INDIAN LAW REPORTS DELHI SERIES 2012

(Containing cases determined by the High Court of Delhi)

VOLUME-1, PART-II

(CONTAINS GENERAL INDEX)

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

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

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

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Controller of Publications
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Tel.: 23817823/9689/3761/3762/3764/3765
Fax.: 23817876

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

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ARBITRATION ACT, 1940 AND ARBITRATION & CONCILIATION ACT, 1996—Applicability—Disputes between the parties culminated into award dated 12.08.96, wherein money was awarded in favour of appellant along with interest from date of award till date of payment or decree, whichever earlier—Both parties understood that the award was governed by the Act of 1940 as the reference was made prior to coming into force of 1996 Act—Appellant filed application under Sec. 14 & 17 of the 1940 Act, in which Hon'ble Singh Judge vide order dated 27.05.2002 held that in view of law prevaliling by way of apex Court judgment, the award enforceable as decree withoutany application as it is 1996 Act that was applicable and since no objections were filed under Sec. 34 of 1996 Act within time, the objections were dismissed—Neither side challenged order dated 27.05.2002, which became final and the appellant filed execution proceedings in which respondent on 12.06.2003 paid the awarded money with interest calculated from date of award till 27.05.2002—Thereafter, the appellant claimedinterest from 27.05.2002 to 12.06.2003, but withdrew the application—Thereafter, the apex court gave a re-thought to the then existing legal position, effect where of was that the award in question was liable to be governed by the 1940 the Act, under which interest was liable to be paid only till expiry of 90 days from award, so respondent under Sec. 151 CPC claimed that interest paid for period beyond 90 days from date of award till 27.05.2002 was excess payment and liable to be refunded—Hon'ble Single Judge allowed the application—Appeal—Held, order dated 27.05.2002 was based on the then prevalent legal position and since the respondent did not challenge the said

order, the way others did not to bring about change in legal position now respondent cannot be allowed to make grievance and reopen the closed litigation—Also held, the date of decree remains the same as date of award but the decree is not enforceable for a period of 90 days in view of Sec.36 of 1996 Act, which is a window given to the judgment debtor to make payment failing which rigours of enforecement would come into play, so interest is liable to be paid till decree is satisfied.

K.R. Builders Pvt. Ltd. v. *DDA* *541*

— Section 34—Limitation—Award dated 20.03.10 aganist Petitioner pronounced and certified copies sent by the Arbitral Tribunal by registered post to Petitioner's corporate office in Delhi, which was the address in the cause title of proceedings before the Tribunal and also in the OMP before the Hon'ble High court—Respondent filed application under Sec. 33(4) of the Act and notice was served on the counsel for Petitioner on 26.04.10, so on 17.05.10 counsel for Petitioner appeared before the Tribunal and claimed that the Petitioner had not received copy of award, but this contention was rejected by the Tribunal on 31.05.10 observing that postal receipts and AD cards were on record—Tribunal passed amended award on 09.09.10 and again sent certified copies to the parties by registered post on 01.10.10—Petitioner's Project Director at Salem wrote letter requesting for formal copy of amended award, in reply where of Secretary to the Tribunal informed having already sent the same, but without prejudice to rights of parties, another was sent and the same was received by the Petitioner on 20.12.10—Petition challenging the award filed on 15.03.11, and as per Petitioner, the objections are within time—Held, the memo of parties before the Arbitral Tribunal as well as the OMP indicated address of the Petitioner as its corporate address in Delhi, where the award and the amended award were sent by registered post by the Tribunal—In the

President and Vice President respectively—During counting it was observed that some ballot papers had been tampered with by erasing the tick mark placed against the names of plaintiffs and putting tick mark against the names of Defendants No. 4&5 on ballot papers—Plaintiffs claimed that these tampered ballots be read in their favour—Defendant No.1 proceeded with declaring defendants No. 4&5 as President and Vice President—Plaintiffs contend that the rejected ballots be counted in their name—Held, prima facie it appears that the disputed ballot papers have been tampered with, but going by the claim of Plaintiffs, since these votes had been cast in presence of Plaintiffs, Election officer had no option but to reject the same and therefore, Plaintiffis connot claim themselves to be winning candidates—Since the dispute between the parties is only with respect to these ballots, which are invalid, vote having been cast in the presence of plaintiffs, there is no ground to order re-election at this stage and no case for interim injunction made out.

Niranjan Lal Gupta & Anr. v. *Gurmeet Singh Baweja & Ors.* *757*

— Order XXII Rule 10—Suit filed by the plaintiff M/s DLF Universal Ltd. aganist five defendants including respondent no. 1 Delhi Wakf Board, stating inter alia that the piece of land measuring 1410 Sq. Yards forming part of the land of the petitioner had been encroached by the respondents—Written statement filed by the respondents—Respondent no.1 contended therein that it already had a decree dated 29.01.1983 in its favour and since the decree that remained unchalllenged the land now was in his share—Applicant herein namely Lal Chand Public Charitable Trust filed an application under Order XXII Rule 10 in 1996 while the suit had been filed in 1982 stating therein that after a settlement deed dated 1989, the MCD became owner of the said land—Submitted that MCD is not contesting this suit as in another litigation

between the parties it had allowed the case to be dismissed in default—If case is not contested it would suffer the same fate—It would result in jeopardizing its interest as it was lessee in respect of the said land—Held, Order XXII Rule 10 postulates that suit can be continued by the person on whom the petitioners interest has devolved which in this case is MCD and not the Applicant who had been a lessee since 1963 in the said land and his status not changed since then.

Lal Chand Public Charitable Trust v. *Delhi Wakf Board & Ors.* *799*

— Order VI Rule 17—Eviction petition by respondent seeking eviction of petitioner from ground floor of premises bearing no. 138-A, Golf Links, New Delhi, on the ground of bonafide requirement for residence of its Director Amit Deep Kohli—Leave to defend filed on 23.07.10—Application seeking amendment of the leave to defend filed on 09.05.2011—Amit Deep Kohli is a Director in other holding companies of the petitioner—Other properties available with Company for residence—Tenant is an old lady staying alone—Petitioner submitted, Landlord was a construction company carrying on construction activity—Other properties were commercial flats not part of Delhi—Application seeking leave to defend dismissed—Petition—Held—The facts which were sought to be incorporated by amendment i.e. that the landlord Company was a part of a huge Real Estate Group of Companies having several properties in their name were all facts known to the tenant—These facts were pre-existing i.e. existing at the time when the application for leave to defend was filed; if such an application is permitted the whole purpose and intent of the provisions of Section 25 B (4) would be defeated as the specifically stipulated period for filing an application for leave to defend within 15 days would be given a go by and by permitting the amendment there would be an automatic extension of time for filing the application for leave to

of formal order of sanction not made available—Earlier, on more that one occasion sanction to prosecute not granted—Grant of sanction challenged as arbitrary and malafide and amounts to review of earlier decisions—Held—Court at Delhi does not have territorial jurisdiction to entertain the petition—Challenge could be made before the Special Judge—Sanction order contains detailed for according the sanction—The sanction could not have issued by anyone below the Minister, the matter never gone in the past to the Minister—Case does not fall in the category of extreme and rare nor there is any ex-facie illegality in the sanction accorded—Petition dismissed with costs.

— Art. 226 Writ—Tender—interpretation of commercial contract—Petitioner challenged the order dated 04.10.2010 scrapping/cancelling tender no.6724/T-138/08-09/SPL/24, as petitioner was L-1 of respondent no.1, vide writ petition no. 8252/2010, Respondent no.1, took the plea that he exercised its right as owner under Article 28.1 of the Tender document—Writ petition withdrawn with liberty to take recourse to legal remedy in accordance with law—Respondent no.1 with respondent no.2 and respondent No. 3 floated fresh tender no. 6724/T-183/10-11/SKG/28 with amendment pertaining to clause 8.1.1.1. dealing with past experience of the bidder in executing a similar work—Challenged the amendement in clause 8.1.1.1 plea of malice, arbitrariness, unresonablenes and lack of fairness—Held—Respondent no.1 withheld completion report received from Dy. Chief Engineer-IV Mus Car Nicobar island while seeking independent input from respondent no.2—Raised certains queries followed by series of letters—integrity of the entire process was suspect—Decision of respondent no.1 dated 04.10.2010 fraught with malice in law, contrary to the principles of fairness, equity

and good conscience—Amended clause 8.1.1.1 bad in law.

— Article 227—Securities and Exchange Board of India Act, 1992—Sections 24 (1) and 27 Respondant filed a complaint before Ld. CMM for the offence under Section 24(1) and 27 of the Act against M/s. Master Green Forest Ltd—Allegations that accused company was operating collective investment scheme—Raised huge amount from General Public in contravention of the Act and Regulation—There were allegations against the promoters/Directions and the persons responsible for the day to day affairs of the company, who actively connived with each other in the commission of offence—Only company was arrayed as an accused—ld. ACMM vide its order dated 15th December 2003 observed—Perusal of the complaint discloses commission of offence Punishable under Section 24 (1) and 27 of the Act and accordingly, all the accused be summoned for 21 February 2004—Petitioners filed the present petition seeking quashing of the proceedings pending against them—Petitioners contended—Petitioners were not arrayed as accused—No summons were issued to them vide order dated 15.12.2003—In the garb of filing fresh addresses of accused, complainant filed the list of the directors—Trial Court issued the summons without application of mind—As no summons were issued at the first instance, petitioner should not have been summoned as directors except as provided under Section 319 Cr.P.C—Respondent contended that no case for quashing is made out—Ingredients in the complaint discloses commission of cognizable offence against petitioners also—Held—Indubitably, the Court takes cognizance of the offence and not the offenders—No doubt in the memo of parties filed along with the complaint only the company was made an accused however, perusal of the order dated 15th December, 2003

summoning the accused shows that the Learned ACMM has used the word "accordingly all the accused be summoned for 21st February, 2004" the use of these words show that the Learned ACMM was conscious of the fact that besides the accused company i.e M/s. Master Green Forest Limited there were other accused also—Further the complaint clearly stated that the Directors and Promoters of the company who were the persons in-charge and responsible for the day-to-day affairs of the Company and all of them actively connived with each other for the commission of the offence—Thus, the role of promoters and Directors was specifically mentioned in the complaint—It was further mentioned that accused company and its promoters and Director in-charge and responstble to the accused company for the conduct of its business were liable for the violations of the accused company as provided under Section 27 of the SEBI Act—Thereafter opportunities were giving to Respondent to furnish the details so that process could be issued aganist the accused—Thus, it is not as if all of a sudden vide the order dated 13th October, 2006 the accused were summoned. In view of the facts of the present case the contention of the Petitioner that the summons having not been issued in the first instance by the Learned magistrate, the Learned Additional Sessions Judge could not have issued the summons unless the stage under Section 319 Cr.P.C. was arrived at, deserves to be rejected.

Daya Ram Verma & Ors. v. *Securities & Exchange Board of India* *527*

— Article 227—Securities and Exchange Board of India Act, 1992—Sections 24 (1) and 27—Respondent filed a coomplaint before Ld. CMM for the offence under Sections 24(1) and 27 of the Act against M/s Master Green Forest Ltd—Allegations that accused company was operating collective investment scheme—Raised huge amount from General Public in contravention of Act and Regulations—There were

allegations against the promoters/Directions and the persons responsible for the day to day affairs of the company, who actively connived with each other in the commission of offence—Only company was arrayed as an accused—Ld. ACMM vide its order dated 15th December 2003 observed—Perusal of the complaint discloses commission of offence punishable under Section 24(1) and 27 of the Act and accordingly, all the accused be summoned for 21 February 2004—Petitioners filed the present petition seeking quashing of the proceedings pending against them—Petitioners Contended—No specific role is assigned to them in the complaint—Merely stating that all the Directors and promoters connived with each other and were in-charge and responsible for the day-to day functioning of the company cannot fasten the vicarious liability on the petitioners—Respondent contended that no case for quashing is made out—Ingredients in the comlaint disclose commission of cognizable offence—Held—Complaint clearly stated that the promoters and Directors of the Company in-charge and responsible for the conduct of its affairs have connived with each other and have committed the offence—In the present case the offence alleged is of running a collective investment scheme contrary to the provisions of SEBI Act and Regulations—No doubt Section 27 of SEBI Act makes responsible all other Directors of the company who are responsible and in-charge of the day-to day affairs of the company, however in a case of conspiracy number of people can be involved and this is the allegation of the Respondent in the complaint. Thus, I find no merit in the contention that even on the facts of the present case no case for proceeding aganist the Petitioners are made out.

Daya Ram Verma & Ors. v. *Securities & Exchange Board of India* *527*

— Article 226—Writ —Narcotic Drugs and Psychotropic Substance Act, 1985 (NDPS Act)—Section 68(H) (I) Section

respondent No. 1 to issue directions as sought for—Held—The definition of the expression 'enterprise' as used in the Competition Act read with definition of "service" thereof, clearly shows that the respondent no. 2 is an enterprise which is covered by the said provisions—The allegation against respondent no. 2 is that respondent no. 2, by virtue of its agreement with the petitioners, was seeking to control the provision of services which was causing adverse effect on competition within India, in as much as, the chess players registered with respondent no. 2 were not free to form another association or to organize tournaments and participate therein, without facing the consequence of losing their registration with respondent no. 2 which is the nationally recognized sports federation for the sports of chess—The power of this Court under Article 226 of the Constitution of India extends to the issuance of appropriate directions, orders or writs for enforcement of any of the rights conferred by Part III of the Constitution or for any other purpose—Since in the present case the petitoner has brought to this Court's notice the aforesaid state of affairs in relation to respondent no. 2 the said aspects need thorough investigation under the provisions of the Competition Act by the Competition Commission—There could be breach of the petitioners fundamental right to freedom, resulting from the policies and practices of respondent No. 2, as guranteed under Article 19(1)(c) and 19(1)(g) of the Constitution of India—Directions issued to Competition Commission to enquire into the alleged contravention of the Provisions of Section of 3 and Section 4 by respondent no. 2 by its aforesaid constitutional provisions and conduct under Section 26 of the Competition Commission Act, 2002.

Hemant Sharma & Ors. v. *Union of India and Ors.* *620*

CUSTOMS ACT, 1962—Section 120—Respondents were

apprehended on their arrival IGI Airport on suspicion of carrying some contraband substance—Notice under Section 50 of The Act and under Section 120 of Customs Act served upon them giving them an option to get themselves and their baggage searched before Gazetted Officer of Customs or a Magistrate—Respondents did not know either Hindi or English language, thus an official from KAM Airlines who knew language of Respondents, explained contents of notices to them—On Knowing contents, Respondents opted search by Custom Officer—On search of baggage, Heroin was found concealed in bottom portion of bag in cotton cloth belt—After fulfilling requirements of Act, Respondents were charge sheeted for offences punishable under Section 21, 23 & 28 of Act—On conclusion of trial, they were acquitted after finding lacunas in prosecution case and procedural safeguards contained in Section 50 of Act were not adhered to—Appellant challenged acquittal in appeal—It was urged on behalf of appellant that notice under Section 50 of Act was not required to be served upon Respondents as recovery was effected from hand bag and not from his person—Held:- Provisions of Section 50 of NDPS Act, are mandatory and non compliance renders recovery of illicit article suspect—Thus, non compliance of these provisions is viewed seriously and adverse inference is drawn against prosecution, particulary, when accused has denied that he has served any such notice and it has created doubt with regard to truthfulness of prosecution witnesses.

Customs v. *Mohammad Bagour* *711*

DELHI MUNICIPAL CORPORATION ACT, 1957—Section 345 A—Premises bearing No. 147-B, Gujjar Dairy, Gautam Nagar, New Delhi were registered under the National Capital Territory of Delhi (Incredible India) Bed & Breakfast Establishment Registration and Regulation Act, 2007—Respondent served notice upon the petitioner that property is

LAND ACQUISITION ACT, 1894—Sections 4, 6 & 48—Land measuring 80 bighas 7 biswas situated in village Rangpuri @ Malikpur Kohi (Vasant kunj) Tehsil Mehrauli notified under section 4 and 6 of the Act vide notification dated 23.01.1965 and 26.12.1965 respectively followed by an award passed in the year 1981—Petitioner alleged that possession of aforesaid land was not taken by the Government—Land purcahse by petitioner No. 3 Shri Ram Saroop Kuthuria as karta of HUF vide sale deed dated 18th April 1967 executed by Smt. Saroop devi, Smt. Sarjo and Smt. Bartho—Petitioner sought release of land under Section 48—Petitioner claimed to be running a school under the name and style of Kuthuria Public School since 1988 on the said land—Representation moved on 17.08.1995 01.01.1996 and 11.11.1996—No response to the representations—Petition seeking direction to direct the respondents to decide the representations and not to demolish any part of building—Respondent contended—Possession of entire land taken except 9 Biswas where some built up structure was found—Petitioner No.3 purchased the land after notification under Section 4 of Act—Raised illegal construction during pendency of earlier writ petition without any sanction from the competent Authority—Representations were placed before De-notification committee—Rejected—Petitioners have no right—Held—Since De-notification Guidelines issued by the Government do not permit de-notification of land in question, which the petitioners purchased after issuance of notification under Section 4 of Land Acquisition Act, no ground exist to direct the Government either to de-notify this land or to re-consider the representations of the petitioners—The writ petition dismissed—The interim orders passed in favour of the petitioners during pendency of the writ petition are vacated.

Kathuria Public School v. *Union of India* *652*

LIMITATION ACT, 1963—Section 5—Writ petition dismissed in default on 03/05/11—Restoration applicant under Sec. 5 of the Act—Application contended that his counsel expired in June, 2003 and although son of the counsel had contacted the petitioner, seeking instructions, but due to illness, the petitioner residing in Punjab could not come to Delhi and under these circumstances when the matter came up for hearing on 03/05/2011, neither the petitioner nor his counsel could appear which led to dismissal of writ petition in default—Despite opportunity the respondents did not file reply—Held, the applicant has been able to make out sufficient cause, so both the applications allowed and writ petition restored.

EX. SI Lakhwinder Singh v. *Union of India & Ors.* *766*

— Section 5—Suit for declaration and permanent injunction filed for restraining the appellant from abolishing the suit property and interfering in the peaceful possession—Trial Court vide judgment dated 01.05.2010 decreed the suit—Appellant filed appeal after a delay of 78 days with application under Section 5 of limitation Act—Earlier counsel changed—New counsel requested earlier counsel to hand over the record—Provided only 26.06.10—Inspection report dated 07.01.2005 found missing—Certified copy made available on 28.07.2010 Held—The words 'sufficient cause as appearing in Section 5 of the Limitation Act have to be construed liberally so as to advance substantial justice to the parties; a litigant should not be shut out at the threshold and be deprived of the opportunity to be heard on merits; dealy may be condoned provided that the applicant is able to furnish a sufficiently justifiable explanation for his delay— No hard and fast rule can be laid down—Each case has to be decided on its factual matrix—Unless there is lack of bona fides or a total inaction or negligence on the part of the litigant, the protection of Section 5 should not be

deprived to a party, mistake of a counsel may also amount to a sufficient cause for condonation of delay; it is always a question of fact—In the instant case, keeping in view the explanation furnished by the learned counsel for the petitoner the petitioner should not be declined a hearing on merits for the fault which at best is attributable to his counsel—Order set-aside.

New Okhla Industrial Development Authority v. *KM Paramjit & Anr.* *617*

MOTOR VEHICLE ACT, 1988—Section 96 (2)(b)(ii)—Driving licence of offending driver was valid upto 23.01.1988 and he took the same from Court on 31.07.1989 for renewal, but in the intervening period, the accident in question occurred on 16.07.1988—Tribunal exonerated the insurance company on the ground that at the time of accident the offending driver did not hold a valid driving licence—Appeal—Held, insurance company connot be absolved of its liability to pay in the absence of evidence on record to show that the offending driver was disqualified from holding an effective driving licence.

Ami Chand & Anr. v. *Jai Prakash and Ors.* *460*

— Appeal impugns order dated 24.03.2011 of the Motor Accidents Claims Tribunal (MACT)—Appellant denied liability as driver had no valid licenese at the time of accident and this constituted a breach of policy condition as proved by the insurance company—The compensation awarded under the non-pecuniary head towards inconvenience, hardship, discomfort frustration, mental stress and other compensation, towards loss of amenities of life are challenged as being one and the same. Held—The award of compensation under the different heads by the Tribunal was fair in light of the injuries

suffered by the victim and the Court found no reason to interfere with award.

Bajaj Allianz General Insurance Co. Ltd. v. *Somveer Singh & Ors.* *754*

— Appellant sought enhancement of compensation in respect of injuries suffered by him in a motor accident which led to amputation—Appellant claimed that due to his injuries his chances of promotion have been hampered and his compensation was barely enough to cover his medical expenses. Held—In assessing compensation during accident cases, a reasonable and compassionate view must be taken and the court must be liberal in determining quantum—Compensation increased and accordingly appeal allowed.

Jaffar Abbas v. *Mohan & Ors.* *789*

— Appellant seeks enhancement of compensation in respect of deceased's re-employment and pension—The Tribunal had determined that only the handicapped Appellant No. 3 was dependent and not the husband and the son—Respondent No. 3 claimed that income tax was incorrectly taken and thus the compensation would differ. Held—Since the dependent by deceased on herself was her handicapped daughter, the amount spent on personal expenses would be less 1/3rd income instead of 5% was liable to be deducted—Compensation calculated accordingly—Further, income tax also deducted—Award calculated. Amount accordingly.

Panna Lal & Ors. v. *Anjit Kumar Jha & Ors.* *805*

NARCOTICS DRUGS AND PSYCHOTROPIC SUBSTANCE ACT, 1985—Section 21, 22, 23 & 28—Appellant challenged judgment acquitting Respondent for offences punishable under Section 21, 22, 23 & 28 of Act—As per prosecution,

Respondent was apprehended by Air Custom officer at IGI Airport, New Delhi, on suspicion of carrying Heroin concealed in 70-75 capsules inside his body—On permission from learned Duty Magistrate, Respondent was taken in RML Hospital where he ejected 77 capsules—After complying with the provisions of the Act, Respondent was arrested and on conclusion of investigations, he was charge sheeted—Learned Special Judge found various discrepancies in prosecution case and thus acquitted Respondent—Acquittal challenged urging, no discrepancy in link evidence which was duly proved by prosecution beyond reasonable doubt—Held:- A criminal trial is a quest for truth—The prosecution is required to prove its case beyond reasonable doubt and not by way of perfect proof free from all blemishes.

— Section 21, 23, 28, 50, 57, 67—Customs Act, 1962—Section 120—Respondents were apprehended on their arrival IGI Airport on suspicion of carrying some contraband substance—Notice under Section 50 of The Act and under Section 120 of Customs Act served upon them giving them an option to get themselves and their baggage searched before Gazetted Officer of Customs or a Magistrate—Respondents did not know either Hindi or English language, thus an official from KAM Airlines who knew language of Respondents, explained contents of notices to them—On Knowing contents, Respondents opted search by Custom Officer—On search of baggage, Heroin was found concealed in bottom portion of bag in cotton cloth belt—After fulfilling requirements of Act, Respondents were charge sheeted for offences punishable under Section 21, 23 & 28 of Act—On conclusion of trial, they were acquitted after finding lacunas in prosecution case and procedural safeguards contained in Section 50 of Act were not adhered to—Appellant challenged acquittal in appeal—It was urged on behalf of appellant that notice under Section

50 of Act was not required to be served upon Respondents as recovery was effected from hand bag and not from his person—Held:- Provisions of Section 50 of NDPS Act, are mandatory and non compliance renders recovery of illicit article suspect—Thus, non compliance of these provisions is viewed seriously and adverse inference is drawn against prosecution, particulary, when accused has denied that he has served any such notice and it has created doubt with regard to truthfulness of prosecution witnesses.

— Section 68(H) (I) Section 68 A(2) (d)—Section 68 B(g)—Section 68 j—Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988 (PITNDPS Act)—Section 3(1) and 10(1)—Detention order dated 26.07.1989 issued aganist Mohd. Azad @ Avid Parvez, brother of the petitioner—Detained w.e.f. 10.07.1991—Declaration u/s. 10(1) justifying detention beyond initial three months issued—Detention order dated 26.07.1989—challenged before Calcutta High Court—Unsuccessful—Special Leave Petition before the Supreme Court dismissed—Challenge to order u/s.10(1) successful—Detention beyond initial three months vitiated—show cause notice u/s. 68 H (1) NDPS Act issued to the petitioner—reply submitted—Daclaration issued and properties forfeited to the Central Government vide order dated 16.10.1997—Appeal before the Appellant Authority—Dimissed vide order dated 07.06.1999—Order challenged through the present writ petition under Article 226—Plea that the properties were acquired by his father for him not taken before the Competent Authority nor before the Appellate Authority—No document filed either before the Competent Authority nor before the Appellate Authority —Held—Plea after thought—Cannot be raised for the first time in the Writ petition—The burden of proving that the property was not illegally acquired on the person affected—The consistent findings do not call

of a sudden vide the order dated 13th October, 2006 the accused were summoned. In view of the facts of the present case the contention of the Petitioner that the summons having not been issued in the first instance by the Learned magistrate, the Learned Additional Sessions Judge could not have issued the summons unless the stage under Section 319 Cr.P.C. was arrived at, deserves to be rejected.

Daya Ram Verma & Ors. v. *Securities & Exchange Board of India* *527*

— Sections 24 (1) and 27—Respondent filed a coomplaint before Ld. CMM for the offence under Sections 24(1) and 27 of the Act against M/s Master Green Forest Ltd—Allegations that accused company was operating collective investment scheme—Raised huge amount from General Public in contravention of Act and Regulations—There were allegations against the promoters/Directions and the persons responsible for the day to day affairs of the company, who actively connived with each other in the commission of offence—Only company was arrayed as an accused—Ld. ACMM vide its order dated 15th December 2003 observed—Perusal of the complaint discloses commission of offence punishable under Section 24(1) and 27 of the Act and accordingly, all the accused be summoned for 21 February 2004—Petitioners filed the present petition seeking quashing of the proceedings pending against them—Petitioners Contended—No specific role is assigned to them in the complaint—Merely stating that all the Directors and promoters connived with each other and were in-charge and responsible for the day-to day functioning of the company cannot fasten the vicarious liability on the petitioners—Respondent contended that no case for quashing is made out—Ingredients in the comlaint disclose commission of cognizable offence—Held—Complaint clearly stated that the promoters and Directors of the Company in-charge and

responsible for the conduct of its affairs have connived with each other and have committed the offence—In the present case the offence alleged is of running a collective investment scheme contrary to the provisions of SEBI Act and Regulations—No doubt Section 27 of SEBI Act makes responsible all other Directors of the company who are responsible and in-charge of the day-to day affairs of the company, however in a case of conspiracy number of people can be involved and this is the allegation of the Respondent in the complaint. Thus, I find no merit in the contention that even on the facts of the present case no case for proceeding aganist the Petitioners are made out.

Daya Ram Verma & Ors. v. *Securities & Exchange Board of India* *527*

ILR (2012) I DELHI 453
W.P. (C)

RAJINDER RAI **....PETITIONER**

VERSUS

MCD AND ORS. **....RESPONDENTS**

(HIMA KOHLI, J.)

W.P. (C) NO. : 7407/2011 & C.M. NO. : 16794/2011 **DATE OF DECISION: 10.10.2011**

Constitution of India, 1950—Article 226—Delhi Municipal Corporation Act, 1957—Section 345 A—Premises bearing No. 147-B, Gujjar Dairy, Gautam Nagar, New Delhi were registered under the National Capital Territory of Delhi (Incredible India) Bed & Breakfast Establishment Registration and Regulation Act, 2007—Respondent served notice upon the petitioner that property is being used for commerical purpose in violation of sanctioned use—Called upon to stop the misuse otherwise it would be sealed—Petition challenged the notice—Respondent contends—Premises visited by Monitoring Committee appointed by Supreme Court of India on 14.09.2011 and directed MCD to seal the subject premises—Held—Any Action on the part of respondent/MCD to seal subject premises without the petitioner being afforded a personal hearing, would amount to violation of principles of natural justice, praticularly when the settled law is that rules of natural justice must be read into Section 345-A of the DMC Act—It is clear that neither has the petitioner been heard on the issue of misuse of premises, subject matter of the notice dated 18.09.2011 issued by the respondent/MCD under Section 345-A of the DMC Act, nor has he been afforded

an opportunity to submit any representation, much less be heard on the issue of ownership of land on which the built-up structure stands, which was the subject matter of the noting dated 03.10.20111, made by a member of the monitoring Committee.

In the given facts and circumstances, it cannot be denied that any action on the part of the respondent/MCD to seal the subject premises without the petitioner being afforded a personal hearing, would amount to violation of principles of natural justice, particularly when the settled law is that rules of natural justice must be read into Section 345-A of the DMC Act, as observed in the case of **Praveen Ahuja vs. MCD & Ors.** in W.P.(C) 2816/2011 decided on 05.07.2011 and **Ahuja Property Developers (P) Ltd. Vs. MCD** reported as 42(1990)DLT 474 (DB), a decision which was followed in the case of **Shrimati Shamim Bano vs. MCD** reported as 2007 VIII AD (Delhi) 304. **(Para 10)**

In the present case, it is clear that neither has the petitioner been heard on the issue of misuse of premises, subject matter of the notice dated 18.9.2011 issued by the respondent/MCD under Section 345-A of the DMC Act, nor has he been afforded an opportunity to submit any representation, much less heard on the issue of ownership of the land on which the built-up structure stands, subject matter of the noting dated 3.10.2011, made by a member of the Monitoring Committee. **(Para 11)**

Important Issue Involved: Rules of Natural Justice must be complied for taking action under Section 345-A of DMC Act, 1957.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Ravinder Sethi, Sr Advocate with Mr. Sumit Bansal and Mr. Gaurav Sarin, Advocates.

FOR THE RESPONDENTS : Mr. Ajay Arora, Advocate with Mr. Kapil Dutta, Advocate.

CASES REFERRED TO:

1. *Praveen Ahuja* vs. *MCD & Ors.* in W.P.(C) 2816/2011 decided on 05.07.2011.
2. *Rajinder Rai* vs. *MCD & Ors.* W.P.(C) 7126/2009.
3. *Shrimati Shamim Bano* vs. *MCD* reported as 2007 VIII AD (Delhi) 304.
4. *Ahuja Property Developers (P) Ltd.* vs. *MCD* reported as 42(1990)DLT 474 (DB).

RESULT: The petition disposed of alongwith the pending application.

HIMA KOHLI, J. (Oral)

1. The present petition is filed by the petitioner praying inter alia for directions to the respondent/MCD not to take any coercive action in respect of premises bearing No.147-B, Gujjar Dairy, Gautam Nagar, New Delhi.

2. Learned Senior Advocate appearing for the petitioner states that the aforesaid premises were purchased by the petitioner by virtue of a sale deed dated 18.08.2008 (Annexure P-1). Prior to the purchase of the property by the petitioner, it was being used for commercial purposes and was sealed in the year 2007 in terms of the directions issued by the Monitoring Committee appointed by the Supreme Court of India. Subsequently, the predecessor-in-interest of the petitioner submitted an undertaking that the subject premises would be used only for residential purposes, on the basis of which, the premises was de-sealed on 11.09.2007 and was subsequently purchased by the petitioner in August 2008.

3. It is the contention of the petitioner that the said premises is being used for residential purposes and that he has got the premises registered under the National Capital Territory of Delhi (Incredible India) Bed & Breakfast Establishment Registration and Regulation Act, 2007 (hereinafter referred to as **'the Act'**). He further states that out of the built-up structure comprising of a basement, ground floor, first floor, second floor and third floor, whereon 12 rooms have been constructed,

only five rooms have been registered under the Act. The said five rooms include two rooms on the ground floor and three rooms on the first floor. In support of the submission that five rooms are registered under the aforesaid scheme, the attention of this Court is drawn to the Certificate of Registration at page 45, which shows that the same is valid w.e.f. 12.10.2009 to 11.10.2012. It is further stated that the remaining rooms are being used only for private residential purposes.

4. It is further submitted that recently, the petitioner was served with a notice dated 18.09.2011 issued by the respondent/MCD under Section 345-A of the Delhi Municipal Corporation Act, 1957 informing him that it had been found that the entire property comprising of ground floor, first floor, second floor and third floor was being put to use for commercial purposes, in violation of the sanctioned use of the premises. By virtue of the aforesaid notice, the petitioner was called upon to stop the misuse and bring the premises within the permitted use, failing which he was warned that the premises would be sealed.

5. Learned Senior Advocate appearing for the petitioner states that immediately upon receipt of the aforesaid notice, the petitioner submitted to the respondent/MCD, a reply dated 19.09.2011 (Annexure P-9), followed by a reminder dated 30.09.2011 (Annexure P-10), but no response whatsoever has been received from the respondent/MCD till date. Instead, the petitioner has been threatened with the sealing action.

6. Counsel for the respondent/MCD, who appears on advance copy, denies the aforesaid submissions made on behalf of the petitioner and asserts that the subject premises was got inspected by the officers of the respondent/MCD on 15.09.2011 and in the course of the said inspection, it was found that the entire premises including the basement was being illegally used to run a guest house for commercial purposes, which is contrary even to the Registration Certificate issued by the Government of National Capital Territory of Delhi under the Act. He further states that recently, the Monitoring Committee appointed by the Supreme Court of India inspected the subject premises on 14.9.2011 along with four other premises situated in the same area, i.e., Gujjar Dairy, Gautam Nagar and directed the officers of the respondent/MCD to seal the subject premises, which was de-sealed after the undertaking given by the predecessor-in-interest of the petitioner. He hands over the file of the Department containing the noting dated 03.10.2010 signed by a member of the

Monitoring Committee appointed by the Supreme Court, wherein directions have been issued to the respondent/MCD to re-seal/seal the subject premises as also four other premises in the same area on the ground that they have been found to exist on government land, which has already been acquired.

7. At this stage, learned Senior Advocate states that the petitioner is completely unaware of the orders passed by the Monitoring Committee and the entire inspection and the ensuing proceedings have taken place behind his back and that no opportunity has been afforded to the petitioner to place his stand before the Monitoring Committee before such an extreme order of sealing has been directed against the subject premises. It is further asserted on behalf of the petitioner that the built-up structure exists on land which is unacquired private land, which fact was confirmed by the DDA in a writ petition preferred earlier by the petitioner, registered as W.P.(C) 7126/2009 entitled **Rajinder Rai vs. MCD & Ors.** wherein an order dated 22.11.2010 was passed recording DDA's confirmation of the said fact in para 9 thereof. Reliance is also placed on the order dated 28.02.2011 passed by the Deputy Commissioner, South Zone, wherein the proceedings of W.P.(C) 7126/2009 have been taken note of. It is stated that the petitioner must be afforded an opportunity to place all these facts before the Committee for its consideration and having been confronted with the aforesaid turn of events only in the course of the present proceedings, counsel for the petitioner at least be permitted to peruse the noting file of the respondent/MCD to enable the petitioner to make a representation to the Monitoring Committee before implementation of the sealing orders passed by the said Committee against the subject premises.

8. What emerges from the above is that the reply dated 19.9.2011 filed by the petitioner to the notice to show cause issued by the respondent/MCD under Section 345-A of the Delhi Municipal Corporation Act, 1957, seeking a personal hearing, has admittedly yet to be decided upon by the respondent/MCD, one way or the other. Furthermore, the inspection conducted by the Monitoring Committee on 14.9.2011 was prior to the issuance of the show cause notice on 18.09.2011 and as per the noting dated 03.10.2011 made by a member of the Monitoring Committee, the direction for re-sealing/sealing of the premises was issued to the respondent/MCD as the premises of the petitioner was found to be on land acquired by the Government, and not for any misuse found on the

premises, which is the ground taken in the show cause notice dated 18.9.2011. It is to be noted that even as regards the issue of ownership of the subject land, the petitioner has admittedly not been heard either by the respondent/MCD or by the Monitoring Committee and the order of sealing passed by the Committee on the ground that the land underneath the built-up structure is government land, has come to the knowledge of the petitioner only in the course of the present proceedings.

9. It is settled law that before any coercive steps are initiated by a civic authority or any other government authority against a party, such party is entitled to make a representation and to be heard by the said authority before a decision is taken in that regard.

10. In the given facts and circumstances, it cannot be denied that any action on the part of the respondent/MCD to seal the subject premises without the petitioner being afforded a personal hearing, would amount to violation of principles of natural justice, particularly when the settled law is that rules of natural justice must be read into Section 345-A of the DMC Act, as observed in the case of **Praveen Ahuja vs. MCD & Ors.** in W.P.(C) 2816/2011 decided on 05.07.2011 and **Ahuja Property Developers (P) Ltd. Vs. MCD** reported as 42(1990)DLT 474 (DB), a decision which was followed in the case of **Shrimati Shamim Bano vs. MCD** reported as 2007 VIII AD (Delhi) 304.

11. In the present case, it is clear that neither has the petitioner been heard on the issue of misuse of premises, subject matter of the notice dated 18.9.2011 issued by the respondent/MCD under Section 345-A of the DMC Act, nor has he been afforded an opportunity to submit any representation, much less heard on the issue of ownership of the land on which the built-up structure stands, subject matter of the noting dated 3.10.2011, made by a member of the Monitoring Committee.

12. In view of the aforesaid facts and circumstances, the present petition is disposed of on the following lines: -

(i) The respondent/MCD shall give an opportunity for inspection of the Departmental file containing the noting dated 03.10.2011, by a member of the Monitoring Committee, to the counsel for the petitioner today itself.

(ii) The petitioner shall be entitled to make a further representation within one week, to the respondent/MCD and place on record all the relevant facts with regard to

the ownership of the subject premises, alongwith the relevant documents/orders, if any, relied upon by him, in the light of the observations made in the noting dated 03.10.2011.

(iii) The aforesaid representation shall be immediately processed by the respondent/MCD and forwarded to the Monitoring Committee for its consideration.

(iv) As counsel for the respondent/MCD states that now the Monitoring Committee is seized of the matter with regard to the re-sealing/sealing of the subject premises, it shall also place before the said Committee the notice to show cause dated 18.09.2011 issued by the respondent/MCD under Section 345-A of the Act, along with the representations dated 19.9.2011 and 30.9.2011 received earlier from the petitioner with regard to the alleged misuse of the premises, alongwith the subsequent representation to be made by the petitioner within one week as regards the ownership of the land on which the building is situated, for appropriate orders to be passed by the Monitoring Committee, after granting a hearing to the petitioner.

(v) The decision taken on the representation made by the petitioner shall be duly intimated to him in writing.

13. It is directed that till the representation already submitted by the petitioner (Annexure P-9) and the one to be submitted by the petitioner within one week, as mentioned hereinabove, are considered after a hearing is granted to the petitioner and an order is conveyed in writing to the petitioner thereafter, the respondent/MCD shall not take any coercive steps by way of sealing action against the subject premises. Needless to state that the observations made hereinabove shall not influence decision to be taken by the Monitoring Committee which shall proceed to deal with the representation of the petitioner as per law.

The petition is disposed of alongwith the pending application.

DASTI to parties under the signatures of the Court Master.

ILR (2012) I DELHI 460
FAO

AMI CHAND & ANR. ....APPELLANTS

VERSUS

JAI PRAKASH AND ORS. ....RESPONDENTS

(REVA KHETRAPAL, J.)

FAO NO. : 488/1999 DATE OF DECISION: 12.10.2011

Motor Vehicle Act, 1988—Section 96 (2)(b)(ii)—Driving licence of offending driver was valid upto 23.01.1988 and he took the same from Court on 31.07.1989 for renewal, but in the intervening period, the accident in question occurred on 16.07.1988—Tribunal exonerated the insurance company on the ground that at the time of accident the offending driver did not hold a valid driving licence—Appeal—Held, insurance company connot be absolved of its liability to pay in the absence of evidence on record to show that the offending driver was disqualified from holding an effective driving licence.

Tested on the aforesaid anvil, in my view, the Insurance Company cannot be absolved of its liability in the absence of cogent evidence on the record to show that the driver of the vehicle was disqualified from holding an effective driving licence, for, the insurance policy Ex.RW2/A clearly stipulates that any person who is driving on the insured's order or with his permission would be included in the classes of persons entitled to drive the vehicle in question provided that he holds or had held and has not been disqualified from holding an effective driving licence as per the Motor Vehicles Act and the rules framed thereunder. In such circumstances, to my mind, clearly in the present case, it cannot be said that the insured had breached the conditions of the insurance

policy as the person driving the vehicle had held a driving licence and it has not been established on record that he had been disqualified from holding an effective driving licence. It is well established that the person who alleges breach must prove the same. The Insurance Company was, therefore, required to establish the breach of the policy by cogent evidence. It has failed to prove that there has been breach of the conditions of policy on the part of the insured, and therefore, it cannot be absolved of its liability.

(Para 18)

Important Issue Involved: Insurance company connot be absolved of its liability of pay in the absence of evidence on record to show that the offending driver was disqualified from holding an effective driving licence.

[Vi Gu]

APPEARANCES:

FOR THE APPELLANTS : Mr. O.P. Mannie, Advocate.

FOR THE RESPONDENTS : Mr. Salil Paul, Advocate for the respondent No. 3.

CASES REFERRED TO:

1. *R.K. Malik & Anr.* vs. *Kiran Pal & Ors.,* (2009) 14 SCC 1.
2. *National Insurance Co. Ltd.* vs. *Swaran Singh and Ors.,* (2004) 3 SCC 297.
3. *Lata Wadhwa and Ors.* vs. *State of Bihar and ors.,* (2001) 8 SCC 197.
4. *M.S. Grewal and Anr.* vs. *Deep Chand Sood and Ors.,* (2001) 8 SCC 151.
5. *Oriental Insurance Company* vs. *Mohammed Sab Ali Sab Kaladagi & Ors.,* II (1999) ACC 70.
6. *M/s. Srinivasa Roadways, Madurai* vs. *Saroja and Ors.,* 1975 ACJ 265.

RESULT: Appeal allowed.

REVA KHETRAPAL, J.

1. This appeal is directed against the judgment of the Motor Accidents Claims Tribunal, Karkardooma, Delhi dated 23.07.1999, whereby a sum of Rs. 32,000/- was awarded in favour of the appellants and against the respondents with interest at the rate of 9% per annum from the date of the institution of the Claim Petition till realisation.

2. Concisely, the facts are that on 16.07.1988, at about 12.15 p.m, the bicycle of one Shakti Kumar, aged 12 years, was hit by a truck bearing No.DHL-5657, being driven rashly and negligently by the respondent No.1, on account of which Shakti Kumar sustained injuries to which he succumbed. The appellants are the father and mother of the said Shakti Kumar (hereinafter referred to as "the deceased"), who filed a Claim Petition under Sections 110A & 92A of the Motor Vehicles Act, 1939 claiming compensation in the sum of Rs. 3 lacs against the respondent No.1-driver, the respondent No.2-owner and the respondent No.3-Insurance Company. The learned Claims Tribunal, after conducting an enquiry against the said respondents, held that the accident was the outcome of the rash and negligent driving of the respondent No.1, against whom FIR No.10/88 had also been registered under Sections 279/304A IPC. On the aspect of quantum of compensation, after noting that the deceased was a student of sixth standard at the time of the accident, the Tribunal awarded damages for the death of the child in the sum of Rs. 30,000/- with funeral expenses of Rs. 2,000/-, in all, a sum of Rs. 32,000/- with interest thereon. It, however, exonerated the Insurance Company from the payment of compensation on the ground that the respondent No.1-driver, Jai Prakash held no driving licence at the time of the accident.

3. Aggrieved by the aforesaid findings of the Claims Tribunal, the present appeal has been preferred by the appellants assailing the award of the Tribunal on the ground that the Tribunal awarded a very meagre amount of compensation, in the sum of Rs. 32,000/- only, and on the further ground that the Tribunal failed to appreciate that the respondent No.1-driver of the offending vehicle was having a driving licence and was not disqualified from holding a driving licence, and as such, all the three respondents, namely, the driver, the owner and the insurer of the

offending vehicle, ought to have been saddled with the liability to pay the award amount to the appellants.

4. Mr. O.P. Mannie, the learned counsel for the appellants contended that a paltry amount of compensation had been awarded to the appellants which deserved to be enhanced on all counts. He submitted that the Tribunal, after observing that the deceased was a child of 12 years, who was studying in the sixth standard at the time of his unfortunate demise, proceeded to award a lumpsum of Rs. 32,000/- to the claimants against the claimed amount of Rs. 3 lacs, throwing to the winds the settled principles of law for computing compensation payable to the legal representatives of a deceased person. Mr. Mannie further contended that it was incumbent upon the Tribunal to have determined the pecuniary and non-pecuniary losses suffered by the appellants before awarding compensation to the appellants. Instead, the Tribunal awarded a lumpsum compensation without the application of any multiplier and without even awarding nominal damages to the appellants on account of the loss of estate and the loss of love and affection of the deceased.

5. In order to substantiate his contention, Mr. Mannie heavily relied upon the judgment of the Supreme Court rendered in the case of **R.K. Malik & Anr. vs. Kiran Pal & Ors.,** (2009) 14 SCC 1. In the said case, twenty-nine school-going children were drowned as a result of a road accident caused by the overturning of the bus in which the said children were proceeding to the school, which bus after overrunning the road and breaking the railing got drowned in the Yamuna river at Wazirabad Yamuna Bridge. The Tribunal, by its common judgment, awarded a sum of Rs. 1,55,000/- to the dependents of the children between the age group of 10 to 15 years and Rs. 1,65,000/- to the dependents of children between 15 to 18 years. In the case of three children who were less than 10 years, the Tribunal awarded compensation of Rs. 1,05,000/-, Rs. 1,30,000/- and Rs. 1,31,000/- in their respective cases. Against the said order of the Tribunal, appeals were filed before the High Court, which were heard together by the High Court. The High Court by its common order held that the appellants were entitled to enhancement of compensation in all the cases by Rs. 75,000/- and Rs. 1,000/- (if not already awarded by the Tribunal) and interest at the rate of 7.5% per annum from the date of the filing of the petition till payment. Feeling aggrieved, a Special Leave Petition was filed by the appellants, contending that the High Court

ought to have applied the ratio of **Lata Wadhwa and Ors. vs. State of Bihar and ors.,** (2001) 8 SCC 197 to the facts of the case and also that it had failed to award a fair and reasonable compensation. The Supreme Court, observing that compensation in cases of motor accidents, as in other matters, is paid to the dependants of the deceased persons for reparation of damages, and to put them in the pre-accidental position, held that the damages so awarded should be an adequate sum of money that would put the party, who has suffered, in the same position if he had not suffered on account of the wrong committed. Compensation is, therefore, required to be paid for prospective pecuniary loss. On the aspect of computation of compensation, after noticing that the Act provided for payment of 'just compensation' vide Sections 166 and 168 of the Motor Vehicles Act, 1988, the Court observed that it had repeatedly been held that it is the multiplier method which should be applied as the said method is based upon the principle that the claimant must be paid a capital sum, which would yield interest to provide material benefits of the same standard and duration as the deceased would have provided for the dependents, if the deceased had lived and earned. The Court further observed that uniform application of the multiplier method ensures consistency and certainty and prevents different amounts being awarded in different cases.

6. Applying the ratio of the aforesaid judgment to the present case, I have not the least bit of hesitation in holding that the learned Tribunal did not award 'just compensation' for the pecuniary losses suffered by the appellants as the Tribunal threw to the winds the application of the multiplier method, which, as noticed above, the Supreme Court has unequivocally laid down, should be uniformly applied for the purpose of ascertaining the quantum of 'just compensation' in all cases of motor accidents. The learned Tribunal also failed to award 'just compensation' for the non-pecuniary losses sustained by the appellants, which, in my opinion, it was bound to do. It is, therefore, proposed to re-compute the compensation in accordance with the settled principles of law as enunciated by the Supreme Court from time to time and it is upon this exercise that I now embark.

7. Assuming the notional income of the deceased child to be in the sum of Rs. 15,000/- per annum in terms of Schedule II, and applying the multiplier of 15 specified in the Second Column of the table in

Schedule II to the Act, the pecuniary damages payable to the appellants are computed to be in the sum of Rs. 2,25,000/-. It is a well settled legal principle that in addition to awarding compensation for pecuniary loss, compensation must also be granted for the future prospects of the children. In the case of **Lata Wadhwa** (supra) and **M.S. Grewal and Anr. vs. Deep Chand Sood and Ors.,** (2001) 8 SCC 151, the Supreme Court recognised that denying compensation towards future prospects would be unjust, and deemed it appropriate to grant Rs. 75,000/- as compensation for the future prospects of the children to be paid to each claimant over and above the awarded amount. Such award of future prospects was also approved of in the case of **R.K. Malik** (supra). Accordingly, it is deemed just and fair to award a sum of Rs. 75,000/- towards the future prospects of the deceased child, who was admittedly a student in pursuit of education for his advancement in life.

8. So far as the non-pecuniary damages are concerned, as noticed above, the Tribunal has not awarded any compensation for the non-pecuniary damages sustained by the claimants. Accordingly, a sum of Rs. 75,000/- is awarded towards non-pecuniary damages, including loss of expectation of life, loss of estate of the deceased and loss of love and affection of the deceased. The total compensation awarded thus comes to Rs. 3,75,000/- (Rupees Three Lac Seventy Five Thousand Only). The learned Tribunal awarded interest at the rate of 9% per annum from the date of the institution of the petition till the date of realisation on the compensation awarded by it. In view of the fact that the award amount has been enhanced considerably by this Court, the appellants are held entitled to interest on the enhanced award amount at 7.5% per annum for the aforesaid period. On the original award amount of Rs. 32,000/-, interest at the rate of 9% per annum as awarded by the Tribunal is held to be payable.

9. The next question which arises for consideration in the present appeal is the question as to the respective liability of the respondents to pay the award amount. Mr. Mannie strongly contended on behalf of the appellants that even assuming that the respondent No.1-driver was not holding a valid and effective driving licence on the date of the accident, the Insurance Company cannot be exonerated from its liability to make payment of the award amount in the first instance. The argument of Mr. Mannie is that in the present case the driver was not disqualified from

holding a driving licence, and as such, there was no breach of the policy conditions. Reference was made by Mr. Mannie in this regard to the relevant portion of the insurance policy (Exhibit RW2/A) captioned "Persons or Classes of Persons entitled to drive", which reads as follows:

> "Persons or Classes of Persons entitled to drive
>
> Any of the following:
>
> (a) The Insured
>
> (b) Any other person who is driving on the Insured's order or with his permission.
>
> Provided that the person driving holds or had held and has not been disqualified from holding an effective driving licence with all the required endorsements thereon as per the Motor Vehicles Act and the Rules made thereunder for the time being in force to drive the category of Motor Vehicle insured hereunder."

10. On the basis of the aforesaid section contained in the insurance policy, Mr. Mannie contended that the Insurance Company could not be exonerated from its liability to pay compensation unless and until it proved that the driver was not only not duly licenced, but also disqualified from holding an effective driving licence.

11. In order to substantiate his aforesaid contention, Mr. Mannie relied upon the provisions of 96(2)(b)(ii), which read as under:

> "(ii) a condition excluding driving by a named person or persons or **by any person who is not duly licensed, or by any person who has been disqualified for holding** or obtaining a driving licence during the period of disqualification;"

12. He contended that according to the construction of this section, the Insurance Company can succeed for establishing its defence if the person was not duly licensed or he was disqualified from holding or obtaining the driving licence during the period of disqualification. In other words, either of the conditions has to be duly fulfilled. But in the policy issued in the present case (Ex.RW2/A), the word 'and' is used as conjunction instead of the word 'or' used in the Statute. By the use of the word 'and', it stands established that the Insurance Company has to

prove that the driver was not only not duly licensed, but was also disqualified for holding a licence. In this context, Mr. Mannie relied upon a Division Bench judgment of the Madras High Court in the case of **M/s. Srinivasa Roadways, Madurai vs. Saroja and Ors.,** 1975 ACJ 265, wherein the Division Bench, after referring to the provisions of sub-clause (ii) of Clause (b) of Section 96(2) pertaining to breach of the policy conditions and the relevant portion of the insurance policy pertaining to the limitations as to the use of the vehicle in the said case, made the following apposite observations:

> "..... the three sub-clauses in Section 96 (2) (b) (ii) indicate the amptitude of permissible exclusion. As the sub-clauses are disjunctive, an option is given to the Insurance Company to exclude at its discretion driving either by a named person or by a Person who is not duly licensed or by a person who has been disqualified for holding or obtaining a driving licence or to exclude driving by all these three classes of persons. In other words, it is open to the Insurance Company to refuse to cover a risk brought about by a person like R.-1 in this case, who at the time of the accident, had held a licence, but had no effective licence covering the period of the accident. But, unfortunately, the Insurance Company, has in this case exercised its option even to include a person who had held a licence prior to the date of the accident (that is to say, a licence that had expired prior to the date of the accident) and yet was not disqualified for holding or obtaining such a licence at the time of the accident. The Insurance policy issued by the Motor Owners Insurance Co. Ltd.. in this case has been marked as Ex. B 8. In the schedule to this policy, the limitations as to use of the bus have been defined, and it is stipulated that,
>
> > "the vehicle may be driven either by the Insured or any other person provided he is in the insured's employ and is driving on his order or with his permission; provided that the person driving holds a licence to drive the motor vehicle or has held and is not disqualified for holding or obtaining such a licence."
>
> What is the construction to be placed on the words 'the person driving holds a licence to drive the motor vehicle or has held and

> is not disqualified for holding or obtaining such a licence?' This clause clearly contemplates a person who did not hold a valid licence on the date of the accident, but who had held a licence previously and who had not, at the time of accident, been disqualified for holding or obtaining such a licence. The Insurance Company, with its great business experience, must have thought it right to cover an accident caused by a person who has had considerable driving experience, and yet due to inadvertence or absentmindedness, has not chosen to renew that licence during the period allowed by law and has been involved in an accident while he had not yet obtained a renewal of the licence."

13. On the strength of the aforesaid judgment, it was contended that if all the conditions laid down in the section are not reproduced in the policy and the policy positively undertakes to cover liability in respect of an accident caused by a person who though not having an effective licence at the time of the accident, has not been disqualified to hold a licence, the Company cannot escape liability. It was further contended that there cannot be a compromise between the word 'or' and the word 'and'. Reliance in this regard was also placed on the judgment of the Karnataka High Court in the case of **Oriental Insurance Company vs. Mohammed Sab Ali Sab Kaladagi & Ors.,** II (1999) ACC 70. In the said case, the clause in the insurance policy issued by the appellant was akin to the clause in the insurance policy in the present case. Referring to the provisions of Section 149(2)(a)(ii), the Court made the following observations:

> "5. The wording used as 'or' assumes much importance in this case. According to the construction of this section, the Insurance Company can succeed only if the person was not duly licensed or he was disqualified from holding or obtaining the driving licence during the period of disqualification. According to the construction of the language either of the conditions has to be duly fulfilled. But in the policy issued the word 'and' is used as conjunction. By the use of word 'and' it goes to show that the Insurance Company has to prove that the driver was not only not duly licensed but also was also disqualified for holding the licence. The word 'or' and the word 'and' used in the policy assumes much importance. There cannot be compromise between

the word 'or' and 'and'. The plain language as it is read has to be understood. In this direction, Mr. B.S. Patil, learned Counsel for the respondents relied upon the observation as how the construction of the statute be understood. On page 96 of the Interpretation of Statutes by Maxwell it is stated as follows:-

> "To suppress the mischief and advance the remedy.
>
> It is said to be the duty of the Judge to make such construction of a statute as shall suppress the mischief and advance the remedy."

6. The another golden rule (sic.) that is to be remembered is that the statute is capable of being interpreted in two ways. In the case on hand the claimants shall become the victims in the event the Insurance Company is exonerated. The very purpose of issuing the policy is to protect the third party risk. If the Insurance Company is allowed to go scot free on this ground, great hardship would be caused to the claimants. Hence in view of the impending danger that is likely to arise in the case of claimants, the beneficial interpretation has to come to the rescue of the claimants. It is of-quoted that the duty is to provide the light and not to generate heat. Unless the Insurance Company can place any of the materials covered by Sections 19, 20, 132, 134 and 185, it can never be said that there was any disqualification to hold the licence. It goes without saying that when the specific contention of disqualification is taken by the Insurance Company, the burden is also on the Insurance Company to adduce the evidence that the driver was not duly licensed and was disqualified. No material evidence is adduced in this direction."

14. Mr. Salil Paul, the learned counsel for the respondent No.3, on the other hand, sought to rebut the aforesaid contentions of Mr.Mannie and to support the award of the Tribunal by relying upon the provisions of Chapter II of the Motor Vehicles Act, 1939, and, in particular, the provisions relating to the necessity for possessing a driving licence as incorporated in Section 3, and those relating to renewal of driving licences as contained in Section 11 of the said Act. For the sake of convenience, the said sections, insofar as the same are relevant for the present purposes, are reproduced hereunder:

Section 3

"Necessity for driving licence.– (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a motor vehicle as a paid employee or shall so drive a transport vehicle unless his driving licence specifically entitles him so to do. (2) A State Government may prescribes the conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle. (3) Notwithstanding anything contained in sub-section (1), a person who holds an effective driving licence authorizing him to drive a motor car may drive any motor cab hired by him for his own use."

Section 11 "11. Renewal of driving licences.– (1) Any licensing authority may, on application made to it, renew a licence issued under the provisions of this Act with effect from the date of its expiry:

Provided that in any case where the application for the renewal of a licence is made more than thirty days after the date of its expiry, the driving licence shall be renewed with effect from the date of its renewal:

Provided further that where the application is for the renewal of a licence to drive as a paid employee or to drive a transport vehicle or where in any other case the original licence was issued on production of medical certificate, the same shall be accompanied by a fresh medical certificate in Form C as set forth in the First Schedule, signed by a registered medical practitioner, and the provisions of sub-section (5) of section 7 shall apply to every such case.

(2) .....

(3) .....

(4) .....

(5) ....."

15. Mr. Salil Paul contended that the learned Tribunal, on the basis of the evidence adduced, had rightly come to the conclusion that the licence of the respondent No.1-driver was valid only upto 23.01.1988, and that he had taken the licence back from the Court on 31.07.1989 for the purpose of getting the same renewed. Thus, for the entire period intervening 24.01.1988 to 31.07.1989, the respondent No.1 was not holding a valid and effective driving licence. The accident in question admittedly took place on 16.07.1988, on which date the respondent No.1 was not holding a valid driving licence. Mr. Paul further contended that the respondent No.1 had also been challaned by the Police under Section 3/112 of the Motor Vehicles Act, 1939, for not possessing a valid driving licence, and this fact had been taken into account by the learned Tribunal for arriving at the finding that on the date of the accident, the offending vehicle was being driven by its driver without any valid driving licence.

16. Having considered the rival submissions of the parties, in my opinion, though the facts in the present case conclusively establish that on the date of the accident the respondent No.1-driver was driving the offending vehicle without any valid driving licence, and the learned Tribunal has rightly held that the offending truck was being driven by a person who was not holding a valid driving licence, the Insurance Company cannot be exonerated from making payment of the award amount in the first instance. The question as to whether an Insurance Company can avoid its liability in the event it raises a defence as envisaged in sub-section (2) of Section 149 of the Act, corresponding to sub-section (2) of Section 96 of the Motor Vehicles Act, 1939, was the subject matter of consideration by a three-Judge Bench of the Supreme Court in the case of **National Insurance Co. Ltd. vs. Swaran Singh and Ors.,** (2004) 3 SCC 297, wherein a large number of decisions were taken note of and considered, and thereafter the Court arrived at the following conclusion: (SCC, Pg. 323, 324)

> "Clause (a) opens with the words "that there has been a breach of a specified condition of the policy", implying that the insurer's defence of the action would depend upon the terms of the policy. The said sub-clause contains three conditions of disjunctive character, namely, the insurer can get away from the liability when (a) a named person drives the vehicle; (b) it was being driven by a person who did not have a duly granted licence; and (c) driver is a, person disqualified for holding or obtaining a driving licence."

17. The Court further observed that the Insurance Company with a view to avoid its liabilities is not only required to show that the conditions laid down under Section 149(2)(a) or (b) are satisfied, it is further required to establish that there has been a breach on the part of the insured. It was also observed that a contract of insurance also falls within the realm of contract, thus, like any other contract, the intention of the parties must be gathered from the expressions used therein. The insurer's liability, however, arises both from contract as well as statute.

18. Tested on the aforesaid anvil, in my view, the Insurance Company cannot be absolved of its liability in the absence of cogent evidence on the record to show that the driver of the vehicle was disqualified from holding an effective driving licence, for, the insurance policy Ex.RW2/A clearly stipulates that any person who is driving on the insured's order or with his permission would be included in the classes of persons entitled to drive the vehicle in question provided that he holds or had held and has not been disqualified from holding an effective driving licence as per the Motor Vehicles Act and the rules framed thereunder. In such circumstances, to my mind, clearly in the present case, it cannot be said that the insured had breached the conditions of the insurance policy as the person driving the vehicle had held a driving licence and it has not been established on record that he had been disqualified from holding an effective driving licence. It is well established that the person who alleges breach must prove the same. The Insurance Company was, therefore, required to establish the breach of the policy by cogent evidence. It has failed to prove that there has been breach of the conditions of policy on the part of the insured, and therefore, it cannot be absolved of its liability.

19. In view of the legal position enunciated above, it is held that the Insurance Company shall pay the amount of compensation as adjudged in paragraph 8 hereinabove to the appellants by depositing the same with the Registrar General of this Court within 30 days of the date of the passing of this order, which shall be released to the appellants in equal proportion.

20. The appeal stands disposed of accordingly. There shall be no order as to costs.

21. Records of the Tribunal be sent back to the concerned Tribunal.

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W.P. (C)

SANTOSH KUMAR JHA ....PETITIONER

VERSUS

UOI & ORS. ....RESPONDENTS

(RAJIV SAHAI ENDLAW, J.)

W.P. (C) NO. : 3035/2011 DATE OF DECISION: 17.10.2011

Constitution of India, 1950—Writ—Prevention of Corruption Act, 1988—Section 19—Sanction for prosecution accorded for offence committed in Mumbai—FIR registered in Mumbai—Charge sheet filed before Special Judge, Mumbai—Territorial jurisdiction—Copy of formal order of sanction not made available—Earlier, on more that one occasion sanction to prosecute not granted—Grant of sanction challenged as arbitrary and malafide and amounts to review of earlier decisions—Held—Court at Delhi does not have territorial jurisdiction to entertain the petition—Challenge could be made before the Special Judge—Sanction order contains detailed for according the sanction—The sanction could not have issued by anyone below the Minister, the matter never gone in the past to the Minister—Case does not fall in the category of extreme and rare nor there is any ex-facie illegality in the sanction accorded—Petition dismissed

with costs.

Sub-Sections (3) & (4) of Section 19 are thus indicative of objections regarding and/or challenge if any to the sanction, being maintainable before the Special Judge only and/or in any appeal and/or other proceedings in the nature of revision etc. arising from the proceedings before the Special Judge. **(Para 11)**

The petitioner herein has neither shown any reason for this case to fall in the category of "extreme and rare" nor has shown any ex facie illegality in the sanction accorded. Rather the counsel for the petitioner has argued by taking this Court through the laborious exercise of scrutinizing the material. Thus, no case for entertaining under Article 226 is made out. **(Para 15)**

All the aforesaid questions require detailed examination of documents and records. The same as noticed above is beyond the scope of writ jurisdiction. Suffice it is to state that an Expert Committee had been constituted before sanction was accorded. The benefit of the report of the said Expert Committee was not available when according to the petitioner the sanction was refused. The present is not thus a clear cut case where it can be said that no new material was available before the sanctioning authority. The counsel for the respondent No.3 CBI has referred to **Dinesh Kumar Vs. Chairman, Airport Authority of India** 2011 (2) JCC 733 where this Court held that the question whether or not sanctioning authority applied its mind to the facts and the material collected is a mixed question of law and facts which requires evidence for determination and if at all the petitioner has any grievance against the validity of the sanction order, he obviously would get a chance to challenge its validity before the concerned Court where the charge sheet is filed. The aforesaid equally applies to the ground of challenge in the present case also. The question whether any ground for review existed or not would require going into a plethora of documents and records available before the sanctioning

authority on both the occasions. The said question is thus a mixed question of law and fact which cannot be adjudicated at this stage. **(Para 28)**

Important Issue Involved: (A) Sub section (3) and (4) of section 19 are indicative of objections regarding to challenge, if any to the sanction being maintainable before the Special Judge only and/or in any appeal and or other proceedings in the nature of revision etc. arising from the proceedings before the Special Judge.

(B) The Import of Section 19(3) (c) prohibiting any court, though may not cover the High Court exercising powers under Article 226, from staying the proceedings the Act on any other ground is to ensure expeditious decision.

(C) Where the case dose not fall in the category of 'extreme and rare' and there is no ex-facie illegality in sanction accorded, laborious exercise of scrutinizing and detailed examination of documents and record is beyond the scope of writ jurisdiction.

(D) Therer is no bar to review the order and the only test is whether there was any ground for review or not. And whether any ground existed or not, require going into available documents and records before the sanctioning authority, is a mixed question of law and fact.

[Vi Gu]

APPEARANCES:

FOR THE PETITIONER : Mr. C.B. Pandey, Advocate and Ranjan Pandey, Advocate.

FOR THE RESPONDENTS : Mr. R.V. Sinha with Mr. R.N. Singh and Ms. Sangita Rai, Advocates for the respondent nos.1 and 2 Ms. Sonia Mathur and Mr. Sushil Kumar Dubey Advocates for Respondent no.3.

CASES REFERRED TO:

1. *Dinesh Kumar* vs. *Chairman, Airport Authority of India* 2011 (2) JCC 733.
2. *Chittaranjan Das* vs. *State of Orissa* (2011) 7 SCC 167.
3. *UOI* vs. *Vartak Labour Union* JT 2011 (3) SC 110.
4. *Sterling Agro Industries Ltd.* vs. *Union of India* 181 (2011) DLT 658.
5. *State of Himachal Pradesh* vs. *Nishant Sareen* AIR 2011 SC 404.
6. *Jasbir Singh Chhabra* vs. *State of Punjab* (2010) 4 SCC 192.
7. *Sethi Auto Service Station* vs. *DDA* (2009) 1 SCC 180.
8. *State of Punjab* vs. *Mohammed Iqbal Bhatti* (2009) 17 SCC 92.
9. *State of Madhya Pradesh* vs. *Jiyalal* (2009) 15 SCC 72.
10. *Bholu Ram* vs. *State of Punjab* 2008 (12) SCALE 133.
11. *Mosaraf Hossain Khan* vs. *Bhagheeratha Engg. Ltd.* (2006) 3 SCC 658.
12. *Hari Dutt Sharma* vs. *Union of India* 125 (2005) DLT 17.
13. *Abha Tyagi* vs. *Delhi Energy Development Agency* 2002 III AD (Delhi) 641.
14. *C.B.I. Anti-Corruption Branch, Mumbai* vs. *Narayan Diwakar* (1999) 4 SCC 656.
15. *Dhirendra Krishan* vs. *BHEL* ILR (1999) I Delhi 538.
16. *Durgaprasad P. Dash* vs. *State Bank of Saurashtra* MANU/GJ/0343/1996.
17. *State of M.P.* vs. *Dr. Krishna Chandra Saksena* (1996) 11 SCC 439.

18. *Dr. J. Jayalalitha* vs. *Dr. M. Channa Reddy, Governor of Tamil Nadu* (1995) II MLJ 187.

19. *State of West Bengal* vs. *Mohd. Khalid* (1995) 1 SCC 684.

20. *State of Bihar* vs. *P.P. Sharma* AIR 1991 SC 1260.

21. *Mohd. Iqbal Ahmed* vs. *State of Andhra Pradesh* AIR 1979 SC 677.

22. *Parmanand Dass* vs. *State of Andhra Pradesh* (1978) 4 SCC 32.

RESULT: Petition dismissed.

RAJIV SAHAI ENDLAW, J.

