acquired by members of a joint family with the aid of ancestral property. It is not the case of the plaintiff that the two properties were ancestral properties. His case is that these two properties (9/10 and 8/11 W.E.A. Karol Bagh, New Delhi) were separate properties of Lala Bai Mukand and were thrown by him into the common coparcenery stock by declaration (Ex. P.W. 1/3) made by him. This is the case set up by him in the plaint and for that it is necessary for us to deal with the question that under what circumstances property, which originally is separate and self acquired property of a member of a joint Hindu family may become joint family property.

26. The law is now well settled that such a separate or self acquired property by operation of the doctrine of blending becomes joint family property, if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. A clear intention to waive his separate rights must be established. The basis of the doctrine is the existence of coparcenery property as well as existence of separate property of a coparcener.

[Emphasis supplied by me.]

27. In **Mallesappa Bandeppa Desai and Anr. v. Desai Mallappa alias Malesappa and Anr.** MANU/SC/0377/1961 : [1961] 3 SCR 779 approving he opinion of **Privy Council in Rajanikantha Pal v. Jagmohan Pal** AIR 1923 PC 57 it was held:-

The rule of blending postulates that a coparcener who is interested in the coparcenery property and who owns separate property of his own may be deliberate and intentional conduct treat hi separate property as forming part of the coparcenery property. If it appears that property which is separately acquired has been deliberately and voluntary thrown by the owner into the joint stock with the clear intention of abandoning his claim on the said property and with the object of assimilating it to the joint family property, then the said property becomes a part of the joint family estate; in other words, the separate property of a coparcener loses its separate character by reason of a coparcener of the owner's conduct and get thrown into the common stock of which it becomes a part. The doctrine, therefore, inevitably postulates that the owner of the separate property is a coparcener who has an interest in the coparcener property and desires to blend his separate property with the coparcenery property. There can be no doubt that the conduct on which a plea of blending is based must clearly and unequivocally show the intention of the owner of the separate property to convert his property into an item of joint family property. A mere intention of benefit the members of the family by allowing them the use of the income coming from the said property may not necessarily be enough to justify an inference of blending; but the basis of the doctrine is the existence of coparcenery and coparcenery property as well as the existence of the separate property of a coparcener.

[Emphasis supplied.]

28. .....

29. The basic requirements of the doctrine of blending namely, existence of coparcenery or coparcenery property as well as existence of separate property were reiterated by the Supreme Court in **Goli Eswariah v. Commissioner of Gift Tax, A.P.** MANU/SC/0258/1970 : [1970]76ITR675(SC) wherein it was held:-

"To pronounce on the question of law presented for our decision, we must first examine what is the true scope of doctrine of throwing into the 'common stock' or 'common hotchpotch'. It must be remembered that a Hindu family is not a creature of a contract. As observed by this Court in **Mallesappa Bandeppa Desai v. Desai Mallappa,** MANU/SC/0377/1961 : [1961] 3 SCR 779 that the doctrine of throwing into common stock inevitably postulates that the owner of a separate property is a coparcener who has an interest in the coparcenery property and desires to blend his separate property with the coparcenery property. The existence of a coparcenary is absolutely necessary before a coparcener can throw into the common stock his self acquired properties. The separate property of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by him into the common stock with the intention of abandoning his separate claim therein. The separate property of a Hindu ceases to be a separate property and acquires the characteristic of joint family or ancestral property not by any physical mixing with his joint family or ancestral property but by his own volition and intention by his waiving and surrendering his separate rights in it as separate property. The act by which the coparcener throws his separate property to the common stock is a unilateral act. There is no question of either the family rejecting or accepting it. By his individual volition he renounces his individual right in that property and treats it as a property of the family. No longer he declares his intention to treat his self acquired property as that of the joint family property, the property assumes the character of joint family property. The doctrine of throwing into the common stock is a doctrine peculiar to the Mitakshara School of Hindu law. When a coparcener throws his separate property into the common stock, he makes no gift under Chapter VII of the Transfer of Property Act. In such a case thee is no donor or donee. Further no question of acceptance of the property thrown into the common stock arises."

30. Same principles was reiterated in **K.V. Narayanan v. K.V. Ranganadhan and Ors.** MANU/SC/0528/1976 : [1976]3SCR637 and in **Pushpa Devi v. The Commissioner of Income-tax,** New Delhi MANU/SC/0378/1977 : [1977]109ITR730(SC).

31. Thus the pre-requisite of the doctrine on blending being existence of coparcenery or coparcener property as well as the existence of separate property, in case of any one of the basic requirement lacking there would be no question of applicability of the doctrine of blending…….

[Emphasis supplied by me.]

32.....

33.....

34. ..... This theory of having blended his separate property and characterised it as a joint Hindu Family property this must fall to the ground simply on the ground that as on the date there was no coparcenery or joint Hindu family property with which the two properties could have been blended. ....."

9. Thus, the claim of the defendant for partition of the house in dispute on the ground that it was a joint family property because of the same having been thrown into the common stock of the joint family cannot be accepted.

10. It was also contended by the learned counsel for the appellant that since as per the plaintiff's own case the entire sale consideration for the purchase of the house in dispute was paid to the vendor out of the savings bank account of their mother but the sale deed was got registered in the name of the plaintiff it is clear that this was a case of benami transaction and the plaintiff was a mere benamidar and consequently he could not maintain a suit for possession against the defendant claiming himself to be the real owner. Mr. Goburdhan also contended that the bar against raising any defence on the ground of benami is not attracted here in view of the exception clause in sub-Section 3(b) of Section 4 of the Act of 1988. Therefore, contended Mr. Goburdhan, the objection taken by the plaintiff in reply to the counter claim that the plea of benami was barred under Section 4(1) of the said Act of 1988 cannot be accepted.

11. In my view, even this argument raised by the learned counsel for the appellant has to be rejected since it was not his case that the house in dispute had been purchased by the mother in the name of her son as a benamidar. As noticed already, his defence proceeded on the

basis that the house in dispute was the personal property of the plaintiff but the same had assumed the character of a joint family property when the plaintiff had made a declaration that he was throwing that property into the common hotch potch of Kalia family and that plea has already been rejected by me.

12. In any event, even if it is accepted that the mother had purchased the house in dispute in the name of her son as a benamidar the defendant cannot derive any benefit since the plea of benami transaction is now hit by the provisions of Section 4(1) of The Benami Transactions (Prohibition) Act, 1988 which reads as under:

> "4(1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property"

Learned counsel for the appellant in order to bring out the case from purview of this provision of law took shelter under sub-section 3(b) of Section 4 which reads under:-

> "4(3)Nothing in this section shall apply,-
>
> (a) …….
>
> (b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity."

13. The submission of Mr. Goburdhan was that it is a case of mother and son the son was standing in a fiduciary capacity and also as a trustee qua the mother while holding the property in his own name and, therefore, the plea of benami was not hit by Section 4(1) of the Act of 1988 in view of the exception provided under sub-section 3(b) of Section 4. This argument also cannot be accepted since it was not even the case of the mother that she had purchased the house in dispute in the name of the plaintiff as a benamidar and that he was holding that property as a trustee for her or in a fiduciary capacity towards her. Even the defendant had not taken such a plea. In any event, the plaintiff, in whose name his mother had purchased the house in dispute, cannot be said to be the

trustee of his mother and it also cannot be said that he was holding that property in fiduciary capacity towards his mother. A similar question had cropped up for consideration before a learned Single Bench of this Court in which case also the property in question had been purchased by the mother in the name of her son and when that son had sought to take shelter under the provisions of Section 4(3)(b) of the Act of 1988 this Court had taken the view that the son could not be said to be holding the property as a trustee of her mother or in a fiduciary capacity. That decision is reported as 2003 (67) DRJ 174, **"Anil Bhasin vs. Vijay Kumar Bhasin & Ors."** and the relevant paras of that decision are reproduced below:

> 15. It is obvious that in view of Section 7 of the Benami Transaction Act, which repealed Sections 81 and 82 of the Indian Trusts Act 1882, there cannot be the same concept of trusteeship or fiduciary capacity, or that of the transferee being deemed to be holding for the benefit of the person buying or providing the consideration as was the position prior to the amendment of 1988.
>
> 16. At the same time, there exists the provisions of Section 4(3)(b) of the Benami Transactions Act 1988, being in the nature of a proviso excluding from the prohibition, the right to recover property held benami, in such situations where the person in whose name the property is held, is a trustee or other persons standing in a fiduciary capacity.
>
> 17. To my mind, the only interpretation which can reconcile all the provisions, is to hold that after the repeal of Sections 81 and 82 of the Indian Trusts Act 1882, it is only those instances of fiduciary capacity such as property of partnership firm held in the name of one of the partners, or property which Mr. X wanted Mr. Y to buy in the name of Mr. X, but in violation of that instruction, Mr. Y has bought the property in his (Y's) own name. In such a case mr. Y being in fiduciary capacity and a trustee of Mr. X, the provisions of Section 4(3)(b) will ensure that prohibition of Benami Transaction does not stand in the way of a legal proceeding by Mr. X to enforce any right in respect of the said property.

> 18. The distinction is subtle, but significant. If mr. X asks Mr. Y to purchase in his own name certain property, of which consideration has been paid by Mr. X, then that is a benami, transaction. On the other if Mr. X were to ask Mr. Y to buy the property in the name of Mr. X, but for any reason Mr. Y purchase the property in his own name (viz name of Mr. Y), then the relationship of trustee and or fiduciary capacity is available in the former case, but not in the latter case."

14. Similar view was taken by Kerala High Court also in a judgment reported as (1989) 180 ITR 503titled **"C. Narayan vs. Gangadharan".**

Therefore, the argument of Mr. Goburdhan in the present case that the plea of benami is permissible in view of sub-section 3(b) of Section 4 of the Act of 1988 stands rejected.

15. It was finally submitted by the learned counsel for the appellant that the learned trial Court had not given any decision in respect of the counter claim for the relief of partition lodged by the defendant and, therefore, this Court should remand back the matter to the trial Court with a direction to dispose of the counter claim also, one way or the other. There is no doubt that there is no specific observation made by the learned trial Court in the concluding paras of the impugned judgment. However, since the relief of partition was sought by the defendant – appellant in his counter claim on the ground that the house in dispute belonged to the joint family and that plea had been categorically rejected by the trial Court it is clear that the counter claim stood rejected and particularly when he had not sought any other relief on any other ground in the counter claim. Therefore, there is no question of sending back the matter to the trial Court for passing a formal order of rejection of the counter claim. Learned counsel for the appellant had also contended that if such a formal order had been passed in respect of the counter claim the same would have atleast got a decent burial. Since appeal is in continuation of a suit that formal order of rejection of the counter claim lodged by the appellant – defendant can be passed even by this Court.

16. As a result of the rejection of all the pleas raised before this Court for the reversal of the decree of possession the appeal to that extent is liable to be dismissed. Nothing was argued on the question of award of mesne profits @ Rs. 5000/- per month by the trial Court as

far as the period of three months prior to the institution of the suit is concerned. Considering the fact that the house in dispute is situated in a posh locality of Delhi the grant of mesne profits @ Rs. 5000/- per month does not appear to be unjustified also and, therefore, the trial Court's decree to that extent also stands affirmed.

17. However, as far as the grant of mesne profits by the trial Court to the plaintiff for the period after the filing of the suit till vacation of the property in question is concerned, the same cannot be sustained since no enquiry was ordered to be held by the trial Court for fixation of mesne profits for that period which was mandatorily required to be conducted in view of the provisions of Order XX Rule 12 of the Code of Civil Procedure and this legal position was not disputed even by learned counsel for the respondent – plaintiff. It is now well settled that in a suit for possession of some immovable property the Court has a discretion to order an enquiry into the mesne profits which are to be payable to the successful plaintiff after the institution of the suit till the delivery of the possession of the suit property by the unsuccessful defendant or to leave the plaintiff to have recourse to the remedy of filing of an independent suit for that relief. In case the Court feels inclined to award mesne profits to the successful plaintiff in the suit for possession itself then at first instance an enquiry is to be held and depending upon the result of that enquiry a final decree is to be passed regarding the relief of mesne profits. Since in the present case no enquiry was ordered by the learned trial Court for the mesne profits payable to the plaintiff for the period after the institution of the suit no decree could be passed in favour of the plaintiff for that period and, therefore, that part of the impugned judgment and decree is liable to be set aside.

18. In view of the fore-going conclusions, this appeal is allowed partly. The impugned judgment and decree to the extent the defendant has been ordered to vacate the premises in his occupation forming part of the house in dispute and to pay mesne profits for a period of three months prior to the institution of the suit @ Rs. 5000/- per month is concerned it is affirmed and the counter claim stands formally rejected. The decree awarding mesne profits to the plaintiff for the period after the institution of the suit, however, is set aside. In the facts and circumstances of the case, parties are left to bear their own costs and the appellant is granted three months, time to vacate the accommodation in his possession.

ILR (2011) DELHI II 754
CM(M)

SHIWANI KABRA ....PETITIONER

VERSUS

SHALEEN KABRA ....RESPONDENT

(G.S. SISTANI, J.)

CM(M) NO. : 1018/2010 DATE OF DECISION: 21.02.2011

Hindu Marriage Act, 1955—Section 26—Aggrieved petitioner mother filed petition challenging order of trial Court whereby two applications of Respondent's father seeking modification of custody arrangements of children in view of his transfer to Jammu & Kashmir, and for permission to take their transfer certificates from school in Delhi, were allowed—As per petitioner, considering age of children, to be 13 & 8 years mother should be appointed as guardian of children—Also, children were studying in most reputed school in Delhi and same education standard would not be available in Jammu—Respondent urged petitioner had no capability to meet with needs of children whereas he was in better position to take care of educational needs of children—Held:—A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents—In selecting proper guardian of a minor, the paramount consideration should be the welfare and well being of the child—In selecting a guardian, the Court is exercising parents patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort contentment, health, education, intellectual development and favourable surroundings—But over and above physical comforts,

moral and ethical values cannot be ignored—Elder son to stay with father and the younger son shall remain in the custody of the mother.

The welfare of the child cannot be measured merely on the basis of the position of the father, his social status, or the academic degrees, or the fact that the physical comfort, which he may be able to provide to his children. It is the duty of the Court while considering, what is the welfare of the child, to consider the same in the widest sense. The younger son is barely eight years of age and is at the most impressionable age of his life and definitely the mother would have the interest of the minor most at heart. His tendered years would need the care, protection and guidance of a person, who has most interest in his welfare and who has the time to lend her years to her younger son and allow him to rest his head on her shoulders when he needs at the most. He would need his mother and it is the heart of the mother, which can read the mind of the child at that age. **(Para 39)**

Important Issue Involved: A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents—In selecting proper guardian of a minor, the paramount consideration should be the welfare and well being of the child—In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort contentment, health, education, intellectual development and favourable surroundings—But over and above physical comforts, moral and ethical values cannot be ignored.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Brijesh Kalappa, Mr. Gopal Singh and Ms. Divya Nair, Advocates.

FOR THE RESPONDENT : Ms. Priya Hingorani, Mr. Aman Hongorani and Mr. Santosh Kumar, Advocates.

CASES REFERRED TO:

1. *Vikram Vir Vohra* vs. *Shalini Bhalla* (2010) 4 SCC 409.
2. *Anjali Kapoor* vs. *Rajiv Baijal*, reported at (2009) 7 SCC 322.
3. *Gaurav Nagpal* vs. *Sumedha Nagpal* reported in (2009)1 SCC 42.
4. *Mausami Moitra Ganguly* vs. *Jayant Ganguli* reported at (2008)7 SCC 673.
5. *Nil Ratan Kundu and Another* vs. *Abhijit Kundu* reported at (2008)9 SCC 413.
6. *Tara Chand Mavar* vs. *Basabti Devi* reported in I (1989) DMC 402.
7. *Thriety Hoshie Dolikuka* vs. *Hoshian Shavaksha Dolikuka* reported in (1982)2 SCC 544.
8. *Sumedha Nagpal* vs. *State of Delhi* (SCC p. 747, paras 2 & 5).
9. *Rosy Jacob* vs. *Jacob A. Chakramakkal* (SCC p. 847, para 7).

RESULT: Petition disposed of.

G.S. SISTANI, J. (ORAL)

1. The present petition has been filed by the petitioner mother and is directed against the order dated 19.07.2010 passed by the Learned Additional District judge whereby two applications of the Respondent father seeking modification of the custody arrangements of children in view of his transfer to J&K and for permission to take the transfer certificates of both the children from the school in Delhi have been allowed.

2. The brief facts that are necessary for disposal of this petition are that marriage between the petitioner and the respondent was solemnised on 14.02.1994. Two sons, presently of 13 and 8 years of age, were born

out of the wedlock. The Petitioner and the Respondent have been living separately since 10.04.2007 and have been involved in various litigations since then. The respondent has filed a divorce petition under section 13(1)(i)&(1A) of the Hindu Marriage Act while the petitioner has initiated proceedings under the Domestic Violence Act.

3. The respondent father is an IAS Officer of J&K cadre and in view of his transfer to J&K, the respondent moved two applications dated 25.05.2010 and 22.06.2010 seeking modification of the custody arrangements of the two children and for granting permission to take transfer certificates from the schools in Delhi so as to complete the admission process of the two children in a school in Jammu. The learned additional district judge, after hearing both the parties allowed the applications of the respondent father which has led to the filing of the present petition. The trial court while allowing the applications issued the following directions:

> "33. However he (respondent) shall be required to make necessary arrangements at school at Delhi to ensure that seats of both the children are kept reserved for the current academic year by payment of necessary fee, as had been undertaken by petitioner himself. Petitioner shall ensure that he gets a Government accommodation allotted in his name at the earliest and that he makes such arrangements that children are not left in custody of servants alone and that there is some family member of the petitioner available to supervise the children in his absence. Further, respondent shall have right to exclusive custody of children for two days in every fortnight and petitioner shall be required to bear the expenses and to make necessary arrangements for her travel from Delhi to J&K and back to Delhi as well as for her lodging and comfortable stay at J&K, in accordance with his own status and standing. In case, respondent is not able ˇto go for meeting with the children, during her fortnightly visit, for any reason, she shall inform petitioner in advance and shall be entitled to be compensated with exclusive custody of children during their holidays for days, she misses out on meeting with the children. During the long holidays, i.e., holidays for more than four days, respondent shall be permitted to take children to meet her relatives. However, such visits shall not be more than once in three months. In case respondent wants to take her relatives or parents to meet the children at J&K, she shall be required to bear expenses of travel of her relatives of her own. Petitioner and respondent may also mutually agree that petitioner shall bring children to Delhi for fortnightly meeting with the respondent, once in two months or earlier as agreed upon by them. Petitioner shall allow respondent to speak to children at least once a day.
>
> 34. This modification in order of custody and visitation of children shall be operational for a period of six months and shall be reviewed after six months subject to the conduct of the parties as well as performance of the children in school at J&K for further posting of petitioner whichever is earlier."

4. The counsel for the petitioner submits that the learned additional district judge has failed to appreciate the fact that considering the age of the children the mother should be appointed as guardian of the children. The court has further failed to appreciate that Delhi is an education hub and that both the children are studying in Delhi Public School, RK Puram and Vasant Vihar respectively which are the most reputed schools of India. The Heritage School, Jammu in which the respondent has sought admission of the two children fades pale to the education standards of Delhi Public Schools since it has started only in the year 2005 and is untested in terms of its excellence and teaching. The said school is not even preferred by the locals of Jammu who rate Delhi Public School, Jammu or Army Public School at Nagrota or even the Kendriya Vidyalaya to be providing a better and higher quality education. Removing the children from the rolls of a reputed school of Delhi would certainly be prejudicial to the educational interests of the children in the long run. It is further contended by the counsel that by reserving the seats of the children in the schools at Delhi, the trial court has reflected that it is uncertain of the arrangements made by the respondent in J&K.

5. The counsel for petitioner next submits that while the trial court has observed the fact that the respondent has tutored the children and that the children were left alone at J&K with the servants while the respondent was away at work, has erroneously allowed the applications of the respondent and that the trial court has been influenced by the fact that the respondent is an IAS officer occupying a high position in the

government and thus would be in a better position to handle the children. It is next contended by the counsel that the trial court ought not to have granted the sole custody of the children to the respondent by allowing him to take the children to an altogether different state especially when the parents of the respondent also do not reside with him. It is further submitted that granting the custody of the children to the respondent would mean that the children would virtually live with the servants without any supervision of the family members. The counsel for petitioner further submits that the trial court has erroneously allowed the prayer of the respondent for absolute custody of the two children and to take them to a different state on the pretext that the respondent got the two children admitted in a Jammu school in an utter disregard of the orders of the court.

6. Mr. Brijesh Kalappa, counsel for the petitioner, next submits that the respondent husband being posted as the Managing Director of Power Development Corporation, J&K, is ordinarily likely to remain as a resident of Srinagar where the headquarters of Power Development Corporation are situated. The Heritage School is situated in Jammu city which is 7-8 hours by road from Srinagar. While the respondent would be away at work, children would be staying mostly in the company of servants as the respondent would mostly be busy in work and at best be available on weekends. It is the contention of the counsel of the petitioner that the Respondent lives under administrative difficulties and is holding a sensitive post wherein liabilities of State fall upon him and he would not be able to take good care of the children.

7. The counsel for the petitioner further submits that the trial court has failed to consider that the petitioner is competent to take care of the educational needs of the children and to provide them with motherly love, care and protection. The petitioner is a graduate from the Vanasthali Vidyapeeth University, Udaipur and has done her specialisation in Home Science, Music and Social Science. It is further submitted that though the respondent father is very well educated, but the education of father alone is not imperative for the overall development of the children. It was further submitted that since the respondent, being an IAS officer, used to return late owing to his work pressure he had no time for the children and it was the petitioner who has always taught the children and taken care of their needs and it is only after the initiation of the custody

proceedings that the respondent has started taking interest in the children. The counsel for petitioner further contends that the petitioner has developed illicit relations with one Ms. X (name withheld) who is a journalist in Daily News Analysis and that she is the precipitating factor for all problems in the matrimonial life of the petitioner and the respondent.

8. Admittedly, there was no order of the court for dividing the time of the custody of children during the summer vacations, but there was a mutual understanding between both the parties since 2007 that the custody during the vacations was to be divided in equal proportions. The respondent in utter disregard of the aforesaid order dated 13.07.2007 and 10.06.2010 (by which the respondent had to hand over the custody of the children to the petitioner by 14.06.2010) fled from Delhi along with the two children on 21.05.2010 without even informing the petitioner and took them to Jammu. It has been contended by the counsel for the petitioner that the admission of the children in Heritage School, Jammu is a result of the contemptuous action of the respondent for which a contempt petition is pending before the learned metropolitan magistrate. The act of admission of children in a school in Jammu is without any permission of the court and without any information to the petitioner depriving her of the rightful custody of the children as per the custody arrangement agreed upon by the parties. The counsel further drew the attention of the court on other instances when the respondent has flouted the orders of the trial court with regard to the custody of the children in view of his position as an IAS Officer.

9. It has been submitted by the counsel for the petitioner that the trial court has lost sight of the fact that while the elder son is in his transitional stage of physical and mental human development, the younger son is only 8 years of age and is too young to live without his mother and the welfare of the children lies in allowing them to stay with their mother. The counsel further submitted that the petitioner has already undergone the trauma of miscarriage of twins in the year 1994 and again she is being separated from both her children vide the order of the trial court.

10. The counsel for the petitioner places reliance on **Gaurav Nagpal v. Sumedha Nagpal** reported in (2009)1 SCC 42 and more particularly at para 42 which reads as under:

"42. Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible.

43. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force"

11. The counsel for the respondent has reiterated the arguments raised before the trial court. Ms. Hingorani, Advocate, submits that the trial court has considered all the orders which have been passed from time to time and while keeping the interest and well-being of the minor children, the trial court has passed the order modifying the custody arrangement and permitted the respondent to take transfer certificates of both the children from the school at Delhi for admission in school at Jammu. It is submitted by the counsel for the respondent that the fact that the respondent is serving in the State of Jammu & Kashmir should not come in the way of the respondent to perform his parental duties.

12. The Counsel for respondent submits that the petitioner is totally incompetent to provide academic guidance to the children. It is denied that the petitioner has done her specialisation in Home Science, music and social science. It is contended that the petitioner has no capability to meet the needs of modern education as her knowledge of subjects like English, Maths, Science, Social Studies, Computers etc. is abysmal and that she only has the option of relying on tutors. It is further submitted that the tutors appointed by the petitioner were substandard and inefficient. The counsel for respondent has strongly urged before the court that respondent is in a better position to take care of the educational needs of the children as he has a meritorious educational background of being graduate from IIT Delhi, has pursued his MBA from FMS, University of Delhi and is an Indian Administrative officer of 1992 Batch. The parents of the respondent are also well known educationists who have retired from senior positions in education department, Rajasthan and would be

able to provide educational help to the children whereas the petitioner has a poor academic record and the father of the petitioner is also just 10th pass and is facing serious criminal charge. The counsel for respondent next submits that the custody arrangements vide order dated 24.04.2010 brought smiles back on the children's face and there was great improvement in their academic record. The children followed a regular routine with extracurricular activities, studies, visiting parks and a healthy food regime. It is next submitted that since December 2008, the responsibility of the education of the children has been shouldered on the respondent. It is further alleged that the petitioner is extremely incompetent and careless towards the children; she does not attend the parent teacher meetings of the children and does not take interest in the progress of the children. The extra-curicular activities of the children had also come to a standstill and the academic performance had deteriorated.

13. It is also contended by the counsel for the respondent that the petitioner has also been totally uncaring towards the medical needs of the children and is so indisciplined that right dosage of medicine at right time are never administered to the children. The counsel for respondent further submits that the younger child has been sent to school in unclean and stinking school uniform. On various occasions, the school tiffin given by the petitioner to the children did not prescribe to the healthy nutritious eating regime prescribed by the school but instead the children were sent to school with biscuits and other unhealthy tiffin.

14. The counsel for the respondent next submits that the petitioner has a lose moral character and she did not take care of the children since she was involved with a servant (name withheld) that she had no time to look after the children. The counsel for respondent relies on certain audio and video tapes and also call records of the petitioner in support of the allegation that the petitioner has illicit relations with the servant. Further, the counsel submits that the respondent caught the petitioner alongwith her paramour (name withheld) red handed on 08.04.2007 at his home. It has also been alleged by the counsel for the respondent that prior to the said servant the petitioner had illicit relations with another man (name withheld) during their stay in Udaipur when the respondent caught the petitioner red handed.

15. The counsel for the respondent next submits that the conduct

of the petitioner and her father is such that it would be prejudicial to the welfare of the children if the custody is granted to the petitioner. The counsel contends that the father of the petitioner had married a second time in 1987 in desire of a male child who was born in 1995. The aforementioned fact came to the knowledge of the respondent only in the year 2003. The petitioner's father threw out his second wife and son in 2005 and is presently facing trial under section 406, 498-A IPC and also under the Domestic Violence Act. The petitioner's father is also paying maintenance to his illegitimate son and second wife under the orders of the court. It is contended by the counsel for the respondent that home influence plays an important role in developing the personality of the children and in the circumstances mentioned above, the educational qualification of the petitioner and her father and also the conduct of the petitioner and her father would not be conducive to the welfare of the two children in case their custody is granted to the petitioner mother.

16. It is further submitted by the counsel for the respondent that all arrangements have been made by the respondent for the stay of the children in Jammu and the parents of the respondent have also shifted with the respondent. As per the respondent, the children would be under the supervision and control of their grandparents and not in the custody of the servants alone as has been alleged by the petitioner. In contrast, the counsel for the respondent contends that the petitioner stays alone and there is nobody to take care of the children other than the petitioner herself.

17. The counsel for the respondent next contends that on all occasions the two children have shown a strong desire to stay with the respondent father only. Reliance is placed upon **Nil Ratan Kundu and Another v. Abhijit Kundu** reported at (2008)9 SCC 413 and more particularly at para 52 which reads as under:

> "52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence

> or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

18. Reliance has also been placed on **Mausami Moitra Ganguly v. Jayant Ganguli** reported at (2008)7 SCC 673 and more particularly at paras 10, 19 and 26 which read as under:

> "10. Taking into account the material on record, the High Court found that: (i) the respondent is financially sound and able to cater to all the needs of the child for his development whereas the appellant is unable to provide the same since she is living all alone; (ii) the child is not able to reconcile with his uprooting from Allahabad and denial of love and affection of the father; and (iii) the questions which were put to the child and answers thereto indicate that the child wants to study at Allahabad. Having regard to the prevalent circumstances and the fact that the child had received his education from primary stage with his father at Allahabad, the Court came to the conclusion that the welfare and development of the child and his future would be best served at present at Allahabad in the hands of the father. Accordingly, the High Court set aside the order passed by the Family Court and granted the custody of Master Satyajeet to the respondent, with the following directions:
>
> > "1. The appellant shall make arrangement for Master Satyajeet to continue his studies in best schools of Allahabad and will ensure the development and welfare of the child in the best way possible.

2. The respondent mother Ms Mausami Moitra shall be at liberty to visit the child either in the appellant's house or in the premises of mutual friend or at an agreed place at any point of time and the appellant father shall not object to her meeting with the child.

3. The appellant will also allow the child to live with the mother during school vacations or on appropriate occasions.

4. Master Satyajeet shall be allowed to attend and participate in family functions/festivities subject to his school attendance and examinations, etc. which are held in the family of his mother or during any other occasions as jointly agreed to by both the appellant father and the respondent mother.

5. Any other further arrangements mutually agreed to between the appellant father and the respondent mother in the interest of the child." Consequently, the custody of the child was restored to the father. It is this order of the High Court which is under challenge in the present appeal.

19. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably, the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

26. Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that the child's interest and welfare will be best served if he continues to be in the custody of the father. In our opinion, for the present, it is not desirable to disturb the custody of Master Satyajeet and, therefore, the order of the High Court giving his exclusive custody

to the father with visitation rights to the mother deserves to be maintained. We feel that the visitation rights given to the appellant by the High Court, as noted above, also do not require any modification. We, therefore, affirm the order and the afore-extracted directions given by the High Court. It will, however, be open to the parties to move this Court for modification of this order or for seeking any direction regarding the custody and well-being of the child, if there is any change in the circumstances."

19. The counsel for the respondent, while relying on the facts of the case of **Tara Chand Mavar v. Basabti Devi** reported in I (1989) DMC 402, submits that the petitioner has poor educational background and no independent source of livelihood. The petitioner is totally dependent on her father and the maintenance awarded for the upbringing of the two children and on the tutors to meet their educational needs whereas the respondent is a reputed officer in the Indian Administrative Service who has a keen desire that his children receive good education and are brought up in an atmosphere which allows an overall development of the child's personality. The Counsel for the respondent draws the attention of the court to the observation in para 14 of the above case which reads as under:

"14. The trial court thought it fit of allow the child Rinku in the custody of the mother on the sole sentimental consideration that as the child has been living with his mother since his birth and the child also wants to live with his mother. The learned Judge thought it fit to allow the child to remain in custody of his mother. In our considered opinion no sentimental consideration should come in the way of deciding the custody of the child where the sole and only consideration is welfare of minor child. Minor child of 7 years cannot form any intelligent opinion about his own welfare and to give preference in whose custody the child wants to live. Therefore, merely because the minor child Rinku expressed preference to live with his mother, this cannot be said to be a proper consideration for allowing the child to remain in custody of his mother. The Court has carefully to see that sentimental consideration should not prevail over obvious welfare of a minor. The expression "welfare of the minor" has

very wide meaning. It has several facts including financial, educational, physical, moral and religious welfare. Therefore, due regards should also be given to the affection and capacity for building up a good career for the child."

20. It is strongly urged by the counsel for the respondent no question of contempt of the orders of the court arise as there are no orders of the court restraining either party from taking the children out of Delhi during vacations nor was there any order by court or arrangement between the parties by virtue of which the vacations were to be divided equally between the parties. The order dated 13.07.2007 is completely silent in relation to vacations. The counsel for the respondent further contends that the respondent took the children to J&K only on 05.06.2010 and not on 25.05.2010 as has been alleged by the petitioner. It is further contended that the petitioner procured the order dated 10.06.2010, whereby the respondent was directed to handover the custody of the children to the petitioner by 14.06.2010, by misrepresentation and suppression of facts and the respondent learned about the said order only on 18.10.2010. The counsel further submits that the children while in J&K, completed their holiday homework, visited various tourist spots and were always under the supervision of the respondent or the respondent's relatives visiting J&K.

21. As far as the plea of having illicit relations with the servant (name withheld) is concerned, the counsel for the petitioner submits that the allegation is patently wild, baseless and false and has been levelled only with a view to prejudice the rights of the petitioner and also with a view to deprive the petitioner of the custody of her children. The counsel for petitioner further submits that the respondent on one hand levels allegations of adultery against the petitioner with the said servant in the present petition whereas in the petition for divorce, the respondent has alleged adulterous relationship of the petitioner with another man (name withheld). Refuting the allegation of the respondent, the counsel for the petitioner submits that the respondent is involved in an extra marital relationship with a lady journalist Ms. X (name withheld). It is further contended by the counsel for the petitioner that the respondent and his mother are personalities with distorted psychology and the respondent has also placed spy cameras all over the matrimonial home and has invaded the petitioner's right to privacy.

22. As regards the audio and video tapes and the call records relied upon by the counsel for the respondent, the counsel for the petitioner submits that they are false and fabricated. Various discrepancies have been pointed out in the said call records. The counsel for the petitioner has also contended that the petitioner is very much able to teach the children and has relied on work sheets of Manu and Pranshu showing their excellent performance in all subjects.

23. The counsel for the petitioner submits that on all occasions the food sent by the petitioner prescribed to the class menu but since the younger child complained of not liking certain foodstuff prescribed in the class menu, the petitioner found it better to give something to the child that he is fond of so that he does not return from school on an empty stomach.

24. I have heard the counsel for the parties and have carefully perused the entire material on record. The arguments of the counsel for the petitioner can be summarized as under :

. Keeping in view the age of the children, the mother is the right choice as guardian of the children and competent to take care of the educational and other needs of the children.

. Delhi is an education hub and the children currently are studying in one of the best schools of India.

. Respondent lives under difficult administrative conditions and would not have much time for the children. Children would be left at the mercy of the servants.

. The respondent in a contemptuous act has got the children admitted to Heritage School, Jammu without informing the court and the petitioner.

. The trial court is influenced by the fact that the respondent occupies a high post in the administration.

. Merely because the respondent is well qualified from IIT, FMS and is an IAS officer by itself cannot lead to the conclusion that petitioner is unfit to look after the children.

. Petitioner's father has engaged the best tutors for teaching both the children.