1. The writ petition impugns the sanction accorded, in exercise of powers under Section 19 of the Prevention of Corruption Act, 1988 (POCA), by the Minister for Railways on 14.02.2011 for the prosecution of the petitioner. The writ petition came up before this Court first on 06.05.2011 when on oral request of the petitioner, the Central Vigilance Commission (CVC) and the Central Bureau of Investigation (CBI) were impleaded as respondents. It was the contention of the petitioner on that date, that the petitioner till then had not been able to get a copy of the formal order granting sanction for his prosecution; that the previous history of the case showed that on more than one occasion, the matter was examined and it had been decided not to grant sanction to prosecute the petitioner; that the said decision was reversed under pressure from the respondent No.3 CBI. The petitioner accordingly sought interim order restraining further steps pursuant to the sanction accorded on 14.02.2011.

2. Notice of the petition was issued and the question of interim relief left to be considered on the next date of hearing. On 10.05.2011, it was directed that in the event the respondent No.3 CBI proposed to file a charge sheet, it will first inform this Court. Thereafter on 03.06.2011, the counsel for the petitioner informed that notwithstanding the earlier order of this Court, the petitioner had been summoned by the Special Judge of CBI Court in Greater Mumbai; violation of order dated 10th May, 2011 of this Court is alleged. Vide subsequent interim orders dated 15.06.2011 and 05.07.2011, the Special Judge, CBI, Greater Mumbai was requested not to insist on the personal presence of the petitioner

before that Court. Counter affidavit has been filed by the respondent No.3 CBI and to which rejoinder has been filed by the petitioner. The counsels for the parties have been heard. The counsel for the respondent No.3 CBI during the course of hearing has handed over their records as to the grant of sanction for prosecution of the petitioner. The petitioner after the conclusion of the hearing has filed an additional affidavit dated 02.09.2011 enclosing therewith the formal sanction order dated 26.04.2011 for the prosecution of the petitioner.

3. The petitioner has pleaded:

(a) that he was appointed as an Indian Railway Traffic Service (IRTS) Cadre Officer in the Railways Department on the basis of direct recruitment through Civil Services Examinations (1992) and is presently working as Deputy Chief O'perations Manager (Planning), Western Railway, Mumbai;

(b) that he, in the years 2001 and 2004, had purchased immovable properties at Greater Noida and Lucknow respectively, after availing of bank loan and loans from relatives and duly intimated about the purchase of aforesaid properties to the department, in accordance with Rules;

(c) that a Departmental Vigilance Enquiry was instituted against him and the case was also given to the respondent No.3 CBI and an FIR was lodged by the respondent No.3 CBI against the petitioner of offence punishable under Section 13(2) read with Section 13(1)(d) of POCA and registered for investigation;

(d) that the respondent No.3 CBI arrived at a conclusion of the petitioner possessing assets disproportionate by 54%;

(e) that the respondent No.2 Member Traffic, Railway Board forwarded the aforesaid report of respondent No.3 CBI to General Manager, Western Railway who held that the petitioner was not found in possession of any undeclared property and the case was of violation of the Railway Services (Conduct) Rules, 1966 regarding taking prior permission before acceptance of a gift cheque and accordingly recommended to the respondent No.2 Railway

Board only departmental enquiry and no prosecution against the petitioner;

(f) that the competent Disciplinary Authority on 21.02.2008 took a decision for initiation of only major penalty proceedings against the petitioner and did not recommend prosecution of the petitioner;

(g) the respondent No.4 CVC in its note dated 14.05.2008 recorded that the respondent No.3 CBI takes up cases involving more than 30% of the assets as fit for prosecution; that in the present case as per calculation of the Railways, the percentage of disproportionate assets is only 20.65%; that the respondent No.4 CVC's own calculation of disproportionate assets was of 34.7% while that of respondent No.3 CBI, as aforesaid, was of 54%. In the circumstances, the matter was referred back to the respondent No.3 CBI to consider the views of the respondent No.2 Railway Board;

(h) the petition does not disclose the findings of the respondent No.3 CBI at this stage; however it is pleaded that on the matter being referred again to respondent No.4 CVC and thereafter again to the respondent No.2 Railway Board, the respondent No.2 Railway Board again on 06.01.2009 opined that the case did not warrant prosecution by the respondent No.3 CBI;

(i) however the respondent No.3 CBI again approached the respondent No.4 CVC and a joint meeting of respondent No.3 CBI, respondent No.4 CVC and the respondent No.2 Railway Board was held on 11.09.2009 in which it was found that respondent No.3 CBI can be said to have brought out a clear "disproportion" of 15.73% which can go upto 24.42% only if there is a strong evidence to reject the income of the wife of the petitioner and the loan;

(j) that under the influence of respondent No.3 CBI, a Committee of Experts was constituted and on the basis of report whereof respondent No.4 CVC advised prosecution of the petitioner and the Disciplinary Authority of the

petitioner changed its earlier view and recommended sanction of prosecution of the petitioner.

4. The petitioner contends that the Disciplinary Authority having initially applied its mind and not sanctioned prosecution, has now, in sanctioning the prosecution acted mechanically at the behest of respondent No.3 CBI. It is contended that the earlier decision of not recommending prosecution had attained finality and could not have been reviewed in the absence of any fresh material coming on record. Reliance in this regard is placed on **Abha Tyagi v. Delhi Energy Development Agency** 2002 III AD (Delhi) 641 and the judgment dated 23rd July, 2004 of the Division Bench of this Court in LPA No. 542/2002 arising therefrom. For the same reasons the order of sanction is also averred to be arbitrary and mala fide. Various other errors in the computation of percentage of disproportionate assets of the petitioner are averred. It is also contended that the constitution of an Expert Committee was illegal. It is alleged that while in the FIR the check period was from 1993 to 2005, it has been reduced while computing the percentage of disproportionate assets to six years (1999 to 2005) only causing great prejudice to the petitioner. It is further contended that the representations of the petitioner from time to time have not been considered. With reference to **Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh** AIR 1979 SC 677, it is contended that grant of prosecution sanction is a sacrosanct exercise and not a mere idle formality and thus the grant of sanction by the respondent No.2 Railway Board on the basis of the orders of respondent No.4 CVC is illegal; that the sanctioning authority has not applied its own mind.

5. The respondent No.3 CBI qua the argument of the petitioner of the violation of the interim order dated 10.05.2011 of this Court directing the respondent No.3 CBI to, if proposing to file the charge sheet to first inform this Court, has explained that the charge sheet in fact had been filed prior thereto on 05.05.2011 and thus there is no violation of the interim order of this Court. It is further pleaded that intimation thereof was given to the petitioner on 05.05.2011 itself and the petitioner was asked to remain present on 11.05.2011 but the petitioner stated that he will be on leave at Delhi till 15.05.2011; that the Special Judge, CBI, Greater Mumbai took cognizance on 11.05.2011.

6. The respondent No.3 CBI in its counter affidavit as also on each and every date of hearing, has been vehemently opposing the territorial

jurisdiction of this Court to entertain this petition. It is pleaded that the alleged offence has been committed at Mumbai, the FIR has been registered at Mumbai and the charge sheet has also been filed before the Special Judge, CBI, Greater Mumbai; the petitioner is also posted at Mumbai and the Special Judge, CBI, Greater Mumbai has already taken cognizance of the matter and the impugned sanction order is a part of the charge sheet and is under the judicial scrutiny of the learned Special Judge. It has further been contended on each and every date that the Special Judge, CBI, Greater Mumbai being beyond the territorial jurisdiction of this Court, no order with respect to proceedings of that Court could be made by this Court. Reliance is placed on **C.B.I. Anti-Corruption Branch, Mumbai Vs. Narayan Diwakar** (1999) 4 SCC 656 and on **Mosaraf Hossain Khan Vs. Bhagheeratha Engg. Ltd.** (2006) 3 SCC 658. It is contended that it would be more appropriate to challenge the order taking cognizance in the Criminal Court having jurisdiction and the issue of validity of sanction should be gone into by that Court only. Reference is also made to **Bholu Ram Vs. State of Punjab** 2008 (12) SCALE 133. It is also the argument of the respondent No.3 CBI that efficacious alternative remedy being available as aforesaid, the discretionary writ remedy ought to be declined to the petitioner.

7. It is further the plea of the respondent No.3 CBI that the present proceedings are dilatory; that the order of sanction of prosecution has been issued in the name of the President as per the Government of India (Allocation of Business) Rules, 1961 and the same was authenticated as per Government of India Authentication (Orders and Other Instruments) Rules, 2002 and under Article 77 of the Constitution of India, the same is not to be called into question.

8. It is also pleaded by the respondent No.3 CBI on merits that at the time of first advice of respondent No.4 CVC, certain material facts were not taken into consideration by the respondent No.4 CVC and hence the facts which were not considered at the time of first advice were further highlighted and represented by respondent No.3 CBI for re-consideration of respondent No.4 CVC and upon consideration thereof on report of the Expert Committee, the respondent No.4 CVC reconsidered the matter and gave the reconsidered advice for issuance of sanction order for prosecution of the petitioner.

9. The petitioner in his rejoinder to the counter affidavit has justified the territorial jurisdiction of this Court by pleading that the offices of the respondents are within the jurisdiction of this Court, the sanction order dated 26.04.2011 for prosecution has been issued by the Ministry of Railways from New Delhi; all the information for approval of sanction for prosecution has been gathered by the petitioner through the medium of Right to Information Act, 2005 in New Delhi only. The petitioner further avers that the petitioner till now having not been served with any summons pertaining to prosecution, has no other avenue to challenge the sanction for prosecution except by way of this writ petition. He denies having been informed of the filing of the charge sheet and states that the present petition was filed even prior to the charge sheet being filed in the Court of the Special Judge, CBI, Greater Mumbai. It is reiterated that the filing of the charge sheet is in violation of the orders of this Court. Else, the pleas in the counter affidavit regarding grant of sanction are controverted.

10. Section 19 of POCA prohibits any Court from taking cognizance of an offence punishable thereunder except with the previous sanction of the Central Government or the State Government as the case may be and in the case of any other person, of the authority competent to remove him from his office. A first reading thereof appears to indicate that the challenge if any to the sanction, cannot be before the Court taking cognizance of the offence inasmuch as without a valid sanction, that Court would have no jurisdiction. However, Section 19 itself in sub-section (3) thereof provides that no finding, sentence or order passed by a Special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission, irregularity in the sanction required under sub-section (1), unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby. It further provides that no Court shall stay the proceedings under the Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice. Sub-Section (4) further provides that in determining whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the Court shall have regard to the fact whether the objection could and should have been raised "at any earlier stage in the proceedings".

11. Sub-Sections (3) & (4) of Section 19 are thus indicative of objections regarding and/or challenge if any to the sanction, being maintainable before the Special Judge only and/or in any appeal and/or other proceedings in the nature of revision etc. arising from the proceedings before the Special Judge.

12. The aforesaid question assumes relevance not only to determine whether this Court would have territorial jurisdiction but also whether the petitioner has alternative remedy. If the petitioner has the option of taking the pleas as taken herein before the Special Judge, CBI, Greater Mumbai, then the rule of alternative remedy though not absolute, would bar the jurisdiction of this Court. Moreover, if the Special Judge is empowered to entertain all such pleas and the petitioner if aggrieved from the findings of the Special Judge, CBI, Greater Mumbai has remedies thereagainst, then such remedies would definitely be in the High Court at Mumbai under whose territorial jurisdiction the Special Judge is.

13. I find the Supreme Court in **State of Madhya Pradesh v. Jiyalal** (2009) 15 SCC 72 to have held that it is open to an accused to question the genuineness or validity of the sanction order before the Special Judge. Similarly, in **State of M.P. v. Dr. Krishna Chandra Saksena** (1996) 11 SCC 439 it was held that the question whether before granting sanction all the relevant evidence had been considered or not, could be examined only at the stage of trial when the sanctioning authority comes forward as a prosecution witness to support the sanction order if challenged during the trial and before that stage and at the very inception, the sanction order cannot be quashed on the supposition that all the relevant documents were not considered by the sanctioning authority. Similarly, recently in **Chittaranjan Das Vs. State of Orissa** (2011) 7 SCC 167 also, it was observed that if disputed questions of fact are involved, it is expedient to leave the question of validity of the sanction to be decided by the trial court.

14. Once one reaches a conclusion that the challenge made as in this petition could be made by the petitioner before the Special Judge, CBI also, the question of maintainability of this petition under Article 226 of the Constitution arises. Ofcourse, the present petition was filed before the chargesheet was filed in the Court of Special Judge, CBI, Greater Mumbai. However, the question still arises whether a person against

whom sanction has been so accorded and whose prosecution is imminent can, by rushing to the Court, create a situation in which unless stay of prosecution is granted the challenge to the sanction would become irrelevant. I am of the view that if such challenge were to be held to be maintainable, the same would delay the prosecution. The purport of Section 19(3)(c), prohibiting any Court from staying the proceedings under this Act on any other ground is again to ensure expeditious decision. Though the word "Court" in Section 19(3)(c) may not cover the High Court exercising powers under Article 226 but the legislative intent appears to be to ensure expeditious trial in such cases. It has been so held in **State of Bihar Vs. P.P. Sharma** AIR 1991 SC 1260 also. Reference in this regard may also be made to **State of West Bengal Vs. Mohd. Khalid** (1995) 1 SCC 684 though relating to the Terrorist and Disruptive Activities (Prevention) Act, 1987 but holding that though in an extreme and rare case the High Court may be justified in invoking the power under Article 226, that power is not exercisable where the position may be debatable. It was further held that in such cases the gamut of procedure prescribed under the special Act must be followed, namely raising the objection before the Designated Court and if necessary challenging the order of the Designated Court. It was yet further held that where the High Court has to perform the laboured exercise of scrutinizing the material, there is sufficient indication that the writ jurisdiction under Article 226 is not available.

15. The petitioner herein has neither shown any reason for this case to fall in the category of "extreme and rare" nor has shown any ex facie illegality in the sanction accorded. Rather the counsel for the petitioner has argued by taking this Court through the laborious exercise of scrutinizing the material. Thus, no case for entertaining under Article 226 is made out.

16. Mention in this regard may also be made of the judgment of the Division Bench of Madras High Court in **Dr. J. Jayalalitha v. Dr. M. Channa Reddy, Governor of Tamil Nadu** (1995) II MLJ 187 where a criminal writ petition impugning the order of sanction was held to be premature for the reason of ample opportunity to raise all contentions being available. Mention may also be made to the judgment of C.K. Thakker, J. in **Durgaprasad P. Dash Vs. State Bank of Saurashtra** MANU/GJ/0343/1996 speaking for the Gujarat High Court, while holding

that the powers under Article 226 cannot be curtailed or taken away by legislation, laying down that the High Court will not be oblivious of the fact that the petition, before cognizance is taken by the Special Court, is premature and as and when cognizance is taken it being open to the accused to take all the contentions that no sanction could have been granted or that grant of sanction is contrary to law before the Special Court. It was further held that jurisdiction under Article 226 is to be exercised in the larger interest of justice and looking to the seriousness of the allegations, interference with the sanction may not be in larger public interest. Mention may also be made of **State of Punjab Vs. Mohammed Iqbal Bhatti** (2009) 17 SCC 92 where also the Supreme Court, though in a Civil Appeal and arising from a Civil Writ Petition, held that the legality and/or validity of the order granting sanction would be subject to review by the Criminal Courts.

17. The law therefore appears to be that a Civil Writ Petition would not ordinarily lie in the circumstances.

18. The Full Bench of this Court recently in judgment dated 29th July, 2011 in LPA No. 819 of 2010 titled **C.S. Agarwal v. State** had occasion to determine whether a petition under Article 226 of the Constitution of India is in the exercise of civil or criminal jurisdiction. After considering the case law in the regard, the test culled out was "whether criminal proceedings are pending or not and the petition under Article 226 of the Constitution is preferred concerning those criminal proceedings which could result in conviction and order of sentence". It was further held that when, the Writ Petition for quashing of an FIR is filed, if the FIR is not quashed, it may lead to filing of the challan by the Investigating Agency; framing of charge; and can result in conviction or order of sentence – seeking quashing of such an FIR would therefore be criminal proceedings and while dealing with such proceedings, the High Court exercises its criminal jurisdiction. Seen in this light also, the High Court which ought to exercise such criminal jurisdiction would naturally be the High Court within whose jurisdiction, but for the interference by the High Court, the Court where challan would be filed, charge framed and order resulting in conviction may be made is situated. Such High Court in the facts of this case, is not this Court but the Bombay High Court.

19. I find that in **Dhirendra Krishan Vs. BHEL** ILR (1999) I Delhi 538 also Criminal Writ Petition impugning the sanction to have been preferred.

20. On the aspect of territorial jurisdiction of this Court, the counsel for the respondent No.3 CBI has also referred to **Hari Dutt Sharma Vs. Union of India** 125 (2005) DLT 17 where also this Court refused to entertain the Civil Writ Petition for the reason of the cause of action having proximity to Mumbai where the FIR had been lodged and charge sheet had been filed and the trial was in progress.

21. I therefore accept the objection of the respondents as to the territorial jurisdiction of this Court and hold that this Court does not have the territorial jurisdiction to entertain this petition.

22. Alternatively, even if it were to be held that this Court has territorial jurisdiction to entertain the petition, a five Judge Bench of this Court in **Sterling Agro Industries Ltd. v. Union of India** 181 (2011) DLT 658 has held that this Court can refuse to entertain the petition if finds another High Court to be a more convenient Court to entertain the petition. The difficulties in this Court entertaining this petition have already been noticed above in this Court being not able to issue any directions to the Court of the Special Judge CBI, Greater Mumbai. For this reason also, this is an appropriate case for this Court to refuse to entertain the petition.

23. Though the aforesaid is sufficient for disposal of this petition but for complete adjudication it is expedient to also deal with the challenge on merits by the petitioner to the order of sanction. As aforesaid, **Delhi Energy Development Agency** (supra) forms the fulcrum of the case of the petitioner. However, the said judgment itself notices the dicta in **P.P. Sharma** (supra) and in **Parmanand Dass Vs. State of Andhra Pradesh** (1978) 4 SCC 32 laying down that sanction order is an administrative act and there is no legal bar for reconsideration or revocation of the order by the sanctioning authority; rather it was held that "we find that there could be no legal bar to the sanctioning authority revising its own opinion before the sanction order is placed before the Court". However, the Division Bench of this Court in Delhi Energy Development Agency further held that the sanctioning authority cannot be left free to change its orders and decisions at its will and whim though it may reconsider its order and

even revise it but only when some reasonable rationale and valid basis exists therefor. It was held that such basis may arise where the order is found to be suffering from some material infirmity, irregularity or perversity or where some fresh investigation material becomes available to the authority to dictate a reversal of the first order. The Division Bench in that case however found no such fresh material and held that different interpretation on the same material was not permissible.

24. The Supreme Court also recently in **State of Himachal Pradesh v. Nishant Sareen** AIR 2011 SC 404 held that it is not permissible for the sanctioning authority to review or reconsider the matter on the same material. Earlier in **Mohammed Iqbal Bhatti** (supra) also while reiterating that the State in the matter of grant or refusal to grant sanction exercises statutory jurisdiction and the same would not mean that once exercised it cannot be exercised once again, it was held that for exercising its jurisdiction at a subsequent stage, the express power of review in the State may not be necessary as even such a power is administrative in character. It was further held that while passing an order for grant of sanction, serious application of mind on the part of the concerned authority is imperative and an order refusing to grant sanction would be subject to review by "Criminal Courts". In that case, the Supreme Court affirmed the finding of fact of the High Court that no material was placed before the competent authority and only a communication had been received from the Director, Vigilance Bureau and which was not a new material. Upon finding that no fresh material had been placed before the sanctioning authority and no case of the sanctioning authority on an earlier occasion having failed to take into consideration a relevant fact or having taken into consideration irrelevant fact having been made out, it was held that the decision ought not to have been changed.

25. A perusal of the sanction order dated 26.04.2011 shows the same to be containing detailed reasons for according the sanction. The counsels have also referred to the Allocation of Business Rules, 1961 of the Government of India, framed under Article 77 of the Constitution of India, with the counsel for the respondent No.3 CBI contending that the appointing authority of the petitioner being the President of India and thus the order granting or refusing sanction could not have been issued by anyone below the Minister of Railways and the matter having never gone in the past to the Minister and the counsel for the petitioner contending

that while the competent authority for granting sanction is the Minister but the competent authority for rejecting the sanction is the respondent No.2 Railway Board. However in view of the unequivocal position in law that there is no bar to review of the order and the only test is whether there was any ground for review or not, the said questions are not relevant.

26. I may also notice that it is also the contention of the counsel for the respondent No.2 Railway Board, supporting the counsel for the respondent No.3 CBI, that the petitioner is merely relying upon the observations at various stages in the decision making process whether to grant sanction or not. There is merit in the said contention also. The Apex Court in **Sethi Auto Service Station v. DDA** (2009) 1 SCC 180 held that internal notings are not meant for outside exposure and notings in the file culminate into an executable order affecting the rights of the parties only when it reaches the final decision making authority in the department, gets his approval and the final order is communicated to the person concerned. Similarly, in **Jasbir Singh Chhabra v. State of Punjab** (2010) 4 SCC 192, it was held that issues and policy matters which are required to be decided by the Government are dealt with by several functionaries some of whom may record notings on the files favouring a particular person, someone may suggest a particular line of action; however, the final decision is required to be taken by the designated authority keeping in view the larger public interest. The said views were recently approved in **UOI v. Vartak Labour Union** JT 2011 (3) SC 110.

27. The Indian Railways Vigilance Manual 2006, copy of which has been handed over, in paras 501 to 515 thereof provides for a detailed procedure running into several stages for obtaining CVC's advice in cases relating to CBI's request for prosecution with the final decision being of the Minister, Railways. It is not the case of the petitioner also that in the present case at any earlier point of time the file was referred to the Minister.

28. All the aforesaid questions require detailed examination of documents and records. The same as noticed above is beyond the scope of writ jurisdiction. Suffice it is to state that an Expert Committee had been constituted before sanction was accorded. The benefit of the report of the said Expert Committee was not available when according to the

petitioner the sanction was refused. The present is not thus a clear cut case where it can be said that no new material was available before the sanctioning authority. The counsel for the respondent No.3 CBI has referred to **Dinesh Kumar Vs. Chairman, Airport Authority of India** 2011 (2) JCC 733 where this Court held that the question whether or not sanctioning authority applied its mind to the facts and the material collected is a mixed question of law and facts which requires evidence for determination and if at all the petitioner has any grievance against the validity of the sanction order, he obviously would get a chance to challenge its validity before the concerned Court where the charge sheet is filed. The aforesaid equally applies to the ground of challenge in the present case also. The question whether any ground for review existed or not would require going into a plethora of documents and records available before the sanctioning authority on both the occasions. The said question is thus a mixed question of law and fact which cannot be adjudicated at this stage.

29. I may also notice that the question in the present case is of, what percentage the assets of the petitioner were found disproportionate. The earlier decision relied upon by the petitioner appears to be guided by the comparatively small percentage by which the petitioner's assets were disproportionate. While exercising equity jurisdiction, this Court would not exercise the equity in favour of a person who has disproportionate assets howsoever miniscule they may be.

30. Thus there is no merit in the petition. The same is dismissed. The petitioner is also burdened with costs of Rs. 20,000/- payable to the respondent No.3 CBI before the Court of Special Judge, CBI, Greater Mumbai on the next date of hearing.

ILR (2012) I DELHI 490
WP (C)

RDS PROJECTS LTD. ....PETITIONER

VERSUS

RATANGIRI GAS AND POWER PVT. LTD. & ORS. ....RESPONDENTS

(SANJAY KISHAN KAUL & RAJIV SHAKDHER, JJ.)

WP (C) NO. : 534/2011 DATE OF DECISION: 17.10.2011

Constitution of India, 1950—Art. 226 Writ—Tender—interpretation of commercial contract—Petitioner challenged the order dated 04.10.2010 scrapping/cancelling tender no.6724/T-138/08-09/SPL/24, as petitioner was L-1 of respondent no.1, vide writ petition no. 8252/2010, Respondent no.1, took the plea that he exercised its right as owner under Article 28.1 of the Tender document—Writ petition withdrawn with liberty to take recourse to legal remedy in accordance with law—Respondent no.1 with respondent no.2 and respondent No. 3 floated fresh tender no. 6724/T-183/10-11/SKG/28 with amendment pertaining to clause 8.1.1.1. dealing with past experience of the bidder in executing a similar work—Challenged the amendement in clause 8.1.1.1 plea of malice, arbitrariness, unresonablenes and lack of fairness—Held—Respondent no.1 withheld completion report received from Dy. Chief Engineer-IV Mus Car Nicobar island while seeking independent input from respondent no.2—Raised certains queries followed by series of letters—integrity of the entire process was suspect—Decision of respondent no.1 dated 04.10.2010 fraught with malice in law, contrary to the principles of fairness, equity and good conscience—Amended clause 8.1.1.1

bad in law.

A perusal of the clause would show that a bidder, would have to have experience of having successfully completed as a single bidder or as a leader of a consortium at least one project of breakwater of a minimum length of 400 metre located in an off shore location, during the last twenty (20) years to be reckoned from the last date of submission of bids. Plain language of the said clause would show that a project could be executed in different phases. The ordinary meaning of the word 'project' would be "planned undertaking or scheme" (See The Conscise Oxford Dictionary Ninth Edition, 1995). Therefore, the fact that the qualifying project at Mus Car Nicobar Island was executed by RDS in two (2) phases could not have ousted it. In understanding the meaning of the words and expression used in a contract, courts would ordinarily go by the meaning given to the words by those who administer and operate the contract, unless that meaning is completely at variance with the understanding of a common prudent person. Both the experts, who dealt with the evaluation of the bids, i.e., GAIL and EIL, despite receipt of material in the form of CAG report and the Deputy Chief Engineer-IV, Andaman Harbour Works letter, which indicated that qualifying contract had been executed in two (2) phases, came to the conclusion that RDS was eligible and, therefore, the award recommendation did not require a review. We fail to understand how the legal department could take a view, on this matter, contrary to what the persons, who operate these contracts, understood the expression to mean. In a construction of commercial contract (if one were to assume for a moment that construction of contract was required to ascertain the intention of parties), the accepted rule is that if semantic and syntactical construction is at variance with the business common sense, then it must yield to business common sense. The observations in **Antaios Cia. Naviera S.A. v. Salen Rederierna A.B.** (1985) A.C. 191 been apposite are extracted below:

> "While deprecating the extension of the use of the expression 'purposive construction' from the interpretation of statutes to the interpretation of private contracts, I agree with the passage I have cited from the arbitrators. award and I take this opportunity of restating that, if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."

30.1 The purpose of construction has been described felicitously by Lloyd L.J. in **The Sounion (1987) 1 Lloyd's Re. 230** as follows: "Designed to separate the purposive sheep from the literalist goats."

30.2 We may note at this stage that we had pointedly put to the ASG Ms.Indra Jai Singh during the course of hearing, as to whether there was any doubt or dispute that RDS had not executed the qualifying work at Mus Car Nicobar Island equivalent to the contracted length of 500 metres. Ms.Indra Jai Singh, on instructions, categorically informed us that this aspect of the matter was not in issue. She, however, submitted that what was in issue, was the fact, that since it had now emerged that RDS had completed the project in two (2) phases; according to EIL, it was not eligible. With EIL having taken this stand, which was not contradicted by GAIL at the hearing; it quite surprised us when, Mr.Chandhiok appearing on behalf of RGPPL took the stand that RDS had not even constructed the required minimum 400 metres length of the qualifying work. We may also point out at this stage the stand of the UOI in its affidavit. UOI has categorically supported its certificate dated 05.04.2008 and the clarification issued on 05.06.2010 by the Deputy Chief Engineer-IV, Andaman Harbour Works. Therefore, this argument of RGPPL cannot be accepted. **(Para 30)**

Important Issue Involved: Malice in law occurs when a person or an entity commits a wrongful act intentionally without just cause or reason. In a construction of commercial contract, if semantic and syntactical Construction is at variance with the business common sense, the it must yield to business common sense.

[Vi Gu]

APPEARANCES:

FOR THE PETITIONERS : Mr. Jagdeep Dhankar, Sr. Advocate with Ms. Asha Jain Madan & Mr. Mukesh Jain, Advocates.

FOR THE RESPONDENTS : Mr. A.S. Chandhiok, ASG with Mr. S.K. Taneja, Senior Advocate with Mr. Puneet Taneja and Mr. Anant Kumar Sinha, Advocates for Respondent no.1/RGPPL. Mr. Gourab Banerji, ASG with Mr. Ajit Pudussery and Mr. Dinesh Khurana, Advocates for Respondent no.2/ GAIL. Ms. Indira Jai Singh, ASG Mr. Ashok Mathur and Ms. Sonam Anand Advocates for Respondent No. 3/EIL. Mr. Neeraj Chaudhari, CGSC with Mr. Mohit Auluck and Mr. Khalid Arshad, Advocates for Respondent No. 4/UOI.

CASES REFERRED TO:

1. *West Bengal State Electricity Board* vs. *Dilip Kumar Ray* (2007) 14 SCC 568, para 19 at page 582.
2. *R.S. Garg* vs. *State of U.P & Ors.* (2006) 6 SCC 430, para 25 at page 448].
3. *Mahabir Auto Stores & Ors.* vs. *Indian Oil Corporation & Ors.* (1990) 3 SCC 752, para 13 at page 761].
4. *Antaios Cia. Naviera S.A.* vs. *Salen Rederierna A.B.* (1985) A.C. 191.
5. *Shearer* vs. *Shield* (1914) AC 808.

RESULT: Petition disposed of .

RAJIV SHAKDHER, J.

1. This writ petition would bear testimony to the adage that truth is a conundrum wrapped in mystery surrounded by a multitude of lies. The petitioner is in court, the second time round, much harried and exasperated. In the first round the petitioner, i.e., RDS Projects Ltd. (hereinafter referred to as 'RDS') by way of a writ petition bearing no. 8252/2010, sought to challenge the decision of respondent no. 1, i.e., Ratnagiri Gas & Power Pvt. Ltd. (hereinafter referred to as 'RGPPL') dated 04.10.2010, conveyed to it on 06.10.2010, seeking to scrap/ cancel the tender bearing no. 6724/T-138/08-09/SPL/24 (hereinafter referred to as the "1st Tender") after it had been declared the lowest tenderer, i.e., L-1. RDS withdrew the said writ petition alongwith an application for grant of interim relief in view of the stand of RGPPL that it had exercised its rights as an owner under Article 28.1 of the 1st tender. Since the petitioner apprehended his exclusion by the respondents in the subsequent round, it sought leave and liberty of this court to take recourse to a legal remedy in accordance with the law. A Division Bench of this court of which one of us (i.e., Sanjay Kishan Kaul, J) was a party, granted such liberty to the petitioner vide order dated 14.12.2010.

2. True to form, RGPPL through aegis of Respondent No. 2, i.e., Gas Authority of India Ltd. (hereinafter referred to as 'GAIL'), and respondent no. 3, i.e., Engineering India Ltd. (hereinafter referred to as 'EIL'), floated a fresh tender bearing no. 6724/T-183/10-11/SKG/28 (hereinafter referred to as the '2nd Tender'); albeit with a change/ amendment. The change/amendment with which the petitioner is aggrieved pertains to clause 8.1.1.1. It is pertinent to mention here that clause 8.1.1.1 deals with past experience of the bidder in executing a similar work. We would be referring to the requisites set out in clause 8.1.1.1 with respect to qualifying work, and as one goes along, the change in specifications brought about by amendment made in clause 8.1.1.1 in the 2nd tender. We would come back to the amendment in the said clause made in the 2nd tender, but before that, why the change has taken place is pertinent, as the petitioner has pleaded malice, apart from the usual

grounds of arbitrariness and unreasonableness and the lack of fairness on the part of the respondents in bringing about the said change. We may note at the outset that the change is brought about in clause 8.1.1.1, which found a mention in the 1st tender as compared to those which have been incorporated in the very same clause, in the 2nd tender; even though subtle, are significant from the point of view of the petitioner. Therefore, the reason for narrating the background in which the respondents issued the 2nd tender.

BACKGROUND

3. The Maharashtra State Government, it appears, wanted to resuscitate the Dabhol Power Project (in short 'DPP') which had run into troubled waters; a story which has been widely recorded. The job of resuscitation was entrusted to National Thermal Power Corporation (in short 'NTPC') and GAIL. The DPP, inter alia, included a gas based component, that is, a cycle power project alongwith an integrated LNG terminal with associated infrastructure facilities; situate in the district of Ratnagiri, in the State of Maharashtra. Thus, insofar as DPP was concerned, both components required revival. The first one being a power block and the second being, the LNG block. In order to execute the task entrusted to NTPC and GAIL, a joint venture company was incorporated which, resulted in the birth of RGPPL. The co-owners of RGPPL were appointed as the owners. engineers to revive the power block as well as the LNG block. The LNG terminal required protection and hence, what in technical terms is referred to as 'breakwater' had to be constructed in the sea on shores of which, evidently, the LNG terminal block was situated. Since the job entailed specialized technical and engineering experience, knowledge and skill accompanied with marine facilities as its core competence, GAIL in turn engaged the services of EIL. The EIL was thus appointed as the primary project management consultant. The EIL in turn sought and obtained approval of GAIL to involve one U.K. based entity, namely, Scott Wilson as their back-up consultant for marine works. RGPPL thus had the luxury of having at its disposal not one, not two, but three experts.

4. The extent of the role played by the experts is demonstrable from the averments made by RGPPL in its pleadings before us wherein it is averred and therefore candidly admitted, that the board of directors in their deliberations held on 04.10.2010 had come to a conclusion that

in respect of aspects pertaining to: revival/completion of the power blocks as well as LNG block which would pertain to strategies for ***"packaging"***, ***"tendering mode"***, and ***"award recommendations"*** including ***"price negotiations"*** wherever required; it would have to rely on the owners engineers, i.e., NTPC and GAIL. Thus, RGPPL's formalization of award of various contracts, including the contract in issue, was to be based on the recommendation of the owner's engineers.

5. GAIL, in turn, in its pleadings before us, has taken the stand that as per the arrangement arrived at between the parties, (which inter alia includes RGPPL), EIL was to prepare the tender, float tender enquiries, evaluate offers received and finally recommend the award of contract to GAIL in respect of LNG terminal project. GAIL was thus required to examine and approve the recommendations of the various stages of the tendering process which included approving the tender, bidders evaluation criteria, approving price bids, and finally giving its recommendation for award of the contract. GAIL thus, in the pleadings, has taken the stand that in the exercise undertaken by it, of examination and evaluation of bids till the stage of forwarding the award recommendation to RGPPL – it followed its own contract in procurement procedures. It is in this background that it became relevant for us to refer from hereon the events which led the EIL to float the 1st tender; the queries raised by RGPPL; the reiteration of EIL of its evaluation, the consequent declaration of the petitioner as L-1, and finally the curious turn-around of EIL and GAIL (though sub-silentio) in declaring that the petitioner had been wrongly declared as L-1; a recommendation dated 01.09.2010 which apparently formed the basis of RGPPL decision of 04.10.2010 to cancel the 1st tender.

6. The 1st tender was floated by EIL on 26.06.2009. Against the said tender, bids were received from five (5) bidders, i.e., the petitioner before us i.e. RDS, M/s ESSAR Construction Ltd., M/s Afcons Infrastructure Ltd., Joint Venture of M/s Hojgaard Punj Lloyd Ltd. and lastly the Joint Venture of M/s Hung-Hua & Ranjit Buildcon Ltd. The bids of the aforesaid five (5) bidders were evaluated by EIL alongwith their back-up consultant, Scott Wilson, U.K. Upon evaluation, it was found that Hung-Hua & Ranjit Buildcon Ltd. were not technically qualified, resultantly, the said bidder was disqualified. This resulted in four (4) bidders being left in the field. Consequently, EIL recommended to GAIL

that the price bids of the said four bidders be opened. It would be pertinent to note at this stage that under the terms of the 1st tender, which are no different, we are told in the 2nd tender, the price bids could only be opened qua bids which were found to have qualified in the techno-commercial round, i.e., their bids were found technically and commercially suitable. (See clauses 24 and 25 of the instructions to bids).

7. It is in this background that EIL on 24.12.2009 recommended the name of the remaining four (4) bidders for appropriate approval of GAIL in respect of their price bids. It appears that GAIL, while evaluating EIL's recommendation observed that the foreign consultant, i.e., Scott Wilson, U.K., had not accepted the adoption of **"sling"** methodology used by RDS for transporting, loading and placement of rock armour for construction of breakwater, in the contract evidently earlier executed by RDS. Therefore, by a communication dated 30.12.2009, GAIL sought reconfirmation from EIL, whether it ought to accept the sling methodology adopted by RDS. EIL by a return letter 31.12.2009, confirmed that RDS would not use the sling methodology while loading out and placing rock armour and that instead, it would use what is known as "hydraulic grab" technology. GAIL, however, by a communication dated 25.01.2010 called upon EIL to seek the opinion of Scott Wilson, U.K. in that regard. EIL evidently discussed the matter with Scott Wilson, U.K, and thereupon, vide letter dated 01.02.2010 forwarded the Scott Wilson, the U.K. addendum to their earlier technical evaluation report dated 29.01.2010. By virtue of this addendum, Scott Wilson, U.K. evidently confirmed the inclusion of RDS in the list of those bidders whose price bids had been recommended for being opened for appropriate evaluation. GAIL, thereupon reviewed EIL's price bid opening recommendation, and after appropriate review conveyed its approval for price bid opening of the very same bidders, who EIL had recommended in the letter dated 24.12.2009. Once again RDS was included in the list of recommended bidders.

8. Consequently, on 11.02.2010 in the presence of the said recommended bidders, the price bids were opened. It was found that RDS, i.e., the petitioner, was the lowest bidder at (approximately) Rs 390 crores, while the next lower bidder was Afcons Infrastructure Ltd., whose price was higher by about Rs 160 crores in comparison to RDS,

(having bid at Rs 550 crores). On 26.2.2010, EIL forwarded their recommendation to GAIL. It is pertinent to note that the justification cost (i.e., the estimated cost of the project) at the lower end of the spectrum, was nearly Rs 662 crores (approximately).

9. On receipt of requisite recommendation and the back-up material, GAIL upon appropriate examination and approval of the competent authority forwarded its recommendation to RGPPL vide communication dated 08.03.2010. In this communication, GAIL advised that while, executing the contract, RDS should ensure that: it would inter alia provide suitably experienced staff with sufficient equipment to ensure quality and adherence to time schedule; demonstrate and implement appropriate planning and co-ordination of resources, undertake design technical reviews to international standards; and lastly, provide site supervision staff experienced in breakwater construction; once again, to ensure quality of construction and compliance with specifications. To be noted, the communication ended by explicitly stating therein that the recommendation had the approval of competent authority, and is generally in line with GAIL's procedure and system.

10. From the point of view of the RDS, one would have imagined that the execution of the formal contract hereon would be a given. This was, however, not so as RGPPL by a letter dated 26.03.2010 sought various clarifications including in respect of aspects mentioned in GAIL's letter dated 08.03.2010 issued to RDS, to which we have made a reference hereinabove. The interesting part is that in respect of query no. 5 raised in the aforementioned letter, RGPPL brought to attention of GAIL that the estimated cost of the project was Rs 662.80 crores plus minus 25%, whereas bid of RDS, which was declared as L-1, was lower than the estimated cost by approximately 41.17%. RGPPL went on to state that if the bid, is abnormally low, then it ought to give the owner sufficient cause to reject the bid unless after due scrutiny and analysis of the rates, it is convinced about the reasonableness of the bid. RGPPL thus sought GAIL's response to this query amongst others. It would not be out of place to mention that RGPPL also raised a doubt about RDS's ability to complete the breakwater project at hand in the given time frame of thirty three (33) months when, on its own showing, it had taken three (3) years for it to complete a breakwater project at Mus Car Nicobar, of 500 m; which incidently was shown as its qualifying work in the bid

documents. In this background, since the bid was valid till 30.04.2010, a request was made by RGPPL to seek the extension of validity of the bid till 15.05.2010. RGPPL also sought a copy of the recommendation of Scott Wilson, U.K. on the aspect of the confirmation received from RDS that it would use hydraulic garb technology as against the sling method for load out and placing of rock armour. GAIL, by its letter dated 07.04.2010 gave a detailed point wise response to all eight queries, to which we have made a mention hereinabove, including queries raised pertaining to the difference between estimated cost and the bid price of RDS, and the capability of RDS to execute the project within the stipulated thirty three (33) months, given its experience in executing such like projects. The relevant part of the response on this aspect reads as follows:

> ".....A.5 Accuracy of Cost Estimate:
>
> The price quote of L1 bidder is reasonable as compared to lower bound cost estimate. The reasons for the same are as per Annexure -1 attached with the letter.
>
> A.6 Project Execution time and Bidders Capability:
>
> Based on the critical review of M/s RDS Projects offer, their replies to various technical queries and detailed presentation on execution/ construction methodology for the tendered work indicates that M/s RDS Projects is capable of executing the subject tender works in the stipulated time schedule.
>
> Further, project execution time for any breakwater project is dependent on resources mobilization, availability of query at nearby location and marine environmental conditions at site etc. and therefore project completion time periods may differ even though project physical parameters (size and shape) may be comparable...."

10.1 The communication ended with the GAIL appending the addendum to its technical recommendation dated 29.01.2010, pertaining to the issue of the technology which, RDS proposed to use for execution of the work at hand. It is pertinent to note at this stage that both the recommendation of GAIL dated 08.03.2010 whereby, RDS was recommended for award of the work and, the response dated 07.04.2010 pursuant to the first stage of queries raised by RGPPL, vide its letter

dated 22.03.2010 were sent under the hand of the same officer, i.e., Mr M.B. Gohil, General Manager (Project), GAIL.

10.2 Interestingly, in the interregnum as if by co-incidence, a writ petition was filed in this court by Ranjit Buildcon Ltd., that is, the unsuccessful bidder, inter alia, seeking a direction that RDS be declared as being ***'technically non-qualified'*** for undertaking the DPP and appropriate direction to quash any letter/LOI issued by RGPPL in favour of RDS in respect of the said project. The affidavit appended to the said writ petition is dated 22.03.2010. This writ petition, which was numbered as WPC(C) No. 2142/2010 bears the date 23.03.2010. As indicated above, the first set of queries of RGPPL to GAIL, is also a communication, dated 22.03.2010.

11. It appears that by a letter dated 25.03.2010, RGPPL formally informed GAIL as regards institution of the writ petition by Ranjit Buildcon Ltd. This communication was based evidently on a notice dated 23.01.2010 received from the solicitors of Ranjit Buildcon Ltd. A copy of the writ petition was enclosed to the said communication of RGPPL. A detailed reply was sought by RGPPL for its purposes. GAIL in turn forwarded a copy of the writ petition to EIL vide its communication dated 29.03.2010, while recording therein that discussions with regard to the institution of the writ petition had been held in the office of Managing Director of RGPPL on 26.03.2010. This letter was also issued under the hand of M.B. Gohil. On 09.04.2010, EIL dispatched a point wise reply in respect of the averments and allegations made in the writ petition filed by Ranjit Buildcon Ltd. Apparently in respect of the qualification of RDS, the response prepared by EIL was as follows:

> "RDS Not Qualified (Reply to point nos. 25, 26, 28, 29, 30, 31, 32, 33 & 34)
>
> Requirement of Bidder's Qualification Criteria (in case of single bidder) as set out in the IFB are as follows:
>
> The bidder shall have experience of having successfully completed, as a single bidder, or as a leader of a consortium/ joint venture, at least one project of a breakwater in an offshore location (offshore location is defined as the area submerged in the ocean sea) of minimum length of 400m during the last 20 (twenty) years to be reckoned from the last date of submission

of bids. Documentary evidence submitted along with the bid offer conclusively established that:

- Breakwater at MUS in Car Nicobar Island is located at an offshore location

  (Refer Annexure – 1: Completion certificate issued by Ministry of Shipping, Road Transport and Highways – Department of Shipping, Little Andaman which mentions that "The entire work has been executed in sea (beyond low water line) by M/s RDS Projects Ltd., and they have successfully completed during June 2003".

- M/s RDS has completed the entire works pertaining to breakwater at MUS in Car Nicobar island as a single entity on behalf of M/s Ellen Hinengo Ltd. (Refer Annexure -1: Completion certificate issued by Ministry of Shipping, Road Transport and Highways – Department of Shipping, Little Andaman). Hence, meeting the BQC requirement of qualifying project."

12. GAIL by a letter of even date, i.e., 09.04.2010, forwarded the same to RGPPL. RGPPL wasted no time in responding to GAIL's communication and thus, by a return communication of even date, i.e., 09.04.2010, sought the following from GAIL: (a) The letter of award containing detailed scope of work, contract value, payment terms, completion schedule and other contractual stipulations, and (b) the veracity of the completion certification submitted by RDS projects ltd., duly verified by GAIL/EIL.

12.1 These documents were sought ostensibly in order to enable RGPPL to prepare its reply in response to the writ petition of Ranjit Buildcon Ltd. GAIL by a return communication dated 12.04.2010, informed RGPPL that a work order for the qualifying project (work) had already been submitted by RDS, though detailed work order was not available with the bid documents filed by RDS. In so far as the completion certificate is concerned, GAIL stated that RDS had furnished a completion certificate issued by the Ministry of Shipping, Road Transport and Highways Department of Shipping, Government of India and, therefore, they had no reason to doubt the veracity of the document.

12.2 RGPPL reiterated its request for work order vide letter dated 28.04.2010. EIL, on its part sent an email dated 24.05.2010 and 30.04.2010 seeking a copy of the work order of its qualifying work. GAIL, by a letter dated 21.05.2010 informed RGPPL that though they had not received the work order from EIL, they had been following up the issue.

12.3 Interestingly, RGPPL, it appeared, was looking for information which perhaps, it already had in its possession by virtue of the Comptroller and Auditor General (in short 'CAG') report number 2/2002 which seemed to suggest that the qualifying work, i.e., the breakwater constructed at Mus Car Nicobar Island in the Andaman Nikobar Island had been constructed in ***"phases"***. Therefore, while the website of Andaman Lakshdeep Harbour Works observed that there was only one breakwater at Mus Car Nicobar Island with a length of 490 m, it desperately wanted the work order to establish the fact that RDS had executed the qualifying work/project not at one go but in different phases by virtue of the separate contracts. Therefore, by a letter dated 26.05.2010, RGPPL once again sought the copy of the work order. It is in this letter that RGPPL for the first time, revealed the information that it had in its possession by virtue of what was available on the website of Andaman Lakshdeep Harbor Works, and that which it found contained in the CAG's report. It may be noted that GAIL evidently referred to contents of this letter to EIL vide email dated 27.05.2010. RGPPL, on the other hand, raised pointed queries for the first time with respect to qualification criteria provided in clause 8.1.1.1. In the context of the qualification criteria provided therein, it sought to know from GAIL that the GAIL had declared RDS as qualified based on a certificate dated 05.04.2008 issued by the Dy. Chief Engineer, Andaman Harbour Works. It was put to GAIL that since the certificate referred to a tender of 26.05.1999, the certificate did not state the scope of the qualifying work involved construction of a breakwater of 500 m length. It went on to say that viewed in the background of the CAG's report (which is a report of 2002), the scope of the tender was limited to 290 metre, therefore, it questioned the conclusion arrived at by GAIL that RDS had the requisite experience of constructing 500 metre breakwater. The communication ended with RGPPL invoking clause 9 of the instruction for bidder (in short 'IFB') which empowered it to seek further documents from the bidder. Based on this clause, RGPPL asserted its rights to receive a copy of the work order. It appears that GAIL sent a communication dated 09.06.2010 on

the aspects on which queries had been raised by RGPPL. RGPPL on its part seems to have sought and obtained clarifications from the Dy. Chief Engineer-IV, Andaman Harbour Works. The said Dy. Chief Engineer-IV vide its letter dated 05.06.2010 issued its clarification which were forwarded for consideration of GAIL and EIL. The said communication being crucial for the purposes of adjudication of matter in issue, for the sake of convenience, the relevant portion is extracted hereinbelow:

> "With reference to the above, it is to inform that the work in question, "Construction of Breakwater and Wharf at Mus in Car Nicobar Island" was executed under Deputy Chief Engineer-IV circle. Most of the office records which were maintained in Little Andaman & Car Nicobar Island were washed away during Tsunami waves on 26th December 2004. The following details were furnished based on the available information.
>
> It is reiterated that the subject breakwater was completed in June 03 and has witnessed Tsunami in the Dec 04 wherein entire establishment at Nicobar was washed away thus no records are available due to old case and havoc created by Tsunami. Thus clarification as asked for cannot be given as per format attached. However, it will be my endeavour to give details at my best.
>
> **Briefly it is submitted that this only offshore breakwater of 22-490 mtr. Length (Constructed length of 500 mtr.) at Mus Car Nicobar was constructed in two phases/ contracts both of which were awarded to M/s EHL a tribal society of Car Nicobar Island in continuation i.e.,** before the first work completed the second was awarded.
>
> **First contract bearing no. EEM/LA/DB/A-10/95-96 dated 5.6.1995 valuing 14.10 crores, was awarded to M/s EHL with all items of work** connected with construction of breakwater i.e., mining and supply of boulders of various sizes, Tetrapod casting and placing mining/ crushing aggregates etc. **Subsequently to augment further progress, another agency M/s Reacon International was introduced against work order valuing 6.28 crores against supply of boulders only.** EOT granted to M/s EHL as delay not attribute table to them. **Therefore, finally the balance work including left over items of 1st contract was put to tender and awarded to M/s EHL vide DCE/LA/DB/T-2/99-2000 Vol. IV 3318 dated 3rd Nov. 2000 valuing 30.01 crores for final completion of the structure. No EOT involved. It is hereby certified that M/s RDS Project Ltd. was the sole construction agency for and on behalf of M/s EHL, for undertaking all activities under these contracts to which their performance had been exemplary."** (emphasis is ours)

13. EIL on its part, examined the certificate dated 05.04.2010 issued by the Deputy Chief Engineer-IV, Andaman Harbour Works, in the light of the queries raised by RGPPL and the clarification issued on 05.06.2010 by the said Deputy Chief Engineer. In this regard, the CAG report number 2/2002 was also noticed wherein it had been stated that the work had been completed in ***"phases"***. After reviewing the material placed before it, EIL vide its communication dated 10.06.2010 concluded that even though the qualifying work at Mus Car Nicobar Island had been completed in ***two phases,*** its recommendation did not ***"necessitate any revision in the award recommendation"***. It is pertinent to note that the said communication of 10.06.2010, which reviewed the material placed before it by RGPPL, inter alia, the CAG report and the clarification dated 05.06.2010 issued by the Deputy Chief Engineer –IV, Andaman Harbour Works indicating that the qualifying project at Mus Car Nicobar Island, had been executed by RDS in two phases and by virtue of two separate contracts, was signed off under the hand and signatures of Sh. R.K. Bhandari, General Manager (Projects), EIL. The reason why we have referred to the signatories would become clear as we progress further with our narrative.

14. The communication dated 10.06.2010 was not, it appears, to the liking of RGPPL. Consequently, RGPPL vide another communication dated 15.06.2010, returned GAIL's recommendation of 08.03.2010 on the ground that documentary evidence substantiating that the RDS met the Bidder Qualification Criteria (in short 'BQC'), had not been furnished. In this communication, RGPPL went on to say that the GAIL's recommendation was conditional (these so called conditions have already been referred by us hereinabove in the earlier part of our judgment). It directed RGPPL to withdraw these conditions appended to their recommendation. It also went on to note that the clarification issued by

the Deputy Chief Engineer – IV, Andaman Harbour Works vide letter dated 05.06.2010 was not backed by any institutional data. In the context of all this, it sought documentary evidence to establish "beyond doubt" (i) whether the RDS was a single bidder for the qualifying (work) project; (ii) whether the RDS had successfully completed one project of breakwater of minimum length of 400 meter; and (iii) whether the qualifying project breakwater was in an offshore location as per BQC.

15. The letter dated 15.06.2010 was followed by RGPPL's letter dated 22.06.2010. It now sought clarification regarding non-submission of audited financial statements by RGPPL for the immediately preceding financial year, i.e., 2008-09. The purpose being: evidently to analyze the financial credentials of RDS. GAIL, as in the past, by a communication dated 23.06.2010 written under the hand of Mr M.B. Gohil, General Manager (PD-GP), forwarded the same to EIL. This time the communication was addressed to one Shri Ravi Saxena, Dy. General Manager (Project). Earlier, communications were addressed to Mr.R.K.Bhandari, General Manager (Projects). As is evident, RGPPL had again changed the goal post as it now sought to inquire as to whether the net worth of RDS was positive during the financial year 2008-09. EIL vide letter dated 1.07.2010 once again sent a comprehensive reply to the RGPPL's letter dated 26.06.2010. EIL confirmed that the RDS met the financial criteria, as stipulated in the tender. As regards non-availability of the balance sheet for the financial year 2008-09 was concerned, EIL informed that since the unpriced bid was opened on 16.09.2010, the tenderers, whose financial year closed thereafter, were at liberty to submit the audited financial statements of those three (3) years which preceded the said date. Nevertheless, audited financial statements of RDS of 2008-09 were also obtained and furnished to GAIL for onward transmission to RGPPL. In order to put the matter "beyond doubt", GAIL on its part, sought in the interregnum, the opinion of the Attorney General of India on 28.06.2010. Suffice it to say, that the Attorney General vide his opinion dated 30.06.2010, opined that RDS qualified the single bidder qualification criteria provided in the 1st tender. It is pertinent to note at this stage that even though the documents pertaining to the execution of the qualifying work at Mus Car Nicobar Island had been obtained including the report of the CAG and the clarificatory letter dated 05.06.2010 of the Dy. Chief Engineer-IV, Andaman Harbour Works – the query on which the opinion of the learned Attorney

General was sought by GAIL, was in the light of the fact that the qualifying work having been awarded to Ellon Hinengo Ltd. (in short 'EHL'), whether RDS could be considered as the person who had executed the contract. In other words, in the context of the fact that the work had been awarded to EHL, whether RDS would stand in the position of a sub-contractor.

16. Given the response of EIL and the opinion of Attorney General received by GAIL, GAIL by a communication dated 10.07.2010 forwarded the synopsized response of EIL that; **(i) the entire work of construction of breakwater at Mus in Car Nicobar Island was executed by RDS on behalf of EHL; (ii) the contracted length of the breakwater was 500 meters; (iii) the entire work was executed in sea (beyond low water line) by RDS; (iv) the work was successfully completed in June, 2003; (v) the qualifying work was executed by RDS as a single bidder which met the BQC stipulated under the first tender; (vi) Even though the CAG report no. 2/2002 and the clarificatory letter of the Deputy Chief Engineer – IV, Andaman Harbour Works dated 05.06.2010 suggested that the work had been completed in two phases/ contracts both of which were awarded to EHL; the additional information did not necessitate any revision in the recommendation for award of work to RDS; (viii) the completion certificate dated 05.04.2008 is considered as adequate evidence of the qualifying work having been executed; (vii) Learned Attorney General had opined that RDS having done the entire work, was qualified under the expression 'single bidder' in relation to the 500 meter breakwater project by RDS in Mus Car Nicobar Island; (ix) the conditions thus far referred to in GAIL's letter dated 08.03.2010, were advisory in nature, as indicated in GAIL's letter dated 09.04.2010; therefore, GAIL's recommendation could not be construed as a conditional recommendation; (x) RDS met the financial criteria, as was indicated in EIL's letter dated 01.07.2010; (xi) it specifically referred to item no. 6.2.3 in the agenda of the 6th board of directors meeting of the RGPPL, wherein it had been in particular observed that RGPPL would have to rely, inter alia, on the recommendations of NTPC and GAIL qua the LNG block; and (xii) finally, after recording the aforesaid, GAIL once again reiterated its recommendation of 08.03.2010 and called upon RGPPL to re-consider the award of the said work to RDS.**

16.1 The communication ended by noting that without the breakwater, capacity utilization of LNG terminal would be limited to the extent of 20% and that consequently the daily loss because of the failure to utilize the terminal to its full capacity was working out to Rs 1.50 crores. The communication, however, ended by putting the onus back on RGPPL by indicating therein that since RGPPL was the owner, it would have a final view in the matter. This communication was once again issued under the hand of Mr M.B. Gohil of GAIL. The letter contained enclosures such as GAIL's recommendation dated 08.03.2010 (in original), copies of EIL's letters dated 10.06.2010 & 01.07.2010 alongwith annexures and opinion of Attorney General of India dated 30.06.2010.

17. It appears that in the meanwhile, RGPPL had preferred an application under the Right to Information Act, 2005 (in short 'RTI') with the Andaman Harbour Works. Seeking information and documents vis-a-vis the qualifying work; this included the work order dated 27.04.1995 awarded to EHL and the scope of work of the qualifying tender. The documents obtained were forwarded to GAIL by RGPPL vide its letter dated 26.07.2010. It would be important to note that a perusal of the record submitted by RGPPL would show that just prior to issuance of the letter dated 26.07.2010, its Board of Directors had convened a meeting on 20.07.2010. A perusal of the minutes would show that one of the Directors had raised an objection as to why the Managing Director had initiated the agenda on the LNG terminal while in respect of other LNG terminals meetings had been initiated at the behest of the Dy. M.D. The Managing Director of RGPPL seems to have suggested that the Board note had been prepared with the knowledge of the Dy. M.D. and all versions of the draft notes had been shared with him. The Dy. M.D., however, took the stand that since the Board note contravened the opinion of the 'GAIL Directors', he would not be amenable to appending his signatures on the Board note. As a matter of fact, two Directors took the position that since the owners. Engineers had opined that RDS fulfilled the BQC requirements, the contract ought to be awarded to RDS. The Managing Director took a contrary position. The events which followed hereafter would show that this dissent for some curious reasons disappeared, even though there was no material change in circumstances. Importantly, there is no reference to these minutes in the affidavit filed by RGPPL. GAIL, on its part furnished, by a letter of even date i.e., 26.07.2010, the said information to Mr R.K. Bhandari, General Manager

(Projects) of EIL. By this letter, GAIL called upon EIL to review its recommendation based on the documents received through the RTI route, particularly, in the context of its earlier evaluation of RDS as conforming to the BQC under the 1st tender. This letter was sent under the hand of Mr M.B. Gohil, General Manager, GAIL, and as indicated above, addressed to Mr R.K. Bhandari, General Manager (Projects) in EIL. Since in the meanwhile, as noticed above, Ravi Saxena had been given the task of evaluation on behalf of EIL, he did the needful and communicated his assessment vide email dated 11.08.2010. After "critically" reviewing the material at hand, which RGPPL had obtained through the RTI route, EIL opined as follows:

> **"1. During the evaluation stage, M/s RDS offer was evaluated based on the documents furnished in their offer which include completion certificate no. DCE/LA/GI-20/928 dated 5.4.2008 issued by Dy. Chief Engineer – IV Andaman harbor Works Little Andaman. As the said completion certificate contained all the requisite information as per bid stipulations, M/s RDS was considered as qualified bidder.**
>
> **2.** Information which has now been made available to us additionally has been critically reviewed and it is found that contents of documents are not inconsistent with each other and therefore, we may not take cognizance of the said documents. **Moreover, though the work of breakwater at MUS has been carried out in two phases under two separate work orders, it may be considered as single project as Completion Certificate (No. DCE/LA/GI-20/928 dated 5.4.2008) issued to M/s RDS is for the entire breakwater length. This fact is further corroborated by the letter No. DCE-IV/LA/ALHW/ CAMP:PBF-35/764 dated 05/06/2010 issued by the office of Deputy Chief Engineer-IV which enumerates that M/s RDS was the sole construction agency for & on behalf of M/s EHL for undertaking all activities under these contracts to which their performance had been exemplary and also by the extract of CAG Report No. 2 of 2002 (Civil)."** (emphasis is ours)

17.1 The communication included the opinion that no revision in the award recommendation was necessitated at this stage.

18. Curiously, despite this emphatic stand, EIL took a complete u-turn on 01.09.2010 in response to GAIL's letter dated 26.07.2010 which had already been replied by EIL vide its e-mail dated 11.08.2010. Based on the same material, which as per the e-mail of 11.08.2010 had been critically reviewed, it came to an entirely different conclusion and the person who came to this conclusion was the very same gentleman, i.e., Ravi Saxena, who had issued the earlier communication, i.e., e-mail dated 11.08.2010. In his communication of 01.09.2010 the officer opined as follows:

> **"Considering the facts as brought out from above mentioned documents, it is evident that Ministry has awarded project for construction of breakwater from chainage 22 to 200 meters and project for construction of breakwater for chainage 200 to 330 meters subsequently extended to 490 meters as separate projects. In view of the documents made available and having perused all the documents in concurrence with each other, it emerges that since both the phases have been considered as separate projects by the Ministry, M/s RDS can not club the experience of having executed two separate projects to qualify the BQF which requires that the bidder should have experience of at least one project of a breakwater in an offshore location of minimum 400 m.**
>
> **In light of above, it is concluded that experience submitted by M/s RDS can not be taken as execution in 'single project' and therefore, M/s RDS does not meet the BQC requirement."**

19. This aspect of the matter troubled us immensely. Therefore, in the hearing held before us, we had put to the learned counsel for EIL, Mr Ashok Mathur as to how on the very same material, the same person i.e., Ravi Saxena, Deputy General Manager (Projects), EIL could have come to a diametrically converse conclusion. Mr Mathur had no answers, till he was guided by an officer of EIL by drawing his attention to a legal opinion on record of one Ms Smita Sehgal dated 26.08.2010. We had put to Mr Mathur during the course of hearing, as to whether this aspect had been disclosed in the counter affidavit filed by EIL in court. Mr Ashok Mathur quite fairly conceded that this aspect had not been referred to in

the counter affidavit filed by EIL. In these circumstances we had put to Mr Mathur whether at this point in time, when respondent no. 3/EIL had already concluded its submissions in reply, would it be fair to refer to those documents or allow the said legal opinion to be placed on record in the midst of the hearing when the petitioner had no opportunity to deal with it in the rejoinder placed on record. EIL having been caught on the wrong foot, however, persisted in its efforts. Consequently, towards this end, an application was filed and moved before us on 12.09.2011 when, after recording our observations that there ought not to have been any need to file the said additional affidavit (which was sought to be done by way of an application) as EIL was aware of the case set up by the petitioner, and therefore, our queries, could not have come as a surprise - the application was allowed and EIL was permitted to place the documents filed on record even at that fag end of the hearing, only to enable EIL to have its complete say; though the analysis of the effect of the document was made subject to the final outcome of the case. The application was allowed with cost of Rs 50,000/-. Liberty was granted to the petitioner to meet this new development by way of an oral rejoinder at the hearing to follow.

20. It would be, therefore, important to deal with this aspect of the matter which evidently brought about change of heart and mind in the EIL's officer led by Ravi Saxena. The affidavit accompanying the appeal adverts to the fact that pursuant to email dated 11.08.2010 issued by Ravi Saxena of EIL, the then Dy. General Manager (Projects) an internal meeting was held to ascertain the view, (we assume of the legal department), in the light of additional material made available to EIL. A decision was taken at this meeting evidently to refer the matter to the legal department for their opinion. To be noted, the date of this internal meeting is not adverted to in the additional affidavit dated 06.09.2011 filed by Ms Smita Sehgal. The affiant, however, adverts to an inter-office memorandum dated 20.08.2010, whereby the material was forwarded to the legal department seeking its opinion. It is in that background that legal department on 26.08.2010 opined that RDS did not meet the BQC requirement of the 1st tender. We may only notice that the opinion concludes by stating that since the Ministry had awarded the project for construction of breakwater (qualifying project) from chainage 22 to 200 meters, and the project for construction of breakwater from chainage 200 to 300 meters (subsequently extended 490 meters), RDS had

experienced not of a ***"single project"*** but of ***"two projects"***, and hence did not qualify the BQC requirement of the 1st tender which required the bidder to have experience of at least one project of a breakwater in an offshore location of minimum length of 400 meters. The author of the opinion is also the affiant to the additional affidavit. Ms Sehgal pivots this view on the strict construction of the language of the document in issue and goes on to say that however ***"harsh" "absurd"*** or even contrary to common perception the conclusion may be, that is the only conclusion she could draw on the construction of the document. What is even more interesting is that this very legal opinion bears the endorsement dated 27.08.2010 of Mr.Grover Director (Projects) – calling upon Mr R.K. Bhandari, General Manager (Projects) to follow the opinion of the legal department. It is important to remind ourselves at this juncture that till 10.06.2010, it was the same R.K. Bhandari, who opined based on the very same additional information, (which formed the edifice of Ms Smita Sehgal's opinion) that material forwarded did not necessitate revision in award recommendation. There is no averment in the affidavit as to whether Mr.Grover called a meeting of Mr.R.K.Bhandari and Mr.Ravi Saxena to discuss the opinion of the legal department. Mr Grover's endorsement suggests quite clearly that he left no scope for debate or discussion.

21. On receipt of EIL's revised recommendation of 01.09.2010, GAIL vide communication dated 18.09.2010 simply forwarded the opinion of EIL to RGPPL. In its communication, GAIL made it clear that since RGPPL was the owner under the contract, it should take appropriate action at their end. The RGPPL was, at this stage, not happy with the communiquT of GAIL whereby, the onus for the final decision was put on it, therefore by a letter dated 20.09.2010 it called upon GAIL to forward its recommendation based on the communication of EIL dated 01.09.2010. This letter of RGPPL dated 20.09.2010 is not on our record, though it finds mention in paragraph 37 of the affidavit filed by Mr.M.B. Gohil. GAIL, however, did not oblige as is evident from its letter dated 22.09.2010. GAIL after giving reference to its earlier recommendation dated 08.03.2010, and also letters dated 09.04.2010, 21.04.2010, 09.06.2010 and 10.07.2010, put the onus back on RGPPL to take a decision in the matter being the owner of the project as it had in its wisdom, all the relevant information, on the subject, available with it. The author of letters dated 18.09.2010 and 22.09.2010 is one Sh. S.C. Khetan,

Dy. General Manager (PD), in GAIL, who appears to have taken over from M.G. Gohil. It appears that given the stance of GAIL, RGPPL proceeded to take a stance in the matter. Consequently, by email dated 07.10.2010, RGPPL informed GAIL that they had taken a decision at their Board of Directors meeting held on 04.10.2010 to annul the 1st tender. It also indicated in the said communication that by a letter dated 06.10.2010, this decision had also been conveyed to RDS. Since RDS had been disqualified, their EMD was also sought to be returned. GAIL, by this very communication had been asked to re-float a fresh tender. The email of 07.10.2010 was followed by a letter dated 13.10.2010 of RGPPL to GAIL broadly conveying the same information. Consequent thereto, GAIL informed EIL vide letter dated 19.10.2010 to initiate a fresh tender process for construction of breakwater works at the LNG terminal. On 31.12.2010, EIL forwarded the NIT alongwith international competitive bidding (in short 'ICB') and the BQC for fresh tender (i.e., the 2nd tender) to GAIL for approval. The tender committee, comprising of the executive director, approved the issuance of the said documents with the amended clause 8.1.1.1. This document was further approved by the competent authority, i.e, the Director (Marketing). The approval was obtained on 06.01.2011. Based on the above, EIL floated the 2nd tender inquiry on an ICB basis on 12.01.2011. It is this 2nd tender which contains the amended clause 8.1.1.1 which is the cause of grievance in the present writ petition.

SUBMISSION OF COUNSELS

22. In the background of the aforesaid facts and circumstances, submissions were made by counsels for parties. The arguments have been addressed before us on behalf of petitioner/RDS by Mr Jagdeep Dhankar, senior advocate; on behalf of RGPPL by Mr A.S. Chandhiok, Addl. Solicitor General (ASG); on behalf of GAIL by Mr Gourab Banerji, ASG; and on behalf of EIL by Mr Ashok Mathur, Advocate. Ms Indira Jai Singh, learned ASG made submissions on behalf of EIL in support of the application filed, to bring on record the legal opinion, which has been referred to above by us. Mr Neeraj Choudhari, CGSC made submissions on behalf of UOI.