. Children are at a tender age when they need the love and care of the mother and not the status and position of the father which will only spoil the children.

25. The arguments of the counsel for the respondent are summarized as under :

. Petitioner is incompetent to meet the educational requirements of the children as she is only a graduate in Home science, music and social science.

. Petitioner is in an adulterous relationship with one servant (name withheld) and has neglected the children

. Since December 2008, educational responsibilities of the children have been entrusted upon the respondent and the children have shown marked improvement in their studies.

. Respondent, being a government employee, can provide all the facilities to the children.

. Petitioner's father is facing criminal trial which will cast a bad influence on the children.

. The children have shown a keen desire to stay with the respondent.

. School record would show that the mother is disinterested in studies of the children and does not even provide proper tiffin or send the children in clean clothes.

26. The law with regard to deciding application with regard to custody of children is well settled. It would be useful to refer to some of the judgments of the Apex Court on the subject. In the case of **Anjali Kapoor v. Rajiv Baijal,** reported at (2009) 7 SCC 322, it has been held:

> "15. Under the Guardians and Wards Act, 1890, the father is the guardian of the minor child until he is found unfit to be the guardian of the minor female child. In deciding such questions, the welfare of the minor child is the paramount consideration and such a question cannot be decided merely based upon the rights of the parties under the law. [See **Sumedha Nagpal v. State of Delhi**[1] (SCC p. 747, paras 2 & 5).]

16. In **Rosy Jacob v. Jacob A. Chakramakkal**[2] this Court has

observed that: (SCC p. 847, para 7)

> "7. … the principle on which the court should decide the fitness of the guardian mainly depends on two ˇfactors: (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors." This Court considering the welfare of the child also stated that: (SCC p. 855, para 15)
>
> "15. ... The children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society…."

17. In **Elizabeth Dinshaw v. Arvand M. Dinshaw**[3] this Court has observed that whenever a question arises before court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child.

> 18. At this stage, it may be useful to refer to the decision of the Madras High Court, to which reference is made by the High Court in the case of **Muthuswami Moopanar**[4] wherein the Court has observed, that, if a minor has for many years from a tender age lived with grandparents or near relatives and has been well cared for and during that time the minor's father has shown a lack of interest in the minor, these are circumstances of very great importance, having bearing upon the question of the interest and welfare of the minor and on the bona fides of the petition by the father for their custody. In our view, the observations made by the Madras High Court cannot be taken exception to by us. In fact those observations are tailor-made to the facts pleaded by the appellant in this case. We respectfully agree with the view expressed by the learned Judges in the aforesaid decision.

19. In **McGrath (infants), Re**[5] it was observed that: (Ch p. 148)

> "... The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

20. In **American Jurisprudence,** 2nd Edn., Vol. 39, it is stated that:

> "… An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to award its custody to the father or mother, the court may properly consult the child, if it has sufficient judgment."

21. In **Walker v. Walker & Harrison**[6] the New Zealand Court (cited by British Law Commission, Working Paper No. 96) stated that:

> "Welfare is an all-encompassing word. It includes material welfare; both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. *However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents."*

(emphasis supplied)"

27. In the case of **Vikram Vir Vohra Vs. Shalini Bhalla** (2010) 4 SCC 409, the Apex Court has held as under:

> "12. In a matter relating to the custody of a child, this Court must remember that it is dealing with a very sensitive issue in considering the nature of care and affection that a child requires in the growing stages of his or her life. That is why custody orders are always considered interlocutory orders and by the nature of such proceedings custody orders cannot be made rigid and final. They are capable of being altered and moulded keeping in mind the needs of the child.
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> 13. In **Rosy Jacob v. Jacob A. Chakramakkal**[7] a three-Judge Bench of this Court held that all orders relating to the custody of minors were considered to be temporary orders. The learned Judges made it clear that with the passage of time, the Court is entitled to modify the order in the interest of the minor child. The Court went to the extent of saying that even if orders are based on consent, those orders can also be varied if the welfare of the child so demands.
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> 14. The aforesaid principle has again been followed in **Dhanwanti Joshi v. Madhav Unde**[8].
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> 15. Even though the aforesaid principles have been laid down in proceedings under the Guardians and Wards Act, 1890 these principles are equally applicable in dealing with the custody of a child under Section 26 of the Act since in both the situations two things are common; the first, being orders relating to custody of a growing child and secondly, the paramount consideration of the welfare of the child. Such considerations are never static nor can they be squeezed in a straitjacket. Therefore, each case has to be dealt with on the basis of its peculiar facts.
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> 16. In this connection, the principles laid down by this Court in **Gaurav Nagpal v. Sumedha Nagpal**[9] are very pertinent. Those principles in paras 42 and 43 are set out below: (SCC p. 55)
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> > "42. Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding

under the said Act, the court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible.

43. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the 'welfare of the child' and not rights of the parents under a statute for the time being in force."

That is why this Court has all along insisted on focussing the welfare of the child and accepted it to be the paramount consideration guiding the court's discretion in custody order. (See **Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka**[10], AIR p. 1289, para 17.)"

28. It has been repeatedly held that while considering an application for custody of the children the Court must primarily look into the welfare and interest of the child, which is of paramount importance. But it is also well settled that while passing an order, the Court must also give due consideration to the wishes of the child if the child is mature enough to make an intelligent preference though the final decision is of the court to see what is conducive to the welfare of the child. In **Thriety Hoshie Dolikuka v. Hoshian Shavaksha Dolikuka** reported in (1982)2 SCC 544, the Apex Court has observed as under:

"25. We may, however, point out that there cannot be any manner of doubt as to the court's power of interviewing any minor for ascertaining the wishes of the minor, if the court considers it so necessary for its own satisfaction in dealing with the question relating to the custody of the minor."

29. A similar view has been expressed in **Nil Ratan Kundu v. Abhijit Kundu** (supra) which reads as under:

"Apart from the statutory provision in the form of sub-section (3) of Section 17 of the 1890 Act, such examination also helps the court in performing onerous duty, in exercising discretionary

jurisdiction and in deciding the delicate issue of custody of a tender-aged child. Moreover, the final decision rests with the court which is bound to consider all questions and to make an appropriate order keeping in view the welfare of the child. Normally, therefore, in custody cases, wishes of the minor should be ascertained by the court before deciding as to whom the custody should be given."

It was further observed that

"If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.

30. The present petition is to be decided on the touchstone of the law laid down by the Hon'ble Supreme Court.

31. The learned trial court has been totally guided by the fact that both the children have shown a strong desire to stay with the respondent father since despite taking note of the fact that the respondent has tutored the children by taking them to J&K and also that the children were left at the mercy of the servants, the trial court has allowed the applications of the respondent. The trial court has not stated any reason for allowing the two applications. It would be useful to reproduce the observation of the trial court which is as under :

"29. The children Pranshu and Manu appeared before the Court on 08.07.2010 and were heard at length in the chamber it appears that petitioner (respondent herein) has made concerted efforts to mould the thinking of two children after taking them away with him on 05.06.2010 to J&K. From the audience given to the children, it appears that both the children were staying in a Guest House with the petitioner and were told that their friends, children of another officer from J&K cadre who had been transferred back to J&K along with the petitioner, would also be staying at J&K. While the petitioner was away at work, the children stayed at the guest house and were left by themselves to spend their day as per their wishes. The petitioner took them to the school, where he had made arrangements for their provisional admission,

and made the children understand that they would be continuing their further studies in the school at J&K. The younger child Manu, however, appeared to be less tutored as he in his innocence said that he had been told that they, i.e. he and Pranshu, would then return back to Delhi. He also said that he would miss his friends at Delhi but since he would be returning back, he was not feeling much bad about it and that during vacations, his other friends had also gone away for holidays. On the other hand, Pranshu appeared to be taken into the thought of independence; he would have while staying in J&K, especially in the absence of the petitioner. The period which Pranshu and Manu had spent at J&K appeared to have given them a feeling of immense independence without any check on their wishes and desires as to time schedule they would be required to follow, food they were to take etc. The children also mentioned that both their grandparents, i.e., parents of the petitioner were not staying with them at that time and had gone to stay at Jaipur. Thus, it is obvious that children were without supervision of any family member, while petitioner was away for work and children were left with servants."

32. The respondent has made serious allegations against the petitioner that the petitioner is in an adulterous relationship with the said servant and has placed on record certain audio-video tapes and call records in support of the contention. The petitioner has refuted the aforementioned allegation and submitted that the said allegation have been made only with a view to prejudice the court and to deprive the petitioner of the custody of her children. The counsel for the petitioner further contends that the respondent is himself in an extra marital relationship with a lady journalist (name withheld). During the course of proceedings on being asked about the whereabouts of the servant (name withheld), it was revealed by counsel for the respondent that from the past 3 years, the whereabouts of the said servant are not known. Various material discrepancies have also been pointed out in the call records relied upon by the counsel for the respondent. Though a faint impression has been created to show that a large number of phone calls were made from a cell number which was being used by the petitioner to a cell number being used by the said servant but since this issue is not to be decided by this court and any impression or opinion in this regard shall cause serious prejudice to the

rights of the parties, it would not be appropriate to give any opinion except that in the absence of concrete evidence, this court shall refrain itself from making any observation on the aforementioned contention of the counsel for the respondent since the issue has a material bearing on the final outcome of the cases pending between the parties. I also find force in the submission of the counsel for the petitioner that some of the call records show phone calls being made at odd hours which would be impossible while staying in a small flat. Even otherwise, the whereabouts of the servant (name withheld) are unknown who was stated to be only 17 years of age at the relevant time.

33. It has also been contended by the counsel for the respondent that the respondent being an IAS officer and with a meritorious educational background, is more competent to look after the modern educational needs of the children whereas the petitioner, being only a B.A. (Pass), is totally incompetent to cater to the educational needs of the children. As far the present contention is concerned, it did not find favour with the trial court and I concur with the view of the learned trial court since educational qualification of the parents alone cannot have any material bearing on the issue of custody of the children. Although in today's day and age what is really required is proper guidance which can be provided by mother or the father. It has been rightly observed by the learned trial court:

"the repeated assertions of petitioner that he is more qualified than the respondent to teach children does not inspire much confidence as children of less educated or uneducated parents also do exceptionally well in present times. Even otherwise, both the parties ought to have made joint efforts to make necessary arrangements for education and extra coaching of the children in coordination."

34. I do not find force in the submission that simply because the father is very well qualified and only he can cater to the educational need of the children and thus he must be given custody of the children.

35. To show the indifference of the petitioner towards the children and her careless and negligent attitude qua them, counsel for the respondent has highlighted various instances like a note from the class teacher wherein the class teacher has remarked that the child is not being sent with the

food prescribed in the class menu nor any seasonal fruits are being sent; another note from the class teacher wherein the class teacher remarked that the child is being sent to school in unclean uniform due to his habit of bedwetting; failure to attend the parent teacher meetings of the children; sending the younger child to school in unclean school uniform; neglecting the medical needs of the children by not paying heed to the complaints of the younger child of pain in his ear for two days who was later taken to AIIMS by the respondent when the child started bleeding from his ear wherein he tested positive for the initial tests for dengue. It is contended by the counsel for respondent that the petitioner further neglected the medical needs of the child by not administering him the right dosage of medicine at the right time. The counsel further drew the attention of this court to the almanac of both the children wherein the petitioner has failed to fill in the details of medical history of the children nor has she provided details like blood group, family doctor etc which might be required at the time of any medical emergency. It is next submitted that the petitioner used to send the elder child Pranshu to pick the younger child Manu from the bus stop. While some of these instances do appear to be glaring, but I do find some force in the contention of counsel for petitioner that to deal with the child of such tender and impressionable age, she would rather encourage the child to eat rather than to return home on an empty stomach which only a mother's heart can appreciate and one does not need to be an IIT graduate or an IAS Officer to appreciate this.

36. The counsel for the petitioner contends that the trial court was itself uncertain of the welfare of the child in the hands of the respondent father and thus directed to reserve seats of both the children in the school in Delhi. I find no merit in this contention of the counsel for the petitioner as it is settled law that an order of custody is never final but an interlocutory order capable of being modified keeping in mind the needs of the child. In my view what must have prevailed upon the trial court in reserving the seats of the children is the ultimate welfare of the child and that their academic year is not be wasted.

37. Both the parties have drawn the attention of the court to the progress report of the children and the remarks given by the class teacher. While, counsel for the petitioner has relied upon the progress report of the younger child to show that petitioner is fully competent and capable to teach him and the good report cards are on proof of the same;

counsel for respondent, on the ˇother hand, has placed reliance on the report cards of the elder son to show that at the time when he was with the mother the elder son's progress has declined and as and when the father has been teaching both the child, his grades have improved. The elder son has accorded the views of his father in the Chamber meeting. The elder son has also repeated the incidents of negligence of the mother, or her manhandling the children, or sending the elder son to the bus stop to pick up the younger son, all of which may not strike a 13 year old child, which would show the extent of influence of the father on the elder son. While during the course of hearing, learned counsel for the respondent had admitted that whereabouts of the servant (name withheld) are not known for the past three years and the alleged incident would be minimum years old, the elder son did not hesitate in referring to the incident in the Chamber meeting.

38. I have met both the children separately in the chamber. I have also met the parties in chamber. The elder child Pranshu is 13 years of age and appeared to be tutored by the respondent father and also swayed by the luxuries and independence he would have in his stay with the father. He has stated in clear terms that he does not want to stay with his mother. He further said that the respondent father helps him in his studies and there has been improvement in his performance only because of the respondent. During the meeting in the chamber with the elder son, Pranshu categorically stated that he wants to stay with his father in Jammu and showed extreme hostility towards his mother. The mother, in a separate chamber hearing, has also reconciled with the fact that she is not able to handle the elder child and his educational needs and thus, will only rely on tuitions to cater to his academic needs.

39. The welfare of the child cannot be measured merely on the basis of the position of the father, his social status, or the academic degrees, or the fact that the physical comfort, which he may be able to provide to his children. It is the duty of the Court while considering, what is the welfare of the child, to consider the same in the widest sense. The younger son is barely eight years of age and is at the most impressionable age of his life and definitely the mother would have the interest of the minor most at heart. His tendered years would need the care, protection and guidance of a person, who has most interest in his welfare and who has the time to lend her years to her younger son and

allow him to rest his head on her shoulders when he needs at the most. He would need his mother and it is the heart of the mother, which can read the mind of the child at that age.

40. It has strongly been argued before this Court that the younger child despite being eight years of age is in the habit of bedwetting and the mother has not been able to consider his bedwetting. Such psychological disorders are only a small example of the price paid by children for the fighting of their parents. To pull the child out from the lap of the mother, which is known as a natural cradle, to a distant place from Delhi to Jammu in the supervision of old grand-parents and a busy father, would certainly not be in the welfare of the younger son. The younger son is to be brought up in the ordinary comfort, in an atmosphere of contentment and favourable surroundings and only a mother at that age can put moral and ethical values in the mind of the younger child. Hence, in the interest of the elder son, Pranshu, he shall remain in the custody of the respondent father.

41. The younger son Manu is just 8 years old. During the chamber meeting, he appeared to be less tutored and has shown a keen desire to stay with his elder brother. He also showed some inclination to stay with his father as he gets to eat non-vegetarian food during his stay with the father and never gets any scolding from his father. The child showed no animosity towards his mother and seemed open to stay either with the father or the mother. He appeared to be very tender and incapable of forming an intelligent preference as to whom he wants to stay with. In any case, he is too young to take care of his own needs. At such an impressionable age, the child does not require only food and shelter but also motherly love and affection to meet his emotional needs since his psychological and emotional approach to life is still to be nurtured. Further, there is no clinching material on record to show that the welfare of the younger son Manu would be at peril in case the custody is granted to the petitioner. Hence, in the interest of the younger son, I deem it appropriate that his custody be granted to the petitioner mother.

42. During the course of hearing, various permutations and combinations were proposed, but were accepted by neither of the parties. While, both the parties had agreed that more than anything else, the children are happy to be in each others company, generally for the

present, it does not seem to be possible for the reasons stated above with regard to younger son. However, as far as the elder son is concerned and the fact that he has shown a clear inclination not to stay with the mother in future, his attitude may be hostile towards her mother and on the other hand a fair admission on the part of the mother that she would be unable to teach her elder son but would be able to provide good tutors, I am of the view that it would be in the best interest of the elder son to stay with the father, who would be able to guide him and teach him as he is in any case more confident of the two children. In the fitness of things, it is directed that the younger son shall remain in the custody of the mother; and the elder son shall remain in the custody of the father.

43. At this stage it is agreed between the parties that both the children will celebrate *HOLI* with the father this year and in the next year the children will celebrate *HOLI* with the mother. For this year the children will celebrate *DIWALI* with the mother and accordingly in the next year *DIWALI* will be celebrated with the father. It is further agreed that the father will meet his younger son once a month with liberty to keep him during the weekend; and the mother will meet the elder son once in a month when both the brothers will stay together with the mother. It is further agreed that in case where the holidays are of 9 days or more than 9 days the same shall be equally shared between the parents, and the father/ mother will ensure that the child reaches back to the other parent in whose custody the child is well before time that is to say at least one day prior to the reopening of the school after vacations, in order to make the father/ mother to prepare the child for going to school. The child will be handed over by 11:00 a.m. and will be returned before 7:30 p.m.. This arrangement is made for the present, having regard to the fact that father will meet the children in Delhi. But in case the child/ children are to be taken at the place of posting of the father, the father agrees to bear all expenses of travel. Both the parties agree that children will be free to talk to each other on telephone and to the parents for unlimited period and none of the parents will cause any unnecessary hindrance or obstruction. On the occasion of birthday of any child, it will be open for the parent to meet the child at the place of residence of the child. In case either of the parent wants the child/ children to accompany them at family functions, weddings, ceremonies, promotions etc., the parties shall mutually decide the modalities from time to time.

44. Accordingly the petition stands disposed of in above terms. Needless to say any observations made in this order are only for the purpose of deciding the present petition.

ILR (2011) DELHI II 781
CRL. MC

DIRECTORATE GENERAL OF CENTRAL EXCISE INTELLIGENCE **....PETITIONER**

VERSUS

BRIJESH KANODIA **....RESPONDENT**

(SHIV NARAYAN DHINGRA, J.)

CRL MC NO. : 3537/2010 **DATE OF DECISION: 22.02.2011**

Code of Criminal Procedure, 1973—Section 482—Central Excise Act, 1944—Section 14—While respondent was in judicial custody, application was made by petitioner department to make enquiries from respondent/accused in Central jail—Id. ACMM directed that respondent accused be not interrogated in Central Jail but he be brought to Court and enquiry be made before Court—Respondent accused brought in Court and Id. ACMM recorded order-sheet about conduct of enquiry on hourly basis—Arguments heard on bail application of respondent on same very day and granted bail—Order challenged before High Court—Plea taken, Id. ACMM transgressed all limits of propriety and acted as a part of investigation and heard application himself—Held—Inherent powers are granted only to High Court and inherent powers not available to Courts Subordinate to High Court—Subordinate Courts are supposed to act in accordance with provisions of Code of Criminal Procedure (Cr.P.C) and cannot transgress limits imposed upon Courts by Cr.P.C—There is no provision in Cr.P.C that Court can order enquiry be made from accused in its presence nor Court can order that interrogation of accused by IO be done in presence of Court—This is to keep judicial and executive functions separate—Once investigation is done in presence of Court, Court becomes a witness to investigation and this act of Court prejudices Court either in favour of accused or in favour of prosecution—It is for this reason that investigation and adjudication are done by two separate wings and Courts cannot become party to investigation—Order granting bail set aside and matter remanded back to present ACMM for considering application of accused afresh.

The inherent powers under Section 482 Cr.P.C have been granted only to the High Courts and there are no inherent powers available to the courts subordinate to the High Court. The subordinate courts are supposed to act in accordance with the provisions of Cr.P.C and cannot transgress the limits imposed upon the courts by Cr.P.C. There is no provision in Cr.P.C that a court can order that an enquiry be made from the accused in its presence nor the court can order that interrogation of accused by the investigating agency be done in presence of the court. This is to keep the judicial functions and executive functions separate. Once the investigation is done in presence of the court, the court becomes a witness to the investigation and this act of the court prejudices the court either in favour of accused or in favour of the prosecution. It is for this reason that the investigation and adjudication are done by two separate wings and the courts cannot become party to the investigation. In **State of Bihar v J.A.C Saldanha** AIR 1980 SC 326 (Full Bench), the Supreme Court observed, *there was a clear cut and well demarcated sphere of activity in the field of crime detection and crime punishment and investigation*

of an offence was in the field exclusively reserved for the executive. The superintendent over which vests a State Government, the role of the courts start only once the investigation is complete and investigating officer submits report to the court and requests court to take cognizance of the offence. In **Eastern Spinning Mills & Virendra Kumar Sharda v Rajiv Poddar** AIR 1985 SC 1668 (Full Bench), the Supreme Court observed, *"save in exceptional case where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences. Investigation must proceed unhampered by Court orders".* In **M/s Jayant Vitamins Ltd. v Chaitanyakumar** AIR 1992 SC 1930, the Supreme Court observed, *"The investigation into an offence is a statutory function of the police and the superintendence thereof is vested in the State Government and the Court is not justified without any compelling and justifiable reason to interfere with the investigation".* In **Dukhishyam Benupani, Asst. Director, ED (FERA) v Arun Kumar Bajoria** 1998 (1) SCC 52, the Supreme Court observed, *"it is not the function of the court to monitor investigation processes so long as such investigation does not transgress any provision of law. It must be left to the investigating agency to decide the venue, the timings and the question and the manner of putting such questions to person involved in such offences. A blanket order fully insulating a person from arrest would make his interrogation a mere ritual".* **(Para 4)**

Important Issue Involved: Neither the Court can order that an enquiry be made from the accused in its presence nor Court can order that interrogation of accused by investigating agency be done in presence of the Court.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Satish Aggarwala, Advocate.

FOR THE RESPONDENT : Mr. Pradeep Jain and Mr. Yogesh Mittal, Advocates.

CASES REFERRED TO:

1. *State of M.P.* vs. *Jiyalal* 2009 (15) SCC 72.
2. *Dukhishyam Benupani, Asst. Director, ED (FERA)* vs. *Arun Kumar Bajoria* 1998 (1) SCC 52.
3. *M/s Jayant Vitamins Ltd.* vs. *Chaitanyakumar* AIR 1992 SC 1930.
4. *Eastern Spinning Mills & Virendra Kumar Sharda* vs. *Rajiv Poddar* AIR 1985 SC 1668.
5. *State of Bihar* vs. *J.A.C Saldanha* AIR 1980 SC 326.
6. *Privy Council in Emperor* vs. *Khwaja Nazir Ahmad* AIR 1945 PC 18.

RESULT: Disposed of.

SHIV NARAYAN DHINGRA, J.

1. This petition under Section 482 Cr.P.C has been preferred by the petitioner for cancellation of bail of the respondent/accused granted by learned ACMM vide order dated 18th September 2010 on the ground that the learned ACMM in this case transgressed all limits of propriety and acted as a part of investigation and then heard the bail application himself. The other grounds for cancellation of bail are on merits which this Court is not considering.

2. While respondent was in judicial custody, an application was made by the petitioner department to make enquiries from the respondent /accused in Central Jail, Tihar, Delhi under Section 14 of the Central Excise Act so as to complete certain aspects of the investigation. The permission was sought so that Mr. Anil Chandeliya, Senior Intelligence Officer may visit Central Jail, Tihar and make enquiries from the respondent. The learned ACMM directed that the respondent accused be not interrogated in Central Jail, Tihar but he be brought to the Court and any enquiry be made before the court on 17th September 2010 at 10 am. He issued production warrants of the accused/ respondent to be brought before the Court on 18th September 2010. Thereafter, the accused was produced and the learned ACMM kept recording order-sheets about the

conduct of enquiries being done by SIO from the petitioner department on hourly basis. The first order-sheet of the day make it clear that the accused was produced on 18th September 2010 and the learned Judge kept on recording hourly order-sheets in respect of the enquiry. His orders are at 10.30 am, 11.30 am, 12.15 pm, 1.30 pm and after lunch. The learned ACMM heard arguments on the bail application made by the accused and granted bail on the same very day. Since it was already 5.35 pm by the time he passed order, he directed that the order be sent to Jail via special messenger along with release warrants.

3. As far back as 1945, **Privy Council in Emperor v Khwaja Nazir Ahmad** AIR 1945 PC 18 had observed, *"It was the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry"*. The Privy Council further observed, *"It would be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate cases when moved under Section 491 Cr.P.C."*.

4. The inherent powers under Section 482 Cr.P.C have been granted only to the High Courts and there are no inherent powers available to the courts subordinate to the High Court. The subordinate courts are supposed to act in accordance with the provisions of Cr.P.C and cannot transgress the limits imposed upon the courts by Cr.P.C. There is no provision in Cr.P.C that a court can order that an enquiry be made from the accused in its presence nor the court can order that interrogation of accused by the investigating agency be done in presence of the court. This is to keep the judicial functions and executive functions separate. Once the investigation is done in presence of the court, the court becomes a witness to the investigation and this act of the court prejudices the court either in favour of accused or in favour of the prosecution. It is for this reason that the investigation and adjudication are done by two separate wings and the courts cannot become party to the investigation. In **State of Bihar v J.A.C Saldanha** AIR 1980 SC 326 (Full Bench), the Supreme

Court observed, *there was a clear cut and well demarcated sphere of activity in the field of crime detection and crime punishment and investigation of an offence was in the field exclusively reserved for the executive.* The superintendent over which vests a State Government, the role of the courts start only once the investigation is complete and investigating officer submits report to the court and requests court to take cognizance of the offence. In **Eastern Spinning Mills & Virendra Kumar Sharda v Rajiv Poddar** AIR 1985 SC 1668 (Full Bench), the Supreme Court observed, *"save in exceptional case where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences. Investigation must proceed unhampered by Court orders"*. In **M/s Jayant Vitamins Ltd. v Chaitanyakumar** AIR 1992 SC 1930, the Supreme Court observed, *"The investigation into an offence is a statutory function of the police and the superintendence thereof is vested in the State Government and the Court is not justified without any compelling and justifiable reason to interfere with the investigation"*. In **Dukhishyam Benupani, Asst. Director, ED (FERA) v Arun Kumar Bajoria** 1998 (1) SCC 52, the Supreme Court observed, *"it is not the function of the court to monitor investigation processes so long as such investigation does not transgress any provision of law. It must be left to the investigating agency to decide the venue, the timings and the question and the manner of putting such questions to person involved in such offences. A blanket order fully insulating a person from arrest would make his interrogation a mere ritual"*.

5. It is thus apparent that the learned ACMM who possessed no inherent powers to interfere into the investigation showed keen interest in the investigation in this case and wanted the accused to be brought to his court and investigation be done in his presence.

6. The keen interest of the ACMM in this case was not an isolated incident. The learned ACMM in all cases has shown poor understanding of criminal law. This Court had occasion to consider several other orders passed by learned ACMM and was compelled to find out about other cases before the learned ACMM and the results were startling. In all criminal cases decided by learned ACMM, either the accused were discharged or acquitted on technical grounds more specifically on technical ground of sanction granted being not a valid sanction or granted without

application of mind. It is not that the relevant law in respect of sanction was not brought to the notice of the court. The Supreme Court categorically observed that the courts cannot acquit a person on the ground of sanction not being valid unless there was serious failure of justice and prejudice has been caused to the accused on the ground of invalid or defective sanction [**State of M.P. v Jiyalal** 2009 (15) SCC 72]. The Supreme Court laid down that it is not necessary for prosecution to examine the person, who was the sanctioning authority, to prove the sanctioning order. Despite clear ruling of the Supreme Court, the learned ACMM had been passing orders contrary to the judgment of the Supreme Court and despite every sanctioning order being in detail giving facts and reasons for granting sanction, the learned ACMM had been passing orders that the sanction was granted without application of mind, though law is that the court cannot draw any adverse conclusion that the sanction for prosecution was not properly granted or was defective without indicating any basis for such conclusion. Out of 78 cases decided by this ACMM from April, 2010 to October 2010, he discharged/acquitted accused persons in 73 cases only on this technical ground. The conviction in remaining five cases was under compulsion because accused persons pleaded guilty.

7. Without going into the merits of the case and looking into the conduct of learned ACMM that he transgressed all limits of judicial propriety, the order dated 18th September 2010 passed by learned ACMM granting bail to the respondent is hereby set aside and the matter is remanded back to the present ACMM for considering the application of the respondent/ accused afresh on merits without being influenced by the order of earlier ACMM. The application for bail of the accused/ respondent is already on record and the reply to the same is also on record of learned ACMM. The accused/respondent shall surrender before the learned ACMM on 1st March, 2011 and the learned ACMM shall hear arguments either on the same day or on the following day and shall dispose of the bail application of the accused/ respondent on merits.

8. The petition stands disposed of with above order.

ILR (2011) DELHI II 788
WP (C)

M.S. KABLI ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(S. MURALIDHAR, J.)

W.P. (C) NO. : 14341/2005 DATE OF DECISION: 22.02.2011
CM. APPL. 10758/05 : 14341/2005

Companies Act, 1956—Section 224 (7) and 225—M/s Super Cassette Industries Limited filed application before Central Government for approval for removal of its statutory auditor the Petitioner—After considering reply of petitioner, Regional Director rejected all six grounds urged by SCIL but accepted submission of SCIL that it had lost confidence in petitioner and accorded approval for removal—Order challenged in High Court—Plea taken, when all grounds on which SCIL applied to Central Government for approval of removal of petitioner have been negatived by Regional Director, such approval could not have been granted only on ground of loss of confidence—Per contra, plea taken grounds on which auditor can be removed included loss of confidence—Held—Impugned order is untenable is so far as it negatived all grounds concerning conduct and competence of the petitioner as alleged by SCIL before Regional Director and yet accepted its plea that it has lost confidence—Provisions recognize that auditors are expected to function as independent professionals and not simply toe line of management of a company—Central Government will have to be satisfied that reasons are genuine keeping in view best interests of company and consistent with need to ensure professional

autonomy to its auditors—Impugned order set aside.

While it is true that Section 224 (7) of the Act does not indicate the specific grounds on which the removal of the statutory auditor of a company can be sought, it obviously has to be for valid reasons. A plain reading of Sections 224 (7) and 225 of the Act reveals that the legislative intent was to place a check on the power of the company to remove its statutory auditors. A two stage approval of the decision taken by the Board of Directors of the Company to remove the statutory auditor is envisaged. First a resolution has to be passed by the shareholders of the company at an AGM or EGM, as the case may be. Once such resolution is passed by the shareholders, the company has to seek approval of the Central Government to such removal under Section 224 (7) of the Act. Section 225 of the Act ensures that there is no violation of principles of natural justice vis-à-vis the auditor. The auditor is given an opportunity of being heard by the central government. While it is true that the overall interests of the company and the creditors are to be kept in mind while deciding to either appoint or remove an auditor, the above provisions underscore that statutory auditors cannot be lightly removed. Further, the statutory procedure has to be followed. This factors in the right of the auditor to be dealt with in a fair and objective manner. The provisions recognise that auditors are expected to function as independent professionals and not simply toe the line of the management of a company. Consequently, the reasons for which a statutory auditor is sought to be removed by a company would also be relevant. The central government will have to be satisfied that the reasons are genuine keeping in view the best interests of the company and consistent with the need to ensure professional autonomy to its auditors. **(Para 13)**

Important Issue Involved: Where Central Government negatived all the grounds urged by a company while seeking approval for removal of its statutory auditor, concerning his conduct and competence, its plea that it has lost confidence in statutory auditor can not be accepted.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Ashish Makhija with Mr. Vivek Mohanty and Ms. Poulani Putaatunda, Advocates.

FOR THE RESPONDENTS : Mr. S.K. Dubey with Mr. Tungesh, Advocates for R-1 and R-2, Mr. Arun Kathpalia with Mr. Kamal Sawhney, Advocates for R-3.

CASE REFERRED TO:

1. *Basant Ram & Sons* vs. *Union of India* 87 (2000) DLT 838.

RESULT: Allowed.

S. MURALIDHAR, J.

1. The Petitioner, a practising Chartered Accountant, is the sole proprietor of M/s. M.S. Kabli & Company. The Petitioner is aggrieved by an order dated 28th July 2005 passed by the Regional Director (Northern Region), Ministry of Company Affairs, Government of India according approval under Section 224 (7) of the Companies Act, 1956 ('Act') for removal of the Petitioner as statutory auditor of M/s. Super Cassette Industries Limited ('SCIL').

2. The Petitioner was first appointed as the statutory auditor of SCIL in the year 1992. Thereafter, the Petitioner was reappointed as a joint statutory auditor of SCIL in the Annual General Meeting ('AGM') of SCIL held on 30th September 2003 and further reappointed as such at the AGM held on 30th September 2004. On 9th May 2005 an application was filed by SCIL before Respondent No. 1 under Section 224 (7) of

the Act seeking approval for the removal of the Petitioner. On 10th May 2005 an Extraordinary General Meeting ('EGM') of the SCIL was held and a special resolution passed for removal of the Petitioner as the joint statutory auditor subject to approval by the Central Government.

3. The Regional Director considered the reply sent by the Petitioner to the application filed by the SCIL. There were six specific grounds urged by SCIL in its application under Section 224 (7) of the Act. The first was that the Petitioner did not have adequate infrastructure to conduct the audit. This was negatived by the Regional Director as being without merit since the Petitioner had conducted the audit of the SCIL as the sole auditor continuously for 13 years up to the year ending 31st March 2003. Moreover, the appointment had been made at the AGM held on 30th September 2004 on the recommendation of the Board of Directors of the company, knowing fully well about the Petitioner's infrastructure.

4. The second ground was that the Petitioner did not possess sufficient expertise in taxation matters. This was also negatived by the Regional Director holding that the SCIL is always free to appoint/engage a person of its choice for taxation matters.

5. The third ground was that there was inordinate delay in completion of the audit. This was negatived by the Regional Director since the SCIL had failed to produce evidence to substantiate this allegation.

6. The fourth ground was that on account of delay caused by the Petitioner, SCIL could not submit its balance sheet to the Copyright Board before 31st March 2004. The impugned order noted that the balance sheet was signed by the statutory auditors on 3rd September 2004 and therefore, SCIL could have summoned the AGM at a short notice to adopt the balance sheet and file it before the Copyright Board well before 15th September 2004.

7. The fifth ground that the Petitioner had misbehaved with the staff of SCIL was also disbelieved. The sixth ground that the Petitioner was not present at the time of physical verification of stocks on 31st March 2005, was also negatived. It was held that the statutory auditors were not always expected to be present at the time of physical verification of stocks.

8. After having rejected all the above grounds, the impugned order

accepted the submission of SCIL that it had lost confidence in the Petitioner. Relying on the judgment of this Court in **Basant Ram & Sons v. Union of India** 87 (2000) DLT 838, the Regional Director proceeded to accord approval under Section 224 (7) of the Act for removal of the Petitioner.

9. Mr. Ashish Makhija, learned counsel for the Petitioner at the outset submitted that the Petitioner was only interested in ensuring that the impugned order is set aside but not interested in other consequential reliefs. It was specifically stated that the Petitioner was not interested in continuing as the statutory auditor of SCIL. Mr. Makhija further submitted that when all the grounds on which the SCIL applied to the Central Government for approval of the removal of the Petitioner have been negatived by the Regional Director, such approval could not have been granted only on the ground of loss of confidence. Clearly, there was no basis for accepting such a plea when all other pleas were found to be untrue.

10. Appearing for SCIL Mr. Arun Kumar Kathpalia, learned counsel submitted that the decision in **Basant Ram & Sons** explained that the grounds on which auditors can be removed included loss of confidence. He also wondered whether setting aside the impugned order at this stage would cause complications vis-à-vis the actions taken consequent to the impugned order. Mr. Kathpalia added that a reading of Section 224 (7) read with Section 225 of the Act would show that these provisions were meant to protect the interests of the company and not so much the statutory auditors.

11. The above submissions have been considered. The impugned order of the Regional Director negatived all the contentions of the SCIL regarding the conduct and competence of the Petitioner. However, the impugned order accepted the plea of the SCIL that it had lost confidence in the Petitioner and proceeded to grant approval for removal of the Petitioner on that basis. On the face of it, the impugned order is untenable in so far as it negatived all the grounds concerning the conduct and competence of the Petitioner as alleged by the SCIL before the Regional Director and yet accepted its plea that it has lost confidence.

12. Section 224 (7) and Section 225 of the Act which are relevant for this purpose read as under:

"Section 224 (7) Except as provided in the proviso to sub-section (5), any auditor appointed under this Section may be removed from office before the expiry of his term only by the company in general meeting, after obtaining the previous approval of the Central Government in that behalf.

Section 225 - Provisions as to resolutions for appointing or removing auditors - (1) Special notice shall be required for a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor, or providing expressly that a retiring auditor shall not be re-appointed.

(2) On receipt of notice of such a resolution, the company shall forthwith send a copy thereof to the retiring auditor.

(3) Where notice is given of such a resolution and the retiring auditor makes with respect thereto representations in writing to the company (not exceeding a reasonable length) and requests their notification to members of the company, the company shall, unless the representations are received by it too late for it to do so, -

(a) in any notice of the resolution given to members of the company, state the fact of the representations having been made; and

(b) send a copy of the representations to every member of the company to whom notice of the meeting is sent, whether before or after the receipt of the representations by the company,

and if a copy of the representations is not sent as aforesaid because they were received too late or because of the company's default the auditor may (without prejudice to his right to be heard orally) require that the representations shall be read out at the meeting:

Provided that copies of the representations need not be sent out and the representations need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Central Government is satisfied that the rights conferred by this sub-section are being abused to

secure needless publicity for defamatory matter; and the Central Government may order the company's costs on such an application to be paid it in whole or in art by the auditor, notwithstanding that he is not a party to the application.

(4) Sub-sections (2) and (3) shall apply to a resolution to remove the first auditors or any of them under sub-section (5) of section 224 or to the removal of any auditor or auditors under sub-section (7) of that section, as they apply in relation to a resolution that a retiring auditor shall not be re-appointed."

13. While it is true that Section 224 (7) of the Act does not indicate the specific grounds on which the removal of the statutory auditor of a company can be sought, it obviously has to be for valid reasons. A plain reading of Sections 224 (7) and 225 of the Act reveals that the legislative intent was to place a check on the power of the company to remove its statutory auditors. A two stage approval of the decision taken by the Board of Directors of the Company to remove the statutory auditor is envisaged. First a resolution has to be passed by the shareholders of the company at an AGM or EGM, as the case may be. Once such resolution is passed by the shareholders, the company has to seek approval of the Central Government to such removal under Section 224 (7) of the Act. Section 225 of the Act ensures that there is no violation of principles of natural justice vis-à-vis the auditor. The auditor is given an opportunity of being heard by the central government. While it is true that the overall interests of the company and the creditors are to be kept in mind while deciding to either appoint or remove an auditor, the above provisions underscore that statutory auditors cannot be lightly removed. Further, the statutory procedure has to be followed. This factors in the right of the auditor to be dealt with in a fair and objective manner. The provisions recognise that auditors are expected to function as independent professionals and not simply toe the line of the management of a company. Consequently, the reasons for which a statutory auditor is sought to be removed by a company would also be relevant. The central government will have to be satisfied that the reasons are genuine keeping in view the best interests of the company and consistent with the need to ensure professional autonomy to its auditors.

14. In the considered view of this Court, the impugned order of the Regional Director undermines the above object and spirit of Section 224

(7) of the Act read with Section 225 thereof. Each of the six grounds advanced by SCIL to question the competence and conduct of the Petitioner was held to be untenable. Having declined to accept those grounds, it is inconceivable that the Regional Director simply accepted the ground that the SCIL had lost confidence in the Petitioner.

15. The factual position in the present case distinguishes it from the facts in **Basant Ram & Sons.** Consequently, this Court does not find that the said decision assists SCIL in supporting the impugned order.

16. For all the aforementioned reasons, this Court finds the impugned order to be untenable in law and accordingly sets it aside. However, in view of the statement made by learned counsel for the Petitioner and the apprehension expressed by learned counsel for SCIL, this Court clarifies that the setting aside of the impugned order of the Regional Director will not result in undoing any of the actions taken pursuant to the impugned order. This Court also takes on record the statement made on behalf of the Petitioner that he does not wish to continue as a statutory auditor of the SCIL as a result of the impugned order being set aside.

17. The writ petition and the pending application are disposed of in the above terms.

ILR (2011) DELHI II 795
CS (OS)

M/S. S.N. NANDY & CO. ....PLAINTIFF

VERSUS

M/S. NICCO CORPORATION LTD. ....DEFENDANT

(V.K. JAIN, J.)

CS (OS) NO. : 2448/2000 DATE OF DECISION: 23.02.2011

(A) Indian Contract Act, 1872—Section 70—Civil work assigned to plaintiff by defendant for lumpsum price

extra work entrusted to plaintiff—Suit for recovery of payment of extra work with interest—Held—Three conditions to be fulfilled before benefit u/s 70 can be invoked. First is that the claimant should either lawfully do something for another person or deliver something him. The second is that while doing or delivering something, claimant must not be acting gratuitously and thirdly the person of whom something is done or to whom something is delivered must enjoy the thing done or delivered to him. Plaintiff entitled to recover payment for extra work done.

Assuming, however, that the extra works claimed by the plaintiff were not authorized by the defendant and, therefore, the defendant is under no contractual obligation to pay for those works, the plaintiff is entitled to get reasonable payment for these works in view of the provisions contained in Section 70 of the Contract Act, 1872, which reads as under:-

> **"70. Obligation of person enjoying benefit of non-gratuitous act.**— Where a person lawfully does anything for another person, or delivers anything to him not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."
>
> **(Para 17)**

A bare perusal of the above referred Section would show that three conditions need to be fulfilled before benefit of this provision can be invoked by a person. The first condition is that the claimant should either lawfully do something for another person or deliver something to him. The second condition is that while doing or delivering something, the claimant must not be acting gratuitously and thirdly, the person for whom something is done or to whom something is delivered must enjoy the thing done for or delivered to him as the case may be. Invocation of Section 70 of the

Contract Act was disputed by learned counsel for the defendant on the ground that the plaintiff has not pleaded essential requirement of the Section. In support of his contention that pleading ingredients of Section 70 is a pre-condition for its invocation, the learned counsel for the defendant has referred to **Kotah Match Factory Kotah v. State of Rajasthan,** AIR 1970 Rajasthan 118, **Hansraj Gupta & Co. v. Union of India,** AIR 1973 SC 2724, **Union of India v. Sita Ram Jaiswal,** AIR 1977 SC 329 and **Devi Sahai Palliwal v. Union of India and another,** AIR 1977 SC 2082. **(Para 18)**

Thus the plaintiff is entitled to recover a sum of Rs 1,10,000/- for the extra quantity of the work involved in office-cum-lab, Rs 3 lakhs for the extra quantity of the work involved in Treated Effluent Sump. Rs 1,05,000/- for the extra work involved in Sludge Lagoon/Drying Bed. Rs 1,85,000 for the Pump House at Common Catch Pit. Rs 1,20,000 for Cooling Tower Basin over Common Catch Pit. Rs 29,347/- for the extra quantity of boundary wall and Rs 1,53,217.50/- for reconstruction of boundary wall. He is entitled to give adjustment of Rs 1,29,843/-to the defendant towards revised quantity of the work involved in Pump House-I and Rs 1,85,937/- towards reduction in the quantity of work involved in Pump House-II. The balance amount payable to the plaintiff for the extra work thus comes to Rs 6,86,784.50/- **(Para 38)**

This is plaintiff's own case that he had received a sum of Rs.5 lakhs from the defendant as an advance towards the extra work executed by him. After deducting the aforesaid amount of Rs.5 lakhs from the amount of Rs 6,86,784.50/- found payable to the plaintiff. The balance principal sum payable to him comes to Rs 1,86,784.50. The issue is decided accordingly. **(Para 39)**

(B) Indian Limitation Act, 1963—Section 19—Held—Where payment on account of a debt is made before the expiration of the prescribed period, a fresh period of limitation would be computed from the time when the payment was made.

Section 19 of the Limitation Act, to the extent it is relevant, provides that where payment on account of a debt is made before the expiration of the prescribed period, by the person liable to pay the debt or by his agent duly authorized in this behalf, a fresh period of limitation would be computed from the time when the payment was made. The last payment having been made by the defendant is on 28th August, 1997, a fresh period of limitation if computed from this date would expire on 28th August, 2000. The suit having been filed on 26th May, 2000 is, therefore, well within time. Though it was contended by the learned counsel for the defendant that the payment on 28th August, 1997 was made after the limitation prescribed for filing a suit of this nature had expired, that obviously is incorrect since payments by way of cheques were made by the defendant from time to time and at no occasion there was gap of three or more years between the two payments. In this regard, it would be pertinent to note that though the extra works executed by the plaintiff were out of the scope of work contained in the LOI dated 15th October, 1992, the amount payable by the defendant to the plaintiff towards the civil work executed by him at Biological Oxidation Plant at R.S.P. Rourkela was one debt and though having two components, one for the works covered in the scope of LOI and the other for the works which were beyond the scope of LOI cannot be said that the payment for the work included in the scope of work awarded vide LOI dated 15th October, 1992 was one debt and payment for the extra work executed by the plaintiff was another debt. The project executed by the defendant for the plaintiff was one project, i.e., civil work at Biological Oxidation Plant at R.S.P. Rourkela and, therefore, payment for the entire quantity irrespective of whether for the work included within the scope of work indicated in the LOI or for the work beyond the scope of LOI, constituted one debt, which the defendant owed to the plaintiff. Therefore, even the payment was made by the defendant to the plaintiff towards price of

the contractual work, which was included in the LOI it would extend the period of limitation also for ˇthe extra work executed by the plaintiff while carrying out civil work at Biological Oxidation Plant at R.S.P. Rourkela. It would also be pertinent to note here that this is not the requirement of law that while making a payment, the debtor must make it towards part payment. Any payment, irrespective of, whether it is made as part payment or otherwise, would extend the period of limitation under Section 19 of the Limitation Act. In this regard I may refer to the decision of the **Privy Council in Rama Shah v. Lal Chand,** AIR 1940 Privy Council 63 where the Court, inter alia, observed as under:-

> "In the Limitation Act, Section 19, which deals with acknowledgments, is not to be read as based upon the theory of implied promise: and it is difficult to see why Section 20, which deals with payments, should be regarded as based upon a theory of acknowledgment. The Indian Legislature may well have thought that a payment if made on account of the debt and evidenced by writing gave the creditor some excuse for further delay in suing, or was sufficient new proof of the original debt to make it safe to entertain an action upon it at a later date than would otherwise have been desirable. The words in Section 20 by which the matter must be judged are "where part of the principal of a debt is paid". As it is not prescribed by the Section that the payment should be intended by the debtor to go towards the principal debt at all, the words 'as such' having no place in this part of the Section, it is not in their Lordships' view correct to require that the payment should have been made of part as part." **(Para 43)**

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. S.D. Singh, Ms. Bharti Tyagi, Mr. Rahul Kumar Singh, Ms. Megha Bansiwal, Advocates.

FOR THE DEFENDANT : Mr. Rahul Gupta, Mr. Pinaki Addy and Ms. Ira Gupta, Advocates.

CASES REFERRED TO:

1. *Uttam Kumar* vs. *State* 2010(3) JCC 1946.
2. *Satender Kumar* vs. *Municipal Corporation of Delhi and another*, 168 (2010) DLT 15.
3. *Hansa Vision Pvt. Ltd.* vs. *Dabur (India) Limited & Ors*, 168 (2010) DLT 562.
4. *Food Corporation of India & Others* vs. *Vikas Majdoor Kamdas Sahkari Mandli Ltd.*, 2007 (13) Scale 126.
5. *Major (Retd.) Inder Singh Rekhi* vs. *Delhi Development Authority*, (1988) 2 SCC 338.
6. *Union of India* vs. *Sita Ram Jaiswal*, AIR 1977 SC 329.
7. *Devi Sahai Palliwal* vs. *Union of India and another*, AIR 1977 SC 2082.
8. *Hansraj Gupta & Co.* vs. *Union of India, AIR 1973 SC 2724.*
9. *Kotah Match Factory Kotah* vs. *State of Rajasthan*, AIR 1970 Rajasthan 118.
10. *State of West Bengal* vs. *M/s B.K. Mondal and Sons*, AIR 1962 SC 779.
11. *Chuni Lal Dwarka Nath* vs. *Hartford Fire Insurance Co. Ltd. and Anr.* AIR 1950 Punjab 440.
12. *Privy Council in Rama Shah* vs. *Lal Chand*, AIR 1940 Privy Council 63.
13. *V.R. Subramanyam* vs. *B. Thayappa and others*, 3 SCR 663.

RESULT: Suit decreed.

V.K. JAIN, J.

1. This is a suit for recovery of Rs.92,20,562/-. The defendant-

company, which was awarded the work for Biological Oxidation Plant for Coal Chemical Effluents at Rourkela Steel Plant (hereinafter referred to as "RSP), assigned the civil work for the aforesaid plant to the plaintiff for a lump sum amount of Rs.2,87,30,000/- vide Letter of ˇIntent (hereinafter referred to as LOI) dated 15th October, 1992. The scope of work as also the commercial terms for its execution were annexed to the LOI. It is alleged that in a meeting held in the last week of February, 1993, among the plaintiff, defendant and the officials of RSP, some major changes were made in the nature of civil work which was assigned to the plaintiff and those changes involved extra work and extra price implications. Some other extra works were later entrusted to the plaintiff for execution. The plaintiff submitted a claim of Rs.32 lakhs to the defendant for the extra work executed by it, which was later on corrected and changed to Rs.42,04,500/-. It is alleged that a sum of Rs.5 lakhs was paid by the defendant to the plaintiff in February, 1994, which was adjusted towards payment for the extra works. The amount payable by the defendant to the plaintiff towards payment of the extra work is alleged to have accumulated to Rs.57,18,500/. The plaintiff has claimed an amount of Rs.43,51,217/- as principal sum from the defendant along with interest on that amount at the rate of 24 % per annum, amounting to Rs.48,69,345/- - till 31st March, 2000.

2. The defendant has contested the suit. It has taken a preliminary objection that a full and final payment of Rs.9,36,900/- was made to the plaintiff on 29.8.1997 and having accepted that amount, the plaintiff cannot claim any further amount under the contract in question. The other preliminary objection taken by the defendant is that the suit is barred by limitation having been filed on 26.9.2000. On merits, it has been alleged that the defendant has cleared all the liabilities which were due to the plaintiff under contract in question. It is also alleged that extra work claimed by the plaintiff was already covered in the scope of price breakup given by it on 15.3.1993 which was subsequently amended on 19.3.1993. The defendant has denied for entrusting extra work to the plaintiff and having assured payment for the alleged extra work. It is claimed that the plaintiff, on his own did the alleged extra work and got the same approved from RSP because he was fully aware that under the contract he was required to do that work.

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

1. Whether plaint has been signed and verified and suit instituted by a duly authorized person on behalf of the plaintiff?

2. Whether plaintiff executed extra work not covered by the letter dated 15th October 1992? If answer is in affirmative, of what amount?

3. Whether plaintiff is entitled to interest? If so, on which amount, at what rate and for which period?

4. Whether amount of Rs.9,36,900/- was received by the plaintiff by way of full and final payment as alleged in para No.1 of the preliminary objection of written statement?

5. Whether suit is barred by time?

6. Whether this Court has no territorial jurisdiction to try the suit?

7. Relief.

Issue No.6

4. During arguments, the learned counsel for the defendant stated that he was not pressing this issue. Accordingly, this issue is stuck off.

Issue No.1

5. Mr. S.N.Nandy is the proprietor of S.N.Nandy & Co. and the plaint has been signed and verified by him. Institution of suit, and signing and verification of pleadings by the proprietor of a partnership concern is perfectly legal and valid. In fact, Mr.S.N.Nandy & Co. is only a trade name adopted by him and the suit ought to have been filed by Mr S.N. Nandy as its proprietor. The issue is decided against the plaintiff and in favour of the defendant.

Issue No.2

6. The plaintiff has examined himself as PW-1 whereas the defendant has examined one witness Mr. Kartick Kumar Chatterjee as DW-1.

7. In his affidavit by way of evidence, the plaintiff has stated that in the last week of February, 1993, a meeting was organized between him, the defendant and the department of RSP and certain major changes in the scope of civil work were made by RSP and accepted by the

defendant. He accordingly wrote letter dated 2.3.1993 to the defendant giving details of the extra works as well as the price implication. He claimed to have sent another communication dated 17.6.1993 to the defendant in this regard and has stated that the defendant had permitted him to proceed with the work including extra and additional work with promise and assurance that payment would be made in due course. He has further stated that in the meetings held on 3.1.1994 and 6.1.1994, the defendant acknowledged the extra works done by the plaintiff and also accepted his entitlement for payment. He accordingly sent a communication dated 7.1.1994 to the defendant in this regard. He claimed that the defendant made promises and assurances to clear his dues but failed to do so. According to him, in the joint meeting held on 11.3.1994 and 12.3.1994, the issue with regard to extra work was discussed and the defendant promised to scrutinize the claim and make payment against the same. Similar promise, according to him, was made when he visited the office of the defendant on 29.6.1994 and 14.7.1994. He has stated that on 10.11.1994, Deputy Managing Director of the defendant company came to Delhi and the issue about payment of extra work was discussed and a promise was made to make payment.

He further stated that a sum of Rs.5 lakhs was received by him towards extra work on 15.02.1994. He maintained that the extra work was executed at the site with the consent and due information to the defendant and on their assurance to make payment. He further stated that the defendant sent a cheque of Rs.9,36,900/- being last 5% of the original contract value and the payment towards extra work remained payable to him. He has proved the comparative statement Ex.PW-1/51 prepared by him. Ex.PW-1/52, according to him are details of change in scope of work.

8. In rebuttal, Mr. Kartick Kumar Chatterjee who was examined as DW-1 has stated that the plaintiff was entrusted the work of design, construction and maintenance of civil work in the Biological Oxidation Plant for coal chemical effluents of RSP on turnkey basis, for a total lump sum price of Rs.2,87,30,000/- as per the terms and conditions stipulated in the LOI dated 15.10.1992. The LOI, according to him, did not contemplate any extra work with extra price implication nor did it contain any price variation clause. He has also proved the letter dated 15.3.1993 written by the plaintiff giving detailed item-wise price-wise

breakup and has stated that complete full and final payment under the contract and LOI was made to the plaintiff vide receipt dated 29.8.1997. According to him, nothing is left due to the plaintiff. He maintained that the plaintiff never executed any extra item or extra work.

9. Ex.PW-1/4 is the offer made by the plaintiff to the defendant company for civil work of BOD plant at RSP. Paras 2 and 3 of the letter read as under:-

> "We have gone through the entire scope of civil work and specifications furnished to us along with the enquiry. Our lumpsum offer for entire civil work is based on M/s. NCL's scope of work, specifications and layout, and Flow diagram drawings sent to us.
>
> Our total lumpsum price consideration for the above job shall be Rs.275 lacks (Rupees two hundred seventy five lacs only) includes design, execution and supervision. Our lumpsum price also includes cost of all materials and manpower required for the job. The price implication of WCT is not considered, by us."

10. Ex.PW-1/5 is the letter of the plaintiff dated 6.8.1992 whereby, he submitted lump sum price quotation for Earthern Sludge lagoon for a covered area of 800 sqm. and providing one metre wide pavement. A sum of Rs.2,55,000/- was quoted for the sludge lagoon and Rs.3,35,000/- was quoted for the pavement. Ex.PW-1/6 is the letter dated 15.10.1992 whereby the work for the design, engineering, drawing, construction and maintenance of all the civil works in the Biological Oxidation Plant for coal chemicals effluents etc. at RSP was awarded to the plaintiff for a lump sum price of Rs.2,87,30,000/-. The scope of work covered by the letter and major chemical terms and conditions were also enclosed to this letter. The scope of work as defined in the annexure to this document reads as under:-

> **"SCOPE OF WORKS**
>
> The scope of work of this LOI covers the Design. Engineering preparation of Arrangement and Detailed Drawings, obtaining approval from RSP, construction in accordance with the approved drawings, Specifications and Instructions of RSP/NCL and maintenance of all the Civil-Works involved in the Biological

Oxidation Plant for Coal Chemical Effluents at RSP.

The list of items of Civil-Works involved in the above project is shown in the enclosed Annexure No.1."

Annexure-I gave detailed breakup of the scope of work awarded to the plaintiff.

11. It would thus be noticed that though the initial offer made by the plaintiff was for Rs.2,75,00,000/-, the work was awarded to him for Rs.2,87,30,000/- which is Rs.12,30,000/- more than the quotation given by him and the difference between the price and the price at which the work was awarded is more than the amount of Rs.5,90,000/- which the plaintiff had claimed for extra items/earthern sludge lagoon and bituminous pavement, vide letter Ex.PW-1/5. This becomes important since contention of the learned counsel for the defendant was that value of the work was enhanced in order to pay for the extra work involved in the execution of contract.

12. Ex.DW-1/P-1 is the letter of the plaintiff dated 15.3.1993 whereby he sent detailed price breakup for the civil work awarded to him. This breakup was sent by the plaintiff in order to facilitate progressive payment to him during the execution of the work. A perusal of the annexure to this letter would show that the plaintiff had divided the amount of Rs.2,87,30,000/- into various heads and sub-heads. This break up is important as no item-wise value was given either in the quotation of the plaintiff or in the LOI issued to him by the defendant. It is not open to the plaintiff to say that the items mentioned in this break up were not included in the scope of work awarded to him, nor can he claim any amount higher than the amount assessed by him for each item mentioned in this document.

13. Admittedly, the work was awarded to the plaintiff on turnkey basis and a composite amount of Rs.2,87,30,000/- was to be paid to him for the whole of the work. Unless the plaintiff is able to show that the work claimed by him as extra work was beyond the scope of the composite work awarded to him on turnkey basis, he will not be entitled to any extra payment. Since the break-up submitted by the plaintiff as annexure to his letter Exhibit DW1/P1 was based on the awarded amount, which was higher than the amount initially awarded by him, he can claim

payment only for that work, which was not included in the break up sent by him to the defendant. Of course, he would be entitled to payment of the work, which was not included in the break-up given by him to the defendant as well as for the quantity which exceeded the quantity indicated in the break-up, provided he is able to make out either a contractual obligation or a statutory obligation on the part of the defendant to pay to him for that extra work/extra quantity.

14. The case of the plaintiff is that the extra works were executed by him on the instructions of the defendant. The case of the defendant, however, is that no extra work was entrusted by it to the plaintiff and the works claimed as extra work were included within the scope of the work awarded to the plaintiff.

15. In his cross-examination, the plaintiff has admitted that no prior permission was taken before executing the extra works. The next question which then comes up is as to whether the defendant had impliedly consented to pay for the works. Exhibit PW1/9 is the letter sent by the plaintiff to the defendant on 2nd March, 1993, referring to the discussions held with various departments of RSP and stating therein that the defendant had agreed for some major changes/incorporations in the scope of civil work having substantial extra price implication on the agreed lump sum value. The details of the additional work with extra price implications were annexed as Annexure A to this letter. The items mentioned and included in Annexure A to this letter were sludge drying beds in place of sludge lagoons, treated effluent sump for increased capacity, screed concrete in channels and plaster with WPC in all RCC tank floors, providing anti-forming system, providing fencing around MCC/ Transformer rooms with gates and bituminous pavement, providing additional aprons around RCC tanks and pathways as approach to units and two coats of Epoxy Paint inside Equalization tanks. Out of these items, screed concrete in channels and plaster with WPC in all RCC tank floors, anti-foaming system, fencing around MCC/Transformer rooms and pathways as approach to units and two coats of Epoxy Paint inside Equalization tanks have not been shown either in Exhibit PW1/51 or in Exhibit PW1/128, which indicates that either these works were not actually executed or were treated to be within the scope of the awarded work and that is why the plaintiff has not claimed any payment from the defendant for these works. Exhibit PW1/12 is the letter of the plaintiff dated 17th

June, 1993, informing the defendant that the works mentioned in the letter would be treated as extra works and payment for them shall have to be made separately to him over and above the agreed lump sum value. The two items mentioned in this letter were dry pump house attached with the sump size of 5.00 M X 5.00 M and providing necessary support foundation and walkway platform suitable for installation of Cooling Tower Device on the top of the sump. However, neither of these items has been claimed in Exhibit PW1/51 or PW1/128. Vide letter dated 7th January, 1994, which is exhibit PW1/17, the plaintiff sought outstanding payment along with finalization of extra work, which were claimed to be worth Rs.32 lakhs. Vide letter dated 25th July, 1994, which is exhibit PW1/21, the plaintiff again sought payment for the extra claim raised by him. Vide letter dated 30th September, 1994, which is exhibit PW1/26, the plaintiff again requested the defendant for finalization of his extra claims, which he had submitted on 31st December, 1993. This request was reiterated vide fax massage dated 9th November, 1994, which is exhibit PW1/27, fax message dated 29th November, 1994, which is exhibit PW1/29 and fax letter dated 12th December, 1994, which is exhibit PW1/33.

16. A payment of Rs.5 lakhs was made by the defendant to the plaintiff vide cheque No.251361 dated 15th February, 1994 drawn on Hong Kong Bank. Vide letter dated 30th May, 1995, which is Exhibit PW1/D-2, the defendant claimed that this payment was to be adjusted against further R/A bills commencing from 10th R/A bill onwards but inadvertently that was not done. The plaintiff immediately replied to this letter vide his response dated 2nd June, 1995, which is Exhibit PW1/35 and claimed that the payment of Rs.5 lakhs was made as advance against extra work carried out by him and had been released after he had submitted his claim of Rs.41 lakhs towards extra work. He maintained that this amount could be adjusted against payment of extra work. There was no response from the defendant to this letter, which leads to the inference that ˇthis payment was made towards extra work. Vide letter dated 5th August, 1997, which is Exhibit PW1/44, the plaintiff sought payment for the extra work executed by him. Vide fax message dated 18th July, 1996, which is Exhibit PW1/38, the plaintiff again sought payment for the extra work. Vide letter dated 17th June, 1997, which is Exhibit PW1/43, the plaintiff demanded a sum of Rs.51,34,500/- from the defendant towards price of extra work after deducting a sum of Rs.5 lakhs already

received by him as advance towards these extra works. The above referred correspondence clearly indicates that some extra works were executed by the plaintiff to the knowledge of the defendant. Had the defendant not given an implied consent to any extra work, it would have adequately responded to the letters of the plaintiff and would not have paid Rs 5 lakhs to the plaintiff towards payment of extra works. Silence on the part of the defendant, despite repeated correspondence and claims from the plaintiff for the extra works alleged to have been executed by him gives an indication of an implied consent for some payment for the extra works by him.

17. Assuming, however, that the extra works claimed by the plaintiff were not authorized by the defendant and, therefore, the defendant is under no contractual obligation to pay for those works, the plaintiff is entitled to get reasonable payment for these works in view of the provisions contained in Section 70 of the Contract Act, 1872, which reads as under:-

> **"70. Obligation of person enjoying benefit of non-gratuitous act.—** Where a person lawfully does anything for another person, or delivers anything to him not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

18. A bare perusal of the above referred Section would show that three conditions need to be fulfilled before benefit of this provision can be invoked by a person. The first condition is that the claimant should either lawfully do something for another person or deliver something to him. The second condition is that while doing or delivering something, the claimant must not be acting gratuitously and thirdly, the person for whom something is done or to whom something is delivered must enjoy the thing done for or delivered to him as the case may be. Invocation of Section 70 of the Contract Act was disputed by learned counsel for the defendant on the ground that the plaintiff has not pleaded essential requirement of the Section. In support of his contention that pleading ingredients of Section 70 is a pre-condition for its invocation, the learned counsel for the defendant has referred to **Kotah Match Factory Kotah v. State of Rajasthan,** AIR 1970 Rajasthan 118, **Hansraj Gupta & Co.**

v. Union of India, AIR 1973 SC 2724, **Union of India v. Sita Ram Jaiswal,** AIR 1977 SC 329 and **Devi Sahai Palliwal v. Union of India and another,** AIR 1977 SC 2082.

19. In **Kotah Match Factory** (supra), the Rajasthan High Court noted that the plaintiff did not raise the plea for compensation under Section 70 of the Contract Act nor was any issue framed, nor were the parties given an opportunity to lead any evidence on the point. It was found that the case of the appellant before the Court was based upon an agreement. It was held that since the parties had not gone on trial on the question of compensation under Section 70 of the Contract Act, if the benefit of the aforesaid provision is allowed at this stage, it would amount to taking the opposite party by surprise. In **Hansraj Gupta & Co.**(supra), the Supreme Court was of the view that the conditions for the applicability of the Section 70 must at least be set out in the pleadings and proved. In **Sita Ram Jaiswal** (supra), the Supreme Court, inter alia, observed as under:-

> "6. The three ingredients to support the cause of action under Section 70 of the Indian Contract Act are these: First, the goods to be delivered lawfully or anything has to be done for another person lawfully. Second, the thing done or the goods delivered is so done or delivered "not intending to do so gratuitously." Third, the person to whom the goods are delivered "enjoys the benefit thereof." It is only when the three ingredients are pleaded in the plaint that a cause of action is constituted under Section 70 of the Indian Contract Act. If any plaintiff pleads the three ingredients and proves the three features the defendant is then bound to make compensation in respect of or to restore the things so done or delivered."

In **Devi Sahai Palliwal** (supra), the Supreme Court found that there was no allegation in the plaint to support any pleading in proceeding under Section 70 of the Indian Contract Act. Relying upon its earlier decision in Sitaram Jaiswal (supra), it was held that in the absence of proper pleadings under Section 70 of the Indian Contract Act, the plaint should not be entertained.

20. The learned counsel for the plaintiff on the other hand has referred to **State of West Bengal v. M/s B.K. Mondal and Sons,** AIR

1962 SC 779, **V.R. Subramanyam v. B. Thayappa and others,** 3 SCR 663 and **Food Corporation of India & Others v. Vikas Majdoor Kamdas Sahkari Mandli Ltd.,** 2007 (13) Scale 126. In the case of **B.K. Mondal and Sons** (supra), the Supreme Court, after reiterating the three conditions, which need to be satisfied before invoking Section 70 of the Contract Act, was of the view that when these conditions are satisfied, Section 70 imposes upon the person for whom something is done or to whom something is delivered, the liability to make compensation in respect of or restore the thing done for or delivered to him. During the course of the judgment, the Court, inter alia, observed as under:-

> "14…….If a person delivers something to another it would be open to the latter person to refuse to accept the thing or to return it; in that case S. 70 would not come into operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again S. 70 would not apply. In other words, the person said to be made liable under S. 70 always has the option not to accept the thing or to return it. It is only where he voluntarily accepts the thing or enjoys the work done that the liability under S. 70 arises. Taking the facts in the case before us, after the respondent constructed the warehouse, for instance, it was open to the appellant to refuse to accept the said warehouse and to have the benefit of it. It could have called upon the respondent to demolish the said warehouse and take away the materials used by it in constructing it; but, if the appellant accepted the said warehouse and used it and enjoyed its benefit then different considerations come into play and S. 70 can be invoked. Section 70 occurs in Chapter V which deals with certain relations resembling those created by contract. In other words, this chapter does not deal with the rights or liabilities accruing from the contract. It deals with the rights and liabilities accruing from relations which resemble those created by contract…….Therefore, in cases falling under S. 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract nor ask for damages for the breach of the contract for the simple reason that there is no contract between him and the other person for whom he does something or to whom be delivers something. All

that Section 70 provides is that if the goods delivered are accepted or the work done is voluntarily enjoyed then the liability to pay compensation for the enjoyment of the said goods or the acceptance of the said work arises. Thus, where a claim for compensation is made by one person against another under S. 70, it is not on the basis of any subsisting contract between the parties, it is on the basis of the fact that something was done by the party for another and the said work so done has been voluntarily accepted by the other party. That broadly stated is the effect of the conditions prescribed by S. 70."

21. In **V.R. Subramanyam** (supra), the Court reiteratd the settled proposition of law that if a party of a contract rendered service to other not intending to do so gratuitously and another person had obtained some benefit, the former is entitled to compensation for the value of the services rendered by him. It was further held that even if a person has failed to prove an express agreement in this regard , the Court may still award him compensation under Section 70 of the Contract Act and such a decree for compensation would be under the statute and not under a contract.

22. In **Food Corporation of India** (supra), the Supreme Court, inter alia, observed as under:-

"12…..A person who does work or who supplies goods under a contract, if no price is fixed, is entitled to be paid a reasonable sum for his labour and the goods supplied. If the work is outside the contract, the terms of the contract can have no application; and the contractor is entitled to be paid a reasonable price for such work as was done by him.

13. If a party to a contract has done additional construction for another not intending to do it gratuitously and such other has obtained benefit, the former is entitled to compensation for the additional work not covered by the contract. If an oral agreement is pleaded, which is not proved, he will be entitled to compensation under Section 70. Payment under this section can also be claimed for work done beyond the terms of the contract, when the benefit of the work has been availed of by the defendant."