23. Mr Dhankar in his submissions has taken us minutely through those very documents which we have referred hereinabove to show how the owners engineers, GAIL as well as EIL till 11.08.2010 consistently

adhered to the stand that their recommendation to award the contract to RDS did not require any revision. He submitted that the change which was brought about on 01.09.2010 was made with a malafide intention only to oust the petitioner. The decision in respect of the said change was recommended by Ravi Saxena on behalf of the EIL, who was also the author of the earlier communication dated 11.08.2010, wherein he had conveyed to GAIL and through GAIL to RGPPL that notwithstanding the qualifying work having been executed by the petitioner in "two phases" under two contracts, the petitioner was eligible and its recommendations for award of contract to RDS did not require a revision. Mr Dhankar submitted that the action of the respondent was fraught with malice, arbitrariness and lacked complete fairness, in as much as, the only intent of RGPPL was somehow to get the EIL and GAIL to change their opinion so that RDS was ousted from the work in issue. Having achieved in its design, RGPPL presented this court with fate accompli when the petitioner/RDS filed a writ petition bearing no. 8252/2010 to challenge RGPPL's decision of 04.10.2010 by cancelling the 1st tender altogether. The petitioner/RDS was thus left with no option but to withdraw the petition and take its chance in a fresh round if and when the work were to be awarded. The RDS's apprehension, which is recorded in the court's order dated 14.12.2010, came true, when in the fresh (2nd) tender floated by the respondents, the eligibility criteria contained in clause 8.1.1.1. in the 1st tender, was significantly changed to ensure its complete exclusion from the race, so to speak. Given the facts and circumstances of the case in this matter, the court could come to no other conclusion but that the respondents. action were malicious, unfair and contrary to justice and equity. We may only note here that at the request of Mr Dhankar, Mr Chandhiok, learned ASG had accorded an opportunity to the petitioner to inspect briefly, RGPPL's record in court; based on which Mr Dhankar brought to our notice, a significant fact, which is that on 17.09.2010, RGPPL had received a copy of the completion report dated 09.08.2005 from the concerned authorities i.e., Deputy Chief Engineer–IV, which clearly indicated that the breakwater work (i.e., the qualifying work) at Mus Car Nicobar Island had been constructed and completed. Mr Dhankar submitted that RGPPL, while issuing its communication on 20.09.2010 to GAIL, called upon it to submit its recommendation (and not simply forward that which EIL had given vide its communication dated 01.09.2010) – which ordinarily would have

meant that it wanted its independent input on the issue at hand; and therefore, in order to ascertain its view, it ought to give every material it had at hand, including the completion report dated 17.09.2010, if its action were not motivated. Mr Dhankar submitted that otherwise, all this while, RGPPL had been furnishing documents to GAIL to opine on the matter, however, this crucial document had been withheld by RGPPL because by this time, it had already received an opinion which it was so desperately seeking, which was the ouster of RDS.

24. On behalf of GAIL, Mr Gaurab Banerji took us through a series of documents and correspondence which had been exchanged amongst the parties on the aspect pertaining to the qualifying work and its impact on the eligibility of RDS. Mr Banerji laid special emphasis on the fact that the RDS had made a misrepresentation, in as much as, in its bid document filed in respect of the 1st tender against query no. 6, it had stated that it had executed a breakwater of total length of 500 metres at Mus Car Nicobar Island; the milestone dates being:- date of award – November, 2000; commencement of work – November, 2000; the scheduled date of completion – June, 2003; and lastly, the actual date of completion – June, 2003. According to the learned ASG, the said information given in the aforementioned document by RDS had been confirmed against query no.10 raised in the very same document. Mr Banerji submitted that by way of evidence, the only proof that RDS provided to establish the veracity of the said information concerning qualifying work, was the certificate of the Government of India, Ministry of Shipping, Roadways and Highways dated 05.04.2008. Since the material collected by RGPPL demonstrated that the qualifying work had in fact commenced in 1995, and that it got concluded in 2003, demonstrated that RDS had misrepresented facts which led both GAIL and EIL into believing that the RDS was eligible. Mr Banerji laid stress on the fact that the contract in issue, i.e, the 2nd tender envisaged execution of the work in three (3) years. He submitted that if petitioner had taken eight (8) years to complete a breakwater of 500 metre length then both the experts, i.e., GAIL and EIL including the owner had the right to review their decision and cancel the contract as under the 2nd tender, a successful bidder would be required to construct a breakwater of 1800 m length in thirty three (33) months. Mr Banerji submitted that, the given the facts and circumstances of the case and the documents on record, it could not be said that respondents have taken a decision with the malicious intent or, that it

was unfair and arbitrary.

25. Mr Mathur, in his brief submissions, dittoed the arguments of Mr Banerji. As indicated above, Mr Mathur had very little to say on the change of opinion of EIL between 11.08.2010 and 01.09.2010. The reason for the opinion; which is also noticed by us above, was the opinion obtained from the legal department of EIL.

26. Mr Chandhiok, learned ASG appearing for the RGPPL argued that under clause 28.1 of the IFB read with clause 19, RGPPL as the owner was entitled to cancel the 1st tender. Mr Chandhiok submitted that under clause 9 of the ITB the owner was entitled to seek additional information from the bidders. It was his case that this information was sought from time to time from RDS through the aegis of owners. engineers, who in turn prevailed upon EIL to seek this information. Despite, several communications beginning from March, 2010, the said information was not made available by RDS. RGPPL had to obtain the information from various sources, including the RTI route. It was the information which RGPPL had gathered, i.e., the CAG Report, and the information available on the website of Andaman Harbour Works, which gave a clue to the fact that RDS had neither constructed entire 500 metres of the qualifying work, purportedly executed at Mus Car Nicobar Island, nor had it been executed under one single contract in a single phase, as was the requirement of clause 8.1.1.1 of the 1st tender. It was Mr Chandhiok's submission that, given this misrepresentation, RGPPL as the owner, in public interest, was entitled to cancel the 1st tender. Mr Chandhiok raised certain issues on the "maintainability" of the reliefs sought in the writ petition. In this regard, Mr Chandhiok drew our attention to the reliefs claimed by RDS whereby it sought a direction from this court to quash the decision taken by RGPPL's board of directors on 04.10.2010, cancelling the 1st tender. Learned ASG submitted that this relief could not be sought by RDS, in the present writ petition, in view of the fact that RDS had withdrawn its earlier writ petition, i.e., WP(C) No. 8252/2010 without seeking liberty to file a fresh writ petition to challenge the very same decision. In order to buttress this submission, Mr Chandhiok submitted that, at best, RDS could seek to challenge the 2nd tender by way of the present writ petition, wherein allegation made is that the petitioner was wrongfully excluded. It was the ASG's submission that liberty sought and granted by this court by its order

dated 14.12.2010 was of a limited nature. In order to buttress his submission, learned ASG referred to an application bearing no. 13791/2010 dated 07.10.2010, filed by RGPPL, in the writ petition filed by Ranjit Buildcon Ltd. [WP(C) No. 2142/2010]. Learned ASG referred to paragraphs 3, 5, 6, 7 & 10 of the said application. Based on the assertion made therein, wherein broadly, it has been stated that RDS had been declared ineligible for failure to meet the qualifying criteria – Mr Chandhiok submitted that a Division Bench (which included one of us i.e., Sanjay Kishan Kaul, J) of this Court had by an order dated 30.11.2010 dismissed the writ petition as withdrawn. Mr Chandhiok submitted that even though the application contained allegations against RDS, (which was impleaded as respondent no. 2 in the said writ petition), no caveats were entered by RDS when it came up for hearing. For all these reasons, it was Mr Chandhiok's submission that RDS is neither entitled to assail the decision of RGPPL dated 04.10.2010 nor could it seek a writ of mandamus calling upon RGPPL to award the contract in its favour.

27. On behalf of UOI, Mr Neeraj Choudhary adverted to only the averments made in the counter affidavit filed by the UOI.

REASONS

28. Having heard the learned counsel for the parties and facts noticed hereinabove, it is quite clear that after RDS was declared as L-1, a concerted attempt was made to oust the RDS. Under the terms of the 1st tender, the job of evaluating the eligibility of the bidders was that of EIL. EIL made its recommendations, as regards techno-commercial qualification of RDS and that of three (3) other bidders, as far back as, 24.12.2009. GAIL, after evaluating EIL's recommendation sought its opinion on the technology that RDS would use for loading out and placement of rock armour. GAIL insisted, that EIL should get the back-up consultant, i.e., Scott Wilson, U.K to opine on the matter. EIL did the needful and forwarded an addendum in that regard generated by Scott Wilson, U.K. to its report on 29.01.2010. This cleared the way for opening the price bid. It is not disputed, as it cannot be, that the price bid under the tender conditions (i.e., the 1st tender) could only been opened in respect of those bidders who were considered to be techno-commercially qualified. On 10.02.2010, GAIL gave its approval to EIL to open the price bid of the four (4) bidders who had qualified the techno-commercial round. Ranjit Buildcon Ltd., which had been

disqualified in the techno commercial round, stood aggrieved in the meanwhile. On 11.02.2010, when price bids were opened, it was undisputedly found that RDS was the lowest bidder at Rs 390 crores (approximately). It is also not in dispute that the difference between the next lowest bidder, which was Afcons Infrastructure, is a sum of Rs 160 crores (approximately). The EIL conveyed its award recommendation to GAIL vide its letter dated 26.02.2010. GAIL in turn forwarded its award recommendation, (after due examination of the award recommendation of EIL) on 08.03.2010. Mr M.B. Gohil, on behalf of GAIL communicated that recommendation. RGPPL, it appears was not happy with this state of affairs. RGPPL raised various queries by its letter dated 22.03.2010; to which we have already made a reference. This was followed by a series of letter dated 09.04.2010, 26.05.2010 and 26.07.2010. In between, RGPPL had obtained a CAG report no. 2/2002. A perusal of RGPPL's record would show that on 14.05.2010 it had written to CAG that it had downloaded its audit report no.2/2002 with respect to construction of breakwater at Mus Car Nicobar Island and that it be given a certified copy of the same alongwith any additional record with regard to the same. The CAG obliged evidently vide its letter dated 17.05.2010 by forwarding a copy of its report no.2/2002. What is not known is when did RGPPL for the first time download a copy of the report from the website despite the fact that the matter had been hanging fire since 08.03.2010. More pertinently, these letters are not referred to in the affidavit filed by RGPPL. It evidently, also became wise to the information available on the website of the Andaman Harbour Works, which indicated that the qualifying work at Mus Car Nicobar Island, which the RDS claimed as its experience in executing the instant work, was only of a length ad-measuring 490 metres. GAIL, at the insistence of RGPPL, conveyed this information to EIL. It is pertinent to note that, keeping in mind the information that RGPPL had, it called upon GAIL to obtain the work order issued in respect of breakwater evidently constructed by RDS at Mus Car Nicobar Island. Other queries were also raised (to which we have made a reference above) by RGPPL, in its letter dated 08.06.2010. In the interregnum, RGPPL had also received a letter from the Deputy Chief Engineer – IV, Andaman Harbour Works dated 05.06.2010. This letter of Deputy Chief Engineer – IV Andaman Harbour Works was also forwarded for consideration of the EIL. Sh.R.K.Bhandari, on behalf of EIL, in his letter dated 10.06.2010 remained

firm on his stand that the material placed before him, which included CAG's report number 2/2002 as also the letter of the Deputy Chief Engineer –IV, Andaman Harbour Works dated 05.06.2010, did not require a revision in EIL's award recommendation qua RDS. Not being satisfied, RGPPL by a letter dated 15.06.2010 issued a missive to GAIL, in which it inter alia observed therein for the first time [after nearly three (3) months] that its initial recommendation of 08.03.2010 was conditional. GAIL, in the meanwhile, also sought the opinion of the Attorney General on the issue raised by RGPPL that since work at Mus Nicobar had been awarded to EHL could it be said that RDS had executed the work as, it was only a sub-contractor, and therefore did it come within the ambit of the expression "single bidder". The Attorney General, however, to the misfortune of RGPPL as it would appear, clearly opined that RDS was eligible and fell within the meaning of the expression 'single bidder'. The rationale broadly given was that even though qualifying work had been awarded to EHL, it did not have the necessary wherewithal, the work having been executed by RDS, it could not be said that it was sub-contractor. It may, however, be pertinent to emphasis the fact that the query put to the learned Attorney General was restricted to whether RDS could be considered a sub-contractor in view of the fact that the works had been awarded by the Government of India to EHL.

28.1 The point to be taken note of is, that even though opinion of the learned Attorney General was sought on 08.06.2010 when the CAG report of 2002/or at least letter dated 05.06.2010 issued Deputy Chief Engineer-IV, Andaman Harbour Works was available, no query was raised about the eligibility of RDS in the context of the fact that the qualifying work had been executed at Mus Car Nicobar Island in two (2) phases under two (2) contracts. The query to the learned AG was confined to whether RDS fit the bill of a 'single bidder'.

29. RGPPL even at this stage did not let the matter lie. It evidently collected material through the RTI route by making an application in that regard with the Andaman Harbour Works. The information obtained was transmitted to GAIL, under the cover of its letter dated 26.06.2010. EIL once again was called upon to give its recommendation. EIL, by an email dated 11.08.2010, after a critical review, came to the conclusion that, the mere fact that the qualifying work at Mus Car Nicobar Island had been carried out in two (2) phases, it could not be said that RDS was not a

single bidder. EIL stuck to its decision that no revision in the award recommendation was necessitated at this stage. Then of course, came the internal meeting of EIL – as to when it was held is not disclosed in the additional affidavit filed. The affidavit does not advert to the fact as to who all participated in this internal meeting. At the internal meeting, the matter was evidently referred to the legal department of EIL. The legal department gave an opinion on 26.08.2010, stating therein that principle of strict construction had to be applied to the contract documents, and on application of the said principle it had to be concluded that RDS had not fulfilled the BQC requirement stipulated in the tender, (i.e. the 1st tender), however, ***"harsh"*** or ***"absurd"*** such conclusion may be. It was submitted before us that this opinion became the edifice for the change of view that the EIL took on 01.9.2010. We may note at the outset that the opinion is completely converse to the stand taken by the EIL up to 11.08.2010. It is pertinent to note (a fact we were told in the hearing) that the said legal opinion bears the endorsement of Mr.Grover, Director (Projects) calling upon Mr.R.K.Bhandari, General Manager (Project), EIL to simply comply with the view taken by the legal department. As noticed here in above by us, Mr.R.K.Bhandari was the same gentleman, who on 10.06.2010 had opined that no revision in the award recommendation in favour of RDS was called for. The crucial question which arises, is that, was Mr.R.K.Bhandari given a chance to express his view on the opinion rendered by the legal department. This is a pertinent aspect of matter to our minds since Mr.R.K.Bhandari, followed by Mr. Ravi Saxena, in EIL and, Mr.M.B.Gohil in GAIL, were people who would have dealt with such like contract on a number of occasions. Being experts in their respective fields, they would know what was intended when terms like "single project" and "single bidder" were put in Clause 8.1.1.1. Therefore, for the legal department of EIL to take a contrary, though "absurd" and "harsh" view, required at least a modicum of response from the expert, which was none other than Mr.R.K.Bhandari dealing with the issue till 10.06.2010. Mr.Grover Director (Projects) did not deem it fit to even ask for his comments. Therefore, the integrity of entire process is suspect to say the least. In any event, in our view, the opinion is completely contrary to the plain language of clause 8.1.1.1. At this juncture we may note the relevant provisions of clause 8.1.1.1 as they obtained in the 1st tender:

> "8.1.1.1 The bidder shall have experience of having successfully completed, as a single bidder or as a leader of a Consortium/ Joint Venture, at least one project of a breakwater in an offshore location (as defined at clause No. 8.1.2.5 below) of minimum length of 400 m during the last 20 (twenty) years to be reckoned from the last date of submission of bids. The scope of work of the proposed qualifying project work should comprise of the design, engineering, project management and construction of the breakwater."

30. A perusal of the clause would show that a bidder, would have to have experience of having successfully completed as a single bidder or as a leader of a consortium at least one project of breakwater of a minimum length of 400 metre located in an off shore location, during the last twenty (20) years to be reckoned from the last date of submission of bids. Plain language of the said clause would show that a project could be executed in different phases. The ordinary meaning of the word 'project' would be "planned undertaking or scheme" (See The Conscise Oxford Dictionary Ninth Edition, 1995). Therefore, the fact that the qualifying project at Mus Car Nicobar Island was executed by RDS in two (2) phases could not have ousted it. In understanding the meaning of the words and expression used in a contract, courts would ordinarily go by the meaning given to the words by those who administer and operate the contract, unless that meaning is completely at variance with the understanding of a common prudent person. Both the experts, who dealt with the evaluation of the bids, i.e., GAIL and EIL, despite receipt of material in the form of CAG report and the Deputy Chief Engineer-IV, Andaman Harbour Works letter, which indicated that qualifying contract had been executed in two (2) phases, came to the conclusion that RDS was eligible and, therefore, the award recommendation did not require a review. We fail to understand how the legal department could take a view, on this matter, contrary to what the persons, who operate these contracts, understood the expression to mean. In a construction of commercial contract (if one were to assume for a moment that construction of contract was required to ascertain the intention of parties), the accepted rule is that if semantic and syntactical construction is at variance with the business common sense, then it must yield to business common sense. The observations in **Antaios Cia. Naviera S.A. v. Salen Rederierna A.B.** (1985) A.C. 191 been apposite are extracted below:

"While deprecating the extension of the use of the expression 'purposive construction' from the interpretation of statutes to the interpretation of private contracts, I agree with the passage I have cited from the arbitrators. award and I take this opportunity of restating that, if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."

30.1 The purpose of construction has been described felicitously by Lloyd L.J. in **The Sounion (1987) 1 Lloyd's Re. 230** as follows: "Designed to separate the purposive sheep from the literalist goats."

30.2 We may note at this stage that we had pointedly put to the ASG Ms.Indra Jai Singh during the course of hearing, as to whether there was any doubt or dispute that RDS had not executed the qualifying work at Mus Car Nicobar Island equivalent to the contracted length of 500 metres. Ms.Indra Jai Singh, on instructions, categorically informed us that this aspect of the matter was not in issue. She, however, submitted that what was in issue, was the fact, that since it had now emerged that RDS had completed the project in two (2) phases; according to EIL, it was not eligible. With EIL having taken this stand, which was not contradicted by GAIL at the hearing; it quite surprised us when, Mr.Chandhiok appearing on behalf of RGPPL took the stand that RDS had not even constructed the required minimum 400 metres length of the qualifying work. We may also point out at this stage the stand of the UOI in its affidavit. UOI has categorically supported its certificate dated 05.04.2008 and the clarification issued on 05.06.2010 by the Deputy Chief Engineer-IV, Andaman Harbour Works. Therefore, this argument of RGPPL cannot be accepted.

31. The submission made on behalf of the respondents, in one form or the other, that there had been a misrepresentation by RDS, in as much as, in the bid document it had disclosed that the qualifying work had commenced in 2000 and was completed in 2003, was put by us to Mr Dhankar. Mr Dhankar informed us that the RDS somehow misconstrued the information sought in the bid document. On being queried as to why RDS had withheld the work order, Mr Dhankar submitted that since most of the records of the Andaman Harbour Works had got swept in the tsunami of the December, 2004, it had become difficult to recoup the

work order. Mr Dhankar submitted that, nevertheless, the said information was available with the respondents by July, 2010 and, therefore, they had every opportunity to examine the effect of the same prior to issuance of recommendation dated 11.08.2010.

32. Having examined the matter closely, we got a distinct impression that RGPPL was somehow attempting to find a way around the recommendation issued by GAIL and EIL. Even though the information given against the query no. 6 of the bid document filed by RDS was not completely accurate, it did appear to us that RGPPL had with it the information that the qualifying work at Mus Car Nicobar Island had commenced in 1995 and that it was awarded in two (2) phases, under two (2) separate contracts. This distinct impression we get as the information with regard to the fact that the qualifying work had been executed in two (2) phases was available in the CAG report of 2/2002. Some part of the information was also available on the website of the Andaman Harbour Works. Therefore, whether the information given against query no. 6 in the tender documents actually misled RGPPL is, in the facts and circumstances obtaining in the case, difficult to believe. Notwithstanding this, the said information lost its materiality in view of the fact that, the said information was sought to be used by RGPPL only to say that RDS was not eligible as the qualifying work had been executed in two (2) phases. The aspect pertaining to the time taken in the execution of the qualifying the work; was a factor which did not even figure in the mind of the Evaluator i.e., EIL on 01.09.2010; though Mr.Banerjee true to his craft had attempted to make this an issue. The fact remains, that despite this information being available, on review and examination at length, both GAIL and EIL came to the conclusion that their initial recommendation of 08.03.2010 did not require a revision. Therefore, for the EIL to have turned turtle, so to say, on 01.09.2010, based on a legal opinion generated by its legal department, belies credibility to say the least. What is interesting, is that, even though GAIL, up to a point took the stand that in respect of all recommendations qua award of contract for DPP; RGPPL would have to rely upon on it – it collapsed under the weight of RGPPL or perhaps threw up its hands in complete frustration, as it appears after 11.08.2010. This is evident from the fact that after the EIL's u-turn on 01.09.2010, GAIL refused to give its own view in the matter, which it was required to do under the terms and conditions of the tender. RGPPL sought its recommendation by its letter dated

20.09.2010, despite which, GAIL refused to do so, as is evident from its return communication dated 22.09.2010, wherein it called upon RGPPL to take the decision in its capacity as the owner in view of the fact that the entire material was available with it. We have no doubt in our minds that in this background, the decision taken at the Board of Directors. meeting of RGPPL on 04.10.2010 was pregnant with malice, and that it had been taken for considerations other than those which are in accord with good conscious, equity and fairness. The new clause (which is the amended version of clause 8.1.1.1 obtaining in the 1st tender) was undoubtedly introduced in the fresh tender, (i.e., the 2nd tender), to completely oust RDS. For the sake of convenience the amended clause is extracted hereinbelow:

> "8.1.1.1 The bidder must have completed in a single contract, as a single bidder or as a leader of a consortium, at least one breakwater (using marine spread – refer Note 1) of minimum length of 400 m located in sea during the last 20 (twenty) years to be reckoned from the last date of submission of bids. The scope of work of the above referred qualifying job should comprise of design, engineering, construction and project management of the breakwater. Land connected breakwater having a minimum length of 400m located in sea is also acceptable provided construction has been carried out using marine spread as mentioned above."

33. A bare perusal would show that the respondents have called for bids only for those bidders who have completed in a single contract as a single bidder or as a leader of a consortium/ joint venture one project of a breakwater, located in sea, of minimum length of 400 metre during the last twenty (20) years to be reckoned from the last date of submission of bids. At the end of this amended clause, there is also the insertion of the following provision "...Land connected breakwater having a minimum length of 400 metre located in sea is also acceptable provided construction has been carried out using marine spread...". 33.1 The respondents knowfully well that RDS can never apply or be found eligible in respect of the 2nd tender as: the qualifying work which RDS had executed, is a subject matter of two (2) contracts and not a single contract; and that project was an offshore project as against one located in sea. The additional provision of a land connected breakwater which was not an option

available in the 1st tender is, according to RDS, deliberately inserted to accommodate bidders who missed the bus, so to speak, in the first round. Since there is no material in respect of the last part, we are not impressed by the same but it is definitely apparent to us that the words ***'single contract'*** as also that the ***'qualifying work should be located in sea',*** have been introduced in the facts and circumstances of the case to exclude RDS. This is a clear case of malice in law which occurs when a person or an entity commits a wrongful act intentionally without just cause or reason. The following observations of Viscount Haldane in **Shearer vs Shield** (1914) AC 808 have been cited with approval in **West Bengal State Electricity Board vs Dilip Kumar Ray** (2007) 14 SCC 568, para 19 at page 582:

> ".... 'A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts ignorantly, and in that sense innocently.."

33.2 It is quite apparent that RGPPL exercised its power solely with the object of achieving a pre-meditated object to the detriment of the aggrieved party, i.e., the RDS. The action of RGPPL was thus geared to achieve an "authorized purpose" which in our view could be construed as malice in law [see **R.S. Garg vs State of U.P & Ors.** (2006) 6 SCC 430, para 25 at page 448]. That malice in law is an incident or "dimension" of fair play in action; is now well established [see **Mahabir Auto Stores & Ors. vs Indian Oil Corporation & Ors.** (1990) 3 SCC 752, para 13 at page 761].

34. Mr Chandhiok's submission that RDS could not lay a challenge to the decision of the Board of Directors of RGPPL dated 04.10.2010 based on a fact that RDS had withdrawn its writ petition [WP(C) 8252/ 2010] without liberty to file a fresh writ petition is, according to us, completely misconceived and untenable. The reason for that is simply the fact that the court did not adjudicate upon the issues raised in the said writ petition. It would be important to note that prior to the said writ petition being filed by RDS, one Ranjit Buildcon Ltd. had filed a writ petition no. 2142/2010, in which, RGPPL had filed an application, wherein broadly, it had been averred that the RDS had been declared ineligible in

respect of the 1st tender for its failure to meet the qualifying criteria. The said writ petition of Ranjit Buildcon Ltd. was dismissed as withdrawn. RDS was impleaded as a respondent in this writ petition.

34.1 RDS could have said very little in the matter, the petition being of Ranjit Buildcon Ltd.. It is for this reason perhaps, that RDS instituted a separate and independent writ petition being no. 8252/2010 seeking to challenge essentially the decision of the board of directors of RGPPL dated 04.10.2010. When it was put to the learned counsel for RDS that nothing would survive since the tender by itself had been cancelled by RGPPL in exercise of its powers under Article 28.1 of the said tender, it withdrew the writ petition with the caveat that if a fresh tender is floated by RGPPL, it ought to have liberty to have recourse to an appropriate legal remedy, in accordance with law, to challenge such a tender if it sought to exclude the RDS. Said liberty was granted by the court in the order dated 14.12.2010. 34.2 In view of these factors it could hardly be contended by RGPPL that while seeking to challenge the amended clause 8.1.1.1 (now inserted in the 2nd tender) that RDS could not demonstrate that the decision arrived at by RGPPL's board of directors on 04.10.2010 is fraught with malice in law and was otherwise contrary to the principles of fairness, equity and good conscience. The submissions of Mr Chandhiok on this count, in our view, are also without merit.

35. Given the aforesaid, in our view, we have no hesitation in moulding prayer (A) in the writ petition and declaring that the amended clause 8.1.1.1 (inserted in the 2nd tender) in the given facts and circumstances of this case is bad in law. Similarly, for the reasons given above, we quash the decision taken by the RGPPL in its board of directors. meeting held on 04.10.2010, whereby the bid of RDS in the 1st tender was rejected and the bidding process in the 1st tender was annulled. This would really mean that RGPPL would have to revisit the issue in the light of observations made by us hereinabove. It would, while doing so, bear in mind the fact that the GAIL has not given its opinion in the matter – which it is required to render, given the fact that it is the owner's engineer.

36. This brings us to the last relief sought in the writ petition seeking a direction against RGPPL to formalize award of contract in favour of RDS in respect of DPP. We are afraid that we cannot grant this relief for the reason that over the years the courts have demarcated

certain boundaries for itself which includes not issuing directions to the States and its instrumentalities to award contracts in favour of one or the other party, however, aggrieved that party may be. It appears to us this may at times seem frustrating to a litigant. At the end of day the litigant wants, and rightly so, the fruits of litigation. It is no relief to the petitioner to get, in a manner of speaking, a certificate from the court that the actions of the respondents are illegal or invalid in law, but then being told that an appropriate direction to do justice in the matter would flow finally from the respondent state. It appears to us the reason and the rationale for this is that the State and its instrumentalities at the end of the day, it is believed have the interest of the republic in mind. It is believed that having erred, once the State would correct its course. The State or its instrumentalities cannot but act in the interest of the republic. Whether they do so or not is ordinarily left to those who govern them. We say no more but leave it to the conscious of the superior officers and the members of the Board of Directors. of the respondents, i.e., RGPPL, GAIL and EIL to take a decision in accordance with fairness, equity and justice keeping the interest of the State in mind. While taking the said decision, it would be wise to revisit the entire issue including the fact that the RDS has offered a price which is Rs 160 crores less than that of Afcons Infrastructure (i.e., L-2); and that despite queries being raised that this was below the estimated cost of Rs 662 crores, both experts in the field had granted its approval to the bid of RDS.

37. Before we part, we may also observe that we had directed both parties to file their respective bill of cost. The bill of costs filed on behalf of the RDS suggests that they have incurred on counsels. fee a sum of Rs.33,22,000/-. Since RDS has succeeded to a large extent, we direct payment of 3/4th of the costs in its favour. The three respondents, i.e., RGPPL, GAIL and EIL shall pay a sum of Rs.24,91,500/- to RDS by way of cost in equal proportion. With the aforesaid observations the petition is disposed of.

ILR (2012) I DELHI 527
CRL. M.C & M.A.

DAYA RAM VERMA & ORS. ....PETITIONER

VERSUS

SECURITIES & EXCHANGE BOARD OF INDIA ....RESPONDENT

(MUKTA GUPTA, J.)

CRL. M.C. NO. : 766/2010 DATE OF DECISION: 18.10.2011
& CRL. M.A. NO. : 2778/2010

(A) Constitution of India, 1950—Article 227—Securities and Exchange Board of India Act, 1992—Sections 24 (1) and 27 Respondant filed a complaint before Ld. CMM for the offence under Section 24(1) and 27 of the Act against M/s. Master Green Forest Ltd—Allegations that accused company was operating collective investment scheme—Raised huge amount from General Public in contravention of the Act and Regulation—There were allegations against the promoters/Directions and the persons responsible for the day to day affairs of the company, who actively connived with each other in the commission of offence—Only company was arrayed as an accused—ld. ACMM vide its order dated 15th December 2003 observed—Perusal of the complaint discloses commission of offence Punishable under Section 24 (1) and 27 of the Act and accordingly, all the accused be summoned for 21 February 2004—Petitioners filed the present petition seeking quashing of the proceedings pending against them—Petitioners contended—Petitioners were not arrayed as accused—No summons were issued to them vide order dated 15.12.2003—In the garb of filing fresh addresses of accused, complainant filed the list of the directors—

Trial Court issued the summons without application of mind—As no summons were issued at the first instance, petitioner should not have been summoned as directors except as provided under Section 319 Cr.P.C—Respondent contended that no case for quashing is made out—Ingredients in the complaint discloses commission of cognizable offence against petitioners also—Held—Indubitably, the Court takes cognizance of the offence and not the offenders—No doubt in the memo of parties filed along with the complaint only the company was made an accused however, perusal of the order dated 15th December, 2003 summoning the accused shows that the Learned ACMM has used the word "accordingly all the accused be summoned for 21st February, 2004" the use of these words show that the Learned ACMM was conscious of the fact that besides the accused company i.e M/s. Master Green Forest Limited there were other accused also—Further the complaint clearly stated that the Directors and Promoters of the company who were the persons in-charge and responsible for the day-to-day affairs of the Company and all of them actively connived with each other for the commission of the offence—Thus, the role of promoters and Directors was specifically mentioned in the complaint—It was further mentioned that accused company and its promoters and Director in-charge and responstble to the accused company for the conduct of its business were liable for the violations of the accused company as provided under Section 27 of the SEBI Act—Thereafter opportunities were giving to Respondent to furnish the details so that process could be issued aganist the accused—Thus, it is not as if all of a sudden vide the order dated 13th October, 2006 the accused were summoned. In view of the facts of the present case the contention of the Petitioner that the summons having not been issued in the first instance by the Learned magistrate, the Learned Additional

Sessions Judge could not have issued the summons unless the stage under Section 319 Cr.P.C. was arrived at, deserves to be rejected.

I have heard learned counsel for the parties and perused the records. Indubitably, the Court takes cognizance of the offence and not the offenders. No doubt in the memo of parties filed along with the complaint only the company was made an accused however, perusal of the order dated 15th December, 2003 summoning the accused shows that the Learned ACMM has used the word "accordingly all the accused be summoned for 21st February, 2004". The use of these words show that the Learned ACMM was conscious of the fact that besides the accused company i.e. M/s. Master Green Forest Limited there were other accused also. Further the complaint clearly stated that the Directors and promoters of the company who were the persons in-charge and responsible for the day-to-day affairs of the company and all of them actively connived with each other for the commission of the offence. Thus, the role of the promoters and Directors was specifically mentioned in the complaint. It was further mentioned that the accused company and its promoters and Directors in-charge and responsible to the accused company for the conduct of its business were liable for the violations of the accused company as provided under Section 27 of the SEBI Act. Thereafter opportunities were given to the Respondent to furnish the details so that process could be issued against the accused. Thus, it is not as if all of a sudden vide the order dated 13th October, 2006 the accused were summoned. In view of the facts of the present case the contention of the Petitioner that the summons having not been issued in the first instance by the Learned Magistrate, the Learned Additional Sessions Judge could not have issued the summons unless the stage under Section 319 Cr.P.C. was arrived at deserves to be rejected. Thus, the reliance of the Petitioner on **Ranjit Singh** (supra) is wholly misconceived. **(Para 6)**

(B) Constitution of India, 1950—Article 227—Securities and Exchange Board of India Act, 1992—Sections 24 (1) and 27—Respondent filed a coomplaint before Ld. CMM for the offence under Sections 24(1) and 27 of the Act against M/s Master Green Forest Ltd—Allegations that accused company was operating collective investment scheme—Raised huge amount from General Public in contravention of Act and Regulations—There were allegations against the promoters/Directions and the persons responsible for the day to day affairs of the company, who actively connived with each other in the commission of offence—Only company was arrayed as an accused—Ld. ACMM vide its order dated 15th December 2003 observed—Perusal of the complaint discloses commission of offence punishable under Section 24(1) and 27 of the Act and accordingly, all the accused be summoned for 21 February 2004—Petitioners filed the present petition seeking quashing of the proceedings pending against them—Petitioners Contended—No specific role is assigned to them in the complaint—Merely stating that all the Directors and promoters connived with each other and were in-charge and responsible for the day-to day functioning of the company cannot fasten the vicarious liability on the petitioners—Respondent contended that no case for quashing is made out—Ingredients in the comlaint disclose commission of cognizable offence—Held—Complaint clearly stated that the promoters and Directors of the Company in-charge and responsible for the conduct of its affairs have connived with each other and have committed the offence—In the present case the offence alleged is of running a collective investment scheme contrary to the provisions of SEBI Act and Regulations—No doubt Section 27 of SEBI Act makes responsible all other Directors of the company who are responsible and in-charge of the day-to day affairs of the company, however in a case of conspiracy

number of people can be involved and this is the allegation of the Respondent in the complaint. Thus, I find no merit in the contention that even on the facts of the present case no case for proceeding aganist the Petitioners are made out.

Regarding the issue whether the complaint discloses sufficient evidence against the Petitioners or not, it may be noted that as reproduced above the complaint clearly states that the promoters and Directors of the company in-charge and responsible for the conduct of its affairs have connived with each other and have committed the offence. In **K.K. Ahuja vs. V.K. Vora and another, vs.** 2009 (10) SCC 48 it was held:

> "27. The position under Section 141 of the Negotiable Instruments Act, 1881 can be summarized thus:
>
> (i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix Managing to the word Director makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.
>
> (ii) In the case of a director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141.

> (iii) In the case of a Director, Secretary or Manager (as defined in Section 2 (24) of the Companies Act) or a person referred to in Clauses (e) and (f) of Section 5 of Companies Act, an averment in the complaint that he was in-charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 141 (1). No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141 (2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.
>
> (iv) Other officers of a company cannot be made liable under sub-section (1) of Section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, be averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence." **(Para 7)**

In the present case the offence alleged is of running a collective investment scheme contrary to the provisions of SEBI Act and Regulations. No doubt Section 27 of the SEBI Act makes responsible all other Directors of the company who are responsible and in-charge of the day-to-day affairs of the company, however in a case of conspiracy number of people can be involved and this is the allegation of the Respondent in the complaint. Thus, I find no merit in the contention that even on the facts of the present case no case for proceeding against the Petitioners are made out. **(Para 8)**

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Joginder Sukhija, Advocate.

FOR THE RESPONDENTS : Mr. Sanjay Mann, Advocate.

CASES REFERRED TO:

1. *National Small Industries Corp. Ltd.* vs. *Harmeet Singh Paintal & Anr.* 2010 (2) J.T. 161.
2. *K.K. Ahuja* vs. *V.K. Vora and another,* 2009 (10) SCC 48.
3. *H.R. Kapoor* vs. *SEBI* 2008 Crl.L.J. 4632.
4. *Panther Fincap and Management Services Ltd. and Ors.* vs. *SEBI,* MANU/DE/9208/2006.
5. *G.D. Goyal* vs. *State* Crl.M.C. 4575/2005.
6. *Rajesh Bagga* vs. *State & Anr.* 2005 (124) DLT 312.
7. *Charanjit Singh* vs. *D.B. Merchant Banking Services Ltd.* 1 (2002) BC 489.
8. *Ranjit Singh* vs. *State of Punjab* (1998) 7 SCC 149.
9. *MCD* vs. *Ram Krishna Rotagi,* 1983 (1) SCC 1.
10. *Raghuvansh Dubey* vs. *State of Bihar,* AIR 1967 SC 1167.

RESULT: Petition and applications dismissed.

MUKTA GUPTA, J.

1. The Respondents filed a complaint before the Learned CMM, Tis Hazari for offences punishable under Section 24(1) and 27 of the Securities and Exchange Board of India Act, 1992 (in short SEBI Act) against M/s. Master Green Forest Ltd. In the complaint it was alleged that the accused company was operating collective investment scheme and raised a huge amount from the general public in contravention with the SEBI Act and Regulations. Besides the allegations against the company, the allegations against its Directors and promoters who were not arrayed as an accused were that the accused through its promoters/Directors who are the persons in-charge and responsible for the day-to-day affairs of the company and all of who actively connived with each other for the commission of the offence. In Para 20 it was further alleged that the accused company and its promoters and Directors in-charge and responsible to the accused company for the conduct of its business were

liable for the violation of the accused company as provided under Section 27 of the SEBI Act. On the said complaint being filed only arraying the company as an accused, Learned ACMM vide its order dated 15th December, 2003 observed that the perusal of the complaint discloses commission of offence punishable under Section 24 (1) and 27 of the SEBI Act and accordingly all the accused be summoned for 21st February, 2004 and therefore, on 23rd August, 2004 when the process was not returned back, fresh summons were issued.

2. On 31st January, 2005 the case was listed before the Learned Additional District and Sessions Judge on transfer in view of the administrative orders passed by this Court. Again since process was not received back, fresh summons were issued against the accused persons. On 15th April, 2005 SEBI was granted an opportunity to furnish the complete details of the accused for enabling the Court to summon the accused and the matter was fixed for 9th September, 2005. However, complete details were not furnished and thus the matter was again adjourned on the 9th September, 2005 and 9th December, 2005. On 10th March, 2006 the complainant submitted to the Court that on account of computerization of the ROC report no details have been supplied as yet to the SEBI. Thus, the matter was adjourned to 26th May, 2006 for further proceedings. Despite all this particulars were not furnished when last opportunity was granted to the Complainant on 13th October, 2006 for furnishing particulars and it was directed that the accused be summoned for 1st December, 2006 for appearance. On this date a list was filed naming the Petitioners as the Directors of the said company. It is against this order summoning the Petitioners and framing notices under Section 251 Cr.P.C. that the Petitioners are before this Court seeking quashing of the proceedings pending against the Petitioners and the complaint in the complaint case titled SEBI Vs. M/s. Master Green Forest Limited being complaint case No. 1250/2003.

3. Learned counsel for the Petitioner contends that the Petitioners were not arrayed as an accused and no summons were issued to them vide order dated 15th December, 2003. It is in the garb of filing the fresh address of the accused that the complainant filed the list of the Directors, shareholders etc. and got them summoned. There is no application of mind by the Learned Trial Court while issuing summons against the Petitioners. Further, since no summons were issued in the first instance

the Petitioners could not have been summoned as Director except as provided under Section 319 Cr.P.C. Reliance is placed on **Ranjit Singh Vs. State of Punjab** (1998) 7 SCC 149.

4. It is further contended that even as per the complaint no specific role has been assigned to the Petitioners. Merely stating that all the Directors and promoters connived with each other and were in-charge and responsible for the day-to-day functioning of the company cannot fasten the vicarious liability on the Petitioners, there being no specific allegations against the Petitioners. Reliance in this regard is placed on **National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal & Anr.** 2010 (2) J.T. 161; **G.D. Goyal Vs. State** Crl.M.C. 4575/2005 decided by this Court on 22.05.2007; **Rajesh Bagga Vs. State & Anr.** 2005 (124) DLT 312; **Charanjit Singh Vs. D.B. Merchant Banking Services Ltd.** 1 (2002) BC 489 to contend that only on specific allegations being raised, the Petitioners could have been summoned and not merely by virtue of their being the Directors of the accused company.

5. Learned counsel for the Respondent on the other hand contends that it is well settled legal proposition that the Magistrate takes cognizance of the offence and not the offences. Reliance is placed on **Raghuvansh Dubey vs. State of Bihar,** AIR 1967 SC 1167 to contend that there were specific averments in the complaint regarding the Directors and promoters and that is why they were summoned as the accused vide the order dated 15th December, 2003. However, since details were not available with the Respondents time was granted by the Learned Trial Court to furnish the details i.e. the names and addresses of the accused. The present is not a case where the committal proceedings took place before the Learned Additional Sessions Judge. The Learned Additional Sessions Judge was acting as a Court of original jurisdiction because this Court in exercise of its administrative powers had directed that all complaints of SEBI will be tried by the Learned Additional Sessions Judges. Thus, the Learned Additional Sessions Judge was competent to summon the Petitioners as accused and the issuance of process by the Learned Additional Sessions Judge was not without jurisdiction. Reliance is placed on **Panther Fincap and Management Services Ltd. and Ors. Vs. SEBI,** MANU/DE/9208/2006. Reliance is further placed on **H.R. Kapoor Vs. SEBI** 2008 Crl.L.J. 4632 to contend that under Section 27 of the SEBI Act every person, who at the time when the offence was

committed was in-charge and was responsible to the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of the said offence and shall be liable to be proceeded against. The decisions relied by the learned counsel for the Petitioner relate to the offences under Section 138 read with Section 141 of the Negotiable Instruments Act unlike Section 27 of the SEBI Act. Reliance is also placed on **MCD Vs. Ram Krishna Rotagi,** 1983 (1) SCC 1 to contend that no case for quashing is made out at this stage as the ingredients in the complaint disclose the commission of a cognizable offence. It is thus stated that no case for quashing of the proceedings is made and the petition be dismissed.

6. I have heard learned counsel for the parties and perused the records. Indubitably, the Court takes cognizance of the offence and not the offenders. No doubt in the memo of parties filed along with the complaint only the company was made an accused however, perusal of the order dated 15th December, 2003 summoning the accused shows that the Learned ACMM has used the word "accordingly all the accused be summoned for 21st February, 2004". The use of these words show that the Learned ACMM was conscious of the fact that besides the accused company i.e. M/s. Master Green Forest Limited there were other accused also. Further the complaint clearly stated that the Directors and promoters of the company who were the persons in-charge and responsible for the day-to-day affairs of the company and all of them actively connived with each other for the commission of the offence. Thus, the role of the promoters and Directors was specifically mentioned in the complaint. It was further mentioned that the accused company and its promoters and Directors in-charge and responsible to the accused company for the conduct of its business were liable for the violations of the accused company as provided under Section 27 of the SEBI Act. Thereafter opportunities were given to the Respondent to furnish the details so that process could be issued against the accused. Thus, it is not as if all of a sudden vide the order dated 13th October, 2006 the accused were summoned. In view of the facts of the present case the contention of the Petitioner that the summons having not been issued in the first instance by the Learned Magistrate, the Learned Additional Sessions Judge could not have issued the summons unless the stage under Section 319 Cr.P.C. was arrived at deserves to be rejected. Thus, the reliance of the Petitioner on **Ranjit Singh** (supra) is wholly misconceived.

7. Regarding the issue whether the complaint discloses sufficient evidence against the Petitioners or not, it may be noted that as reproduced above the complaint clearly states that the promoters and Directors of the company in-charge and responsible for the conduct of its affairs have connived with each other and have committed the offence. In **K.K. Ahuja vs. V.K. Vora and another, vs.** 2009 (10) SCC 48 it was held:

> "27. The position under Section 141 of the Negotiable Instruments Act, 1881 can be summarized thus:
>
> (i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix Managing to the word Director makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.
>
> (ii) In the case of a director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141.
>
> (iii) In the case of a Director, Secretary or Manager (as defined in Section 2 (24) of the Companies Act) or a person referred to in Clauses (e) and (f) of Section 5 of Companies Act, an averment in the complaint that he was in-charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 141 (1). No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141 (2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.

> (iv) Other officers of a company cannot be made liable under sub-section (1) of Section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, be averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence."

8. In the present case the offence alleged is of running a collective investment scheme contrary to the provisions of SEBI Act and Regulations. No doubt Section 27 of the SEBI Act makes responsible all other Directors of the company who are responsible and in-charge of the day-to-day affairs of the company, however in a case of conspiracy number of people can be involved and this is the allegation of the Respondent in the complaint. Thus, I find no merit in the contention that even on the facts of the present case no case for proceeding against the Petitioners are made out.

Petition and application are dismissed.

ILR (2012) I DELHI 538
CM (M)

SMT. MADHURIKA SHARMA & ORS. ....PETITIONER

VERSUS

SMT. BHAGWATI DEVI SHARMA & ANR. ....RESPONDENT

(INDERMEET KAUR, J.)

CM (M) NO. : 885/2011 DATE OF DECISION: 19.10.2011

Code of Civil Procedure, 1908—Order IX Rule 7—Application filed ten years after the defendants were proceeded ex parte—Default explained only on the ground that the defendants are housewives, who had engagged a lawyers and were not aware of the

proceedings—Held, mere engaging the lawyers does not take away duty of the litigant to prosecute the case diligently, so trial Court rightly dismissed the application under Order IX Rule 7 CPC.

Impugned order suffers from no infirmity; petition is dismissed.

(Para 4)

Important Issue Involved: Mere engaging the lawyer does not take away duty of the litigant to prosecute the case diligently.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Man Mohan Swaroop and Ms. Sanyogita Swaroop, Advocates.

FOR THE RESPONDENT : None.

RESULT: Petition dismissed.

INDERMEET KAUR, J. (Oral)

CM No. 14285/2011 (exemption) in CM (M) No. 885/2011

1. Exemption allowed subject to just exceptions.

CM (M) No. 885/2011

2. The order impugned before this court is the order dated 29.03.2011 had dismissed the application filed of the defendants under Order IX Rule VII of the Code of Civil Procedure (hereinafter referred to as 'the Code'). This application had been filed by the defendant Nos. 7, 8, 10 and 11; by way of this application defendant Nos. 7, 8, 10 and 11 had sought setting aside ex parte order dated 05.07.1999. This application had been filed after about ten years. Contention in this application is that the applicants/petitioners were housewives and defendant Nos. 7 and 10 are resident of Rajasthan, defendant No. 10 is a resident of Rohini, Delhi and defendant No. 11 is a resident of UP; The applicants had engaged Mr. T.C. Gupta for defending their suit. They were not aware that the suit was not being prosecuted diligently; in fact, an

application had been filed by their advocate Sh. Alok Kumar to set aside the ex parte order dated 19.02.2008; this was in mistake that the ex parte order was of 19.02.2008 whereas the ex parte order had been passed actually on 05.07.1999. It was only after the petitioners have obtained certified copies of the subsequent orders and engaged another counsel Sh. Man Mohan Swaroop, these facts came to light; thereafter, the present application has been filed.

3. The impugned order had noted that there was a gap of about almost ten years in preferring this application for setting aside ex parte order which was passed on 05.07.1999. The only defence of the petitioners is that the petitioners are housewives and they were not aware of the proceedings; even this is presumed to be a correct fact, it does not take away the duty which is cast upon a litigant to prosecute his case diligently. Record shows that as per the statement of the petitioners, they had engaged three counsel but what did the petitioners do to follow up their case remained unexplainable and unanswered. A litigant after engaging a counsel is also supposed to follow up his case with his lawyer; he cannot be abdicated from his responsibility merely because he has engaged an advocate. The impugned order had correctly noted that there was no justifiable reason for this long delay of ten years; the application under Order IX Rule VII of the Code had accordingly been dismissed. Relevant would it be to note that on an earlier date i.e. 18.09.2008, an application under Order IX Rule VII of the Code had been filed which was dismissed on 12.08.2010; this application had sought to set aside ex parte order dated 19.02.2008 whereas the record shows that the ex parte order had been passed on 05.07.1999. Facts have been noted by the trial court in the correct perspective.

4. Impugned order suffers from no infirmity; petition is dismissed.

ILR (2012) I DELHI 541
EFA (OS)

K.R. BUILDERS PVT. LTD. ....APPELLANT

VERSUS

DDA ....RESPONDENT

(SANJAY KISHAN KAUL & RAJIV SHAKDHER, JJ.)

EFA (OS) NO. : 44/2009 DATE OF DECISION: 20.10.2011

Arbitration Act, 1940 and Arbitration & Conciliation Act, 1996—Applicability—Disputes between the parties culminated into award dated 12.08.96, wherein money was awarded in favour of appellant along with interest from date of award till date of payment or decree, whichever earlier—Both parties understood that the award was governed by the Act of 1940 as the reference was made prior to coming into force of 1996 Act—Appellant filed application under Sec. 14 & 17 of the 1940 Act, in which Hon'ble Singh Judge vide order dated 27.05.2002 held that in view of law prevaliling by way of apex Court judgment, the award enforceable as decree withoutany application as it is 1996 Act that was applicable and since no objections were filed under Sec. 34 of 1996 Act within time, the objections were dismissed—Neither side challenged order dated 27.05.2002, which became final and the appellant filed execution proceedings in which respondent on 12.06.2003 paid the awarded money with interest calculated from date of award till 27.05.2002—Thereafter, the appellant claimedinterest from 27.05.2002 to 12.06.2003, but withdrew the application—Thereafter, the apex court gave a re-thought to the then existing legal position, effect where of was that the award in question was liable to be governed by

the 1940 the Act, under which interest was liable to be paid only till expiry of 90 days from award, so respondent under Sec. 151 CPC claimed that interest paid for period beyond 90 days from date of award till 27.05.2002 was excess payment and liable to be refunded—Hon'ble Single Judge allowed the application—Appeal—Held, order dated 27.05.2002 was based on the then prevalent legal position and since the respondent did not challenge the said order, the way others did not to bring about change in legal position now respondent cannot be allowed to make grievance and reopen the closed litigation—Also held, the date of decree remains the same as date of award but the decree is not enforceable for a period of 90 days in view of Sec.36 of 1996 Act, which is a window given to the judgment debtor to make payment failing which rigours of enforecement would come into play, so interest is liable to be paid till decree is satisfied.

We find that there appears to be some misconception about the date of the decree. The date of the decree remains the same as the date of the award. The decree is not enforceable for a period of 90 days in view of the provisions of Section 36 of the new Act, which reads as under:

> "36. Enforcement – Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court." **(Para 18)**

It is this window which was given to the judgment debtor to make the payment or to challenge the award failing which the rigours of enforcement would arise. Any other construction would make it illogical and thus the interest is liable to be paid till the decree is satisfied. **(Para 19)**

[Gi Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Raman Kapur, Sr. Advocate. with Mr. Aviral Tiwari, Advocate.

FOR THE RESPONDENT : Mr. Arjun Pant, Advocate.

CASES REFERRED TO:

1. *Milkfood Ltd.* vs. *GMC Icecream (P) Ltd.;* JT 2004 (4) SC 393.
2. *Shankar Construction Company* vs. *National Building Construction Corporation Ltd.;* 2003 (3) Arb.L.R.333.
3. *S.Kumar* vs. *Delhi Development Authority;* (103) 2003 DLT 502.
4. *Thyssen Stahlunion GMBH* vs. *Steel Authority of India;* (1999) 9 SCC 334.

RESULT: Appeal Allowed.

SANJAY KISHAN KAUL, J. (ORAL)

1. Admit.

2. Learned counsel for the respondent accepts notice.

3. At request of learned counsel for the parties, the appeal is taken up for final disposal.

4. The appellant is aggrieved by the unsuccessful endeavour of the respondent to re-open a closed chapter of a satisfied decreed by the impugned order dated 25.09.2009.

5. The disputes between the parties which were governed by the arbitration clause resulted in an award in favour of the appellant dated 12.08.1996. The amount awarded was with simple interest at the rate of 16 % per annum from the *date of the award till the date of payment or date of decree, whichever was earlier, on the awarded amount.* Both the parties understood that the award was governed by the Indian Arbitration Act, 1940 ('the old Act' for short) as the reference was made on 01.01.1993 i.e. prior to The Arbitration and Conciliation Act, 1996 ('the new Act') coming into force. Thus, the appellant as a decree holder filed an application under Sections 14 & 17 of the old Act for filing the award

in court and making it rule of the court. On the filing of the said application, the award was filed in the court and notice was issued to the respondent who filed objections under Sections 30 & 33 of the old Act. The application filed by the appellant and the objections filed by the respondent were disposed of by the learned single Judge (as he then was) vide the order dated 27.05.2002 holding that the provisions of the old Act would not apply and that the award was governed by the provisions of the new Act. On the basis of this finding, a conclusion was reached that the exercise of filing an application under Sections 14 & 17 of the old Act was futile as the award was enforceable as a decree of the court and since no application had been filed by the respondent under Section 34 of the new Act within the statutory period, there was no valid challenge to the award and the objections were consequently dismissed. This was in view of the legal principles enunciated in **Thyssen Stahlunion GMBH v. Steel Authority of India;** (1999) 9 SCC 334.

6. The appellant thereafter proceeded to seek execution of the decree in terms of the award dated 12.08.1996 as none of the parties filed an appeal against the order dated 27.05.2002 which became final. The respondent sought to satisfy the decree by making a payment of a sum of Rs.12,21,856.53/- after deducting the TDS thereon.

7. This payment was made on 12.06.2003 calculating interest at the rate of 16 % per annum on the awarded amount from the date of the award till the order was passed on 27.05.2002. The payment was, thus, made assuming that the order dated 27.05.2002 amounted to a decree as if the award dated 12.08.1996 was made rule of the court and a decree had been passed. The aforesaid should have put quietus to the issue, but the appellant sought to execute the decree for the remaining amount with interest payable from 27.05.2002 to date of payment. The appellant, however, gave up this endeavour and withdrew the application for the said purpose, but in the bargain kindled some thoughts in the minds of the competent authority of the respondent, who re-examined the issue.

8. The respondent felt that since the award provided for payment of interest up to the date of the decree or date of payment whichever is earlier, interest was liable to be paid only till the expiry of 90 days from the date of the award in view of the provisions of the new Act. This was in view of the stipulation in the award itself as worded.

9. The other development which took place was re-thought given to the legal position by the Supreme Court in **Milkfood Ltd.v. GMC Icecream (P) Ltd.;** JT 2004 (4) SC 393 in terms whereof if a reference was made prior to the new Act coming into force, the award was to be governed by the old Act unless the parties specifically agreed to have the proceedings under the new Act (which was not so in the present case)

10. The effect was, thus, that the award in question was liable to be governed by the old Act, but then the order dated 27.05.2002 had already become final as none of the parties had challenged the same.

11. The respondent sought to re-open the chapter by filing EA No.417/2005 setting out the aforesaid facts and claiming that the interest paid for the period beyond 90 days from the date of the award till 27.05.2002 was the excess amount paid which was liable to be refunded amounting to Rs.5,27,308/-. This application has been allowed vide the impugned order.

12. A perusal of the impugned order shows that the learned single Judge appears to have proceeded on the principle of "double jeopardy". Learned single Judge has opined that the respondent suffered on account of the application moved under Sections 30 & 33 of the old Act being dismissed as per the then prevalent law which subsequently changed by pronouncements of the Supreme Court. This was stated to be the "first jeopardy" to the respondent. The "second jeopardy" was payment made by the respondent assuming the award to be under the new Act, but simultaneously making payment of interest up to the date of payment contrary to the terms of the award. The learned single Judge, thus, directed refund of the excess payment made.

13. On hearing learned counsel for the parties, we are unable to agree with the conclusion of the learned single Judge.

14. Insofar as the question as to which of the Acts would govern the parties, the opinion rendered in the judgment dated 27.05.2002 was as per the then prevalent position. If the respondent was of the view that it laid down an incorrect principle of law, nothing prevented the respondent from filing an appeal. After all, some other parties did contest the matter and took the matter right till the Supreme Court which resulted in the judgment in **Milkfood Ltd.v. GMC Icecream (P) Ltd's** (supra).

15. The respondent, thus, cannot make a grievance in this behalf as to accept such a plea would amount to re-opening closed litigations where both the parties accepted the same, as in the present case.

16. The second aspect arises from the award itself and as to what nature of direction qua the issue of interest was passed in the award. The arbitrator had granted interest from the date of the award till date of payment or date of decree, whichever was earlier. This pre-supposed that the award was liable to be filed in the court to be made rule of the court and thus a subsequent date would arise when the decree would be passed. The arbitrator thus fixed interest to an earlier date assuming that the court would fix the rate of interest post the decree period. The fact remains that the award was treated as an award under the new Act. As to how such an expression has to be understood has been dealt by the learned single Judge in **S.Kumar v. Delhi Development Authority;** (103) 2003 DLT 502 where it was observed in para 7 as under:

> "7. In view of the fact that award itself is a decree, the directions of the Arbitrator that the pendente lite interest shall be paid from 8.4.1998 to the date of payment or date of decree whichever is earlier actually meant that interest was payable upto date of payment. Filing of objections by a party under Section 34 and refusal thereof is of non relevance so far as payment of future interest is concerned. The application under Section 34 is only relevant for the purpose of enforcement of the decree. The moment this application is refused, the decree becomes enforceable and the date of decree remains the same as that of the award."

17. A similar view has been taken by another learned single Judge in **Shankar Construction Company v. National Building Construction Corporation Ltd.;** 2003 (3) Arb.L.R.333.

18. We find that there appears to be some misconception about the date of the decree. The date of the decree remains the same as the date of the award. The decree is not enforceable for a period of 90 days in view of the provisions of Section 36 of the new Act, which reads as under:

> "36. Enforcement – Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the

award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court."

19. It is this window which was given to the judgment debtor to make the payment or to challenge the award failing which the rigours of enforcement would arise. Any other construction would make it illogical and thus the interest is liable to be paid till the decree is satisfied.

20. We may also note that even otherwise, the respondent detained the money payable under the decree and utilized the same and is thus liable to pay interest.

21. We are of the view that the learned single Judge applied principle of "double jeopardy" which has no application to the jurisprudence applicable to such matters.

22. We also cannot lose sight of the fact that not only did the parties accept the order dated 27.05.2002, but even made payments in terms thereof and when the appellant sought to enforce the award for the balance amount from the date of the judgment of 27.05.2002 till date of payment, it was persuaded to give up the said claim to put a quietus to the issue. It was, thus, impermissible for the respondent to re-agitate the issue predicated on the plea that it became wiser after having seen the application filed by the appellant which he had withdrawn for payment of such balance interest.

23. We see no reason why this closed chapter ought to have been permitted to be re-opened by the learned single Judge in execution proceedings through the process of an application filed under Section 151 of CPC.

24. The impugned order is accordingly set aside and EA No.417/2005 stands dismissed.

25. The appeal is accordingly allowed leaving the parties to bear their own costs.

CM No.17947/2009

No directions are required in this application.

The application stands disposed of.

ILR (2012) I DELHI 548
O.M.P

NATIONAL HIGHWAYS AUTHORITY OF INDIA ....PETITIONER

VERSUS

M/S. BHAGEERATHA ENGINEERING LTD. ....RESPONDENT

(S. MURALIDHAR, J.)

O.M.P. NO. : 310/2011 DATE OF DECISION: 20.10.2011

Arbitration & Conciliation Act, 1996—Section 34—Limitation—Award dated 20.03.10 aganist Petitioner pronounced and certified copies sent by the Arbitral Tribunal by registered post to Petitioner's corporate office in Delhi, which was the address in the cause title of proceedings before the Tribunal and also in the OMP before the Hon'ble High court—Respondent filed application under Sec. 33(4) of the Act and notice was served on the counsel for Petitioner on 26.04.10, so on 17.05.10 counsel for Petitioner appeared before the Tribunal and claimed that the Petitioner had not received copy of award, but this contention was rejected by the Tribunal on 31.05.10 observing that postal receipts and AD cards were on record—Tribunal passed amended award on 09.09.10 and again sent certified copies to the parties by registered post on 01.10.10—Petitioner's Project Director at Salem wrote letter requesting for formal copy of amended award, in reply where of Secretary to the Tribunal informed having already sent the same, but without prejudice to rights of parties, another was sent and the same was received by the Petitioner on 20.12.10—Petition challenging the award filed on 15.03.11, and as per Petitioner, the objections are within time—Held, the memo of parties before the Arbitral Tribunal as well as

the OMP indicated address of the Petitioner as its corporate address in Delhi, where the award and the amended award were sent by registered post by the Tribunal—In the absence of Petitioner informing any other address for dispatch of communications, it was not the duty of the Tribunal to make enquiries about proper adddress of parties for the purposes of communications—As such, the Arbitral Tribunal fully complied with Sec. 31(5) of the Act—Further, proceedings under Sec. 33 also show that parties knew about passing of award and Petitioner knew of sending of award to its Delhi office, but Petitioner made no efforts to send the same to its Salem office—Accordingly, Petition held time barred.

The memo of parties in the arbitral proceedings, as is evident from the first page of the main Award as well as the amended Award, indicates the address of the NHAI to be its corporate office at New Delhi. As rightly pointed out by learned counsel for the Respondent the memo of parties in the present petition as well as the affidavit in support of the petition clearly indicates the address of the NHAI to be its corporate office at New Delhi. In the absence of the NHAI informing the Tribunal that the proper address for dispatch of all communications and in particular certified copies of the Award was its project office at Salem, the Tribunal would have had no means to know that the copies of the Award ought not to have been sent to NHAI's corporate office at New Delhi. There is an obligation on the parties to a dispute to inform the forum in which such proceedings are pending of the correct address to which copies of the Award or proceedings should be sent. The Arbitral Tribunal is not required to make enquiries as to the proper address of the party for the purposes of communication. It has to go by the address that appears in the memo of parties or cause title of the case before it. In the present case, therefore, the Arbitral Tribunal fully complied with the requirement of Section 31 (5) of the Act when it sent the Award as well as the amended Award to the corporate office of NHAI at New

Delhi. **(Para 13)**

Important Issue Involved: In the absence of the Petitioner informing any other address for dispatch of communications, it was not the duty of the Tribunal to make enquiries about proper address of parties for the purposes of communications.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Sudhir Nandrajog, Senior Advocate with Ms. Meenakshi Sood and Mr. Mukesh Kumar, Advocates.

FOR THE RESPONDENT : Mr. Amit George with Ms. Rajshree Jain, Advocates.

CASES REFERRED TO:

1. *National Projects Constructions Corporation Ltd.* vs. *Bundela Bandhu Constructions Company* AIR 2007 Del 202.
2. *Union of India* vs. *Tecco Trichy Engineers and Contractors* AIR 2005 SC 1832.

RESULT: Petition Dismissed.

S. MURALIDHAR, J.

I.A. No. 6587 of 2011 (for condonation of delay)

For the reasons stated therein, the application is allowed. The delay in re-filing the petition is condoned.

The application is disposed of.

O.M.P. 310/2011

1. This petition is by the National Highways Authority of India ('NHAI') under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act') challenging an Award dated 20th March 2010 further amended by an Award dated 9th September 2010 passed by the

Arbitral Tribunal "to the extent it has been held therein under Claim No. 2 that where the quantity executed is less than 75% of the BOQ, the Claimant is entitled to compensation towards loss of profit due to reduction in quantity beyond 25% of BOQ and the amount awarded to the Claimant on that ground by way of the amended Award, as also to the extent that costs of Rs. 5 lakhs have been imposed against the Applicant and in favour of the Respondent by the Ld. AT."

2. At the very first hearing on 27th April 2011, this Court noted the objection raised by the Respondent claimant, who appeared on advance notice, that the petition was barred by limitation.

3. The facts relevant for the above purpose are that in the cause title of the proceedings before the Arbitral Tribunal the address of the NHAI was that of its corporate office, i.e., G-5 and G-6, Sector 10, Dwarka, New Delhi-110065. Incidentally, this is the address indicated in the memo of parties filed with the present O.M.P. No. 310 of 2011. It appears that after the Award was pronounced by the Arbitral Tribunal on 20th March 2011 certified copies thereof were sent by registered post by the Arbitral Tribunal to both parties, i.e. the NHAI as well as the Respondent claimant, to their respective addresses as appearing in the cause title of the case in the arbitral proceedings.

4. The Respondent filed an application before the Arbitral Tribunal thereafter under Section 33(4) of the Act. Notice on the said application was served on counsel for the NHAI on or around 26th April 2010. On 17th May 2010 counsel for the NHAI filed an application before the Arbitral Tribunal in which it was claimed that the NHAI had till then not received a copy of the Award. Accordingly, NHAI requested the Arbitral Tribunal for a copy of the Award.

5. This application was listed before the Arbitral Tribunal on 31st May 2010. The Arbitral Tribunal rejected the said application by the following order, which was passed in the presence of learned counsel for the parties:

> "The Respondent's Counsel had sent an application dated 17th May 2010 pleading that the copy of the Award had not been supplied to the Respondent and as such a copy may be given to the Respondent at the earliest. We have gone through the records. Signed copies of the Award were sent to both the parties by Regd. AD Post. The postal receipts as well as Ads are available on our records. Therefore, the plea of the Respondent that a copy was not sent to it cannot be accepted. The prayer for supplying one more copy is declined. The claimant has moved an application u/s 33(4) of the A&C Act, 1996 for determination of the amounts due under the Award to claimant. Copy has been given to Ld. Counsel for the respondent. Response to the quantifications as made by the claimant be filed within 4 weeks with copy to Ld. Counsel for the claimant, who may file a rejoinder thereto within 2 weeks thereafter. The application would be taken up for consideration on 05th August 2010 at 5:00 P.M.
>
> The parties are directed to deposit arbitration fee in equal share for 3 hearings for each of the Arbitrators @ Rs. 20,000/- per hearing. The fee be paid within 4 weeks. TDS certificates for the earlier payment be also supplied to the Arbitrators within 4 weeks."

6. The Arbitral Tribunal passed an amended Award on 9th September 2010. It appears that the Arbitral Tribunal sent a copy of the amended Award to the parties at their respective addresses as appearing in the memo of parties by registered post on 1st October 2010. It is the case of NHAI that a copy of the amended Award, although may have been received at its corporate office at Delhi, was not received by the Project Implementation Unit ('PIU') of the NHAI at Salem in Tamil Nadu. A letter dated 7th December 2010 was written by the Project Director of the NHAI at Salem to the Arbitral Tribunal enclosing a written request on behalf of the NHAI for supply of a formal copy of the amended Award dated 9th September 2010. In the enclosed written request, in para 2, it was stated that the NHAI had been informed by the Respondent through its representative that the Tribunal had published an amended Award on 9th September 2010 and that the Respondent had been furnished a copy thereof. There was no indication as to when the NHAI was so informed by the Respondent. It was further stated that the NHAI had not received any formal communication or a copy of the amended Award in its office.

7. In reply to the said letter dated 7th December 2010, the Secretary to the Presiding Arbitrator wrote a letter dated 13th December 2010 to the Project Director of the NHAI at Salem as under:

"Sir,

Kindly refer to your letter No. 2130 dated 7th December 2010 along with written request for forwarding a formal copy of the Amended Award dated 9.9.2010 to the respondent. I am directed to inform you that the signed copy of the Amended Award dated 9.9.2010 was sent to you as well as the opposite party through Regd. Post vide receipt dated 1st October 2010. It is presumed that you must have received the signed copy of the Amended Award. However, without prejudice to the respective rights of the parties in regard to the limitation for filing objections I am enclosing a True Copy of the Amended Award dated 9th September 2010. This True Copy has been certified by the Presiding Arbitrator, Hon.ble Mr. Justice R.C. Chopra (Retd.).

Thanking you,

Yours faithfully,
Sd/-
Secretary to the
Justice R.C. Chopra (Retd.)
Presiding Arbitrator"

8. According to the NHAI, the above letter was received along with a copy of the amended Award by it on 20th December 2010. It is contended that the present petition was filed on 15th March 2011 within a period of three months from the date of receipt of the amended Award and therefore was within limitation in terms of Section 34(3) of the Act.

9. The Respondent has, however, denied the above assertion. The Respondent made an application under the Right to Information Act, 2005 to the Minto Road Post Office at New Delhi and received a reply from the said Post Office by a letter dated 1st March 2011 that the registered letter sent by the Tribunal to the NHAI at its corporate office at New Delhi enclosing a copy of the amended Award dated 9th September 2010 was delivered at that address on 4th October 2010. Accordingly, it is contended by the Respondent that the present petition was filed beyond a period of three months after 4th October 2010 and is therefore clearly barred by limitation in terms of Section 34(3) of the Act. The second contention is that, in any event, NHAI seeks to challenge not merely the amended Award dated 9th September 2010 but the main

Award dated 20th March 2010. Consequently, the present petition is clearly barred by limitation.

10. Mr. Sudhir Nandrajog, learned Senior counsel appearing for NHAI relied on the judgment of the Supreme Court in **Union of India v. Tecco Trichy Engineers and Contractors** AIR 2005 SC 1832 to contend that for the purposes of Section 34(3) as well as Section 31(5) of the Act the Award should be taken to have been delivered to NHAI only when it was in fact received by the concerned officer of the NHAI who was "directly connected with and involved in the project in question" and "who is control of the proceedings before the Arbitrator." He also relied on the decision of this Court in **National Projects Constructions Corporation Ltd. v. Bundela Bandhu Constructions Company** AIR 2007 Del 202 which followed the decision in **Tecco Trichy Engineers and Contractors.** It is submitted that in the present case, some of the correspondence exchanged between the Arbitral Tribunal and the NHAI was with its project office at Salem and that notwithstanding the memo of parties in the proceedings before the Arbitral Proceedings showing the address of NHAI as its corporate office at New Delhi, it was incumbent on the Arbitral Tribunal to ensure that the Award was sent to NHAI's project office at Salem. Alternatively, it is submitted that even if it were to be assumed that a certified copy of the Award was delivered to the NHAI at its corporate office in Delhi, the limitation for the purpose of Section 34 (3) of the Act would begin to run only from the time the amended Award was further delivered to NHAI's project office at Salem.

11. Mr. Amit George, learned counsel appearing for the Respondent, on the other hand, points out that despite the application by the NHAI before the Arbitral Tribunal being rejected on 31st May 2010, thereby negativing its plea that it had not received a copy of the main Award dated 20th March 2010, the Petitioner never wrote to the Arbitral Tribunal informing it that the proper address for dispatch of the certified copy of the Award was not its corporate office but the project office at Salem. He further submits that even before this Court, both in the memo of parties as well as in the affidavit in support of the petition, the address of the NHAI is indicated as its corporate office at Delhi. The confirmation from the postal authority also is to the effect that the amended Award dated 9th September 2010 was received in the corporate office of NHAI at New Delhi on 4th October 2010. Consequently, there is no doubt that

the present petition was barred by limitation in terms of Section 34 (3) of the Act.

12. In order to appreciate the above submissions, it is necessary to refer to the relevant statutory provisions. Under Section 31 (5) of the Act, once an arbitral Award is made "a signed copy shall be delivered to each party." This is no doubt an obligation on the Arbitral Tribunal. In the present case, as is evident from the order dated 31st May 2010 passed by the Arbitral Tribunal, once the main Award dated 20th March 2010 was passed by it, certified signed copies thereof were dispatched to the NHAI as well as the Respondent by registered post with acknowledgement due. The Arbitral Tribunal has further stated in the order dated 31st May 2010 that the postal receipt as well as the acknowledgement due card was available on its record. The Arbitral Tribunal rejected the plea of the NHAI that a copy of the Award dated 20th March 2010 was not sent to it. There was a presumption that the Award dated 20th March 2010 had been delivered in due course to the NHAI at its corporate office at New Delhi.

13. The memo of parties in the arbitral proceedings, as is evident from the first page of the main Award as well as the amended Award, indicates the address of the NHAI to be its corporate office at New Delhi. As rightly pointed out by learned counsel for the Respondent the memo of parties in the present petition as well as the affidavit in support of the petition clearly indicates the address of the NHAI to be its corporate office at New Delhi. In the absence of the NHAI informing the Tribunal that the proper address for dispatch of all communications and in particular certified copies of the Award was its project office at Salem, the Tribunal would have had no means to know that the copies of the Award ought not to have been sent to NHAI's corporate office at New Delhi. There is an obligation on the parties to a dispute to inform the forum in which such proceedings are pending of the correct address to which copies of the Award or proceedings should be sent. The Arbitral Tribunal is not required to make enquiries as to the proper address of the party for the purposes of communication. It has to go by the address that appears in the memo of parties or cause title of the case before it. In the present case, therefore, the Arbitral Tribunal fully complied with the requirement of Section 31 (5) of the Act when it sent the Award as well as the amended Award to the corporate office of NHAI at New Delhi.

14. Section 34 (3) of the Act reads as under:

> **"Section 34 Application for setting aside arbitral award:**
>
> (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award, or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:
>
> Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months if may entertain the application within a further period of thirty days, but not thereafter."

15. The learned Senior counsel for the NHAI is right in contending that the period of limitation would begin to run only from the date the certified copy of the amended Award is received by a party to the arbitration proceedings before the Arbitral Tribunal. The key phrase in the above provision is "the date on which the party making that application had received the arbitral award." In the considered view of this Court, the 'party' for the purposes of Section 34 (3) of the Act is no different from the 'party' for the purposes of Section 31 (5) of the Act. In both provisions, the word 'party' is to mean that party whose address is indicated in the memo of parties or the cause title of the proceedings before the arbitral proceedings.

16. In the present case, after the amended Award dated 9th September 2010 was sent to its project office at Salem, NHAI on 31st December 2010 filed an application under Section 33 of the Act. The Arbitral Tribunal rejected the said application on 10th February 2011. However, learned Senior counsel for the Petitioner very fairly stated that the NHAI cannot take advantage of the dismissal of its application under Section 33. In other words, the period of limitation would begin to run from the date on which the amended Award dated 9th September 2010 was delivered to NHAI and would not get postponed to 10th February 2011.

17. In the present case at no stage did the NHAI inform the Arbitral Tribunal that the address of NHAI as appearing in the memo of parties or the cause title in the arbitral proceedings was not the address to which

the copies of the Award or the amended Award had to be sent. Absent such a specific communication by the NHAI to the Arbitral Tribunal, the dispatch of the certified copy of the Award as well as of the amended Award by the Arbitral Award to the NHAI at its corporate office at New Delhi by registered post was sufficient compliance with the requirements of both Sections 31(5) as well as 34(3) of the Act. It is not possible to accept the contention of learned Senior counsel for NHAI that for the purpose of Section 34(3) of the Act the limitation would begin to run only from the date on which the project office of the NHAI received a copy of the amended Award dated 1st September 2010. As explained hereinbefore, the amended Award dated 9th September 2010 was received in Delhi office on 4th October 2010 itself and that would be the relevant date for the purpose of commencement of limitation under Section 34(3) of the Act.

18. The facts of the decision in **Tecco Trichy Engineers and Contractors** were that the Award in that case was sent to the General Manager, Southern Railway on 12th March 2001. It was received by the Chief Engineer who was also the Chief Project Manager on 19th March 2001. It was opined by the Supreme Court that for the purposes of Section 34(3) the limitation began to run only from the date on which the Chief Engineer received a copy of the Award passed by the Tribunal. Since the Railways was a large organization containing divisional heads, it was only the departmental head, which in that case was the Chief Engineer, who was likely to know whether the arbitral Award was adverse to the departmental interests. He was the person directly connected with and involved in the proceedings. However, as will be noticed, the facts in the present case are different.

19. The distinguishing feature of the present case is that there were applications made by the parties under Section 33 of the Act which would show that both parties knew of passing of the impugned Award. In the present case, however, the NHAI could not have pleaded that it did not know of passing of the main Award after it received a copy of the application filed by the Respondent under Section 33 of the Act on or around 26th April 2010. It also knew that the main Award was in fact sent to its Delhi office because the order dated 31st May 2010 was passed by the Tribunal in the presence of its counsel. The Arbitral Tribunal rejected the plea of NHAI that it had not sent the NHAI a copy

of the Award. Even thereafter, the NHAI made no effort to inform the Arbitral Tribunal in writing that the amended Award or order, which it knew was going to come about as a result of the application filed by the Respondent under Section 33, should be sent to its project office at Salem.

20. For the aforementioned reasons, this Court finds that the present petition is barred by limitation in terms of Section 34(3) of the Act. The petition is accordingly dismissed with costs of Rs. 5,000/- which will be paid by the NHAI to the Respondent within four weeks.

ILR (2012) I DELHI 558
CM

MS. MADHU GUPTA ....APPELLANT

VERSUS

M/S. GARDENIA ESTATES (P) LTD. ....RESPONDENT

(INDERMEET KAUR, J.)

CM (M) NO. : 1239/2011, DATE OF DECISION: 21.10.2011
CM NOS. : 19530-31/2011 &
CAVEAT NO. : 958/2011

Delhi Rent Control Act, 1958—Section 25B, 14(1)(e)—Code of Civil Procedure, 1908—Order VI Rule 17—Eviction petition by respondent seeking eviction of petitioner from ground floor of premises bearing no. 138-A, Golf Links, New Delhi, on the ground of bonafide requirement for residence of its Director Amit Deep Kohli—Leave to defend filed on 23.07.10—Application seeking amendment of the leave to defend filed on 09.05.2011—Amit Deep Kohli is a Director in other holding companies of the petitioner—Other properties

available with Company for residence—Tenant is an old lady staying alone—Petitioner submitted, Landlord was a construction company carrying on construction activity—Other properties were commercial flats not part of Delhi—Application seeking leave to defend dismissed—Petition—Held—The facts which were sought to be incorporated by amendment i.e. that the landlord Company was a part of a huge Real Estate Group of Companies having several properties in their name were all facts known to the tenant—These facts were pre-existing i.e. existing at the time when the application for leave to defend was filed; if such an application is permitted the whole purpose and intent of the provisions of Section 25 B (4) would be defeated as the specifically stipulated period for filing an application for leave to defend within 15 days would be given a go by and by permitting the amendment there would be an automatic extension of time for filing the application for leave to defend—This could not and was not the intend of the statute.

Contention of the petitioner before this Court is that the procedure contained in Section 25B is silent as to whether an amendment is permissible or not and in the absence of which Rule 23 of the Delhi Rent Control Rules, 1959 can be adhered to. Reliance has also been placed upon the judgment of **Ved Prakash** (supra). The said judgment had been pronounced on 07.8.2009 which is admittedly prior in time to the judgment of **Prithipal Singh** (supra) which was pronounced on 18.12.2009. The judgment of **Prithipal Singh** is clear and categorical on the point that the procedure contained in Section 25B of the DRCA has to be strictly adhered to for dealing with a petition under Section 14(1)(e) of the DRCA. This ratio of **Prithipal Singh** precludes the applicability of the provisions of the Code of Civil Procedure; further the amendments sought for even otherwise were of facts which were already known to the petitioner. The facts which were sought to be incorporated i.e. that the landlord company was a part of a huge Real Estate Group

of companies having several properties in their name were all facts known to the tenant; even otherwise they would not have a bearing on the bonafide requirement of the Director of the company namely Amit Deep Singh who is seeking this eviction order for the personal residence for his wife and two children. These facts were all pre-existing i.e. existing at the time when the application for leave to defend was filed; if such an application is permitted the whole purpose and intent of the provisions of Section 25B(4) would be defeated as the specifically stipulated period for filing an application for leave to defend within 15 days would be given a go by and by permitting the amendment there would be an automatic extension of time for filing the application for leave to defend. This could not and was not the intent of the statute. In **Ved Prakash** (Supra) also the amendments sought for although being of subsequent events were disallowed, as having been filed belatedly. **(Para 11)**

Important Issue Involved: Amendment of application for leave to defend cannot be permitted.

[Vi Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. V.K. Rao, Sr. Advocate with Ms. Ekta Kalra, Advocate.

FOR THE RESPONDENT : Mr. P.D. Gupta and Mr. Kamal Gupta, Advocates.

CASES REFERRED TO:

1. *Prithipal Singh* vs. *Satpal Singh,* (2010) 2 SCC 15.
2. *Ved Prakash & Anr.* vs. *Om Prakash Jain* 2009 10 (AD)Delhi 284.
3. *Ravi Dutt Sharma* vs. *Ratan Lal Bhargava* (1984) 2 SCC 75.

RESULT: Petition dismissed.

INDERMEET KAUR, J. (Oral)

1. Order impugned is the order dated 24.9.2011 vide which the application filed by the tenant seeking amendment of his application for leave to defend under Order 6 rule 17 of the Code of Civil Procedure (hereinafter referred to as 'the Code') had been dismissed.

2. Record shows that the present eviction petition has been filed by the landlord M/s Gardenia Estates (P) Ltd. on the ground that there is bonafide requirement of the one of the directors of the landlord company namely Amit Deep Kohli of the disputed premises for his residence. The disputed premises are the ground floor of premises bearing no. 138-A, Golf Links, New Delhi which has been tenanted out to the tenant/petitioner namely Madhu Gupta. Application for leave to defend had been filed on 23.7.2010; present application seeking amendment of the said application for leave to defend had been filed about ten months later i.e. on 09.5.2011. In the application under Order 6 Rule 17 of the Code the submission made by the tenant is that the director of the landlord company namely Amit Deep Kohli is a director in other holding companies of the petitioner as well and details of the said companies have been given para 3 of the said application; contention being that the present petition has been filed only to harass the petitioner as other properties are also available with the petitioner company; further contention being that the company Speed Lines Pvt. Ltd. has commercial flats at six places details of which have been mentioned in the said application; there is no bonafide need of the present accommodation; the application further wishes to incorporate the factum that the tenant is an old ailing lady staying alone at the aforenoted premises and the intent of the legislation i.e. the Delhi Rent Control Act would be destroyed if such like petitions are allowed. This is the gist of the amendment application.

3. Reply has been filed by the landlord to the application under Order VI Rule 17 of the Code. On behalf of the landlord it has been urged that the properties which have been detailed in the application for amendment stating that Amit Deep Kohli is a director of the aforenoted company which has commercial flats at various places, are all located in Gurgaon; submission is that the landlord is a construction company and is carrying on its commercial activity of construction; the aforenoted properties are commercial flats and admittedly not a part of Delhi; the premises in dispute is bonafide required by the director of the company

for his own need; the present accommodation where the petitioner is putting up his family is small to accommodate his wife and two children.

4. The impugned order had dismissed the application primarily on the ground that an application seeking amendment is not permissible in an eviction petition under Section 14(1)(e) of the DRCA as the procedure enlisted for dealing with such an application is contained in Section 25(B) of the said Act and in view of the pronouncement of the Apex Court reported in (2010) 2 SCC 15 **Prithipal Singh Vs. Satpal Singh,** such an application could not be entertained.

5. This order is the subject matter of the present petition.

6. On behalf of the petitioner it has vehemently been urged that the judgment of **Prithipal Singh** (supra) is peculiar to the facts of the said case; contention being that in that case application for leave to defend was not filed within the stipulated period whereupon the court had noted that the time could not be extended for the said purpose and in that scenario it has been noted that Rule 23 of Delhi Rent Control Rules, 1959 is inapplicable. Facts of the instant case are different. Counsel for the petitioner has placed reliance upon a judgment of a Bench of this Court reported in 2009 10 (AD)Delhi 284 **Ved Prakash & Anr. Vs. Om Prakash Jain** wherein an amendment application seeking permission to amend an application for leave to defend had been considered; contention being that such an application is clearly maintainable; even on merits the case of the petitioner is prima facie strong; the last contention of the petitioner being that he has no objection if a time bound frame is chalked out by this court for disposal of his application for leave to defend.

7. In the counter arguments; these submission have been vehemently disputed. It is submitted that the Apex Court has in **Prithipal Singh** (supra) held that such an application is not maintainable; even on merits the facts now sought to be incorporated were all pre-existing which were well within the knowledge of the petitioner at the time of filing of his application for leave to defend; this is only a delaying tactic.

8. In **Prithipal Singh** (supra) the court was dealing with the prayer of the tenant who had sought extension of time for filing his application for leave to defend. Admittedly he had not filed the application within the stipulated period of 15 days. The history of the legislation i.e. the DRCA and introduction of Chapter IIIA which is a special procedure introduced

by the legislature for a summary trial of certain applications filed under the Rent Act had been delved into. In this context the Apex Court had noted as follows:

> "Section 25-B of the Act is a complete code by which the entire procedure to be adopted for eviction of a tenant on the ground of bona fide requirement filed by the landlord in respect of a premises, shall be followed. From a close examination of Section 25-B(1) of the Rent Act, it is evident and clear that an application filed by a landlord for recovery of possession of any premises on the ground specified in clause(e) of the proviso to sub-section(1) of Section 14 or under Section 14-A or under Section 14-B or under 14-C or under Section 14-D, shall be dealt with in accordance with the procedure specified in this section. Apart from that, Section 25-B itself is a special code and therefore, the Rent Controller, while dealing with an application for eviction of a tenant on the ground of bona fide requirement, has to follow a procedure strictly in compliance with Section 25-B of the Act."

9. Rule 23 of the Delhi Rent Control Rules, 1959 is also relevant; the extract of which reads herein as under:

> "23.Code of Civil Procedure to be generally followed In deciding any question relating to procedure not specifically provided by the Act and these rules the Controller and the Rent Control Tribunal shall, as far as possible, be guided by the provisions contained in the Code of Civil Procedure, 1908."

10. In this context the Apex Court in **Prithipal Sing** (supra) on the applicability of Rule 23 had made the following observation: "Rule 23 does not specifically confer any power on the Controller to follow the provisions of CPC in cases of special classes of landlords. Rule 23 is a general rule, by which the Controller in deciding any question relating to procedure not specifically provided by the Act and these Rules shall, as far as possible, be guided by the provisions contained in CPC. After insertion of Section 25-B of the Act, any application for granting eviction for a special kind of landlord, shall be dealt with strictly in compliance with Section 25-B and Rule 23 of the Rules, which also does not give full right to apply the provisions of CPC, cannot be applied."

11. Contention of the petitioner before this Court is that the procedure contained in Section 25B is silent as to whether an amendment is permissible or not and in the absence of which Rule 23 of the Delhi Rent Control Rules, 1959 can be adhered to. Reliance has also been placed upon the judgment of **Ved Prakash** (supra). The said judgment had been pronounced on 07.8.2009 which is admittedly prior in time to the judgment of **Prithipal Singh** (supra) which was pronounced on 18.12.2009. The judgment of **Prithipal Singh** is clear and categorical on the point that the procedure contained in Section 25B of the DRCA has to be strictly adhered to for dealing with a petition under Section 14(1)(e) of the DRCA. This ratio of **Prithipal Singh** precludes the applicability of the provisions of the Code of Civil Procedure; further the amendments sought for even otherwise were of facts which were already known to the petitioner. The facts which were sought to be incorporated i.e. that the landlord company was a part of a huge Real Estate Group of companies having several properties in their name were all facts known to the tenant; even otherwise they would not have a bearing on the bonafide requirement of the Director of the company namely Amit Deep Singh who is seeking this eviction order for the personal residence for his wife and two children. These facts were all pre-existing i.e. existing at the time when the application for leave to defend was filed; if such an application is permitted the whole purpose and intent of the provisions of Section 25B(4) would be defeated as the specifically stipulated period for filing an application for leave to defend within 15 days would be given a go by and by permitting the amendment there would be an automatic extension of time for filing the application for leave to defend. This could not and was not the intent of the statute. In **Ved Prakash** (Supra) also the amendments sought for although being of subsequent events were disallowed, as having been filed belatedly.

12. The Supreme Court in the judgment of Prithipal Singh has also quoted with approval the observation made by the Apex Court in its earlier judgment reported in (1984) 2 SCC 75 **Ravi Dutt Sharma Vs. Ratan Lal Bhargava.** Relevant extract reads as follows:

> "7. ..... The dominant object of amending act is to provide a speedy, expeditious and effective remedy for a class of landlords contemplated by Section 14(1)(e) and 14-A and for avoiding unusual dilatory process provided otherwise by the Rent Act. It

is common experience that suits for eviction under the Act take a long time commencing with the Rent Controller and ending up with the Supreme Court. In many cases experience has indicated that by the time the eviction decree became final several years elapsed and either the landlord died or the necessity which provided the cause of action disappeared and it there was further delay in securing eviction and the family of the landlord had by then expanded, in the absence of accommodation the members of the family were virtually thrown on the road. It was this mischief which the legislature intended to avoid by incorporating the new procedure in Chapter III-A. The legislature in its wisdom though that in cases where the landlords required their own premises for bona fide and personal necessity they should be treated as a separate class along with the landlords covered by Section 14-A and should be allowed to reap the fruits of decrees for eviction within the quickest possible time. In cannot, therefore, be said that the classification of such landlords would be an unreasonable one because such a classification has got a clear nexus with the objects of the amending Act and the purposes which it seeks to subserve. Tenants cannot complain of any discrimination because the Rent Act merely gave certain protection to them in public interest and if the protection or a part of it afforded by the Rent Act was withdrawn and the common law right of the tenant under the Transfer of Property Act was still preserved, no genuine grievance could be made."

13. Thus after the insertion of 25-B of the Act any application for granting eviction by a special kind of landlord shall be dealt with strictly in compliance with the procedure as contained in Section 25-B. Impugned order suffers from no infirmity. Dismissed.

ILR (2012) I DELHI 566
W.P. (CIVIL)

ZAHID PARWEZ ....PETITIONER

VERSUS

UOI & ORS. ....RESPONDENTS

(VIPIN SANGHI, J.)

W.P. (C) NO. : 5607/1999 DATE OF DECISION: 21.10.2011

Constitution of India, 1950—Article 226—Writ —Narcotic Drugs and Psychotropic Substance Act, 1985 (NDPS Act)—Section 68(H) (I) Section 68 A(2) (d)—Section 68 B(g)—Section 68 j—Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988 (PITNDPS Act)—Section 3(1) and 10(1)—Detention order dated 26.07.1989 issued aganist Mohd. Azad @ Avid Parvez, brother of the petitioner—Detained w.e.f. 10.07.1991—Declaration u/s. 10(1) justifying detention beyond initial three months issued—Detention order dated 26.07.1989—challenged before Calcutta High Court—Unsuccessful—Special Leave Petition before the Supreme Court dismissed—Challenge to order u/s.10(1) successful—Detention beyond initial three months vitiated—show cause notice u/s. 68 H (1) NDPS Act issued to the petitioner—reply submitted—Daclaration issued and properties forfeited to the Central Government vide order dated 16.10.1997—Appeal before the Appellant Authority—Dimissed vide order dated 07.06.1999—Order challenged through the present writ petition under Article 226—Plea that the properties were acquired by his father for him not taken before the Competent Authority nor before the Appellate Authority—No document filed either before the Competent Authority nor before the Appellate

Authority —Held—Plea after thought—Cannot be raised for the first time in the Writ petition—The burden of proving that the property was not illegally acquired on the person affected—The consistent findings do not call for any interfernce—Petition dimissed with costs.

I may note that, for the first time, in the present writ petition the petitioner has made an assertion that his father was having liquor vends; that he was an income tax assessee, and; that he had rental income. None of this was stated before the competent authority or the appellate authority. No evidence/document was filed either before the competent authority, or the appellate authority, and none has been filed in these proceedings. It is not permissible for the petitioner to raise such pleas before this Court for the first time in these proceedings. **(Para 13)**

The statutory framework appears to be founded upon the fact that the details and particulars as to how a particular property has been acquired by a person are within his special knowledge. It is for him to explain as to how he has acquired it, and the source of the funds from which the property had been acquired. **(Para 18)**

Important Issue Involved: (A) It is not permissible to raise pleas, which have not been taken before any of the authorities, for first time in writ proceedings.

(B) The statutory framework (under the NDPS Act) appears to be founded upon the fact that the details and particulars as to how a perticular property has been acquired by a person are within his special knowledge. It is for him to explain as to how he has acquired it, and the source of the funds from which the property had been acquired.

[Vi Gu]

APPEARANCES:

FOR THE PETITIONER : Mr. Vishal Arun, Advocate.

FOR THE RESPONDENTS : Mr. A.S Chandhiok, ASG, with Mr. Ruchir Mishra, Advocate for the Respondents Nos.1 to 4.

CASES REFFERRED TO:

1. *Shahid Parvez* vs. *Union of India & Others,* 175 (2010) DLT 547.
2. *Kesar Devi* vs. *Union of India & Others,* (2003) 7 SCC 427.
3. *Maqudoom Meera Hameem* vs. *Joint Secretary to Government of India,* W.P.(Crl.) No. 83/1995 decided on 17th August, 1995.
4. *Akhilesh Kumar Tyagi* vs. *Union of India* reported in 1995 IV AD (Delhi) 107.
5. *Akhilesh Kumar Tyagi* vs. *Union of India & Others,* 60 (1995) DLT 203 (FB).
6. *Attorney General For India & Others* vs. *Amratlal Prajivandas & Others,* (1994) 5 SCC 54, at para 56(3)(b).

RESULT: Petition dimissed.

VIPIN SANGHI, J. (Oral)

1. One Md. Azad @ Avid Parwiz S/o Abdul Rouf was sought to be detained vide detention order dated 26.07.1989 issued by the Joint Secretary to the Government of India under Section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (PITNDPS Act) with a view to prevent him from engaging in manufacture, possession, sale, purchase, transportation, warehousing, import & export inter-State of narcotic drugs. This detention order became effective on 10.07.1991, when the detenue was detained. On 12.08.1991, the Special Secretary to the Government of India sought to issue a declaration under Section 10(1) of the PITNDPS Act. The purpose of issuing the said declaration was to justify the detention beyond the initial period of three months.

2. The admitted position is that the detenue unsuccessfully challenged the detention order dated 26.07.1989 before the Calcutta High Court vide Crl. Misc. No. 1244/1992. The Special Leave Petition (SLP) preferred by the detenue before the Supreme Court was also dismissed. However, the challenge to the declaration made under Section 10(1) of the PITNDPS Act was successful before this Court vide W.P.(Crl.) No. 315/1992. This Court while disposing of W.P.(Crl.) No. 315/1992, inter alia, passed the following order:

> "It is agreed between the parties that this matter is covered by the decision of this Court in **Akhilesh Kumar Tyagi Vs. Union of India** reported in 1995 IV AD (Delhi) 107. The writ petition is allowed in terms thereof. The initial period of detention of three months is sustained.
>
> .... I, therefore, hold that the detention for a period of three months is valid and continue detention is vitiated."

3. The petitioner is the brother of the detenue Md. Azad @ Avid Parwiz. A show cause notice was issued to the petitioner under Section 68H(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) on 20.04.1994. It was contended that the petitioner is a person covered under Section 68A(2)(d) of the NDPS Act. The petitioner was granted the opportunity to show cause in response to the said notice. The said notice pertained to the following properties:

Deed No.	Date of Regn.	Mouza	Vol. No.	Khata No.	Plot No.
4178 of 1985	16.8.85	Samakona, Balasore.	67	6	44
4990 of 1985	11.10.85	Kasaba, Balasore.	179	147	1342 1343 1344
4991 of 1985	14.10.85	Kasaba, Balasore.	79	174	1342 1343 1344

The reply was sent by the petitioner, but the same has not been placed before this Court.

4. The competent authority vide order dated 16.10.1997 held that it was conclusively established that the aforesaid properties are illegally acquired within the meaning of Section 68B(g) of the NDPS Act. A declaration was issued that the said properties are illegally acquired within the meaning of the said provision and they were forfeited by the Central Government, free from all encumbrances. The petitioner preferred an appeal before the appellate authority for forfeited properties. Before the appellate authority, it appears, the mother of the petitioner filed an affidavit, wherein it was claimed that the properties had been acquired by her husband, i.e., the late father of the petitioner, in the name of the petitioner. It was claimed that the detenue Md. Azad @ Avid Parwiz had no concern with the said properties and they did not belong to him.

5. The appeal preferred by the petitioner was dismissed vide order dated 07.06.1999 upholding the forfeiture of the said properties. Consequently, the petitioner has preferred this writ petition under Article 226 of the Constitution of India to assail the aforesaid orders of the competent authority as well as the appellate authority. The petitioner has also sought to assail the detention order dated 26.07.1989 and the declaration dated 12.08.1991 in respect of his brother Md. Azad @ Avid Parwiz.

6. At the outset, I may note that the prayer in relation to the detention order dated 26.07.1989 and the declaration dated 12.08.1991 made in the present petition is misconceived for the reason that the detention order dated 26.07.1989 was unsuccessfully challenged by the detenue before the Calcutta High Court and thereafter before the Supreme Court. The said challenge has attained finality and the petitioner cannot seek to reopen the same. So far as the declaration dated 12.08.1991 is concerned, the same already stands quashed by this Court in W.P.(Crl.) No. 315/1992. Moreover, it is not open to the petitioner in these proceedings to challenge the detention order in the light of the judgment of the Supreme Court in **Attorney General For India & Others Vs. Amratlal Prajivandas & Others,** (1994) 5 SCC 54, at para 56(3)(b).

7. The first submission of the learned counsel for the petitioner is that the show cause notice was incompetent inasmuch as the petitioner

is not covered under Chapter V-A of the NDPS Act. He submits that in the present case, the detention beyond the period of three months was held to be illegal. Consequently, Section 68Z came into play, which provides that where the detention order of the detenue is set aside or withdrawn, properties seized or frozen under this Chapter shall stand released. In this regard, he places reliance on the order dated 16.05.2002 in W.P.(Crl.) No. 315/1992 as also the judgment of this Court in **Shahid Parvez vs. Union of India & Others,** 175 (2010) DLT 547. He submits that in **Shahid Parvez** (supra), this Court had considered the effect of the order passed on 16.05.2002 in W.P.(Crl.) No. 315/1992 and in paragraph 16 held that the detention order itself was void ab initio. Para 16 of the decision in **Shahid Parvez** (supra) reads as follows:

> "16. Analysing the order dated 16th May 2002 passed by this Court in the present case, the opening line appears to indicate that this Court held the initial period of three months detention of the Petitioner's brother to be valid but the remaining period of detention to be invalid in terms of the judgment in **Akhilesh Kumar Tyagi**. What is also significant is that the contention of the learned ASG to the contrary was negatived and it was held that "the detention for a period of three months is valid and continued detention is vitiated." Extending the logic of the decision in **Akhilesh Kumar Tyagi** to the order dated 16th May 2002, while the detention for a period of three months was held to be valid, the detention order itself was held to be void ab intio. It must be noted that the order dated 16th May 2002 passed by this Court attained finality with the Respondents accepting it. Further, while the period of three months of detention was held valid, the detention order was itself held to be void ab initio, i.e. from the date it was issued."

8. I do not find any merit in this submission of the learned counsel for the petitioner. The dismissal of the petitioner's writ petition before the Calcutta High Court and the affirmation of the said dismissal by the Supreme Court coupled with the order dated 16.05.2002 passed in W.P.(Crl.) No. 315/1992, leaves no manner of doubt that so far as the initial detention order dated 26.07.1989 is concerned, the same remained intact and was not quashed or set aside in any judicial proceeding. The detention of the detenue in pursuance of the said detention order for the

initial period of three months was held to be legal and valid. However, on account of the fact that the declaration No. 13/91 dated 12.08.1991 was held to be illegal by this Court in W.P.(Crl.) No. 315/1992, the effect was that the act of detention of the detenue beyond the period of three months became illegal.

9. A careful examination of the order dated 16.05.2002 in W.P.(Crl.) No. 315/1992, the judgment of the Full Bench of this Court in **Akhilesh Kumar Tyagi Vs. Union of India & Others,** 60 (1995) DLT 203 (FB), and the judgment of this Court in **Shahid Parvez** (supra) would show that there is a typographical error in the aforesaid extract inasmuch, as, the word 'detention' existing in the 13th line of the said paragraph has wrongly been typed in place of the word 'declaration'. The learned Judge in **Shahid Parvez** (supra) has extracted in para 14 the position in law as it existed in the light of the decision in **Maqudoom Meera Hameem Vs. Joint Secretary to Government of India,** W.P.(Crl.) No. 83/1995 decided on 17th August, 1995, wherein it was held by the Division Bench that in case "where the reference to the Advisory Board was made beyond 5 weeks and the Advisory Board gave its opinion beyond 11 weeks, the continued detention during the extended period became bad" (emphasis supplied). In **Akhilesh Kumar Tyagi** (supra) the correctness of the decision in **Maqudoom Meera Hameem** (supra) was questioned by the Union of India. It was contended that till such time as detention order was quashed it remain valid. Consequently, it was contended by the UOI that the detention beyond three months did not become illegal automatically. This contention of the Union of India was rejected in **Akhilesh Kumar Tyagi** (supra), wherein the Full Bench observed that the continued detention beyond three months would be invalid. [see para 30 of the **Akhilesh Kumar Tyagi** (supra) which has been extracted in **Shahid Pervez** (supra)]. The Court, in **Akhilesh Kumar Tyagi** (supra) did not hold that merely because the declaration under section 9 of COFEPOSA was illegal, the initial detention order, or the initial detention was also ipso facto illegal. I am, therefore of the opinion that the word 'detention' used in para 16 before the words 'order' and after the words 'for a period of three months was held to be valid' in **Shahid Pervez** (supra) should be read as 'declaration'. Consequently, section 68Z has no application to this case as the original detention order has not been quashed or set aside or withdrawn at any stage by any competent authority. Therefore, the respondents were entitled to invoke the provisions of

Chapter V-A of the NDPS Act.

10. A perusal of Section 68A would show that the provisions of Chapter V-A, which deal with forfeiture of properties derived from, or used in illicit traffic applies to every person in respect of whom an order of detention has been made under the PITNDPS Act. (see Section 68A(2)(c)). By virtue of Section 68A(2)(d) the said Chapter has been made applicable to every person who is a relative of a person referred to in clause (a) or clause (b) or Clause (c). The expression 'relative' has been defined in Section 68B(i) to mean, inter alia, brother or sister of the person. Therefore, it is amply clear that the petitioner is covered by Chapter V-A of the NDPS Act, as he is the brother of the detenue, and his contention to the contrary cannot be accepted.

11. It is next contended by the learned counsel for the petitioner that the show cause notice was issued to the petitioner without any inquiry or prima-facie appreciation of any relevant material by the respondent. He submits that there is absolutely no nexus established by the respondent between the petitioner's property and the detenue or his income allegedly derived from his alleged dealing in narcotics drugs and psychotropic substances. He submits that the onus to establish the said nexus lay upon the respondents, which they have completely failed to discharge. He submits that the orders passed by the competent authority and the appellate authority proceed on a presumption. Since the exercise undertaken has penal consequences, the onus lay upon the respondents. In this regard, he again places reliance on the decision in **Shahid Parvez** (supra), and, in particular, paragraphs 18 to 20 of the said decision, which read as follows:

> "18. The impugned order of the CA, affirmed by the Appellate Tribunal, cannot be sustained even on merits. The records of the CA have been perused by this Court. The relevant period is the one immediately preceding issuance of show cause notice to the Petitioner under Section 68-H (1) of the NDPS Act. It appears that following certain letters received from the Income Tax Office, Balasore, on 1st November 1996, the Investigating Officer/CA at Calcutta made a noting directing the Department "to ascertain the existence of Shri Shahid Parvez." He advised: "We may as well write to Branch Manager, Central Bank of India, Brahamansahi Branch, Soro, Balasore to furnish details of Bank

> Account No. 263 such as name of holder and address, name of introducer and address, date of opening and present position of the account".
>
> 19. This was followed by several reminders and the noting dated 17th June 1997 where it was acknowledged that the Branch Manager, Central Bank of India had furnished address of the brother of the Petitioner and other required information. However, the notice sent under Section 68-H (1) NDPS Act appears to have been returned with the remark "left". It appears that previous to this, an order was already passed against the Petitioner on 10th August 1992 under Section 68-F (2) of the NDPS Act. The noting in the file CA/CAL/NDPS-86/92/93 do not show any investigation having been conducted to co-relate the details received from the Income Tax office in respect of source of the Petitioner's income to even form a prima facie view that the properties in question were acquired by him from the earnings of his brother Mohd. Azad on account of illicit trafficking in drugs. In file CA/Cal/NDPS/31/98-99, there are two identical notings dated 17th February 1999 and 9th March 1999 by the CA, Calcutta which reads as under:
>
> > "I have perused the relevant records. I have applied my mind to all the facts and circumstances of the case. I have today recorded my reasons in terms of Section 68H (1) of the NDPS Act, 1985 and I am satisfied that this is a fit case for issue of notice under Section 68 H (1) of the NDPS Act, 1985. Issue notice under Section 68H (1) of the NDPS Act."
>
> 20. It is not known what records were perused by the CA before issuing the above orders. As far as this Court can find, there was no systematic enquiry or investigation preceding the passing of the above orders. It appears that prior to issuing a show-cause notice to the Petitioner under Section 68-H(1) of the NDPS Act, no effort was made by the CA to be prima facie satisfied that the essential conditions existed to attract that provision. **Even before the CA or the Appellate Tribunal, the initial burden was on the office of the CA to show that the properties in the name of the Petitioner were acquired by**

him through the illegal earnings of his brother. The Petitioner on his part produced a 1998 sale deed in his favour in respect of one of the properties. However, the opinion formed by the CA, as extracted hereinbefore, fails to establish even prima facie any casual link existing between the Petitioner's properties and the illegal earnings of the Petitioner's brother. The order of the CA is a mere reproduction of the language of the statute which is inadequate for demonstrating application of mind to arrive at even a prima facie satisfaction that the essential ingredients of Section 68-H (1) NDPS act stood attracted." (emphasis supplied)

12. Once again I do not find any merit in the submission of the learned counsel for the petitioner. It is not in dispute that the petitioner was minor of about 12 years at the time when the aforesaid properties are stated to have been acquired in the year 1985. He did not have any independent source of income of his own at that time. This is not even his case. The case set up by the petitioner at the appellate stage was that his father had acquired the said properties for him. He did not produce any material or evidence before the competent authority or the appellate authority, and none has been produced even in these proceedings, to show as to what was his father's avocation, income and how he cornered the resources to acquire the said properties.

13. I may note that, for the first time, in the present writ petition the petitioner has made an assertion that his father was having liquor vends; that he was an income tax assessee, and; that he had rental income. None of this was stated before the competent authority or the appellate authority. No evidence/document was filed either before the competent authority, or the appellate authority, and none has been filed in these proceedings. It is not permissible for the petitioner to raise such pleas before this Court for the first time in these proceedings.

14. The impugned orders have to be tested on the basis of the materials produced before the authorities who have passed these orders. The said plea is clearly an afterthought and is an attempt to improve his case by petitioner. From the known source of income of the petitioner or his father, the aforesaid properties have not been established to have been acquired. It has not even been argued that the competent authority did not have, or did not record the reasons for issuance of the show

cause notice.

15. On the other hand, the principle of law contained in the aforesaid observations made by this Court in **Shahid Parvez** (supra), with due respect, appears to be per incuriam. I may refer to the provision contained in Section 68J of the NDPS Act which provides that "in any proceedings under this Chapter, the burden of proving that any property under Section 68H is not illegally acquired property shall be on the person affected." Therefore, the observation of the learned Judge that the onus would be on the respondent authorities is in the teeth of the said statutory provision. I may note that Section 68J has not been noticed by the learned Judge in **Shahid Parvez** (supra).

16. So far as the competent authorities "reason" to believe that the aforesaid properties are illegally acquired is concerned, the acquisition of immovable properties by a minor of 12 years itself furnishes reason to entertain the said belief. The consequence of the said belief is only that an enquiry is set into motion by issuance of a show cause notice to grant the person concerned an opportunity to disclose his income, earnings or assets, out of which or by means of which he has acquired the property in question.

17. While deciding **Shahid Pervez** (supra), the learned Judge has also not noticed the judgment of the Supreme Court in **Kesar Devi Vs. Union of India & Others,** (2003) 7 SCC 427. This was a case dealing with the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA). The provisions of SAFEMA, dealt with by the Supreme Court in para 10 of the judgment, are similar to the provisions of the NDPS Act with which I am concerned. Section 6(1) of SAFEMA is similar to section 68H of NDPS Act. Section 8 of SAFEMA is similar to section 68J of NDPS Act. The Supreme Court, inter alia, observed as follows:

> "The condition precedent for issuing a notice by the competent authority under Section 6(1) is that he should have reason to believe that all or any of such properties are illegally acquired properties and the reasons for such belief have to be recorded in writing. The language of the Section does not show that there is any requirement of mentioning any link or nexus between the convict or detenu and the property ostensibly standing in the

name of the person to whom the notice has been issued. Section 8 of the Act which deals with burden of proof is very important. It lays down that in any proceedings under the Act, the burden of proving that any property specified in the notice served under Section 6 is not illegally acquired property, shall be on the person affected. The combined effect of Section 6(1) and Section 8 is that the competent authority should have reason to believe (which reasons have to be recorded in writing) that properties ostensibly standing in the name of a person to whom the Act applies are illegally acquired properties, he can issue a notice to such a person. Thereafter, the burden of proving that such property is not illegally acquired property will be upon the person to whom notice has been issued. The statutory provisions do not show that the competent authority, in addition to recording reasons for his belief, has to further mention any nexus or link between the convict or detenu (as described in Sub-section (2) of Section 2) and the property which is sought to be forfeited in the sense that money or consideration for the same was provided by such convict or detenu. If a further requirement regarding establishing any link or nexus is imposed upon the competent authority, the provisions of Section 8 regarding burden of proof will become otiose and the very purpose of enacting such a Section would be defeated."

18. The statutory framework appears to be founded upon the fact that the details and particulars as to how a particular property has been acquired by a person are within his special knowledge. It is for him to explain as to how he has acquired it, and the source of the funds from which the property had been acquired.

19. The petitioner was a minor in the year 1985 when the properties were acquired. He is a younger brother of the detenue. This being the position, the consistent conclusions and findings of fact reached by the competent authority as well as the appellate authority do not call for any interference in these proceedings.

20. Accordingly the present petition is dismissed with costs of Rs.50,000/-.

ILR (2012) I DELHI 578
W.P. (C)

SHIV NATH CHOUDHARY RAM DASS ....PETITIONER

VERSUS

NDMC & ORS. ....RESPONDENTS

(HIMA KOHLI, J.)

W.P. (C) NO. : 4743/2011 AND 5254/2011 ALONGWITH W.P. (C) NO. : 2601/2011, 2602/2011, 3052/2011 & ANRS.

DATE OF DECISION: 24.10.2011

Constitution of India, 1950—Article 226—Petition to restrain the respondent/NDMC from removing the petitioner from the sites occupied by them till the enactment of an appropriate legislation, in terms of the directions issued by the Supreme Court in the case of Gainda Ram—Respondent contended—Simply because legislature has not enacted a law, it cannot be said that there existed a vacuum—In Sodan Singh case Supreme Court directed for immediate eviction of unauthorised squatters/hawkers—Held—On the question of how to ascertain the implication of a status order passed by a Court in the case of *Messrs Bharat Cocking Coal Limited* (supra), it was observed by the Supreme Court that the expression, 'status quo' is undoubtedly a term of ambiguity and at times, gives rise to doubt and difficulty and in case any party has any doubt on the meaning and the effect of the status quo order, the proper course for such a party would be to approach the Court that had passed the status quo order, to seek clarifications—It would not be appropriate for this Court to grant stay orders in the face of the status quo order dated 15.07.2011

passed by the Supreme Court—It was reiterated that any such order shall be an anti-thesis to the orders of the Supreme Courts which must be respected both, in letter and spirit—In such circumstances, any interim orders to the petitioners declined —However, liberty granted to both the parties to apply to the Supreme Court for a clarification of the status quo order dated 15.07.2011 passed in the case of *Gainda Ram* (supra).

The fountainhead of the dispute in the present cases therefore remains the status quo order dated 15.7.2011 passed by the Supreme Court. The issue which is sought to be agitated before this Court is that having regard to the status quo order, whether a stay order ought to be granted by this Court in favour of the petitioners/vendors as prayed for by them, irrespective of their legal status, thus forbidding the respondent/NDMC from threatening and/or removing them from the different sites occupied by them in the NDMC areas. In other words, this Court is being called upon to examine the meaning, scope and effect of the status quo order dated 15.07.2011. On the question of how to ascertain the implication of a status quo order passed by a court, in the case of **Messrs Bharat Coking Coal Limited** (supra), it was observed by the Supreme Court that the expression, 'status quo' is undoubtedly a term of ambiguity and at times, gives rise to doubt and difficulty and in case any party has any doubt on the meaning and the effect of the status quo order, the proper course for such a party would be to approach the Court that had passed the status quo order, to seek clarifications. **(Para 29)**

In view of the aforesaid facts and circumstances, this Court is of the opinion that it will not be appropriate for it to grant stay orders in the face of the status quo order dated 15.07.2011 passed by the Supreme Court. It is reiterated that any such order shall be an anti-thesis to the orders of the Supreme Court, which must be respected both, in letter and spirit. In such circumstances, the present petitions are disposed of by declining grant of any interim orders to the

petitioners. However, liberty is granted to both the parties to apply to the Supreme Court for a clarification of the status quo order dated 15.07.2011 passed in the case of **Gainda Ram** (supra). The parties are left to bear their own costs. **(Para 32)**

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. B.B. Sawhney, Sr. Advocate with Mr. Ankan Suri, Mr. Lakshay Sawhney, Mr. Ankur Suri and Mr. Sunil Kumar, Advocates for the Petitioners. Mr. Sumit Kumar Singh, Mr. Anand Shailani, Mr. Satish Kumar Tripathi, Mr. N.K. Sahoo, Mr. R.N. Singh, Mr. M.R. Singh, Mr. Ramesh K. Mishra, Mr. Surender Pandit, Mr. Navjot Kumar, Mr. Mahendra Singh, Mr. Sunder Lal Juneja, Mr. Pranesh, Mr. B.B. Bhatia, Mr, Navjot Kumar and Mr. Satish Chand Gupta, Mr. Pranesh and Mr. Sahil Kapoor, Ms. S. Fatima, Mr. Jagdeep Kr. Sharma Ms. Rani Chhabra, Ms. Rupinder Kaur, Ms. Ferida Satarawala, Mr. R.N. Singh, Mr. Vikash Batra, Mr. V.P. Rana and Mr. Javjot Kumar Advocates for the petitioners.

FOR THE RESPONDENTS : Ms. Madhu Tewatia, Ms. Sidhi Arora, Mr. Vinod Kumar, Mr. Arjun Pant, Mr. Ashutosh Lohia and Mr. Vinod Wadhwa, Advocates for the respondent/NDMC. Mr. Najmi Waziri, Standing Counsel, Mr. Bhupesh Narula Mr. Sanjay Sahay, Ms. Farida Satarwal Chopra, Mr. Sachin Datta, Mr. Abhimanyu Kumar

and Ms. Rachna Sexena, Advocates for the respondent/GNCTD. Ms. Navratan Chaudhary, Mr. H.S. Sachdeva, Mr. D. Rajeshwar Rao, Mr. Vikram Aggarwal and Mr. Shariq Mohammad, Advocate for the respondent/Delhi Police.

CASES REFERRED TO:

1. *Mohd. Ismail* vs. *NDMC & Ors.* W.P.(C) 1449/2011.
2. *Patri Vyapar Mandal Delhi (Regd.)* vs. *MCD Town Hall & Ors.* reported as (2009) 12 SCC 475.
3. *Sodan Singh* vs. *NDMC & Ors.* reported as (1998) 2 SCC 727.
4. *Municipal Corporation of Greater Bombay & Ors.* vs. *Indian Oil Corporation Ltd.* reported as AIR 1991 SC 686.
5. *MCD* vs. *Gurnam Kaur* reported as (1989) 1 SCC 101.
6. *Messrs Bharat Coking Coal Limited* vs. *State of Bihar & Ors.* reported as 1987 (Supp) SCC 394.
7. *Sudhir Madan & Ors.* vs. *MCD,* W.P.(C) 1699/1987.
8. *Gainda Ram & Ors.* vs. *NDMC & Ors.,*W.P.(C) 1699

RESULT: Petition disposed

HIMA KOHLI, J.

1. This common judgment shall dispose of the petitions filed by the petitioners/vendors as the issues raised in these writ petitions are common. For the sake of convenience, facts of W.P.(C) 4743/2011 are taken note of.

2. The focus of the lengthy arguments addressed by both sides revolves around an order dated 15.07.2011 passed by the Supreme Court on some miscellaneous applications presented in W.P.(C) 1699/1987 entitled **Gainda Ram & Ors. vs. NDMC & Ors.,** which matter was decided on 08.10.2010 by issuing exhaustive directions. Before proceeding to deal with the respective arguments addressed by the learned counsels

for the petitioners/vendors and the respondent/NDMC, it would be appropriate to set out the aforesaid order dated 15.07.2011, which is the bone of contention and is reproduced hereinbelow:-

> "Heard learned counsel for the applicants and perused the record.
>
> Since judgment of this Court has so far not been implemented, inasmuch as appropriate legislation has not been enacted by the competent legislature, we direct the parties to maintain the status quo as it is obtaining today."

3. It was the submission of the learned counsel for the respondent/NDMC that the aforesaid order issued by the Supreme Court, calling upon the parties to maintain status quo as obtaining on 15.07.2011, can only be interpreted to mean that the extensive directions issued earlier, on 08.10.2010, in the case of **Gainda Ram** (supra) reported as **(2010) 10 SCC 715** shall continue to remain in operation, including the adjudicatory mechanism provided for by the NDMC in the scheme presented by it before the Supreme Court and approved in the said judgment, till the appropriate government enacts a law for regulating urban street hawkers and street vendors. It was stated that simply because the legislature has not enacted a law in this regard on or before 30.06.2011, as directed in the aforesaid judgment, it cannot be contended by the petitioners/vendors that there exists a vacuum and the said vacuum can no longer be filled up by continuing to regulate the vending activities in the NDMC jurisdiction in the manner as set out in the aforesaid judgment.

4. To give a brief background of the dispute, learned counsel for the respondent/NDMC walked this Court through some prominent decisions of the Supreme Court rendered from time to time, which relate to pavement squatters/hawkers, starting from the decision in the case of **Sodan Singh vs. NDMC & Ors.** reported as (1998) 2 SCC 727, the interim order dated 03.03.2006 passed by the Supreme Court in W.P.(C) 1699/1987 entitled **Sudhir Madan & Ors. vs. MCD,** the final judgment in the case of **Sudhir Madan** (supra) reported as (2009) 17 SCC 597 and lastly, the judgment dated 08.10.2010 passed in the case of **Gainda Ram** (supra).

5. Learned counsel for the respondent/NDMC vehemently opposed the prayer of the petitioners/vendors for grant of interim orders restraining

the respondent/NDMC from removing them from the sites occupied by them till the enactment of an appropriate legislation, in terms of the directions issued by the Supreme Court in the case of **Gainda Ram** (supra). She particularly referred to the observations made by the Supreme Court in paras 40 and 41 of the judgment in the case of **Sodan Singh** (supra), which dealt with the immediate eviction of unauthorized squatters/ hawkers and laid emphasis on the fact that in the said case, the Supreme Court had directed removal of unauthorized squatters/hawkers without awaiting final allotment of sites to be allotted to eligible claimants at the places recommended by the Thareja Committee or suggested by the NDMC.

6. Again, in the interim order dated 03.03.2006 passed in **Sudhir Madan's** case (supra), the following observation made by the Supreme Court was highlighted by the counsel for the respondent/NDMC:-

> "While we undertake this exercise, we direct the Authorities to see to it that those persons, who are carrying on hawking activities or who are squatting on public land without any authority, even in accordance with the present day scheme in force, are removed forthwith. This includes unauthorized hawking, squatting on public streets, footpaths and public parks, including playground. We direct the Delhi Administration to take steps immediately in collaboration with MCD and NDMC with necessary assistance from Delhi Police to clear the roads, streets, footpaths, parks etc. by unauthorized occupants/squatters/hawkers."

7. As to the judgment dated 17.05.2007 rendered in the case of **Sudhir Madan** (supra), much emphasis was laid by the counsel for the respondent/NDMC on paras 28 to 30 and 35, which are reproduced hereinbelow for ready reference:-

> "28. The New Delhi Municipal Committee has also submitted its Scheme. We have considered the Scheme submitted before us. The area which falls under NDMC does not create problems such as those in the areas under MCD. However, in the said Scheme reference has been made to persons who do not have permission under Section 225 or licence under Section 330 of the NDMC Act, 1994 but who are unauthorisedly continuing to carry on business as hawkers/street vendors. They have been

> described as those who are "tolerated" in the NDMC area. We fail to understand why any person who violates the law should be tolerated. Either they should be compelled to obey the law or the law may be suitably amended, if it is found to create undue hardship. The problems need to be addressed by the legislature or the rulemaking authority. We, therefore, observe that if it is felt that the persons who fall in this category require special protection, the Act may be suitably amended to cover their cases or else the number of such illegal squatters may increase from time to time.
>
> 29. There has been no serious objection to the Scheme submitted by NDMC which is a comprehensive scheme. Certain directions have, however, been sought for from this Court. We approve the Scheme submitted by NDMC. 30. It is submitted before us that the Schemes which have been approved by this Court must be subject to any Act or rules that may be framed in consonance with the National Policy on Urban Street Vendors. It goes without saying that we have approved the Schemes as framed by MCD and NDMC. If the legislature intervenes and frames another scheme or regulations governing such Schemes, that will certainly supersede the Schemes prepared by MCD and NDMC. It is well settled that any administrative action is always subject to law that may be framed by the competent legislature. 35. Subject to the aforesaid modifications/changes in the Schemes submitted by MCD and NDMC, the same are approved. The said authorities shall now take appropriate steps to implement the Scheme forthwith. In case of any difficulty faced by them in implementing the schemes, they shall have the liberty to apply to this Court."

8. Lastly, in the recent judgment in the case of **Gainda Ram** (supra), learned counsel for the respondent/NDMC specifically relied upon paras 30, 32, 50 to 66 to state that the Supreme Court was conscious of the fact that a structured regulation and legislation is urgently required to control and regulate the fundamental right of hawking. She also pointed out that the three tier disputes redressal mechanism set out in the affidavit filed by the then Chairperson of the NDMC was taken note of by the Supreme Court in para 72 of the aforesaid judgment and in para 73, it was then observed as below:-

"73. In paragraph 12 of the affidavit it has been stated that there shall be an Appellate Authority which shall attend to the redressal of grievances of squatters, hawkers, traders, residents or any other person by hearing appeals against the decision of the Vending Committee (Main). Paragraph 12 of that affidavit is set out below:-

> There shall be an Appellate Authority. On the forwarding of petitions received by the Chairperson, this Authority shall attend to redressal of grievances of squatters, hawkers, traders, residents or any other person. The Authority shall also hear appeals against the decision of Vending Committee (Main). Decisions of this Authority unless challenged before a Higher Forum or in any Competent Court, shall be final. This Authority shall be initially headed by a person appointed by the Chairperson having at least 10 years legal or judicial background. There can be more than one member in this Authority."

9. After making the aforesaid observations, in paras 74 to 76 of the judgment, the Supreme Court went on to observe as below:-

"74. In the said affidavit, which was affirmed before this Court on 24th August, 2010 it has been stated that NDMC shall comply with the orders which would be passed by the adjudicatory mechanism contemplated in the scheme and which has been approved by this Court for the NDMC area, unless such orders are made subject matter of challenge before a higher forum or in any other competent Court.

75. In view of such schemes, the hawkers, squatters and vendors must abide by the Dispute Redressal scheme mentioned above. There should not be any direct approach to this Court by way of fresh petition or IAs, bypassing the Dispute Redressal Mechanism provided in the scheme.

76. However, before 30th June, 2011, the appropriate Government is to enact a law on the basis of the Bill mentioned above or on the basis of any amendment thereof so that the hawkers may precisely know the contours of their rights."

10. It was thus sought to be contended on behalf of the respondent/

NDMC that there can be no vacuum as far as regulation of trade of street hawkers/vendors in the NDMC jurisdiction is concerned and the failure on the part of the legislature to abide by the timeline set out by the Supreme Court in the case of Gainda Ram (supra), by putting in place a statute on or before 30.06.2011, cannot be interpreted by the petitioners/ vendors to mean that they can continue their trade unhindered at any place of their choice in the NDMC jurisdiction, in an unregulated manner and without any obstruction or objection from the NDMC.

11. Learned counsel for the respondent/NDMC particularly referred to paras 74 and 75 of the aforesaid judgment to state that the dispute redressal scheme, noticed by the Supreme Court in para 75 was the one that was legally functioning in NDMC jurisdiction and which was taken note of by the Court in the preceding para 74. In other words, she stated that the scheme as set out in the affidavit dated 24.08.2010, filed by the then Chairperson of NDMC before the Supreme Court in **Gainda Ram's** case (supra), was the one which was finally approved by the Supreme Court. She further submitted that assuming, without admitting, that the dispute redressal scheme set out by the NDMC had lapsed on 30.6.2011, as claimed by the petitioners, then the NDMC Act provides an adequate fallback to ensure orderly management of vendors in the area. Specific reference was made in this regard to the provisions contained in Sections 221, 224, 225 and 226 of the said Act.

12. It was further argued by the counsel for the respondent/NDMC that the application filed by the NDMC before the Supreme Court in July 2011 praying inter alia for extension of time to regulate hawkers/squatters in the NDMC area, as per the scheme mentioned in the judgment in **Gainda Ram's** case (supra), till the enactment of a law by the legislature in that regard, had not yet been finally disposed of by the Supreme Court at the time of passing of the status quo order dated 15.07.2011 and similarly, the other application filed by one of the hawkers/vendors praying *inter alia* for restraining the respondent/NDMC from granting *Tehbazari* rights to the winners of the lucky draw of lots for allotment, which was to be held on 12.05.2011 or any date thereafter, was also pending consideration before the Supreme Court. Hence, no finality could be attached to the order dated 15.7.2011 which can only be considered an interim measure till the final disposal of the aforesaid applications or the enactment of a legislation.

13. On merits, learned counsel for the respondent/NDMC referred to the affidavit dated 01.08.2011 filed by the Director (Enforcement), NDMC, wherein it was stated that pursuant to the public notice issued by the NDMC inviting applications under the NDMC Urban Street Vending Scheme in the year 2007, the respondent/NDMC had received 4367 applications. The documents required by the applicants for registration under the Scheme included a proof of age, documentary proof/affidavit for the purpose of annual income, proof of residence, proof in support of special categories like handicapped, Kashmiri migrants etc. and proof of squatting in the NDMC area, if any. In para 4 of the aforesaid affidavit, the following criteria approved/adopted by the Vending Committee to shortlist the eligible applicants is set out:-

> "4. That the criteria approved/adopted by the Vending Committee to shortlist the eligible applicants is as under:-
>
> (i) The applicants should be resident of Delhi with his name registered in electoral rolls as per abstract of photo E-Roll or ERO certificate.
>
> (ii) The applicant should be a major, viz. with over 18 years of age as per valid birth certificate or age certificate or school certificate etc.
>
> (iii) The applicant should be a needy as per income records of DC (Revenue) or as vulnerability records of Government of NCT of Delhi (Samajik Suvidha Sangam: vulnerable and most vulnerable category).
>
> (iv) The applicant should be registered as per NDMC Street Vendors Scheme. The policy verification of the applicant should be available.
>
> (v) The applicant or his dependent family member should not be employed or should not have any other *tehbazari*/vending or any other business premises in Delhi as per record verification of NDMC/MCD.
>
> (vi) Preference will be given to applicants who are physically handicapped or widows or senior citizens above 60 years or Kashmiri migrants or SC/ST (necessary certificate to be submitted and relaxation may be given in the above criteria)."

14. As per the respondent/NDMC, the category-wise list of eligible shortlisted applicants in terms of the aforesaid criteria totalled to 3878 applicants. The affidavit dated 01.08.2011 states that the respondent/NDMC has identified 183 new spaces, in addition to the 203 remaining spaces identified by the Thareja Committee in the NDMC area, which were available for allotment, thus taking the total number of available spaces to 386. It was further stated that due to factors like de-listing of the Parliament Street on security grounds, construction of flyovers and Metro Stations at various locations in the NDMC jurisdiction, the number of authorized *tehbazari* squatters has changed from 348 to 404 in number. The number of applicants, who the respondent/NDMC claims, are vending unauthorisedly at Connaught Place, Sarojini Nagar, Parliament Street and Janpath areas and in whose favour, status quo orders are operating, is stated to be 323 in number. The affidavit asserts that simply because the names of the petitioners, who are registered with the NDMC, figure in the eligibility list drawn by the respondent/NDMC, cannot be treated as proof of their regularly vending in the NDMC area and nor does it confer on them any enforceable vested right to ensure a vending space for them in the NDMC area, which is directly dependent on the number of spaces available. Thus, it was contended that neither the possession of any number of challans, nor the absence thereof can make a difference, for the reason that challans cannot form the basis for the petitioners to claim any vested legal right to squat at a given space.

15. Counsel for the respondent/NDMC asserted that the present petitions are not maintainable inasmuch as the petitioners have an equally efficacious alternate remedy of approaching the appellate authority constituted by the Chairperson, NDMC, for redressal of their grievances and failure on their part to have approached the Vending Committee is not on account of the fact that the said Committee including the appellate authority is not functioning, but because they have found it more convenient to bypass the aforesaid forum and approach this Court directly, which is not permissible. She stated that extensive measures have been taken by the respondent/NDMC to constitute the adjudicatory mechanism by way of a three tier system in the following manner:-

1. Vending Sub-Committee (Site of Spaces),
2. Vending Sub-Committee (Heath and Hygiene) and
3. Vending Sub-Committee (Enforcement).

16. She stated that the creation of the aforesaid three Vending Sub-Committees, Vending Committee (Main), as also of the appellate authority which was constituted to redress the grievances of the squatters, hawkers, traders, residents or any other person against the decision of the Vending Committee (Main), was placed before the Supreme Court for consideration and the said three tier adjudicatory mechanism was duly approved in the judgment of **Gainda Ram** (supra).

17. Per contra, learned counsels for the petitioners/vendors, who appeared on different dates, vehemently opposed the aforesaid stand taken by the respondent/NDMC and asserted that the scheme floated by the respondent/NDMC for regulating vending activities in its jurisdiction had lapsed on 30.06.2011 in the absence of the enactment of a legislation as per directions of the Supreme Court in the case of **Gainda Ram** (supra) and as on date, there is no scheme in existence. It was canvassed that the implication of the aforesaid order of status quo passed by the Supreme Court on 15.07.2011 can only mean that irrespective of the fact whether the squatting is legal or illegal, the same be permitted to continue on an 'as is where is' basis, and such status quo is to be maintained by all the parties till a law is framed by the legislature.

18. Mr. B.B. Sawhney, Sr. Advocate appearing for the petitioners/vendors submitted that in the case of **Gainda Ram** (supra), the Supreme Court had directed that the appropriate government must enact a law on or before 30.06.2011 so that the hawkers may precisely know the contours of their rights, hence the dispute redressal mechanism provided for in the scheme mentioned in the aforesaid judgment could operate only upto 30.06.2011 and thereafter, the said scheme would automatically stand lapsed. He stated that no other interpretation can be given to the order dated 15.07.2011, directing maintenance of status quo, in view of the qualifying words, "as it is obtaining today". He argued that if the scheme was continuing to operate, as claimed by the learned counsel for the respondent/NDMC, then there was no good reason for the respondent/NDMC to have refrained from holding a draw of lots, which was slated for the same day, i.e., 15.07.2011, and that fact of the matter is that even the respondent/NDMC had understood the status quo order to mean that there is no scheme in place after 30.6.2011, for the reason that in para 68 of the aforesaid judgment in the case of **Gainda Ram** (supra), all the writ petitions and the interim applications filed before the Supreme Court

were disposed of with clear and specific directions that the problem of hawking and street vending could be regulated by the schemes framed by the NDMC and MCD only upto 30.06.2011 and not thereafter. It was asserted on behalf of the petitioners/vendors that as on date, the directions of the Supreme Court that status quo is to be maintained by the parties can only be given one interpretation, which is that till a law is ultimately enacted by the Parliament, irrespective of their legal status, all the petitioners/vendors would be permitted to continue squatting/hawking at the sites that have been occupied by them.

19. Insofar as the composition of the dispute redressal mechanism is concerned, learned Senior Advocate for the petitioners submitted that contrary to the understanding of the respondent/NDMC, the scheme reproduced at paras 72 and 73 in the judgment in the case of **Gainda Ram** (supra), was not the one which was actually recognized by the Supreme Court, and rather it is the dispute redressal scheme mentioned in para 75 of the aforesaid judgment i.e., a scheme for urban street vendors for NDMC area as formulated in the year 2006, which was ultimately approved by the Supreme Court on 17.05.2007, in the case of **Sudhir Madan** (supra), which is the scheme which finds mention specifically in the following para 74 and is the one approved by the Supreme Court. It was contended that even otherwise, the National Capital Territory of Delhi Laws (Special Provisions) Act, 2011 (hereinafter referred to as **'Special Provisions Act'**) comes to the rescue of the petitioners for the reason that sub-clause (2) of Section 3 of the Special Provisions Act mandates maintenance of *status quo* as on 01.01.2006, notwithstanding any judgment, decree or order of any court, in respect of encroachment or unauthorized development. Thus, it was submitted on behalf of the petitioners/vendors that they were entitled to grant of interim protection till the enactment of a legislation to regulate hawking/vending activities in urban streets in Delhi on the basis of the National Policy on Urban Street Vendors, 2009 framed on 17.06.2009 and the Special Provisions Act.

20. With reference to the Special Provisions Act, learned Senior Advocate for the petitioners stated that the phrase, "unauthorized development" used in the definition clause has to be seen in the same context as the one in which the phrase "encroachment" has been defined, wherein it is mentioned that putting up of temporary, semi-temporary or

permanent structure for residential use or commercial use or any other use, and the placement of goods on the pavements by the petitioners is liable to be termed as unauthorized use for maintaining status quo under the Special Provisions Act. Much emphasis was laid on the averments made by the respondent/NDMC in its interim application filed before the Supreme Court in **Gainda Ram's** case (supra) in July 2011, to submit that the respondent/NDMC itself had stated in the said application that the scheme had lapsed and therefore, the only interpretation that can be given to the status quo order passed by the Supreme Court on 15.07.2011 can be that no scheme would exist after 30.06.2011 and thus, the benefit of the Special Provisions Act ought to be extended to the petitioners. He submitted that the phrase 'street vendors' has been clearly defined under the National Policy on Urban Street Vendors, 2009. Reliance was placed in the case of **Patri Vyapar Mandal Delhi (Regd.) vs. MCD Town Hall & Ors.** reported as (2009) 12 SCC 475 and the provisions of the Special Provisions Act to submit that even the Supreme Court had recognized the fact that the Special Provisions Act is the only Central law governing the field and it would have primacy over other Statutes and administrative orders. It is thus stated that the provisions of the NDMC Act cannot be invoked by the respondent/NDMC as the said Act is not in consonance with Article 96 of the Constitution of India and furthermore, the Special Provisions Act being valid till the end of December 2011, no orders in derogation of the provisions of the said Act can be passed.