23. In the case before this Court, though the plaintiff has not specifically pleaded the provisions of Section 70 of the Contract Act, nor

has any issue been framed by the Court on its applicability, he has pleaded all the ingredients necessary for invocation of the aforesaid statutory provision. In the plaint, the plaintiff has repeatedly alleged execution of extra work for the defendant. In fact, his entire claim in the suit is based on the extra works alleged to have been executed by him for the defendant. In para 7 of the plaint, he alleged that since changes in the scope of work involved extra work and extra price implications, the letter dated 2nd March, 1993 was written by him giving details of additional work and price implication. In para 9 of the plaint, he ˇalleged that in his letter dated 17th June, 1993, he had clearly pointed out about the payment of extra work over and above the value of the contract. Thus, the plaintiff has made it quite clear in the plaint that the extra works were not executed gratuitously and that the defendant was obliged to make payment for those works. In para 19 of the plaint, it is alleged that the extra work executed by him was duly accepted by the defendant. In para 21, he again alleged that all the works executed by him were accepted by the parties. In para 27 of the plaint, the plaintiff reiterated that the extra work was duly executed by him and accepted by the defendant. The plaintiff has, thus, pleaded all the necessary ingredients of Section 70 of the Contract Act by claiming that (i) he had executed extra works for the defendant; (2) extra works executed by him were accepted by the defendant and (3) he had not executed extra work gratuitously. The defendant could have refused to accept the extra works/ extra quantities executed by the plaintiff. In that event, it would not have been liable to pay for them. But, the defendant failed to do so and accepted these works. Therefore, even if it is presumed that the defendant had not consented to pay for the extra work by the plaintiff, it is ˇobliged in law to compensate him for the extra works, which were accepted by it, without any protest and without claiming that the plaintiff will not be paid for those works.

24. Ex.PW-1/51 is the comparative charge filed by the plaintiff showing change in scope of work in various units. The charts reads as under:-

"BOD PLANT AT RSP, ROURKELA

CHANGE OF SCOPE IN VARIOUS UNITS

Sl. No.	Units	Original Scope	Revised Scope	Difference
1.	Pump House-I	128 m2	86.45 m2	(-)41.55 m2
2	Pump House-II	192 m2	90.00 m2	(-) 102.00 m2
3.	Office-cum-Lab	300 m2	330.77 m2	(+) 30.77 m2
4.	DAF Building	Nil	255.79 m2	(+) 255.79 m2
5.	MCC Building	Nil	200.16 m2	(+) 200.16 m2 343.17 m2
6.	Treated Effluent Sump	40 m3	100 m3	(+) 60 m2
7.	Sludge Lagoon/ Drying Bed	800 m2	1080 m2	(+) 280 m2
8.	Influent Sump	Nil	35 m3	(+) 35 m2
9.	Pump House at Common Catch Pit		Nil 33 m2	(+)Nil 33 m2
10.	Cooling Tower Basin Over Common Catch Pit	Nil	30.67 m2	31 m2

Pump House I & II

25. A perusal of the above-referred chart would show that as far as item No.1 and 2 viz. Pump House-I and Pump House-II are concerned, there was reduction in the quantity of the work, for which credit has to be given to the defendant.

As per Ex.PW-1/51, the quantity of Pump House-I as per the original scope of work is 128 sq.mt. but, on revision the quantity was reduced to 86.45 sq.mt. Since the plaintiff is claiming payment for the extra work as well as extra quantity executed by him, he is required to give adjustment to the defendant for the lesser quantity executed by him. A perusal of Ex.DW-1/P1 would show that the plaintiff had quoted Rs.4 Lacs for Pump House-I. If the value of 128 sq.mt was Rs.4 Lacs, the value of 41.55 sq. mt. which is the difference between the original quantity and the revised quantity comes to Rs.129843/-.

The plaintiff is required to give adjustment of this amount to the plaintiff on account of reduction in the quantity of the work for Pump House-I. The plaintiff had assessed the value of Pump House-II at Rs.3,50,000/- for 192 m2 in Ex.DW-1/P1. If the value of 192 sq.mt. was Rs.3,50,000/-, the value of difference between the original quantity and the revised quantity of 102 sq.mt. comes to Rs.185937/-. The plaintiff is required to give adjustment for this amount to the defendant.

DAF Building

26. As regards item No.4 DAF Building in chart Ex. PW1/51, the case of the plaintiff as indicated in the Chart is that this item was not included in the scope of work awarded to him. However, a perusal of the Annexure to plaintiff's letter Ex.DW-1/P-1 would show that DAF Unit was shown as item No.5 whereas DAF Dosing Pump House was shown as item No. 15 and the plaintiff had assessed value of DAF Unit at Rs.50,000/- and that of DAF Dosing Pump House at Rs.7 lakhs. There is no evidence on record to indicate that DAF Building was different from DAF unit and DAF Dosing Pump House. Nowhere has it been alleged in the plaint that DAF Building was a work different from DAF Unit and DAF Dosing Pump. In fact, the plaintiff has not specified any alleged extra item in the plaint. As a result, the defendant had no opportunity to rebut the case of plaintiff in respect of each item claimed to be extra item. In his affidavit, the plaintiff did not say that DAF Building was different from DAF Unit and DAF Housing Pump. No other evidence was led by him to prove that these are different items. Since the defendant had claimed that all the works executed by plaintiff were included in the scope of LOI, it was incumbent upon the plaintiff to prove that this was a work different from the works included in Ex DW-1/P1. In fact, there is no evidence during trial to even prove that any such work was actually executed by the plaintiff.

27. It was contended by the learned counsel for the plaintiff that since there is no cross-examination of the plaintiff in this regard, it is not open to the defendant to dispute the execution of the extra works or to say that these works were not extra works. In support of his contention, he has relied upon the decision of this Court in **Uttam Kumar vs. State** 2010(3) JCC 1946 and the decision of Punjab High Court in **Chuni Lal Dwarka Nath v. Hartford Fire Insurance Co. Ltd. and Anr.** AIR 1950 Punjab 440. In the case of **Uttam Kumar** (supra), which was a

criminal appeal against conviction, it was found that no question was put to the police officer as to why he took six police men along with him. Observing, that without questioning a witness on a point of controversy and eliciting a response, no argument can be built on said controversy by hinging the controversy on surmises and conjectures, this Court felt that had the witness been asked, an answer would have come and then there could have been some scope for a debate. It was also found that another witness Vibhor was not cross-examined with respect to the essential portion of his testimony, which had virtually gone unrebutted. This Court, then, referred to the observations made by Punjab High Court in **Chuni Lal Dwarka Nath** (supra) that a party should put to each of his opponent witness so much of his case as concerns that particular witness and if no such questions are put, the Court presumes that the witness account has been accepted. However, these judgments are of no help to the plaintiff for the simple reasons that in his affidavit by way of evidence, the plaintiff did not even depose with respect to execution of the alleged extra works. He did not say that DAF building was different from DAF Unit and DAF Dosing Pump House which were shown as Item No. 5 and 15 respectively in Ex.DW-1/P1. Had the plaintiff stated that he had constructed DAF Building and that work was different from DAF Unit and DAF Dosing Pump House, only then failure of the defendant to cross-examine him in this regard could have proved detrimental to the defendant and could have accrued to the benefit of the plaintiff. The case of the defendant has all along been that all the alleged extra work was within the scope of the work awarded to the plaintiff. Moreover, during the course of arguments, I gave an opportunity to the learned counsel for the plaintiff to satisfy me, from the drawings, if available on record that DAF Building was different from DAF Unit and DAF Dosing Pump House shown in Ex.DW-1/P1. No such attempt was, however, made. Hence, DAF Building cannot be considered to be an extra item and the plaintiff is not entitled to any extra amount for this work.

MCC BUILDING

28. Item No.4 shown in chart Ex.PW-1/51 is MCC Building. A perusal of the annexure to plaintiff's letter Ex.DW-1/P-1 would show that MCC-cum-transformer room was shown as item No.18 in this document and the plaintiff had assessed the value of this work at Rs.8

lakhs. Again, there is no material on record to indicate that MCC Building was different from MCC-transformer room. Also, there is no evidence produced during trial, to prove execution of this work. The plaintiff did not say about execution of this work in his affidavit. He did not claim that MCC Building was different from MCC Transformer Room. No attempt was made to satisfy me, from drawings, etc. that these were two separate works. Consequently, this work cannot be treated as extra item and the plaintiff is not entitled to any amount from the defendant towards payment of this work.

OFFICE CUM LAB

29. As regards office-cum-lab which is item No.3 in the Chart Ex.PW-1/51, according to the plaintiff there has been increase in the scope of work since the quantity had increased from 300 sq.m. to 330.77 sq.m., the increase being 30.77 sqm. The plaintiff had assessed the value of office-cum-lab building at Rs.11 lakhs in the annexure to his letter Ex.DW-1/P-1. If the cost of 300 sqm. was Rs.11 lakhs, the cost of the extra quantity measuring 30.77 quantity would come to about Rs.1,10,000/-. The plaintiff therefore cannot claim more than Rs.1,10,000/- for this extra work. Though in his affidavit, the plaintiff did not specifically say that the quantity of this item had increased from 300 m2 to 330.77m2, I do not propose to deny the payment, since during the course of arguments before me, the contention of the learned counsel for the defendant was that the plaintiff can claim for extra quantity, only as per value assessed in Ex.DW-1/P1. This was not his contention ˇthat in fact the quantity did not exceed 300 m2.

TREATED EFFLUENT SUMP

30. As regards Treated Effluent Sump which is item No. 6 in the Chart Ex.PW-1/51, the quantity according to the plaintiff had increased from 40 cubic metre to 100 cubic metre, the increase being 60 cubic metre. The plaintiff has in annexure to letter Ex.DW-1/P-1 assessed the value for Treated Effluent Sump at Rs.2 lakhs. If this was the value for 40 cubic metre, he is entitled to only Rs.3 lakhs towards payment of the extra quantity. Though in his affidavit by way of evidence, the plaintiff did not refer to execution of extra quantity of this item, I am granting this payment to him, as the contention before me was that he cannot claim at a value higher than estimated by him, and this was not the

contention that there was no excess quantity of this item.

SLUDGE LAGOON/DRYING BED

31. Item No.7 shown in the Chart Ex.PW-1/51 is sludge lagoon/ Drying Bed. The quantity is alleged to have increased from 800 sqm. to 1080 sqm. the increase being 280 sqm. The case of the plaintiff is that he had given value of Rs.2,50,000/- for 800 sqm. for sludge lagoon whereas he has constructed sludge lagoon/ sludge drying bed measuring 1080 sqm., price of which comes to Rs.17,28,000/-. The first question which comes up for consideration in this regard is whether sludge lagoon/ sludge drawing bed is different from the sludge lagoon shown in Ex.DW-1/P-1 and if so, whether the plaintiff is entitled to any extra payment for this item. The heading of item No.14 in the annexure to letter Ex.DW-1/P-1 is sludge lagoon/drawing bed. Same is the heading given in the comparative chart. The plaintiff, therefore, cannot say that the work executed by him was different from the work for which break up was given by him. By quoting Rs.3 lakhs for sludge lagoon/drawing beds, the plaintiff clearly indicated that there were alternative works and valued this work at Rs.3 lakhs irrespective of whether it was to be sludge lagoon or drawing bed.

The plaintiff has not told the Court how drawing beds are different from the sludge lagoons. More importantly, the work indicated in EX.DW-1/P-1 is not sludge lagoon but sludge lagoon/drawing bed and same is the work alleged to have been executed by the plaintiff. Therefore, the plaintiff is entitled only to the extra quantity measuring 280 sqm. Calculated at the value assessed by the plaintiff himself in Ex.DW-1/P-1, the price for the extra quantity measuring 280 sqm. would come to Rs.1,05,000/-. The plaintiff is entitled to recover only this much amount in respect of this extra quantity. Here also, though the plaintiff did not claim execution of extra quantity, in his affidavit by way of evidence, I am inclined to allow payment for extra quantity as this was not the contention before me that no extra quantity was executed.

INFLUENT SUMP

32. Item No.8 in chart Ex.PW-1/51 is Influent Sump which the plaintiff claims to be a new item. However a perusal of annexure to letter Ex.DW-1/P1 would show that influent sump was shown as items No.3 in this document and the plaintiff had assessed its value at Rs.1,00,000/-. There is neither any pleading nor evidence before the Court to show that more than one influent sump were constructed by the plaintiff. NO attempt was made to show from drawings etc. that the plaintiff had constructed an additional influent sump. Therefore he is not entitled to any amount towards this item.

PUMP HOUSE AT COMMON CATCH PIT

33. Item No.9 in chart Ex.PW-1/51 is Pump House at Common Catch Pit. Though Common Catch Pit has been shown as item No.21 in annexure to letter Ex.DW1/P1, the breakup of this item does not indicate any Pump House. Therefore, if the plaintiff had constructed a Pump House at Common Catch Pit, it would be an extra item and the plaintiff would be entitled to payment for this item. During arguments, this was not the contention of the defendant that no pump house at common catch pit was constructed by the plaintiff. The plaintiff has claimed a sum of Rs.1,85,000/- for this extra item. No evidence has been led by the defendant to prove that the value of this extra item would be less than Rs.1,85,000/-. I, therefore, hold that the plaintiff is entitled to recover a sum of Rs.1,85,000/- from the defendant towards payment of this extra item.

COOLING TOWER BASIN OVER COMMON CATCH PIT

34. Item No.10 shown in chart Ex.PW-1/51 is Cooling Tower Basin over Common Catch Pit, which is not included in the work indicated under item No.2, Common Catch Pit in annexure to letter Ex.DW1/P1. Again this was not the contention of the defendant that no Cooling Tower Basin was constructed by the plaintiff over Common Catch Pit. The plaintiff, therefore, is entitled to payment towards this extra item. He has claimed a sum of Rs.1,20,000/- for this extra item. There is no evidence led by the defendant to show that the cost of this extra item was less than Rs.1,20,000/-. I, therefore, see no reason to disbelieve the unrebutted evidence of the plaintiff in this regard and also that he is entitled to recover a sum of Rs.1,20,000/- from the defendant towards payment of this extra item.

APRON AROUND RCC TANK

35. In his comparative statement Ex.PW-1/128, the plaintiff has also claimed Rs.80,000/- towards payment for Apron around the RCC

Tank. A perusal of annexure to letter Ex.DW-1/P1 would show that the plaintiff was to construct Equalization Tank-TO1B, Aeration Tank-I T05 and Aeration Tank-II T07. Apron has been shown as one of the sub items of Equalization Tank-TO1A. The plaintiff had assessed its value at Rs.50,000/-. Aprons are also shows as a part of Equalization Tank-TO1B and its value has been assessed at Rs.50,000/- Aprons has also been included in the work shown under the heading Aeration Tank-I and the plaintiff has assessed its value at Rs.92,000/- for the aprons/finishing. Aprons/finishing has also been shown under Aeration Tank-II against item No.10 and the plaintiff has assessed its value at Rs.1,68,000/-. The plaintiff has not told the Court how the Apron around the RCC Tank shown by him at item No.21 in Ex.PW-1/128 is an extra item when examined in the light of the fact that he has already included aprons while giving detailed breakup of Equalization Tank-TO1B, Aeration Tank-I T05 and Aeration Tank-II T07. No evidence has been led by the plaintiff to show how many aprons he was to construct in terms of the LOI and how many were actually constructed by him. No attempt was made to satisfy me from the drawings that the any additional apron was constructed by the plaintiff. He has, therefore, failed to prove that aprons around the RCC Tank were extra items. I, therefore, hold that the plaintiff is not entitled to any payment for Apron around the RCC Tank.

BOUNDARY WALL (EXTRA QUANTITY)

36. At serial No.22 of Ex.PW-1/128, the plaintiff has claimed a sum of Rs.75,000/- towards excess quantity measuring 25 RM of boundary wall. The chart indicates that the quantity as per the work order was 345 RM whereas the quantity as per the approved drawing was 370 RM. During arguments, there was no claim by the defendant that the actual quantity was not 370RM. A perusal of annexure to letter Ex.DW-1/P1 would show that the plaintiff had assessed the value of boundary wall, gates/guard room at Rs.5 Lacs. The breakup of this item would show that a sum of Rs.25,000/- was claimed towards design and drawing, Rs.50,000/- towards guard rooms and Rs.20,000/- towards gates. This would mean that the value of the boundary wall was Rs.4,05,000/- (Rs.5Lac – Rs.25,000/- – Rs.50,000/- – Rs.20,000/-). If the value of 345 RM is taken as Rs.4,05,000/- the value of the excess quantity measuring 25 RM would come to Rs.29,347/-. The plaintiff is entitled to recovery of this amount from the defendant towards excess quantity of boundary

wall.

RECONSTRUCTION OF BOUNDARY WALL

37. In Ex.PW-1/128, the plaintiff has claimed Rs.153217.50 towards reconstruction of boundary wall in terms of his letter dated 30th November 1994. A perusal of Ex.PW-1/23, which is the letter written by the plaintiff to defendant on 27th August 1994 shows that there was some verbal discussion between the parties regarding reconstruction of boundary wall and Bio-Oxidation plant and the plaintiff quoted a price of Rs.1,55,000/- for this work. He also gave details of the price quoted by him for this item. A perusal of Ex.PW-1/25, which is the letter sent by the defendant to the plaintiff on 31st August 1994, shows that on receipt of the letter dated 27th August 1994, the defendant requested the plaintiff to start the reconstruction of boundary wall with immediate effect. This letter does not indicate that reconstruction of boundary wall was necessitated on account of some defect in the boundary wall earlier constructed by the plaintiff. Since the plaintiff quoted a sum of Rs.1,55,000/- for reconstruction of the boundary wall and the defendant asked him to go ahead with the work, the defendant is liable to pay for this work which has to be treated as an extra work. I, therefore, hold that the plaintiff is entitled to recover a sum of Rs.153217.50 from the defendant for reconstruction of the boundary wall.

38. Thus the plaintiff is entitled to recover a sum of Rs 1,10,000/- for the extra quantity of the work involved in office-cum-lab, Rs 3 lakhs for the extra quantity of the work involved in Treated Effluent Sump. Rs 1,05,000/- for the extra work involved in Sludge Lagoon/ Drying Bed. Rs 1,85,000 for the Pump House at Common Catch Pit. Rs 1,20,000 for Cooling Tower Basin over Common Catch Pit. Rs 29,347/- for the extra quantity of boundary wall and Rs 1,53,217.50/- for reconstruction of boundary wall. He is entitled to give adjustment of Rs 1,29,843/-to the defendant towards revised quantity of the work involved in Pump House-I and Rs 1,85,937/- towards reduction in the quantity of work involved in Pump House-II. The balance amount payable to the plaintiff for the extra work thus comes to Rs 6,86,784.50/-

39. This is plaintiff's own case that he had received a sum of Rs.5 lakhs from the defendant as an advance towards the extra work executed by him. After deducting the aforesaid amount of Rs.5 lakhs from the

amount of Rs 6,86,784.50/-found payable to the plaintiff. The balance principal sum payable to him comes to Rs 1,86,784.50. The issue is decided accordingly.

ISSUE NO.4

40. Relying upon the receipt dated 27th August, 1997, which is exhibit PW-1/D1 the defendant has claimed that payment of Rs.9,36,900/- was accepted by the plaintiff in full and final settlement of all his claims and having done so, he is now estopped from claiming any further amount from it towards payment of the extra works. The receipt Exhibit PW1/D1 reads as under:-

" "RECEIPT"

Received with thanks the full and final payment of Rs.936900.00 (being last 5% of our contract value) vide cheque no.668151, dated: 28-08-97 drawn on Allahabad Bank, Calcutta against Civil Works of our original contract value of Rs.2,87,30,000.00

for S.N. Nandy & Co.

Date: 29-08-97

Sd/-

(S.N. Nandy)

Proprietor"

41. This document, to my mind, contains an admission that the plaintiff had received Rs.9,36,900/- from the defendant towards full and final payment of the work to the extent it was covered under the LOI Exhibit PW1/6 dated 15th October, 1992. This document does not apply to the˘ claim of the plaintiff for the extra works executed by him to the extent those works were beyond the scope of the LOI dated 15th October, 1992. On receipt of this payment, the plaintiff had no claim left against the defendant with respect to those works, which were included in the scope of work awarded vide LOI dated 15.10.1992, but, it does not preclude the plaintiff from making claim for payment of extra works, which he executed for the defendant. While executing this receipt, the plaintiff did not say that he had no claim left against the defendant company with respect to civil work for Biological Oxidation Plant at

R.S.P. Rourkela nor did he say that he had received payment for whole of the work executed by him at the above referred plant. The scope of the receipt was confined to the civil works, which were awarded to him vide LOI dated 15th October, 1992 and there is no justification for enlarging the scope of this document beyond what is evident from its plain and natural reading. Use of the expression "being last 5% of our contract value" and "contract value of Rs.2,87,30,000/-" in this receipt clearly indicates that what the plaintiff acknowledged was full and final payment of the contracted value and not the price of the extra works, which he had executed for the defendant. In Bharat Coking Coal Ltd. V. Annapurna Construction, (2003) 8 SCC 154, the respondent before the Supreme Court had accepted the final bill. It was contended on behalf of the appellant that the respondent having accepted the final bill, a further claim by it was inadmissible. Rejecting the contention, it was held that acceptance of final bill would not mean that the respondent was not entitled to raise any claim since the respondent had not unequivocally stated that it would not raise any further claim. The Court was of the view that in the absence of such a declaration, the respondent cannot be held to be estopped or precluded from raising any claim. In Pandit Construction Company v. Delhi Development Authority and another, 143 (2007) DLT 270, the petitioner had made the endorsement „accepted in full and final. on the final bill submitted to the DDA. The claim of the petitioner was rejected by the Arbitrator on the ground that the final bill had been accepted by the petitioner as full and final settlement. The petitioner, however, maintained that this was not full and final settlement of accounts. Accepting the contention of the petitioner, this Court held that a settlement, to be binding, must be recorded in clear and unambiguous terms. The Court was of the view that the endorsement 'accepted in full and final' could also be read to mean that the amount received was in respect of full amount of the bill on which endorsement was made.

The issue is accordingly decided in favour of the plaintiff and against the defendant.

ISSUE NO.5

42. Admittedly, the defendant company had been making payment to the plaintiff from time to time. The documents filed by the plaintiff show that the payments used to be made by cheques. The following payments were made by the defendant to the plaintiff between 1994-

1997 :-

Cheque No.	Date	Amount (Rs.)
527145	18.01.1994	4,00,000/-
527175	27.01.2994	5,43,670/-
527338	04.02.1994	5,32,421/-
527431	18.02.1994	5,00,000/-
038274	15.03.1994	5,00,000/-
038339	23.03.1994	4,00,000/-
038628	20.04.1994	9,49,762/-
490273	27.05.1994	3,27,945/-
446810	04.08.1994	5,65,023/-
575449	13.10.1995	15,00,000/-
575430	11.10.1995	3,00,000/-
575450	13.10.1995	3,20,162/-
212246	10.11.1995	2,54,749/-
212247	10.11.1995	4,00,000/-
50410	23.07.1996	83,659/-
68151	28.08.1997	9,36,500/-

43. Section 19 of the Limitation Act, to the extent it is relevant, provides that where payment on account of a debt is made before the expiration of the prescribed period, by the person liable to pay the debt or by his agent duly authorized in this behalf, a fresh period of limitation would be computed from the time when the payment was made. The last payment having been made by the defendant is on 28th August, 1997, a fresh period of limitation if computed from this date would expire on 28th August, 2000. The suit having been filed on 26th May, 2000 is, therefore, well within time. Though it was contended by the learned counsel for the defendant that the payment on 28th August, 1997 was made after the limitation prescribed for filing a suit of this nature had expired, that obviously is incorrect since payments by way of cheques were made by the defendant from time to time and at no occasion there was gap of three or more years between the two payments. In this

regard, it would be pertinent to note that though the extra works executed by the plaintiff were out of the scope of work contained in the LOI dated 15th October, 1992, the amount payable by the defendant to the plaintiff towards the civil work executed by him at Biological Oxidation Plant at R.S.P. Rourkela was one debt and though having two components, one for the works covered in the scope of LOI and the other for the works which were beyond the scope of LOI cannot be said that the payment for the work included in the scope of work awarded vide LOI dated 15th October, 1992 was one debt and payment for the extra work executed by the plaintiff was another debt. The project executed by the defendant for the plaintiff was one project, i.e., civil work at Biological Oxidation Plant at R.S.P. Rourkela and, therefore, payment for the entire quantity irrespective of whether for the work included within the scope of work indicated in the LOI or for the work beyond the scope of LOI, constituted one debt, which the defendant owed to the plaintiff. Therefore, even the payment was made by the defendant to the plaintiff towards price of the contractual work, which was included in the LOI it would extend the period of limitation also for the extra work executed by the plaintiff while carrying out civil work at Biological Oxidation Plant at R.S.P. Rourkela. It would also be pertinent to note here that this is not the requirement of law that while making a payment, the debtor must make it towards part payment. Any payment, irrespective of, whether it is made as part payment or otherwise, would extend the period of limitation under Section 19 of the Limitation Act. In this regard I may refer to the decision of the **Privy Council in Rama Shah v. Lal Chand,** AIR 1940 Privy Council 63 where the Court, inter alia, observed as under:-

> "In the Limitation Act, Section 19, which deals with acknowledgments, is not to be read as based upon the theory of implied promise: and it is difficult to see why Section 20, which deals with payments, should be regarded as based upon a theory of acknowledgment. The Indian Legislature may well have thought that a payment if made on account of the debt and evidenced by writing gave the creditor some excuse for further delay in suing, or was sufficient new proof of the original debt to make it safe to entertain an action upon it at a later date than would otherwise have been desirable. The words in Section 20 by which the matter must be judged are "where part of the principal of a debt is paid". As it is not prescribed by the Section that the payment

should be intended by the debtor to go towards the principal debt at all, the words 'as such' having no place in this part of the Section, it is not in their Lordships' view correct to require that the payment should have been made of part as part."

44. In support of his contention that the suit is barred by limitation, learned counsel for the defendant has referred to **Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority,** (1988) 2 SCC 338, **Satender Kumar v. Municipal Corporation of Delhi and another,** 168 (2010) DLT 15, and **Hansa Vision Pvt. Ltd. V. Dabur (India) Limited & Ors,** 168 (2010) DLT 562.

45. In the case of **Inder Singh Rekhi** (supra), the Court was dealing with a petition under Section 20 of the Arbitration Act, 1940. During the course of judgment, the court observed that on completion of the work a right to get payment would normally arise but where the final bills have not been prepared, the cause of action would arise from the date when the assertion of the claim was made. It was further observed that a party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill has not finally prepared, the claim made by the claimant is the accrual of cause of action.

In the case of **Satender Kumar** (supra), this Court, after referring to the decision of the Supreme Court in the case of **Inder Singh Rekhi** (supra), inter alia, held as under:-

"16(iii) As regards contracts for execution of building work, Article 18 comes into play in that when no specific date for payment is fixed, limitation commences and the cause of action accrues for the purpose of limitation on the completion of work.

(iv) In its application, Article 18 will cause different dates for accrual of causes of action in building works when a time period is fixed for submitting of a bill by the contractor and to which there is no response to the owner. Where a final bill is submitted and liability under the same, even if, in part, is admitted or some payment is made then such actions extend limitation in terms of Section 18 of the Limitation Act."

In the case of **Hansa Vision Pvt. Ltd.** (supra), this Court, referring

to Article 113 of the Limitation Act, 1963, observed that the period of limitation is 3 years to be computed from the date when right to sue accrues, wherever the aforesaid Article applies.

All these judgments tend to support the contention of the learned counsel for the defendant that in a suit for price of work executed by contractor, Article 18 of the Limitation Act would be the relevant Article, which provides a period of limitation of 3 years from the date when the work is done, where no time has fixed for payment. They also support his contention that a party cannot postpone the accrual of cause of action by writing letters and reminders seeking payment from the other party and once the period of limitation starts running, mere sending reminders would not postpone the accrual of cause of action even if the defendant does not dispute his liability in this regard. However, the benefit of Section 19 of Limitation Act cannot be denied to the plaintiff even if Article 18 of the Limitation Act is applied to the case. The issue is decided against the defendant and in favour of the plaintiff.

ISSUE NO.3

46. The plaintiff has claimed interest @ 18% per annum for the period from 31st December, 1993 to 31st March, 2000 on the amount of Rs.41,98,000/- and from 30th November, 1994 to 31st March, 2000 on the amount of Rs.1,53,217/- thereby making a total sum of Rs.48,69,345/- towards interest. The plaint does not disclose the basis on which interest has been claimed by the plaintiff. Admittedly, there is no agreement between the parties for payment of interest. No custom or usage of trade with respect to payment of interest has either been pleaded or proved by the plaintiff. It is settled proposition of law that in a civil suit interest cannot be awarded as damages. However, interest can be awarded by the Court under the provisions of the Interest Act, 1978. Section 3 of the Interest Act, 1978, to the extent it is relevant, provides that in any proceedings for the recovery of any debt in which the claim of interest in respect of any debt is made, the Court may, if it thinks fit, allow interest to the person entitled to the debt on a rate not exceeding the current rate of interest. If the proceedings relate to a debt, which is not payable by virtue of a written instrument at a certain time, interest can be awarded for the period from the date mentioned in this regard in a written notice given by the person entitled or making the claim to the

person liable that interest will be claimed, till the date of institution of the proceedings. Vide his letter dated 18th July, 1996, the plaintiff informed the defendant that the losses incurred by him were being worked out in terms of interest and the same shall be intimated to it. The details of interest were then sent by the plaintiff to the defendant vide its letter dated 20th July, 1996, which is Exhibit PW1/39. He claimed interest @ 24% per annum. I, therefore, feel that interest should be awarded to the plaintiff from 20th July, 1996 till the date of filing of this suit at the rate of 12% per annum. Calculating accordingly the amount of interest at the rate of 12% per annum on the principal amount of Rs.1,86,784.50/-, interest for the period from 20th July, 1996 to 26th May, 2000 comes to Rs.86,294.44p. The plaintiff is entitled to recover total amount of Rs.2,72,078.94p from the defendant.

ORDER

For the reasons given in the preceding paragraphs, a decree for a sum of Rs.2,72,078.94p with proportionate costs and pendente lite and future interest at the rate of 12% per annum is passed in favour of the plaintiff and against the defendant.

Decree sheet be prepared accordingly.

ILR (2011) DELHI II 827
ITA

COMMISSIONER OF INCOME TAX CENTRAL-II, NEW DELHI **....APPELLANT**

VERSUS

SHRI NARENDER ANAND **....RESPONDENT**

(SANJAY KISHAN KAUL AND RAJIV SHAKDHER, JJ.)

ITA NO. : 82/1999 **DATE OF DECISION: 24.02.2011**

Income Tax Act, 1961—Section 43, 80, 139—Whether

extension of time for filing return in terms of proviso to Section 139(1) automatically means extension of due date for the purpose of Section 43 B of the Act—Held—Once neither penalty can be imposed nor any other such negative consequences follow to the assessee by reason of filing his return late, so long as there is an extended period of time granted or deemed to be granted by the AO, all acts done within the extended period must, thus, be deemed to have been done within the prescribed period of time as originally stipulated.

The following question of law was framed vide order dated 7.9.2000 to be answered by this Court:

> "Whether on the facts and circumstances of the case, the Tribunal was justified in holding that where time for filing return is extended in terms of proviso to Section 139 (1) it automatically means extension of the due date for the purpose of Section 43B of the Income Tax Act?" **(Para 1)**

We have given our thoughtful consideration to the matter in issue. To answer the question of law framed we feel the following aspects have to be taken into account:

i. The object with which Section 43B was inserted.

ii. The object with which the proviso was inserted in Section 43B of the IT Act.

iii. The effect of extension granted by the AO to the assessee under proviso (iii) of Section 139(1) of the IT Act.

iv. The factum of the sales tax having been actually paid within the extended period of time. **(Para 21)**

We find that once neither penalty can be imposed nor any other such negative consequences follow to the assessee by reason of filing his returns late, so long as there is an extended period of time granted or deemed to be granted by the AO, all acts done within the extended period must,

thus, be deemed to have been done within the prescribed period of time as originally stipulated. **(Para 27)**

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. Sanjeev Sabharwal, Advocate.

FOR THE RESPONDENT : Mr. P.N. Monga & Mr Manu Monga, Advocates.

CASES REFERRED TO:

1. *Mehsana Ice & Cold Storage P. Ltd.* vs. *CIT* (2005) 275 ITR 601.
2. *Friends Clearing Agency (P) Ltd.* vs. *Commission of Income Tax-II ITA* No.3/1999.
3. *Orissa State Warehousing Corporation* vs. *Commissioner of Income Tax* (1999) 237 ITR 589.
4. *Allied Motors (Private) Limited* vs. *CIT* (1997) 224 ITR 677.
5. *Krishna Chandra Dutta (Cookme) Private Limited* vs. *CIT* (1993) 204 ITR 23.
6. *Amin Chand Payarelal* vs. *Inspecting Assistant Commissioner of Income Tax Range-1 (Central), Calcutta & Ors.* (1989) 180 ITR 330.
7. *Harmanjit Trust* vs. *CIT, Patiala-I* (148) 1984 ITR 214.
8. *R. B. Jodha Mal Kuthiala* vs. *CIT* [1971] 82 ITR 570.
9. *CIT, Madhya Pradesh & Bhopal* vs. *Sodra Devi* (1957) 32 ITR 615 (SC).

RESULT: Appeal dismissed.

SANJAY KISHAN KAUL, J.

1. The following question of law was framed vide order dated 7.9.2000 to be answered by this Court:

> "Whether on the facts and circumstances of the case, the Tribunal was justified in holding that where time for filing return is extended

> in terms of proviso to Section 139 (1) it automatically means extension of the due date for the purpose of Section 43B of the Income Tax Act?"

2. The respondent/assessee was required to file returns for the year ending 31.3.1988 by 31.7.1988. The assessee, however, filed an application on 29.7.1988 praying for extension of time up to 30.9.1988 to file the return and this request was accepted by the Assessing Officer (for short 'AO') vide letter dated 11.8.1988. The return was filed by the assessee on 6.11.1990 declaring an income of `48,64,920.00 for the relevant assessment year.

3. It is during the assessment proceedings while scrutinizing the return that the AO noticed that the assessee had not paid the sales tax within time. The assessee's stand was that the sales tax in the sum of Rs. 1,24,058.00 on 11.8.1988 and Rs. 18,63,682.00 was paid on 11.8.1988 while sales tax amounting to Rs. 17,680.00 was paid on 8.9.1988 . The assessee, thus, contended that the amount should be considered to have been paid within time allowed for filing of return and thus none of these amounts should be disallowed under Section 43B of the Income Tax Act, 1961 (hereinafter referred to as the 'IT Act'). This plea was, however, not accepted by the AO, who disallowed the amount and added the same to the income of the assessee along with other additions vide order dated 27.3.1991.