21. Mr. S.K. Tripathi, Advocate appearing for some of the petitioners/vendors sought to embellish the submissions of Mr.Sawhney, Sr.Advocate and relied on the orders passed in W.P.(C) 1449/2011 entitled **Mohd. Ismail vs. NDMC & Ors.** to urge that the "Appellate Authority" constituted under the dispute redressal mechanism for the NDMC area, has not been functioning, which fact he stated is borne out from a perusal of the order dated 08.03.2011 passed in the aforesaid case, wherein the Court took notice of the claim of the petitioner/vendor therein to the effect that inspite of orders passed by the Appellate Authority allowing squatting at a particular site, till a final determination by the Vending Committee as to his eligibility, the respondent/NDMC and the police were disturbing his activities. In the aforesaid order, the statement of the counsel for the respondent/NDMC was recorded to the effect that the appellate authority, whose order was being relied upon by the petitioner therein, was constituted initially for the MCD areas and later started functioning for the NDMC

areas as well for the reason that at that time, there was no separate appellate authority for the NDMC areas, but subsequently, in accordance with the scheme approved by the Supreme Court, the Chairperson, NDMC had constituted a separate appellate authority for the NDMC areas. Therefore, the appellate authority appointed earlier had ceased to have jurisdiction qua the NDMC areas. It was thus contended on behalf of the petitioners/vendors that the aforesaid order clearly indicates that the appellate authority in the NDMC areas is not functioning.

22. Reliance was also placed on the minutes of the meeting of the Vending Committee dated 11.03.2010, to claim that if the fact of whether there was actual squatting/vending was verified by the Committee and if the names of the petitioners/vendors figured in the eligibility list prepared by the respondent/NDMC for holding the draw of lots, then it did not lie in the mouth of the respondent/NDMC to claim that the petitioners, who had been verified and found to be eligible, were not entitled to squat at various sites in the NDMC area after 30.06.2011.

23. In rebuttal, counsel for the respondent/NDMC disputed the contentions of the petitioners/vendors and while reiterating her earlier submissions, asserted that the petitioners did not have any legally enforceable right, created on the basis of the eligibility list drawn by NDMC, for claiming grant of interim orders in their favour. She again referred to paras 68, 69, 75, 76 and 78 of the judgment in the case of **Gainda Ram** (supra), to emphasize that when the aforesaid paras are read collectively, it is clear that the petitioners cannot claim an entitlement to any interim orders as sought by them in the present proceedings. She further stated that even otherwise, the Special Provisions Act relied upon by the petitioners has duly recognized the schemes prepared by the local authorities in the National Capital Territory of Delhi for regulation of urban street vendors. To substantiate the said submission, she drew the attention of this Court to the preamble of the aforesaid Act, which mentions the fact that all the schemes prepared by the local authorities in the National Capital Territory of Delhi, for regulation of urban street vendors in accordance with the National Policy on Urban Street Vendors, 2009 and the Master Plan for Delhi 2021, have been implemented and further that more time is required for proper implementation of the schemes regarding hawkers and urban street vendors.

24. A specific reference was made by the learned counsel for the respondent/NDMC to Section 2(1)(c) of the Special Provisions Act, which defines the phrase "encroachment" to claim that it does not cover the petitioners herein, who are squatters. Further reference was made to the provision of Section 3 of the Special Provisions Act, which contains a non obstante clause, to state that *status quo* with regard to the encroachment or unauthorized development as on 01.01.2006, mentioned in the said provision, was in the context of the definition of the phrases "encroachment" and "unauthorized development" set out in the definition clause at Sections 2(1)(c) and 2(1)(i) respectively of the Special Provisions Act and thus, the petitioners/vendors did not qualify under the aforesaid enactment for claiming protection as none of the ingredients set out in the provisions of the aforesaid enactment are found to exist in their case. It was submitted that the Special Provisions Act, which came into effect in the year 2007 and has been extended from time to time and lastly, till December 2011, does not give permission to persons to re-start any activity once they have been removed by the civic authority and similarly, the Scheme of 2009 does not entitle the registrants to squat unless they have been allotted a specific site. In support of the aforesaid submission, reliance was place on the judgment in the case of **MCD vs. Gurnam Kaur** reported as (1989) 1 SCC 101. For the purpose of interpreting the meaning of the phrase, "structure", reference was made to the judgment of the Supreme Court in the case of **Municipal Corporation of Greater Bombay & Ors. vs. Indian Oil Corporation Ltd.** reported as AIR 1991 SC 686. For the purpose of understanding the expression, 'status quo', reference was made to the judgment in the case of **Messrs Bharat Coking Coal Limited vs. State of Bihar & Ors.** reported as 1987 (Supp) SCC 394 to submit that in ordinary legal connotation, the term 'status quo' implies the existing state of things at any given point of time.

25. As for the National Policy on Urban Street Vendors, counsel for the respondent/NDMC stated that both, the 2004 policy and the 2009 policy, find mention in the decision of the Supreme Court in the case of **Gainda Ram** (supra) and it was only after taking into consideration the said policies, did the Court directed the institutionalization of urban street vending through legislation. It was further stated that at the time of delivering the judgment dated 8.10.2010, the Supreme Court took notice of the NCT of Delhi Laws (Special Provisions) Act, 2009, which was valid upto 30.12.2010, apart from noticing the Model Street Vendors

(Protection of Livelihood and Regulation of Street Vending) Bill, 2009 introduced by the Government of India, Ministry of Housing & Urban Poverty Alleviation. She stated that nothing new is now being submitted by the petitioners/vendors herein, for the present petitions to be entertained for any purpose whatsoever and all the grievances raised by the petitioners can easily be addressed before the Vending Committee/appellate authority under the scheme relating to urban street vending in the NDMC area, which fora continue to remain functional, even after 30.6.2011.

26. This Court has heard these matters at length since 17.8.2011, on different dates. Various counsels for the petitioners/vendors and the Standing Counsel for the respondent/NDMC had addressed the Court. Their respective arguments have been taken note of. Both sides have made strenuous efforts to explain what the status quo order dated 15.7.2011 passed by the Supreme Court in the case of **Gainda Ram**(supra) implies. The *leitmotif* of the arguments addressed on behalf of the petitioners/vendors is that the status quo order read with the qualifying words, "as it is obtaining today", suffixed to the order, can only be read to imply that as on date, i.e., 15.7.2011, there was no scheme operational in the NDMC areas to regulate vending activities and till a law is ultimately enacted by the legislature, all the petitioners, irrespective of their legal status, can continue squatting/hawking at different sites that have been occupied by them. It is also asserted that in the teeth of the status quo orders passed by the Supreme Court, the respondent/NDMC in collusion with the police authorities, is threatening to illegally remove the petitioners/vendors from different sites, which is detrimental, adverse, harassing and belligerent to those, who have been found eligible by the respondent/NDMC for being allotted specific *tehbazari* spaces within the NDMC jurisdiction, but are being threatened due to lack of further action in this regard which is pending at the end of the respondent/NDMC. The second limb of submissions made by the learned counsels for the petitioners/vendors was that the Special Provisions Act would additionally come to the rescue of the petitioners/vendors, which also requires maintenance of status quo as existing on 01.10.2006, till the end of December, 2011.

27. On the other hand, the main thrust of the arguments addressed by the counsel for the respondent/NDMC was that as the legislature has failed to enact an appropriate legislation in terms of the decision of the

Supreme Court in the case of Gainda Ram(supra), the subsequent order dated 15.7.2011 directing parties to maintain the status quo as it is obtaining on the said date can only imply that the state of affairs as existing on date are not to be disturbed, until the rights of the parties can be finally determined through legislation. It was submitted that while passing the status quo order on 15.07.2011, the Supreme Court was conscious of the fact that the Parliament had yet to enact a comprehensive legislation to regulate urban street vending and in such circumstances, it goes without saying that it was the intent of the Court that the entire dispute redressal mechanism as recognized in the case of **Gainda Ram**(supra) would continue to remain in operation, so as to regulate the urban street vending in the NDMC area, till the legislation in that regard is enacted. Further, it was stressed that the Special Provisions Act did not provide any protective umbrella to the petitioners, whose squatting activities neither fell under the definition of "encroachment", nor under "unauthorized development". It was further asserted that even otherwise pending an appropriate legislation, the NDMC Act was available as a fall back option and the relevant provisions in the said enactment would continue to regulate street vending activity in the NDMC area and the petitioners/vendors could not claim a vested right to squat at any site of their own.

28. From the above, it is apparent that arguments and counter arguments have been raised by both sides on their respective versions of the meaning and the effect of the status quo order dated 15.7.2011 passed by the Supreme Court. It is also very apparent, that the meaning sought to be attributed by both sides as to the implication of the said status quo order, is diametrically opposed to each other. Not only this, both sides are at a tangent on the factum of the pendency or otherwise of the interim applications filed before the Supreme Court by both, the applicants/vendors and the respondent/NDMC, for clarifications, on which the aforesaid order came to be passed as it is the stand of the respondent/NDMC that the aforesaid applications were not disposed of while passing the order dated 15.7.2011. The parties are poles apart on the question of import of the status quo order, and the effect of the observations made by the Supreme Court in the case of **Gainda Ram**(supra) as regards the approval of NDMC scheme. They are also at loggerheads on the composition of the adjudicatory mechanism in the NDMC jurisdiction and the manner of its functioning, as also the identity of the scheme

which is validly operating in the NDMC areas for regulating urban street vending, which had all been subject matter of consideration before the Supreme Court in the aforesaid case. The other issues agitated by the parties, starting from the interpretation of the various observations made by the Supreme Court in the aforesaid judgment, to the formulation of the scheme as approved by the Supreme Court in the case of **Sudhir Madan** (supra), to the composition of the disputes redressal mechanism and its validity as also the meaning of the status quo order, are all in a turmoil as both the parties have stoutly defended their respective stands which are completely at variance with each other. The only common ground shared by the parties is the factum of passing of the recent judgment dated 08.10.2010 in the case of **Gainda Ram**(supra) and the subsequent status quo order dated 15.7.2011 passed by the Supreme Court.

29. The fountainhead of the dispute in the present cases therefore remains the status quo order dated 15.7.2011 passed by the Supreme Court. The issue which is sought to be agitated before this Court is that having regard to the status quo order, whether a stay order ought to be granted by this Court in favour of the petitioners/vendors as prayed for by them, irrespective of their legal status, thus forbidding the respondent/NDMC from threatening and/or removing them from the different sites occupied by them in the NDMC areas. In other words, this Court is being called upon to examine the meaning, scope and effect of the status quo order dated 15.07.2011. On the question of how to ascertain the implication of a status quo order passed by a court, in the case of **Messrs Bharat Coking Coal Limited** (supra), it was observed by the Supreme Court that the expression, 'status quo' is undoubtedly a term of ambiguity and at times, gives rise to doubt and difficulty and in case any party has any doubt on the meaning and the effect of the status quo order, the proper course for such a party would be to approach the Court that had passed the status quo order, to seek clarifications.

30. In the case at hand, while seeking to ride the wave of the aforesaid status quo order, the parties have chosen to overlook one important factor, which is that a status quo order operates on both sides. The Supreme Court has passed orders requiring both sides to maintain status quo. Once such an order of the Supreme Court is on record, the same not only binds all the parties to the adjudication, and all the parties, civil or judicial who are required to act in accordance with the said

orders, but it equally binds the High Court from interfering with such an order, as the said order has been passed in litigations before the highest Court of the land.

31. The orders of the Supreme Court are on record. The status quo order is a clear signal to the High Court as well, to avoid granting any order, including an interim order, when the Supreme Court has directed for status quo to be maintained. In such circumstances, if this Court was to grant a stay order in favour of the petitioners/vendors arrayed before it, it would be tantamount to negating the orders of the Supreme Court, which require the parties to maintain status quo pending enactment of appropriate legislation. If either of the parties were unclear about the interpretation of the status quo order, it was for them to have applied to the Supreme Court for clarifications thereof. Additionally, the reliance placed by the petitioners/vendors on the Special Provisions Act seeking interim legal sanctity to the placement of goods by them on the pavements, by terming it as encroachment/unauthorized use, as recognized under the said Act and their contention that the Supreme Court had recognized the fact that the Special Provisions Act is the only Central law having primacy over other Statutes, are also matters that the petitioners/vendors ought to have placed before the Supreme Court while seeking clarifications of the status quo order. It would therefore be advisable for the petitioners/vendors as also the respondent/NDMC to approach the Supreme Court and make their submissions there as regards their grievances. However, as both parties insisted that their arguments be taken note of and their submissions be placed on record, some pains have been taken to do the needful.

32. In view of the aforesaid facts and circumstances, this Court is of the opinion that it will not be appropriate for it to grant stay orders in the face of the status quo order dated 15.07.2011 passed by the Supreme Court. It is reiterated that any such order shall be an anti-thesis to the orders of the Supreme Court, which must be respected both, in letter and spirit. In such circumstances, the present petitions are disposed of by declining grant of any interim orders to the petitioners. However, liberty is granted to both the parties to apply to the Supreme Court for a clarification of the status quo order dated 15.07.2011 passed in the case of **Gainda Ram** (supra). The parties are left to bear their own costs.

ILR (2012) I DELHI 598
CRL. M.C.

VED PRAKASH **....PETITIONER**

VERSUS

SRI OM **....RESPONDENT**

(SURESH KAIT, J.)

CRL. M.C. NO. : 2258/2011 **DATE OF DECISION: 31.10.2011**

Indian Penal Code, 1860—Section 402, 406, 506—Code of Criminal Procedure, 1973-204, 256—Respondent filed complaint under Section 402, 406, 506 IPC against petitioner—In pre Summoning evidence, he examined himself and one more witness who was not named in list of witnesses as his witness—Summoning order was passed by learned Metropolitan Magistrate and case was listed for pre-Summoning evidence—Aggrieved by summoning order, petitioner challenged it and urged, one of the witness namely Sh. Raj Singh examined at pre summoning stage, was not named in list of witnesses which caused injustice to respondent—Also, on other grounds summoning was bad in law—Held:- Non-compliance of Section 204 (1A) is not an illegality which renders subsequent proceedings null & void, but it is a curable irregularity—If no prejudice is caused to accused, trial shall not be vitiated.

I am of the opinion that even if filing of the list of witnesses is contemplated by sub-Section (2) of Section 204 and is considered to be mandatory, the provisions contained in Section 465 of Code have to be taken into consideration before declaring the issue of process as illegal. This Section 465 of the new Code is equivalent to Section 537 of the old code and it provides that no finding, sentence or order

passed by a court of competent jurisdiction shall be reversed or altered by a Court of appeal or Revision on any error or omission or irregularity in the complaint, summons, warrants, proclamation, order, judgment or every proceedings before or during the trial unless in the opinion of appellant or the revision court if failure of justice is in fact opened occasioned thereby. **(Para 31)**

Important Issue Involved: Non-compliance of Section 204 (1A) is not an illegality which renders subsequent proceedings null & void, but, it is a curable, irregularity—If no prejudice is caused to accused, trial shall not be vitiated.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. T.L. Garg, Advocate.

FOR THE RESPONDENT : Mr. R.P. Kaushik, Advocate.

CASES REFERRED TO:

1. *Bhagwati Prasad* vs. *Chandramaul* 1996 2 SCR 286.
2. *Ram Sarup Gupta* vs. *Bishun Narain Inter College and others* 1987 2 SCC 555.
3. *Sunil Akhya Chaudhary* vs. *H.M. Zadwet* reported in MANU/WB/00050/1968.
4. *State of Bombay* vs. *Janardhan and others* AIR 1960 Bom 513.
5. *Ali Jan* vs. *Amir Khan* 1957 Cri LJ 630.

RESULT: Petition dismissed.

SURESH KAIT, J.

1. Vide this petition, learned counsel for the petitioner has assailed the summoning order dated 20.01.2005 passed by learned MM in CCNo. 22/03.

2. He has submitted that as per the list of witnesses submitted by the complainant, following were made witnesses in the complaint:-

2. Complainant.
2. Sh. Jagdish Singh
3. Sh. Inderjit.
4. Sh. Dharambir Singh.
5. Sh. Daya Nand.
6. Clerk, from M/s Motor General Finance company.
7. Any other or further witness with the prior permission of the Hon'ble Court.

3. He has further submitted that CW 2 Mr. Raj Singh s/o Late Sh. Subey Singh R/o H.No. 377, Kanjawala, Delhi 81; was examined on 28.09.2004 without being in list of witnesses and on his deposition the aforesaid impugned summoning order was passed.

4. Learned counsel for the petitioner had taken a legal plea that as per the list of witnesses, the complainant in Caluse7 has stated "any other or further witness with the prior permission of the Hon'ble Court" whereas CW 2 Raj Singh was examined without the prior permission of the court, which is bad in law.

5. Learned counsel for the petitioner based on the aforesaid submissions has relied upon the judgment **State of Bombay v. Janardhan and others** AIR 1960 Bom 513, wherein it was observed as under:-

".....Witnesses mean only those mentioned in list under S.204(IA) by complainant. Complainant is restricted to the examination of witnesses whose names are given in the list under section 204(IA).....".

".....The object of giving a list of witnesses, as provided in S.204(1A), is to give notice to the accused of the names of the witnesses for the complainant so that accused can prepare for their cross-examination. If witnesses not named in the list referred to in S.2049(IA) are allowed to be examined by the complainant the object of the Legislature in adding the new S. 204(IA) would be defeated. After the insertion of S.204(IA), S 256 has to be read along with S. 252 also with S. 204(IA). Therefore, in my opinion, in cases instituted otherwise on a police report the complainant is

restricted to the examination of witnesses whose name are given in the list under S. 204(IA)....."

6. Admittedly, the complaint was filed under Section 402/406/506 IPC on 18.11.2000. CW1 Sh. Om was examined in pre-summoning evidence on 06.04.2004.

7. Thereafter, vide order dated 20.01.2005, learned MM passed the impugned summoning order. Thereafter, the case was listed for pre-summoning evidence on 24.10.2010.

8. Facts stated in the complaint relating to offence under Section 506 IPC are mentioned in para 7 of the impugned order, which reads as under:-

> "The complaint met with accused 2 and 3 in order to show the letter received from the finance company. These directors declined to pay the instalments as agreed earlier initially and also to pay anything to the complainant in lieu of plying of the vehicle. When the complainant further insisted and stated to approach the authorities and the court for getting justice and money which he invested on the promise and inducement of the accused persons. These aforesaid directors threatened the complainant on 12.12.1998 at the gun point to kill the complainant in case he dared to take any such action stated above. The complainant return back his house and contacted 7 other persons who also invested their money on their promise and inducement by the accused persons like that of the complainant."

9. Respondent has filed his reply which states that Chapter XV of the Code deals with the complaint made to the Magistrate. It starts with Section 200 which provides that Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

> Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-
>
> (a) If a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint; or

> (b) If the Magistrate makes over the case for inquiry, or trial to another Magistrate under section 192:
>
> Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

10. Section 202 of Cr.P.C. provides postponement of issue of process, whereas Section 203 provides dismissal of complaint. Section 204 provides issue of process, whereas sub-clause (2) provides no summons or warrants shall be issued against accused under Section (1) Sub-section (1) until a list of prosecution witnesses have been filed.

11. The Petitioner's main emphasis is that one Raj Singh has been examined in pre-summoning stage, though his name did found place in the list of witnesses. Thus, so far as the respondent has caused injustice to the petitioner and as such the summoning is bad in law.

12. The second ground taken by the petitioner is that the complainant has not stated anywhere about the petitioner Ved Prakash even though he has been summoned under Section 506 IPC.

13. Further, it is stated, the scheme of Chapter XV of Cr.P.C. is very clear and provides for examination of the complainant and his witnesses after taking cognizance of complaint on oath before the summons are issued to accused persons. It is stated that in the present case, the complainant was examined along with another witness present in the court at the time of examination.

14. Learned Magistrate examined the witness namely Raj Singh as per provision of Section 200 and thereafter, order for summoning of accused persons.

15. Further, it is stated that the list of witnesses as required under Section 204 (2) Cr.P.C. has also been filed before summons were issued, as such there is no illegality or non compliance of any of the requirement contemplated under Section 204 of Cr.P.C.

16. It is further stated that the purpose of filing of list of witnesses is to make aware the accused persons about the nature of the evidence which may be adduced against them during the proceedings. In the

instant case, the witness Raj Singh was also examined in pre-summoning stage, which followed the summoning of the accused. So question of accused persons not knowing the name of the witness namely Raj Singh is not sustainable and as such no prejudice has been caused to accused persons. Moreover, the purpose of the filing of list of witnesses has been served.

17. Learned counsel for the respondent has relied upon a case of Abdul Hafiz V. GHulam Mohi-ud-din 1997 Cri LJ 591 and Kanhu Ram V. Durga Ram 1980 Cri LJ 518, it has been held that omission to file list of witnesses does not vitiate the proceedings if the purpose otherwise is served. The omission is regularly curable under Section 465 Cr.P.C.

18. Further, he has relied upon another Judgment in a case of **Ali Jan V. Amir Khan** 1957 Cri LJ 630, wherein, it has been held that the complainant can file second or even three list of witnesses and non-incorporating any name does not vitiate the proceedings.

19. As relied upon by the learned counsel for the petitioner in the case of **Janardan** (supra) decided by Bombay High Court, wherein it is clearly observed that the object of giving a list of witness as provided in Section 204 (1 A) is to give notice to the accused of the names of the witnesses for the complainant so that the accused can prepare for their cross-examination. If witnesses not named in the list referred to in S. 204 (1A) are allowed to be examined by the complainant the object of the Legislature in adding the new S. 204 (1A) would be defeated. After the insertion of S. 204 (1A), S. 256 has to be read along with S. 252 also with S. 204 (1A), Therefore, the cases instituted otherwise on a police report the complainant is restricted to the examination of witnesses whose names are given in the list under S. 204 (1A).

20. In the present case, the complainant has been examined and one witness CW2, Sh. Raj Singh has also been examined and thereafter, learned Magistrate has issued summons against the petitioner.

21. It has been decided in **Ram Sarup Gupta V. Bishun Narain Inter College and others** 1987 2 SCC 555 that in the absence of pleading, evidence if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and

purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction; pedantic approach should be adopted to defeat justice on hair –splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings; instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence in that event it would not be open to a party to raise the question of absence of pleadings in appeal.

22. As decided by Constitution Bench of Supreme Court in a case of **Bhagwati Prasad V. Chandramaul** 1996 2 SCR 286 while considering this question observed as under :-

> If a pleas is not specifically ade and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadins made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issues, and evidence has been led about them, then the argument that a particular matter was nto expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the court has to consider in dealing with such an objection s : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of

them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to another."

23. As enumerated in Section 204(2) of Cr.P.C. that no summons or warrants shall be issued against the accused under Sub-section (1) until a list of prosecution of witness has been filed.

24. In clause (3), it is enumerated that in a proceeding instituted upon a complaint in writing every summons or warrants issued in Sub section (1) shall be accompanied by a copy of such complaint.

25. In the instant case, learned MM has passed an order on summoning, further summons are to be issued to the accused. It is mandatory that along with the summons, the copy of the complaint of relevant documents and the list of witnesses is required.

26. The petitioner has challenged the order of summoning passed by the learned trial court. The summons are issued to the accused, if the procedure enumerated under Section 204 of Cr.P.C. is not complied with, then it is a defect in issuing the summons against the accused because accused must know what is the complaint and evidence against him.

27. In the instant case, the learned MM has examined complainant and also examined one of the witness namely Raj Singh, therefore, it in the very much knowledge of the petitioner/accused that what is the complaint and evidence against him.

28. View taken in a case of Ghulam Mohd. Vani reported in MANU/JK/004/1971 (citation to be checked) that non compliance of Section 204(1A) is not an illegality which renders subsequent proceedings null and void but is a curable irregularity.

29. It is further observed that under Section 204(1A), it is statutory proceedings is made in a public interest for the protection and benefit of the accused and has to be complied with normally; however, it is not mandatory in the sense that even if no prejudice is caused to the accused, it will vitiate the trail.

30. The single Judge of Calcutta High Court has also observed in **Sunil Akhya Chaudhary V. H.M. Zadwet** reported in MANU/WB/00050/1968 (Citation and parties name to be checked) as held over the intention of Legislature in indicating Section 204(1A) is quite clear. It is that before issuing of summons or warrants against the accused persons, the list of witnesses should be filed before that point of Charge and need not be when petition/complaint is filed.

31. I am of the opinion that even if filing of the list of witnesses is contemplated by sub-Section (2) of Section 204 and is considered to be mandatory, the provisions contained in Section 465 of Code have to be taken into consideration before declaring the issue of process as illegal. This Section 465 of the new Code is equivalent to Section 537 of the old code and it provides that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered by a Court of appeal or Revision on any error or omission or irregularity in the complaint, summons, warrants, proclamation, order, judgment or every proceedings before or during the trial unless in the opinion of appellant or the revision court if failure of justice is in fact opened occasioned thereby.

32. The issue which is raised by the learned counsel for the petitioner cannot be considered even an error in passing the summoning order. Even in a case where an error in issuing the process is there, even on that basis the complaint cannot be rejected and cannot be set aside the summoning order passed by the learned MM.

33. Therefore, I am not inclined to interfere in the order, as no infirmity found in the impugned order. It will not result in failure of justice and no prejudice has been caused to the petitioner/accused.

34. Criminal M.C. 2258/2011 is accordingly dismissed.

35. No order as to costs.

ILR (2012) I DELHI 607
RSA

SHRI DURGA DASS BANKA ....APPELLANT

VERSUS

SHRI AJIT SINGH & ORS. ....RESPONDENTS

(KAILASH GAMBHIR, J.)

RSA NO. : 149/2011 DATE OF DECISION: 01.11.2011

Code of Civil Procedure, 1908—Section 100—Second appeal—Suit for mandatory and prermanent injunction filed by Appellant praying for decree directing Respondent no.1 to remove unauthorized construction in the shop and to further restrain him from carrying out any further construction therein—Suit filed inter-alia on the ground that father of the Respondent no.1 had given an undertaking to remove unauthorized construction before the Hon'ble Division Bench by an earlier order dated 22.08.1975—It was alleged that appellant come into possession after the death of his father and despite an undertaking given by his father, had raised unauthorized construction on the roof of the shop—Appellant though had filed his affidavit in evidence and had also been partly examined but he could not appear further because of his illness, being aged—Fresh affidavit filed by his son as attorney—suit dismissed by Trial Court observing that attorney had not deposed anywhere that he had personal knowledge about the facts of the case—First Appellate Court also dismissed the appeal—Held, as a special power of attorney son of Appellant was authorized to depose in place of his father—Neither his evidence could be rejected nor an adverse inference drawn on the ground that plaintiff himself had not appeared as his own witness—The question to be considered only was whether attorney holder son of plaintiff had deposed something which was only in the personal knowledge of the plaintiff or some act to which only plaintiff was privy to—The factum of the undertaking being given to the Division Bench could not have been something exclusively in the personal knowledge of Appellant alone—The Copy of order of Hon'ble Division Bench proved on record by son of Appellant as his attorney.

Hence, any act which is not a private act or which is not something the principal alone can have personal knowledge of can be deposed by the attorney holder and taken in evidence while deciding the issues. There is no bar hence under the Code or otherwise where the attorney holder is deposing regarding a fact which is proved on record. The learned trial court was required to consider the documentary evidence instead of giving any weightage to the oral evidence led by the son of the appellant. The copy of the said order was placed and proved on record by the son of the appellant. Perusal of the said order would clearly show that a clear undertaking was given by the father of the defendant that he would not raise any unauthorized construction and that was the only relevant factor of consideration.

(Para 9)

Important Issue Involved: A fact which cannot be said to be in the exclusive knowledge of the principal can be deposed by the attorney holder and taken in evidence while deciding issues.

[La Ga]

APPEARANCES:

FOR THE APPELLANT : Mr. Ashok Chhabra, Advocate.

FOR THE RESPONDENTS : Mr. V.S. Singh for respondent no.1 Ms. Mini Pushkarna, Advocate for

the Respondent No. 2. Mr. Manish Srivastava for Respondent no.3.

CASES REFERRED TO:

1. *Capt.Praveen Davar(Retd) & Anr.* vs. *Harvansh Kumari & Ors.* 2010(119)DRJ560.
2. *Om Prakash* vs. *Inder Kaur,* 156(2009) DLT 292.
3. *Om Prakash* vs. *Inder Kaur* 2009 107 DRJ 263.
4. *Mr.Vinay Jude Dias* vs. *Ms.Renajeet Kaur* AIR 2009 Delhi 70.
5. *Satnam Channan* vs. *Darshan Singh* 2006(2) RCR (Civil) 615 P and H].
6. *Janki Vashdeo Bhojwani & Anr.* vs. *Indusind Bank Ltd. & Ors.* 2005 1 AD (SC) 168.
7. *Janki Vashdeo Bhojwani and Anr.* vs. *Indusind Bank Ltd. and Ors.* : AIR 2005 SC 439.
8. *Smt. Ramkubai (since deceased) by Lrs and Ors.* vs. *Hajarimal Dhokalchand Chandak and Ors.* : AIR 1999 SC 3089.

RESULT: Appeal allowed.

KAILASH GAMBHIR, J.

1. By this Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908 the appellant seeks to challenge the order dated 20.5.2009 passed by the learned trial court and the order dated 8.2.2011 passed by the learned appellate court, whereby the first appeal filed by the appellant against the order dated 20.5.2009 was dismissed.

2. Mr. Ashok Chhabra, learned counsel for the appellant submits that both the learned courts below have given illegal and perverse findings by misconstruing the judgment of the Apex Court in the case of **Janki Vashdeo Bhojwani & Anr. Vs. Indusind Bank Ltd. & Ors.** 2005 1 AD (SC) 168 by taking a view that since the appellant being the son of the original plaintiff does not have personal knowledge of the facts of the case and therefore he could not have claimed to be fully conversant with the facts and depose in place of his father in his capacity as attorney

holder. The contention of the counsel is that the appellant is the son of the original plaintiff but before the learned trial court, the father of the appellant had throughout been appearing and even he had filed his affidavit in evidence and also entered the witness box for the cross-examination, but because of the old age and also because he had suffered a paralytic stroke he could not appear in the matter further. Counsel thus states that in such extenuating circumstances the appellant being the son had filed his power of attorney before the learned trial court and had filed affidavit by way of his evidence. Counsel further submits that the respondent no.1 remained ex-parte throughout before the learned trial court but he had appeared before the first appellate court and now has also appeared before this court. Counsel also submits that the appellant had primarily based his case on the undertaking given by the father of the respondent before the Division Bench of this Court in Crl. Original No.107/1973 wherein the father of the respondent no.1 had undertaken not to raise any construction over the roof of the shop bearing no. 2562, Gali No. 6, Beadon Pura, Ajmal Khan Road, Karol Bagh, New Delhi and to demolish the unauthorized construction already raised by him over the roof of the said shop. Counsel also submits that the respondent MCD had appeared before the learned trial court and they had not disputed the said position of unauthorized construction being raised by the respondent no.1 over the roof of the shop in utter violation of the said undertaking. Counsel thus urges that the learned trial court as well as the first appellate court without even bothering to look at the said documentary evidence, which was an undertaking given by the father of the respondent no.1, had dismissed the suit of the appellant by taking a hyper-technical view that the appellant being the power of attorney, having no personal knowledge of the facts of the case could not have deposed the same in place of the plaintiff. In support of his arguments, counsel has placed reliance on the judgment of this court in the case of **Om Prakash Vs. Inder Kaur,** 156(2009) DLT 292.

3. Opposing the present appeal, learned counsel for the respondent no.1 submits that no fault can be found in both the orders passed by the courts below and the present appeal deserves outright dismissal. Counsel submits that the appellant who appeared in the witness box in his capacity as attorney holder had no knowledge of the facts of the case and therefore he was not a competent person to depose on behalf of the original plaintiff. Counsel has invited attention of this court to page 9 of the

impugned judgment dated 20.5.2009 wherein the learned trial court has observed that the plaintiff in his evidence has clearly contradicted the case as set up by the plaintiff in the plaint. Counsel thus states that both the courts below rightly placed reliance on the judgment of the Apex Court in **Janki Devi's** case (Supra) by taking a view that the appellant having no personal knowledge of the facts of the case was not competent to depose on behalf of the plaintiff. Counsel for the respondent MCD has not disputed the fact that the unauthorized construction was raised by the respondent no.1 over the roof of the shop in question in contravention of the said undertaking.

4. I have heard learned counsel for the parties at considerable length and given my thoughtful consideration to the arguments advanced by them.

5. A suit for mandatory and permanent injunction was filed by the appellant against the respondent inter alia on the grounds that he is a owner of the property bearing No.2562, Gali No.6, Beadon Pura, Ajmal Khan Road, Karol Bagh, New Delhi and the respondent no.1 is in occupation of the part of the property. It is further pleaded that in a contempt petition filed by the appellant, father of the respondent no.1 Amrik Singh had given an undertaking to remove three walls, wooden planks and tarpoline, whatever unauthorized construction as existing on the roof of the shop bearing no. 2562, Gali No.6, Beadon Pura, Ajmal Khan Road, Karol Bagh, Delhi with further undertaking not to put any construction of any sort again on the aforesaid roof or use the same in any other manner hereafter. It is also pleaded that in view of the said undertaking given by the father of the respondent no.1 the Hon'ble Division Bench vide order dated 22.8.1975 gave the directions to Mr. Amrik Singh to remove the walls, etc mentioned by him in the statement. The said matter was finally disposed of by the Division Bench of this Court vide order dated 8.9.1975. It is also the case of the appellant that the respondent no.1 on the demise of his father Shri Amrik Singh came into possession of the said shop and despite being aware of the said undertaking given by his father, carried out the construction again on the roof of the said shop. It is further the case of the appellant that a legal notice dated 15.2.2000 was served upon the respondent no.1 but despite service of the notice respondent no.1 failed to remove the said unauthorized construction. Based on these facts, the appellant prayed for a decree of

mandatory injunction to direct the respondent no.1 to remove unauthorized construction as shown by him in the plan attached with the plaint and restrain the respondent no.1 from carrying out any further construction in the shop in question. The said suit filed by the appellant was not contested by the respondent no.1 and it is only the respondent MCD who had filed the written statement and contested the said suit. The MCD in their written statement did not dispute the fact of raising of unauthorized construction by the respondent no.1. Based on the pleadings of the parties, the learned trial court framed the issues and thereafter the appellant and the MCD led their respective evidence. In the evidence the appellant had filed his own affidavit and after filing of his affidavit he in fact had appeared for his cross-examination and part cross-examination was conducted by the MCD as would be manifest from the order dated 22.9.2004 of the learned trial court. Thereafter, the matter was adjourned for 7.10.2004 for further cross-examination of the appellant but on 7.10.2004, the appellant did not appear because of his illness and a submission was made by his counsel on his behalf that in his place his son will appear as an attorney to depose on his behalf. Thereafter a fresh affidavit was filed by Mr. Vipin Banka, son of the appellant and his evidence remained unrebutted. The said suit filed by the appellant was dismissed by the learned trial court and the prime reason given by the learned trial court for the dismissal of the said suit was that nowhere the said attorney deposed that he has got personal knowledge about the facts of the said case. After placing reliance on the judgment of the Apex Court in **Janki Devi's** case (Supra), the learned trial court came to the conclusion that the son of the appellant having no personal knowledge about the facts of the present case was not competent to depose on behalf of his father, the original plaintiff and therefore the plaintiff/appellant had failed to prove the issues , onus of which was upon him. Against the said order of the learned trial court the appellant preferred an appeal and the learned appellate court also taking the same line of thought, dismissed the appeal vide order dated 8.2.2011. Feeling aggrieved with both the said orders, the appellant has preferred the present appeal.

6. The appeal is taken up for final hearing at the stage of admission itself.

7. The substantial question of law which arises in the present case is as to

"Whether an attorney holder can be authorized to depose on behalf of principal when the principal due to old age and serious illness cannot depose himself".

It is not in dispute between the parties that Mr. Vipin Banka is the son of the appellant and the appellant is 85 years old and suffering from serious illness. It is also not in dispute that the appellant himself had filed the suit and in fact had appeared in the court and had also filed his own affidavit in evidence and had entered the witness box for his cross-examination and it is at that stage due to his serious illness he could not appear for his further cross-examination and then son of the appellant had appeared in the witness box and deposed on behalf of his father. In my considered view, as a special power of attorney holder, Mr. Vipin Banka was fully authorized to depose in place of his father. Once such an authority has been given by the father to his son to depose on his behalf, can it be said that despite the said authority being given the son would not be competent to depose on behalf of his father? Not disputing the legal position that the facts which are within the knowledge of the plaintiff can only be deposed by the plaintiff alone and not by his attorney holder, but the moot question which arises in the present case is where the father because of his old age and illness gives an authority to his son or any of his family member to depose on his behalf, whether deposition of such an attorney holder can be ignored on the ground that the plaintiff himself did not appear in the witness box.? The answer to this is in the judgment of this court relied upon by the counsel for the plaintiff in **Om Prakash Vs. Inder Kaur,** 156(2009) DLT 292 wherein it was held that the evidence given by a witness cannot be rejected on the ground that he is a father or a relative, nor any adverse inference can be drawn against the plaintiff on the ground that he had not appeared his own witness in the case as the plaintiff is master of his case and he can prove his case without appearing in the witness box.

8. The case of **Janki Vashdeo** (Supra) on which reliance was placed by both the courts below reaffirms the well settled law that the power of attorney holder cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge of. However the said legal position is not attracted to the facts of the case at hand. The question that arises for consideration is that *whether what was deposed by the attorney holder, the son of the plaintiff appellant*

herein, was something that the principal had a personal knowledge of or was relating to some act done by the plaintiff which only he was privy to. The answer to this question is an emphatic no. As is evident from the facts of the case at hand, the suit was instituted to get the order of the Hon'ble Division Bench of this Court enforced where the undertaking was given by the father of the appellant not to raise any unauthorized construction and to remove the existing construction which was unauthorized in the said order. Can it be said that the order of the court is something that the principal alone would have personal knowledge of? The order was of the court and the attorney deposing regarding the same is not something to be in his personal knowledge but a fact which has been proved on record. Here it would be relevant to refer to the judgment of this court in the case of **Capt.Praveen Davar(Retd) & Anr. vs. Harvansh Kumari & Ors.** 2010(119)DRJ560 wherein the court while distinguishing the judgment in the case of Janki Vashdeo Bhijwani held as under:

"16. An attempt was made by Mr. Singla, the learned senior counsel for the appellants to contend that none of the plaintiffs having entered into the witness box to assert their title, the evidence of PW-1 Shri Bihari Lal Walia, the Attorney of the respondents, could be of no assistance to the respondents. Relying upon the judgment of the Hon'ble Supreme Court in **Janki Vashdeo Bhojwani and Anr. v. Indusind Bank Ltd. and Ors.** : AIR 2005 SC 439, the learned senior counsel for the appellants contended that the word "acts", employed in Order 3 Rules 1 & 2 CPC, was confined to acts done by the power of attorney holder in exercise of powers granted by the instrument and was not inclusive of deposing in place and instead of the principal in respect of the matters in which the acts were done by the principal and not by him, and in which only the principal could have a personal knowledge. Apart from the fact that this point was not urged before the learned trial court and has been taken up for the first time in this appeal, there is, even otherwise, in my view, no merit in the same. The provisions of Order 3 Rules 1 and 2 CPC, as is clear from a reading thereof, contain no impediment to the Attorney deposing in place of and instead of the landlord. In **Smt. Ramkubai (since deceased) by Lrs and Ors. v. Hajarimal Dhokalchand Chandak and Ors.** : AIR

1999 SC 3089, the Supreme Court while dealing with a case where the landlady did not appear in the witness box herself, but instead produced her son, who was also her G.P.A. holder, held that it was not important or essential for the landlord/landlady to enter the witness box to support the case. [See also: **Om Prakash v. Inder Kaur** 2009 107 DRJ 263 and **Satnam Channan v. Darshan Singh** 2006(2) RCR (Civil) 615 P and H].

17. The judgment in **Janki Vashdeo Bhojwani's** case (supra) relied upon by the learned senior counsel for the appellants also does not come to the aid of the appellants and is clearly distinguishable. It has been held in the said case that if the power of attorney renders some acts in pursuance of the power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Further, it has been held that he cannot depose for the principal in respect of the matters, in which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined. **It nowhere states that even though the facts deposed are not facts within the personal knowledge of the principal alone, the power of attorney holder cannot depose on behalf of the principal.**

(emphasis supplied)"

Hence,in my considered view the learned courts below have misinterpreted the import of the judgment of the Apex Court and applied it to the facts of the case at hand. It would also be pertinent to mention here the judgment of this court in the case of **Mr.Vinay Jude Dias vs. Ms.Renajeet Kaur** AIR 2009 Delhi 70 wherein the court while dealing with the deposition of the attorney holder with regard to the fact that whether the parties before the court were married or not held as under:

"Facts which are within the special knowledge of principal and are not in the knowledge of attorney can only be deposed by the principal. Whether the parties were married on a particular day, is not a private act of the parties. Marriage is normally a public act in this country and evidence can be given by anyone who has knowledge of the fact. Whether the parties are living separate or

not is also known to other people associated with the parties and is not something secret. Similarly, for how long parties were living separate can be deposed in the Court by any person who is aware of the facts. If an attorney aware of these facts and can answer the questions of the Court, the attorney cannot be told that he is not a competent witness or his statement would not be recorded. Similarly an attorney, on the basis of instructions/ directions given to him, can answer the queries, if there was any possibility of parties patching up and living together or the marriage has broken down irretrievably. An attorney has to be allowed to appear in the witness box and make statement. The Court may reject that part of his statement which is based on hearsay or which he has no personal knowledge. But he cannot be prevented from appearing in the witness box and deposing and answering the queries. Same is the import of judgment of Supreme Court in **Janaki Vasudeo Bhojwani** (supra) wherein Supreme Court had not debarred an attorney from appearing in the witness box but the Supreme Court has stated the facts which are only in the knowledge of the principal, about those facts attorney cannot testify in the Court."

9. Hence, any act which is not a private act or which is not something the principal alone can have personal knowledge of can be deposed by the attorney holder and taken in evidence while deciding the issues. There is no bar hence under the Code or otherwise where the attorney holder is deposing regarding a fact which is proved on record. The learned trial court was required to consider the documentary evidence instead of giving any weightage to the oral evidence led by the son of the appellant. The copy of the said order was placed and proved on record by the son of the appellant. Perusal of the said order would clearly show that a clear undertaking was given by the father of the defendant that he would not raise any unauthorized construction and that was the only relevant factor of consideration.

10. Hence, in the light of the above dismissed, the present appeal is allowed.

ILR (2012) I DELHI 617
CM (M)

NEW OKHLA INDUSTRIAL DEVELOPMENT AUTHORITY **....PETITIONER**

VERSUS

KM PARAMJIT & ANR. **....RESPONDENTS**

(INDERMEET KAUR, J.)

CM (M) NO. : 1278/2011, 1279/2011, 1280/2011, CM (M) NO. : 1281/2011 **DATE OF DECISION: 01.11.2011**

Code of Civil Procedure, 1908—Section 96—Limitation Act, 1963—Section 5—Suit for declaration and permanent injunction filed for restraining the appellant from abolishing the suit property and interfering in the peaceful possession—Trial Court vide judgment dated 01.05.2010 decreed the suit—Appellant filed appeal after a delay of 78 days with application under Section 5 of limitation Act—Earlier counsel changed—New counsel requested earlier counsel to hand over the record—Provided only 26.06.10—Inspection report dated 07.01.2005 found missing—Certified copy made available on 28.07.2010 Held—The words 'sufficient cause as appearing in Section 5 of the Limitation Act have to be construed liberally so as to advance substantial justice to the parties; a litigant should not be shut out at the threshold and be deprived of the opportunity to be heard on merits; dealy may be condoned provided that the applicant is able to furnish a sufficiently justifiable explanation for his delay— No hard and fast rule can be laid down—Each case has to be decided on its factual matrix—Unless there is lack of bona fides or a total inaction or negligence on the part of the litigant, the protection of Section 5 should not be deprived to a party, mistake of a counsel may also amount to a sufficient cause for condonation of delay; it is always a question of fact—In the instant case, keeping in view the explanation furnished by the learned counsel for the petitoner the petitioner should not be declined a hearing on merits for the fault which at best is attributable to his counsel—Order set-aside.

The words 'sufficient cause' as appearing in Section 5 of the Limitation Act have to be construed liberally so as to advance substantial justice to the parties; a litigant should not be shut out at the threshold and be deprived of the opportunity to be heard on merits; delay may be condoned provided that the applicant is able to furnish a sufficiently justifiable explanation for his delay. No hard and fast rule can be laid down. Each case has to be decided on its factual matrix. Unless there is lack of bona fides or a total inaction or negligence on the part of the litigant, the protection of Section 5 should not be deprived to a party; mistake of a counsel may also amount to a sufficient cause for condonation of delay; it is always a question of fact.

(Para 4)

Important Issue Involved: Mistake of counsel is also a sufficient cause for condonation of delay under section 5 of Limitation Act.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. H.L. Raina, Advocate.

FOR THE PETITIONER : Mr. I.V. Raghav and Mr. S.B. Raghav Advocates for R-1.

RESULT: Appeal allowed

INDERMEET KAUR, J. (Oral)

1. The order impugned before this court is the order dated 11.03.2011 vide which the application filed by the appellant under Section 5 of the Limitation Act seeking condonation of delay of 78 days in filing the appeal had been dismissed.

2. Record shows that a suit for permanent injunction and declaration had been filed by the plaintiff against the two defendants; the prayer in the suit was that the defendants i.e the New Okhla Industrial Development Authority as also the DDA be restrained from abolishing the suit property and interfering in the peaceful possession of the property. On the pleadings of the parties issues were framed as the main bone of contention was as to whether the property falls in Noida or in Delhi. The Trial Court vide judgment dated 01.05.2010 had decreed the suit in favour of the plaintiff holding that the suit property falls within Illaqa Shahdara, Delhi. Appeal against the aforenoted judgment was filed by the petitioner i.e. the New Okhla Industrial Development Authority after a delay of 78 days. In the application under Section 5 of the Limitation Act the delay has been explained in para Nos. 2 and 3.

3. It is not in dispute and as it is borne out from the record that the certified copy of the judgment and decree dated 01.05.2010 had been applied for on 07.05.2010 which was obtained on 17.05.2010; appeal was to be filed till 17.06.2010; it was filed belatedly for the reason that the earlier counsel who was dealing with the matter had been changed; new counsel had requested the earlier counsel for handing over the complete case file which was given to the new counsel only on 26.06.2010; the inspection report dated 07.01.2005 was found missing which was to be obtained before the appeal could be filed; certified copy of these papers were made available only on 28.07.2010; this was the explanation furnished by the petitioner for the delay in filing the appeal.

4. The words 'sufficient cause' as appearing in Section 5 of the Limitation Act have to be construed liberally so as to advance substantial justice to the parties; a litigant should not be shut out at the threshold and be deprived of the opportunity to be heard on merits; delay may be condoned provided that the applicant is able to furnish a sufficiently justifiable explanation for his delay. No hard and fast rule can be laid down. Each case has to be decided on its factual matrix. Unless there

is lack of bona fides or a total inaction or negligence on the part of the litigant, the protection of Section 5 should not be deprived to a party; mistake of a counsel may also amount to a sufficient cause for condonation of delay; it is always a question of fact.

5. In the instant case, keeping in view the explanation furnished by the learned counsel for the petitioner in the application which was duly supported by the affidavit of the Tehsildar of the petitioner who had stated that this application had been drafted on the basis of the relevant record, the justification furnished by the petitioner for not filing the appeal within time has been explained. The petitioner should not be declined a hearing on merits for the fault which at best is attributable to his counsel. The impugned order is accordingly set aside. Delay in filing the appeal is condoned.

This order is passed subject to payment of Rs. 5,000/- as costs. The parties to appear before the First Appellate Court on 15.11.2011 and the Trial Court shall proceed to dispose of the appeal on its merits.

ILR (2012) I DELHI 620
W.P. (C)

HEMANT SHARMA & ORS. ....PETITIONERS

VERSUS

UNION OF INDIA AND ORS. ....RESPONDENTS

(VIPIN SANGHI, J.)

W.P. (C) NO. : 5770/2011 DATE OF DECISION: 04.11.2011

Constitution of India, 1950—Article 19 & 226—Petition seeking mandamus to direct resondent No. 1 to take appropriate steps so that respondent No. 2 i.e. All India Chess Federation does not ban/threaten to ban chess players, associating themselves with other

chess associations—Petitioners were chess players registered with respondent No. 2—Petitioners being amateurs liked to play chess whenever an opportunity presented itself even in those tournaments not organised by respondent no. 2—Respondent No. 2 prohibited chess players registered with it from playing in any tournament/competition which did not have the approval of respondent No. 2—This is highly monopolistic and anti competitive and exploiting its dominant position to impose such unreasonable restriction on the rights of players—Respondent contended that there was statutory obligation on the part of respondent No. 1 to issue directions as sought for—Held—The definition of the expression 'enterprise' as used in the Competition Act read with definition of "service" thereof, clearly shows that the respondent no. 2 is an enterprise which is covered by the said provisions—The allegation against respondent no. 2 is that respondent no. 2, by virtue of its agreement with the petitioners, was seeking to control the provision of services which was causing adverse effect on competition within India, in as much as, the chess players registered with respondent no. 2 were not free to form another association or to organize tournaments and participate therein, without facing the consequence of losing their registration with respondent no. 2 which is the nationally recognized sports federation for the sports of chess—The power of this Court under Article 226 of the Constitution of India extends to the issuance of appropriate directions, orders or writs for enforcement of any of the rights conferred by Part III of the Constitution or for any other purpose—Since in the present case the petitoner has brought to this Court's notice the aforesaid state of affairs in relation to respondent no. 2 the said aspects need thorough investigation under the provisions of the Competition Act by the Competition Commission—There could be breach of the petitioners

fundamental right to freedom, resulting from the policies and practices of respondent No. 2, as guranteed under Article 19(1)(c) and 19(1)(g) of the Constitution of India—Directions issued to Competition Commission to enquire into the alleged contravention of the Provisions of Section of 3 and Section 4 by respondent no. 2 by its aforesaid constitutional provisions and conduct under Section 26 of the Competition Commission Act, 2002.

The definition of the expression 'enterprise' as used in the Competition Act read with the definition of "service" thereof, in my view, clearly shows that the respondent no.2 is an enterprise which is covered by the said provisions. The allegation against respondent no.2 is that respondent no.2, by virtue of its agreement with the petitioners, is seeking to control the provision of services which is causing adverse effect on competition within India, in asmuch, as, the chess players registered with respondent no.2 are not free to form another association or to organize tournaments and participate therein, without facing the consequence of losing their registration with respondent no.2 which is the nationally recognized sports federation for the sports of chess. The allegation also is that respondent no.2 is abusing its dominant position as the NSF. **(Para 31)**

The power of this Court under Article 226 of the Constitution of India extends to the issuance of appropriate directions, orders or writs for enforcement of any of the rights conferred by Part III of the Constitution or for any other purpose. Since in the present case the petitioner has brought to this Court's notice the aforesaid state of affairs in relation to respondent no.2, this Court is of the opinion that the said aspects need thorough investigation under the provisions of the Competition Act by the Competition Commission. There could be breach of the petitioners fundamental rights to freedom, resulting from the policies and practices of respondent No.2, as guaranteed under Article 19(1)(c) and 19(1)(g) of the Constitution of India. **(Para 33)**

Important Issue Involved: All India Chess Federation action to ban/threaten to ban chess players, associating themselves with other chess competitions is breach of fundamental right of the players guaranteed under Article 19 (1)(c) and 19(1)(g).

[Vi Ba]

APPEARANCES:

FOR THE PETITIONERS : Ms. Rekha Palli, Advocate.

FOR THE RESPONDENTS : Mr. Neeraj Chaudhari, CGSC with Mr. Khalid Arshad, Advocate for UOI
Ms. Manmeet Arora with Ms. Fareha Ahmed Khan, Advocates for respondent no. 2

CASES REFERRED TO:

1. *T.C.Thangaraj; P.Suganthi & Anr* vs. *V. Engammal & Ors.,* 2011(8) Scale 120.
2. *Competition Commission* vs. *Steel Authority of India Limited and Another,* (2010) 10 SCC 744.
3. *State of West Bengal and Others* vs. *Committee for Protection of Democratic Rights, West Bengal and Others,* AIR 2010 SC 1476.
4. *Tribhuban Parkash* vs. *Union of India,* AIR 1970 SC 540.

RESULT: Direction issued to Competition Commission to inquire.

VIPIN SANGHI, J. (Oral)

1. By this petition, the petitioner seeks the issuance of a writ of mandamus to direct respondent no.1 i.e. UOI to the Secretary, Ministry of Youth Affairs & Sports, to take appropriate steps so that respondent no.2 i.e. All India Chess Federation does not ban/threaten to ban chess players, associating themselves with other chess associations. Respondent no.2 is the National Federation for the sport of chess, recognized by respondent no.1. Respondent no.2 also is the body recognized by the

concerned international federation i.e. Federation Internationale Des Echess (FIDE).

2. The petitioners claim to be chess players. In the past, they have registered themselves with respondent no.2 on an annual basis. They have been participating in chess tournaments organized by respondent no.2, and those which respondent no.2 has authorized or approved. The case of the petitioners is that the petitioners being amateurs, like to play chess whenever an opportunity presents itself, even in those tournaments not organized by respondent no.2 or which may not have the blessings of respondent no.2.

3. The submission of the petitioner is that respondent no.1 has issued the revised guidelines for assistance to National Sports Federation (NSF). Under these guidelines, it is provided that National Sports Federations shall be fully responsible and accountable for the overall management, direction, control, regulation, promotion, development and sponsorship of the discipline for which they are recognized by the concerned International Federation. They are expected to discharge their responsibilities in consonance with the principles laid down in the OIympic Charter, or in the charter of the Indian Olympic Association, or the relevant International Federation as the case may be. These guidelines further provide that the NSFs should maintain certain basic standards, norms and procedures with regard to their internal functioning, which conform to the high principles and objectives laid down by the concerned international federation, and which are also in complete consonance with the principles laid down in the Olympic Charter or in the constitution of the Indian Olympic Association. The sports federations seeking recognition as NSFs are required to apply as per the guidelines contained in Annexure P-II to the said guidelines contained in Memorandum No.F.6-6/94-SP-III. The considerations which the Ministry of Youth Affairs & Sports shall take into account and be guided by, inter alia, are that the sports federation is recognized by the international federation and the Asian federation, the role played and contribution made by the association in promoting and developing sports in India, and the role played by the association in protection and promotion of players interest and welfare.

4. Ms. Palli, learned counsel for the petitioner points out that the FIDE has laid down the moral principles of FIDE which are applicable to FIDE for non-FIDE chess competitions. The second principle laid

down is that FIDE reaffirms its commitment to the right to play chess and opposes all actions that would hinder that right. Ms. Palli further submits that under the guidelines issued by the Ministry of Youth Affairs & Sports, it is the obligation of respondent no.2 to protect the right of the players to play chess and to oppose all organized actions which would hinder that right of the petitioners to play chess. Ms. Palli further submits, by reference to the aforesaid guidelines that the NSFs are primarily responsible for judicious selection of sports persons for participation in major international events based on merit and with the object of enhancing national prestige and bringing glory to the country. The NSFs are expected to introduce seeding and ranking systems which would provide an automatic and transparent system of selection. The NSFs are also required to introduce machinery for the redressal of players. grievances. Such federations are also expected to evolve a system of extensive local competitions.

5. The procedure for suspension/withdrawal of recommendation is contained in Annexure III of the said guidelines. One of the reasons for which the recommendation may be withdrawn by respondent no.1, in respect of NSF, is that where in the judgment of the Government of India, the federation is not functioning in the best interest of development of sports for which the federation was granted recognition.

6. The grievance of the petitioners is that respondent no.2 prohibits chess players who are registered with it from playing in any tournament, or participating in any competition of chess, if such a tournament/ competition is organized by an association/federation or other body which does not have the approval of respondent no.2. Ms. Palli submits that the said conduct of respondent no.2 is highly monopolistic and anti-competitive. Respondent no.2 being the internationally recognized sports federation is exploiting its dominant position to impose such unreasonable restrictions on the rights of the players, by issuing caution notices and by claiming that such conduct of the players is detrimental to the interest of respondent no.2. In this respect, Ms. Palli has drawn my attention to the caution notice displayed by respondent no.2 on its website. The said caution notice reads:-

Caution

"This is to inform all chess players/organizers/officials that any

chess event organized under the banner of "Chess Association of India" is not recognized by the All India Chess Federation.

A reminder of our earlier circular

CAUTION

A set of disgruntled elements have announced that they have formed a Chess Association as rivals to the All India Chess Federation. In their mails the Chess Association of India has announced that, with the permission of World

Chess Federation Inc (a rival to FIDE) they will organize an open tournament at Delhi from 23rd Dec weith a Prize fund of Rs.15 lakhs.

All India Chess Federation cautions all chess players affiliated to us not to participate in these tournaments or any other tournament to be organized by Chess Association of India in future as their events are not recognized by All India Chess Federation and as such not authorized by AICF. This is to further remind all AICF registered players that you have signed a declaration in the players registration form, which we quote for your ready reference.

"I also declare that I will not participate in any unauthorized tournament/championship."

By playing in the tournaments conducted by Chess Association of India, the registered players of AICF will attract disciplinary action and hence are cautioned against playing in the tournaments to be organized by the rival body. – Published on 09th December, 2009."

7. Ms. Palli submits that one of the petitioner's made an enquiry under the Right to Information Act on respondent no.2. The first query was whether respondent no.2 had removed or recommended the FIDE to remove the rating of some chess players of India. The said query was answered in the affirmative by respondent no.2. The second query was that on what charges and under which clause of the byelaws of Federation such recommendation was made? The answer to the said query given by respondent no.2 reads as follows:-

"Ans: Action was taken under the following Sections/Clause of the bye laws of All India Chess Federation,

Section 9(n) : To take disciplinary action against its members, the office bearers, officials and players recognized by the federation or of any recongised Members.

Section 16(b)(XV) : To take disciplinary action against Officials and Players concerning the charges leveled.

Section 27. Rules and Regulations:

All Rules and Regulations framed for relevant purposes or on any matters and adopted by the Central Council and the General Body shall have the same force as this Constitution.

Rule II of Annexure to the Bye Laws:

(C) Players shall desist from indulging in any act detrimental to the interests of Federation.

(j) Players shall not fraudulently participate in events.

(v) Any other act which is against the aim and objects of the Federation and detrimental to its interests.

(x) Players shall strictly abide by the Constitution, Rules Regulations and Orders/Instructions of the Federations in force from time to time and also abide by the instructions of the Arbiters and AICF Office Bearers.

As per players Registration form

DECLARATION

2. I also declare that I shall abide by the rules and regulations and the latest amendments and decisions of the State/ District Chess Association/Federation as the case may be and cooperate with the officials in participating in State and National Tournaments/Championships.

3. I also declare that I will not participate in any unauthorized tournament/championship".

8. Ms. Palli submits that the Railway Sports Promotion Board, which is also affiliated to respondent no.2 federation issued a circular

dated 24.6.2011 to the effect that some railway chess players had participated in chess tournaments which were not authorized by respondent no.2. Respondent no.2 had relied upon its rule that a player who is registered with respondent no.2 cannot play in any unauthorized tournament and if he does so, he shall attract disciplinary action. The Railway Sports Promotion Board has, therefore, directed that chess players who have participated in any chess tournament which does not figure in the tournament calendar of respondent no.2 and is not recognized by respondent no.2 should not be allowed to participate in the tournament organized by Railway Sports Promotion Board. Ms. Palli submits that when the petitioner made a representation to respondent no.1 against the aforesaid conduct of respondent no.2, respondent no.1 has merely forwarded the petitioners grievance to respondent no.2 and obtained its response without examining the position itself. Respondent no.2 in its communication dated 10.05.2011 has, interalia, stated as follows:-

"The players who are registered with All India Chess Federation are bound by the Rules and Regulations of the Federation. Those players who want to be part of the Federation have to follow these rules. As per the Rules of the Federation no player can participate in unauthorized/illegal tournaments which are not recognized or approved by the Federation. This fact is known to all the players and the same is posted on our website.

Some former office bearers of the Federation who have been expelled /suspended for their acts of omissions and commissions have floated a new body called the "Chess Association of India" claiming themselves to be a parallel body to the All India Chess Federation. They are organizing tournaments and also naming some of these tournaments as National Championships. This according to us is a criminal act as the players are duped that the certificates issued by them is valid for employment opportunities in government and public sector undertakings.

We have prominently displayed on our website that players participating in such tournaments are liable for disciplinary proceedings and cautioned them against participating. Despite this some players have participated in unauthorized tournaments and as such they seized to become our members. The Federation is not duty bound to offer secretarial services to these players.

Moreover, the Federation pays a fee to each of our members to the FIDE annually.

Our Central Council has decided to inform FIDE about the players who are no longer our members and to withdraw their ratings. They are free to play in tournaments not approved by us. We cannot stop them in playing unapproved/illegal tournaments. But they cannot continue to be our members. So it is wrong to say that our actions are undemocratic or illegal.

We enclose the players registration form wherein the players have to sign a declaration stating that they will not play in unauthorized tournaments, is highlighted for your immediate reference. We are also enclosing a copy of our notification on our website cautioning the players against participating in unauthorized/illegal tournaments".

9. The aforesaid conduct or stand of respondent no.2 is not denied by learned counsel for respondent no.2 In fact, she has drawn my attention to the declaration that chess players make at the time of seeking registration. The said declaration, inter alia reads as follows:-

"I also declare that I shall abide by the rules and regulations and the latest amendments and decisions of the State/District Chess Association/Federation as the case may be and cooperate with the officials in participating in State and National Tournaments/ Championships."

10. She has also drawn my attention to the annexure to the constitution and byelaws of respondent no.2 which, inter alia provides in clause(z) as follows:-

"No player shall participate in any tournament not authorized by All India Chess Federation or by its affiliate members or District Associations and units affiliated to them. The above violation shall attract disciplinary proceedings including cash penalties apart from debarring from participating in any tournaments in future."

11. Learned counsel for respondent no.2 submits that there is no challenge by the petitioner to the constitutional byelaws of respondent no.2 in the present petition and even if such a challenge were to be raised, this is not the right forum. She also submits that respondent no.1

does not retain any supervisory jurisdiction over respondent no.2. Consequently, this Court cannot issue any direction to respondent No.1, as prayed for in this petition. She further submits that respondent no.2 is not even located within the jurisdiction of this Court and, even according to the petitioner, no relief is directed against respondent No.2 directly. The prayer made in the petition is directed only against respondent no.1, though it affects respondent no.2 as well.

12. The petitioner indeed has not been able to point out any statutory obligation on the part of respondent no.1 to issue the directions as sought for in this petition pertaining to respondent no.2 In the absence of such authority and responsibility vested in respondent no.1, this Court is not inclined to entertain the present writ petition and grant the relief as sought for in this petition.

13. However, in my view, the matter does not end there. Prima facie, it appears to me that the endeavour of respondent no.2 appears to be to exercise its monopolistic and dominant position to stifle the growth of any other association of chess players, by threatening the chess players registered with it, with disciplinary action/expulsion and a virtual boycott in case they participate in tournaments organized by such other associations. The policy and conduct of respondent No.2 may, therefore, call for examination by the Competition Commission constituted under the Competition Act, 2002.

14. Learned counsel for the petitioner has relied upon the decision of the Supreme Court in **State of West Bengal and Others Vs. Committee for Protection of Democratic Rights, West Bengal and Others,** AIR 2010 SC 1476. The issue considered by the Supreme Court in this decision was whether the High Court, in exercise of this jurisdiction under Article 226 of the Constitution has the power to direct the CBI to investigate a case within its territorial jurisdiction without the concurrence of the State Government, as is required under Section 6 of the Delhi Special Police Establishment Act, 1946 under which the CBI has been constituted. The Supreme Court has held that, in deserving and exceptional cases, the Court may direct the CBI to cause an investigation to be made in such like cases.

15. Learned counsel for respondent no.2 has sought to explain that under the scheme of things, as it exists not only in this country, but

internationally, only one federation is recognized at the district, state and national level- which also obtains recognition from the international body pertaining to the discipline of sport in question. By reference to the guidelines, she submits that only that sports federation, which is recognized by the concerned international sports council, is granted national recognition by the Government of India.

16. The issue is not about the recognition of respondent no.2 as the NSF. The issue is with regard to the right of the players of chess to form another association and to organize tournaments in the country without the involvement of or the blessings of respondent No.2. The issue is with regard to the right of the players to freely participate in tournaments so organized, without the fear of being hounded by respondent no.2 and without the fear of the Sword of Damocles falling on their heads, if they participate in such so-called illegal or unauthorized tournaments.

17. Respondent no.2 has been given the mandate to select the players who would eventually be entitled to participate in international tournaments. Respondent no.2 also flexes its muscles by instructing FIDE to remove the ranking of the chess players who participate in unauthorized or illegal tournaments. Therefore the dependence of all players on respondent no. 2 for registration cannot be overemphasized.

18. I have put it to learned counsel for respondent no.2 as to why this Court should not refer the constitutional provisions, rules and regulations and the aforesaid conduct and practice of respondent no.2 for investigation and inquiry by the Competition Commission constituted under the Competition Act, 2002, as I am inclined to do so. Learned counsel for respondent no.2 submits, by reference to the Statement of Objects and Reasons, and the preamble of the Competition Act, that the said Act has been enacted to deal with commercial matters only. The Statement of Objects and Reasons of the said Act shows that the said Act has been enacted by the Parliament as a result of the opening up of the economy, in pursuit of globalization. The purpose is to gear up the Indian market to face competition from within, and outside. The Preamble of the Act provides that the Act is enacted in view of the economic development of the country, to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried out by other participants and markets in India. She also refers to the judgment of the

Supreme Court in **Competition Commission Vs. Steel Authority of India Limited and Another,** (2010) 10 SCC 744, wherein the Supreme Court sets out the background in which the Competition Act has been enacted and the purpose for which it has been enacted.

19. Ms. Manmeet Arora, submits that respondent no. 2 NSF is not covered by the Competition Act. She further submits that the power to make a reference under Section 19(1)(b) of the Competition Act is vested with the Central Government, or the State Government or the statutory authority. She submits that the expression "statutory authority" is defined in Section 2(w) of the Act to mean any authority, board, corporation, council, institute, university or any other body corporate established by or under any Central, State or Provincial Act for the purposes of regulating production or supply of goods or provision of any services or markets therefor or any matter connected therewith or incidental thereto. She submits that this Court is not a statutory authority as it is constituted under the Constitution of India.

20. She further submits that the reference can be made by a statutory authority under Section 21 of the Act. This Section postulates that where the statutory authority, during the course of any proceedings before it, is inclined to make any decision which would be contrary to the provisions of the Competition Act, such authority may make a reference to the Competition Commission. Upon receipt of such reference, the Competition Commission is required to give its opinion and to send the same to the statutory authority. She submits that this Court is in the process of disposing of this petition and the situation contemplated by Section 21 of the Act does not exist in the facts of this case. She submits that the opinion of the Competition commission is not binding on this Court. In fact, the decisions of the Competition Commission are subject to judicial review before this Court. She also submits that this Court is not exercising territorial jurisdiction over respondent no.2 and, therefore, this Court has no jurisdiction to refer the case of respondent no.2 for examination by the Competition Commission.

21. Learned counsel for the respondent submits that the decision in **State of West Bengal** (supra) is of no avail to the petitioner for the reason that the issuance of the direction by the High Court for the conduct of investigation by the CBI was upheld in the peculiar circumstances of that case. It was found, as a matter of fact, that the

local police was not investigating the case which involved the death of eleven persons while few others were missing The allegation in that case was that the ruling party in the State was not interested in the conduct of fair and local investigation. She submits that it is open to the petitioner to approach the Competition Commission on its own and this Court should not, therefore, make a reference to the Commission under Article 226 of the Constitution. She also relies on **T.C.Thangaraj; P.Suganthi & Anr Vs. V. Engammal & Ors.,** 2011(8) Scale 120, wherein the Supreme Court reversed the decision of the High Court directing investigation by the CBI in a case where the allegation was that, since one of the accused was a police officer, the local police was not conducting the investigation properly. The Supreme Court held that if the High Court found that the investigation was not being completed because one of the accused was an Inspector of Police, the High Court could have directed the Superintendent of Police to entrust the investigation to an officer, senior in rank to the Inspector of Police under Section 154(3) Cr.P.C and not to the CBI. The Supreme Court also referred to Section 156(3) of the Cr.P.C which provides a check on the performance by the police of their duties, and where the Magistrate finds that the police have not done their duty or not investigated satisfactorily, he can direct the Police to carry out the investigation properly, and can monitor the same.