4. The respondent/assessee filed an appeal before the Commissioner of Income Tax (Appeals), [in short 'CIT(A)], who confirmed the order of the AO on 5.3.1992. The order of the CIT (A) is predicated on the reasoning that it is for mitigating hardships experienced by the taxpayers in respect of sales tax which was due for the last quarter of the accounting year but was payable only in the next quarter after the completion of the accounting year, that an amendment was brought in as a proviso for excluding the applicability of provisions of Section 43B of the IT Act in respect of payment made before due date of filing of return. Since the due date for filing of return of return for purposes of Section 43B of the IT Act was 31.7.1988 for the year in question, the period of extension granted by the AO has to be excluded from the purview of Section 43B of the IT Act.

5. The assessee being aggrieved filed an appeal before the ITAT,

which found in favour of the assessee vide order dated 28.1.1999. The order of the ITAT records that if the amount of sales tax stood paid within the extended period as granted by the AO, then the amount could not be disallowed for making addition. Consequently, the ITAT directed the AO to verify the payment of outstanding sales tax, and if that stood paid by the assessee within the extended period of time for filing return, not to make the addition on this account to the total income of the assessee.

6. In order to appreciate the controversy, it is necessary to reproduce the provisions which have to be considered in this behalf and the same are as under:

"Section 43 B

43B. Certain deductions to be only on actual payment.--Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of--

(a) any sum payable by the assessee by way of tax or duty under any law for the time being in force, or

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employee,

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him.

Provided that nothing contained in this section shall apply in relation to any sum referred to in clause (a) or clause (c) or clause (d) which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return:

Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid during the previous year on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36."

…. …. …. …. …. …. …. …. …. ….

Section 139 (1)

139. Return of income.--(1) Every person, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax, shall furnish a return of his income or the income of such other person during the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed--

(a) in the case of every person whose total income, or the total income of any other person in respect of which he is assessable under this Act, includes any income from business or profession, before the expiry of four months from the end of the previous year or where there is more than one previous year, from the end of the previous year which expired last before the commencement of the assessment year, or before the 30th day of June of the assessment year, whichever is later;

(b) in the case of every other person, before the 30th day of June of the assessment year:

Provided that, on an application made in the prescribed manner, the Assessing Officer may, in his discretion, extend the date for furnishing the return, and notwithstanding that the date is so extended, interest shall be chargeable in accordance with the provisions of sub-section (8).

…. …. …. …. …. …. …. …. …. ….

(8) (a) Where the return under sub-section (1) or sub-section (2) or sub-section (4) for an assessment year is furnished after the specified date, or is not furnished, then whether or not the

Assessing Officer has extended the date for furnishing the return under sub-section (1) or sub-section (2), the assessee shall be liable to pay simple interest at fifteen per cent. per annum, reckoned from the day immediately following the specified date to the date of the furnishing of the return or, where no return has been furnished, the date of completion of the assessment under section 144, on the amount of the tax payable on the total income as determined on regular assessment, as reduced by the advance tax, if any, paid, and any tax deducted at source:

Provided that the Assessing Officer may, in such cases and under such circumstances as may be prescribed, reduce or waive the interest payable by any assessee under this sub-section.

(b) Where as a result of an order under section 147 or section 154 or section 155 or section 250 or section 254 or section 260 or section 262 or section 263 or section 264, the amount of tax on which interest was payable under this sub-section has been increased or reduced, as the case may be, the interest shall be increased or reduced accordingly, and--

(i) in a case where the interest is increased, the Assessing Officer shall serve on the assessee, a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be a notice under section 156 and the provisions of this Act shall apply accordingly ;

(ii) in a case where the interest is reduced, the excess interest paid, if any, shall be refunded."

6.1 We have also extracted relevant portion of Section 80 of the IT Act, even though it was not relied upon before the authorities below, since arguments were advanced before us based on the said provision.

"Section 80

80. Submission of return for losses.--Notwithstanding anything contained in this Chapter, no loss which has not been determined in pursuance of a return filed within the time allowed under sub-section (1) of section 139 or within such further time as may be allowed by the Assessing Officer, shall be carried forward and

set off under sub-section (1) of section 72 or sub-section (2) of section 73 or sub-section (1) or sub-section (3) of section 74 or sub section (3) of section 74A."

7. It is the plea of the appellant/department that since Section 43B of the IT Act starts with a non-obstante clause as per scheme of that Section the deductions allowable under the IT Act are permissible only in computing the income under Section 28 of the IT Act of the previous year in which such sum is actually paid by the assessee. The assessee has followed the mercantile system of accounting. The sums payable by the assessee on account of certain liabilities mentioned in Section 43B of the IT Act in the accounting year will be allowed in which such sums are actually paid. It is only the proviso which carved out the exception to the main clause. As per the proviso if the same, as mentioned in the proviso, is payable during the accounting year but is not paid during that period and is actually paid on or before the due date for furnishing the return of income under Section 139(1) of the IT Act in respect of such period in which liability was incurred, then the same is allowable in computing the income of that accounting year. It is, thus, the submission of the department that since the due date for filing of returns of the relevant year under consideration was 31.7.1988 and undisputedly the respondent/ assessee had not discharged his sales tax liability within that period as per facts found but the amounts having been paid on 11.8.1988 and 8.9.1988, the assessee was not entitled to deductions of such amounts as per provisions of Section 43B of the IT Act.

8. It is the submission of the department that authorization bestowed on the Assessing Officer (in short 'AO') on account of a proviso to Section 139(1) of the IT Act to extend the date for furnishing the return in its discretion does not empower the AO to change the due date for filing the return as mentioned in the main clause of Section 139 of the IT Act and, that is the reason that as per the proviso interest has to be paid by the assessee in accordance with Section 139(8) of the IT Act mandatorily even if the date for filing of return is extended by the AO. The proviso to Section 43B was, thus, contended not to be applicable where the amount is not paid as per the due date as specified in the main provision of Section 139(1) of the IT Act.

9. It was emphasized that the object with which the proviso to Section 43B was inserted must be kept in mind. This was a sequitur to

the department finding out that certain assessees were claiming a liability on the basis of accrual following the mercantile system of accounting but were disputing the payment of such liabilities or not paying such liabilities altogether. Thus, the benefit was extended to the assessees only if they had actually paid the amount within the dates specified for filing of the return as per the main proviso of Section 139(1) of the IT Act.

10. To support the aforesaid interpretation learned counsel also referred to the provisions of Section 80 of the IT Act providing for submission of return for losses to contend that where the legislature wanted the benefit to be extended not only to a return filed within the time allowed under sub-section (1) of Section 139 of the IT Act or within such further time as may be allowed by the AO a specific provision has been made as in case of Section 80 of the IT Act. Thus, it has been specifically stipulated "in pursuance of a return filed within time allowed under sub-section (1) of Section 139 or within such further time as may be allowed by the Assessing Officer". To appreciate the submission we asked learned counsel to set forth as to how these provisions stood at different intervals of time. The provision as it stood at different periods of time shows that the phraseology "or within such further time as may be allowed by the Assessing Officer" did not exist till 1.4.1985 when it was so introduced and continued so till 31.3.1989. From 1.4.1989 the provision provided for "in accordance with the provisions of sub-section (3) of Section 139".

11. Form No.6 under Rule 13 of the Income Tax Rules, 1962, which gives the format for the application for extension of date for furnishing of return of income under Section 139(1) of the IT Act has also been referred to where the request made is for "time for furnishing the return may be extended up to ……..".

12. To support his plea learned counsel referred to various judgements. In **Krishna Chandra Dutta (Cookme) Private Limited Vs. CIT** (1993) 204 ITR 23 the return for the assessment year 1983-84 was filed belatedly on 2.7.1985 claiming loss on account of premature encashment of Cash Certificates for paying of debt to bank. The amendment to Section 80 of the IT Act effective from 1.4.1984 requiring the return of losses to be filed within time for benefit of carry forward and set off was held not to be a retrospective in character but effective in respect of assessment years subsequent to the assessment year 1983-84.

13. The objective of introducing the proviso to Section 43B of the IT Act has been explained in **Allied Motors (Private) Limited Vs. CIT** (1997) 224 ITR 677. The question which was examined was whether the proviso clarifying the sums paid after the accounting year but before the due date of submission of return was retrospective in character. The principle of reasonable construction was applied since the proviso inserted was to remedy unintended consequences, it was treated as retrospective. The budget speech of the Finance Minister for the year 1983-84 reported in (1983) 140 ITR (St.) 31 was referred to where in para 60 it is stated as under:

> "60. Several cases have come to notice where taxpayers do not discharge their statutory liability such as in respect of excise duty, employer's contribution to provident fund, Employees. State Insurance Scheme, etc., for long periods of time, extending sometimes to several years. For the purpose of their income-tax assessments, they claim the liability as deduction on the ground that they maintain accounts on mercantile or accrual basis. On the other hand, they dispute the liability and do not discharge the same. For some reason or the other, undisputed liabilities also are not paid. To curb this practice, it is proposed to provide that deduction for any sum payable by the assessee by way of tax or duty under any law for the time being in force (irrespective of whether such tax or duty is disputed or not) or any sum payable by the assessee as an employer by way of contribution to any provident fund, or superannuation fund or gratuity fund or any other fund for the welfare of employees shall be allowed only in computing the income of that previous year in which such sum is actually paid by him."

14. In view of the aforesaid it was observed as under:

> "Section 43B was, therefore, clearly aimed at curbing the activities of those taxpayers, who did not discharge their statutory liability of payment of excise duty, employer's contribution to provident fund, etc., for long periods of time but claimed deductions in that regard from their income on the ground that the liability to pay these amounts had been incurred by them in the relevant previous year. It was to stop this mischief that section 43B was inserted. It was clearly not realised that the language in which

section 43B was worded, would cause hardship to those taxpayers who had paid sales tax within the statutory period prescribed for this payment, although the payment so made by them did not fall in the relevant previous year. This was because the sales tax collected pertained to the last quarter of the relevant accounting year. It could be paid only in the next quarter which fell in the next accounting year. Therefore, even when the sales tax had in fact been paid by the assessee within the statutory period prescribed for its payment and prior to the filing of the income tax return, these assessees were unwittingly prevented from claiming a legitimate deduction in respect of the tax paid by them. This was not intended by section 43B. Hence, the first proviso was inserted in section 43B. The amendment which was made by the Finance Act of 1987 in section 43B by inserting, inter alia, the first proviso, was remedial in nature, designed to eliminate unintended consequences which may cause undue hardship to the assessee and which made the provision unworkable or unjust in a specific situation."

The departmental circular No.550 dated 1.1.1990 was also extracted, which is as under:

"Amendment of provisions relating to certain deductions to be allowed only on actual payment.

15.1. Under the existing provisions of section 43B of the Income-tax Act, 1961, a deduction for any sum payable by way of tax, duty, cess or fee, etc., is allowed on actual payment basis only. The objective behind these provisions is to provide for a tax disincentive by denying deduction in respect of a 'statutory liability' which is not paid in time. The Finance Act, 1987, inserted a proviso to section 43B to provide that any sum payable by way of tax or duty, etc., liability for which was incurred in the previous year will be allowed as a deduction, if it is actually paid by the due date of furnishing the return under section 139(1) of the Income-tax Act, in respect of assessment year to which the aforesaid previous year relates. This proviso was introduced to remove the hardship caused to certain taxpayers who had represented that since the sales tax for the last quarter cannot be paid within the previous year, the original provisions of section

43B will unnecessarily involve disallowance of the payment for the last quarter.

15.2. Certain courts have interpreted the provisions of section 43B in a manner which may negate the very operation of this section. The interpretation given by these courts revolves around the use of the words 'any sum payable'. The interpretation given to these words is that the amount payable in a particular year should also be statutorily payable under the relevant statute in the same year. Thus, the sales tax in respect of sales made in the last quarter was held to be totally outside the purview of section 43B since the same is not statutorily payable in the financial year to which it relates. This is against the legislative intent and, therefore, by way of inserting an Explanation, it has been clarified that the words 'any sum payable', shall mean any sum, liability for which has been incurred by the taxpayer during the previous year irrespective of the date by which such sum is statutorily payable . . ."

15. It was, thus, observed as under:

"Therefore, in the well known words of Judge Learned Hand, one cannot make a fortress out of the dictionary; and should remember that statutes have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. In the case of **R. B. Jodha Mal Kuthiala v. CIT** [1971] 82 ITR 570, this court said that one should apply the rule of reasonable interpretation. A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation, so that a reasonable interpretation can be given to the section as a whole."

16. In **Harmanjit Trust Vs. CIT,** Patiala-I (148) 1984 ITR 214 it was held that once the assessee in the prescribed form delivers to the AO a request for extension of time to file the return, a duty is cast on the AO to intimate the assessee whether his request for extension of time for furnishing the return has been granted or refused and if there is no reply

within a reasonable time from the AO, the assessee could presume that his request for extension of time has been granted.

17. Learned counsel for the respondent/assessee naturally supported the conclusions arrived at by the ITAT to contend that once it is found that extension has been granted or deemed to be granted for filing of return up to a particular date, then the sales tax paid prior to that date has to be taken into account as deductible and cannot be added back. The effect of such extension is pleaded to be that the date for filing of the return stands shifted to the date up to which extension is granted with all natural consequences.

18. We may refer to two judgements cited in this behalf, which are germane to the issue. The first is in the case of **Mehsana Ice & Cold Storage P. Ltd. Vs. CIT** (2005) 275 ITR 601 by the Division Bench of the Gujarat High Court. For the assessment year 1985-86 the assessee sought extension of time up to 31.12.1985 and tendered the return within that time. The application seeking extension of time was neither rejected nor granted and it was held that in view of the pronouncements the extension application was construed to have been granted and thus the return was within time, and as a sequitur to that, the assessee could not be denied the benefit of carrying forward the business losses. In that context it was observed as:

> "Under section 139(3) of the Act a return of loss has to be furnished within the time allowed under sub-section (1) or within such further time which, on an application made in the prescribed manner, the Assessing Officer may, in his discretion, allow. The assessee being a limited company, under normal circumstances the time to furnish a return under section 139(1) of the Act would be before the expiry of four months from the end of the previous year, i.e., July 31, 1985. However, under the proviso to section 139(1) of the Act an Assessing Officer is granted discretion to extend the date for furnishing the return on an application made in the prescribed manner. Therefore, the scheme of the Act envisages that the due date is either the one stated under clause (a) or clause (b) of sub-section (1) of section 139 of the Act, or the extended date which may be fixed on exercise of discretion by the Assessing Officer on an application moved

> by an assessee under the proviso. However, as to what is the effect in a case where an application is made in time before the Assessing Officer under the proviso to sub-section (1) of section 139 of the Act, and where such application is not dealt with by the Assessing Officer, i.e., it is neither rejected nor granted, is no longer res integra."

19. The Calcutta High Court in **Amin Chand Payarelal Vs. Inspecting Assistant Commissioner of Income Tax Range-1 (Central), Calcutta & Ors.** (1989) 180 ITR 330 dealing with the issue of imposition of penalty in case the return was filed within the extended time allowed. The effect of the AO extending the date for filing the return under Section 139(1) of the IT Act was, as contended by the assessee, is as under:

> "When the Income-tax Officer extends the date for furnishing the return under proviso (iii) to section 139(1), he does so in exercise of the authority conferred by the statute and the additional time available to the assessee consequent upon such extension is, for all relevant purposes, of the same character and as effective as the statutory period specifically enacted by Parliament. It constitutes an integral part of the time allowed for furnishing a return. Therefore, where the Income-tax Officer extends the date, then all the time up to that date is the time allowed for furnishing the return. The additional period consequent upon such extension falls within the expression "the time allowed" in clause (a) of section 271(1) and the penalty provisions do not come into play during the period of extension of time by the Income-tax Officer. It has also been observed that, from the language of proviso (iii) to section 139(1), it is apparent that interest becomes payable only upon the Income-tax Officer acting, on an application made by the assessee for the purpose and extending the date for furnishing the return. The ratio of the said decision is (i) that in the ordinary course of things, the Income-tax Officer could have extended the date only upon being satisfied that there was good reason for doing so, and that would have been on the grounds pleaded by the assessee and that in the circumstances of this case, a presumption could validly be raised that all that was done ; (ii) that, on the facts, the extension was

a matter falling within section 139(1) and the returns furnished by the assessee must be attributed to that provision ; they were not returns furnished within the contemplation of section 139(4) ; (iii) that, therefore, the penalty provisions did not come into play at all."

The stand of the department was:

"Learned lawyer appearing for the income-tax authorities has, however, submitted that the acts done and/or caused to have been, done by the respondent are well-justified and in accordance with law and the acts complained of are neither contrary to and/or inconsistent with the provisions of the Income-tax Act and the allegations in the writ petition are otherwise unwarranted and uncalled for."

On the basis of the submissions, it was observed as under:

"With all anxiety, this court has heard the arguments advanced on behalf of the respective parties. Undisputedly, the petitioner has paid all income-tax dues and the grievance of the petitioner is only against the imposition of penalty and the notice of demand in this behalf The question to be decided in this writ petition is as to whether the steps taken by the respondents to impose penalty are without jurisdiction or not. Regard being had to the facts of this case and applying the test laid down by the Supreme Court, this court finds that the Inspecting Assistant Commissioner of Income-tax has no jurisdiction to impose penalty. Time is already extended to file the return and the assessed amount being paid should be deemed to have been paid within the extended time and there cannot be any further demand for penalty in the manner sought to be done in the instant case."

20. Learned counsel for the Department also referred to the judgement in **Orissa State Warehousing Corporation Vs. Commissioner of Income Tax** (1999) 237 ITR 589 to contend that while dealing with the question of exemption under Section 10(29) of the IT Act, it was observed that a fiscal statute should be interpreted on the basis of the language used therein and not *de hors* the same. No words ought to be added and only the language used ought to be considered so as to ascertain the proper meaning and intent of the legislation. It was also observed that the

court is to ascribe the natural and ordinary meaning to the words used by the legislature and the court ought not, under any circumstances, substitute its own impression and ideas in place of the legislature intent as it is available from a plain reading of the statutory provisions.

21. We have given our thoughtful consideration to the matter in issue. To answer the question of law framed we feel the following aspects have to be taken into account:

i. The object with which Section 43B was inserted.

ii. The object with which the proviso was inserted in Section 43B of the IT Act.

iii. The effect of extension granted by the AO to the assessee under proviso (iii) of Section 139(1) of the IT Act.

iv. The factum of the sales tax having been actually paid within the extended period of time.

22. It has already been held in **Allied Motors (Private) Limited** case (supra) while making the proviso applicable retrospectively that Section 43B of the IT Act was introduced to curb the activities of those tax payers who did not discharge the statutory liability of payment of excise duty, provident fund, etc. for a long period of time but claimed deductions in that regard from their income on account of the liabilities to pay these amounts having been incurred by them in the relevant previous years. Thus, to cure the mischief, Section 43B was inserted.

23. However, when Section 43B was so worded it was not realized that it would cause hardship to those tax payers who had paid sales tax within statutory period prescribed for payment although the payment made by them did not fall within the relevant year. This was so because the same pertains to the last quarter of the relevant accounting year and could be paid only in the next quarter which fall in the next accounting year. Thus, even the assessee's who paid sales tax within the statutory period prescribed for its payment and prior to the filing of the income tax return were prevented from claiming legitimate deductions in respect of tax paid by them. This resulted in the first proviso to eliminate unintended consequences.

24. The principles for applying the mischief rule was set out in **CIT, Madhya Pradesh & Bhopal Vs. Sodra Devi** (1957) 32 ITR 615

(SC) wherein it was observed as under:

> "22. ….we must of necessity have resort to the state of the law before the enactment of the provisions; the mischief and defect for which the law did not provide; the remedy which the legislature resolved and appointed to cure the defect and; the true reason of the remedy…."

25. The judgement in **Amin Chand Payarelal** case (supra) explains the effect of extension of date for furnishing of return under proviso (iii) to Section 139(1) of the IT Act. Thus, what the assessee was required to do up to a particular date under Section 139(1) of the IT Act is permitted to be done by a subsequent date. It is in view thereof it was held that penalty could not be imposed if the assessee had paid all the income tax dues.

26. If we apply the aforesaid principles we find that the extended date as granted by the AO was 30.9.1988. The return was, of course, filed belatedly for which the assessee suffered necessary penalties. The benefit is, however, sought to be extended only on account of the actual payment of sales tax within that extended period of time of 30.9.1988. The ITAT, in fact, has asked that the payment of this amount can be verified by the AO. It is not a case where some deduction is being claimed twice, once on the basis of accrual; and second on the basis of payment. We have in ITA No.3/1999 titled **Friends Clearing Agency (P) Ltd. Vs. Commission of Income Tax-II** decided on 4.1.2011 examined the issue of deduction claimed by an assessee being interest payable on loan raised by it from a bank accrued and ascertained liability in respect of the year in question and while examining the same considered this very aspect of the deduction not being claimed twice.

27. We find that once neither penalty can be imposed nor any other such negative consequences follow to the assessee by reason of filing his returns late, so long as there is an extended period of time granted or deemed to be granted by the AO, all acts done within the extended period must, thus, be deemed to have been done within the prescribed period of time as originally stipulated.

28. We also find that the mere fact that Section 80 is worded differently would not come to the aid of the department. This is so as the mischief which was sought to be cured by introduction of Section

43B will not arise in the present case as the deduction is permissible only if the amount is actually paid and that too within the extended period of time which was of three months. The introduction of proviso was to cure unintended consequences and thus the benefit was available even for sales tax paid up to the date of filing of the return. This was so as the assessing authority would then know that the payment had actually flowed before the return was filed. The payment in the present case would actually have flowed before the date of filing of the return, the only consequence being that such date is extended by three months as a consequence of the order passed by the assessing authority on the application of the assessee filed within time.

29. We are, thus, in agreement with the view taken by the ITAT for all the aforesaid reasons and thus answer the question in favour of the assessee and consequently dismiss the appeal.

ILR (2011) DELHI II 844
RSA

HOSHIAR SINGH & ORS. ....APPELLANTS

VERSUS

OM PRAKASH (NOW DECEASED) THROUGH HIS L.RS ....RESPONDENTS

(INDERMEET KAUR, J.)

RSA NO. : 103/2004 & CM NO. : 5533/2004 & 3384/2006 **DATE OF DECISION: 28.02.2011**

Code of Civil Procedure, 1908—Possession and Adverse Possession—Respondent filed a suit for possession—Appellants claimed title by adverse possession—Suit decreed—Plea of adverse possession—Not proved—Findings endorsed by First

Appellate Court—Second appeal filed. Held: The claim of adverse possession was not substantiated—At best only case of possession—Mere possession does not mature into an adverse possession—For adverse possession—Possession must be open, peaceful, uninterrupted and hostile qua its true owner.

The claim of adverse possession set up by the appellants/ defendants was not substantiated. The onus to discharge this issue was on the defendants. DW-1 had reiterated on oath that he is in possession since 1947; earlier this land was occupied by muslims who had fled to Pakistan, however, the only document which he could produce was Ex. DW-3/ 1 which was his licence evidencing his work as a blacksmith in the suit land since the year 1961-62. DW-1 in his cross-examination had admitted that electricity and water connection had been taken in the name of DW-2 Nain Singh in the year 1955 and 1968; no such document was produced. DW-1 had further stated that the house tax was paid by his elder brother DW-2 but no such house tax receipts were also produced. The impugned judgment had noted these facts. It had noted that no documentary evidence including house tax receipt, ration card electricity and water bills of the suit premises had been produced by the defendants to set up their claim of adverse possession. This fact finding had been returned in the impugned judgment while disposing of issue no.2. The impugned judgment had endorsed the finding of the trial judge. This was after a re-appraisal and scrutiny of the oral and documentary evidence. After a careful examination of this oral and documentary evidence this finding was arrived at. At best this was a possession; mere possession does not mature into an adverse possession. To establish the plea of adverse possession, the possession must be open, peaceful, uninterrupted and hostile qua its true owner. None of this has been established by the defendants. This finding in no manner can be said to be perverse; it calls for no interference. **(Para 21)**

Important Issue Involved: Mere possession does not mature into an adverse possession. To establish the plea of adverse possession, the possession must be open, peaceful, uninterrupted and hostile qua its true owner.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANTS : Mr. Manish Gandhi, Advocate.

FOR THE RESPONDENTS : Mr. Lalit Gupta, Mr. Deepak Sahni and Mr. Deepak Aggarwal, Advocates

CASES REFERRED TO:

1. *Kalika Prasad* vs. *Chhatrapal Singh (dead)* 1997 I AD SC 534.
2. *Jaidev Singh* vs. *Sujan Singh* 1993 RLR 462.

RESULT: Appeal dismissed.

INDERMEET KAUR, J.

1. This appeal has impugned the judgment and decree dated 30.8.2003 which had endorsed the finding of the trial judge dated 30.9.1997 whereby the suit filed by the plaintiff Om Prakash seeking possession of shops bearing No.902 and 902A, Mehrauli in occupation of the defendants had been decreed in his favour.

2. The plaintiff is stated to be the owner of premise No.348, Ward No.VIII, Meena Bazar, Mehrauli, New Delhi. He had purchased this property on 16.9.1975 vide sale deed Ex.PW-1/1. Defendants were stated to be in unauthorized occupation of two shops i.e. shops bearing no.902 and 902/2A, Ward No.VIII, Meena Bazar, Mehrauli, New Delhi which numbers had been allotted by the Municipal Corporation without authority. Defendants in spite of requests failed to vacate the suit property. Suit was accordingly filed.

3. In the written statement, it was contended that the ownership of the plaintiff was denied. Plea of adverse possession had been set up by the defendants.

4. On the pleadings of the parties, the following four issues were framed. They read as follows:

1. Whether the property in suit bears municipal No.348 (old) and 902/1 (new) Ward No.VIII Mehrauli and is owned by the Plaintiff? If so its effect? OPD
2. Whether Nain Singh has become owner of suit premises by adverse possession? If so its effect? OPD
3. Whether the suit is within time? OPP
4. Relief.

5. Plaintiff had examined seven witnesses; three witnesses had been examined on behalf of the defendants. PW-1 Om Prakash was the plaintiff himself. He had proved certified copy of the sale deed dated 16.9.1975 as Ex.PW-1/1; the site plan depicting the location and the identity of the suit property was proved as Ex.PW-1/2. PW-2 Islamuddin was an attesting witness to the sale deed. In his cross-examination he has stated that blacksmiths are in occupation of the suit land since about 40 years. PW-4 was the clerk from Mehrauli Zone, MCD. His testimony had been adverted to as the vehement contention of the appellant is that he had brought the record of the property No.901 and 902A and not of 902 which is the property in dispute; his testimony has to necessarily discarded. PW-5 was also Assistant Zonal Inspector of MCD. He had also brought the summoned record. His deposition is to the effect that Om Prakash is the owner of property no.902/1-2. PW-7 was the brother of the plaintiff. He had in his deposition explained that the old number of the property was 348 and the present number is 902/1; it was denotified by the Custodian of the Evacuees by orders Ex.PW-1/2 and Ex.PW-1/3. Per contra the defendants had produced three witnesses in defence of whom defendant no.1 examined himself as DW-1 . He had deposed that he is in possession of the suit property since 1947; muslims were occupying this property who have since fled to Pakistan. He has become the owners by adverse possession. DW-2 and DW-3 had also supported this version. The solitary document of the defendants was Ex.DW3-/1 which was a licence of the blacksmiths of the year 1961-62. The contention of the appellants/defendants is that even as per this document, the defendants are in continuous, open and adversarial possession since 1961-62. Suit filed in the year 1978 was barred by time.

6. The trial judge had decreed the suit of the plaintiff for possession. Relief of permanent injunction had been decreed. Title of the plaintiff to the suit land had been proved. Plea of adverse possession set up by the defendants had not been proved.

7. These findings were endorsed by the first appellate Court.

8. This is a second appeal. It has been admitted and on 15.11.2007 the following substantial question has been formulated:

> "Whether on the evidence on record appellants have satisfied the ingredients of adverse possession on the plea that at the time of partition some Muslim abandoned the property and the same was occupied by the appellants who even effected constructions thereon without any hindrance or obstacle."

9. Thereafter on 21.2.2011 an additional substantial question of law has been formulated; it reads as follows:

> "Whether the findings in the impugned judgment dated 30.8.2003 qua the ownership and the identification of the suit property is a perverse finding? If so, its effect ?"

10. On behalf of the appellants, it has been urged that the ownership of the suit land has not been proved. Attention has also been drawn to the sale deed dated 14.4.1938 Ex. PW-6/1 executed by LRs of Haji Abdul Karim in favour of the plaintiff wherein the municipal number has been mentioned as 253. It is pointed out that in the sale deed Ex.PW-1/1 (acted upon by the plaintiff) the municipal number of the property has not been mentioned; the boundaries as reflected in Ex.PW-1/1 do not match with the boundaries as contained in the compromise decree dated 08.02.1968 passed by the Calcutta High Court. This decree dated 08.2.1968 had in fact decreed a family settlement which requires a compulsory registration as no transfer of immovable property could be effected without such a registration. It was hit by bar of Section 17 and 49 of the Registration Act. To support this submission reliance has been placed 1993 RLR 462 **Jaidev Singh Vs. Sujan Singh.** It is pointed out that identification of the suit land has also not been established; in the sale deed Ex. PW-6/1 reference has been made to municipal No.253 whereas the contention of the plaintiff is that the municipal number was 348; when and how municipal number 348 had thereafter changed to municipal

no.902 and to 902/A and has not been explained or answered by the plaintiff; in the absence of the correct identification of the suit land a decree could not have followed in favour of the plaintiff. The plea of adverse possession had also been illegally rejected by the Courts below. Attention has been drawn to versions of PW-2 wherein he had admitted that blacksmiths are in possession of suit land since last 40 years. It is pointed out that this deposition of PW-2 was effected on 24.9.1986 meaning thereby that the plaintiff himself had admitted the possession of the defendants in the suit land since 1946-47. The suit filed in the year 1978 was clearly barred by limitation. Reliance has been placed upon 1997 I AD SC 534 **Kalika Prasad Vs. Chhatrapal Singh (dead)** to substantiate this plea that the defendants had perfected their title by prescription and they cannot be now ousted.

11. On behalf of the respondent, it is submitted that the judgment of the two Courts below suffer from no infirmity and the title of the plaintiff stand proved. There is no confusion on the identification of the suit property. Plea of adverse possession set up by the defendants was rightly dismissed as there was no evidence before the court to establish this plea.

12. This Court is a second appeal Court. It has to answer the aforenoted substantial questions of law.

13. Suit property was originally owned by Haji Abdul Karim. He had purchased it on 14.4.1938 vide sale deed Ex. PW-6/1 from Manik Chand. The boundaries mentioned herein reads as follows:

> "North - Wall of House of heirs of Rai Chhunna Mal Saheb Sahu
>
> South - Open Land – Rai Bahadur Lala Sri Kishan Dass Saheb Sahu
>
> East - Land of passage and Gate of House Chowkidar and Mehrabdar, Chhjali Sankeen and Nali and passage, one Mori Khassi with land connected with the House upto passage.
>
> West- the land of Thorough Passage, Five Gates of Shops, Platform with Sankeen Stones with Chhajja & Kathera with Two Wooden Doors constructed on t he Platform, Five Mories, Wooden Verandah and Five Chokhats and

> Wall of Chhunna Mal Sahen babat Khanja."

14. Municipal number is 253. After the death of Abdul Karim on 10.07.1957 (page 4 of the settlement) his legal heirs had entered into a family settlement which has been recorded by the Calcutta High Court on 08.2.1968 (page 721 of the fist appeal court record). As per this family settlement the property had devolved upon his three grand children namely Ikhlas Ahmed, Mumtaz Begum and Noorjahan (children of his pre-deceased daughter Amtulla). Page 18 of this decree describes the property number as 348 situated at Meena Bazar, Mehrauli where reference has made to the earlier title deed dated 14.4.1938; No. 348 is thus traced back to No. 253. In this decree the boundaries of the suit land had been described as follows:

> "North - Land of Chhunna Mal
>
> South - Land formerly belonging to Mohd. Yusuf Paiwalay.
>
> East - By Road
>
> West - Main Road."

15. Such a family settlement which only acknowledges the pre-existing right of the family members does not require registration. This has been held in the judgment of **Jaidev Singh** (supra) relied upon by the appellant.

16. Plaintiff Om Prakash vide registered sale deed dated 16.09.1975 Ex.PW-1/1 had purchased five shops and a Khan having an area of 5031 sq. feet as per the plan attached along with from the legal heirs of Abdul Karim. The boundaries of the land purchased by the plaintiff and as mentioned in Ex. PW-1/1 read as follows:

> "North - Property of Shri Chhunna Mal
>
> South - Shri Om Prakash
>
> East - Darshan Devi
>
> West - Main Road"

17. The site plan Ex. PW-1/2 attached along with Ex.PW-1/1 has been described as a plan of premises No.348, Ward no.VIII, Meena Bazar, Mehrauli. The disputed portion had been depicted in red colour. It is bounded as follows:

"North – Property of Chhunna Mal

South - Others property

East - Property purchased by Smt. Darshna Devi

West - Main road"

18. In para 1 of the plaint, the plaintiff has categorically averred that he was owner of the premises bearing No.348, Ward-VIII, Meena Bazar, Mehrauli, New Delhi which has been allotted a new number. His contention is that the defendants are in unauthorized occupation of the two shops i.e. shops No. 902 and 902/2A. PW-5 on the basis of the summoned record proved that Om Prakash is in fact the owner of the disputed property i.e. of municipal No. 902/1-2. Identity of the suit property has also been clarified by PW-7; who has deposed that the earlier number of the suit land was number 348 and the present number is 902/1. These depositions clearly establish that the suit land which was earlier having No. 253 become No. 348 and thereafter was renumbered as 902/1-2. These were two parts of 902; i.e. 902 & 902A or may be read as 902/1-2.

19. The boundaries as depicted in Ex.PW-6/1; the compromise decree dated 08.02.1968 of the Calcutta High Court and in the subsequent sale deed Ex. PW-1/1 and the site plan Ex. PW-1/2 also all match with one another. On the North is the house of Rai Chhunna Mal; on the South is others property; on the West is the main road. This was (prior to 1975) the disputed property which has since been purchased by the plaintiff. On the East is the property of Darshan Devi who had purchased it subsequently; earlier on the eastern side there was a road/land passage/nali.

20. The ownership and identification of the suit land has thus been established through this chain of successive oral and documentary evidence. Testimony of PW-1, PW-5 and PW-7 had further corroborated this documentary evidence. There is no confusion qua these issues. The additional substantial question of law is answered in the negative i.e. against the appellant and in favour of the respondent.

21. The claim of adverse possession set up by the appellants/ defendants was not substantiated. The onus to discharge this issue was

on the defendants. DW-1 had reiterated on oath that he is in possession since 1947; earlier this land was occupied by muslims who had fled to Pakistan, however, the only document which he could produce was Ex. DW-3/1 which was his licence evidencing his work as a blacksmith in the suit land since the year 1961-62. DW-1 in his cross-examination had admitted that electricity and water connection had been taken in the name of DW-2 Nain Singh in the year 1955 and 1968; no such document was produced. DW-1 had further stated that the house tax was paid by his elder brother DW-2 but no such house tax receipts were also produced. The impugned judgment had noted these facts. It had noted that no documentary evidence including house tax receipt, ration card electricity and water bills of the suit premises had been produced by the defendants to set up their claim of adverse possession. This fact finding had been returned in the impugned judgment while disposing of issue no.2. The impugned judgment had endorsed the finding of the trial judge. This was after a re-appraisal and scrutiny of the oral and documentary evidence. After a careful examination of this oral and documentary evidence this finding was arrived at. At best this was a possession; mere possession does not mature into an adverse possession. To establish the plea of adverse possession, the possession must be open, peaceful, uninterrupted and hostile qua its true owner. None of this has been established by the defendants. This finding in no manner can be said to be perverse; it calls for no interference.

22. Ex.PW-1/3 is an order dated 22.11.1955 passed by the Assistant Custodian describing this suit property as 'Khandhar' and was declared as an evacuee property. Ex.PW-1/2 is the order dated 30.4.1959 passed by the Assistant Custodian denotifying this property where again it has been referred to as a 'Khandhar'. The denotification was in favour of Abdul Karim; property was released as an evacuee property on 11.7.1957. Plaintiff had thereafter purchased this property on 16.9.1975 vide Ex. PW-1/1 from the legal heirs of Abdul Karim. Suit had been filed in 1978 i.e. within three years of the purchase of this property. It was within limitation. The additional substantial question of law formulated on 15.11.2007 is also answered against the appellant and in favour of the respondent.

23. There is no merit in the appeal. The appeal as also pending applications are dismissed.

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2011 (2) AD (Delhi) 596	=	ILR (DS) 2011 (II) 781
2011 (3) AD (Delhi) 145	=	ILR (DS) 2011 (II) 788
2011 (3) AD (Delhi) 350	=	ILR (DS) 2011 (II) 827
2011 (1) Arb LR 244	=	ILR (DS) 2011 (II) 181
2011 (3) AD (Delhi) 73	=	ILR (DS) 2011 (II) 679
2011 (176) DLT 536	=	ILR (DS) 2011 (II) 470
2011 (178) DLT 768	=	ILR (DS) 2011 (II) 23
2011 (177) DLT 144	=	ILR (DS) 2011 (II) 115
2011 (179) DLT 372	=	ILR (DS) 2011 (II) 175
2011 (177) DLT 474	=	ILR (DS) 2011 (II) 181

2011 (179) DLT 211	=	ILR (DS) 2011 (II) 209
2011 (178) DLT 196	=	ILR (DS) 2011 (II) 229
2011 (179) DLT 310	=	ILR (DS) 2011 (II) 237
2011 (177) DLT 369	=	ILR (DS) 2011 (II) 257
2011 (177) DLT 248	=	ILR (DS) 2011 (II) 274
2011 (178) DLT 562	=	ILR (DS) 2011 (II) 306
2011 (177) DLT 109	=	ILR (DS) 2011 (II) 317
2011 (177) DLT 373	=	ILR (DS) 2011 (II) 340
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2011 (177) DLT 260	=	ILR (DS) 2011 (II) 507
2011 (176) DLT 668	=	ILR (DS) 2011 (II) 568
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2011 (178) DLT 294	=	ILR (DS) 2011 (II) 739
2011 (122) DRJ 221	=	ILR (DS) 2011 (II) 73
2011 (122) DRJ 117	=	ILR (DS) 2011 (II) 181
2011 (122) DRJ 10	=	ILR (DS) 2011 (II) 288
2011 (122) DRJ 45	=	ILR (DS) 2011 (II) 378
2011 (122) DRJ 513	=	ILR (DS) 2011 (II) 398
2011 (122) DRJ 98	=	ILR (DS) 2011 (II) 479
2011 (122) DRJ 434	=	ILR (DS) 2011 (II) 788
2011 (264) ELT 502	=	ILR (DS) 2011 (II) 10
2011 (267) ELT 313	=	ILR (DS) 2011 (II) 609
2011 (266) ELT 461	=	ILR (DS) 2011 (II) 781
2011 (1) JCC 668	=	ILR (DS) 2011 (II) 1
2011 (1) JCC 155	=	ILR (DS) 2011 (II) 10
2011 (1) JCC 22 (Narcotics)	=	ILR (DS) 2011 (II) 14
2011 (2) JCC 81 (Narcotics)	=	ILR (DS) 2011 (II) 14
2011 (1) JCC 441	=	ILR (DS) 2011 (II) 243
2011 (2) JCC 705	=	ILR (DS) 2011 (II) 378
2011 (1) JCC 12 (Narcotics)	=	ILR (DS) 2011 (II) 465
2011 (2) JCC 867	=	ILR (DS) 2011 (II) 669
2011 (1) JCC 526	=	ILR (DS) 2011 (II) 679
2011 (1) JCC 692	=	ILR (DS) 2011 (II) 781
2011 (45) PTC 353	=	ILR (DS) 2011 (II) 257
2011 (45) PTC 217	=	ILR (DS) 2011 (II) 317
2011 (3) R.A.J 12	=	ILR (DS) 2011 (II) 181
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2011 (3) R.A.J 108	=	ILR (DS) 2011 (II) 274

HIGH COURT OF DELHI : NEW DELHI
NOTIFICATION
NEW DELHI, THE 22ND MARCH, 2011

No. 147/Rules/DHC.—In exercise of powers conferred by Section 7 of the Delhi High Court Act, 1966 (Act 26 of 1996) and all other powers enabling it in this behalf, the High Court of Delhi, hereby substitutes the existing Chapter 2 of High Court Rules and Orders, Vol. V, by the following new Chapter 2:—

CHAPTER 2
PREPARATION OF RECORDS
PART !
RECORDS IN FIRST APPEAL

1. Dispensing filling of paper books in Regular First Appeals.—In First Appeals from Orders of Decree, appellant will not be required to file paper books except when specifically required by the Court. The original Trial Court Record, however, shall be made a available to the Court at the time of hearing or arguments.

2. Contents of paper book where filing of paper books has been specifically ordered.—Subject to specific orders of the Court, where filing of paper book has been ordered, paper books will be prepared and filed by the appellant(s) within one month of admission of the appeal, consisting of:

(a) The plaint and pleas.

(b) Issues.

(c) Documents either referred to in the plaint as forming the basis of the suit or considered by the Court in its judgment, or duly proved by either of the parties in the Court. Documents in the vernacular will be translated into and typed/computer printed in English.

(d) Oral evidence whether recorded in Court or on commission.

(e) Impugned Judgment/Decree.

(f) Grounds of Appeal.

(g) The order of the Bench admitting the appeal.

PART B

The Printing of Paper-Book in Second Appeal and Revisions

1. Dispensing filing of paper books in Second Appeals.—In Second Appeals from Order or Decree appellant will not be required to file paper books except when specifically required by the Court. The original Trial Court Record, and record of first appeal however, shall be made available to the Court at the time of hearing of arguments.

2. Contents of paper book where filing of paper books has been specifically ordered.—Subject to specific orders of the Court, where filing of paper books has been ordered, paper books will be prepared and filed by the appellant(s) within one month of admission of the appeal, consisting of:

(a) copies or translation of the judgments of the Lower Courts and the decree of the Lower Appellate Court;

(b) the grounds of appeal or revision and a memorandum of the names of the parties or, if the appeal or revision was filed in vernacular, a translation thereof; and

(c) a copy of the order of the Judge admitting the case to a Bench.

PART C
PREPARATION OF PAPER-BOOKS
IN LETTERS PATENT APPEALS

1. Ordinarily no paper-book required.—In appeals under clause 10 of the Letters Patent, ordinarily no paper books is required to be, filed, unless the Judge admitting the appeal specifically directs that the paper-book shall be filed.

2. Contents of paper book where filing of paper books has been specifically ordered.—In case where, by a special order of the Court, filing of paper book has been ordered, the paper book shall ordinarily consist of:

(a) The memorandum of appeal;

(b) a copy of the judgment appealed from;

(c) copy of the judgment or other documents which were before the Judge from whose judgment the appeal is preferred.

3. No appeal under clause 10 of the Letters Patent will be received by the Deputy Registrar unless it is accompanied by two typed, photostat or computerised copies of the following:

(a) Memorandum of appeal;

(b) Judgment appealed from; and

(c) Copy of the judgment or other documents which were before the Judge from whose judgment the appeal is preferred.

Explanation: The paper-book in cases decided in exercise or original jurisdiction or in exercise of jurisdiction under Article 226 of the Constitution will mean copies of the petition, the written statement and application, if any.

PART D
THE TRANSLATION OF CERTAIN VERNACULAR DOCUMENTS PRESENTED TO THE HIGH COURT

1. Translation of vernacular documents.—In every appeal in which under these rules a paper-book has to be prepared, vernacular documents included in the said paper book shall ordinarily be translated and not transliterated. Translation of the vernacular documents made by the parties for the purpose shall be got revised from the Registry of the Court before filing the paper book. The cost of the revision shall be borne by the parties by whom the vernacular documents are translated and filed.

2. What documents to be translated and at whose expense.—In any case where the vernacular documents filed in the High Court, either in its Civil Appellate or Civil Revisional jurisdiction, as may from time to time be prescribed by the Court, are not got translated by the party himself filing the same, then the same can be got done from the agency specified in Rule 3 and subject to Rule 5 the expenses of such translation shall be paid by the party filing the document.

3. Agency for translation and scale of charges.—Where necessary, the translation shall be made and certified such agency as the Court may from time to time appoint, and the charges shall be a per rates specified in the Schedule-II, appended with these rules.

4. Initial deposit.—On the presentation of an appeal or petition to which these rules apply, the person presenting the same shall deposit the amount required to defray the cost of translation, if any, or to cover the cost of checking of the translated record, if any. No appeal or petition will be accepted unless accompanied by such deposit.

5. Payment may be excused in certain cases.—The Court in regard to any particular class of classes of cases, by a rule of Court, and a Judge, in respect of any particular case not provided for by rule of Court, by an order stating the grounds thereof, may dispense with the payment prescribed by these rules.

Schedule-I

The following vernacular documents are required to be translated—

(1) Memorandum of appeal.

(2) Petition for revision.

(3) Annexures to such memorandum or petition.

(4) Copies of decrees, judgments or orders.

(5) Application for:

(i) review of judgments of the High Court;

(ii) appointment of guardian ad litem;

(iii) appointment of new parties or representatives of existing or deceased parties;

(iv) re-admission of case for—

(a) non-appearance, or

(b) non-payment of translation, printing and process-fee;

(v) stay of execution of decrees;

(vi) transfer;

(vii) alteration of dates of hearing;

(viii) compliance with a connected with the rules relating

to the preparation of printed records.

(6) Returns to orders of remand of High Court.

(7) Objections to orders of remand of High Court.

(8) Deed of compromise.

SCHEDULE-II

The cost of translating and of revising the translated record will be charged for at the following the rates under Rule 4 above:

Translating the record per page or part thereof	Rs. 75
Revising the record per page or part thereof	Rs.40

PART E
GENERAL INSTRUCTIONS

1. Order of documents in the paper book.—All documents included in the paper book shall be printed according to their serial order, first those produced by the plaintiff and then those produced by the defendant. On each document shall be endorsed the order by the date on, which it was admitted by the Court:

Provided that when counsels for both the parties agree that the documents should be arranged for convenience in a different order the documents shall be printed in that order. In this case, a foot-note shall be added on the first page of the volume of documents that the documents have been printed in the order suggested by counsel for the parties.

2. Responsibility for accuracy of contents.—The parties or their pleaders shall sign the paper book, thus filed, in the left bottom corner of each page, and will be held responsible for the accuracy of the documents of the paper book.

3. Number of printed copies.—Such number of copies of the paper book shall be printed as the Court may, by general rule in this behalf or by specific order in any particular case direct.

4. Cost of translating and revising the translated record.—A sum of Rs. 500 for translating the plaint and pleas shall be deposited in

every case in which the translated plaint and the pleas are to be included in the paper-book. The typed or computerized copies of such translated plaint and pleas shall not, however, be prepared except at the specific request of the parties or their counsel, or, when so directed by the Judge or Judges admitting the appeal.

5. Procedure on non-payment of deposit.—If the applicant or respondent fails to deposit the sum required under Rule 4 within the prescribed period, the appeal shall on the expiry of that period, be laid before a Judge for orders who may, in his discretion, grant further time or dismiss the appeal. The Judge may further, in his discretion discharge or modify an Ad interim orders passed earlier in the case. The case shall be laid before a Judge for orders every time the default is repeated.

6. Supply of copies to parties.—In every where a paper book has been ordered to prepared each of the appellant or respondent, appearing separately, shall be supplied with such number of copies free of charge as may be ordered by the Court.

7. Typing/printing expenses to be included in costs.—(1) At the foot of every paper-book shall be noted the amount of typing/printing and other charges and the party from whom levied and such amount shall be included in the costs of appeal, unless the Court shall in any case otherwise direct.

(2) Should the amount so charged be less than the sum deposited under Rule 4, the concerned Registrar or the Deputy Registrar shall refund then unexpended balance to the party by whom deposit was made. Should it be more, he will take action under Rule 5.

8. Interpretation—For the purpose of Rules 4 to 7. the expression "Appeal" shall include a petition for revision admitted to a hearing before a Division Bench or referred to a Full Bench and the expression "Appellant" shall include a petitioner in the revision petition.

Note:—These amendments shall come into force from the date of their publication in the Gazette.

By Order of the Court,

V.P. VAISH, Registrar

NOMINAL-INDEX
VOLUME-2
MARCH AND APRIL, 2011

Pages

"A"

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SUBJECT-INDEX
VOLUME-2,
MARCH AND APRIL, 2011

ARBITRATION AND CONCILIATION ACT, 1996—Section 9—Appellants preferred appeals against order dismissing grant of interim injunction on application moved by them under Section 9 of the Act—Appellants urged, Section 9 vests wider powers in Courts to grant interim injunctions—Per contra, Respondent urged grant of such interim injunction would have effect of granting appellant final relief—Held:- The power under Section 9 is not totally independent of the well known principles governing the grant of interim injunction that generally govern the Courts in this connection—The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governs the grant of interim injunction—Except for the residual Clause (e) which is very widely worded, the power to grant injunctions remain the same.

Simplex Infrastructures Ltd. v. *National Highways Authority of India* *274*

— Sections 48, 49—Decree holder, company based in Arizona, USA and Judgment Debtor, Indian Company at New Delhi entered into Trade Mark Licence Agreement which contained Arbitration Clause—Dispute arose between parties, matter referred to Arbitration of International Chambers of Commerce, Paris—Arbitration Award passed in favour of decree holder which moved execution petition to seek enforcement of foreign award—Objection filed by JD; it urged, award contrary to public policy of India as it was contrary to express terms of contract between parties—As

per decree holder, foreign award cannot be challenged on merits and it did not violate public policy of India—Held:- In respect of foreign awards, the defence of "public policy" should be construed "narrowly" and the contraventions should be "something more than the contravention of the law of India—The doctrine must be construed in the sense as applied in the field of private international law i.e. being contrary to the fundamental policy of Indian Law—Also the foreign award should be contrary to the interest of India or justice or morality—Merely because a monetary award has been made against an Indian entity on account of its commercial dealings would not make the award either contrary to the interests of India or justice or morality.

Penn Racquet Sports v. *Mayor International Limited*... *181*

ARMY ACT, 1950—Army Rule, 1954—R. 180-184—Appellant a 'Major'—Appointed as presiding officer in May 1992 of Board of Officers—To take over possession of building constructed by contractor for Army Aviation Corps at Jhansi—Got adverse ACR for the year 1991-92—Non-statutory representation rejected—ACR for 1992-93 graded as "high average officer"—Made statutory petition against the reviewing officer inter-alia alleging that Reviewing officer taken bribe from contractor—Wanted Appellant not to report deficiencies—Upon refusal out of vengeance, given low grading for 1992-93—Demanded initiating of inquiry against senior officer—Inquiry against senior failed to prove the allegation—Notice of censure given to Appellant—Filed reply to the notice—Minor penalty of censure given—Not promoted to next higher rank of Lt. Colonol—Filed writ petition on the three grounds—i. Grading in ACRs required to be communicated being below bench mark could not be considered by selection board—ii. The finding of Court of inquiry and punishment as illegal, as was held in violation of Rule 180 which requires that in an inquiry affecting character

or military reputation of an officer opportunity must be given to such officer to represent himself throughout the enquiry, cross-examining the witnesses which was not granted—iii. Not supplied findings and directions of Court of Enquiry resulted in violation of principles of natural justice—Ld. Single Judge held—Adverse remark in the ACRs of 1992-93 expunged on statutory complaint of the Appellant—Not required to be communicated—Court of enquiry against senior filed on his complaint; not necessary to give opportunity of hearing; the appellant was given due opportunity of remaining present and cross-examining the witnesses when his character and military reputation likely to be adversely affected—iii. Not entitled to be supplied with findings under R.184—Filed Letters Patent Appeal—Held—As conceded by counsel for appellant, in view of law laid down by Supreme Court below bench mark ACR gradings of the members of Armed Force are not to be conveyed—ii. Agreed with single judge R, 180 is to be applied in respect of a person in an enquiry only from the time such enquiry affects or is likely to affect the character or military reputation of said person—iii. Following judgment of *State of Orissa vs. Dr. Binapani Dei* AIR 1967 SC 1267 an administrative decision or order to be made consistent with rule of principles of natural justice—Rule of natural justice required—1. to give all information as to the nature of case which the party has to meet—ii. To supply all information, evidence or material which the authority wishes to use against the party—iii. To receive all relevant material which the party wishes to produce in support of his case—iv. To given an opportunity to party to rebut adverse information, evidence or material appearing against such party—Award of punishment of censure an administrative action, GOS required to observe the rule of natural justice—Order of censure quashed—Respondents given liberty to proceed further in accordance with law—Appeal allowed in these terms.

Maj. R.K. Sareen v. *UOI & Ors.* *684*

BENAMI TRANSACTIONS (PROHIBITION) ACT 1988—Section 4(3)(b)—Plaintiff filed suit against his brother (defendant) for possession and mesne profits—Defendant filed counter claim for seeking partition on the ground, property was joint family property—According to plaintiff he was remitting money in the account of his mother—Prior to execution of sale deed Agreement to Sell executed between vendor and plaintiff—Signed by defendant as attorney of plaintiff—Defendant claimed though house was purchased in the name of plaintiff but subsequently thrown into hotch potch of joint family—Thus, property ceased to be separate property of plaintiff—Counter claim of defendant was objected on the ground that defendant was debarred from raising the plea of benami in view of Section 4 of Act—Existence of Joint Hindu Family also denied by him—Suit decreed in favour of plaintiff—Challenged in first appeal—Held—Evident from record that house was personal acquisition of plaintiff—There was no joint family property in existence at the time of alleged throwing of house into common hotch potch—To attract the rule of blending of separate property of a coparcener with joint family property there has to be in existence some coparcenery property as well as some separate property of coparcener—Plea raised on behalf of defendant that plaintiff stood in a fidiciary capacity and also as a trustee qua the mother while holding the property in his own name, thus falling in exception clause sub-section 3(b) of Section 4 of the Act of, was not accepted. On the ground that the plaintiff had not asked the mother to buy the property in her name—Decree in respect of mesne profits however set aside for no enquiry having been held to determine mesne profits under Order 22 Rule 12 CPC.

D.N. Kalia v. *R.N. Kalia*..... *739*

CENTRAL EXCISE ACT, 1944—Section 14—While respondent was in judicial custody, application was made by petitioner department to make enquiries from respondent/accused in

Central jail—Id. ACMM directed that respondent accused be not interrogated in Central Jail but he be brought to Court and enquiry be made before Court—Respondent accused brought in Court and Id. ACMM recorded order-sheet about conduct of enquiry on hourly basis—Arguments heard on bail application of respondent on same very day and granted bail—Order challenged before High Court—Plea taken, Id. ACMM transgressed all limits of propriety and acted as a part of investigation and heard application himself—Held—Inherent powers are granted only to High Court and inherent powers not available to Courts Subordinate to High Court—Subordinate Courts are supposed to act in accordance with provisions of Code of Criminal Procedure (Cr.P.C) and cannot transgress limits imposed upon Courts by Cr.P.C—There is no provision in Cr.P.C that Court can order enquiry be made from accused in its presence nor Court can order that interrogation of accused by IO be done in presence of Court—This is to keep judicial and executive functions separate—Once investigation is done in presence of Court, Court becomes a witness to investigation and this act of Court prejudices Court either in favour of accused or in favour of prosecution—It is for this reason that investigation and adjudication are done by two separate wings and Courts cannot become party to investigation—Order granting bail set aside and matter remanded back to present ACMM for considering application of accused afresh.

Directorate General of Central Excise Intelligence v. *Brijesh Kanodia* *781*

— Section 35—Petitioner engaged in export of various goods under Rule 19 of Central Excise Rules, 2002—It executed bond with Respondents for exporting goods by purchasing manufactured excisable goods duty free on basis of CT-1, issued from time to time by Respondents—Necessary documents for scrutiny of Respondents furnished by petitioner

but show cause notices served on petitioner—Replies tendered by petitioner with prayer to drop proceedings and show cause notices—Assistant Commissioner dealt with Show Cause Notices and ordered to make demand of Rs. 3,29,819/- in terms of Section 11-AC of Act—Appeal preferred by aggrieved petitioner dismissed being time barred by one day and application for condonation of delay rejected—Revision petition also dismissed—Accordingly, petitioner preferred writ petitioner urging period for reckoning limitation has to be computed from day the right to prefer an appeal had accrued which was wrongly computed by Commissioner—Percontra, Respondent no.2 submitted, method of computation of limitation period adopted by Commissioner not faulty—Held:- Sections 4 and 14, Limitation Act, are not similar in their effect—Whereas under Section 14 of the Act the time spent can be excluded, Section 4 does not entitle a person to add he days on which the Court is closed to the statutory period—Section 4 of Limitation Act and Section 10 of the General Clause Act enable a person to do what the could not have done on a holiday on the next working day—Commissioner and the revisional authority had correctly computed the period of limitation.

M/s. Uttam Sucrotech International (P) Limited v. *Union of India & Another* *160*

CODE OF CIVIL PROCEDURE, 1908—Order 6, Rule 17—Section 96(3)—Order 2 Rule 2—Respondent No. 1 filed suit for perpetual and mandatory injunction on tort of interference allegedly committed by respondent no.2 by interfering with their contract and illegally conspiring to replace Respondent No.1 with another party which according to written statement, is appellant—As Respondent No.2 had conceded, application of respondent no.1 to amend plaint and to implead appellant was allowed by Ld. Single Judge—Order challenged in appeal—Plea taken, complete and total concession had not

been expressed—Cause of action and nature of suit has changed by inclusion of new amendment—Held—Appellant should have filed review application before Ld. Single Judge stating that only a partial concession was made and had opposed inclusion of amended prayer when orders were reserved—Having failed to do so, appellant foreclosed from contending that impugned order records position incorrectly—Amendments in prayer clause would follow as a natural and essential consequence to amendments in plaint—This is vital for holistic determination of dispute—It shall be allowed so as to avoid multiplicity of litigation amongst parties—New prayer added on strength of some new averments added by amendments will not qualitatively alter suit in every case—Where amendment prayer is sought to be added on basis of facts which are immcately attached to original cause of action and either happens subsequently or comes to knowledge subsequently such amendment cannot be said to substantially alter nature of suit—It would be allowed if no prejudice is caused to other party and plaintiff is not barred from filing fresh suit for these reliefs—Amendment to prayers is essential and unavoidable and impugned decision must be upheld—Grounds on which the Courts are reluctant to allow an amendment is where the plaintiff, through an amendment seeks to change the nature of the suit or change the cause of action originally pleaded in his plaint, or seeks to claim a relief which stands time barred. This however, does not preclude the plaintiff to plead, through an amendment additional grounds or cause of action, that came to his knowledge after filing of the suit or those which happened subsequently but relate back to the original cause of action pleaded in the original plaint.

Walchandnagar Industries Ltd. v. *Saraswati Industrial Syndicate Ltd.* *23*

— Section 2(12)—Mesne Profits—Claim at enhanced market price—Suit property was let out by the plaintiff to the

defendant on a monthly rent of Rs. 72,000/-—Plaintiff terminated the lease and filed a suit for possession and recovery of rent/mesne profits—Decree of possession passed—Plaintiff directed to lead evidence on claim for rent and mesne profit—Plaintiff claimed rent at the rate of Rs. 1,52,000/- per month on ground that monthly rentals of suit property have increased from the date of lease agreement. Held—If there had been any special or unusual rise in the prevailing rents, then upon proof of such unusual rise within that period, an additional sum as mesne profits would have been payable—However the plaintiff did not prove an abnormal increase in this period—Therefore claim of the plaintiff for mesne profits at 1,52,000/- per month—Rejected—The mesne profits are allowed only at Rs. 72,000/- per month.

M/s. Roshan Lal Vegetable Products Pvt. Ltd. v. *M/s. Param International & Anr.* *350*

— Order 1 Rule 9 and 10—Order impleading appellant as co-defendant challenged—Plea taken, appellant not a necessary party for suit between plaintiff and defendants and at best appellant could have been called as witnesses in trial Court and their presence is not necessary as parties—Held—Since suit is one of tortious interference containing allegations of conspiracy, presence of alleged co-conspirator, who is also beneficiary as a party is not only proper but also is necessary—Injustice would be caused to appellant if it were not to be impleaded since there is always likelihood of order being passed which may be adverse to its interests—Plaintiff would have run risk of being non suited for non joinder of appellant who is a necessary party—Ld. single judge committed no error in impleading appellant.

Walchandnagar Industries Ltd. v. *Saraswati Industrial Syndicate Ltd.* *23*

— Order XIV, Rule 2—Appellant filed a suit for recovery—

Contended in plaint that Appellant was a registered partnership firm under Indian Partnership Act 1932 ("PA")—Fact denied by the Respondent—Issues framed by Trial Court—Subsequently Respondent filed an application under Order VII Rule 11 seeking that suit be dismissed as it was not filed by competent person—The person was not shown as a partner of the firm in the Register of firms as on the date of filing of the suit (a plea absent in the written statement)—Trial Court dismissed the suit by reference to documentary evidence. Held—A disputed question of fact cannot be tried either as preliminary issue or by application under Order VII Rule 11 CPC—Respondent was not entitled to raise new issue in an application under Order VII Rule 11 CPC—Departure from written statement/pleading possible only by means of amendment, Court had not decided the preliminary issue by taking the averments of the plaint as correct but the judgment had been passed by reference to documents filed by parties—Disputed questions of fact (Such as Whether a person was a partner of the firm as on the date of institution of the suit) cannot be decided as a preliminary issue or by an application under Order VII Rule 11.

M/s. Jagdamba Industries v. *Sh. Krishan Pratap*..... *115*

— Order 6 Rule 17—Amendment Application—Rejection by First Appellate Court upheld—Appellant filed a suit for declaration that the Appellant stood duly selected to the post of Assistant teacher and was entitled to all consequential benefits—Suit dismissed by the Trial Court—Before first Appellate Court—Appellant filed an application under Order 6 Rule 17 CPC contending that he had made representations to Respondents to absorb him in another school as similarly placed persons—Application dismissed; no appeal filed against the order dismissing appeal—Challenged as one of the grounds in second appeal. Held—No revision or appeal had been filed against the order dismissing application even assuming, plea can be taken

in second appeal, it would raise a new cause of action application therefore rightly rejected.

Badri Prasad Tiwari v. *The Directorate of Education & Ors.* *133*

— Section 96—Total sale consideration was Rs. 90,000 of which Rs. 10,000 had been paid on the date of Agreement to Sell dated 6.10.86—Balance was to be paid within one month by 6.11.86—Trial Court decreed the suit of the Respondent for specific performance—Balance consideration deposited after passing of the decree—Judgment and decree challenged in first appeal. Held—Court of first appeal is Competent for examining both findings of fact and law—Findings of Trial Court perverse—Respondent did not file documents to prove his capacity to pay balance consideration—Evidence relied upon, grossly insufficient—Readiness and willingness to pay must be on the date of performance and not date of decree.

Shri Thakur Dass Verma & Anr. v. *Shri Harish Chand* *138*

— Order 41, Rule 27—Respondent filed a suit for possession and mesne profits—Appellant did not lead evidence to support his case—Suit decreed by Trial Court—Affirmed in first appeal—Application under Order 41 Rule 27 for placing on record documents filed for the first time before Appellate Court—Dismissed—Submitted in second appeal—Appellant, Canadian resident, was contesting through Power of Attorney (PoA) who did not appear in Court after strained relations subsequently fresh PoA executed by Appellant—Application under Order 41 Rule 27 CPC filed after 51 days of fresh PoA—Held, delay in filing application explained—Case of appellant, no borne from records as even the said documents did not establish the Appellant's locus qua the suit property—

Only an attempt to delay proceedings.

Shri Bhupinder Singh v. *Shri Mahavir Singh & Ors.... 150*

— Section 148—Arbitration and Conciliation Act, 1996—Sections 48, 49—Decree holder, company based in Arizona, USA and Judgment Debtor, Indian Company at New Delhi entered into Trade Mark Licence Agreement which contained Arbitration Clause—Dispute arose between parties, matter referred to Arbitration of International Chambers of Commerce, Paris—Arbitration Award passed in favour of decree holder which moved execution petition to seek enforcement of foreign award—Objection filed by JD; it urged, award contrary to public policy of India as it was contrary to express terms of contract between parties—As per decree holder, foreign award cannot be challenged on merits and it did not violate public policy of India—Held:- In respect of foreign awards, the defence of "public policy" should be construed "narrowly" and the contraventions should be "something more than the contravention of the law of India—The doctrine must be construed in the sense as applied in the field of private international law i.e. being contrary to the fundamental policy of Indian Law—Also the foreign award should be contrary to the interest of India or justice or morality—Merely because a monetary award has been made against an Indian entity on account of its commercial dealings would not make the award either contrary to the interests of India or justice or morality.

Penn Racquet Sports v. *Mayor International Limited*... *181*

— Order 17 Rule 2—Leave to defend—Defendant no.2 to 4 Directors of Defendant no. 1 Ltd. Company—Defendant no.5 subsidiary of Punjab Agro Industries Corporation Ltd. (an Associate of Defendant no.1)—Plaintiff alleged that Defendant no.2 to 4 induced him to part with Rs. 2.40 Crores for supply of wheat—Said amount deposited with Defendant no. 5 in

account of Defendant no.1—Defendant no.5 issued two orders for release of wheat in account of Defendant no.1—Defendant no.5 informed plaintiff about refund of remaining amount and first sought his affidavit prior to releasing the amount to Defendant no.1—Plaintiff filed affidavit dropping claims qua Defendant no.5—Subsequently money released to Defendant no.1—Defendant no.1 also released amount to plaintiff leaving outstanding balance of Rs. 37,82,000—Cheque issued by Defendant no.1 for the said sum—Cheque dishonoured—Suit for recovery filed under Order XXXVII Code of Civil Procedure—Applications filed by defendant for leave to contest—Held—Defendant no.1 admittedly issued cheque—Though claimed name of payee left blank—Cheque was left blank—Cheque stated to be delivered to Defendant no.5—No reason given why name of left blank—Company does not ordinarily issue cheques in such manner nor are the same accepted—Said contention difficult of accept—No dispute as to the issuance of cheque—Thus no worthwhile defence raised—Inevitable conclusion that balance amount was agreed to be paid by Defendant no.1 to Plaintiff—No triable issue raised—Defence raised highly implausible that Defendant could defeat case of Plaintiff—Hence application of Defendants dismissed—Defendant no.2 to 4 Directors of Defendant no.1—Hence not personally liable—Plaintiff not entitled to decree against them—Defendant no.5 is separate company—No privity of contract between Plaintiff and Defendant no.5—Thus no decree can be passed against Defendant no.5 as well.

Shri Narender Gupta v. *M/s Reliance Polycrete Ltd. & Ors.* *229*

— Order 22 Rule 4—Regular Second Appeal against the judgment of Appellate Court endorsing the judgment of Trial Court dismissing the suit seeking injunction against defendant who had died during pendency of suit. Whether right to sue survives

against the legal heirs when suit is simplicitor suit for permanent injunction—Held—Cause of action against the deceased alone, grievance against defendant in his personal capacity. Cause of action does not extent to legal representatives. Appeal dismissed.

Smt. Bhagwanti v. *Shri Kanshi Ram Through Legal Heirs* *444*

— Order 23, Rule 3—Plaintiffs registered society, filed suit for declaration & permanent injunction claiming defendants no.2 to 4 not inducted members and elections held in March, April 2007 invalid—Also, defendant no. 1 had no lawful authority to hold himself out as President and other defendants be restrained from representing themselves to be members of society—Plaintiffs also sought for mandatory injunction and other allied consequential reliefs in respect of elections and other actions taken pursuant to it, after April 2007—During course of proceedings, on 19.05.2010, parties arrived at an arrangement and finally ended the suit on recording terms of agreement—Appeal preserved but was permitted to be withdrawn by plaintiff—However, plaintiffs challenged said order by filing a review petition—They urged recording of order dt. 19.05.2010 was without their consent and their counsel protested about disposal of suit on the basis of given proposals—As per defendants, review petition misconceived and after thought as results of election were apparent—Moreover, counsel appearing on behalf of plaintiff was authorized to make submissions and if necessary, record concessions on their behalf who had implied authority to compromise or to agree to matter relating to parties—Held:- The Court is bound to accept the statement of the Judges recorded in their judgment, as to what transpired in Court—It cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence—The principle is well settled that statements of fact as to what

transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence—If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent, upon the party, while the matter is still fresh in the minds of the Judge, to call attention of the very judges who have made the record of the fact that the statement made with regard to his conduct was a statement that had been made in error—That is the only way to have the record corrected—If no such step is taken, the matter must necessarily end there—Plaintiffs failed to establish that what was recorded was not within the authority of their counsel and they had calculatedly changed the previous counsel.