22. In her rejoinder, learned counsel has drawn my attention to Section 2(h) of the Competition Act, which defines the expression 'enterprise. to mean *"a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space."*

23. The expression 'activity' has been defined to include profession or occupation. Respondent no.2, admittedly, charges a registration fee on an annual basis. She submits that respondent no.2 also charges fee from players to participate in tournaments organised by it.

24. Section 2(f) defines the expression 'consumer' to, inter alia, mean, *"any person who (i)———————————————————— (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use;"*

25. It is argued that when the departments of the government, engaged in, inter alia, provision of services of any kind are covered by the expression 'enterprise', certainly respondent No.2 cannot escape from the scope of that expression. It is argued that respondent No.2 itself claims to be rendering service to the players registered with it for a charge, and the petitioners are the consumers of the said services. Respondent No. 2, admittedly, charges a registration fee on an annual basis. She submits that respondent No. 2 also charges fee from players to participate in tournaments organized by it. It is, therefore, argued that respondent No.2 is covered under the Competition Commission Act, 2002. She further submits that the caution that the High Court needs to exercise, in exercise of its jurisdiction under Article 226, while referring a case for investigation to the Competition Commission is not comparable to the situation where the High Court seeks to substitute the CBI as the investigating agency. This is because the said direction of the Court seeks to substitute the normal investigating agency i.e the local police concerned with the CBI, and that too without the concurrence of the State Government. She submits that under Section 19 of the Competition Act, the power of the Commission to cause an investigation can be exercised suo moto or upon information being received from any person, consumer or their association or trade association. When any person or consumer can seek investigation of a case by the CCI, certainly this

Court, in appropriate cases, can ask the CCI to look into a case.

26. Having heard learned counsel for the parties, prima facie, it appears to me that respondent no.2 is rendering services to the petitioners and to all others who are registered with it as chess players. The responsibilities of respondent no.2 as an NSF are set out in the guidelines issued by respondent no.1, some of which have already been referred to earlier. Admittedly, respondent no.2 organises chess tournaments and provides technical support and expertise for conduct of such chess tournaments. That, in my prima facie view, would constitute service rendered by respondent no.2 to the players who are registered with it. Such service is being rendered for a consideration received from the players, as is evident from the registration form, a copy whereof has been filed on record by respondent no.2. It is also borne by respondent No.1 for the benefit of all chess players who provides grants to respondent No.2.

27. Respondent no.2, prima facie, would also fall within the expression 'enterprise. as used in the Act which is very widely worded to even include a person or a department of the government rendering services "of any kind" and excludes only those activities of the government which are relatable to sovereign functions of the government and all activities carried out by the departments of the Central Government dealing with atomic energy, currency, defence and space. Respondent no.2 does not fall in any of the said exceptions.

28. As aforesaid, it is engaged in rendering services of a kind. The reference to the Statement of Objects and Reasons only shows that the Competition Act came to be enacted in the wake of globalization and opening up of India's economy. However, the said Act was also enacted to replace the obsolete Monopolies and Restrictive Trade Practices Act, 1969 which empowered the MRTP commission to enquire into monopolistic and unfair trade practices. The reliance on the Statements and Objects and Reasons of the Competition Act by respondent no.2 is also of no avail in view of the express provisions contained in the said Act which do not show that the provisions of the said Act are applicable only to commercial establishments who provide goods or render services. In **Tribhuban Parkash v. Union of India,** AIR 1970 SC 540, the Supreme Court held that only when there is a doubt as to the meaning of a provision, recourse may be made had to the preamble to ascertain

the reasons for the enactment and hence the intention of the Parliament. If the language of the enactment is capable of more than one meaning then that one is to be preferred which comes nearest to the purpose and scope of the preamble. In other words, Preamble may assist in ascertaining the meaning but it does not affect clear words in a statute. The courts are thus not expected to start with the preamble for construing a statutory provision nor does the mere fact that a clear and unambiguous statutory provision goes beyond the preamble give rise by itself to a doubt on its meaning. Since the meaning of the expression 'enterprise., 'service' and 'consumer' as used in the Competition Act is very clear, I am not inclined to accept the submission of respondent no.2 founded upon a reading of the Statement of Object and Reasons and Preamble to the Competition Act, 2002.

29. The Preamble of the Competition Act, when closely read, shows that the said Act has been enacted to provide, keeping in view the economic development of the country, for the establishment of a Commission **to prevent practices having adverse effect on competition,** to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."(emphasis supplied).

30. Therefore, one of the purposes of the said Act is to prevent practices having adverse effect on competition. The said practice need not necessarily be related to trade or commerce.

31. The definition of the expression 'enterprise' as used in the Competition Act read with the definition of "service" thereof, in my view, clearly shows that the respondent no.2 is an enterprise which is covered by the said provisions. The allegation against respondent no.2 is that respondent no.2, by virtue of its agreement with the petitioners, is seeking to control the provision of services which is causing adverse effect on competition within India, in asmuch, as, the chess players registered with respondent no.2 are not free to form another association or to organize tournaments and participate therein, without facing the consequence of losing their registration with respondent no.2 which is the nationally recognized sports federation for the sports of chess. The allegation also is that respondent no.2 is abusing its dominant position as the NSF.

32. The submission of learned counsel for respondent no.2 is that, in terms of its mandate, respondent no.2 is regulating the sport of chess by preventing players registered with it from participating in chess tournaments organized with other chess associations and organizations which are not recognized by respondent no.2. she submits this is done to protect the interest of the players from being exploited by such other associations/organizations. Whether or not the said activity of respondent no.2 falls foul of the Competition Act would be an issue to be determined by the Competition Commission, and I am not required to go into the said issue.

33. The power of this Court under Article 226 of the Constitution of India extends to the issuance of appropriate directions, orders or writs for enforcement of any of the rights conferred by Part III of the Constitution or for any other purpose. Since in the present case the petitioner has brought to this Court's notice the aforesaid state of affairs in relation to respondent no.2, this Court is of the opinion that the said aspects need thorough investigation under the provisions of the Competition Act by the Competition Commission. There could be breach of the petitioners fundamental rights to freedom, resulting from the policies and practices of respondent No.2, as guaranteed under Article 19(1)(c) and 19(1)(g) of the Constitution of India.

34. The Supreme Court in **State of West Bengal** (supra) has recognized the power of the High Court, in appropriate cases, to require the CBI to cause an investigation in relation to a case falling within its territorial jurisdiction. If the High Court can direct the investigation to be made by the CBI in appropriate cases, whereby the provision of Section 6 of the Delhi Special Police Establishment Act, 1946 is over ridden, certainly the High Court can direct the making of a reference to the Competition Commission under Section 19 of the Competition Act, particularly when the Competition Commission can cause the investigation to be made not only suo motu, but on receipt of intimation "from any person". In fact, in **State of West Bengal** (supra), the Supreme Court in paragraph 45 observed that being the protectors of civil liberties of the citizens, the Supreme Court and the High Courts have not only the power and jurisdiction, but also an obligation to protect the fundamental rights, guaranteed by Part III in general, and under Article 21 of the Constitution

in particular, zealously and vigilantly. The judgment in the case of **T.C.Thangaraj** (supra) has no application in the light of the aforesaid discussion and the substantially different positions of the Competition Act, 2002 and the Delhi Police Establishment Act whereunder CBI is constituted.

35. I, therefore, direct the Competition Commission to enquire into the alleged contravention of the provisions of Section 3 and Section 4 by respondent no.2 by its aforesaid constitutional provisions and conduct under Section 26 of the Competition Commission Act, 2002. The petitioner may appear before the Commission on 28.11.2011. The petitioner shall present before the Commission a memorandum containing its grievances in this respect on the said date.

36. It is made clear that observations made by me in relation to the case of respondent no.2 are only prima facie, and shall not prejudice their case and the Commission shall enquire into the same independently.

ILR (2012) I DELHI 638
CRL. A.

RAJU CHAKRAVARTHY ....APPELLANT

VERSUS

STATE OF NCT OF DELHI ....RESPONDENT

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

CRL A. NO. : 152/2005 DATE OF DECISION: 04.11.2011
CRL. M.A. NO. : 10880/2011

Juvenile Justice (Care and protection of Children) Act, 2000—Section 15, 16—Appellant/accused was juvenile at the time of commission of murder, but

suffered imprisonment for over 10 years, which is three times the maximum period prescribed under the Act—Not an appropriate case to send the appellant to Juvenile Justice Board as the same would be grave injustice—Conviction quashed.

In this case, the facts would reveal that the accused juvenile suffered imprisonment for over 10 years, i.e. over three times the maximum period prescribed under the Act, for sending a juvenile found to have committed an offence, to a special home, (which is 3 years). The report relied on by this Court – which has not been challenged by the State – indicates that he was about about 14 years or less as on the date of occurrence. As per Section 7A sub-Section (2) of the Act of 2000 if Court finds a person to be a juvenile on the date of commission of the offence, the juvenile has to be forwarded to the Board for passing an appropriate orders and sentence and the sentence, if any, passed by a Court shall be deemed to have no effect. Unfortunately, the Appellant has already spent nearly nine years in jail far in excess of the maximum period of three years that too could have been spent by him in a special home as per Section 15 (1)(g) of the Act of 2000. This is not an appropriate case, to send the Appellant to the Juvenile Justice Board to be dealt with in accordance with the provisions of Section 7-A sub-Section (2) of the Act of 2000 or should we end the proceedings here. This court is of the opinion that it would be a grave injustice to direct the Appellant to face an inquiry again before the Board. **(Para 10)**

[Gi Ka]

APPEARANCES:

FOR THE APPELLANT : Ms. Rakhi Dubey, Advocate.

FOR THE RESPONDENT :

Mr. M.N. Dudeja, App.

CASES REFERRED TO:

1. *Jyoti Prakash Rai* vs. *State of Bihar,* AIR 2008 SC 1696.
2. *Rajnit Singh* vs. *State of Haryana* 2008 (9) SCC 453).
3. *Jitender Ram* vs. *State of Jharkhand,* 2006 (9) SCC 428.
4. *Pratap Singh* vs. *State of Jharkhand,* AIR 2005 SC 2731.
5. *Gurpreet Singh* vs. *State of Punjab,* 2005 (12) SCC 615.

RUSULT: Appeal Disposed of.

S. RAVINDRA BHAT (OPEN COURT)

1. The appellant had preferred a Bail Application, Crl. M. (Bail) 278/2009 in which he claimed inter alia that he was a juvenile on the date of commission of the offence. The Court had, therefore, ordered an enquiry under Section 7-A of the Juvenile Justice Act, into this aspect. After lapse of almost two years, when the matter was taken-up, the Court noticed that the progress of enquiry was very slow and accordingly directed the appellant to be enlarged on bail by its order dated 28.07.2011 (in Crl. M. (Bail) 278/2009). The applicant was unable to furnish reduced surety for the sum of Rs. 2500/- and moved Crl. M.A. 10880/2011. In the meanwhile, pursuant to the previous directions, the Court received the report of the enquiry by the Trial Court dated 24.09.2011.

2. The Appellant, along with a co-accused, was convicted for committing the offence punishable under Section 302/34 IPC, by the impugned judgment, dated 27-9-2004. We have considered the same and heard counsel for the parties.

3. The Appellant contended that he was a juvenile, being about 14 years at the time of commission of the offence. On the basis of his averments, and submissions made on his behalf, the Trial Court directed investigation, to enquire into the truth of such an assertion; accordingly, a team of the Delhi Police visited District Purab Midnapore in West Bengal. The material gathered, in the form of CW-1, and inspector in the Delhi Police's statement- corroborated by a certificate from the Principal of the local village school is to the effect that according to the contemporaneous school records, the Appellant's date of birth was 10-07-1987. As far as the medical opinion is concerned, the certificate issued by the medical authorities, in this case, reveals that as on the date

of his examination, the Appellant's bone age indicated that he was between 25 and 40 years. Considering these materials, the Trial Court formed the opinion – to base its report, that the Appellant was 13 years, 5 months and 12 days on the date of the offence.

4. Learned APP did not seriously dispute the inferences drawn in the report. He faintly argued that the ossification test, which led to the bone age report, revealed that the Appellant was more than 25 years. It would be relevant at this stage to consider Rule 12 of the Juvenile Justice (Care and Protection) Rules, 2007, which reads as follows:

> **"12. Procedure to be followed in determination of Age.—**(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose. (2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law,prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail. (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining —
>
> (a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
>
> (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
>
> (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;
>
> (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.
>
> (4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned."

It is apparent from the scheme of the above rule that all specified methods of ag-determination have to be first explored; it is only after they are exhausted that the Board of court has to fall back on the medical opinion given in that regard. Having regard to the structure of the rule, therefore, the court has to first see if other primary evidence is available. In this case, Ex. PW-CW1/A the statement of SI Laxmi Chand, who went to Village Jikarapara, P.O. Pratapdighi, District Purba Midnapur, West Bengal, the date of birth of the Appellant was 10-07-1987; the statement of the Principal, of the school where the appellant was admitted has also been produced. In view of this, the ossification test reports furnished to this court are not of much value. Nevertheless, that record too, in this court's opinion, lends assurance that the Appellant was a juvenile, on the date of the offence, viz. 22/23-12-2000; he would have been approximately over 14 years then. In view of these facts, the court finds no force in the submissions of the prosecution; the bone age was determined, on examination, conducted on 06-09-2011 was 25-40 years. According to the school record – the document furnished to this court by the Trial Court along with its report shows that the Appellant's age on the date

of the incident (22/23-12-2000) was 13 years, 5 months and 12 days.

5. At this stage, it would be necessary to note that the Act is a complete Code, prescribing a special procedure, and an entirely different set of standards to be adopted for juveniles (defined as those who have not completed 18 years of age, by Section 2 (k)) "in conflict" with law (i.e. a juvenile alleged to have committed an offence, by Section 2 (l)). By Section 6 (1) the Juvenile Justice Board is entitled to exclusively deal with all matters, including enquiry into allegations of the juveniles alleged to have committed offences. Whenever a Magistrate – who is not empowered under the Act to exercise jurisdiction – is of opinion that the accused brought before him is a juvenile he has to refer such matter and person to the Board.

6. In terms of Sections 14 and 15, Boards have exclusive jurisdiction to hold enquiries into allegations about juveniles having committed offence. Boards have various options, to prescribe sanctions, including directing a juvenile to be sent to a special home for a period of three years. Section 15 (1), pertinently enables the Board to:-

> "(a)allow the juvenile to go home after advice or admonition following appropriate inquiry against the counseling to the parent or the guardian and the juvenile;
>
> (b) direct the juvenile to participate in group counseling and similar activities:
>
> (c) order the juvenile to perform community service:
>
> (d) order the parent of the juvenile or the juvenile himself to pay a fine, if he is over fourteen years of age and earns money;
>
> (e) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years;
>
> (f) direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behavior and well-being of the juvenile for any period not exceeding

> three years;
>
> (g) make an order directing the juvenile to be sent to a special home for a period of three years:
>
> Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit."

7. If a question as to whether anyone is a juvenile arises, (by virtue of Section 7A) before any Court, it can consider evidence, and return findings in that regard. By reason of Section 7A (2), if the Court holds that the person is a juvenile, it has to forward the matter to the Board for passing appropriate orders or sentence, as the case may be. Section 18 mandates that a juvenile cannot be tried jointly with an adult.

8. Section 20 is important; which prescribes that when a criminal case is pending before a Court in revision or appeal, the Court (wherever the case was pending on the date of coming into force of the Act) can proceed with the matter, but if it is satisfied that the juvenile has committed the offence, refer the matter to the Board for appropriate orders.

9. It has been held in a series of decisions that if the incident occurred when the accused was a juvenile, even if he takes the plea after conviction, and in appeal, he would be entitled to the benefit of Section 20 (**Jyoti Prakash Rai v. State of Bihar,** AIR 2008 SC 1696; **Pratap Singh v. State of Jharkhand,** AIR 2005 SC 2731; **Gurpreet Singh v. State of Punjab,** 2005 (12) SCC 615; **Jitender Ram v. State of Jharkhand,** 2006 (9) SCC 428; **Rajnit Singh v. State of Haryana** 2008 (9) SCC 453).

10. In this case, the facts would reveal that the accused juvenile suffered imprisonment for over 10 years, i.e. over three times the maximum period prescribed under the Act, for sending a juvenile found to have committed an offence, to a special home, (which is 3 years). The report relied on by this Court – which has not been challenged by the State – indicates that he was about about 14 years or less as on the date of occurrence. As per Section 7A sub-Section (2) of the Act of 2000 if Court finds a person to be a juvenile on the date of commission of the offence, the juvenile has to be forwarded to the Board for passing an

appropriate orders and sentence and the sentence, if any, passed by a Court shall be deemed to have no effect. Unfortunately, the Appellant has already spent nearly nine years in jail far in excess of the maximum period of three years that too could have been spent by him in a special home as per Section 15 (1)(g) of the Act of 2000. This is not an appropriate case, to send the Appellant to the Juvenile Justice Board to be dealt with in accordance with the provisions of Section 7-A sub-Section (2) of the Act of 2000 or should we end the proceedings here. This court is of the opinion that it would be a grave injustice to direct the Appellant to face an inquiry again before the Board.

11. In similar circumstances, consistently courts have quashed proceedings, and deemed it appropriate not to remit the matter to the Board, as it would not sub-serve any public interest. In this case too, such an order is the only possible direction in the ends of justice. We therefore, direct that the report of the Trial Court, as to the Appellant's being a juvenile on the date of the offence has to be and is accepted; the conviction recorded by the Trial Court is quashed. The Appellant shall be released forthwith; the Appeal is disposed of in the above terms.

ILR (2012) I DELHI 645
CRP

NEETA MEHRA **....PETITIONER**

VERSUS

SANJAY MEHRA **....RESPONDENTS**

(KAILASH GAMBHIR, J.)

CRP NO. : 156/2011 **DATE OF DECISION: 08.11.2011**

Code of Civil Procedure, 1908—Section 115, 151 Order 9 Rule 43 Rule 1(c)—Application to restore divorce

petition which was dismissed in default, dismissed because of non compliance of direction to liquidate liability towards arrears of maintenance ammount—Respondent filed application under Section 151 CPC for restoration of divorce petition and paid part of arrears of maintenance and undertook to pay balance in three months—Matrimonial Court allowed application and restored divorce petition—Order challenged before High Court—Plea taken, Trial Court committed jurisdictional error by invoking power under Section 151 CPC to restore divorce petition filed by respondent when only remedy available to respondent was to file appeal—Order dismissing application for restoration of divorce petition was passed on merits and could not have been recalled by Trial Court in exercise of its inherent power—Held—Application under Order 9 Rule 4 was rejected only for want of payment of maintenance amount and since respondent could be said to have paid said amount with said undertaking there was no reason left for Court to deny prayer of respondent to seek restoration of his divorce petition—Matrimonial disputes need to be adjudicated on its merits; substantive rights of parties cannot be defeated by adopting a hypertechnical approach, that too on basis of procedural niceties—Procedural laws are handmaids of justice and cannot come in way of advancing cause of justice—No merit in petition which is hereby dismissed.

It is a settled legal position that the power under Section 151 CPC is an addition to and complimentary to the powers expressly conferred under the Code and can be exercised by the Courts to make a suitable order to prevent the abuse of the process of Court and can be exercised when there is no specific provision dealing with the grant of relief as sought. It is also well settled that nothing can limit or affect the inherent powers of the Court to meet the ends of justice as power exercised by the Court under Section 151 CPC is ex debito justitiae; to do real and substantial justice for the

administration of which alone the Court exists or to prevent abuse of the process of the Court. The inherent powers of the Court are with respect to the procedure followed by the Court in deciding the cause before it and are conferred under the Code, but certainly the Courts will not exercise inherent powers when such power could clearly conflict with the powers expressly or by necessary implication conferred on the Courts by the other provisions of the Code.

(Para 5)

Important Issue Involved: The matrimonial disputes needs to be adjudicated on its merits and the substantive rights of the parties cannot be defeated by adopting a hypertechnical approach; that too on the basis of procedural niceties.

[Ar Bh]

APPERANCES:

FOR THE PETITIONER : Mr. Ashok Agrwaal with Mr. Salar M. Khan, Advocates.

FOR THE RESPONDENT : Nemo.

CASE REFERRED TO:

1. *Manohar Lal Chopra* vs. *Rai Bahadur Rao Raja Seth Hiralal,* AIR 1962 SC 527.

RESULT: Dismissed.

KAILASH GAMBHIR, J.

1. By this revision petition filed under Section 115 read with Section 151 CPC, the petitioner seeks to challenge the order dated 30th September, 2009 whereby the learned Trial Court directed restoration of the divorce petition filed by the respondent on the application moved by him under Section 151 CPC.

2. Assailing the said order, learned counsel appearing for the petitioner submits that the learned Trial Court committed jurisdictional error by invoking the power under Section 151 CPC to restore the

divorce petition filed by the respondent when only remedy available to the respondent was to file an appeal in terms of order 43 Rule 1 (c) read with Section 151 CPC. The contention of the counsel for the petitioner is that the divorce petition filed by the respondent was dismissed in default on account of the non-appearance of the respondent and his Advocate on 29.10.2010 and thereafter to seek restoration of the petition the respondent had moved an application under Order 9 Rule 4 CPC, which too was dismissed for non-prosecution by the learned Trial Court vide order dated 16.5.2011, but the said order was illegally recalled by the learned Trial Court on the application moved by the respondent under Order 151 CPC. The counsel also contends that the order dated 16.5.2011 passed by the learned Trial Court in fact was an order on merits and the same could not have been recalled by the learned Trial Court in exercise of its inherent power under Section 151 CPC. Counsel also submits that even the limitation period to challenge the said order dated 16.5.2011 has expired and, therefore, without seeking remedy of filing an appeal, which again could be filed after seeking condonation of delay in filing such an appeal. The counsel thus submits that the order passed by the learned Trial Court under Section 151 CPC for recalling the order dated 16.5.2011 is patently illegal and perverse. Counsel also submits that valuable right accrued in favour of the petitioner with the dismissal of the application of the respondent under Order 9 Rule 4 CPC, which right of the petitioner could not have been defeated by the learned Trial Court by exercising inherent powers of the Court that too in the face of specific legal remedy available under law. In support of his arguments counsel for the petitioner placed reliance on the judgment of the Apex Court in **Manohar Lal Chopra – vs-Rai Bahadur Rao Raja Seth Hiralal,** AIR 1962 SC 527 with special emphasis on para 21 of the same.

3. I have heard learned counsel for the petitioner at considerable length and given my thoughtful consideration to the arguments advanced by him.

4. The divorce petition filed by the respondent under Section 13(1)(ia) of the Hindu Marriage Act was dismissed by the learned Matrimonial Court, not on merits but in default as nobody had caused appearance for the respondent on 29.10.2010 when the said petition was taken up by the Court. To seek restoration of the said petition the

respondent/petitioner had moved an application under Order 9 Rule 4 CPC and the said application moved by the respondent was opposed by the petitioner/respondent primarily on two grounds; firstly that the same was filed invoking a wrong provision of law and secondly on account of the failure of the respondent/petitioner in not making a payment of Rs. 5,000/-towards the maintenance of the child. On the first objection raised by the petitioner/respondent, the learned Court observed and rightly so that the application cannot be rejected merely because it was filed invoking a wrong provision of law. So far as the second objection raised by the petitioner is concerned, the Court directed that the restoration application moved by the respondent/petitioner would be considered only when the respondent/petitioner complies with the directions with regard to the payment of the maintenance amount for which he sought four weeks time for compliance. The matter was adjourned by the Court for 2nd May, 2011 when again the learned Trial Court reiterated its earlier direction to make the payment towards the maintenance amount for considering his restoration application and the matter was adjourned by the learned Trial Court for 16th May, 2011. On 16th May, 2011 the said application moved by the respondent/petitioner was dismissed for non-prosecution because of non-compliance of the said direction by the respondent/petitioner to liquidate his liability towards the arrears of maintenance amount. It is thereafter that the respondent/petitioner had moved an application under Section 151 CPC to seek recalling the 16th order dated May, 2011 and then to consider his application moved by him under Order 9 Rule 4 CPC to seek restoration of his petition.

5. It is a settled legal position that the power under Section 151 CPC is an addition to and complimentary to the powers expressly conferred under the Code and can be exercised by the Courts to make a suitable order to prevent the abuse of the process of Court and can be exercised when there is no specific provision dealing with the grant of relief as sought. It is also well settled that nothing can limit or affect the inherent powers of the Court to meet the ends of justice as power exercised by the Court under Section 151 CPC is ex debito justitiae; to do real and substantial justice for the administration of which alone the Court exists or to prevent abuse of the process of the Court. The inherent powers of the Court are with respect to the procedure followed by the Court in deciding the cause before it and are conferred under the Code, but

certainly the Courts will not exercise inherent powers when such power could clearly conflict with the powers expressly or by necessary implication conferred on the Courts by the other provisions of the Code. In the case at hand, the learned Matrimonial Court did not dismiss the application moved by the respondent/petitioner under Order 9 Rule 4 CPC on merits, but only on the ground that the respondent/petitioner had failed to comply the direction given by the Court to pay the arrears of the maintenance amount as a condition precedent to consider his restoration application. The said order of the learned Matrimonial Court giving the aforesaid direction to the respondent/petitioner, to first pay the amount of maintenance and then to consider his application for restoration was certainly exercised by the said Court invoking its inherent powers as otherwise the Court was well within its jurisdiction to have first decided the said application of the respondent/petitioner looking into the sufficiency of reasons given by the respondent for his non-appearance on 29.10.2010 when the said divorce petition filed by him was dismissed in default. It is a well accepted principle of practice that with a view to do complete justice between the parties, the Courts exercise their inherent powers and exercise of such powers by the Courts may not specifically fall under any specific provisions of the Code. The direction given by the Matrimonial Court to the respondent/petitioner to first pay the arrears of the maintenance amount to consider his restoration application was in exercise of such power by the Matrimonial Court, therefore, it cannot be said that the learned Trial Court had in fact dismissed the application of the respondent moved by him although wrongly labeled under Order 9 rule 4 CPC on its merits, but in fact the said application was dismissed by the learned Trial Court for non-prosecution. In the application moved by the respondent under Section 151 CPC, recalling of the order dated 16.5.2011 was sought by him on the ground that already he had paid an amount of Rs. 90,000/-towards the arrears of the maintenance amount and for the balance amount of Rs. 30,000/-he undertook to pay the same within a period of three months. With the said payment of the maintenance amount and the undertaking of the respondent to pay further amount of maintenance, the learned Trial Court found the conduct of the respondent justifiable for recalling the order dated 16.5.2011 and for restoring his application under Order 9 Rule 9 CPC. Learned Trial Court in para 7 of the impugned order clearly observed that the application of the respondent moved by him under Order 9 Rule 9 was rejected only for want of

payment of the maintenance amount and since the respondent could be said to have paid the said amount with the said undertaking there was no reason left for the Court to deny the prayer of the respondent to seek restoration of his divorce petition. This Court does not find any illegality or perversity in the impugned order passed by the matrimonial Court invoking its inherent power under Section 151 CPC and this Court also does not find that any jurisdictional error was committed by the said Court in allowing the application of the respondent moved by him under Order 9 Rule 9 CPC (wrongly labeled under Order 9 Rule 4 CPC). This Court has taken a consistent view that the matrimonial disputes needs to be adjudicated on its merits and the substantive rights of the parties cannot be defeated by adopting a hypertechnical approach that too on the basis of procedural niceties.

6. It cannot be forgotten that procedural laws are handmaids of justice and cannot come in the way of advancing the cause of justice. As is held by the Apex Court time and again procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice and hence cannot stop the Court to give relief on merits to the parties.

7. The judgment cited by the petitioner also reiterates the settled legal position with regard to powers under Section 151 of the and would not thus help the petitioner to persuade this Court otherwise.

8. In the light of the above, there is no merit in the present petition and the same is hereby dismissed.

ILR (2012) I DELHI 652
W.P. (C)

KATHURIA PUBLIC SCHOOL ....PETITIONER

VERSUS

UNION OF INDIA ....RESPONDENT

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

W.P. (C) NO. : 233/1997 DATE OF DECISION: 09.11.2011

Land Acquisition Act, 1894—Sections 4, 6 & 48—Land measuring 80 bighas 7 biswas situated in village Rangpuri @ Malikpur Kohi (Vasant kunj) Tehsil Mehrauli notified under section 4 and 6 of the Act vide notification dated 23.01.1965 and 26.12.1965 respectively followed by an award passed in the year 1981—Petitioner alleged that possession of aforesaid land was not taken by the Government—Land purcahse by petitioner No. 3 Shri Ram Saroop Kuthuria as karta of HUF vide sale deed dated 18th April 1967 executed by Smt. Saroop devi, Smt. Sarjo and Smt. Bartho—Petitioner sought release of land under Section 48—Petitioner claimed to be running a school under the name and style of Kuthuria Public School since 1988 on the said land—Representation moved on 17.08.1995 01.01.1996 and 11.11.1996—No response to the representations—Petition seeking direction to direct the respondents to decide the representations and not to demolish any part of building—Respondent contended—Possession of entire land taken except 9 Biswas where some built up structure was found—Petitioner No.3 purchased the land after notification under Section 4 of Act—Raised illegal construction during pendency of earlier writ petition without any sanction from the competent Authority—

Representations were placed before De-notification committee—Rejected—Petitioners have no right—Held—Since De-notification Guidelines issued by the Government do not permit de-notification of land in question, which the petitioners purchased after issuance of notification under Section 4 of Land Acquisition Act, no ground exist to direct the Government either to de-notify this land or to re-consider the representations of the petitioners—The writ petition dismissed—The interim orders passed in favour of the petitioners during pendency of the writ petition are vacated.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. N.K. Kaul, Sr. Advocate with Mr. Gaurav Sarin, Advocate with Ms. Charul Sarin & Mr. Ajay Bouri, Advocates.

FOR THE RESPONDENT : Mr. Sanjay Poddar, Sr. Advocate with Mr. Sanjay Kr. Pathak & Mrs. Mohitrao Jadhav, Advocate for UOI & LAC Mr. Summet Batra, Advocate for D. Ed. Mr. Sanjeev Sachdeva,Sr. Advocate with Ms. Roohi Kohli, Mr. P.P. Singh & Ms. Priyanjan Mehta, Advocates Mr. Ajay Verma with Mr. Amit Mehra Advocate for DDA.

CASES REFERRED TO:

1. *Banda Development Authority* vs. *Moti Lal Agarwal & Ors.* (2011) 5 SCC 394.
2. *DDA* vs. *R.S.Kathuria* 2009(7) AD (Delhi) 265.
3. *Sita Ram Bhandar Society, New Delhi* vs. *Lt. Governor, Govt. of N.C.T. Delhi and Ors.* 2009 (10) SCC 501.
4. *Shanti Sports Club and Anr.* vs. *Union of India (UOI) and Ors.* 2009 (15) SCC 705.

5. *Sethi Auto Service Station* vs. *DDA* (2009) 1 SCC 180.
6. *National Thermal Power Corporation Ltd.* vs. *Mahesh Dutta & Ors.* (2009) 8 SCC 339.
7. *Murari and Ors.* vs. *Union of India (UOI) and Ors.* AIR (1997) 1 SCC 15.
8. *Yadu Nandan Garg* vs. *State of Rajasthan and Others:* AIR 1996 Supreme Court 520.
9. *Roshanara Begum* vs. *Union of India:* AIR 1996 Delhi 206.
10. *Smt. Sneh Prabha etc.* vs. *State of U.P. and Another:* AIR 1996 Supreme Court 540.
11. *Union of India* vs. *Shri Shivkumar Bhargava and Ors.* (1995) 6 JT (SC) 274: (1995) AIR SCW 595).
12. *Chandigarh Administration* vs. *Jagjit Singh:* (1995) 1 SCC 745.
13. *Home Secretary, UT of Chandigarh & Anr.* vs. *Darshjit Singh Grewal & Ors.* (1993) 4 SCC 25.
14. *Balwant Narayan Bhagde* vs. *M.D.Bhagwat & Ors.* (1976) 1 SCC 700.

RESULT: Petition dismissed.

V.K. JAIN, J.

1. Land measuring 80 bighas 7 biswas comprised in Khasra Nos. 1726 (3-3), 1727 (4-16), 1728 (2-12), 1729 (6-14), 1747 (4-16), 1748 (4-16), 1749 (4-16), 1750 (4-16), 1751 (4-16), 1752 (4-16), 1753 (3-5), 1754 (6-2), 1755 (4-16), 1756/2 (3-4), 1757/2 (3-4), 1875 (4-16), 1876 (4-16) and 1877 (4-3) in village Rangpuri alias Malikpur Kohi (Vasant Kunj) Tehsil Mehrauli was notified under Sections 4 & 6 of the Land Acquisition Act vide notifications dated 23.1.1965 and 26.12.1965 respectively followed by an award passed in the year 1981. The case of the petitioner is that possession of the aforesaid land was not taken by the Government whereas the case of the respondents is that possession of the entire land except 9 biswas was taken on 31.3.1981 and was handed over to DDA vide notification dated 19.5.1981 issued under Section 22(1) of Delhi Development Act. The aforesaid land was purchased

by petitioner No.3 Shri Ram Saroop Kathuria as karta of a HUF consisting of himself and his sons, vide sale deed dated 18th April, 1967 executed by Smt. Saroopi Devi, Smt. Sarjo and Smt. Bartho in his favour.

2. The acquisition of land was challenged by the petitioners by filing Civil Writ Petition No. 586/1981. An interim order was passed by this Court on 24.3.1981, directing status quo with respect to possession of the land subject matter of the Writ Petition. The interim order, which is alleged to have been served on Land & Building Department of Government of NCT of Delhi on 31.03.1981, was confirmed on 10.4.1981.

3. Vide representation dated 17.8.1995 the petitioners sought release of the aforesaid land under Section 48 of Land Acquisition Act. The Writ Petition came to be dismissed in terms of Full Bench decision of this Court in Roshnara Begum's case dated 24.12.1995. The petitioner filed a Special Leave Petition in Supreme Court against the order of the Full Bench. The Special Leave Petition came to be dismissed by Supreme Court on 1.11.1996. During the course of hearing before the Supreme Court Mr. N.N.Goswami, Counsel for the respondent made a statement that the Government will consider each of the structures and take decision in that respect.

The petitioners, who claim to be running a school under the name and style of Kathuria Public School on the land in question since 1988 and allege to have constructed a school building along with staff quarters and boundary wall on it, vide another representation dated 01.01.1996, again sought release of the land from acquisition seeking parity with the case of Hamdard Public School land of which was de-notified by the Government. The petitioners submitted yet another representation dated 11.11.1986 seeking release of their land on the parity of the case of St. Xavier Society land of which was released from acquisition on 06.9.1996 as well as the case of Hamdard Public School. Since there was no response to the representations made by the petitioners, this writ petition came to be filed alleging selectivity by the respondents in de-notification of acquired land. The petitioners sought writs directing the respondents to decide their representations dated 17.8.1995, 01.1.1996 and 11.11.1986. They also sought directions to the respondent not to demolish any part of the building which they have constructed on land in question and not to take its physical possession from them.

4. In their counter-affidavit, respondent No. 2 Lieutenant Governor of Delhi and respondent No. 3(i) Government of National Capital Territory of Delhi, through Secretary, Land and Building Department, have alleged that petitioners have concealed facts from the Court since they did not disclose that land in question was purchased by petitioner No. 3 vide sale deed dated 18th April, 1967 after land in question had been notified for acquisition. It is also alleged that while taking possession, except in respect of 9 biswas of land comprised in Khasra No. 1877 where some built up structure was found, the respondents had allowed petitioner No. 3 to harvest the cultivation on Khasra Nos. 1726, 1727, 1728, 1729, 1747-1755, 1756/2, 1757/2 and the land stands vested in the Government free from all encumbrances. It is further alleged that petitioner No.3 purchased the land after notification under Section 4 of Land Acquisition Act and raised illegal construction during pendency of the earlier writ petition, without any sanction from the Competent Authority. It is stated that the representation of the petitioners was placed before the De-notification Committee, which, after deliberations, recommended its rejection. Explaining circumstances in which certain acquired land came to be de-notified under Section 48 of Land Acquisition Act, the respondents have contended that the petitioners cannot claim any legal right to seek de-notification of their land, particularly when they purchased it after issuance of notification under Section 4 of Land Acquisition Act. According to the respondents, the facts of the present case are altogether different from the facts of the cases in which the land was de-notified. It is also submitted that since possession of the land has been taken, it cannot be withdrawn from acquisition.

5. In his counter-affidavit, filed on behalf of respondent No. 4-DDA, Mr Shamim Ahmed, Director (Land Management), has stated that the Land Acquisition Collector took over the possession of the entire land except an area, measuring 9 biswas on 31.3.1981. The possession of 9 biswas of land comprised in Khasra No. 1877 could not be taken since a temporary structure existed on this piece of land. The land measuring 79 bighas and 18 biswas, according to DDA, was handed over to it by Land and Building Department on 31.3.1981 when the possession was taken by it. This was followed by notification dated 19.5.1981, issued under Section 22 of Delhi Development Act placing the aforesaid land at the disposal of DDA for its management and development in accordance with Master Plan. It is also alleged that the petitioners having encroached

upon public land, their possession is that of trespassers and that the case of the petitioners is not similar to the case of Hamdard Public School and St. Xavier School.

6. The writ petition was amended so as to rely on the policy guidelines framed by the Government in November, 1998 for de-notification of acquired land and to claim that the petitioners were covered under the aforesaid policy. It was also alleged that the respondents had de-notified the land of Scindia Potteries, situated on Ring Road, vide notification dated 05.2.1999. The petitioners also sought to rely upon a noting dated 05.05.1999 by Mr U.P. Singh, OSD (Litigation), Land & Building Department in the file relating to land of the petitioners as well as the letter dated 26.5.1999, written by Mr Shamim Ahmed, Director (Land Management), DDA to the Deputy Secretary, Land & Building Department. The petitioners also referred to the de-notification of the land of Ramjas Foundation Society on 04.4.2002. They further contended that since the De-notification Committee, as constituted by Competent Authority, had not met on 27.1.1999, the recommendation made in the meeting held on that day was of no legal consequence. In the amended writ petition, the petitioners sought Writ of Mandamus, directing the respondents to release and de-notify their land under Section 48 of Land Acquisition Act, correct the alleged possession proceedings dated 31.03.1981 and Notification dated 19.05.1981 issued under Section 22 (1) of Delhi Development Act. They also sought direction to the defendants not to demolish any of their buildings.

In their additional affidavit, respondents No. 2 and 3(a) submitted that the internal notings made by a particular officer in the official file unless and until accepted by Competent Authority are not binding on the Government and do not confer any legal right on the petitioners to seek relief on the basis of such notings. It is also stated in the additional affidavit that the Competent Authority, after considering the representation made by the petitioners, had declined to release their land under Section 48 of Land Acquisition Act. It was also maintained that the cases of de-notification, referred in the writ petition, were different and there was no discrimination with the petitioners who are not similarly situated.

In the additional affidavit of its Director (Land Management), Mr Suresh P. Padhy, respondent-DDA maintained that possession of 79 bighas and 18 biswas of land was taken over way back on 31.3.1981 and

the acquisition having become complete and absolute, the Government has no power to issue notification under Section 48 of Land Acquisition Act, to release the aforesaid land from acquisition.

Indian Spinal Injury Centre, to which land in question has since been allotted by DDA, has also been impleaded as a party to the petition.

7. The petitioners have vide CM No. 1931/2011 on 10.02.2011 sought permission to place an additional affidavit on record. In the additional affidavit, they have alleged that during pendency of this petition, the petitioners were, on 28.02.2000, handed over the rejection dated 27.01.1999, whereby their representations were rejected by the Lieutenant Governor of Delhi. It would thus be seen that the representations made by the petitioners from time to time seeking de-notification of the acquired land have since been rejected. However, during the course of arguments before us, the prayer of the learned counsel for the petitioners was to direct the respondents to re-consider their representations on the premise that possession of the acquired land was not taken from them on 31.03.1981.

8. In support of his contention that actual physical possession of land measuring 79 bighas and 18 biswas was taken by the Government, from the land owners, the learned Senior Counsel for Govt. of NCT has relied upon the Possession Report dated 31.3.1981 which shows that on that day when the revenue officials went to the site, Kharag Bahadur, employee of Mr R.S. Kathuria was amongst the persons present on the spot at that time. It would be pertinent to note here that the petitioners themselves have filed a copy of this report and there is no averment by them that Mr Kharag Bahadur was not an employee of Mr R.S. Kathuria or that he was not present at the site on 31.03.1981. The report reads as under:

> "As per order of L.A.C. I along with Sarup Singh Kanogo, L.A.; Shri Harpal Singh Patwari, L.A. & Shri Rajinder Singh Peon L.A. reached the spot in Village Rangpuri. Shri Raj Bahadur Naib Tehsildar, DDA, Shri Niranjan Singh Patwari, DDa; Sasrdar Bhagat Singh, Naib Tehsildar, Horticulture, DDA, Shri B.S. Aggarwal, Naib Tehsildar, Land & Building Department were also present with Shri Gopal Sharma & Prem Singh Servants of Ram Prasad and Kharag Bahadur, servant of Ram Sarup Kathuria

and Ashok Kumar owner were present at the spot. The proceedings relating to possession were started.

1279 (6-0), 1280 (3-12), 1281/1(3-8), 1281/2 (1-8), 1282 (4-16), 1295 (0-5), 1296 (4-11), 1297 (4-16), 1298/1 (0-160 1298/2 (2-00), 1299 (7-4), 1300 (5-8), 1301 (3-14), 1302/1 (1-16), 1302/2 (3-00), 1303/1 (1-9), 1303/2 (0-17), 1303/3 (2-10), 1304/1 (4-8), 1304/2 (0-8), 1305 (4-16), 1307 (4-16). 1308/1 (2-9), 1308/2 (2-7), 1309 (4-16), 1310/1 (2-8), 1310/2 (2-8), 1311 (2-10), 1312 (6-10), 1313/1 (3-00), 1313/2 (1-16), 1314 (4-16), 1315 (6-18), 1316 (4-6). 1317 (4-16), 1318 (5-16), 1319 (3-8), 1320 (4-16) , 1321 (5-9), 1322 (3-5), 1323 (4-6), 1324 (6-18), 1325 (6-2), 1327/1 (2-19), 1327/2 (1-19). 1331 (3-8), 1332 (5-11), 1333 (1-16), 1334 (2-1), 1335 (1-1), 1336 (2-6), 1337 (5-13), 1338 (5-4), 1339 (4-16), 1340 (3-5). 1341 (6-7), 1342 (5-19), 1343 (4-8). 1344 (3-12). 1345 (2-12), 1346 (6-8), 1347 (4-16), 1348 (4-16), 1349 (4-16), 1350 (4-16), 1351 (4-16), 1352 (4-16), 1353 (4-16), 1354 (4-16), 1355 (4-16), 1356 (4-16), 1357 (3-16), 1358 (2-16), 1359 (4-16), 1360 (4-16), 1361 (4-16), 1362 (4-16), 1363 (4-16), 1364 (4-16), 1365 (4-12), 1366 (2-8), 1367 (2-9), 1368 (4-16), 1369 (8-3), 1370 (4-16), 1371 (3-14), 1372/1 (5-15), 1372/2 (1-4), 1373 (4-16), 1374 (6-8), 1375 (3-12), 1376/1 (2-19), 1376/2 (0-17_, 1376/3 (1-5), 1377 (5-12), 1378 (0-10), 1379 (3-18), 1380 (4-16), 1381 (2-16), 1382 (6-00), 1381/12 (2-0), 1383(4-16), 1384 (3-4), 1385 (4-16), 1386 (4-16), 1512 (4-16), 1517 (2-16). 1518 (4-16), 1519 (3-10), 1520/1 (4-16), 1520/2 (1-11), 1521 (4-16), 1522 (4-16), 1523 (3-14) 1726 (3-3), 1727 (4-16), 1728 (2-12), 1729 (6-14), 1731 (2-5), 1732/1 (2-4), 1732/2 (2-12), 1733 (4-16), 1734 (4-2), 1735 (1-7), 1736 (4-13), 1737/1 (0-18), 1737/2 (0-12), 1738 (1-4), 1739 (0-1), 1741 (0-4), 1742/1 (2-7), 1744 (4-9), 1745 (4-16), 1746 (4-16), 1747 (4-16), 1748 (4-16) 1749 (4-16), 1750 (4-16), 1751 (4-16), 1752 (4-16), 1753 (3-5), 1754 (6-2), 1755 (4-16), 1756/1 (1-12), 1756/2 (3-4), 1757/1 (1-12), 1757/2 (3-4), 1758 (4-16), 1759 (4-16), 1760 (4-16), 1761 (4-16), 1762 (4-16), 1763 (4-16), 1767 (4-16), 1768/2 (2-9), 1769/1 (2-9), 1769/2 (2-7), 1875 (4-16), 1876 (4-16), 1877 (3-14), 1878 (7-00) measuring 633-17 its physical possession is taken and given to Shri B.S. Aggarwal, Naib Tehsildar, L&B Deptt on all

four Sides on the spot, pillar have been installed. Possession of Khasra Nos. 1310/1 less than one biswa 1337 (1-0), 1338 (1-0), 1341 less than one biswa, 1342 less than one biswa, 1348 less than one biswa, 1358 (2-0), 1365 less than one biswa, 1379 (0-2), 1523 less than one biswa, 1736 less than one biswa, 1877 (0-9) Total Area 5-12 has not been taken being built up. Possession of Khasra No. 1742/2 (2-5), 1743 (4-15) total 7-0 bigha has not been taken due to stay from High Court.

There is crop in Khasra Nos. 1296, 1293 1294, 1304/1, 1303/1, 1372/2, 1380, 1379, 1522, 1521, 1726, 1727, 1728, 1729, 1747, 1748, 1749, 1750, 1751, 1752, 1753, 1754, 1755, 1756/2, 1757/2. The owners have been allowed to harvest the crop. L.A.C. is present at the spot. Notices under his signature have been issued to Ram Sarup Kathuria and Ram Prasad etc that they should vacate the built up area & service is affected in his presence. Munadi to this effect has also been done loudly by Ram Chand Patwari, LA & by beat of canister. No retaliation took place at the time of taking possession. The proceedings regarding possession are complete. Patwari halqua is not present at the spot so a copy of possession report will be sent to him through the Tehsildar Mehrauli, so that necessary entries are made in the revenue record.

31-3-81

Sd/- Sarup Singh Girdawar

Sd/- Gopal Sharma servant of Ram Prashad

Sd/- Naib Tehsildar

Thumb impression of Prem Sharma Servant of Ram Prashad

Sd/- Kharak Bahadur

Sd/- Daya Nand Lambardar

Sd/- Raj Bahadur Naib tehsildar DDA

Sd/-Rajinder Singh

d/- Naib Tehsildar, L&B

Sd/- Hari Chand Patwari, DDA" **(emphasis supplied)**

The contention of Mr Poddar was that actually physical possession

of land in question, except a small piece where some built up structures were found, was taken over by the revenue officials in the presence of the representative of petitioner No. 3 R.S. Kathuria on 31.3.1981 and thereafter petitioner No. 3 was allowed to harvest the crop found cultivated on Khasra Nos. 1726, 1727, 1728, 1729, 1747-1755, 1756/2, 1757/2 so that there is no loss of crop to him. The contention of Mr Poddar was that had possession of the cultivated land not been taken, there would have been no occasion for the revenue officials to permit petitioner No. 3 to harvest the crop, since in that case possession remaining with him, no such permission would have been necessary. It was also submitted that the crop standing on the aforesaid land would in normal course have been harvested within a month or so of the Government taking possession of the cultivated land. This was also the contention of Mr. Poddar that land measuring 79 bighas and 18 biswas being unbuilt and unoccupied land, the revenue officials were not required to do anything more than what they actually did on 31.3.1981.

9. As against this, the learned Counsel for the petitioners contended that actual physical possession of land in question was not taken by the revenue officials on 31.1.1981 and it is the petitioners who continued to retain physical possession, as would be evident from the survey reports which the officials of the respondents prepared on inspection of the site and which confirmed that the buildings of the petitioners existed on the land in question. It was also contended that since this Court vide interim order dated 24.3.1981 passed in C.W.P. 586/1981 had directed status quo with respect to possession of land in question, the possession even if it is assumed to have been taken by the respondents on 31.3.1981 would be void ab initio and non est in law, which the Court is required to ignore from consideration. It was also submitted that when the Court passes such an order it not only directs but also presumes that the position which existed at the time of passing the order continues to exist and any other construction of law on the subject would be contrary to public interest and subvert the cause of justice. This however, was countered by Mr. Poddar, who submitted that the interim order dated 24.3.1981 was not served upon the revenue officials before they took possession on 31.3.1981. This, according to Mr Poddar, has been the consistent stand of the respondents and was accepted by this Court in FAO(OS) No. 313/2007 and 27/08. It was also submitted by Mr Poddar that in any case since the interim order passed by the Court in Civil Writ

Petition No. 586/1981 which was confirmed on 10.4.1981, came to an end on dismissal of the Writ Petition, there being no impediment in the way of the respondents taking possession of the land in question, nothing more was required to be done by them to take physical possession of land in question, they having already possessed it on 31.03.1981. It was also submitted by Mr. Poddar that physical possession taken by the petitioners after 31.03.1981 would amount to trespass and being trespassers the petitioners have no right in law to maintain this petition. Mr. Poddar in support of his contention that the respondents had taken actual physical possession of the land measuring 79 bighas 18 biswas on 31.3.1981 heavily relied upon the decision of this Court in **DDA v. R.S.Kathuria** 2009(7) AD (Delhi) 265 which was a litigation inter se between the parties to this petition and the order passed by this Court in Review Petition No. 41/2009 in FAO (OS) No. 313/2007 and Review Petition No. 47/2009 in FAO (OS) No. 27/2008 which the petitioners had filed against that decision. Mr. Poddar drew our attention to the following view taken by the Division Bench of this Court in that case:

> In the present case, the Award was passed on 30th March, 1981 and the possession was taken on 31st March, 1981 before the interim orders were communicated to the appellant. The continued possession of the respondent No.1 pursuant to the said orders of the Court cannot be treated as possession for the purpose of section 16 of the LA Act and on the dismissal of challenge of respondent No.1 to the acquisition proceedings; the said respondent no.1 has no longer any claim in respect of the same.
>
> x x x x
>
> In view of the facts of the present case, we feel that the learned Single Judge was not right in observing that the respondent No.1 is in possession as the said possession is pursuant to the interim orders of this Court. It is a matter of fact that the said interim order stands vacated on the dismissal of the SLP by the Supreme Court. The learned Single Judge wrongly observed that the appellants have not taken the actual physical possession or symbolic possession and therefore the suit is maintainable for determination of the same. The said finding of the learned Single Judge was contrary to the facts of the present case as the Award having been passed on 30th March, 1981, the question of

the appellants not taking the symbolic and physical possession does not arise as the authorities are free to take the actual possession on the vacation of the interim orders passed in the writ petition filed by respondent No.1.

Mr Poddar pointed out that while arguing the Review Petitions, the petitioners had contended that there was an error apparent on the face of the record in the Court observing in para 44 that "Award having been passed on 30.3.1981 the question of the appellants not taking the symbolic and physical possession does not arise as the authorities are free to take the actual possession on the vacation of the interim order passed in the writ petition filed by the respondent No.1". Mr Poddar also pointed out that the contention of the petitioners in the Review Petition was that the action of taking possession of land on 31.3.1981 cannot negate the legal sanctity of status quo order passed on 24.3.1981 and that the observations contained in the order dated 28.11.2008 to the effect that the possession of land which was taken on 31.3.1981 may come in the way of the applicants in seeking other remedies. The learned Counsel then drew our attention to the following observations made in the order:

> x x xConsidering in the backdrop that the writ petition filed by the respondent No.1 challenging the acquisition had been ultimately dismissed by this Court, which had the effect of vacating the interim order as well and further considering the judgment of this Court was upheld by the Supreme Court in the case of **Murari & Ors. v. Union of India (UOI) & Ors.** [(1997) 1 SCC 15]. View taken in the said judgment by the Apex Court, we are of the considered view that there is no error apparent on the face of record could be pointed out as to how this view is incorrect. Insofar as the judgment relied upon by the learned Counsel for the review petitioner is concerned, it is clear from the reading of the said judgment that it was given on its own facts in the context of the maintainability of petition under Section 48 of the Land Acquisition Act, there is no bearing insofar as the facts of the present case is concerned.
>
> When we read the grounds of appeal preferred by the appellants, we are of the opinion that the appellants had taken categorical stand that the possession of the land was taken on 31.03.1981

> before the service of the status quo order was passed on 24.03.1981. In fact, in para 5 of the memo of party, it is categorically averred that the LAC had passed the award on 30.03.1981 and possession of the land had been taken over before the order of status quo was implemented, the writ petition was dismissed by this Court on 14.12.1995. The respondent No.1 (now deceased) challenged the judgment and order before the Supreme Court and the SLP was also dismissed with the bath of petitions. The pleadings are to be read in totality and respondent No.1 cannot pick certain portions from there to suit its advantage. Going by all these considerations, the issue in question was decided in favour of the appellants and suit of the respondent is dismissed as not maintainable. Insofar as this finding is concerned, we are of the opinion that there is no error much less errors apparent on the fact of record.

The learned Counsel for the petitioners however submitted that the question as to whether possession of land in question was actually taken by the respondents on 31.3.1981 or not was not the matter in issue before the Division Bench and therefore the view taken therein is not binding on the petitioners. The learned Counsel for the petitioners also contended that the respondents were required to take physical possession on the site in terms of Order 21 Rules 35, 36, 95 & 96 CPC and mere symbolic possession by preparing a panchnama on the spot does not meet the requirement of Section 16 of Land Acquisition Act.

10. In support of his contention, the learned Counsel for the petitioners has relied upon **National Thermal Power Corporation Ltd. v. Mahesh Dutta & Ors.** (2009) 8 SCC 339, **Banda Development Authority v. Moti Lal Agarwal & Ors.** (2011) 5 SCC 394, **Balwant Narayan Bhagde v. M.D.Bhagwat & Ors.** (1976) 1 SCC 700, order of this Court in WP(C) No. 1907/1986 passed on 3.2.2010, order dated 25.2.2009 passed in WP(C) No. 1398/1994 and decision of this Court dated 4.3.2010 in WP(C) No. 2563-66/2005. He pointed out that in **Banda Development Authority** (supra), Supreme Court, after considering its earlier decision on the subject had culled out the following principles as regards the mode of taking possession of land acquired under the provisions of Land Acquisition Act:

(i) No hard and fast rule can be laid down as to what act would constitute taking of possession of the acquired land.

(ii) If the acquired land is vacant, the act of the concerned State authority to go to the spot and prepare a panchnama will ordinarily be treated as sufficient to constitute taking of possession.

(iii) If crop is standing on the acquired land or building/structure exists, mere going on the spot by the concerned authority will, by itself, be not sufficient for taking possession. Ordinarily, in such cases, the concerned authority will have to give notice to the occupier of the building/structure or the person who has cultivated the land and take possession in the presence of independent witnesses and get their signatures on the panchnama. Of course, refusal of the owner of the land or building/structure may not lead to an inference that the possession of the acquired land has not been taken.

(iv) If the acquisition is of a large tract of land, it may not be possible for the acquiring/designated authority to take physical possession of each and every parcel of the land and it will be sufficient that symbolic possession is taken by preparing appropriate document in the presence of independent witnesses and getting their signatures on such document.

(v) If beneficiary of the acquisition is an agency/instrumentality of the State and 80% of the total compensation is deposited in terms of Section 17(3A) and substantial portion of the acquired land has been utilized in furtherance of the particular public purpose, then the Court may reasonably presume that possession of the acquired land has been taken.

He also drew our attention to the following view taken in **National Thermal Power Corporation Ltd.** (supra):

".....The question as to whether actual physical possession had been taken in compliance of the provisions of Section 17 of the Act or not would depend upon the facts and circumstances of each case.

27. When possession is to be taken over in respect of the fallow

or patit land, a mere intention to do so may not be enough. It is, however, the positive stand by the appellant that the lands in question are agricultural land and crops used to be grown therein. If the lands in question are agricultural lands, not only actual physical possession had to be taken but also they were required to be properly demarcated. If the land had standing crops, as has been contended by Mr. Raju Ramachandran, steps in relation thereto were required to be taken by the Collector. Even in the said certificate of possession, it had not been stated that there were standing crops on the land on the date on which possession was taken. We may notice that delivery of possession in respect of immovable property should be taken in the manner laid down in Order XXI Rule 35 of the Code of civil Procedure."

Mr Poddar, however, submitted that though Land Acquisition Act is a self-contained Act, even the requirement laid down in Order XXI Rule 35 of CPC stood complied in this case since there was proper demarcation on the spot by installing pillars on all four sites and there was no resistance to the revenue officials taking possession on the site, as would be evident from the Possession Report dated 31.03.1981.

11. Mr. Poddar, while maintaining that actual possession of land measuring 79 bighas 18 biswas was taken on the site on 31.3.1981, and that too before service of status quo order dated 24.3.1981 on the respondents, contended that even a symbolic possession by preparing a panchnama would be sufficient compliance of the requirement of Section 16 of Land Acquisition Act, where the acquired land is unbuilt land. It was also submitted by him that in fact no resistance at all was offered by petitioner No.3 when possession was taken by the revenue officials on 31.3.1981. In support of his contention, Mr Poddar relied upon **Sita Ram Bhandar Society, New Delhi Vs. Lt. Governor, Govt. of N.C.T. Delhi and Ors.** 2009 (10) SCC 501. In particular, Mr Poddar relied upon the following view taken by the Supreme Court:

"It would, thus, be seen from a cumulative reading of the aforesaid judgments, that while taking possession of a large area of land with a large number of owners, it would be impossible for the Collector or the Revenue Official to enter each bigha or biswa and to take possession thereof and that a pragmatic approach

has to be adopted by the Court. It is also clear that one of the methods of taking possession and handing it over to the beneficiary department is the recording of a Panchnama which can in itself constitute evidence of the fact that possession had been taken and the land had vested absolutely in the Government.

Mr. Gupta has, with great emphasis, pointed out that from the affidavit dated 30.07.1996 sworn by Mr. G.S. Meena, Under Secretary, Land and Building Department, it was clear that the appellant continued to remain in possession on account of the stay of dispossession granted by the High Court on 15.07.1981 in WP No. 2220/1981 and the confirmation of the said order on 16.09.1982 and as such the stand of the appellants that possession had been taken was not correct. We have, however, already observed that possession had been taken between 20.06.1980 and 24.06.1980 and the acquired land thus stood vested in the State free from all encumbrances under Section 16 of the Act. It is also relevant that the afore-referred writ petition was dismissed meaning thereby that the said order should automatically be vacated as well. Even assuming for a moment that the petitioner had re-possessed the acquired land at some stage would be of no consequence in view of the provisions of Section 16 ibidem.

In **Narayan Bhagde's** case (supra) one of the arguments raised by the land owner was that as per the communication of the Commissioner the land was still with the land owner and possession thereof had not been taken. The Bench observed that the letter was based on a misconception as the land owner had re-entered the acquired land immediately after its possession had been taken by the government ignoring the scenario that he stood divested of the possession, under Section 16 of the Act. This Court observed as under:

"29.....This was plainly erroneous view, for the legal position is clear that even if the appellant entered upon the land and resumed possession of it the very next moment after the land was actually taken possession of and became vested in the Government, such act on the part of the appellant did not have the effect of obliterating the consequences of vesting.

To our mind, therefore, even assuming that the appellant had re-entered the land on account of the various interim orders granted by the courts, or even otherwise, it would have no effect for two reasons, (1) that the suits/petitions were ultimately dismissed and (2) that the land once having vested in the Government by virtue of Section 16 of the Act, re-entry by the land owner would not obliterate the consequences of vesting."

12. During the course of arguments, the learned Counsel for the petitioners relied upon the notings dated 6.4.1999 and 5.5.1999 recorded by Shri U.P.Singh OSD (Litigation) in the relevant file of Land & Building department and the letter dated 26.5.1999 written by Shri Shamim Ahmed, Director (LM) HQ to DS (LA), Land & Building Department in support of his contention that possession was not taken from the petitioners on 31.3.1981. This however, was controverted by the learned Counsel for the respondents who submitted that the noting recorded by Shri U.P.Singh was the view of an individual, which was not accepted by the competent authority and therefore does not constitute the view of the Government or an admission on its part. It was also pointed out that other Officers who dealt with the file in Land & Building Department did not agree with the view taken by Shri U.P.Singh. Mr. Poddar in this regard drew our attention to the note dated 9.2.2000 recorded by Ms. Pratibha Karan, Principal Secretary (PWD/L&B) whereby the file was placed before the Lieutenant Governor and the recommendation of the De-notification Committee was approved by him on 10.2.2000.

In his note dated 6.4.1999 Mr. U.P.Singh opined that since the copy of status quo order dated 24.3.1981 had been served in Land & Building Department on 31.3.1981, a mistake was committed by LAC in possession proceedings dated 31.3.1981 by including disputed land along with the other land acquired by the Government. He also noted that from a perusal of page 2 of annexure P-V of the representation dated 24.2.1999, it appeared that inspection of the disputed land was carried out by the field staff and at that time it was found that a built up structure of senior secondary school was functioning on it and a building occupied by Oriental Bank of Commerce also existed on it. He was of the view that if the possession of the disputed land was taken on 31.3.1981 prior to service of status quo order, this should have been brought to the notice of the High Court and the status quo order should have been got vacated.

He thus opined that the possession proceedings dated 31.3.1981 being in contravention of the status quo order dated 24.3.1981 were invalid and illegal and need to be corrected.

We also find from the notings on the file that De-notification Committee in its meeting held on 27.1.1991 recommended rejection of the representation made by the petitioners on the ground that possession of land in question was taken over on 31.3.1981 and the above referred noting by Mr. U.P.Singh was made thereafter, on the representation dated 24.2.1999 made by the petitioners.

We find that in the subsequent note dated 2.12.2000 Mr. V.B.Pandey, Legal Advisor recorded that possession of the acquired land was taken by LAC on 31.3.1981 because the status quo order was not served on him. He also noted that DDA vide letters dated 7.1.2000 and 25.1.2000 had reiterated its stand that possession of the land was with them.

In her note dated 9.2.2000 Principal Secretary (PWD/L&B) noted that as the order of this Court dated 24.3.1981 directing maintaining of status quo was not served on the Land Acquisition Collector, the possession of land was taken over on 31.3.1981 and handed over to DDA. She also noted that though the contention of the petitioners was that the possession of the land had remained with them, the record showed otherwise and Additional Secretary (NCR) had confirmed that possession was with DDA. She also noted that latest communication from DDA also showed that physical possession of the land was transferred by LAC and Land & Building Department to DDA vide notifications under Section 22(1) of DDA Act.

It would thus be seen that the opinion of Mr. U.P.Singh was not accepted by his superiors and certainly not by the Lieutenant Governor who was the Competent Authority in the matter and before whom the entire file which included the notings recorded by Mr. U.P.Singh, was placed.

As regards the letter dated 26.5.1999 written by Mr. Shamim Ahmed we find that in this letter he was only referring to the opinion of Mr. U.P.Singh OSD (Litigation). He did say that the site was inspected by the field staff and it was found that an authorized building of senior secondary school existed there along with a nursery, playground, staff quarters and

a building occupied by Oriental Bank of Commerce. However, he did not say that the inspection by the field staff was carried out on or before 31.3.1981. In fact, this is nobody's case before us that the inspection referred in the letter of Mr. Shamim Ahmed was carried out prior to 31.3.1981. No such inspection report has been filed by any of the parties to this petition. We find merit in the contention of Mr. Poddar that if possession of the land was taken over by revenue officials on 31.3.1981, trespass on that land by the petitioners at a later date and construction of buildings on it would be of no consequence and would not be recognized by the Court. Mr. Poddar also pointed out to us that it was Mr. Shamim Ahmed who filed counter affidavit in this behalf on behalf of DDA and stated on oath that possession of land in question was taken over on 31.3.1981 and the land was placed at the disposal of DDA.

The following observations made by Supreme Court in **Shanti Sports Club** (Supra) are pertinent with respect to notings/opinions recorded by the Government Officers/Ministers on the file:

> A noting recorded in the file is merely a noting simpliciter and nothing more. It merely represents expression of opinion by the particular individual. By no stretch of imagination, such noting can be treated as a decision of the Government. Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be termed as a decision of the Government, unless it is sanctified and acted upon by issuing an order in accordance with Articles 77(1) and (2) or culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77(2) or Article 166(2). A noting or even a decision recorded in the file can always be reviewed/reversed/overruled or overturned and the court cannot take cognizance of the earlier noting or decision for exercise of the power of judicial review.

In **Sethi Auto Service Station v. DDA** (2009) 1 SCC 180 Supreme Court observed as under:

> It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no

more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is communicated to the person concerned. Hence, we cannot conclude, merely on the basis of the noting of Mr U.P. Singh and/or the letter of Mr Shamim Ahmed that the possession of land in question was not taken on 31.03.1981.

13. Policy Guidelines dated 02.12.1998 for de-notification of land acquired under the provisions of Land Acquisition Act, which the petitioners themselves have relied upon and placed on record, inter alia, read as under:-

"4.0 CASE WHICH MAY BE CONSIDERED FOR DENOTIFICATION

Cases of the following nature may be considered for denotification:-

4.4 PROPERTIES BUILT-UP AFTER THE ISSUE OF NOTIFICATION U/S.4 OF THE LAND ACQUISITION ACT, 1894.

(1) Land on which built-up structures have come up after issue of notification under Section 4 of the Land Acquisition Act, shall normally not be considered for denotification. However, if cluster of largely residential structures has come up over a long period of time and demolition of the structures shall cause immense hardship to a large number of inhabitants, the following procedures may be adopted: (a) Where there is a recommendation from a technical department/committee of the Government, that the land is inappropriate/unsuitable. (b) Where the feasibility studies if any, conducted show that the land is not suitable for the public purpose for which it is being acquired. (c) Where the colony including the area in question has itself been regularized and services handed over to MCD, the land may be recommended for denotification.

(2) In all cases, a sub-committee comprising the Land Acquisition Collector, a representative of Land & Building Department (not below the rank of a Dy. Secretary) and a representative of DDA (not below the rank of a Dy. Secretary), shall inspect the land and submit a detailed report outlining the number and nature of structures, the feasibility of taking over the land after demolition of the structures, and the specific recommendation on denotification of the land. The Denotification Committee shall consider the report of the sub-committee, the comments of the requisitioning department with specific reference to its need for land, and then make a recommendation to the Lt. Governor for considering or rejecting the proposal."

It would thus be seen that the land on which structures have been raised after issuance of notification under Section 4 of Land Acquisition Act is not to be considered for notification, the exception being cluster of largely residential structures, demolition of which shall cause immense hardship to a large number of inhabitants. In the case before us, admittedly, notification under Section 4 of Land Acquisition Act was issued on 23.01.1965. It is an admitted case that this land was purchased by petitioner No. 3 vide Sale Deed dated 18.4.1967. The structures which presently exist on this land, therefore, must necessarily have come up only after 18.04.1967, which was more than two years after issuance of notification under Section 4 of the Act. This is not the case of the petitioners that residential structures exist on the land in question and demolition of which would cause hardship to those who are living in those residential structures. The case of the petitioners is that they are running a school on this land, though the Survey Report, referred in the notings in the file of Land & Building Department, shows that Oriental Bank of Commerce is also being run in one of the buildings. The built-up structures being used for running a school are not covered under the exception carved out in clause 4.4 (1) of the guidelines and, therefore, going by these guidelines, the Government/Lieutenant Governor cannot de-notify land in question. We would like to note here that the guidelines dated 02.12.1998 have not been challenged in this petition and have, in fact, been relied upon by them on the premise that their case is covered under them.