Bhagwan Mahaveer Educational Society (Regd.) & Ors. v. *Mr. Rajesh Jindal & Ors.* *398*

— Order 21, Rule 90—Whether auction sale can be confirmed by executing Court executing an ex parte decree which was obtained by fraud and has been set aside—Held—Ex parte decree which is basis of auction sale itself vitiated on account of fraud played on the Court as held by lower court setting aside ex parte decree—Auction sale ought to be set aside—Sale without notice to judgment debtor is a nullity—Unless application under Order 21 Rule 90 is disallowed auction sale cannot be confirmed.

Pran Mohini v. *Sheela Verma & Ors.* *568*

— Order 38, Rule 5 & Order 39—Rule 1, 2—Plaintiff filed suit for recovery, declaration, dissolution, rendition of accounts and mandatory injunction with application seeking interim reliefs and attachment before judgment—On other hand, defendants preferred application praying for vacation of ex-parte interim order—As per plaintiff, defendants siphoned off

money owed to plaintiff by transferring same for their own use so as to defeat claims of plaintiff—Also, unless plaintiff is secured, defendant no.1 to 3 would withdraw amounts given to them which were for satisfaction of claims of plaintiff—Ad interim injunction granted restraining defendants from operating their accounts, withdrawing any amount to extent of suit claim—As per defendants, contention raised by plaintiff misplaced that they had intention to abscond from justice or to evade due process of law—They placed material with regard to their standing and assets—Held:- The power under Order 38 Rule 5 CPC is a drastic and extraordinary power—Such power should not be exercised mechanically or merely for the asking—It should be used sparingly and strictly in accordance with the Rule—The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt—Defendant No.1 shall not withdraw the amount lying in Fixed Deposit Account with defendant no.4 Bank.

Deepali Designs & Exhibits Private Limited v.
Pico Deepali Overlays Consortium & Ors. *710*

— Order 22, Rule 12—Blending of self acquired property with other properties of Joint Hindu Family—Joint Family Benami transactions (Prohibition) Act 1988 (Act)—Section 4(3)(b)—Plaintiff filed suit against his brother (defendant) for possession and mesne profits—Defendant filed counter claim for seeking partition on the ground, property was joint family property—According to plaintiff he was remitting money in the account of his mother—Prior to execution of sale deed Agreement to Sell executed between vendor and plaintiff—Signed by defendant as attorney of plaintiff—Defendant claimed though house was purchased in the name of plaintiff but subsequently thrown into hotch potch of joint family—Thus, property ceased to be separate property of plaintiff—Counter claim of defendant was objected on the ground that defendant was debarred from raising the plea of benami in

view of Section 4 of Act—Existence of Joint Hindu Family also denied by him—Suit decreed in favour of plaintiff—Challenged in first appeal—Held—Evident from record that house was personal acquisition of plaintiff—There was no joint family property in existence at the time of alleged throwing of house into common hotch potch—To attract the rule of blending of separate property of a coparcener with joint family property there has to be in existence some coparcenery property as well as some separate property of coparcener—Plea raised on behalf of defendant that plaintiff stood in a fidiciary capacity and also as a trustee qua the mother while holding the property in his own name, thus falling in exception clause sub-section 3(b) of Section 4 of the Act of, was not accepted. On the ground that the plaintiff had not asked the mother to buy the property in her name—Decree in respect of mesne profits however set aside for no enquiry having been held to determine mesne profits under Order 22 Rule 12 CPC.

D.N. Kalia v. *R.N. Kalia*..... *739*

— Suit—Order 8, Rule 1—Service of Summon—Written Statement to be filed within 30 days from the service of summon—Extendable upto 90 days—Striking off defence—Order 8 Rule 10—Pronouncement of judgment—Plaintiff filed an application for pronouncement of judgment—Defendant having failed to filed written statement after service of summons within prescribed period—Defendant sought extension of time and condonation of delay alleging notice not served—Admitted during the arguments receipt of summons by registered post and suit summons in time—Observed—Ordinarily the time schedule prescribed has to be honoured—The defendant should take steps of filing written statement on the appointed date—The extension of time within 30 days or 90 days should not be granted as a matter of routine when the period has expired—Extension can be granted by way of exception for the reasons assigned by defendant and recorded

in writings by the Court as to its satisfaction—It must be spelt out that departure from the time schedule allowed because the circumstances were exceptional occasioned by reasons beyond control of the defendant—Extension required in the interest of justice and grave injustice would occur if not extended—Held—No Court would be justified in exercising a discretion in favour of a person who has openly perjured himself instead of coming clean by disclosing full facts and then seeking exercise of discretion in his favour—For this reason alone defendant is not entitled to extension of time beyond 90 days—Right of defendant to file written statement closed—Defence struck off—Application Allowed.

Sardar Vallabhbhai Patel Smarak Trust v. *Samarth Nangia*..... *620*

— Section 372—Maintainability of Appeal—Trial Court acquitted respondent nos 1 to 4 for offences u/s 120B, 364 r/w sec 120B, 302 r/w sec 120B and 201 r/w sec 120B IPC—Appeal filed by father of deceased—Held, u/s 8 & 9 of the Hindu Succession Act, appellant being Class II heir, would not inherit anythhing from his deceased son—Since widow and children of the deceased who were class I heirs would inherit to the exclusion of the class II heirs and appellant not entitled to property of victim, he would not fall within expression of 'legal heir' in relation to his deceased son—Appeal not maintainable as it is not by a victim as contemplated in Section 372 because appellant does not qualify as victim as defined in Section 2(wa) of the Code—Appeal dismissed.

Chattar Singh v. *Subhash & Ors.* *470*

— Possession and Adverse Possession—Respondent filed a suit for possession—Appellants claimed title by adverse possession—Suit decreed—Plea of adverse possession—Not proved—Findings endorsed by First Appellate Court—Second appeal filed. Held: The claim of adverse possession was not

substantiated—At best only case of possession—Mere possession does not mature into an adverse possession—For adverse possession—Possession must be open, peaceful, uninterrupted and hostile qua its true owner.

Hoshiar Singh & Ors. v. *Om Prakash (Now Deceased) through his L.Rs*..... *844*

CODE OF CRIMINAL PROCEDURE, 1973—Section 389—Suspension of sentence—Narcotic Drugs and Psychotropic Substance Act, 1985—Sections 27-A, 32-A & 37—Vide Trial Court Judgment appellant convicted and sentenced u/s 27-A—Appeal—Application for suspension of sentence—Held, Courts under legal obligation to exercise power of suspension of sentence within parameters of Section 37—When granting suspension of sentence Court has to satisfy itself not only on broad principles of law laid down for suspension of sentence but also the parameters provided u/s 37(1)(b)(ii)—The satisfaction that needs to be recorded at this stage is of "reasonable grounds" which means something more than prima facie grounds—Roving enquiry of evidence not required at this stage—Appellate Court only needs to satisfy itself that prima facie there exists grounds because of which the appeal when heard may result in decision favourable to appellant—On facts held, considering that only piece of evidence to connect appellant to the offence was disclosure statement which is not substantive piece of evidence, he did not misuse liberty granted during bail, his jail conduct was satisfactory, his age and ill-health and he had a daughter of marriageable age with no one in the family to take care of her needs, he was entitled to suspension of sentence—Application allowed.

Rajesh Bhalla v. *State (NCT of Delhi)* *14*

— Section 482—Central Excise Act, 1944—Section 14—While respondent was in judicial custody, application was made by petitioner department to make enquiries from respondent/

accused in Central jail—Id. ACMM directed that respondent accused be not interrogated in Central Jail but he be brought to Court and enquiry be made before Court—Respondent accused brought in Court and Id. ACMM recorded order-sheet about conduct of enquiry on hourly basis—Arguments heard on bail application of respondent on same very day and granted bail—Order challenged before High Court—Plea taken, Id. ACMM transgressed all limits of propriety and acted as a part of investigation and heard application himself—Held—Inherent powers are granted only to High Court and inherent powers not available to Courts Subordinate to High Court—Subordinate Courts are supposed to act in accordance with provisions of Code of Criminal Procedure (Cr.P.C) and cannot transgress limits imposed upon Courts by Cr.P.C—There is no provision in Cr.P.C that Court can order enquiry be made from accused in its presence nor Court can order that interrogation of accused by IO be done in presence of Court—This is to keep judicial and executive functions separate—Once investigation is done in presence of Court, Court becomes a witness to investigation and this act of Court prejudices Court either in favour of accused or in favour of prosecution—It is for this reason that investigation and adjudication are done by two separate wings and Courts cannot become party to investigation—Order granting bail set aside and matter remanded back to present ACMM for considering application of accused afresh.

Directorate General of Central Excise Intelligence v.

Brijesh Kanodia..... *781*

— Section 167(2)—Right to bail—Narcotics Drugs Psychotropic Substances Act, 1985—Accused caught with 125 packets of hashish weighing 32 kgs in his car—Trial Court allowed application for bail since chargesheet not filed within 180 days—Held, Magistrate wrongly calculated period of 180 days

from the date of incident instead of from the date of production of the accused before the Magistrate—Jurisdiction of Magistrate to detain accused in judicial custody arises only when accused is produced before him—Magistrate has power of detention of 180 days in respect of offence under NDPS Act—Beyond prescribed period of 180 days in case of an offence under NDPS Act the Magistrate has no power to extend detention unless challan is filed—Power to authorize detention extinguishes on 180th day and Magistrate has to pass an order releasing accused on bail—In case challan filed, the undefeatable right to bail of accused does not servive—After filing charge-sheet power to remand to Judicial Custody for unlimited period i.e. till trial is over, starts and the accused can be released on bail only if he deserves bail on merits—Order of Trial Court set aside—Petition Allowed.

Narcotics Control Bureau v. *Ashok Mittal & Anr.*..... *465*

— Section 372—Maintainability of Appeal—Trial Court acquitted respondent nos 1 to 4 for offences u/s 120B, 364 r/w sec 120B, 302 r/w sec 120B and 201 r/w sec 120B IPC—Appeal filed by father of deceased—Held, u/s 8 & 9 of the Hindu Succession Act, appellant being Class II heir, would not inherit anythhing from his deceased son—Since widow and children of the deceased who were class I heirs would inherit to the exclusion of the class II heirs and appellant not entitled to property of victim, he would not fall within expression of 'legal heir' in relation to his deceased son—Appeal not maintainable as it is not by a victim as contemplated in Section 372 because appellant does not qualify as victim as defined in Section 2(wa) of the Code—Appeal dismissed.

Chattar Singh v. *Subhash & Ors.* *470*

COMPANIES ACT, 1956—Section 224 (7) and 225—M/s Super Cassette Industries Limited filed application before Central

Government for approval for removal of its statutory auditor the Petitioner—After considering reply of petitioner, Regional Director rejected all six grounds urged by SCIL but accepted submission of SCIL that it had lost confidence in petitioner and accorded approval for removal—Order challenged in High Court—Plea taken, when all grounds on which SCIL applied to Central Government for approval of removal of petitioner have been negatived by Regional Director, such approval could not have been granted only on ground of loss of confidence—Per contra, plea taken grounds on which auditor can be removed included loss of confidence—Held—Impugned order is untenable is so far as it negatived all grounds concerning conduct and competence of the petitioner as alleged by SCIL before Regional Director and yet accepted its plea that it has lost confidence—Provisions recognize that auditors are expected to function as independent professionals and not simply toe line of management of a company—Central Government will have to be satisfied that reasons are genuine keeping in view best interests of company and consistent with need to ensure professional autonomy to its auditors—Impugned order set aside.

M.S. Kabli v. *Union of India & Ors.* *788*

CONSTITUTION OF INDIA, 1950—Respondent no.1, partnership firm enjoyed status of Small Scale Industry for purposes of Excise Act and was granted exemption from payment of excise duty for manufacturing machines for production of wires and cables—Central Excise Officers visited premises of Respondent no.1 with prior information that Respondent no.1 was using brand/logo/trade name of 'Minimax' which belonged to some other unit i.e. M/s Minimax Engineering Industries—Show cause notice issued to Respondent no.1 seeking explanation as to why status of small scale industry should not be withdrawn/cancelled and

exemption be denied as Respondent no.1 violated condition no.4 of the Notification No.8/99 CE by using brand name of trade name of another person—After considering reply adjudicating authority found violation of condition IV in Notification No.8/2002—Respondent no.1 preferred appeal before Commissioner of Central Excise which was dismissed—Further, appeal preferred before Custom Excise & Service Tax Appellate Tribunal was allowed—Aggrieved by said order of Tribunal, appellant department preferred appeal—Held:- In order to qualify as 'brand name' or 'trade name' it has to be established that such a mark, symbol, design or name etc. has acquired the reputation of the nature that one is able to associate the said mark etc. with the manufacturer—What is necessary is that the said mark is of the nature that it establishes connection between the product and the person—Initially three brothers were doing business together and using mark 'Minimax'—Later on, two brothers formed partnership firm and started separate business using same name 'Minimax'—In these circumstances, it cannot be said that partnership firm started using the name 'Minimax' which belong to M/s Minimax Engineering Industries.

Commissioner of Central Excise v. *Minimax Industies & Anr.* *306*

— Petitioner, owner of Flat in Vasant Cooperative Group Housing Society Delhi carried out certain additions and alterations in his Flat which were booked as unauthorized by MCD and order of demolition passed—Petitioner preferred writ petition seeking direction to Government to take decision on report of Dogra Committee appointed by Government which had recommended for extention of permission for additions and alterations as in DDA Flats, to CGHS Flats also—Held:- In Government, Policy matter where power to do or not to do a thing is optional and discretionary there is no statutory obligation—Direction to the

Executive to do a particular thing cannot be given even where matter is of public importance—Courts do not interfere in the policy matters of the State unless the policy violates the mandate of the Constitution or any statutory provision or is otherwise actuated by malafides.

P.N. Kohli v. *Union of India & Others* *340*

— Writ Petition—Letters Patent Appeal—Army Act, 1950—Army Rule, 1954—R. 180-184—Appellant a 'Major'—Appointed as presiding officer in May 1992 of Board of Officers—To take over possession of building constructed by contractor for Army Aviation Corps at Jhansi—Got adverse ACR for the year 1991-92—Non-statutory representation rejected—ACR for 1992-93 graded as "high average officer"—Made statutory petition against the reviewing officer inter-alia alleging that Reviewing officer taken bribe from contractor—Wanted Appellant not to report deficiencies—Upon refusal out of vengeance, given low grading for 1992-93—Demanded initiating of inquiry against senior officer—Inquiry against senior failed to prove the allegation—Notice of censure given to Appellant—Filed reply to the notice—Minor penalty of censure given—Not promoted to next higher rank of Lt. Colonol—Filed writ petition on the three grounds—i. Grading in ACRs required to be communicated being below bench mark could not be considered by selection board—ii. The finding of Court of inquiry and punishment as illegal, as was held in violation of Rule 180 which requires that in an inquiry affecting character or military reputation of an officer opportunity must be given to such officer to represent himself throughout the enquiry, cross-examining the witnesses which was not granted—iii. Not supplied findings and directions of Court of Enquiry resulted in violation of principles of natural justice—Ld. Single Judge held—Adverse remark in the ACRs of 1992-93 expunged on statutory complaint of the Appellant—Not required to be communicated—Court of

enquiry against senior filed on his complaint; not necessary to give opportunity of hearing; the appellant was given due opportunity of remaining present and cross-examining the witnesses when his character and military reputation likely to be adversely affected—iii. Not entitled to be supplied with findings under R.184—Filed Letters Patent Appeal—Held—As conceded by counsel for appellant, in view of law laid down by Supreme Court below bench mark ACR gradings of the members of Armed Force are not to be conveyed—ii. Agreed with single judge R, 180 is to be applied in respect of a person in an enquiry only from the time such enquiry affects or is likely to affect the character or military reputation of said person—iii. Following judgment of *State of Orissa vs. Dr. Binapani Dei* AIR 1967 SC 1267 an administrative decision or order to be made consistent with rule of principles of natural justice—Rule of natural justice required—1. to give all information as to the nature of case which the party has to meet—ii. To supply all information, evidence or material which the authority wishes to use against the party—iii. To receive all relevant material which the party wishes to produce in support of his case—iv. To given an opportunity to party to rebut adverse information, evidence or material appearing against such party—Award of punishment of censure an administrative action, GOS required to observe the rule of natural justice—Order of censure quashed—Respondents given liberty to proceed further in accordance with law—Appeal allowed in these terms.

Maj. R.K. Sareen v. *UOI & Ors.* *684*

COPY RIGHT ACT, 1957—Plaintiff filed suit along with interlocutory application for restraining defendants from using infringing mark KRISHNA or any other mark which was deceptively and confusingly similar to plaintiff's mark—Plaintiff urged, label mark KRISHNA depicting picture of Lord Krishna standing on lotus flower registered for plaintiff in

respect of milk and dairy products falling in class 29—It also obtained copyright registration under Copyright Act and used mark Krishna since 1922 and attained valuable goodwill and reputation with respect to said trademark—Defendant used similar mark (KRISHNA) thereby infringing registered trademark of plaintiff—As per defendant, it used name "Krishna" preceded by words Parul's Lord Krishna which is qualified mark not resulting in infringement—Moreover, plaintiff could not claim monopoly on use of mark "Krishna" as several registrations used word mark Krishna in respect of various products by different persons—Held: In a case where a registered mark appears with a prefix and the registered mark over which rights are claimed is either a descriptive mark or a common name, the test for requisite distinctiveness is to be applied—Not withstanding, the registration of marks, the courts are entitled to, prima facie examine the validity of such registrations in the light of provisions of Sections 9, 30 & 35 of the Act—Defendant permitted to use label mark with condition that prefix Parul and Lord shall have a font size and prominence similar to KRISHNA.

Bhole Baba Milk Food Industries Limited v. *Parul Food Specialities (P) Limited* *317*

— Section 63—Copyright Rules, 1958—Rule 16 (3) and (4)—Petitioner filed applications in respect of artistic works for protection under Copyright Act—Objections filed by respondent No.3 to grant of registrations—Registrar dismissed objections being time barred—In appeal, Copyright Board held objections can be filed within reasonable time immediately after person comes to know about filing of application and directed entries made in Register of Copyrights to be expunged—Order assailed before High Court—Plea taken, when admittedly objections were filed beyond thirty days of filing of application

for registration in view of Rule 16, objection were clearly time barred—Per contra, plea taken, there was no provision for advertisement of filing of application seeking registration of a copyright—Knowledge of filing of application would ordinarily be only after registration is granted—Decision of board reasonable and did not call for interference—Held—Under scheme of Act and Rules there is, unlike in case of a trademark, no provision for advertisement of application—A person objecting to grant of registration can possibly know of filing of application only after registration is granted—Remedy for such a person is to file application for rectification thereafter—That by no means permits respondent No.3 to file objections beyond period of thirty days after filing of application—There is no such provision under the Act or Rules enabling objections to be filed within a 'reasonable time' after objector coming to know of filing of application seeking registration—Respondent No.3 has not stated when it came to know of filing of applications by petitioner—There was no question of computing any thirty day period from date of such knowledge—Objections filed by objectors were time barred—Order of Board holding objections filed by Respondent No.3 not time barred set aside.

Surinder Prakash Gupta v. *Union of India & Ors.*..... *257*

CUSTOM ACT, 1962—Circumstantial evidence—Penalty—Adjudicating authority—Custom Excise & Service Tax Appellate Tribunal (CESTAT)—Appellant importer—Got goods cleared on the basis of advanced licences purchased through one Sh. Gautam Chatterjee—Licence found to be forged—Purported to be issued in name of different licence holders—Custom department Initiated proceedings against Sh. Gautam Chaterjee and other associates—Also, initiated proceedings of levy of duty and penalty against Appellants—Adjudicating authority imposed penalties on the Appellants—Appeal filed before Custom Excise & Service Tax Appellate

Tribunal (CESTAT)—Dismissed—Appeal filed before High Court—Contended: Bonafide purchaser of advanced licences—Obligatory on the custom house before issuing Transfer Release Advise (TRA) to verify the genuineness—TRA issued by custom house—Appellant had no reason to doubt the genuineness of advanced licences and TRA—Entire deal materialised through Sh. Gautam Chaterjee—Represented to Appellant—The licences earlier transferred to UNO Enterprises—The demand draft representing the commission made in the name of UNO Enterprises—Based on the inquiries by custom department statement of Sh. Gautam Chaterjee and others—adjudicating authority opined—Appellant had knowledge about forged advanced licences at the time of purchase—The order of adjudicating authority upheld by Appellate Tribunal—Court observed—Difficult to appreciate as to why appellant chose not to verify from the conerned department the names and particulars of licence holder—Unbelievable that they would have bonafidely chosen to strike a deal of lakhs with small time employee Sh. Gautam Chaterjee—Bonafides become doubtful in view of the fact that if the licenses were in the name of others whereas payment of huge amount were made by draft in the name of UNO Enterprises with whom they were having no dealing—Draft of payment also given to Sh. Gautam Chaterjee—Licence premium in these cases was 50%-75% as against normal premium of 98%—Being importer, supposed to be knowing prevailing normal premium in the market—Held—No illegality or perversity in the findings recorded by Adjudicating Authority and Appellate Authority and Appellate Tribunal—The question framed about legal sustainability of impugned order of Adjudicating Authority and Appellate Tribunal answered in affirmative—Appeal dismissed.

Rahuljee & Company Ltd. v. *Commissioner of Customs, New Delhi* *609*

DELHI HIGH COURT ACT, 1966—Section 10—Refusal to amend as well as refusal to implead are of such moment as would justify appeal under Letters Patent or in case of Delhi High Court under Delhi High Court Act.

Walchandnagar Industries Ltd. v. *Saraswati Industrial Syndicate Ltd.* *23*

DELHI RENT CONTROL ACT, 1950—Section 50—Regular second appeal against order of the Appellate Court endorsing the findings of the Trial Court dismissing the suit for possession, permanent injunction and damages qua suit property which is commercial. Held—*Gian Devi Anand vs. Jeevan Kumar & Ors.* not overruled by *Satyawati Sharma (Dead) by LR's vs. Union of India. Gian Devi* decided the issue of heritability of tenancy rights of commercial premises, which proposition was not in challenge in case of Satyawati. Rent less than Rs. 3500/- Defendant protected as a tenant as he inherited the tenancy, bar of Section 50 applicable, suit rightly dismissed.

Smt. Sudha Aggarwal & Ors. v. *Shri Sunil Kumar Jain* *416*

DELHI SCHOOL EDUCATION RULES, 1973—Rule 114A—Resignation by employee to be accepted within 30 days by managing committee with approval of Director—Requires fulfillment of both conditions—Acceptance of resignation tendered and approval by directorate of Education—Twin conditions are cumulative and not alternative—Failing one, resignation cannot be said to be final.

Manager, Shri Sanatan Dharam Saraswati Bal Mandir School & Anr. v. *Shri K.P. Bansal & Ors.* *209*

GENERAL CLAUSES ACT, 1897—Section 27 and Indian Evidence Act, 1873—Section 14(1)(e)—Regular second appeal

against order of the Appellate Court endorsing the findings of the Trial Court dismissing the suit seeking recovery of possession and damages of suit property holding tenancy was not duly terminated. Notice terminating tenancy sent vide registered A.D.—Whether there is presumption u/s 27 of General Clauses Act in favour of Plaintiff—Held—Section specifically postulates that the registered A.D. envelope must be prepaid and properly addressed to the addressee; this being missing, no presumption arises in favour of plaintiff. Appeal dismissed.

Chand Krishan Bhalla v. *Harpal Singh* *420*

— Section 10, Central Excise Act, 1944—Section 35—Petitioner engaged in export of various goods under Rule 19 of Central Excise Rules, 2002—It executed bond with Respondents for exporting goods by purchasing manufactured excisable goods duty free on basis of CT-1, issued from time to time by Respondents—Necessary documents for scrutiny of Respondents furnished by petitioner but show cause notices served on petitioner—Replies tendered by petitioner with prayer to drop proceedings and show cause notices—Assistant Commissioner dealt with Show Cause Notices and ordered to make demand of Rs. 3,29,819/- in terms of Section 11-AC of Act—Appeal preferred by aggrieved petitioner dismissed being time barred by one day and application for condonation of delay rejected—Revision petition also dismissed—Accordingly, petitioner preferred writ petitioner urging period for reckoning limitation has to be computed from day the right to prefer an appeal had accrued which was wrongly computed by Commissioner—Percontra, Respondent no.2 submitted, method of computation of limitation period adopted by Commissioner not faulty—Held:- Sections 4 and 14, Limitation Act, are not similar in their effect—Whereas under Section 14 of the Act the time spent can be excluded, Section 4 does not entitle a person to add he days on which the Court is closed

to the statutory period—Section 4 of Limitation Act and Section 10 of the General Clause Act enable a person to do what the could not have done on a holiday on the next working day—Commissioner and the revisional authority had correctly computed the period of limitation.

M/s. Uttam Sucrotech International (P) Limited v. *Union of India & Another* *160*

HINDU MARRIAGE ACT, 1955—Section 13 (1) (ia) (b), 23(1) (b) and 28—Indian Evidence Act, 1872—Section 138—Judgment and decree of divorce passed in favour of respondent and against appellant, challenged in appeal before High Court—Plea taken, alleged act of cruelty committed by appellant stands condoned as child was conceived by appellant thereafter—Passionate letters sent by respondent also condoned cruelty—Per contra, plea taken since appellant had committed various acts of cruelty after love letters written by respondent, all previous acts of cruelty got revived—Held—Conception of child is unflinching proof of condonation of acts of cruelty of offending spouse—There cannot be condonation of cruelty if offending spouse continues to indulge in commission of further acts of cruelty, either physical or mental—Acts of cruelty got revived when a false criminal complaint was lodged by appellant with Crime Against Women Cell and also because of abusive language used by appellant in tape recorded conversation—Condition involved in case of revival of offence after condonation is not only that same matrimonial offence will not be committed but also that condoned spouse will in future fulfill in all respects obligations of marriage—Despite forgiveness and tolerance of respondent, appellant continued her vicious behaviour—In face of subsequent conduct of appellant, acts of cruelty would stand revived and respondent entitled to decree of divorce.

Dr. Seema v. *Dr. Alkesh Chaudhary* *378*

— Section 26—Aggrieved petitioner mother filed petition challenging order of trial Court whereby two applications of Respondent's father seeking modification of custody arrangements of children in view of his transfer to Jammu & Kashmir, and for permission to take their transfer certificates from school in Delhi, were allowed—As per petitioner, considering age of children, to be 13 & 8 years mother should be appointed as guardian of children—Also, children were studying in most reputed school in Delhi and same education standard would not be available in Jammu—Respondent urged petitioner had no capability to meet with needs of children whereas he was in better position to take care of educational needs of children—Held:—A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents—In selecting proper guardian of a minor, the paramount consideration should be the welfare and well being of the child—In selecting a guardian, the Court is exercising parents patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort contentment, health, education, intellectual development and favourable surroundings—But over and above physical comforts, moral and ethical values cannot be ignored—Elder son to stay with father and the younger son shall remain in the custody of the mother.

Shiwani Kabra v. *Shaleen Kabra* *754*

INCOME TAX ACT, 1961—Section 43, 80, 139—Whether extension of time for filing return in terms of proviso to Section 139(1) automatically means extension of due date for the purpose of Section 43 B of the Act—Held—Once neither penalty can be imposed nor any other such negative consequences follow to the assessee by reason of filing his return late, so long as there is an extended period of time granted or deemed to be granted by the AO, all acts done within the extended period must, thus, be deemed to have been

done within the prescribed period of time as originally stipulated.

Commissioner of Income Tax Central-II, New Delhi v. *Shri Narender Anand* *827*

INDIAN CONTRACT ACT, 1872—Section 23—Registration Act, 1908—Section 17 and 49—Transfer of Property Act, 1882—Section 106 and 116 Code of Civil Procedure, 1908—Section 34—As per lease deed, defendant/lessee agreed to pay increase in House Tax—Rateable value of property increased and NDMC demanded difference of tax—Plaintiff/lessor demanded increased tax from defendant—Suit filed to recover increased tax—Plea of defendant that defendant liable only in case of increase in levies or rates other than rates of house tax and ground rent—What has been increased is reteable value and not the rate of house tax, no liability in respect of house tax can be imposed on it—Since no registered sale deed was executed after lease deed expired by efflux of time, terms and conditions contained in lease deed are not binding on defendant and house tax for period after expiry of agreed terms of lease cannot be recovered from defendant—Held—Agreement by tenant agreeing to bear increase in house tax of premises taken by him on rent is perfectly legal and binding on parties—There can be no logic behind agreeing to pay increase in amount of house tax as a result of increase in rate of which tax is levied on reteable value and not paying in case increase is due to enhancement of rateable value—What is material to parties is net outgo towards house tax, irrespective of whether it increases/decreases due to revision of rateable value or due to revision of rates—Even on expiry of terms of lease, terms and conditions contained in lease deed continue to bind parties, so long as defendant was holding over tenancy premises—Suit decreed.

Abaskar Construction Pvt. Ltd. v. *Pakistan International Airlines* *447*

INDIAN EVIDENCE ACT, 1873—Section 14(1)(e)—Regular second appeal against order of the Appellate Court endorsing the findings of the Trial Court dismissing the suit seeking recovery of possession and damages of suit property holding tenancy was not duly terminated. Notice terminating tenancy sent vide registered A.D.—Whether there is presumption u/s 27 of General Clauses Act in favour of Plaintiff—Held—Section specifically postulates that the registered A.D. envelope must be prepaid and properly addressed to the addressee; this being missing, no presumption arises in favour of plaintiff. Appeal dismissed.

Chand Krishan Bhalla v. *Harpal Singh* *420*

— Section 138—Judgment and decree of divorce passed in favour of respondent and against appellant, challenged in appeal before High Court—Plea taken, alleged act of cruelty committed by appellant stands condoned as child was conceived by appellant thereafter—Passionate letters sent by respondent also condoned cruelty—Per contra, plea taken since appellant had committed various acts of cruelty after love letters written by respondent, all previous acts of cruelty got revived—Held—Conception of child is unflinching proof of condonation of acts of cruelty of offending spouse—There cannot be condonation of cruelty if offending spouse continues to indulge in commission of further acts of cruelty, either physical or mental—Acts of cruelty got revived when a false criminal complaint was lodged by appellant with Crime Against Women Cell and also because of abusive language used by appellant in tape recorded conversation—Condition involved in case of revival of offence after condonation is not only that same matrimonial offence will not be committed but also that condoned spouse will in future fulfill in all respects obligations of marriage—Despite forgiveness and tolerance of respondent, appellant continued her vicious behaviour—In face of subsequent conduct of appellant, acts of cruelty would

stand revived and respondent entitled to decree of divorce.

Dr. Seema v. *Dr. Alkesh Chaudhary* *378*

INDIAN PENAL CODE, 1860—Section 302, 304—Petitioner, constable under Border Security Force was on duty at Indo Bangladesh Border—He was charged under Section 302 for having murdered one woman on the border—Trial conducted at General Security Force Court which held petitioner guilty of having committed offence punishable under Section 304 Part II—Aggrieved petitioner preferred writ petition challenging the order—He urged woman indulged in smuggling of countrymade liquor to Bangladesh, and on being stopped she along with other women became aggressive—Thus, he in self defence, fired one round from his SLR which proved fatal for woman—Held:- In order to justify the act of causing death of the assailant, the accused has simply to satisfy the Court that he was faced with an assault which caused a reasonable apprehension of death or grievous hurt—Petitioner acquitted.

Ex. Ct. Rajesh Kumar v. *UOI and Others* *358*

— Sections 304 Part II—Son of the deceased and complainant was coming on the scooter when the appellant stopped him and a quarrel took place between them—When the deceased and his wife were separating them appellant gave a fist blow on the chest of deceased because of which he fell and became unconscious—He was declared brought dead in the hospital—On statement of the wife of the deceased, FIR lodged—Trial Court convicted appellant for offence u/s 304-B (II) and sentenced him to undergo RI for a period of 3 years and to pay fine of Rs. 10,000/- and in default RI for three months—Held, proved by medical evidence that deceased died due to heart attack and that death natural due to disease process—Wife of deceased testified that he was a heart patient—Appellant cannot be attributed any intention or knowledge to

cause an injury likely to cause death—One single blow on chest region cannot be said to be with the intention or knowledge of causing grievous hurt—Conviction altered to offence u/s 323 IPC and sentence to period already undergone—Appeal disposed of.

Satya Prakash v. *State* *10*

— Section 304-B/498A/34 Trial Court convicted appellant u/s 304-B/498A/34 IPC and sentenced her to RI of 7 years and fine of Rs. 1,000/- No evidence on record as to who in the family of the in laws had put demand of Rs. 50,000/- and scooter—No evidence to show that cruelty of any kind was perpetuated on the deceased for this demand—Mere demand is not pre requisite of Section 304-B; there should be demand coupled with cruelty or harassment in connection with demand—List of articles of dowry and istridhan filed in court by brother of deceased in Court showed that not a case where dowry was demanded—To convict person for abetment of suicide apart from suicide it has to be proved that the appellant or accused was instrumental in commission of suicide—Since no evidence of cruelty presumption u/s 113 Cr.PC cannot be raised—Conviction cannot also be u/s 306—Trial Court should not act as mere umpires but should ask questions to the witnesses to ascertain the truth—Appeal allowed—Appellant acquitted.

Rani v. *The State of NCT of Delhi* *1*

— Section 302—On receipt of DD, the police reached the spot where deadbody of wife of appellant found in shop/room where appellant staying with her, his three children and nephew—Cause of death was opined as death due to throttling—As per prosecution case, the appellant had throttled the deceased in the course of a quarrel which was on account of illicit relationship of the deceased with the nephew of the

appellant—Next day of incident appellant made extra judicial confession to PW12 about the murder of his wife—Relying on the circumstances of extra judicial confession, motive—Illicit relationship of wife with nephew, evidence of last seen and subsequent conduct in absconding after the offence trial Court convicted appellant u/s 302—Held, on the basis of testimony of PW12, it cannot be held that extra judicial confession was made by accused—No evidence on record to prove motive or even the approximate time or date of death in order to prove evidence of "last seen"—Subsequent conduct by itself insufficient to prove that it could only be the appellant who was responsible for the murder—Where a case rests on circumstantial evidence, it is bounden duty of prosecution to establish that from the circumstances the only conclusion that can be drawn is the guilt of the accused and the circumstance established must be inconsistent with the innocence of the accused—Appellant acquitted—Appeal allowed.