14. During the course of arguments, it was contended by the learned counsel for the petitioners that these guidelines having been issued after they had already represented to the Government for de-notification of their land, cannot be applied to their case. We, however, find no merit in this contention for two reasons. Firstly, the petitioners themselves having relied upon these guidelines and claiming to be covered under them, it is not open to them to say that the guidelines cannot be applied to their case. More importantly, the Government/Lieutenant Governor, while deciding the representation(s), seeking de-notification of acquired land, must necessarily be guided by the policy which is applicable on the date they take decision on such representations. It would not be open to the Government/Lieutenant Governor to ignore these guidelines and de-notify the acquired land even in those cases where such de-notification is not permissible.

As observed by Supreme Court in **Home Secretary, UT of Chandigarh & Anr. v. Darshjit Singh Grewal & Ors.** (1993) 4 SCC 25, the policy guidelines of general applications relatable to the executive power of the Government are binding on the Government and they are bound to adhere to it unless the policy itself is changed.

Assuming that in one or more cases, the government has de-notified acquired land even if it was purchased and construction on the land was raised after issue of notification under Section 4 of Land Acquisition Act, we cannot and ought not to perpetuate that illegality by directing the government to once again commit breach of the guidelines issued by it by de-notifying the land which the petitioners have purchased after issue of notification under Section 4 of the Land Acquisition Act. The court cannot be a party to such an illegality by giving directions sought by the petitioners. Having issued a policy, the Government is duty bound to rigidly follow the policy guidelines and therefore, all its actions in the matter of de-notification of acquired land need to strictly conform to those guidelines of general application.

15. We are in agreement with the learned counsel for the respondents, who contended that the petitioners having purchased land in question, after issuance of notification under Section 4 of Land Acquisition Act, have no legal right to seek de-notification of the acquired land purchased by them in this regard. We may, at this stage, refer to the decision of

Supreme Court in **Smt. Sneh Prabha etc. Vs. State of U.P. and Another:** AIR 1996 Supreme Court 540. In that case, notification under Section 4 of Land Acquisition Act was issued on 16.07.1960. The appellant purchased land vide Sale Deeds dated 15.03.1967 and 27.03.1967. The State Government issued what was known as 'land policy', to lease out areas to the persons from whom the land was acquired. The appellant applied for allotment of plot under the aforesaid policy. She also re-deposited the compensation which she had received from Land Acquisition Officer and sought allotment of land. The allotment was, however, denied to her on the ground that she had purchased the land after issuance of notification under Section 4 of the Act and, therefore, was not eligible for allotment. After issuance of policy, the State Government issued two G.Os. containing guidelines for implementation of the land policy. As per those guidelines, the persons who had purchased the land after publication of notification for its acquisition were not to be given any benefit under the land policy. It was contended on behalf of the appellant that it makes little difference if the subsequent purchaser steps into the shoes of the owner of lays claim for allotment. The contention was, however, rejected by Supreme Court which held that she was not entitled to benefit of the land policy. Dismissing the appeal, Supreme Court held as under:

> "It is settled law that any person who purchases land after publication of the notification under Section 4(1), does so at his/her own peril. The object of publication of the notification under Section 4(1) is notice to everyone that the land is needed or is likely to be needed for public purpose and the acquisition proceedings points out an impediment to anyone to encumber the land acquired thereunder. It authorises the designated officer to enter upon the land to do preliminaries etc. Therefore, any alienation of land after the publication of the notification under Section 4(1) does not bind the Government or the beneficiary under the acquisition. On taking possession of the land, all rights, titles and interests in land stand vested in the State, under Section 16 of the Act, free from all encumbrances and thereby absolute title in the land is acquired thereunder. If any subsequent purchaser acquires land, his/her only right would be subject to the provisions of the Act and/or to receive compensation for the land. In a recent judgment, this Court in **Union of India v. Shri**

Shivkumar Bhargava and Ors. (1995) 6 JT (SC) 274: (1995) AIR SCW 595) considered the controversy and held that a person who purchases land subsequent to the notification is not entitled to alternative site. It is seen that the Land Policy expressly conferred that right only on that person whose land was acquired. In other words, the person must be the owner of the land on the date on which notification under Section 4(1) was published. By necessary implication, the subsequent purchaser was elbowed out from the policy and became disentitled to the benefit of the Land Policy.

It would be pertinent to note here that even in the case before Supreme Court, the policy guidelines came to be issued by the State Government much after the acquired land had been purchased by the appellant.

In **Yadu Nandan Garg Vs. State of Rajasthan and Others:** AIR 1996 Supreme Court 520, notification under Section 4(1) of Rajasthan Land Acquisition Act, 1953 was published on 17.10.1963. The appellant purchased land in question vide Sale Deed dated 15.07.1970 before issue of declaration under Section 6 of the Act on 07.01.1991. The appellant filed an application seeking exemption which was turned down. He then filed a writ petition in the High Court which was rejected by the learned Single Judge as well as by the Division Bench of the High Court. During appeal before Supreme Court, it was contended on behalf of the petitioner that Anand Nursery, which was adjacent to appellant's site was given exemption from acquisition, whereas the appellant's site used for residential purposes had not been exempted, which amounted to discrimination offending Article 14 of the Constitution. The contention was, however, rejected by Supreme Court. Dismissing the appeal, the Court, inter alia, held as under:

> "It is seen that long after the notification under Section 4(1) was published in the Gazette, the appellant had purchased the property and constructed the house thereon. Therefore, as against the State his purchase was not lawful and it could not be used against the State to cloth it with a colour of title as against the State. It is in encumbrance against the State and when the acquisition was finalised and the possession is taken, the State under Section 16 is entitled to have the possession with absolute title free from all encumbrances. The appellant cannot get any title much less valid title to the property."

We are of the view that irrespective of the fact that land in question was purchased by the petitioner No. 3 before coming into force of Delhi Land (Restriction on Transfer) Act, 1973 which specifically prohibits such transfer, the purchase after issue of notifications under Section 4 of Land Acquisition Act would not clothe the petitioners with a right to seek de-notification of the acquired land purchased by them.

16. It was also contended by the learned Counsel for the petitioners that since the De-notification Committee which recommended rejection of the representation of the petitioners was not properly constituted, the recommendation made by it became vitiated in law and consequently the possession taken on the basis of such a recommendation becomes unsustainable. We however, find no merit in the contention. Para 22 of the guidelines clearly stipulates that the recommendations made by the De-notification Committee are not binding on the Lieutenant Governor, who may take a decision on each recommendation, at his discretion. Since the recommendations of the Committee are not binding on the Lieutenant Governor, any irregularity in constitution of the Committee becomes insignificant and does not vitiate the decision taken by the Lieutenant Governor, who had the benefit of having the whole of the file containing notings of various Officers as well as the correspondence, with him at the time of taking decision in the matter.

17. As regards alleged discrimination with the petitioners on the ground that the land belonging to Hamdard Public School, St. Xavier Society, Ramjas Foundation and Scindia Potteries, etc. had been de-notified while denying de-notification of the land of the petitioners, we find that the respondents have duly explained the circumstances in which the aforesaid lands were de-notified.

We also note that a similar contention citing the same instances of de-notification of land was examined by Supreme Court in **Shanti Sports Club and Anr. Vs. Union of India (UOI) and Ors.** 2009 (15) SCC 705. A perusal of the judgment would show that the appellants contended that the Government was duty bound to treat them at par with others like Hamdard Public School, St. Xavier School, Shahbad Estate Extension

Welfare Association, Scindia Potteries, etc., whose land was released from acquisition despite the fact that constructions were made after issuance of a notification under Section 4(1) and declaration under Section 6 of the Act and in some cases even after the award was made. This was also their contention that in view of the observations contained in the last part of para 182 of the judgment of the Full Bench in **Roshanara Begum v. Union of India:** AIR 1996 Delhi 206 and the statement made by Shri N.N.Goswami, counsel for the State, which was recorded in para 21 of the judgment of the Supreme Court in **Murari and Ors. Vs. Union of India** (UOI) and Ors. AIR (1997) 1 SCC 15, the representations made by them for release of the land could not have been rejected on the ground that the construction had been raised after acquisition of land. Rejecting the contention of the appellants, Supreme Court, inter alia, observed as under:

> "The concept of equality enshrined in that Article is a positive concept. The Court can command the State to give equal treatment to similarly situated persons, but cannot issue a mandate that the State should commit illegality or pass wrong order because in another case such an illegality has been committed or wrong order has been passed. If any illegality or irregularity has been committed in favour of an individual or a group of individuals, others cannot invoke the jurisdiction of the High Court or of this Court and seek a direction that the same irregularity or illegality be committed in their favour by the State or its agencies/ instrumentalities. In other words, Article 14 cannot be invoked for perpetuating irregularities or illegalities."

Supreme Court, while rejecting the plea of discrimination taken by the appellants, referred to the following observations made in **Chandigarh Administration v. Jagjit Singh:** (1995) 1 SCC 745:

> "Generally speaking, the mere fact that the respondent-authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted

> in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order. The extraordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent-authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal/unwarranted action must be corrected, if it can be done according to law — indeed, wherever it is possible, the Court should direct the appropriate authority to correct such wrong orders in accordance with law — but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the respondent-authority to repeat the illegality, the Court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law.
>
> In other words, the High Court cannot ignore the law and the well-accepted norms governing the writ jurisdiction and say that because in one case a particular order has been passed or a particular action has been taken, the same must be repeated irrespective of the fact whether such an order or action is contrary to law or otherwise. Each case must be decided on its own merits, factual and legal, in accordance with relevant legal principles. The orders and actions of the authorities cannot be equated to the judgments of the Supreme Court and High Courts nor can they be elevated to the level of the precedents, as understood in the judicial world."

With respect to the observations made by the Full Bench of this Court in **Roshanara Begum** (supra) and the statement made by Shri N.N. Goswami before Supreme Court in the Case of **Murari and Ors.** (supra), the Court observed as under:

> "59. In our opinion, the Government's decision not to withdraw from the acquisition of land in question or de-notify the acquired

land, does not suffer from the vice of discrimination or arbitrary exercise of power or non application of mind. With due deference to the Full Bench of the High Court which disposed of the batch of writ petitions and miscellaneous applications, the observations contained in the last part of paragraph 182 of the judgment suggesting that the petitioner/applicant can make representation for release of the land and the concerned authorities can examine whether the sports complex could serve the purpose of acquiring the land for the particular scheme or the scheme can be modified or amended in respect of the land in question were nothing more than pious hope and the Government rightly did not take them seriously because in the same paragraph the Full Bench unequivocally ruled that the land is required for residential scheme of Vasant Kunj and the sports complex built by the applicant was not in consonance with the public purpose for which the land was earmarked in the scheme.

The statement made by the counsel representing the State before this Court which finds mention in paragraph 21 of the judgment in **Murari v. Union of India** (supra) was neither here nor there. It did not amount to a commitment on behalf of the Government that representations made for release of land will receive favourable consideration. In any case, once this Court had made it clear in **Murari v. Union of India** (supra) that in a matter involving acquisition of thousands of acres of land, it would not be proper to leave out some small portions here and there over which some construction may have been made, the decision of the Government not to withdraw from the acquisition of the land in question cannot be faulted."

18. Dealing with the plea of discrimination in the matter of application of land policy, Supreme Court, in the case of **Smt. Sneh Prabha** (supra), inter alia, observed as under:-

> "Even if a benefit is wrongly given in favour of one or two, it does not clothe with a right to perpetuate the wrong and the Court cannot give countenance to such actions though they are blameworthy and condemnable. Equality clause does not extend to perpetuate wrong nor can anyone equate a right to have the wrong repeated and benefit reaped thereunder."

In **Yadu Nandan Garg** (supra), the contention before Supreme Court was that one Anand Nursery was granted exemption while denying similar benefit to the appellant. Rejecting the plea of discrimination, Supreme Court, *inter alia,* observed as under:-

> "It is true, for reasons best known to the authorities, that Anand Nursery had the benefit of the exemption. The wrong exemption under wrong action taken by the authorities will not cloth others to get the same benefit nor can Article 14 be pressed into service on the ground of invidious discrimination."

We, therefore, find no substance in the plea of discrimination taken by the petitioners.

19. Even if we assume that actual physical possession of the acquired land was not taken by the Government on 31.03.1981, as is claimed by the petitioners, we are of the view that since land in question was acquired by them after issue of notification under Section 4 of Land Acquisition Act, their case is not covered under the guidelines issued by the Government on 02.12.1998 for de-notification of acquired land. We, therefore, find no ground to direct either de-notification of land in question from acquisition by issuing a notification under Section 48 of Land Acquisition Act or reconsideration of the representations made by the petitioners from time to time for de-notification of the aforesaid land.

CONCLUSION

Since De-notification Guidelines issued by the Government do not permit de-notification of land in question, which the petitioners purchased after issuance of notification under Section 4 of Land Acquisition Act, we find no ground to direct the Government either to de-notify this land or to re-consider the representations of the petitioners. The writ petition being devoid of any merit is hereby dismissed. The interim orders passed in favour of the petitioners during pendency of the writ petition are vacated. The parties are left to bear their respective costs.

ILR (2012) I DELHI 681
CRL. A.

PREM KUMAR **....APPELLANT.**

VERSUS

STATE **....RESPONDENT**

(BADAR DURREZ AHMED & VEENA BIRBAL, JJ.)

CRL.A. NO. : 119/1999 **DATE OF DECISION: 09.11.2011**

Juvenile Justice (Care and Protection of Children) Act, 2000—Section 15, 16—Appellant/accused was juvenile at the time of commission of murder, but suffered imprisonment for over 10 years which is three time the maximum period prescribed under the Act—Not an appropriate case to send the appellant to Juvenile Justice Board as the same would be grave injustice—Appellant not interested to challenge his conviction—Conviction upheld, sentence set aside and benefit of Sec. 19 of the Act, granted.

Keeping in mind the decisions of the Supreme Court in the cases of **Hari Ram v. State of Rajasthan & Anr** (2009) 13 SCC 211 and **Dharambir v. State (NCT of Delhi) & Anr** 2010 (4) SCALE 316, the consequent benefit under the said Act would have to be given to the appellant. In view of the provisions of Section 15 and 16 of the said Act, the appellant could not have been 'detained' for a period extending beyond three years, whether in a special home or in a place of safety. Since the appellant has already been in custody for a period far in excess of the stipulated period of three years, he cannot be kept under detention of any kind any further. **(Para 5)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Ms. Charu Verma, Advocate.

FOR THE RESPONDENT : Ms. Richa Kapoor, APP.

CASES REFERRED TO:

1. *Dharambir* vs. *State (NCT of Delhi) & Anr* 2010 (4) SCALE 316.
2. *Hari Ram* vs. *State of Rajasthan & Anr* (2009) 13 SCC 211.

RESULT: Appeal Disposed of.

BADAR DURREZ AHMED, J. (ORAL)

1. This appeal is directed against the judgment dated 20.05.1998 passed by the learned Additional Sessions Judge, Delhi in sessions case No. 123/1996 arising out of FIR No.261/1994 under Section 302 IPC registered at P.S. Pahar Ganj. The appellant has been convicted for the offence punishable under Section 302 IPC and by virtue of the order on sentence dated 21.05.1998 passed by the learned Additional Sessions Judge, he has been sentenced to undergo imprisonment for life and to pay a fine of Rs. 1000/- and in default of payment of fine to further undergo simple imprisonment for three months. The appeal is also directed against the said order on sentence.

2. During the pendency of the present appeal, the appellant Prem Kumar had moved an application being Crl.M.A. 119/1999 claiming that he was a juvenile on the date of the incident i.e., 22.05.1994. Consequently, the appellant prayed that he be treated as a juvenile and be dealt with under the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the said Act). While disposing of the said application, a Division Bench of this Court, by virtue of its order dated 04.05.2011, directed the Additional Sessions Judge to conduct an inquiry with regard to the age of the appellant and also directed that a report be submitted. The report of the learned Additional Sessions Judge has been received which is dated 01.10.2011. As per the said report/order, the appellant has been found to be of the age of 17 years 3 months and 17 days on the date of the incident.

3. There is no contest with regard to this determination by the

learned Additional Sessions Judge. As such, the appellant would have to be treated as a juvenile within the meaning of Section 2(k) of the said Act.

4. We find that the appellant had already undergone incarceration for about 10 years and 10 months when this court had granted him the benefit of suspension of sentence and had directed his release on bail by virtue of the order dated 26.05.2005.

5. Keeping in mind the decisions of the Supreme Court in the cases of **Hari Ram v. State of Rajasthan & Anr** (2009) 13 SCC 211 and **Dharambir v. State (NCT of Delhi) & Anr** 2010 (4) SCALE 316, the consequent benefit under the said Act would have to be given to the appellant. In view of the provisions of Section 15 and 16 of the said Act, the appellant could not have been 'detained' for a period extending beyond three years, whether in a special home or in a place of safety. Since the appellant has already been in custody for a period far in excess of the stipulated period of three years, he cannot be kept under detention of any kind any further.

6. The learned counsel for the appellant states that the appellant is not interested in challenging his conviction but is only seeking the benefit with regard to the sentence under the said Act. In view of Section 20 of the said Act, while we do not disturb the finding of guilt returned by the learned Additional Sessions Judge, the sentence awarded by the learned Additional Sessions Judge is to be set aside. The maximum period of detention under the said Act being only three years, whether in a special home or any place of safety, no further order under Section 15 or 16 of the said Act can be passed in view of the fact that the appellant has already been in custody for over 10 years and 10 months.

7. In view of the foregoing, while the conviction of the appellant under Section 302 IPC is upheld, the sentence passed by the learned Additional Sessions Judge is set aside. It is obvious that the appellant will get the benefit of Section 19 of the said Act. The bail bonds are cancelled and the surety stands discharged. The appeal stands disposed of accordingly.

ILR (2012) I DELHI 684
ITA

THE COMMISSIONER OF INCOME TAX-II NEW DELHI **....APPELLANT**

VERSUS

MODERATE LEASING & CAPITAL SERVICES LTD. **....RESPONDENT**

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

ITA NO. : 137/2010 **DATE OF DECISION: 18.11.2011**

Income Tax Act, 1961—Section 260A—Assessee a limited company engaged, inter-alia, in the business of investment in shares—Assessee debited loss on sale of shares amounting to Rs. 1,34,06,274/- as business loss—Assessee submited, it was an investment company and investing in shares of other companies, was its main business—Any Profit and loss on sale of shares accounted for business loss—AO was of the view that even an investment company could hold shares either as stock-in-trade or as an investment—In which particular segment assessee was holding particular shares would depend upon the initial purchase as that would reflect the intention of the Company to this effect—Assessing Officer rejected the contention of the assessee, on the grounds assessee has been consistenly showing these shares as investment in the Balance sheet filed with the returns of income—From the date of its purchase in 1997 till sold in 2004 there was no transaction of sale of these shares—Order of Assessing Officer affirmed by CIT(A)—Tribunal, however, allowed the appeal treating the sale of shares as business income taking into consideration first that sale of shares in earlier

assessment year had been credited in revenue account of the assessee and second revenue had accepted this position in Assessment Year 2003-04—Held, as per Memorandum / Articles of Association investment in shares was one of the main objectives of the Company—Shares in question were alway shown as investment—Shares were treated as investment in every year till there sale in the Blance Sheet—Assessee was maintaining two portfolios, one was the investment portfolio and the other was the business portfolio—The shares in question were show in the investment portfolio—Once these factors are taken into account merely because in the previous year the sales transaction was reflected in the Profit & Loss Account and was not detected by the Assessing Officer, would not be sufficient to upset the findings of the Assessing Officer based on over all appreciation of facts—Appeal allowed.

In the first instance, it may be noted that as per the memorandum/articles of association, investment in shares is one of the main objectives of the company. Then the shares in question held by the assessee were always shown as investment only. Even if the Assessing Officer has wrongly stated the period of 8 years for holding these shares before their sale, the fact remains that these shares remained with the company for substantial period. From the inception, the shares were treated as investment in every year till their sale in the balance sheet. While showing it in the profit and loss account, the remarks of the auditors become relevant and could not be brushed aside so conveniently as has been done by the Tribunal. Very important fact which is glossed over by the Tribunal is that the respondent/assessee is maintaining two separate portfolios. One portfolio is investment portfolio where shares purchased are shown as investment. Other is business portfolio where share purchased are shown as stock-in-trade. Since the assessee is dealing in the business of sale and purchase of shares as well, in such a scenario when two portfolios are maintained

and shares in question are shown in investment portfolio, that would be a very dominant factor disclosing the intention of the assessee as far as shares in question are concerned. When these factors are kept in mind, merely because in the previous year the sale transaction was reflected in the profit and loss account and that was not deducted by the Assessing Officer, would not be a ground to upset the findings of the Assessing Officer and the CIT (A) based on over all appreciation of facts of the case in this year which is a separate and distinct assessment year. **(Para 9)**

Important Issue Involved: In a case like this it is necessary to examine the fact to find out as to how the shares from the inception had been treated. Once the intention of the assessee becomes clear in respect of such shares, a few aberrations would be immaterial.

[La Ga]

APPEARANCES:

FOR THE PETITIONER : Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

FOR THE RESPONDENT : Mr. Salil Kapoor, Advocate with Mr. Ankit Gupta, Advocate.

CASES REFERRED TO:

1. *CIT* vs. *Dalmia Jain & Company Ltd.* (1972) 83 ITR 438.
2. *Patiala Biscuits Manufacturers Pvt. Ltd.* vs. *CIT* (1971) 82 ITR 812.
3. *Janki Ram Bahadur Ram* vs. *Commissioner of Income Tax* (1965) 57 ITR 21.

RESULT: Appeal allowed.

A.K. SIKRI, J.

1. This appeal was admitted on the following substantial question of law:

"Whether the findings of ITAT are perverse in holding that the loss on sale of shares holding as investment in the books of accounts was revenue loss and not capital loss?"

2. The respondent-assessee is a limited company and engaged in the business of leasing, investment in shares and to act as Managers to issue and offers, to give financial assistance in order and abroad, to act administrator or manager of an investment, trust, of fund, to give guarantee or other financial assistance for development of new enterprise, etc. The assessee filed its return of income for the Assessment Year in question, i.e., 2004-05 and the same was assessed under the provisions of Section 143(3) of the Income Tax Act (hereinafter referred to as 'the Act').

3. During the assessment proceedings, the Assessing Officer (AO) noted from the Profit & Loss Account of the assessee that the assessee had debited loss on sale of shares amounting to Rs. 1,34,06,274/- as business loss. The assessee was asked vide order sheet entry dated 14.9.2005 to give the details of this loss and to explain why it should not be treated as capital loss in view of the fact these shares have been shown as investment in the balance sheet by the assessee company for a number of years.

4. The assessee responded by submitting that it was an investment company and had been investing in shares of other companies, which was explained as its main business. Any profit and loss on sale of business loss had been accounted for business loss and having claimed in Profit & Loss account and in support thereof relied upon some judgments. The AO, however, was not convinced with this explanation. He was of the view that even an investment company could hold shares either as stock-in-trade or as an investment. In which particular segment, the assessee was holding particular shares would depend upon the initial purchase, as that would reflect the intention of such a company. If it is a case of stock-in-trade, the Profit & Loss arising from its transfer is stated as business income or business loss and in case the shares are held as investment, then the sale thereof may result in a short-term or a long-term capital gains with indexation benefits.

Applying this principle, the assessee's contention was considered and rejected on the following grounds:-

(i) There is no bar in law for an investment company to have

shares as either stock-in-trade or as an investment. At the time of initial purchase the character of expenditure is determined by the intention of the assessee. The assessee may choose at its option to treat to purchase as investment or as stock in trade. The legal consequences of these alternatives are different. In the case it is stock in trade, the profit or loss arising from its transfer is treated as a business income or a business profit or loss arising there from has to be treated as a short term or a long term capital gains with indexation benefits. In short, if the contention of the assessee is accepted, the there cannot be any income on account of capital gains in the case of investment companies who purchase shares as investment.

(ii) In the present case, the intention of the assessee is manifest and apparent from the treatment given to these purchases right from F.Y. 1996-97. The assessee has been consistently showing these shares as investments in the balance sheets filed alongwith the returns of income. The assessee cannot be allowed to change its stance after 8 years for the purpose of setting off of this loss against business income. In fact and in law, this is precisely what is prohibited in the provisions relating to set off of losses.

Apart from the reasons given above, the assessing officer pointed out many circumstantial evidences which according to him went against the assessee's contention, and enumerated these circumstances as under:-

(i) In the balance sheet of the assessee, the assessee has shown this 505900 equity shares of Rs. 10/- each fully paid to M/s SBEC Sugar Ltd. as investments and not as stock in trade n the current assets.

(ii) These shares were purchased on 27.01.1997 and are only being sold for the first time in F.Y. 2003-04. n the interregnum period from 1997 to 2004, there was no transaction of sale of these shares.

(iii) The assessee company M/s Moderate Leasing and capital Services Ltd. is a group company of Modi Group. It is a known business practice of the promoters to make

investments in public limited companies through group investment companies. M/s SBEC Sugar Ltd. whose shares have been sold is also one of the group companies of Modi Group of Companies.

(iv) The memorandum and articles of association of the company shows investment in shares as the main objects.

5. The assessee preferred the appeal against the aforesaid assessment order passed by the Assessing Officer but was unsuccessful in the said appeal as the CIT (A) affirmed the order of the Assessing Officer and dismissed the appeal. However, on further appeal by the assessee to the ITAT, the assessee has succeeded and the ITAT while allowing the appeal has treated the gain from the sale of shares as income as business income.

6. The reading of the impugned order of the Tribunal would reflect that the Tribunal first discussed the legal position as stated by the Supreme Court in the case of **Janki Ram Bahadur Ram Vs. Commissioner of Income Tax** (1965) 57 ITR 21 and culled out the legal principle therefrom by pointing out that such a question is a mixed question of fact and law. If a transaction is related to the business, which is normally carried on by the assessee, though not directly part of it, an intention to launch upon an adventure in the nature of trade may readily be inferred. A similar inference would arise where a commodity is purchased and sub-dividend and sold. Such an intention may also be inferred in the case of a commercial commodity. But a transaction of purchase of land, without anything more, may not lead to the inference of embarking upon the adventure in the nature of trade. Therefore, what has to be looked into is the intention at the time of purchases, the manner n which the shares have been dealt with and how they were treated in past and future. The Tribunal thereafter discussed the ratio of the Supreme Court judgment in the case of **Patiala Biscuits Manufacturers Pvt. Ltd. Vs. CIT** (1971) 82 ITR 812 and **CIT Vs. Dalmia Jain & Company Ltd.** (1972) 83 ITR 438. In the former case, the transaction was held on the capital account whereas in the later case, the loss on the sale of shares was treated as trading loss meaning thereby transaction was held as business transaction. After discussing these two cases, the Tribunal concluded that the instant case was more proximate with the decision of the Supreme Court in **Dalmia Jain** (supra) and the case of **Patiala Biscuits** (supra) were distinguishable. The

conclusive part of discussion runs as follows:-

"having considered the facts of the case and rival decided cases submitted by the both parties, we are of the view that the classification of the shares in the books of the assessee may be one of the factors but not the conclusive factor as the question has to be considered in totality of the circumstances, as held in the case of **Janki Ram Bahadur Ram** (supra). The decision of the case of Patiala Biscuits Manufacturers Pvt. Ltd., was in respect of preference shares, where there could not have been any possibility of increase or decrease in value because of fixed rate of dividend. However, the assessee held equity shares and incurred considerable loss in this year as well as in the immediately preceding year. Thus, it bore the risk of loss also, which makes the transaction to be in the nature of a trading transaction, especially in view of its main object of dealing in shares. All through, the losses were shown as business losses and this stand was accepted by the revenue in assessment year 2003-04. Therefore, the facts come to close the facts I the case of **Dalmia Jain & Company Ltd.** (supra), in which the transaction was held to be a trading transaction. Insofar as the remarks made by the auditors are concerned, the case of the learned counsel was that they were only in respect of unsold shares. However, to our mind, such remarks are also not of essence when deciding the issue. If any case, the remarks do not represent true state of affairs as in the assessment year 2008-09, surplus on the sale of these shares has been credited in the books of revenue surplus. Thus, the real question is to find out the true nature of the transaction, which is clearly discernible from the treatment given by the assessee to the sale transaction in the profit and loss accounts of three years. The revenue has already accepted this position in assessment year 2003-04 and no reason is shown to digress from the position."

7. To put in nutshell, as per the ITAT the classification of shares as investment in the profit and loss account is not the conclusive factor though it may be one of the relevant factors. Likewise, the Tribunal has not given much credence to the remarks by the auditors in the profit and loss account on the premise that these remarks do not represent true

state of affairs. The two factors which had weighed with the ITAT in favour of the assessee are:-

(i) The sale of shares in earlier assessment year had been credited in the Revenue account by the assessee.

(ii) The revenue had accepted this position in the assessment year 2003-04 and no reason was shown to digress from the position.

8. We are of the view that the ITAT has taken a very myopic view of the entire matter. Only because some income from the shares sold in the assessment year 2003-04 were treated as business income is taken to be the conclusive factor ignoring and side tracking all other important factors which would outweigh the aforesaid reason give by the Tribunal.

9. In the first instance, it may be noted that as per the memorandum/ articles of association, investment in shares is one of the main objectives of the company. Then the shares in question held by the assessee were always shown as investment only. Even if the Assessing Officer has wrongly stated the period of 8 years for holding these shares before their sale, the fact remains that these shares remained with the company for substantial period. From the inception, the shares were treated as investment in every year till their sale in the balance sheet. While showing it in the profit and loss account, the remarks of the auditors become relevant and could not be brushed aside so conveniently as has been done by the Tribunal. Very important fact which is glossed over by the Tribunal is that the respondent/assessee is maintaining two separate portfolios. One portfolio is investment portfolio where shares purchased are shown as investment. Other is business portfolio where share purchased are shown as stock-in-trade. Since the assessee is dealing in the business of sale and purchase of shares as well, in such a scenario when two portfolios are maintained and shares in question are shown in investment portfolio, that would be a very dominant factor disclosing the intention of the assessee as far as shares in question are concerned. When these factors are kept in mind, merely because in the previous year the sale transaction was reflected in the profit and loss account and that was not deducted by the Assessing Officer, would not be a ground to upset the findings of the Assessing Officer and the CIT (A) based on over all appreciation of facts of the case in this year which is a separate and distinct assessment year.

10. The facts of this case resemble more with the facts of the case in **Patiala Biscuits** (supra). In that case the assessee was carrying in the business of manufacturing biscuits. It purchased preference shares of another company at the time of the expansion of that company. Both the companies belonged to one group, namely, the Dalmia Group. The assessee sold the shares leading to a loss of Rs. 4,80,985/- This was the only transaction fo the assessee in dealing in shares. The Tribunal came to the conclusion that the shares were preference shares carrying a fixed rate of dividend, which could not be appreciate in value. The purchase was not made in the open market. The two companies were inter-linked with each other. And finally, this was a solitary transaction of dealing in shares by the assessee company. Therefore, it was held that the transaction was on the capital account. The Court held that the aforesaid finding of the Tribunal was not vitiated in any manner. The AO had also relied on the decision of Supreme Court in the cast of **CIT Vs. Dalmia Jain** (supra). The facts of that case were that the assessee incurred a loss on sale of shares. It was established that the assessee was dealing in shares. In past, such losses were deducted while computing the total income. On these facts, the Tribunal as well as the High Court came to the conclusion that it was a trading loss. The Supreme Court pointed out that the question is primarily a question of fact. It was not the case of the department that in arriving at its decision, the Tribunal had taken into consideration any irrelevant consideration or failed to take into account any relevant consideration. Thus, it was held that there was no room for any interference by the Court.

11. Since the Tribunal ignored the very material and relevant aspects resulting into perversity of its findings, we accordingly answer the question in the affirmative i.e. in favour of the Revenue and against the assessee holding that the shares in question were held as investments and loss on the sale thereof was capital loss and not Revenue loss. The impugned order of the Tribunal is set aside. This appeal is allowed.

12. No order as to costs.

ILR (2012) I DELHI 693
CRL. REV. P.

PREM KUMAR ....PETITIONER

VERSUS

STATE ....RESPONDENT

(MUKTA GUPTA, J.)

CRL.REV.P. NO. : 370/2009 DATE OF DECISION: 18.11.2011

Indian Penal Code, 1860—Section 379, 34—Code of Criminal Procedure, 1973—Section—313—Petitioner convicted under Section 379/34 IPC for committing theft of a pipe and a copper plate from solar system installed at terrace of barrack No. 5, New Police Lines, Kingsway Camp—Petitioner challenged his conviction in Court of learned Additional Sessions Judge which was upheld but he was ordered to be released on probation—Aggrieved by said judgment, petitioner preferred revision urging, during trial he was not represented through legal aid counsel which caused him great prejudice—Also, testimony of prosecution witnesses were inconsistent and contrary which did not inspire confidence—Held :- The Courts employ the concept of prejudice to aid in remedying the injustice—Not examining accused persons strictly in compliance to Section 313 Cr.P.C. is grave—The opportunity granted under Section 313 Cr.P.C. must be real and non illusionary—Questions must be so framed as to give to accused clear notice of cricumstances relied upon by prosecution, and an opportunity to render such explanation as he can of that circumstance—Each question must be so framed that accused can understand it and appreciate what use the prosecution desires to make of the same agnist him—Accused not

examined strictly in compliance of S.313 and was not given opportunity to cross examine witnesses—Material prejudice caused to occused—Acquited.

The linchpin of Section 313 Cr.PC is the opportunity to 'explain any circumstances appearing in the evidence against him'. This means that every circumstance from which the Court would draw the inference of guilt against the accused has to be put to the accused. It is the duty of the Trial Judge to question the accused properly and fairly, bringing home to the mind of the accused, in simple and clear language, the exact case he has to meet and each material point that is sought to be used against him and of affording him a chance to explain it if he can and so desires. **(Para 8)**

Important Issue Involved: The opportunity granted under Section 313 P.C. must be real and non illusionary—Questions must be so farmed as to give to accused clear notice of circumstances relied by prosecution, and an opportunity to render such explanation as he can of that circumstance—Each question must be so framed that accused can understand it and appreciate what use the prosecution desires to make of the same against him.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. N. Safaya, Advocate.

FOR THE RESPONDENT : Mr. Mukesh Gupta, APP with ASI Ram Gopal, PS Mukherjee Nager.

RESULT: Petition allowed.

MUKTA GUPTA, J. (ORAL)

1. By the present petition the Petitioner seeks setting aside of the order dated 18th March, 2009 passed by Learned Additional Sessions Judge upholding the conviction of the petitioner under section 379/34 IPC and acquitting him for the offence charged.

2. Learned counsel for the Petitioner states that the conviction of the Petitioner under section 379/34 IPC is erroneous and no case under the section is made out against the Petitioner as the essential requirements of the section are not fulfilled in the present case. There are inconsistencies and contradictions in the testimonies of the witnesses and the same does not inspire confidence. During the entire trial the petitioner was either unrepresented or was represented through the legal aid counsel which has caused grave prejudice to him. Hence the Petitioner cannot be convicted for the said offence and the impugned order is liable to be set aside.

3. Per contra learned APP states that the impugned judgment suffers from no illegality, the Petitioner has already been released on probation by the learned Additional Sessions Judge. Thus the present revision petition is liable to be dismissed.

4. Briefly the case of the prosecution is that the Petitioner along with co-accused Jawahar Singh was seen committing theft of a pipe and copper plate from the solar system installed at the terrace of barrack No. 5, New Police Lines, Kingsway Camp. Constable Manmohan Singh who resides on the first floor of the said barrack was on reserve duty on 27th August, 2000. As per the FIR Constable Manmohan Singh went to the terrace for morning walk at about 5.00 A.M. and saw the two accused persons who had already removed the pipe and the copper plate and were putting the same into a gunny bag. He apprehended them. Vide DD no. 38A the information was received at PS Mukherjee Nagar at about 5.45 AM. This DD was marked to HC Pushpendra who seized the recovered articles and arrested both the accused. After completion of investigation charge under Section 379/34 IPC was framed against both the accused persons. Learned Metropolitan Magistrate convicted the accused persons and sentenced them to undergo Rigorous Imprisonment for one year for offences punishable under Section 379/34 IPC. The Petitioner filed an appeal against this order. Vide order dated 18th March, 2009 Learned Additional Sessions Judge upheld the conviction of the Petitioner and released him on probation. This order of the Learned Additional Sessions Judge upholding his conviction is impugned in the present petition.

5. It would be relevant to note that the charge under Section 379/34 IPC was framed against the Petitioner on 14th November, 2000 and the matter was listed for prosecution evidence on 28th November, 2000. On this date PW1 and PW2 were examined by the Learned Trial Court

and were discharged, PW1 was not cross examined whereas PW2 was cross examined by a legal aid counsel. Thereafter on 17th January, 2001 PW3 was examined and discharged. No counsel for the petitioner was present on the said date. PW4 was examined and discharged on 31st January, 2001. On 14th February, 2001 the petitioner was once again unrepresented by any counsel, when PW5 was examined and discharged. Learned Metropolitan Magistrate noted that all the prosecution witnesses stood examined and therefore closed the prosecution evidence. The matter was thereafter listed for recording of statement of accused. On 12th March, 2001, the statement of accused persons was recorded. The matter was then listed for arguments on 21st March, 2001, when an application under Section 311 Cr.P.C was filed by the counsel for accused/ Petitioner for recalling of PW1 and PW2 as their cross-examination could not be done on 28th November, 2000. Learned Trial Court vide order dated 21st March, 2001 allowed the application and the matter was listed for cross examination of all witnesses on 18th April, 2001. On the said date no witness was present for cross examination. Thereafter on several occasions the witnesses were summoned but none was present for cross-examination. On 19th September, 2002 PW 2 was cross examined and discharged. None of the other witnesses have been cross examined and the order sheets do not indicate why the remaining witnesses were not available for cross-examination. Though it is noted that on 20th February, 2003 fresh statement of accused has been recorded but there is no other statement of accused available on record other than the one recorded on 12th March, 2001.Thereafter on 30th April, 2008 Learned trial court passed the judgment convicting the petitioner.

6. A perusal of the statements of the prosecution witnesses and the statement of accused shows that the manner in which the statements were recorded was most unsatisfactory and perfunctory. During the entire trial the petitioner is either not represented by a lawyer or has been represented by some legal aid counsel who has not cross examined the witnesses. Also when the witnesses were recalled for cross examination only one appeared and there is nothing on record to show as to what steps were taken by the court to ensure the presence of other witnesses. The entire trial conducted by the learned Trial Judge seems to be an idle formality.

7. Before proceeding further it would be relevant to reproduce the statement of accused recorded by the trial court:

"Statement of accused Prem Kumar s/o Man Bahadur:

The memorandum of substance of prosecution evidence is put to you accused that on 27/8/2000 you accused were seen by Ct. Manmohan on hearing the noise of khat khat on the roof of barrack no. 5 and when he had gone to take a morning walk and say both of you accused while stealing the brass chadar and rod from Solar System installed on the roof of the said barrack and he also saw you accused putting the same in the gunny bag while you were in the process of taking away the said stolen property while you accused Jawahar Singh was having one gunny bag in your hand whereas the other accused Prem was receiving small plastic bag containing two screw drivers, one plas, two aris and one key and one reti and in the gunny bag there were chadar of brass and rod made of brass weighing about 10 kgs. On alarm being raised the residents of the barrack also came there. Police was informed. Statement of complainant Ex.PW-1/A was recorded on the basis of which FIR Ex. PW-4/A was recorded by ASI Renu on ruka sent by HC Pushpinder through Ct. Avadh Bihari. The sanction by the competent authority for installation of the solar system is Ex.PW3/A. Chadar and pipe made of brass were taken into possession vide Ex. PW-1/B. Ari and screw drivers were taken into possession vide Ex.PW-1/C. Jamatalashi of the accused are Ex.PW-1/D and Ex.PW-1/E respectively and the said articles are Ex.PW-1 to P-7. IO prepared site plan Ex.PW5/B at the instance o the complainant. IO also made the endorsement on the statement of the complainant Ex.PW-1/A and sent the same through Ct. Avadh Bihari for the registration of the case to which accused stated that case is false. PWs have deposed falsely. I do not want to lead defence evidence.

8. The manner in which the statement of accused is recorded is perverse as it cannot made out whether any incriminating circumstance has been put to the accused and what answer the accused has given for the questions. The linchpin of Section 313 Cr.PC is the opportunity to 'explain any circumstances appearing in the evidence against him'. This means that every circumstance from which the Court would draw the

inference of guilt against the accused has to be put to the accused. It is the duty of the Trial Judge to question the accused properly and fairly, bringing home to the mind of the accused, in simple and clear language, the exact case he has to meet and each material point that is sought to be used against him and of affording him a chance to explain it if he can and so desires.

9. The opportunity granted under Section 313 Cr.P.C. must be real and not illusionary. Questions must be so framed as to give to the accused clear notice of the circumstances relied upon by the prosecution, and an opportunity to render such explanation as he can of that circumstance. Each question must be so farmed that the accused can understand it and appreciate what use the prosecution desires to make of the same against him.

10. The Courts employ the concept of prejudice to aid in remedying the injustice. The prejudice in the present case is apparent and grave. The manner in which the trial is conducted in the present case is not a mere irregularity but illegality and the error on part of the trial Judge in not examining the accused persons strictly in compliance to Section 313 Cr.P.C. and not giving the right to cross-examine the witnesses is grave which has resulted in causing material prejudice to the petitioner.

11. In view of the facts that the Petitioner has already faced the ordeal of trial, appeal and the present revision for the last 11 years, I am of the opinion that no useful purpose would be served in remanding the matter back for fresh trial. Even on consideration of facts on record the Learned Additional Sessions Judge thought it fit to release the Petitioner on probation. Consequently, the judgments dated 18th March, 2009 by the Learned Additional Sessions Judge and 30th April, 2008 of the Learned Metropolitan Magistrate are set aside and the Petitioner is acquitted of the charges framed.

12. Petition stands disposed of.

ILR (2012) I DELHI 699
ITA

THE COMMISSIONER OF INCOME TAX DELHI IV **....APPELLANT**

VERSUS

I.P. INDIA PVT. LTD. **....RESPONDENT**

(SANJIV KHANNA & R.V. EASWAR, JJ.)

ITA. NO. : 1192/2011 **DATE OF DECISION: 21.11.2011**

Income Tax Act, 1961—Section 260A—Assessee a private limited company—Assessing Offiicer while computing assessment u/s 143(3) made observation that assessee received share application money in cash from three private limited company in violation of section 269SS and therefore, should be treated as deposits and as a consequence of that liable for penalty under Section 271D—Plea raised by the assessee that the share application monies received by the Company pending allotment of shares do not amount to loan or deposit, accepted by CIT(A) and Tribunal—Appeal preferred by Revenue—Held, there is a distinction between loan and the deposit—In case of loan ordinarily the duty of the debtor is to seek out the creditor and to repay the money—A loan grants temporary use of money or temporary accommodation, whereas in case of deposits it is generally the duty of the depositor to go to the bank or the depositee and make a demand for it and the essence of the deposit is that there must be a liability to return it the party by whom the deposit was made on fulfillment of certain conditions—Receipt of share of application monies from the three private limited companies for allotment of shares in the assessee company cannot be treated as receipt of loan or deposit—Appeal declined to be admitted.

On a careful consideration of the matter, we find that the AO has relied on the judgment of the **Jharkhand High Court** (supra) and referred the issue of levying penalty to the Additional CIT. He did not examine whether the share application monies can be treated as "loan" or "deposit" within the meaning of Section 269SS. The Additional CIT has merely endorsed the view of the AO in passing the penalty order. The CIT(A) has found as a fact that the shares were subsequently allotted to the applicant-companies as shown by the form filed before the Registrar of Companies. Neither the AO nor the Additional CIT has taken the trouble to examine this aspect while imposing the penalty. They have merely relied on the judgment of the Jharkhand High Court (supra). The reliance on this judgment appears to us to be misplaced. In **Baidya Nath Plastic Industries (P) Ltd. and Ors vs K.L. Anand** (1998) 230 ITR 522, a learned Single Judge of this court pointed out that the distinction between a loan and a deposit is that in the case of the former it is ordinarily the duty of the debtor to seek out the creditor and to repay the money according to the agreement while in the case of a deposit it is generally the duty of the depositor to go to the banker or to the depositee, as the case may be, and make a demand for it. This judgment was approvingly cited by a Division Bench of this court in **Director of Income Tax (Exemption) vs ACME Educational Society** (2010) 326 ITR 146 (Del). In this decision, it was held that a loan grants temporary use of money, or temporary accommodation, and that the essence of a deposit is that there must be a liability to return it to the party by whom or on whose behalf it has been made, on fulfillment of certain conditions. If these tests are applied to the facts of the case before us, it may be seen that the receipt of share application monies from the three private limited companies for allotment of shares in the assessee-company cannot be treated as receipt of loan or deposit. In any case, the Tribunal has rightly noticed the cleavage of

judicial opinion on the point and held that in that situation there was reasonable cause u/S.273B, applying the judgment of the Supreme Court in **Vegetable Products** (supra).

(Para 8)

Important Issue Involved: The receipt of share application money cannot be treated as receipt of loan or deposit and, therefore, not covered under Section 269 SS of the Income Tax Act.

[La Ga]

APPEARANCES:

FOR THE PETITIONER : Mr. Sanjeev Sabharwal, Advocate.

FOR THE RESPONDENT : Mr. S. Krishnan, Advocate.

CASES REFERRED TO:

1. *Director of Income Tax (Exemption)* vs. *ACME Educational Society* (2010) 326 ITR 146 (Del).
2. *Commissioner of Income Tax* vs. *Rugmini Ram Ragav Spinners (P) Ltd.* (2008) 304 ITR 417.
3. *Baidya Nath Plastic Industries (P) Ltd. and Ors.* vs. *K.L. Anand* (1998) 230 ITR 522.
4. *CIT* vs. *Vegetable Products Ltd.* (1973) 88 ITR 192 (SC).

RESULT: Appeal Dismissed.

R.V. EASWAR, J.

1. This is an appeal filed by the Revenue under Section 260A of the Income Tax Act (Act, for short) against the order dated 31st March, 2011 of the Income Tax Appellate Tribunal (Tribunal, for short) in ITA 226/Del./2011 relating to the assessment year 2005-06. The following questions of law, stated to be substantial questions of law have been raised in the appeal :

"2.1 Whether learned ITAT/CIT(A) erred in deleting the penalty of Rs.18,00,000/- imposed by the Assessing officer under Section 271D of the Income Tax Act, 1961?

2.2 Whether ITAT was correct in law in holding that the share application money received in cash is not violation of section 269SS attracting penalty under section 271D of the Income Tax Act, 1961?

2.3 Whether the decision of the Hon'ble Jharkhand High Court in the case of M/s Bhalotia Engineering Works Pvt. Ltd. reported at 275 ITR 399 is not applicable in the present case?

2. The respondent assessee is a private limited company. While completing the assessment under Section 143(3) of the Act, the Assessing Officer observed that the assessee received share application monies in cash from three private limited companies as follows :

Sl. No.	Name of the person from whom Share Application Money received	Share Application Money received in "Cash" (in Rs.)
1.	M/s Shekhawat Vanijya Vikas Pvt. Ltd.	6,00,000/-
2.	Udaipuria Commodities Pvt. Ltd.	7,00,000/-
3.	Veena Merchants Pvt. Ltd.	5,00,000/-

3. On the ground that the provisions of Section 269SS of the Act are attracted to the receipt of the above monies in cash, the Assessing Officer was of the view that the assessee was liable to be proceeded against for levy of penalty under Section 271D. He referred to the judgment of the High Court of Jharkhand in **M/s Bhalotia Engineering Works Pvt. Ltd.** (2005) 275 ITR 399 where it was held that receipt of share application monies in cash, in violation of Section 269SS of the Act should be treated as "deposits" with the consequence that the assessee would be liable for penalty under Section 271D. In this view of the matter, he referred the matter to the Additional Commissioner of Income Tax, Range 11, New Delhi, who was the appropriate authority to levy the penalty. Before the Additional Commissioner of Income Tax, the assessee submitted a written reply dated 1st August, 2008 and contended that there was no violation of the provisions of Section 269SS as it had

not accepted any loan or deposit in cash. It was claimed that the receipt of share application monies in cash did not amount to acceptance of loan or deposit by the company. These submissions were, however, rejected by the Additional Commissioner of Income Tax, who by a brief order dated 28th August, 2008 imposed the penalty of Rs.18,00,000/- under Section 271D.

4. The assessee filed an appeal before the CIT(A) repeating the arguments advanced before the Additional Commissioner of Income Tax. In addition, the assessee relied on the judgment of the Madras High Court in **Commissioner of Income Tax Vs. Rugmini Ram Ragav Spinners (P) Ltd.** (2008) 304 ITR 417 where it was held that the money in cash by a company towards allotment of shares, was neither a loan nor a deposit. The CIT(Appeals) considered the submissions of the assessee in detail and held that there was no violation of Section 269SS since the share application monies received by the assessee company would not amount either to a loan or a deposit within a meaning of Section 269SS. He further noted that the shares have in fact been subsequently allotted to the three companies, who advanced the monies to the assessee. In this view of the matter he cancelled the penalty and allowed the assessee's appeal.

5. The Revenue filed an appeal before the Tribunal. The Tribunal in para 6 of its order noted that there was a cleavage of judicial opinion on the question whether the share application monies could be treated as a deposit or loan within the meaning of Section 269SS as could be seen from the judgments of the **Jharkhand and Madras High Court** (supra) and in view of the divergence of judicial opinion, the assessee's plea to the effect that receipt of monies in cash against allotment of shares cannot termed as loans or deposits would be sufficient to drop the penalty. In this behalf the Tribunal relied on the judgment of the Supreme Court in **CIT vs. Vegetable Products Ltd** (1973) 88 ITR 192 (SC) in which it was held that if the Court finds that a taxing provision or penalty provision is ambiguous or can give rise to more than one meaning, then it should adopt that meaning which favours the assessee. Relying on this judgment of the Supreme Court, the Tribunal held that since there was more than one view on the applicability of Section 269SS to monies received as share application monies, the CIT(Appeals) had rightly cancelled the penalty. The appeal filed by the Revenue was thus dismissed.

6. The revenue has raised the questions of law extracted above. The facts are not in dispute. On these facts, the question is whether any substantial question of law arises from the order of the Tribunal cancelling the penalty.

7. Section 269SS prohibits any person from accepting a loan or deposit in cash exceeding Rs.20,000 in the aggregate in a year from a third person. If there is any violation, the person receiving the loan or deposit will be liable to penalty u/S.271D in an amount equal to the amount of the loan or deposit. A loan or deposit is defined in the Explanation below Sec.269SS as a "loan or deposit of money". The assessee's contention, accepted both by the CIT(A) and the Tribunal, is that share application monies received by a company, pending allotment of shares, do not amount to loan or deposit.

8. On a careful consideration of the matter, we find that the AO has relied on the judgment of the **Jharkhand High Court** (supra) and referred the issue of levying penalty to the Additional CIT. He did not examine whether the share application monies can be treated as "loan" or "deposit" within the meaning of Section 269SS. The Additional CIT has merely endorsed the view of the AO in passing the penalty order. The CIT(A) has found as a fact that the shares were subsequently allotted to the applicant-companies as shown by the form filed before the Registrar of Companies. Neither the AO nor the Additional CIT has taken the trouble to examine this aspect while imposing the penalty. They have merely relied on the judgment of the Jharkhand High Court (supra). The reliance on this judgment appears to us to be misplaced. In **Baidya Nath Plastic Industries (P) Ltd. and Ors vs K.L. Anand** (1998) 230 ITR 522, a learned Single Judge of this court pointed out that the distinction between a loan and a deposit is that in the case of the former it is ordinarily the duty of the debtor to seek out the creditor and to repay the money according to the agreement while in the case of a deposit it is generally the duty of the depositor to go to the banker or to the depositee, as the case may be, and make a demand for it. This judgment was approvingly cited by a Division Bench of this court in **Director of Income Tax (Exemption) vs ACME Educational Society** (2010) 326 ITR 146 (Del). In this decision, it was held that a loan grants temporary use of money, or temporary accommodation, and that the essence of a deposit is that there must be a liability to return it to the party by whom or on whose

behalf it has been made, on fulfillment of certain conditions. If these tests are applied to the facts of the case before us, it may be seen that the receipt of share application monies from the three private limited companies for allotment of shares in the assessee-company cannot be treated as receipt of loan or deposit. In any case, the Tribunal has rightly noticed the cleavage of judicial opinion on the point and held that in that situation there was reasonable cause u/S.273B, applying the judgment of the Supreme Court in **Vegetable Products** (supra).

9. We are accordingly of the view that no substantial question of law arises from the order of the Tribunal. We decline to admit the appeal. The same is dismissed with no order as to costs.

ILR (2012) I DELHI 705
LPA

SHRI MOHAN SINGH ....APPELLANT

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

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

LPA NO. : 967/2011 DATE OF DECISION: 22.11.2011

Constitution of India, 1950—Article 226—Petitioner/ Appellant Licensee of a shop and also of an area behind the shop containing all drainage including gully traps and manholes with underground drainage pipeline for waste water to be taken to municipal drains—License cancelled in respect of the said area behind the shop because of the Petitioner/Appellant not providing access through his shop to the said area as per the term of the license—During submissions it was urged on behalf of the petitioner / Appellant that Petitioner was willing to give undertaking to provide access to the said area for maintenance, cleaning etc.—Held, location of the area shows that it was a common area within the meaning of Delhi Apartments Ownership Act, 1986—Though this was not the reason for the cancellation of the license but the Court in exercise of powers under Article 226 of the Constitution of India, cannot grant relief contrary to law—It being the common area Court can not confer an exclusive right in respect of the said area to the Petitioner / Appellant.

As far as the latter of the aforesaid submissions is concerned, though undoubtedly the Division Bench towards the end of the order dated 21st September, 2007 had clarified that the observations would not come in the way of a decision pursuant to the show cause notice but the fact remains that what was observed therein remains relevant in the decision pursuant to the show cause notice also. The reply by the appellant to the show cause notice does not contain anything for what was observed earlier to be not relevant today. We have examined the sketch plan of the market. The location of the subject quadrangle is undoubtedly as of a common area within the meaning of the Delhi Apartments Ownership Act, 1986. The senior counsel for the appellant has of course contended that the licence has not been revoked for the said reason and we, not to be guided by the reasons which did not prevail with the respondents for revoking the licence. However this Court while exercising powers under Article 226 of the Constitution of India cannot give any direction or relief contrary to the law. Once the nature of the said quadrangle is found to be as of a common area, over which all the occupants/users of the market have a right, then this Court cannot confer any exclusive right in the appellant who is occupant of the one of but several shops in the market and vesting of which rights would definitely have an impact on the rights of the other occupants thereof. We are rather surprised at the grant of exclusive licence by the respondents with respect to the said common area.

(Para 6)

Though in view of the above, the grounds for which the licence was revoked are irrelevant but we may observe that considering common nature of the said quadrangle and the implicit need for 24 hour access thereto to all the occupants of the market, grant of exclusive licence with respect thereto to one or two occupants only is bound to interfere with the needs of others. This Court would not grant such an order which cannot be enforced and/or which may cause prejudice to others. The Court is not in a position to supervise the uninterrupted access by the appellant as is sought to be undertaken before this Court and imposing any such condition is likely to lead to multiplicity of litigation.

(Para 7)

Important Issue Involved: In exercise of powers under Article 226 of the Constitution Court cannot grant relief contrary to law though its violation may not have been the reason for the Petitioner to approach the Court for relief.

[La Ga]

APPEARANCES:

FOR THE APPELLANT : Mr. Neeraj Kishan Kaul, Sr. Advocate with Mr. Rajendra Singhvi, Mr. K.K.L Gautam & Mr. Anil A. Batra, Advocate.

FOR THE RESPONDENTS : Mr. R.V. Sinha & Mr. A.S Singh, Advocate.

RESULT: Appeal Dismissed.

RAJIV SAHAI ENDLAW, J.

1. The appellant had filed W.P.(C) No.4179/2007 impugning the order dated 11th May, 2007 of the Director of Estates, Govt. of India revoking the license earlier granted to the appellant in respect of Quadrangle No. IV, Mohan Singh Market, INA, New Delhi. The learned Single Judge has vide impugned judgment dated 10th August, 2011 dismissed the writ

petition holding:-

i. That there was no illegality, irrationality or arbitrariness in the decision of revocation of license;

ii. That the earlier W.P.(C) No. 17550/2004 preferred by the appellant impugning the show cause notice issued before the order of cancellation had been dismissed and the appeal being LPA No.393/2006 preferred by the appellant thereagainst had also been dismissed vide order dated 21st September, 2007 and reasons given therein were also applicable to the challenge to the order ultimately passed of revocation of licence;

iii. That the petitioner as a licencee in any case had no right to the Quadrangle No. IV and the licence by its very nature was revocable.

Aggrieved therefrom the present appeal has been preferred.

2. We may notice that Mohan Singh Market is in the shape of a quadrangle with the shops opening in covered verandah all around the market and with their rear towards a "small central quadrangle". The appellant is a licencee of shop No.207 in the said market. He/his father were given licence with respect to the "small central quadrangle" known as Quadrangle No. IV behind their shop and which licence of the quadrangle alone has now been cancelled. The lincence with respect to the shop No.207 subsists. It is not in dispute that the said quadrangle contains all drainage including gully traps and manholes with underground drainage pipelines from where the waste water is taken out to the Municipal drains. The order dated 21st September, 2007 dismissing the LPA No.393/2006 (earlier preferred by the appellant challenging the show cause notice and seeking a direction for grant of ownership rights in the said quadrangle) records that the quadrangle was in fact a service area for all the shops in the market and if the ownership rights with respect thereto are given to one person or if the same is blocked from all sides, the quadrangle area will not be available for maintenance when it was a common area for circulation/ventilation.

3. The licence earlier granted to the appellant of the said quadrangle has been cancelled on the ground that though the appellant as a term of the licence was required to provide access through his shop to the said

quadrangle for carrying out of the common maintenance but had blocked the entire area of quadrangle in such as way that the maintenance and cleaning work thereof could not be carried out.

4. The senior counsel for the appellant has vehemently contended that the ground for revocation of the licence is erroneous; the appellant never deprived access to the said quadrangle for maintenance, cleaning etc. and has rather repeatedly offered and undertaken that he is willing therefor. It is urged that the appellant even now is willing to give an undertaking in this regard as may satisfy this Court and/or the respondents. It is contended that the learned Single Judge has not noticed the said aspect and has wrongfully dismissed the writ petition.

5. The senior counsel for the appellant with respect to the observations aforesaid in the order dated 21st September, 2007 in LPA No.393/2006 earlier preferred by the appellant contends that the said LPA was concerned with the show cause notice then issued and any observations therein would have no relevance to the final order of cancellation. It is further contended that the appellant was then, also claiming ownership rights with respect to the said quadrangle in accordance with the policy of the respondents but is now not claiming any ownership rights and is confining the claim only to the continuance of the licence and which has been revoked for wrongful reasons. It is further contended that the Division Bench had categorically observed in the order dated 21st September, 2007 that the observations therein would not influence final order passed pursuant to the show cause notice then under challenge.

6. As far as the latter of the aforesaid submissions is concerned, though undoubtedly the Division Bench towards the end of the order dated 21st September, 2007 had clarified that the observations would not come in the way of a decision pursuant to the show cause notice but the fact remains that what was observed therein remains relevant in the decision pursuant to the show cause notice also. The reply by the appellant to the show cause notice does not contain anything for what was observed earlier to be not relevant today. We have examined the sketch plan of the market. The location of the subject quadrangle is undoubtedly as of a common area within the meaning of the Delhi Apartments Ownership Act, 1986. The senior counsel for the appellant has of course contended that the licence has not been revoked for the said reason and we, not to be guided by the reasons which did not prevail with the respondents for

revoking the licence. However this Court while exercising powers under Article 226 of the Constitution of India cannot give any direction or relief contrary to the law. Once the nature of the said quadrangle is found to be as of a common area, over which all the occupants/users of the market have a right, then this Court cannot confer any exclusive right in the appellant who is occupant of the one of but several shops in the market and vesting of which rights would definitely have an impact on the rights of the other occupants thereof. We are rather surprised at the grant of exclusive licence by the respondents with respect to the said common area.

7. Though in view of the above, the grounds for which the licence was revoked are irrelevant but we may observe that considering common nature of the said quadrangle and the implicit need for 24 hour access thereto to all the occupants of the market, grant of exclusive licence with respect thereto to one or two occupants only is bound to interfere with the needs of others. This Court would not grant such an order which cannot be enforced and/or which may cause prejudice to others. The Court is not in a position to supervise the uninterrupted access by the appellant as is sought to be undertaken before this Court and imposing any such condition is likely to lead to multiplicity of litigation.

8. The licence of the said quadrangle cannot also be equated to the licence with respect to a shop. Though the appellant may be correct in contending that the appellant in the matter of grant of a licence with respect to the shop cannot be discriminated qua others similarly placed but the licence with respect to the quadrangle stands on a different footing. The beneficiaries of the said licence were not all shopkeepers but only a select few. For this reason also we are of the view that no error can be found in the action of revocation of such a licence.

9. There is no merit in the appeal; the same is dismissed.

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CRL.L.P.

CUSTOMS **....PETITIONER**

VERSUS

MOHAMMAD BAGOUR **....RESPONDENT**

(SURESH KAIT, J.)

CRL.L.P NO. : 284/2011 & 275/2011 **DATE OF DECISION: 25.11.2011**

Narcotic Drugs & Psychotropic Substances Act, 1985—Section 21, 23, 28, 50, 57, 67—Customs Act, 1962—Section 120—Respondents were apprehended on their arrival IGI Airport on suspicion of carrying some contraband substance—Notice under Section 50 of The Act and under Section 120 of Customs Act served upon them giving them an option to get themselves and their baggage searched before Gazetted Officer of Customs or a Magistrate—Respondents did not know either Hindi or English language, thus an official from KAM Airlines who knew language of Respondents, explained contents of notices to them—On Knowing contents, Respondents opted search by Custom Officer—On search of baggage, Heroin was found concealed in bottom portion of bag in cotton cloth belt—After fulfilling requirements of Act, Respondents were charge sheeted for offences punishable under Section 21, 23 & 28 of Act—On conclusion of trial, they were acquitted after finding lacunas in prosecution case and procedural safeguards contained in Section 50 of Act were not adhered to—Appellant challenged acquittal in appeal—It was urged on behalf of appellant that notice under Section 50 of Act was not required to be served upon Respondents as recovery was

effected from hand bag and not from his person—Held:- Provisions of Section 50 of NDPS Act, are mandatory and non compliance renders recovery of illicit article suspect—Thus, non compliance of these provisions is viewed seriously and adverse inference is drawn against prosecution, particulary, when accused has denied that he has served any such notice and it has created doubt with regard to truthfulness of prosecution witnesses.

As far as notice under Section 50 of NDPS is concerned, Hon.ble Supreme Court in **Narcotics Central Bureau v. Sukh Dev Raj Sodhi** 2011 VII AD (SC) 27 has held in para nos.5 & 6 as under:

> "5. The obligation of the authorities under Section 50 of the NDPS Act has come up for consideration before this court in several cases and recently, the Constitutional Bench of this Court in the case of **Vijaysingh Chandubha Jadeja v. State of Gujarat** [(2011) 1 SCC 609] has settled this controversy. The Constitution Bench has held that requirement of Section 50 of the NDPS Act is a mandatory requirement and the provision of Section 50 must be very strictly construed".

> "6. From the perusal of the conclusion arrived at by this court in Vijaysingh Chandubha Jadeja's case it appears that the requirement under Section 50 of the NDPS Act is not complied with by merely informing the accused of his option to be searched either in the presence of a gazette officer or before a Magistrate. The requirement continues even after that and it is required that the accused person is actually brought before the gazetted officer or the Magistrate and in Para 32, the Constitution Bench made it clear that in order to impart authenticity, transparency and creditworthiness to the entire proceedings, an endeavour should be made by the prosecuting agency

to produce the suspect before the nearest Magistrate". **(Para 30)**

Importent Issue Involved: Provisions of Section 50 of NDPS Act are mandatory and non compliance renders recovery of illicit article suspect—Thus, non compliance of these provisions is viewed seriously and adverse inference is drawn against prosecution, particulary, when accused has denied that he has served any such notice and it has created doubt with regard to truthfulness of prosecution witnesses.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. P.C. Aggarwal & Mr. Sunder Lal Advocates.

FOR THE RESPONDENT : Mr. Yogesh Sexena Advocate.

CASES REFERRED TO:

1. *Vijaysingh Chandubha Jadeja* vs. *State of Gujarat* [(2011) 1 SCC 609].
2. *Narcotics Central Bureau* vs. *Sukh Dev Raj Sodhi* 2011 VII AD (SC) 27.
3. *Vijaysingh Chandubha Jadeja* vs. *State of Gujarat* 2010(4) LRC 225 (SC).
4. *Ajmer Singh* vs. *State of Haryana* 2010(1) LRC 278 (SC).
5. *Union of India* vs. *Balmukand & Ors.* 2009(2) Crimes 171 SC.
6. *Union of India* vs. *Shah Alam and Anrs.* reported in 2009 (3) RCR (Criminal)
7. *State of Haryana* vs. *Mai Ram, Son of Mam Chand* 2008(3) JCC (Narcotics) 188.
8. *Madan Lal* vs. *State of Himachal Pradesh* (2003) Crl.L.J. 3868.

9. *Kuldeep Singh* vs. *NCB* 2000(1) JCC Delhi 74.
10. *State of Punjab* vs. *Baldev Singh* JT 1999(4) SC 595.

RESULT: Petitions dismissed.

SURESH KAIT, J. (Oral)

1. Since the facts and the law involved in both the cases are similar, therefore both the petitions are being taken to deliver common judgment. The case of Mohammad Bagour is being taken as a lead case.

2. Vide the instant petition, the petitioner has challenged the impugned order dated 26.03.2011, whereby Ld. Special Judge, NDPS, Dwarka Court, New Delhi has acquitted the respondent / accused from the charges.

3. The case in brief is that on 18.10.2007, accused arrived at IGI Airport by KAM Air-flight No. RQ-0013 holding Passport No. OR686259 dated 13.05.2006. He was carrying only handbag and was not having any checked in baggage. Surveillance was kept on him in the arrival Hall at IGI Airport on the suspicion that he may be carrying some contraband substance. He was stopped near exit Gate of Arrival Hall after crossing the green channel and was asked by the Custom Officers as to whether he was carrying any goods, to be declared to customs, but he replied that he was carrying only personal effects. Thereafter, he was specifically asked whether he was carrying any contraband goods, but he denied. Mr. Ganpat Singh, (ACO) was not satisfied with his reply and he called two independent witnesses to join and in their presence, respondent / accused was again asked whether he was carrying any goods or contraband goods to be declared to customs, but he claimed to be carrying only personal effects. Thereafter notice under Section 50 of NDPS as well as Section 120 of Customs Act was served upon the respondent / accused that he had an option to get the examination of his baggage and personal search conducted before a Gazetted Officer of Customs or a Magistrate. Since the respondent / accused did not know either Hindi or English Language, as such one Burham Ahmedi, an official from KAM Airlines, who knew language of the respondent, was asked to make him understand the contents of the notice. The said Burham Ahmedi explained to him the contents of the notice. He expressed that he had no objection if any Custom Officer searched him or his Baggage.

The respondent produced his travel documents i.e. the Boarding Card and Afghan Passport. He was taken to Customs Preventive Room in the Arrival Hall for further examination. The handbag carried by the respondent / accused was checked in the presence of Panch Witness, which was found containing cloths and personal effects. The bag was emptied of its content and the bottom portion of the bag was then cut opened and a white colour stitched cotton cloth belt with velcro having four partitions was detected, which was pricked with the help of a needle and white powder oozed out of the same, suspected to be some Narcotics substance. Respondent / accused was asked about the substance and he affirmed that it was Narcotic Substance.

4. It is further alleged that after removing the stitches of cotton belt, 4 packets wrapped with yellow adhesive tape were recovered, which were given Mark E,F,G and H respectively and were found containing off- white Powder which was tested with the field test kit and found positive for 'Heroin'.