Ganesh v. *State* *243*

— Section 70—Civil work assigned to plaintiff by defendant for lumpsum price extra work entrusted to plaintiff—Suit for recovery of payment of extra work with interest—Held—Three conditions to be fulfilled before benefit u/s 70 can be invoked. First is that the claimant should either lawfully do something for another person or deliver something him. The second is that while doing or delivering something, claimant must not be acting gratuitously and thirdly the person of whom something is done or to whom something is delivered must enjoy the thing done or delivered to him. Plaintiff entitled to recover payment for extra work done.

M/s. S.N. Nandy & Co. v. *M/s. Nicco Corporation Ltd.* *795*

— Section 302—Circumstantial Evidence—Prosecution case that PW 17 received information vide DD regarding theft and murder—On reaching spot PW17 and PW15 found household articles scattered and deadbody of wife of appellant with ligature marks on neck—The marriage of deceased with appellant was her second marriage—Appellant started suspecting character of deceased—In the evening of incident as per PW3, the accused and the deceased went to rented godown of the deceased and quarreled there—Deceased collected Rs.13000/- from godown and returned along with appellant—At about 10 p.m., appellant left house on motorcycle—Trial Court convicted accused u/s 302—Held, from evidence, evident that appellant and deceased sometimes had differences and used to quarrel—Trial Court wrongly, while relying on disclosure statement, came to conclusion that appellant suspected character of deceased and therefore murdered her—Prosecution failed to establish motive set up against appellant—Prosecution failed to prove beyond reasonable doubt that accused present in premises at around time of incident—Trial Court wrongly disbelieved alibi of appellant—Contradictions in testimonies of recovery witnesses makes it unsafe to rely on recoveries made post disclosure of appellant—Prosecution unable to establish conclusively each circumstance alleged against accused and to prove beyond reasonable doubt that every link to each such circumstance had been established in turn beyond reasonable doubt so as to point only to guilt of accused and rule out any hypothesis pointing to his innocence—Appellant acquitted—Appeal Allowed.

Vikas BansaL v. *State (NCT of Delhi)* *636*

— Section 302—As per prosecution case, appellant was neighbour of deceased—One month prior to the incident, appellant started teasing and following daughter of deceased who made complainant to father—Deceased reprimanded

appellant—On day of incident when deceased accompanying his daughter for fetching water from municipal tap, appellant caught hold of daughter's hand and asked her to accompany him—Deceased and his daughter reprimanded appellant—Appellant attacked deceased with sharp edged weapon—Appellant managed to escape after brandishing knife—Appellant on arrest, got recovered dagger—Appellant convicted by trial Court u/s 302—Held, evidence of three eye-witnesses relied upon makes their presence at the spot doubtful—Unlikely that, 14 injuries could have been inflicted on deceased in the presence of eye-witnesses without their intervention—None cited as witness from the public—Eye-witness daughter did not even describe weapon of offence used for inflicting injuries in FIR—Despite claim of PW1 that she helped in the process of putting deceased in the Jeep for his removal to hospital, her clothes were not blood stained—None of the three eye-witnesses despite being family members, accompanied deceased to hospital—Site of injuries on the body of deceased wrongly described by PW1—Rukka sent to P.S. after 5 hours of the incident—After clothes of appellant were seized and converted into sealed parcel, seal not handed over to any witness—As per record, recovered dagger was never deposited in the P.S.—Not known where dagger was kept by IO—Although recovered weapon was single edged as per opinion of autopsy surgeon, some injuries could be caused by doubled edged weapon or weapon having curve, clearly showing that two weapons were used by assailants—Testimony of eye-witnesses suspect in view of opinion of doctor indicating that in all probability two weapons had been used to inflict the injuries—Prosecution story belied by medical opinion—Appeal allowed—Appellant acquitted.

Braham Parkash @ Babloo v. *State* *669*

— Section 307—As per case of prosecution, accused poured kerosene oil on Samay Singh (complainant) when he was

sleeping in his jhuggi and thereafter set him on fire as the appellant wanted to get jhuggi vacated because of which they had number of quarrels—Trial Court convicted appellant u/s 307—Held, prosecution case solely based on testimony of complainant, contradictions in statements of complainant before Court and his initial statement make prosecution case doubtful—Defence of accused that complainant (PW1) on day of incident was over-drunk and made nuisance which was resented by neighbours and it was under influence of liquor that he poured kerosene oil on himself and set himself on fire to threaten accused and his family members probable—Despite incident having taken place at 2.30 a.m. in thickly populated area, nobody brought injured to hospital, nor informed police—Complainant himself went to P.S. at 9.05 a.m. and got statement recorded after which he was taken to hospital—Enough time from 2.30 a.m. to 9 a.m. for complainant to reflect on statement to be made particularly in light of fact that if case of defence being proved, then complainant inflicted burn injuries on himself which would make him liable for offence u/s 309—In order to avoid himself from prosecution, complainant having implicated complainant who was objecting to his drunken behaviour cannot be ruled out—Statement of doctor PW6 in cross-examination that if person pours kerosene oil on himself, he can sustain injuries as mentioned in MLC makes defence case probable—Trial Court wrongly inferred that since MLC did not observe smell of alcohol, it was not a case of appellant pouring kerosene at 11.30 a.m. smell of alcohol would have gone—Defence of appellant that complainant under influence of alcohol, himself poured kerosene oil and set himself on fire proved by preponderance of probability—Appellant entitled to benefit of doubt—Appeal Allowed.

Rohtash v. *State* *679*

INDIAN LIMITATION ACT, 1963—Section 19—Held—Where

payment on account of a debt is made before the expiration of the prescribed period, a fresh period of limitation would be computed from the time when the payment was made.

M/s. S.N. Nandy & Co. v. *M/s. Nicco Corporation Ltd.* *795*

INDIAN STAMP ACT, 1899—Section 36—Specific Relief Act, 1963—Section 16(c), 19(a) and (b), 20—Code of Civil Procedure, 1908—Order XLI Rule 22—Suit for specific performance of agreement to sell filed by Respondent No. 1 and 2 against mother of Respondent No. 3 to 6 and appellants who were subsequent purchasers—Case of Respondent No. 3 to 6 that their mother had already entered into agreement to sell with appellants and question of entering into agreement to sell with Respondent No. 1 and 2 did not arise—Agreement to sell and documents of Respondent No.1 and 2 are fabricated—Rather Respondent No.1 and 2 had agreed to sell their land to mother of Respondent No.3 to 6—Trial Court decreed the suit—Order assailed in appeal—Plea taken, agreement to sell with appellants was entered into prior to alleged agreement to sell with Respondent No. 1 and 2—By virtue of registered receipt, irrevocable power of attorney and registered sale deed, appellants were full owners of suit land—Per contra, case of Respondent No. 1 and 2 that agreement to sell in favour of appellants not proved in evidence as it was on unstamped paper—Held—Once instrument has been admitted in evidence, such admission should not be questioned subsequently on ground that instrument was not duly stamped—Subsequent agreement to sell can be of no significance in view of prior agreement to sell more so as prior agreement to sell ultimately culminated in execution of duly registered sale deed in favour of appellants—If a party relies upon agreement to sell of a date prior to date of agreement to sell of which specific performance is claimed, relief of specific performance cannot be granted to party whose agreement to

sell is of a subsequent date—After entering into agreement to sell vendor was in a position of trust qua purchaser and if vendor thereafter conveys title to a third party, title of such party is subject to agreement of its vendor—Even if appellants had been subsequent transferees (which they are not), no decree for specific performance could have been passed by Trial Court without joining them in conveyance deed—Respondent No. 1 and 2 have paid only Rs. 1,000/- and are not entitled to decree of specific performance on payment of Rs. 59,000/- On balancing equities, there is no justification for exercise of discretionary powers of this Court to grant equitable relief of specific performance—Impugned judgment and decree of Trial Court set aside with cost.

LAND ACQUISITION ACT, 1894—Section 5A, Section 6, Section 17—Petitioner challenged acquisition proceeding initiated as well as notification under Section 17 (4) of Act—It claimed to be owner of land measuring 14 Biswas and 8 Biswanisi in Village Khampur, Delhi—It urged, Notification issued by Respondents required land in question for public purpose namely for construction of sewage pumping station by Delhi Jal Board—On receipt of notice, petitioner came to know for first time about acquisition proceedings—As small piece of land belonging to petitioner was to be acquired, therefore, personal service on the petitioner was necessary which was not done—Moreover, no notification under Section 4 was affixed on land in question, thus, once notification under Section 4 fails then entire acquisition proceedings also had to go—As per Respondents, valid cause for issuance of notifications under Section 4, read with Section 17 (1) and (4) of the Act existed as sewage pump station was a part of larger grid to be constructed pursuant to orders passed in various cases by Supreme Court with respect to cleaning of river Yamuna and there was no malafide in acquisition

proceedings—Held:- A conjoint reading of provisions of Section 4 & Section 45 shows that there is very much envisaged personal service upon a person in certain circumstances—Acquisition of a small portion of land belonging only to one person is a fit case where there ought to be a personal service upon the person whose land is sought to be required—In General Notification which involves acquisition of large parcels of land involving many persons, the existence of acquisition proceedings are easily known as a large section of public is affected—Accordingly, there was no due service upon the petitioner and the petitioner would be entitled to compensation as on the date of possession of land and not from the date of notification published under Section 4 of the Act.

LETTERS PATENT APPEAL—Army Act, 1950—Army Rule, 1954—R. 180-184—Appellant a 'Major'—Appointed as presiding officer in May 1992 of Board of Officers—To take over possession of building constructed by contractor for Army Aviation Corps at Jhansi—Got adverse ACR for the year 1991-92—Non-statutory representation rejected—ACR for 1992-93 graded as "high average officer"—Made statutory petition against the reviewing officer inter-alia alleging that Reviewing officer taken bribe from contractor—Wanted Appellant not to report deficiencies—Upon refusal out of vengeance, given low grading for 1992-93—Demanded initiating of inquiry against senior officer—Inquiry against senior failed to prove the allegation—Notice of censure given to Appellant—Filed reply to the notice—Minor penalty of censure given—Not promoted to next higher rank of Lt. Colonol—Filed writ petition on the three grounds—i. Grading in ACRs required to be communicated being below bench mark could not be considered by selection board—ii. The

finding of Court of inquiry and punishment as illegal, as was held in violation of Rule 180 which requires that in an inquiry affecting character or military reputation of an officer opportunity must be given to such officer to represent himself throughout the enquiry, cross-examining the witnesses which was not granted—iii. Not supplied findings and directions of Court of Enquiry resulted in violation of principles of natural justice—Ld. Single Judge held—Adverse remark in the ACRs of 1992-93 expunged on statutory complaint of the Appellant—Not required to be communicated—Court of enquiry against senior filed on his complaint; not necessary to give opportunity of hearing; the appellant was given due opportunity of remaining present and cross-examining the witnesses when his character and military reputation likely to be adversely affected—iii. Not entitled to be supplied with findings under R.184—Filed Letters Patent Appeal—Held—As conceded by counsel for appellant, in view of law laid down by Supreme Court below bench mark ACR gradings of the members of Armed Force are not to be conveyed—ii. Agreed with single judge R, 180 is to be applied in respect of a person in an enquiry only from the time such enquiry affects or is likely to affect the character or military reputation of said person—iii. Following judgment of *State of Orissa vs. Dr. Binapani Dei* AIR 1967 SC 1267 an administrative decision or order to be made consistent with rule of principles of natural justice—Rule of natural justice required—1. to give all information as to the nature of case which the party has to meet—ii. To supply all information, evidence or material which the authority wishes to use against the party—iii. To receive all relevant material which the party wishes to produce in support of his case—iv. To given an opportunity to party to rebut adverse information, evidence or material appearing against such party—Award of punishment of censure an administrative action, GOS required to observe the rule of natural justice—Order of censure quashed—Respondents given liberty to proceed further in accordance with law—

Appeal allowed in these terms.

Maj. R.K. Sareen v. *UOI & Ors.* *684*

LIMITATION ACT, 1963—Section 4 & 14, General Clauses Act, 1897—Section 10, Central Excise Act, 1944—Section 35—Petitioner engaged in export of various goods under Rule 19 of Central Excise Rules, 2002—It executed bond with Respondents for exporting goods by purchasing manufactured excisable goods duty free on basis of CT-1, issued from time to time by Respondents—Necessary documents for scrutiny of Respondents furnished by petitioner but show cause notices served on petitioner—Replies tendered by petitioner with prayer to drop proceedings and show cause notices—Assistant Commissioner dealt with Show Cause Notices and ordered to make demand of Rs. 3,29,819/- in terms of Section 11-AC of Act—Appeal preferred by aggrieved petitioner dismissed being time barred by one day and application for condonation of delay rejected—Revision petition also dismissed—Accordingly, petitioner preferred writ petitioner urging period for reckoning limitation has to be computed from day the right to prefer an appeal had accrued which was wrongly computed by Commissioner—Percontra, Respondent no.2 submitted, method of computation of limitation period adopted by Commissioner not faulty—Held:- Sections 4 and 14, Limitation Act, are not similar in their effect—Whereas under Section 14 of the Act the time spent can be excluded, Section 4 does not entitle a person to add he days on which the Court is closed to the statutory period—Section 4 of Limitation Act and Section 10 of the General Clause Act enable a person to do what the could not have done on a holiday on the next working day—Commissioner and the revisional authority had correctly computed the period of limitation.

M/s. Uttam Sucrotech International (P) Limited v. *Union of India & Another* *160*

NARCOTICS DRUGS PSYCHOTROPIC SUBSTANCES ACT, 1985—Accused caught with 125 packets of hashish weighing 32 kgs in his car—Trial Court allowed application for bail since chargesheet not filed within 180 days—Held, Magistrate wrongly calculated period of 180 days from the date of incident instead of from the date of production of the accused before the Magistrate—Jurisdiction of Magistrate to detain accused in judicial custody arises only when accused is produced before him—Magistrate has power of detention of 180 days in respect of offence under NDPS Act—Beyond prescribed period of 180 days in case of an offence under NDPS Act the Magistrate has no power to extend detention unless challan is filed—Power to authorize detention extinguishes on 180th day and Magistrate has to pass an order releasing accused on bail—In case challan filed, the undefeatable right to bail of accused does not servive—After filing charge-sheet power to remand to Judicial Custody for unlimited period i.e. till trial is over, starts and the accused can be released on bail only if he deserves bail on merits—Order of Trial Court set aside—Petition Allowed.

Narcotics Control Bureau v. *Ashok Mittal & Anr.* *465*

— Sections 27-A, 32-A & 37—Vide Trial Court Judgment appellant convicted and sentenced u/s 27-A—Appeal—Application for suspension of sentence—Held, Courts under legal obligation to exercise power of suspension of sentence within parameters of Section 37—When granting suspension of sentence Court has to satisfy itself not only on broad principles of law laid down for suspension of sentence but also the parameters provided u/s 37(1)(b)(ii)—The satisfaction that needs to be recorded at this stage is of "reasonable grounds" which means something more than prima facie grounds—Roving enquiry of evidence not required at this stage—Appellate Court only needs to satisfy itself that prima facie there exists grounds because of which the appeal when

heard may result in decision favourable to appellant—On facts held, considering that only piece of evidence to connect appellant to the offence was disclosure statement which is not substantive piece of evidence, he did not misuse liberty granted during bail, his jail conduct was satisfactory, his age and ill-health and he had a daughter of marriageable age with no one in the family to take care of her needs, he was entitled to suspension of sentence—Application allowed.

Rajesh Bhalla v. *State (NCT of Delhi)* *14*

THE OFFICIAL SECRETS ACT, 1929—Person who comes to Court seeking specific performance of a contract must show and satisfy the Court that his conduct having been blemishless he is entitled to grant of specific performance of the contract—There is a distinction between readiness to perform the contract and willingness to perform the same—By readiness is meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price.

B.B. Sabharwal & Anr. v. *M/s Sonia Associates*..... *479*

RAILWAYS ACT, 1989—Section 124 A—Claim petition—Fatal Accident—Grant of Compensation—Appellant dependent of deceased Sub-Lt. Samir Sawhney. Naval Officer—While travelling in a train died in untowards accident—Appellant contended: Death had taken place because of accidental fall from train on 16.10.1994—Deceased sustained head injuries resulting in his death—Appellant bonafide passenger having valid ticket—Respondent denied the claim—Ground—Deceased was standing on the foot board and excessively leaning outside when hit by signal post—Relied upon the report of superintendent—No evidence led by respondent—Observed—It was not a case of railway death, a suicide or result of self inflicted injury—Also not their case, died due to

his own criminal act or in the state of intoxication or he was insane or died due to any natural cause or disease—Only in such eventualities Section 124 A bar the payment of compensation—Criminal act envisaged under Clauses C. of Section 124 A must have an element of malicious intent or mens area—Standing at the open door compartments of a running train may be negligent act—It is certainly not a criminal act—Held—The appellant entitled to compensation fixed as per scheduled Rs.4 lakhs with interest @ 9% per annum—Appeal allowed.

Wing Comm. S. Sawhney v. *Union of India*..... *705*

RAILWAY CLAIMS TRIBUNAL ACT, 1987—Section 16, 123(c) (2), 124A (b) and (c)—Appellant filed claim before Railway Tribunal for payment of compensation on account of death of a bona fide passenger—Case of appellant before Tribunal that deceased while proceedings towards door of train for throwing out contents of stomach, accidentally fell down from train due to jerk and sustained injuries on his person and died—Per contra, case of respondent was that death of deceased had occurred on account of his own negligence in as much as he was hit by pole of signal and not due to jerk—Railway Tribunal dismissed claim—Order challenged before High Court—Held—Even if DRM's report is taken as correctly made, situation would still not warrant that passenger was guilty of any criminal act so as to cover case under clause (c) of proviso to Section 124 A—No evidence has been led even by the respondent to prove that anybody saw passenger travelling in train negligently so as to bring his conduct in exceptions provided for under Section 124A of Act—Respondents directed to pay Rs. 4 lakhs which is amount fixed towards compensation in case of death along with interest @ 9% per annum w.e.f. date of filing of claim petition.

Smt. Vidyawati v. *Union of India*..... *237*

SERVICE LAW—Declaration of subsistence of contract of employee after removal from service—Normally not given—Three exceptions—Where removal of public servant in contravention of Article 311—Where worker is sought to be reinstated on being dismissed—Where statutory body acts in violation of statutory provisions—School has acted in breach of Section 114A of Delhi School Education Rules—No substantial question of law—Hence appeal dismissed.

Manager, Shri Sanatan Dharam Saraswati Bal Mandir School & Anr. v. *Shri K.P. Bansal & Ors.* *209*

— Where person illegally denied opportunity to work on promoted post, Whether entitled to full salary and allowances for that period—Plaintiff filed suit for declaration and permanent injunction—Claimed entitlement to post of Principal in Respondent School—Not called for interview for the said post—Juniors to Plaintiff called for interview—Hence suit filed—Trial Court decreed suit against Plaintiff—Jurisdiction barred by Section 25, Delhi School Education Act ("DSEA")—Contract for personal service unenforceable—Appellate Court upheld decision of lower Court—Regular Second appeal filed—Matter remanded back to first appellate Court on 11.03.2004—Appellate Court upheld finding of trial Court—Post of principal a selection post and not promotional post—Hence present second appeal. Only issue was whether the post of Principal is a promotional post or a selection post—Before enactment of Delhi School Education Act, 1973—Terms and conditions of service of employees of Schools governed by Notifications/ Circulars of Delhi Administration—Ratio of JS Arora considered—DSEA and Rules framed thereunder—Contain no provision for method of recruitment to post of Principal—Whether by direct recruitment, promotion or both.

Shri Satya Prakash Gupta v. *Managing Committee, Ramjas Higher Secondary School No. 1 & Ors.* *263*

Ratio of Jaswant Rai examined—Existing employee entitled to opt for service conditions prevailing prior to DSEA—Thus, pre-existing rules to prevail—Usual practice of recruitment by 50% promotion and 50% by direct recruitment—Appellant not granted interview on October 1977 for reason he had qualified MA with 3rd division—Respondent relied on notification dated 13.11.1975—Said notification already nullified by subsequent notification dated 24.04.1977—Hence at time of interview, Appellant entitled to interview.

Shri Satya Prakash Gupta v. *Managing Committee, Ramjas Higher Secondary School No. 1 & Ors. 263*

— Finding that Principal is Selection post—Based on reason that interview held for post—Ratio of Jaswant Rai ignored—Vacancies to be filled by promotion or direct recruitment according to rules made by Administrator—No such rules pointed out.

Shri Satya Prakash Gupta v. *Managing Committee, Ramjas Higher Secondary School No. 1 & Ors. 263*

— Appellant fully entitled to be called for interview—Respondent School not denied qualifications of Appellant—Impugned judgment set aside—Where person illegally denied opportunity to work on promoted post, entitled to full salary and allowances for that period—Appeal allowed—Appellant entitled to be promoted to post to Principal—All consequential benefits to be paid since Appellant retired.

Shri Satya Prakash Gupta v. *Managing Committee, Ramjas Higher Secondary School No. 1 & Ors. 263*

— Where person illegally denied opportunity to work on promoted post, Whether entitled to full salary and allowances for that period—Plaintiff filed suit for declaration and

permanent injunction—Claimed entitlement to post of Principal in Respondent School—Not called for interview for the said post—Juniors to Plaintiff called for interview—Hence suit filed—Trial Court decreed suit against Plaintiff—Jurisdiction barred by Section 25, Delhi School Education Act ("DSEA")—Contract for personal service unenforceable—Appellate Court upheld decision of lower Court—Regular Second appeal filed—Matter remanded back to first appellate Court on 11.03.2004—Appellate Court upheld finding of trial Court—Post of principal a selection post and not promotional post—Hence present second appeal. Only issue was whether the post of Principal is a promotional post or a selection post—Before enactment of Delhi School Education Act, 1973—Terms and conditions of service of employees of Schools governed by Notifications/ Circulars of Delhi Administration—Ratio of JS Arora considered—DSEA and Rules framed thereunder—Contain no provision for method of recruitment to post of Principal—Whether by direct recruitment, promotion or both.

Shri Satya Prakash Gupta v. *Managing Committee, Ramjas Higher Secondary School No. 1 & Ors. 263*

SICK INDUSTRIAL COMPANIES (SPECIAL) PROVISIONS ACT, 1985—Section 22(1)—Plaintiff filed suit for recovery—Defendant raised objection—Suit cannot proceed as defendant was a sick company—On merits denied liability to pay—Defendant filed application for adjourning suit sine die by virtue of Section 22(1), on the ground suit cannot be continued without permission from BIFR, as reference registered with BIFR in 2006 and suit filed on 2008—Held, Section 22 enacted with a view to prevent strain on already scarce resources or creating any obligations or impediments in restoring a sick company to normal health—This, however, needs to be examined on case to case basis—Proceeding for recovery simplicitor need not be stayed until amount sought to be recovered is reckoned or taken into consideration in

rehabilitation scheme before BIFR—In instant case, defendant neither admitted this liability to pay the amount nor such amount reckoned or taken into account by any scheme of rehabilitation of sick defendant company—Proceedings of suit cannot be adjourned sine die.

Sunil Mittal Properties of M/s Shree Shyam Packaging Industries v. *M/s LML Ltd.* *556*

— Section 3, 15, 16, 25; Board of Industrial and Financial Reconstruction Regulations, 1987—Regulation 21: Reference received by the Board of directors of Company rejected by BIFR on ground that company did not approach BIFR with clean hands—Held—Once reference is received by BIFR, it is duty bound to determine whether the company has become sick or not, BIFR did not return any such finding either way. Irrespective of the alleged conduct of petitioner, once reference is received by BIFR it has to make enquiry for determining whether company has become sick or not.

M/s. Dwarikadhish Spinners Limited v. *UCO Bank & Ors.* *427*

SPECIFIC RELIEF ACT, 1963—Section 16(c)—Defendant agreed to sell first floor of a property to plaintiff for Rupees 40 lakhs by an agreement to sell dated 20.1.1997—Rupees 5 lakhs paid towards earnest money—Balance to be paid in 15 days—Defendant was required to get Income Tax clearance certificate, before execution of sale deed—Further sum of Rupees 15 lakhs paid to defendant on 20.05.1997—Alleged defendant neither applied for Income Tax clearance certificate nor for necessary permission from Land and Development Officer—Suit filed for specific performance of agreement to sell or in the alternative for recovery of Rupees 40 thousand as damages—Defendant denied having received Rs. 15 lakhs and therefore earnest money made by the plaintiff stood

forfeited.

B.B. Sabharwal & Anr. v. *M/s Sonia Associates*..... *479*

— Section 10, 20—Suit filed for specific performance of Agreement to Sell dated 20.11.1989 executed between plaintiff and defendant—Defendant owner of property—Plaintiff already a lessee in the property since 1986—Defendants acquired citizenship of USA—RBI directed them to dispose of property as policy did not allow foreign nationals of Indian origin to own/hold commercial properties—Also threatened to prosecute the defendants under the provisions of FERA if the demised premises was not sold to an Indian national resident—By agreement dated 20.11.1989 defendants agreed to sell property to plaintiff—A demand draft of Rs. 3 lakhs sent to defendants by plaintiff after being informed of the necessary approval being granted by RBI—Though no approval had been granted by DDA by that time—Defendants rescinded the agreement through letter dated 28.12.1993 by exercising option as given in clauses VI of the agreement on the ground that RBI had granted permission to NRIs for retaining properties in Indian and therefore they did not wish to enforce the agreement - Bank draft was also returned to plaintiff—Suit was filed by plaintiff on 24.03.1994—Inter alia submitted on behalf of the defendant that the suit was barred by limitation—The defendants were pressurized to sell off the property for fear of being prosecuted under FERA—Defendants were forced to sell the properties to plaintiff because there were few prospective buyers who too were disuaded by the plaintiff 's officials from buying the property as they had been spreading stories that the plaintiff is having a permanent lease in his favour—On the other hand, it was submitted on behalf of plaintiff that it was ready and willing to perform the contract and therefore entitled to decree of specific performance—Held, Article 54 of the Limitation Act provides to limitation of three years from the date fixed for

performance or from the date when the plaintiff notice that performance is refused—No date for performance fixed in agreement—In a writ petition filed by plaintiff against the order of Income Tax Appellate Authority, defendant had filed a counter affidavit wherein it was inter alia stated that for the execution of the agreement defendants are obliged to obtain various approvals—In reply to the interim application also defendants had prayed for status quo order till the decision of the Writ petition which was disposed of on 22.2.1993—Thus till disposal of the interim application defendant's consent for continuation of interim order existed—Thus the suit which was filed on 24.03.1994 was within a period of limitation—To prove coercion and fraud there should be clear pleadings the plea their mother was under pressure of FERA to dispose of the property—Compulsion of law cannot amount to coercion—A decree of specific performance cannot be passed merely because the plaintiff has been able to prove "readiness and willingness to perform contract"—Clause 6 of the agreement with other facts showed that the contract between the parties was determinative in nature—According to Section 14(c), determinable contracts cannot be enforced cannot be decree of specific performance inequitable relief—Judicial discretion to grant specific performance is preserved in Section 20—Court not bound to grant decree of specific performance merely because it is lawful to do so—Motive behind litigation needs to be examined—Court also to examine whether it would be just and equitable to grant such relief—For this purpose, conduct of parties and their interest under contract is also to be examined—"Conduct of the parties" and "circumstances" to be considered from the time of agreement till final hearing of the suit to exercise Court's jurisdiction under the said provisions—Examination of fact reveal that if discretion is exercised in favour of plaintiff it would give plaintiff an unfair advantage over defendants—Plaintiff not parted with any money—Plaintiff enjoyed property despite lapse of lease—These circumstances show it was not equitable

to grant relief to the plaintiff under Section 20(2)(c)—Also found that if agreement is enforced defendants will have to pay unearned increase to the DDA which came to be more than the total consideration resulting in hardship to the defendant within the meaning of Section 20(2)(b).

Boots Pharmaceuticals Ltd. v. *Rajinder Mohindra & Anr.* *507*

— Section 14, 34—Declaration of subsistence of employment contract—Plaintiff/Respondent selected as TGT Math treacher by Appellant—Forced to submit letter of resignation after working for 12 years—Suit filed for declaration and mandatory injunction that resignation letter obtained under pressure and coercion—Decree of declaration passed by Civil Court—Mandatory injunction passed directing reinstatment with full back wages and consequential benefits—Appellate Court upheld decision of Civil Court—Hence present second appeal—Held—Plaintiff has made clear averment of harassment—Resignation forcibly obtained on 18.08.1991—Resignation accepted on 19.08.1991 with immediate effect—Resolution accepting resignation also passed on 19.08.1991—Entire process completed within 3 days—Hence conclusion that resignation tendered under coercion—Evident that Plaintiff had no intention of resigning—No perversity in finding of Courts below.

Manager, Shri Sanatan Dharam Saraswati Bal Mandir School & Anr. v. *Shri K.P. Bansal & Ors.* *209*

— Section 16(c), 19(a) and (b), 20—Code of Civil Procedure, 1908—Order XLI Rule 22—Suit for specific performance of agreement to sell filed by Respondent No. 1 and 2 against mother of Respondent No. 3 to 6 and appellants who were subsequent purchasers—Case of Respondent No. 3 to 6 that their mother had already entered into agreement to sell with

appellants and question of entering into agreement to sell with Respondent No. 1 and 2 did not arise—Agreement to sell and documents of Respondent No.1 and 2 are fabricated—Rather Respondent No.1 and 2 had agreed to sell their land to mother of Respondent No.3 to 6—Trial Court decreed the suit—Order assailed in appeal—Plea taken, agreement to sell with appellants was entered into prior to alleged agreement to sell with Respondent No. 1 and 2—By virtue of registered receipt, irrevocable power of attorney and registered sale deed, appellants were full owners of suit land—Per contra, case of Respondent No. 1 and 2 that agreement to sell in favour of appellants not proved in evidence as it was on unstamped paper—Held—Once instrument has been admitted in evidence, such admission should not be questioned subsequently on ground that instrument was not duly stamped—Subsequent agreement to sell can be of no significance in view of prior agreement to sell more so as prior agreement to sell ultimately culminated in execution of duly registered sale deed in favour of appellants—If a party relies upon agreement to sell of a date prior to date of agreement to sell of which specific performance is claimed, relief of specific performance cannot be granted to party whose agreement to sell is of a subsequent date—After entering into agreement to sell vendor was in a position of trust qua purchaser and if vendor thereafter conveys title to a third party, title of such party is subject to agreement of its vendor—Even if appellants had been subsequent transferees (which they are not), no decree for specific performance could have been passed by Trial Court without joining them in conveyance deed—Respondent No. 1 and 2 have paid only Rs. 1,000/- and are not entitled to decree of specific performance on payment of Rs. 59,000/- On balancing equities, there is no justification for exercise of discretionary powers of this Court to grant equitable relief of specific performance—Impugned judgment and decree of Trial Court set aside with cost.

Smt. Phool Kaur & Ors. v. *Sardar Singh & Ors.* *73*

SUIT—Institution—Filed by non-authorised individual—Liable to be dismissed if same not corrected within reasonable time. Plaintiff Society instituted suit in 1983 for possession and perpetual injunction qua suit property—Suit filed through its Secretary—Secretary duly authorised vide resolution dated 14.11.1982—Issues framed on 03.09.2001—Preliminary issue whether suit instituted by duly authorised person—Plaintiff society filed application in 2004 for amendment of plaint—Averred that no resolution dated 14.11.1982, appropriate resolution dated 20.10.1982—No reason given for delay of 21 years—Civil Court dismissed suit—No resolution authorizing Secretary of Plaintiff Society—Hence suit not maintainable—Appellate Court endorsed finding of Civil Court—Hence present second appeal. Technicalities—No perversity in finding—Suit filed in 1983—Specific objection taken in written statement filed in 1983—Amendment application filed after more than two decades—Even new resolution does not pertain to Plaintiff—Categorical averment with reference to resolution by Plaintiff subsequently found to be non-existent—Hence no substantial question of law—Dismissed.

Shri Sanatan Dharam Sabha, New Delhi v. *Sh. Chander Bhan (Since Deceased) through Lrs.* *175*

TRADE MARKS ACT, 1999—Sections 9, 30, 35, 57 & 124 and Copy Right Act, 1957—Plaintiff filed suit along with interlocutory application for restraining defendants from using infringing mark KRISHNA or any other mark which was deceptively and confusingly similar to plaintiff's mark—Plaintiff urged, label mark KRISHNA depicting picture of Lord Krishna standing on lotus flower registered for plaintiff in respect of milk and dairy products falling in class 29—It also obtained copyright registration under Copyright Act and used mark Krishna since 1922 and attained valuable goodwill and reputation with respect to said trademark—Defendant used

similar mark (KRISHNA) thereby infringing registered trademark of plaintiff—As per defendant, it used name "Krishna" preceded by words Parul's Lord Krishna which is qualified mark not resulting in infringement—Moreover, plaintiff could not claim monopoly on use of mark "Krishna" as several registrations used word mark Krishna in respect of various products by different persons—Held: In a case where a registered mark appears with a prefix and the registered mark over which rights are claimed is either a descriptive mark or a common name, the test for requisite distinctiveness is to be applied—Not withstanding, the registration of marks, the courts are entitled to, prima facie examine the validity of such registrations in the light of provisions of Sections 9, 30 & 35 of the Act—Defendant permitted to use label mark with condition that prefix Parul and Lord shall have a font size and prominence similar to KRISHNA.

Bhole Baba Milk Food Industries Limited v. *Parul Food Specialities (P) Limited* *317*

TRANSFER OF PROPERTY ACT, 1882—Section 106 and 116 Code of Civil Procedure, 1908—Section 34—As per lease deed, defendant/lessee agreed to pay increase in House Tax—Rateable value of property increased and NDMC demanded difference of tax—Plaintiff/lessor demanded increased tax from defendant—Suit filed to recover increased tax—Plea of defendant that defendant liable only in case of increase in levies or rates other than rates of house tax and ground rent—What has been increased is reteable value and not the rate of house tax, no liability in respect of house tax can be imposed on it—Since no registered sale deed was executed after lease deed expired by efflux of time, terms and conditions contained in lease deed are not binding on defendant and house tax for period after expiry of agreed terms of lease cannot be recovered from defendant—Held—Agreement by tenant

agreeing to bear increase in house tax of premises taken by him on rent is perfectly legal and binding on parties—There can be no logic behind agreeing to pay increase in amount of house tax as a result of increase in rate of which tax is levied on reteable value and not paying in case increase is due to enhancement of rateable value—What is material to parties is net outgo towards house tax, irrespective of whether it increases/decreases due to revision of rateable value or due to revision of rates—Even on expiry of terms of lease, terms and conditions contained in lease deed continue to bind parties, so long as defendant was holding over tenancy premises—Suit decreed.

Abaskar Construction Pvt. Ltd. v. *Pakistan International Airlines* *447*