5. The contents of each bag were weighed and were found to be 600 grams, 1263 grams, 1279 grams and 1159 grams. respectively, the total weight being 4301 grams.

6. Thereafter, the said substance was seized as per procedure. Three representatives sample of 5 grams each were drawn from the contents of each of the pocket and were given Mark E-1,E-2,E-3,F-1,F-2,F-3,G-1,G-2,G-3 and H-1,H-2 and H-3 and were kept in 12 poly packs and further placed in 12 brown envelops sealed with custom seal no. 6' over label bearing the details of the contents, the signatures of Panch Witness, respondent / accused and the complainant.

7. The remaining substance was kept in four separate plastic bags of flamingo duty free and then kept in plastic containers which were wrapped with off White cloth separately and were given Mark-E,F,G and H and were sealed with customs seal no.6 over label bearing the details of the contents, the signatures of the Panch Witness, respondent / accused and the complainant.

8. The statement of the respondent was recorded under Section 67 NDPS Act on 09.10.2007 wherein he admitted the recovery of contraband

from his possession. The respondent / accused was arrested under the Provisions of NDPS Act. Thereafter, report under Section 57 NDPS Act was sent by the complainant to Sh. Sanjeev Jain, ACS on 09.10.2007.

9. After sending the information to various authorities by the Assistant Commissioner Preventive on 09.07.2007 regarding the Heroin and arrest of the accused on 10.10.2007, the representative samples Mark E-1, F-1, G-1 and H-1 along with test memo in triplicate were deposited in CRCL by the Complainant along with forwarding letter duly signed by the ACS. Vide test report F.No.1/ND/R/2007/CLD – 493 to 496 (N) dated 21.11.2007 of CRCL, it was opined that on analysis the sample Mark E-1, F-1, G-1 and H-1 answered positive as 'Diacetylmorphine'. The remaining samples were again sent to CRCL on 15.02.2008 through Sh. Ashok Kumar (ACO) for determining the purity percentage. Fresh report dated 05.03.2008 was received in this regard from CRCL and from the same, the purity in sample Mark E-1, F-1,G-1 and H-1 was found to be as follows:-

Mark	Percentage DAM (Heroin)
E1	37.6
F1	40.7
G1	39.7
H1	39.2

10. After completion, the case against the respondent / accused as filed under Section 21, 23 and 28 NDPS Act. On the basis of the material available on record charge was also framed under the aforementioned provisions, to which he plead not guilty and claimed trial.

11. The prosecution in support of its case has examined 7 witnesses.

12. After hearing both the parties, ld. Trial Judge passed his judgement on the basis of evidence on record that admittedly accused was intercepted at IGI Airport on his arrival from Afghanistan. However, it is denied by him that any incriminating substance was recovered from his possession. To prove the recovery of the contraband from the possession of the accused the prosecution has examined only PW-5, who is the complainant/ seizing / arresting officer in the present case. In his testimony he deposed

about interception of respondent / accused at IGI Airport which is admitted by the respondent / accused. The said witness testified about service of notice U/s 50 NDPS Act upon the respondent / accused. He testified that thereafter the hand bag of the accused was checked and was found containing at its bottom portion, white colour cotton cloth stitched velcro belt which was found containing one small and three big packets containing substance suspected to be Heroin, However, his aforesaid testimony has not been corroborated by any independent evidence as both the panch witnesses and even Burhan Ahmadi who could have supported his testimony in this regard being the interpretor in whose presence all the proceedings were conducted, have not been examined by the prosecution and these witnesses were dropped on the request of Ld. SPP for Customs.

13. It is further recorded that though non-examination of independent witnesses by itself does not become fatal to the prosecution. However, it has to be appreciated differently in the facts and circumstances of each case. So far the present case is concerned, prosecution itself has claimed that the accused was not aware of Hindi or English language and as such Burhan Ahmadi who was acquainted with Afghani language i.e. Dari and Farsi was joined in the proceedings to explain notice U/s 50 NDPS Act and notice U/s 102 Customs Act upon the accused, to explain panchnama proceedings to the accused and to record his statement U/s 67 NDPS Act. The non-examination of Burhan Ahmadi effects the prosecution case adversely as it was only this witness who could have explained to the court the manner in which both the notices U/s 50 NDPS Act and U/s 102 Customs Act were served upon the respondent / accused.

14. Ld. Trial Judge has also recorded that the offence under NDPS Act is a grave one. Procedural safeguards provided to the accused under a statute require strict compliance. Section 50 NDPS Act provides an extremely valuable right to the concerned person/ suspect to get his person searched in presence of a Gazetted Officer or a Magistrate. The compliance with the procedural safeguards contained in Sec. 50 of NDPS Act, is intended to protect a person against false accusation and frivolous charges, as also to lend creditability to the search and seizure conducted by the empowered officer. The search before a Gazetted Officer or a Magistrate would impart much more authenticity and credit worthiness to the search and seizure proceeding and it would also strengthen the prosecution case. It is the duty of the empowered officer to inform the

concerned person/ suspect of the existence of his right to have his search conducted before a Gazetted Officer or by a Magistrate, so as to enable him to avail of that right. The prosecution must at the trial establish that the empowered officer had conveyed the information to the concerned person of his/ her right of being searched before the Magistrate or a Gazetted Officer at the time of intended search.

15. Learned Trial Judge has relied upon on the judgment of Hon.ble Supreme Court in **State of Punjab v. Baldev Singh** JT 1999(4) SC 595 that courts have to be satisfied at the trial of the case about due compliance with the requirements provided in Sec. 50 NDPS Act, that no presumption U/s 54 NDPS Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the court that the requirements of Sec. 50 were duly complied with. It is held that the safeguard or protection to be searched in presence of a Gazetted Officer or a Magistrate has been incorporated in Sec. 50 of NDPS Act to ensure that persons are only searched with a view to maintain veracity of evidence derived from such search. The severe punishments have been provided under the Act for mere possession of illicit drugs and narcotics substances. Personal search, more particularly for offences under the NDPS Act are crucial means of obtaining evidence of possession and it is, therefore, necessary that the safeguards provided in Sec. 50 of the Act are observed scrupulously. It was further held that provisions of sub section (1) of Section 50 of NDPS Act, make it imperative for the empowered officer to inform the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a Gazetted Officer or a Magistrate and failure to "inform" the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act.

16. The Apex Court also noted that in case of **Baldev Singh** (Supra) it was not necessary that the information required to be given under Section 50 of NDPS Act, should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the

existence of his right to be searched before a Gazetted officer or a Magistrate, if so required by him.

17. The Trial Judge has also referred the case of **Vijaysinh Chandubha Jadeja v. State of Gujarat** 2010(4) LRC 225 (SC) wherein it was held that:

> "The object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz., to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. The obligation of the authorised officer under subsection (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance."

18. So far as the present case is concerned, as per the prosecution, notice U/s 50 NDPS Act was served upon the respondent/ accused with the help of interpretor Borhan Ahmadi as the accused had language problem and was unable to understand the Hindi and English language. PW 5 testified in his chief examination that in the presence of panch witnesses he had disclosed to the accused that he had the option that the search of his baggage and himself could be conducted before a Magistrate or a Gazetted officer of a Custom officer to which he told that he did not know Hindi and English language. However, he understood the Farsi and Dari languages. He stated that by the expression of respondent/ accused he came to know that he did not know Hindi or English language and knew only Dari and Farsi languages and one person namely Borhan Ahmadi was called from KAM Airline who was acquainted with Dari and Farsi languages, to translate the proceedings to the accused in his own language. On his request Borhan Ahmadi explained the contents of both the notices to the accused and informed him that he had option to get search of his baggage or his person in the presence of a Magistrate or a Gazetted Officer of customs and accused told Borhan Ahmadi that he had no objection if any custom officer took the search of his person or his baggage. Thereafter the signatures of both the panch witnesses, accused and Borhan Ahmadi were taken on both the notices Ex. PW 5/

A and Ex. PW 5/B respectively. The respondent / accused had also put his thumb impression on the notices at point F and G. That Borhan Ahmadi had made an endorsement at point X to X on both the notices to the effect,

> "Read over and explained in vernaculars to Mr Mohd. Bagour who consented for search by any custom officer and signed in token of acceptance."

19. So far as Borhan Ahmadi is concerned, he has not been examined in the present case on the ground that he is not residing at the given address. The panch witnesses namely Mohd. Shafiq and Bhupender Singh have also not been examined, despite last opportunity they were not produced by the prosecution and were dropped from the array of the witnesses by the court vide order dated: 11.01.2011 and 0l.2.2011 respectively. PW 5 admitted in answer to court queries that the consent of the accused for his search by the custom officer was not taken in writing in his own language and that no reason has been given for not obtaining his consent in his own handwriting which could have been later on translated to the court by the interpreter. In the absence of examination of Borhan Ahmadi, particularly, when PW 5 himself is not aware of the Afghani language, as such it has not been proved on record in any manner that the accused was explained the contents of the notices U/s 50 NDPS Act and even U/s 102 Customs Act properly. The endorsement of Borhan Ahmadi made on the notice Ex. PW 5/B from point X to X that *"Read over and explained in vernaculars to Mr Mohd. Bagour who consented for search by any custom officer and signed in token of acceptance,"* itself shows that the accused had not been explained in any manner. It was his legal right to get his person or baggage searched in the presence of a Gazetted officer or a Magistrate, as in the notice U/ s 50 NDPS Act it is not mentioned at all that it was the legal right of the accused.

20. Ld. Trial Judge has also recorded that even the statement of Borhan Ahmadi U/s 67 NDPS Act Ex. PW 5/Q does not find mention the manner in which the notice U/s 50 NDPS Act was served upon the accused nor it finds mention that the accused was explained that it was his legal right to get his search conducted in the presence of a Magistrate or a Gazetted officer.

21. Further ld. Trial Judge has also observed that if the notice was served upon the accused by Borhan Ahmadi at the instance of PW5, then the reply of the notice should have been taken from the respondent / accused in his own handwriting which could have cleared all the doubts about the manner in which it was served and whether the respondent / accused had understood the contents and the purpose of Sec. 50 of the Act and whether he had consented for his search to be conducted by the officer of customs or before a Magistrate or any other the Gazetted Officer.

22. Learned SPP for Customs argued before the Trial Court and learned counsel for the appellant has also argued before this Court that the notice under Section 50 NDPS Act was not required to be served upon the respondent/accused in the present case as recovery was effected from his handbag and nor from his person. In support of his arguments he has relied upon the case of **Ajmer Singh v. State of Haryana** 2010(1) LRC 278 (SC) and has referred to para 13 wherein the contention of the appellant was recorded that the provision of Section 50 of the Act would also apply, while searching the bag, briefcase etc., carried by the person and its non compliance would be fatal to the proceedings initiated under the Act. Their lordships find no merit in the contention of the learned counsel. It requires to be noticed that question of compliance or non-compliance of Section 50 of the NDPS Act is relevant only where search of a person is involved and the said Section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container, etc., does not come within the ambit of Section 50 of the NDPS Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the Section speaks of taking of the person to be searched by a Gazetted Officer or Magistrate for the purpose of search. Thirdly, this issue was considered in **Madan Lal v. State of Himachal Pradesh** (2003) Crl.L.J. 3868 wherein the Court has observed, "A bare reading of Section 50 of the NDPS Act, shows that it only applies in a case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises."

23. This issue has already decided in the case of **Union of India vs. Shah Alam and Anrs.** reported in 2009 (3) RCR (Criminal) and held that before the recovery was effected from his bag, baggage and at the time when notice was served upon the respondents /accused, it was not

known to PW5 that recovery would not be effected from his person but from his bag or baggage.

24. The Trial Judge has recorded that notice Ex PW5/B served upon the respondents/accused was not in compliance of provisions of Section 50 of NDPS Act, as it was partial notice and as the respondents/ accused had offered to be searched in the presence of a Gazetted Officer of a custom besides a Magistrate. The purpose behind Section 50(1) NDPS Act, is to avoid criticism of arbitrary and high handed action against authorised officer. It has to be borne in mind that a Gazetted officer belonging to the department which is effecting a seizure may have bias in favour of the department, whereas no such bias can be attributed to a Magistrate or a Gazetted Officer belonging to the other department. Thus, associating a Gazetted Officer with the raiding party makes such officer impliedly interested in the success of the raid.

25. Admittedly, in the present case the notice under Section 50 of NDPS Act, served to respondent/accused and option was given to the accused that if he so desires his baggage and personal search could be conducted before the Magistrate or a Gazetted Officer of a Customs.

26. The Trial Judge has also relied upon a case of **Kuldeep Singh v. NCB** 2000(1) JCC Delhi 74 in which it has been held by this Court that the Gazetted Officer belonging to the department which is effecting a seizure may have bias in favour of the department, whereas no such bias can be attributed to a Magistrate or a Gazetted Officer belonging to the other department. Thus in the present case the offer given to the accused to be searched by a Magistrate or by a Gazetted Officer of the custom was partial offer as the accused was not given an option for her baggage and personal search to be conducted in the presence of a Gazetted Officer belonging to the other department.

27. Learned Trial Judge has opined that neither notice Ex.PW5/B was proper notice nor it was served upon the accused and the accused was not informed of his right to be searched in the presence of a Gazetted Officer or a Magistrate which is mandatory.

28. The Trial Judge has also recorded that non-examination of Borhan Ahmadi is fatal to the prosecution, as he was the best witness to prove as to what was explained by him on behalf of the complainant,

to the accused while serving notice under Section 50 NDPS Act. Mere examination of PW5 and his testimony to the effect that notice was served through Borhan Ahmadi upon the accused by itself is not sufficient.

29. The Trial Judge has referred to the case of Supreme Court in **Vijaysingh Chandubha Jadeja v. State of Gujarat** 2010(4) LRC 225 (SC); wherein it is recorded that the provision of Section 50 of NDPS Act, are mandatory and non-compliance renders the recovery of illicit article suspect. Thus the non-compliance of these provisions is viewed seriously and adverse inference is drawn against the prosecution, particularly, when the accused has denied that he was served any such notice and it has created doubt with regard to the truthfulness of the prosecution witness.

30. As far as notice under Section 50 of NDPS is concerned, Hon.ble Supreme Court in **Narcotics Central Bureau v. Sukh Dev Raj Sodhi** 2011 VII AD (SC) 27 has held in para nos.5 & 6 as under:

> "5. The obligation of the authorities under Section 50 of the NDPS Act has come up for consideration before this court in several cases and recently, the Constitutional Bench of this Court in the case of **Vijaysingh Chandubha Jadeja v. State of Gujarat** [(2011) 1 SCC 609] has settled this controversy. The Constitution Bench has held that requirement of Section 50 of the NDPS Act is a mandatory requirement and the provision of Section 50 must be very strictly construed".
>
> "6. From the perusal of the conclusion arrived at by this court in Vijaysingh Chandubha Jadeja's case it appears that the requirement under Section 50 of the NDPS Act is not complied with by merely informing the accused of his option to be searched either in the presence of a gazette officer or before a Magistrate. The requirement continues even after that and it is required that the accused person is actually brought before the gazetted officer or the Magistrate and in Para 32, the Constitution Bench made it clear that in order to impart authenticity, transparency and creditworthiness to the entire proceedings, an endeavour should be made by the prosecuting agency to produce the suspect before the nearest Magistrate".

31. The prosecution has also relied upon the statement of respondent/accused recorded under Section 67 of NDPS Act which is Ex PW5/E on record. The prosecution has relied upon the statement of respondents/accused under Section 67 of NDPS Act, before the Trial Court which is Ex PW5/C and before this Court.

32. The law is settled that confessional statement of the accused is a weak type of evidence and conviction should not be based on it and it needs to be corroborated by independent evidence.

33. The learned counsel for the appellant in support of this argument has relied upon a judgment of the Supreme Court in **State of Haryana v. Mai Ram, Son of Mam Chand** 2008(3) JCC (Narcotics) 188 wherein it is recorded that so far as examination of only official witness is concerned it is to be noted that only independent witness who was examined to speak about the seizure did not support the prosecution version, no material was brought on the record by the defence to discredit the evidence of official witnesses. The ultimate question is whether the evidence of official witnesses suffered from any infirmity.

34. In the case of **Union of India v. Balmukand & Ors.** 2009(2) Crimes 171 SC it is held that conviction should not be based merely on the basis of statement made under Section 67 of the Act without any independent corroboration.

35. PW5 in his cross-examination stated that he had given questions to Borhan Ahmadi which were put by him to the accused and then he had reduced into writing his reply in English language. However, it is seen that there is no such framed questions filed on record which were put to the accused by Borhan Ahmadi and in response to the same he recorded the statement of accused under Section 67 NDPS Act except the bald testimony of PW5, there is no evidence on record that the statement Ex.PW5/E was made by the accused through Borhan Ahmadi, as Borhan Ahmadi has not been examined as a prosecution witness to prove as to what statement was made by the respondents/accused to him in his own language which he translated in English language. It is seen that there is no statement of the accused recorded by Borhan Ahmadi in the language of the accused so as to say that the English translated version of the accused was correct. Deposition would have been different

if the statement of respondents/accused had been recorded in his own language and thereafter translation of the same in English language was filed on record. It is also not on record that accused was warned before recording his alleged statement that he had a right to maintain a silence which was his legal right.

36. The Trial Court has also taken note that statement of Borhan Ahmadi himself was recorded on 21st March, 2008 i.e., after more than five months of the alleged incident and there is no explanation on behalf of the prosecution as to why his statement was recorded with inordinate delay and at the same time non mentioning in his statement about fact that he had recorded the statement of accused U/s 67 NDPS Act after he was given questions by PW 5 to be put to the respondent/accused, leads to the inference that no such statement was made by the accused.

37. In these circumstances, the Trial Court has recorded that it becomes immaterial whether the accused retracted from his such statement or not. At the same time the admission of the accused in the said statement about recovery of contraband from his possession becomes immaterial, particularly, in view of the fact that it is admitted by the prosecution that the accused did not know any other language except Dari and Farsi language and the said statement is in English language and it is not proved on record that it was made by the accused.

38. The Trial Judge has also recorded that there is no evidence on record except the bald testimony of PW5 that the contents of panchnama Ex.PW5/C were read over to the accused in his own language by Borhan Ahmadi for the reasons that Borhan Ahmadi had not appeared in the witness box.

39. Besides, the Trial Court also find discrepancies with regard to preparation of Test Memo. The complaint is silent about preparation of the Test Memos at the time of drawl of sample. It does not find mention as to when the Test Memos were prepared. PW5 in his chief examination testified that the Test memo was prepared in triplicate at the time of the drawal of the samples, whereas perusal of the Test Memo Ex.PW5/L shows that it is bearing the date under the signature of PW5 as 10.10.2007 and as such the same was prepared on 10.10.2007. Therefore, there is contradictory evidence led by the prosecution with regard to the date of

the preparation of the Test Memos. If the chief examination of PW5 is believed to be correct, then it is for the prosecution to explain as to where are the Test Memos prepared on 09.10.2007 and in case the Test Memo Ex.PW5/L is believed to be correct then the question arises why the Test Memos were not prepared on the date and time of drawal of the samples which amounts to non-compliance of the standing instructions 1/88.

40. At the same time it is brought to the notice of the court by the defence counsel that PW5 in his cross examination categorically testified that he had not obtained the customs seal No.6 after 09.10.2007. If the seal was not taken again after 09.10.2007, then how the Test Memos were prepared on 10.10.2007 without customs seal No. 6. There is no evidence on record that on 10.10.2007 PW5 had withdrawn customs seal No.6 from the concerned SDO(A) and after preparing the Test Memo had returned the same. At the same time there is no evidence on record that the Test Memos were bearing the custom seal No.6 as there is no facsimile impression of the seal on the Test Memo. Perusal of the office copy of the Test Memo Ex.PW5/L shows that it is bearing the lac seal which too was found in broken condition and is covered with transparent adhesive tape and the seal impression is not legible.

41. Similarly, the Test Memo on which the report of the CRCL Ex.PX is prepared, the same is not bearing the facsimile of the customs seal no.6 and though the impression on fixation of lac seal is there but the lac is missing. In such circumstances, the seal impression could not have been read by the Lab Assistant, CRCL, or even the chemical examiner for comparing the same with the seals affixed on the sample parcel Mark E-1 to H-1. It is astonishing that in the report of the CRCL it is mentioned that the each sample packet was sealed with five red tape seals and impression of each seal affixed on each of the four sample packets tallies with the facsimile of seal as given on the Test Memo, whereas in fact there is no facsimile of the seal on the Test Memo. There is no explanation on behalf of the prosecution that in such circumstances as to with which seal impression, the seals which were found on sample envelopes were compared by the officials or the chemical examiner in the CRCL. It appears that observation to this effect in the Test Report was made in routine without application of mind and comparison of the seals. Thus a important link in the chain of the prosecution evidence is missing and

it cannot be said conclusively that the samples which were examined in the CRCL and were opined to be containing diacetylmorphine were the true representative of the samples drawn from the recovered substance.

42. I note that Ld. Trial Judge has also recorded that there is no evidence on record that the sample Mark E1to H1 were withdrawn by PW 5 from the custody of any SDO(A) for deposit with CRCL. The only witness examined to this effect is PW 4 Sh. Kishan Chand, Supdt., who testified that on 9.10.2007 at about 8 am ACO Ganpat Singh i.e. PW 5 had handed over to him 18 packets vide DR Nos. 3927 to 3931 all dated 9.10.2007 vide entry No.4067 and all these packets were handed over by this witness to the next SDO (A) vide entry No 4069 dated 09.10.2007. Both these relevant entries are proved as Ex PW 4/A and are dated 09.10.2007. Besides, PW 4 no other SDO (A) or valuable godown incharge has been examined by the prosecution to prove the safe custody of the case property and the representative sample till the case property was produced in the court and sample Mark E l to H1were sent to the CRCL. Neither any witness has been examined nor any entry in the SDO(A) register or valuable godown register has been proved on record to prove that PW 5 had withdrawn samples Mark E1 to H1 on 10.10.2007 for deposit in the CRCL. Thus a vital link in the chain of the prosecution case is missing.

43. Another important fact also noted by ld. Trial Judge is that Test Memo in the present case was not prepared at the time of drawl of the samples on the intervening night of 08.10.2007/09.10.2007 but as per the testimony if PW 5 Sh. Ganpat Singh ACO and even the Test Memo Ex.PW 5/L itself speaks that the same was prepared on 10.10.07, there is no evidence on record that once seal was returned by PW 5 to PW 4 Sh. Kishan Chand SDO(A), the custodian of the seal, it was ever issued again to PW 5 for preparing the Test Memos. The trial court has opined that this itself leads to the inference that the seal was easily accessible to PW 5 Sh Ganpat Singh ACO and it is only for this reason he could prepare the Test Memos on 10.10.2007.

44. It is also observed that since the Test memos were prepared on 10.10.2007 and the custom seal was in the custody of PW 5, the samples Mark E l to Hl were also in his custody and as such the tampering of the said samples cannot be ruled out.

45. Keeping the discussion into view, the Trial Judge has acquitted all the charges under Section 21/23 read with Section 28 of NDPS Act, 1985.

46. Keeping the above discussion and settled law into view, I find no discrepancy in the order passed by ld. Trial Judge. Therefore, I am not inclined to interfere with the judgment passed by ld. Trial Judge and confirm the same.

47. Accordingly, both Crl. LP 275/2011 & Crl.LP284/2011 are dismissed.

48. Consequently, both the respondents/accused shall be released forthwith, if not required in any other case.

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

50. No order to costs.

ILR (2012) I DELHI 728
RFA

ANAND SINGH ....APPELLANT

VERSUS

ANURAG BAREJA & ORS. ....RESPONDENTS

(VALMIKI J. MEHTA, J.)

RFA NO. : 480/2011 DATE OF DECISION: 28.11.2011

Code of Civil Procedure, 1908—Section 96; Indian Contract Act, 1872—Section 74—Suit of Appellant/ proposed buyer for recovery of earnest money paid under Agreement to sell, dismissed—HELD—Claim to forfeit amount is a claim in the nature of liquidated damages under Section 74 of Contract Act—Seller

under an agreement to sell cannot forfeit amount unless loss is pleaded and proved by him on account of breach of contract—Appeal allowed—Suit decreed.

It is therefore clear that a seller under an agreement to sell, when he has received monies under the agreement to sell, cannot forfeit such amount, unless loss is pleaded and proved by him. It is the respondents/defendants who have to plead and prove entitlement to forfeiture on account of loss having been caused on account of breach of contract by the appellant/plaintiff/proposed buyer. Thus, even assuming the appellant/plaintiff/proposed buyer is guilty of breach of contract, yet, the respondents/defendants will have to raise appropriate pleadings with respect to loss, get an issue framed, and thereafter lead evidence on such issue to show that losses have been caused to them on account of breach of the agreement to sell by the appellant/plaintiff/proposed buyer, entitling the forfeiture of the amount. **(Para 3)**

Indubitable position which has emerged from the record is that there is no pleading of the respondents/defendants of any loss having been caused on account of breach of contract by the appellant/plaintiff. There is also no issue framed on this aspect. There is also obviously no evidence led on behalf of the respondents/defendants as to how the breach of contract by the appellant/plaintiff has caused loss to the respondents/defendants entitling them to forfeit the amount. In my opinion, therefore, in view of the ratio of the Constitution Bench judgment of the Supreme Court in the case of **Fateh Chand** (supra), the respondents/defendants are not entitled to forfeit the huge amount of Rs. 10,00,000/-. **(Para 6)**

Important Issue Involved: A seller who has received money under the agreement to sell, cannot forfeit such amount unless loss is pleaded & proved by him.

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Rajesh Bhatia Advocate.

FOR THE RESPONDENTS : Mr. A.P. Singh, Advocate. Mr. Pradeep Dhingra & Mr. Sachin sood, Advocates.

CASE REFERRED TO:

1. *Fateh Chand* vs. *Balkishan Dass,* (1964) 1 SCR 515; AIR 1963 SC 1405.

RESULT: Appeal allowed

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal filed under Section 96 of the Code of Civil Procedure (CPC), 1908 is to the impugned judgment of the Trial Court dated 16.5.2011. By the impugned judgment, the Trial Court dismissed the suit of the appellant/plaintiff/proposed buyer for recovery of Rs.10,00,000/- paid under an agreement to sell dated 4.11.2006 with respect to property bearing no. WZ-49B (admeasuring 300 square yards), Khasra No.144-145 , Village Palam, Delhi.

2. Learned counsel for the appellant/plaintiff has argued the appeal with reference to the Constitution Bench judgment of the Supreme Court reported as **Fateh Chand Vs Balkishan Dass,** (1964) 1 SCR 515; AIR 1963 SC 1405, wherein the Supreme Court has said that even if the buyer is guilty of breach of performance of an agreement to sell, however, seller cannot forfeit the earnest money received under the agreement to sell, as the forfeiture is hit by Section 74 of the Indian Contract Act, 1872 being in the nature of the penalty and forfeiture cannot take place unless loss is pleaded and proved by the seller. Paragraphs 8, 10, 15 and 16 of the judgment in the case of **Fateh Chand** (supra) are relevant and read as under:

> 8. The claim made by the plaintiff to forfeit the amount of Rs 24,000 may be adjusted in the light of Section 74 of the Indian Contract Act, which in its material part provides:-
>
> "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if

the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or as the case may be, the penalty stipulated for."

The section is clearly an attempt to eliminate the sometime elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.

10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive

compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

15. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.

16. There is no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant, save as to the loss suffered by him by being kept out of possession of the property. There is no evidence that the property had depreciated in value since the date of the contract provided; nor

was there evidence that any other special damage had resulted. The contact provided for forfeiture of Rs 25,000 consisting of Rs, 1039 paid as earnest money and Rs 24,000 paid as part of the purchase price. The defendant has conceded that the plaintiff was entitled to forfeit the amount of Rs 1000 which was paid as earnest money. We cannot however agree with the High Court that 13 percent of the price may be regarded as reasonable compensation in relation to the value of the contract as a whole, as that in our opinion is assessed on an arbitrary assumption. The plaintiff failed to prove the loss suffered by him in consequence of the breach of the contract committed by the defendant and we are unable to find any principle on which compensation equal to ten percent of the agreed price could be awarded to the plaintiff. The plaintiff has been allowed Rs 1000 which was the earnest money as part of the damages. Besides he had use of the remaining sum of Rs 24,000, and we can rightly presume that he must have been deriving advantage from that amount throughout this period. In the absence therefore of any proof of damage arising from the breach of the contract, we are of opinion that the amount of Rs 1000 (earnest money) which has been forfeited, and the advantage that the plaintiff must have derived from the possession of the remaining sum of Rs 24,000 during all this period would be sufficient compensation to him. It may be added that the plaintiff has separately claimed mesne profits for being kept out possession for which he has got a decree and therefore the fact that the plaintiff was out of possession cannot be taken, into account in determining damages for this purpose. The decree passed by the High Court awarding Rs.11,250 as damages to the plaintiff must therefore be set aside. (Underlining added)

3. It is therefore clear that a seller under an agreement to sell, when he has received monies under the agreement to sell, cannot forfeit such amount, unless loss is pleaded and proved by him. It is the respondents/defendants who have to plead and prove entitlement to forfeiture on account of loss having been caused on account of breach of contract by the appellant/plaintiff/proposed buyer. Thus, even assuming the appellant/plaintiff/proposed buyer is guilty of breach of contract, yet, the respondents/defendants will have to raise appropriate pleadings with respect

to loss, get an issue framed, and thereafter lead evidence on such issue to show that losses have been caused to them on account of breach of the agreement to sell by the appellant/plaintiff/proposed buyer, entitling the forfeiture of the amount.

4. The case of the appellant/plaintiff was that the total sale consideration for the property was Rs.60,00,000/-, out of which a sum of Rs. 10,00,000/- was paid. Though, initially certain cheques, which were issued by the appellant/plaintiff, bounced however, subsequently the appellant/plaintiff paid the amount of Rs. 7,00,000/- in cash, making a total payment of Rs. 10,00,000/- under the agreement to sell.

5. It is urged on behalf of the respondents/defendants, by their counsel in this Court, that the respondents/defendants only received a sum of Rs. 7,00,000/- and not a sum of Rs. 10,00,000/-. It is urged that even this amount of Rs. 7,00,000/- is entitled to be forfeited by the respondents/defendants on account of breach of contract by the appellant/plaintiff.

6. Indubitable position which has emerged from the record is that there is no pleading of the respondents/defendants of any loss having been caused on account of breach of contract by the appellant/plaintiff. There is also no issue framed on this aspect. There is also obviously no evidence led on behalf of the respondents/defendants as to how the breach of contract by the appellant/plaintiff has caused loss to the respondents/defendants entitling them to forfeit the amount. In my opinion, therefore, in view of the ratio of the Constitution Bench judgment of the Supreme Court in the case of **Fateh Chand** (supra), the respondents/defendants are not entitled to forfeit the huge amount of Rs. 10,00,000/-.

7. Learned counsel for the respondents/defendants sought to argue that the liability should only be fixed on the respondents/defendants for a sum of Rs. 7,00,000/- as an amount of Rs. 3,00,000/- was paid to the property broker for entering into the subject transaction. Besides the fact that one of the property broker is none else than the maternal uncle of the respondents/defendants, however, this issue is immaterial, inasmuch as, in the Trial Court it has been proved by the appellant/plaintiff that a sum of Rs. 10,00,000/- was received by the respondents/defendants under the agreement to sell and if the respondents/defendants made some

payment to a broker the same is a matter between the respondents/defendants and their broker, and that cannot mean that Rs. 10,00,000/- is not received by the respondents/defendants. The payment of Rs. 10,00,000/- to the respondents/defendants is proved on behalf of the appellant/plaintiff, inter alia, by the admission of the respondents/defendants in the notice dated 24.2.2007, Ex.DW1/P4 sent by the respondents/defendants, and in which notice, the respondents/defendants have claimed balance payment of Rs. 50,00,000/-. Since the total consideration is admittedly Rs. 60,00,000/-, claiming of balance payment of Rs. 50,00,000/- is a clear cut pointer to the respondents/defendants having received Rs. 10,00,000/-. An admission by a person is the best proof of a disputed fact. I therefore do not find any error in the impugned judgment holding that the respondents/defendants had, in fact, received a sum of Rs. 10,00,000/-.

8. The argument of the learned counsel for the respondents/defendants that the present case does not fall under Section 74 of the Indian Contract Act, 1872 is quite clearly misconceived inasmuch as a claim to forfeit the amount is clearly a claim in the nature of liquidated damages falling under Section 74 of the Indian Contract Act, 1872. This issue is no longer res integra, in view of the decision in the case of **Fateh Chand** (supra). However, since the judgment in the case of **Fateh Chand** (supra) allows for forfeiting of a nominal amount, I would therefore hold that the respondents/defendants are entitled to forfeit a sum of '50,000/-, out of the total payment of Rs. 10,00,000/- received by the respondents/defendants.

9. In view of the above, the appeal is allowed. The impugned judgment and decree is set aside. The suit of the appellant/plaintiff will stand decreed against the respondents/defendants for a sum of Rs. 9,50,000/- along with interest at 12% per annum simple from 24.2.2007 till payment. Parties are left to bear their own costs. Decree sheet be prepared. Trial Court record be sent back.

ILR (2012) I DELHI 736
CRL.A

RAJU @ RANTHU @ RAJU KUMAR ....APPELLANTS

SANJAY KUMAR

VERSUS

STATE ....RESPONDENT

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

CRL. APPEAL NO. : 700/2011 & 1093/2011 DATE OF DECISION: 28.11.2011

Indian Penal Code, 1860—Sections 302, 34—Appellant convicted for having committed murder of one Sh. Saual—Prosecution case rested on circumstantial evidence i.e. last seen evidence, recovery of weapon of offence, recovery of sleepers (Chappals) of deceased worn by him at the time of incident and blood stained Baniyan of one of appellant—It was urged on behalf of appellants "last seen" circumstance not proved as deceased was allegedly taken away by appellants around 4:30 p.m. but his body found on next date morning around 7 a.m. the time gap was large being 12 hours and during this time possibility of any other perpetrator of crime other than appellants cannot be ruled out—Held:- Last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and the deceased is found dead is so small that possibility of any preson other than the accused being the author of the crime becomes impossible—Testimony of prosecution witness not conclusive as regard to last seen theory.

The *last seen theory* kicks in – (if one may use that expression) - only when the prosecution can establish that the possibility of others being with the accused can be ruled–out altogether and more crucially, the time-gap between the death and the *last seen* circumstance is so narrow as to rule out involvement of anyone else with certainty. In this case, the time as to when various witnesses saw the deceased with the accused is confused and conflicting.

(Para 16)

Important Issue Involved: last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Vivek Sood Advocate Ms. Sahilaa, Advocate.

FOR THE RESPONDENT : Mr. Sanjay lao, APP.

CASES REFERRED TO:

1. *Kulvinder Singh and Another* vs. *State of Haryana,* 2011 (5) SCC 258.
2. *Ramreddy Rajesh Khanna Reddy* vs. *State of A.P* AIR 2006 SC 1656.
3. *Ramjee Rai* vs. *State of Bihar* 2006 (13) SCC 229
4. *State of U.P.* vs. *Satish* 2005 CriLJ 1428.

RESULT: Appeals Allowed.

S. RAVINDRA BHAT, J.

1. In these Appeals, the judgment and order of the learned Additional Sessions Judge dated 09.12.2010 in SC No. 126/2008 has been challenged.

By the impugned judgment, the Trial Court convicted the present Appellants for committing the offences punishable under Sections 302/34 IPC and sentenced them to life imprisonment.

2. According to the prosecution, P.S. Kapashera received DD No.11A on 11.08.2008 at 07.10 AM, intimating about a dead body in Gali No.4, behind service station, near Mandu Ram's plot. Inspector S.D. Meena, along with Inspector Lakhinder Singh, SHO, P.S. Kapasahera, HC Zile Singh, Const. Dharmender, Const. Dharambir, Const. Kamal and Const. Naveen went to the spot and found the dead body of an unidentified man, aged about 25/30 years clothed in blue jeans, red T-shirt and mustard underwear. A black thread bearing the image of Christ hung around the neck of the body. The dead man had a black and yellow belt; his height was about 5 feet 7 inches, slim and dark. The body had a stab wound in the abdomen and there was also a cut in the T-shirt. FIR No.176/08 was registered in the police station u/s.302 IPC. The body could not be identified and was sent to DDU Hospital for preservation. Posters were distributed in the whole area and were pasted in public places. The police started showing the photograph of the body to shopkeepers and *rehriwalas* for identification purposes. One Bhola, Proprietor of Satyam Communication, on Old Gurgaon Road, Kapasahera, identified the photograph to be that of Saual, who worked at Gopal's *rehri*. He also showed the rehri to the police. Gopal confirmed that the photograph was Saual's; he was the son of Sh. Silvester, R/o Village Jamdoli, P.S. Dumri, Distt. Gumla, Jharkhand. He also identified the dead body as that of Saual and further told the police that the deceased had been working on his *rehri* selling Chole Bhature for the past about one and a half years. He said that Saual had left with two boys named Sanjay and Raju on 10.08.2008 at about 4.30 or 5 P.M.; those boys used to meet him and also used to meet him earlier also. He further told the police that Saual did not return till the morning of 11.08.2008, due to which he dialed Saual's mobile, i.e. 9810341036, but the phone was answered by someone else, who claimed that Saual was in the bathroom and thereafter switched it off. He suspected Sanjay and Raju of having committed Saual's murder.

3. The two accused were later arrested; they made their disclosure statements which led to recovery of the weapon of offence i.e. stainless steel knife, slippers (chappals) of the deceased worn by him at the time

of the incident and Sanjay's blood stained *baniyan*, all from different places. It was also alleged that the two accused revealed, to the police, that they belonged to Jharkhand and had been working in a private company in Gurgaon. They used to take Chole Bhature from the Kapashera border, while returning from their place of work and had developed friendship with deceased Saual as he too belonged to Jharkhand. Raju had borrowed a sum of Rs. 50/- from Saual on the assurance that he would return it within one or two days, but he did not do so, even after 10 or 15 days. A dispute leading to Raju being beat up by Saual for not returning his money, had taken place; Raju therefore, bore a grudge against Saual. The two of them (accused) took Saual with them, on 10.08.2008 from his *rehri* for eating and drinking. They bought liquor from a nearby vendor and went to Room No.77 and consumed liquor. They made Saual drink excessively. When they reached a secluded place in Gali No.4, Raju stabbed Saual in the abdomen with a knife, which he had brought out from his room hidden in a towel. Saual shouted and fell, whereupon Raju became terrified and left the spot after throwing the knife down, on the spot. Sanjay threw the slippers worn by Saual in a nearby vacant plot and also hide the knife in some other plot. He thereafter went to Anup's room, where he kept his *baniyan* with blood stains in a polythene bag and threw it on the roof of the room.

4. The accused entered the plea of not guilty, and claimed trial. During those proceedings, the prosecution examined several witnesses, and also relied on documentary evidence. After considering all these, the Trial Court, by the impugned judgment, convicted the Appellants.

5. Mr. Vivek Sood, and Ms. Saahila Lamba, learned counsel for the Appellants, argued that the Trial Court's impugned judgement is not sustainable. It is contended that the findings with regard to the "last seen" circumstance had not been proved in this case. It was urged that the deceased was allegedly taken away by the Appellants around 04.30 P.M. on 10.08.2008. His body was found the next morning around 07:00 AM. According to counsel, for the prosecution to have established the "last seen" circumstance, the time gap ought to have been so narrow as to rule out the possibility of anyone other than the accused being the perpetrator of the crime. In this case, contended both counsel, the canvas was large since the time gap was nearly 12 hours. Furthermore what cast serious doubts about the role of the Appellants was that the post-

mortem report fixed the time of death to be about seven days from the time the procedure was commenced i.e. 12:00 AM on 17.08.2008. This brought in considerable uncertainty about the time of death. Even if it was assumed that the death took place between 12 midnight and 01:00 AM in the night intervening 10/11.08.08, the gap between the last seen time, and the time of death was eight hours. Being daytime, it could not be said with certainty that the deceased was only with the present Appellants and none else.

6. It was next submitted that the eyewitnesses testimony about the crucial aspect regarding last seen circumstance was uninspiring if not dubious. Here Learned counsel pointed out that PW-1 deposed that the accused had taken away the deceased, who was his employee, on 10th or 11th August at 04:30 PM. He was unable to identify who Raju was and who Sanjay was even though he claimed knowledge about their identities, and stated that they used to visit the deceased. On the other hand contended Learned counsel PW-2 gave a completely different version and stated that the Appellants went to see the deceased around 11 AM or 12 noon on 10.08.08. He also stated that the police had detained him, Surender Verma and Avinash for three days and interrogated them. Commenting on the testimony of PW 5, Learned counsel argued that this witness claimed to have been the landlord of the accused. The police and prosecution alleged that both the accused were arrested in his presence. However he did not support the prosecution version regarding the arrest of Raju. He also did not support the prosecution version with regard to disclosure statement made by Raju and the consequent recovery of articles at his behest. Great stress was laid on the fact that the Trial Court itself disbelieved the prosecution's theory regarding Raju's arrest, in the impugned judgement, in its observations quoted below:

> "35. I am constrained to note here that the prosecution has failed to prove that the blood stained shirt and gamcha of accused Raju as well as mobile phone of deceased Saual were recovered at the instance of accused Raju or that accused Raju made a disclosure statement Ex.PW14/L, as the only public witness to the same i.e. PW5 has stated specifically that neither was accused Raju arrested in his presence nor did he make any disclosure statement and nor did he effect any recovery in his presence. "

7. It was argued next that the testimony of PW-5 could not be

relied upon to hold the appellants guilty because he was uncertain as to when and even the date regarding having seen the accused and the deceased together. He deposed that two Constables had come on 10.08.2008 to his plot for making enquiries and had showed a photograph in that regard. Furthermore he claims to have told the police that the person in the photograph had gone to the plot four or five days prior to that (i.e. the date of enquiry). This witness also stated that he was called to the police station on 11 August, 12 to August, 13th August and 15 August 2008. If this statement were correct, the time and date when he saw the deceased became a matter of speculation. Contending that the Court would not have been justified in drawing an inference that the witness saw the deceased four or five days prior to his being called to the police station(as he deposed in the court), it was urged that he then would have seen the deceased and accused together on 07.08.08 or 08.08.08, which could not have led to the finding of his being a witness to the last seen circumstance.

8. It was next argued that the time as well as the date of death, could not be established in a manner as to link the Appellants to the crime. The postmortem report's determination that death occurred about 7 days before the examination of the body was conducted, brought in considerable uncertainity even as to the date, and also to the time. Therefore, the spectrum of time, and also the uncertainity as to when which witness had seen the accused with the deceased, rendered a finding that the accused persons were perpetrators of the crime, untenable. Relying on the decision reported as **Ramjee Rai v State of Bihar** 2006 (13) SCC 229, counsel argued that the time of death cannot be precisely determined, and in such cases, it would be unsafe for the Court to assume the accused's guilt, and convict him for murder. Learned counsel also emphasized that PW-5 did not support the prosecution version in some particulars, and his deposition was at variance with what was recorded during the investigation. Counsel highlighted the fact that the witness did not mention the time when he saw the deceased- whether it was in the morning or the evening. This assumed importance, because PW-2 deposed to having seen all three together in the morning, whereas PW-1 stated that he saw them at 04:30 in the evening. Therefore, the testimony of PW-5 was crucial and corroborative. He was however, silent as to the time. Having regard to all these circumstances, the Court ought to set aside the conviction recorded in the impugned judgment.

9. Mr. Sanjay Lao, appearing on behalf of the prosecution, contended that the last seen evidence stands clearly established in the sense that both PW-1 and PW-5 deposed that the deceased left in the company of the appellants. PW-1 was the deceased's employer, and he also deposed that both appellants used to visit him; PW-5 was in fact their land lord. Both of them were independent witnesses, and had no reason to depose falsely. Both of them stated that they saw the deceased alive in the company of the appellants on 10.08.2008. The learned counsel submitted that even if the appellants had parted company with the deceased, it was for them to give some explanation in their statements under Section 313 Cr.P.C. He further submitted that the fact that they furnished an explanation which was patently false, such as denying the tenancy under Sanjay Yadav, would be a circumstance which could be taken against them.

10. Mr. Lao also submitted that though the recovery of articles such as mobile phone were not believed, yet the recovery of the knife was established, and the doctor in his report Ex. PW-3/B stated that the said knife was probably used to kill the deceased. The Appellants had no explanation to the blood stained shirt recovered through Ex. PW-14/I, which was duly established. The deposition of PW-5 was sufficient to link the accused with these articles; under the circumstances, they owed a duty to explain these incriminating circumstances, which they could not, during the trial. Counsel also stated that the confusion about dates, i.e. whether PW-5 was approached on 10th or 12th August, 2008, is not material, because many times witnesses are unable to recollect dates or time, with precision. Moreover, the disclosure statements and recovery memos exhibited, proved that the articles were seized on 15th August, 2008.

11. Thus, according to the learned counsel for the State, the circumstance of the deceased being last seen in the company of the appellants as well as the fact that the death had occurred shortly thereafter and that his death was not under natural circumstances, coupled with the factum of recovery of the blood stained clothes, pursuant to the disclosure statement of Sanjay, and the knife, which was hidden, in a place known only to them, are clear links which complete the chain of evidence against the appellants and, therefore, according to him, the Trial Court has rightly convicted the appellants for the offence under Section 302

and 34 IPC. He contended that the impugned judgment and order on sentence ought not to be interfered with.

12. The last seen theory is based on the premise that in a case, having regard to all the other circumstance, the victim's being last seen with the accused, if proved through unimpeachable evidence, and all the circumstances likewise are proved, would lead the court to conclude that it was only the accused, and no one else who was the perpetrator of the crime. In **State of U.P. v. Satish** 2005 CriLJ 1428, the Supreme Court observed that the last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. The Supreme Court also observed that in the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. A similar observation was made by the Supreme Court in the case of **Ramreddy Rajesh Khanna Reddy v. State of A.P** AIR 2006 SC 1656. In the latter decision, it was held that in cases of 'last seen', the courts should look for some corroboration. The judgment in **State of U.P. v. Satish** (supra) was reiterated. In **Kulvinder Singh and Another v. State of Haryana,** 2011 (5) SCC 258, decided by the Supreme Court, it was held that:

> "16. It is a settled legal proposition that conviction of a person in an offence is generally based solely on evidence that is either oral or documentary, but in exceptional circumstances conviction may also be based solely on circumstantial evidence. The prosecution has to establish its case beyond reasonable doubt and cannot derive any strength from the weakness of the defense put up by the accused. However, a false defense may be called into aid only to lend assurance to the Court where various links in the chain of circumstantial evidence are in themselves complete. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The same should be of a conclusive nature and exclude all possible hypothesis except the one to be proved. Facts so established must be consistent with the hypothesis of the guilt of the accused and the chain of evidence must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

Reasoning:

13. The prosecution case is that the deceased Saual's body was found at 07:10 AM on 11.08.2008; telephonic information was received in that regard. It appears that the police were able to identify the name of the deceased on account of the statement of PW-14, who claims to have sold a mobile phone to Saual. The postmortem in this case was conducted much later, on 17.08.2008; the proceedings started at 12:00 AM; the time of death was fixed approximately 7 days before that. Even if one were to give a wide margin in this case, the time of death possibly could have been any time between the afternoon and late night. This brings in an element of uncertainty; the Court would, therefore, have to go by the broad probability that the murder was committed in the latter part of 10.08.2008 or early 11.08.2008. At this point, the corroboration by the witnesses or even the proof of circumstances, such as the last seen, becomes very crucial. The prosecution relied upon the testimony of PW-1, Saual's employer. He deposed having seen the accused on 10.08.2008/11.08.2008. Even if one were to ignore the confusion in date on account of lapse of memory, this witness claims to have seen the appellants around 04:30 PM on 10.08.2008 when they went away with the deceased. He claims to know about the appellants since they were deceased's friends. The deceased used to work on the rehri selling *chholey bhature* owned by PW-1. PW-2 was the deceased's co-worker; he supported PW-1 to the extent that the appellants were friends of the deceased. However, he did not support the prosecution story at all about the timing, and stated that that deceased and both the appellants were seen together on 10.08.2008 around 11.00 am and 12.00 am. The prosecution furthermore had to confront him with the statement recorded by him under Section 161, through suggestions and leading questions submitted by the Court.

14. In view of these circumstances, the testimony of PW-5 about knowing that the Appellants visited the deceased becomes vital. He curiously stated having joined the investigation on 10.08.2008 itself when the police went to him. Like in the case of PW-1, this may be put down to confusion. However, the subsequent claims of having been called by

the police on later dates, such as on 12th, 13th and 15th of August 2008, cannot be ignored. This is because the witness stated that 4 or 5 days before he was called to the Police Station, he had seen the appellants along with the deceased. Now another significant aspect about this witness is that even though he supported the recoveries allegedly made on the disclosure statements recorded by the appellant Sanjay, he completely disclaimed association with the prosecution *vis-a-vis* the discovery and the recoveries made by Raju. The latter part was accepted by the Trial Court which disbelieved the prosecution regarding the recoveries at the behest of Raju.

15. The testimony of PW-5, in the opinion of the Court, cannot be conclusive as regards the "last seen" theory. The witness was not clear as to which date he had seen the accused and the deceased together. If one were to calculate 4-5 days from 12th/13th August 2008, the conclusion would be that his observation pertained to a time prior to the occurrence of the crime. If the Court were to assume that he in fact was joined the investigation and recorded his statement on 15.08.2008 - when the police claims to have recorded it - the date when he claims to have seen the accused and the deceased, would be 10.08.2008. Though this apparently supports the prosecution, a closer scrutiny would reveal that PW-5 does not specify any time at all. Unlike PW-1 and PW-2, who were clear about the time when they allegedly saw all the three together, PW-5's testimony is utterly vague and general about the time when he claims to have seen all the three. This injects considerable uncertainty and casts doubts on the entire prosecution version of the deceased having been seen along with the appellants.

16. As discussed previously in this judgments, the *last seen theory* kicks in – (if one may use that expression) - only when the prosecution can establish that the possibility of others being with the accused can be ruled–out altogether and more crucially, the time-gap between the death and the *last seen* circumstance is so narrow as to rule out involvement of anyone else with certainty. In this case, the time as to when various witnesses saw the deceased with the accused is confused and conflicting. One of the prosecution's star witness, PW-5 did not support it with regard to the recoveries allegedly made at the behest of Raju. Even the Trial Court discounted the prosecution version in this regard. The entire allegation, therefore, hinged on whether PW-5 was in fact a witness to

the *last seen* circumstance. His silence about the time when he saw the appellants and the deceased, therefore, is very crucial; the Court is left guessing as to whether it was in the morning, as deposed to by PW-1 or after 4:30 as testified by PW-2. Moreover, the death in this case - according to the postmortem report (procedure having been conducted 7 days after the incident) was around 12.00 pm. Having regard to all these factors and the nature of the uncertainties which have emerged, the Court is of the opinion that the Trial Court could not have convicted the appellants for the charges under Section 302/34. The prosecution had sought to rely upon the motive which was to be deposed by some of those witnesses. However, this aspect was not supported during the trial. In a case like the present one where the prosecution relied on circumstantial evidence, particularly the *last seen* circumstance, motive assumed a rather dominant position. The prosecution's inability to prove it, is a serious flaw. We further note that some of the prosecution witnesses were examined and their statement recorded on 12.08.2008. PW-20, the IO stated that PW-5's statement was recorded on 15.08.2008. However, that witness did not support this fact and instead deposed that his statement was recorded on 12th and that he had been called to the Police Station on successive dates. Having regard to the further circumstance that the recoveries claimed to have been made at the behest of Sanjay were from the roof of the building on a plot adjacent to their premises, which was owned by PW-5 – a circumstance which by itself cannot implicate the accused where the basic facts are not proved, in the absence of any testimony by any independent witness, that cannot be read as an incriminating fact.

17. As discussed previously, the prosecution's burden was to prove each circumstance conclusively and beyond reasonable doubt as well as the proof which linked all circumstances by the same degree of proof and establish beyond any doubt that it was the accused alone who could be the author of the crime and that every hypothesis of his innocence had to be ruled-out. This is a case where the prosecution cannot be said to have discharged it. For these reasons, this Court is of the opinion that the judgment and order impugned in this appeal cannot be sustained. It is accordingly set-aside. The appeals are consequently allowed. The Appellants shall be released forthwith.

ILR (2012) I DELHI 747
C.M. (M)

DR. BIMLA BORA **....PETITIONER**

VERSUS

DR. SHAMBHUJI **....RESPONDENT**

(INDERMEET KAUR, J.)

C.M. (M) NO. : 1452/2009 & C.M. NO. : 18027/2009 **DATE OF DECISION: 29.11.2011**

Civil Procedue Code, 1908—Order VII Rule 11—Petition against rejection of application u/o 7 Rule 11—Suit for damage on account of libel and slander-whether plaint discloses cause of action—Held—Defendant's contention that alleged defamatory statement is protected by an absolute privilege indeed a defense raised by Defendant—Court precluded from going into the same while dealing with application u/O 7 R. 11—Held Cause of action is bundle of facts—Only after trial it will be known whether averments qualify as absolute privilege or not Petition Dismissed.

The question which in fact had arisen before the trial court is as to whether the averments made in the plaint did not disclose a cause of action. The onus to discharge this issue was upon the defendant. The arguments have been aforenoted. The argument that the contents of (i) and (ii) (the alleged defamatory communication/statements made by the defendant against the plaintiff are) protected by an absolute privilege are indeed defences raised by the defendant which the court while dealing with an application under Order 7 rule 11 of the Code is precluded from going into. It is only the averments made in the plaint which have to be looked into. **(Para 10)**

The averments made in the present plaint may or may not be cases of absolute privilege; it is also well settled that cause of action is always a bundle of facts; it is only after trial that it will be known whether they will qualify as one or the other. In these circumstances, it cannot be said that the plaint discloses no cause of action. In fact the judgments relied upon by the learned counsel for the petitioner show that an absolute privilege is not available unless the action is clearly identified for explaining such an absolute privilege; complaints or statements made to the police which are not a part of any judicial proceedings and particularly when the matters would go to court may thus not be governed by an absolute privilege; maximum that can be made available would be a qualified privilege. These being defences; at the cost of repetition; could not have been looked into at this stage. **(Para 13)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Dr. R. Venkataramani, Senior Advocate with Mr. Surender Kumar Gupta, Advocate.

FOR THE RESPONDENT : Respondent in person.

CASES REFERRED TO:

1. *Vithalbhai (P) Ltd.* vs. *Union Bank of India;* (2005) 4 SCC 315.
2. *Saleem Bhasi* vs. *State of Maharashtra;* (2002)1 SCC 557.
3. *Rajendra Kumar Sitaram Pande & Ors.* vs. *Uttam and Anr.* AIR 1999 SC 1028.
4. *T.Arivandandam* vs. *T.V.Satyapal & Anr.* (1977) 4 SCC 467.
5. *V. Narayana Bhat* vs. *E.Subhanna Bhat;* AIR 1975 Karnataka 162.
6. *Bira Gareri* vs. *Dulhin Somaria;* AIR 1962 Patna 229.

7. *Madhab Chandra Ghose* vs. *Nirod Chandra;* AIR 1939 Calcutta 477.

8. *Rajasthan Lachhman* vs. *Pyarchand* AIR 1939 169.

RESULT: Petition dismissed.

INDERMEET KAUR, J.

1. Order impugned before this Court is the order dated 28.10.2009 vide which the application filed by the defendant under Order 7 Rule 11 of the Code of Civil Procedure (hereinafter referred to as the Code) seeking rejection of the plaint had been declined.

2. Record shows that the present suit is a suit for damages on account of libel and slander; sum of Rs.50,000/- has been claimed. Plaintiff is a doctor by profession. Defendant is stated to a medical officer working at the CGHS Dispensary; at the relevant time the plaintiff was in charge of the CGHS Dispensary at Vivek Vihar. It has been averred that the defendant was undergoing a departmental penalty pursuant to which she had been relegated as a junior to the plaintiff which was not liked by her. On 11.5.1992 by an office order the plaintiff was directed to deal with the confidential reports (CRs) of various staff members which included the defendant also. Defendant did not like this arrangement and she adopted illegal and unfair means to scandalize this issue. In the plaint three different instances/occasions of defamation have been alleged by the plaintiff.

(i) On 11.8.1992 defendant had written a letter in the open Dak to the Additional Director, CGHS East Zone containing the following words:

> "Very recently a photostat copy of the September 8-22, 1983 issue of 'onlooker' with the old story about H.M.D. Shahdara was circulated in my dispensary. Lastly copies of the same article were circulated to various dispensaries through C.R.Section of Nirman Bhawan with clear intention to defame me, engineered by him in all probability." ....." I am afraid that if given a chance the above named doctor will surely write adverse remarks in my CR to spoil my future career.....". Further averment being that the plaintiff by this letter intended to show that

the defendant was a dishonest CMO. (ii) On 7.9.1992 and 08.9.1992 written complaints were addressed by the defendant to the SHO, police station Vivek Vihar wherein false and malicious writings were made against the plaintiff. A part of the English translated extract of the complaint of 08.9.1992 has been reproduced in the plaint and reads as under:

> "That the plaintiff (Dr.Shambhuji) had threatened in the dispensary to assault the defendant physically and had also threatened to kidnap her children."

Further averment in the plaint being that the plaintiff by way of this complaint has been indicted as a man of criminal background which has caused much pain and humiliation to the plaintiff. The plaintiff also had to undergo investigation which has been conducted by the Sub-Inspector of the concerned police station after this complaint has been lodged with him.

(iii) In para 14 of the plaint, it has been averred that the defendant in the course of meetings with his friend and relatives has maligned the plaintiff telling them that he has murdered his first wife and also has a son from his first wife; he has also told the relatives of the plaintiff to report this matter to his in-laws; this has gravely injured his reputation and caused pain and humiliation to him. On these three contentions the present plaint was filed.

3. Defendant in his written statement has raised a preliminary objection about the maintainability of the suit pursuant to which a preliminary issue had been framed which reads as under:

"Whether the plaint does not disclose cause of action?OPD

4. This preliminary issue had been answered in favour of the plaintiff and against the defendant by the impugned order. The application under order VII Rule 11 of the Code filed by the defendant had been rejected. This is the grievance of the petitioner.

5. Vehement arguments have been addressed by the learned counsel for the petitioner. Contention is that the first two allegations as made in the plaint and noted supra as (i) and (ii) are absolutely privileged and the question of malice or the said communications being the basis for a claim

for defamation is not maintainable. Reliance has been placed upon AIR 1999 SC 1028 **Rajendra Kumar Sitaram Pande & Ors. Vs. Uttam and Anr.** to substantiate his submission that where a complaint is made by a person to his superior officer (which in this case was the complaint dated 11.8.1992); such a complaint would not make out a case for defamation. Reliance has also been placed upon judgments reported in AIR 1939 Calcutta 477 **Madhab Chandra Ghose Vs. Nirod Chandra;** AIR 1975 Karnataka 162 **V. Narayana Bhat Vs. E.Subhanna Bhat;** AIR 1962 Patna 229 **Bira Gareri Vs. Dulhin Somaria;** AIR 1939 169 **Rajasthan Lachhman Vs. Pyarchand** to support a submission that the contents of the defamation alleged in (ii), which are complaints dated 7.9.1982 and 8.9.1982 made to the police officer, are also absolutely privileged and cannot be the subject matter of a defamatory statement. Submission being that there is no codified law for a civil liability in a claim for damages and as such the English common law based on the principles of justice, equity and good conscience are to be made applicable; statements made by a person in his complaint to a police officer is an absolute privilege and as such the contents of these complaints which have formed the second basis of the defamatory suit against the defendant falling in this category, no cause of action has been made out in the plaint on this ground as well. Attention has also been drawn to the text of **Halsbury's Laws of India** as also **Gatley Libel and Slander;** contention being that statements made to a Public Authority as to the misconduct of another are absolute privilege. It is pointed out that the contents of para 14 of the plaint also show that the averments made in the plaint are general; these are no specifics in the plaint as to whom the defendant had made the defamatory statements qua the plaintiff; what was the content or the text of the said statements which in turn amounted to a defamation qua the plaintiff. It is pointed out that the provisions of Order VII Rule 11 of the Code get attracted to such kind of malicious suits which should be nipped in the bud itself. Reliance has been place upon the judgments reported in (2002)1 SCC 557 **Saleem Bhasi Vs. State of Maharashtra;** (2005) 4 SCC 315 **Vithalbhai (P) Ltd. Vs. Union Bank of India;** submission being that where the averments made in a plaint as in the present case make out no case of a cause of action in favour of the plaintiff; the court must exercise its power to reject the plaint. To advance this submission reliance has also been placed upon the judgment of the Apex court reported in (1977) 4 SCC 467 **T.Arivandandam Vs.**

T.V.Satyapal & Anr. Contention being that where the reading of the plaint manifestly shows that it is vexatious and meritless; the court should exercise its power under Order VII Rule 11 of the Code; clever drafting which has otherwise created no cause of action must be dropped in the first hearing itself.

6. Arguments have been refuted. The respondent is appearing in person. His submission is that the question as to whether his averments in the plaint are instances of an absolute privilege or a qualified privilege is a defence which is sought to be set up by the defendant and the defence is not a matter which can be gone into at the time of dealing with an application under Order VII Rule 11 of the Code; averments made in the plaint alone being relevant.

7. Record has been perused.

8. The plaint has been detailed supra. There is no doubt to the proposition that the averment in the plaint alone have to be looked into while dealing with an application under Order VII Rule 11 of the Code. Present suit has been filed in May 1993. It is a suit for damages based on the averments as noted supra claiming damages in the sum of Rs.50,000/-. Written statement was filed in February 1995. Replication was filed in the year 2003; issues have been framed on 09.7.2009. They read as follows:

"1.Whether the plaint does not disclose cause of action? OPD

2.Whether defendant has defamed the plaintiff? Opportunity

3.Whether plaintiff is entitled for damages, if so to what extent? OPP

4.Relief."

9. Issue no.1 had been treated as a preliminary issue. There was admittedly no application under Order 7 Rule 11 of the Code. However Issue No.1 has been treated as a preliminary issue; which is also the language of Order VII Rule 11(a) of the Code.

10. The question which in fact had arisen before the trial court is as to whether the averments made in the plaint did not disclose a cause of action. The onus to discharge this issue was upon the defendant. The arguments have been aforenoted. The argument that the contents of (i)

and (ii) (the alleged defamatory communication/statements made by the defendant against the plaintiff are) protected by an absolute privilege are indeed defences raised by the defendant which the court while dealing with an application under Order 7 rule 11 of the Code is precluded from going into. It is only the averments made in the plaint which have to be looked into.

11. There is no dispute to the proposition that privileges are of two kinds; it may be a case of an absolute privilege or it may be a case of a qualified privilege; whether the contents of the defamation alleged by the plaintiff in terms of his claim in para 1 and para 11 supra are covered by an absolute privilege or by a qualified privilege cannot straightway be decided or deciphered from a plain reading of the plaint; this would be mixed question of law and fact.

12. The law on defamation is not a codified law; the legal precedents cited by the learned counsel for the petitioner are all borrowed propositions from the criminal law which for the purposes of defamation and malicious prosecution has been codified under Sections 499 and 500 of the Indian Penal Code.

13. The averments made in the present plaint may or may not be cases of absolute privilege; it is also well settled that cause of action is always a bundle of facts; it is only after trial that it will be known whether they will qualify as one or the other. In these circumstances, it cannot be said that the plaint discloses no cause of action. In fact the judgments relied upon by the learned counsel for the petitioner show that an absolute privilege is not available unless the action is clearly identified for explaining such an absolute privilege; complaints or statements made to the police which are not a part of any judicial proceedings and particularly when the matters would go to court may thus not be governed by an absolute privilege; maximum that can be made available would be a qualified privilege. These being defences; at the cost of repetition; could not have been looked into at this stage.

14. Impugned order in no manner suffers from any infirmity. Dismissed.

ILR (2012) I DELHI 754
MAC. A.

BAJAJ ALLIANZ GENERAL INSURANCE CO. LTD. ....APPELLANT

VERSUS

SOMVEER SINGH & ORS. ....RESPONDENTS

(G.P. MITTAL, J.)

MAC. APPEAL NO. : 580/2011 DATE OF DECISION: 02.12.2011

Motor Vehicles Act, 1988—Appeal impugns order dated 24.03.2011 of the Motor Accidents Claims Tribunal (MACT)—Appellant denied liability as driver had no valid licenese at the time of accident and this constituted a breach of policy condition as proved by the insurance company—The compensation awarded under the non-pecuniary head towards inconvenience, hardship, discomfort frustration, mental stress and other compensation, towards loss of amenities of life are challenged as being one and the same. Held—The award of compensation under the different heads by the Tribunal was fair in light of the injuries suffered by the victim and the Court found no reason to interfere with award.

It is submitted by the learned counsel for the Appellant that the compensation awarded under the non-pecuniary head i.e. Rs.1,00,000/- towards inconvenience, hardship, discomfort, frustration, mental stress and Rs.50,000/- towards loss of amenities of life was one and the same. It is urged that since the Appellant proved that there was breach of conditions of policy as the driver did not hold a valid and effective licence on the date of accident, the Insurance Company had no liability to pay and should not have been made liable to pay and then recover from the owner.

Reliance is placed on **National Insurance Co. Ltd. v. Parvathneni and Anr.,** (2009) 8 SCC 785 wherein the Hon'ble Supreme Court expressed reservations about the correctness of decisions in **National Insurance Co. Ltd. v. Yellamma, Samundra Devi v. Narendra Kaur,** (vide SCC p. 64, para 16); **Oriental Insurance Co. Ltd. v. Brij Mohan,** (vide SCC p. 64, para 13); **New India Insurance Co. v. Darshana Devi,** (vide SCC p. 424, para 21). Yet unless these decisions are reconsidered the same will hold the fields. **(Para 2)**

During inquiry before the Tribunal, it was established that the Respondent No.1 lost complete vision in her left eye and the compensation under item 5 and 6 in para 12 above totaling Rs. 1,50,000/- in the circumstances cannot be said to be excessive. I do not find any ground to interfere with the award. The appeal is accordingly dismissed. **(Para 3)**

Important Issue Involved: Unless decisions of the supreme Court are reconsidered the position of law holds and a judgement merely expressing reservations about the correctness of the precedents would not have the effect of overruling the same.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Ms. Neeraj Sachdeva, Advocate.

FOR THE RESPONDENT : Mr. Manoj Singh, Advocate for R-1.

CASES REFERRED TO:

1. *National Insurance Co. Ltd.* vs. *Parvathneni and Anr.,* (2009) 8 SCC 785.
2. *National Insurance Co. Ltd.* vs. *Yellamma, Samundra Devi* vs. *Narendra Kaur,* (vide SCC p. 64, para 16).
3. *Oriental Insurance Co. Ltd.* vs. *Brij Mohan,* (vide SCC p. 64, para 13).

4. *New India Insurance Co.* vs. *Darshana Devi,* (vide SCC p. 424, para 21).

RESULT: Appeal dismissed.

G.P. MITTAL, J. (ORAL)

1. Aggrieved by an award dated 24.03.2011 the Appellant Bajaj Allianz General Insurance Co. Ltd. has filed this appeal. Respondent No.1 Krishana Chauhan suffered grievous injury in an accident, which took place on 20.11.2008 at 6:00 AM. Respondent No.1 suffered loss of complete vision in the left eye. The Tribunal awarded a total compensation of Rs.2,77,140/- under different heads. Para 12 of the award is extracted hereunder: -

"12. In view of the above, total compensation head wise payable to petitioner is as under: -

1.	Compensation for pain & sufferings	30,000/-
2.	Compensation for expenses Incurred on medical treatment.	91,640/-
3.	Compensation for Special diet	2,000/-
4.	Compensation for conveyance charges	3,500/-
5.	Compensation on account of inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.	1,00,000/-
6.	Compensation for loss of enjoyment of amenities of life & general damages.	50,000/-
		2,77,140/-

2. It is submitted by the learned counsel for the Appellant that the compensation awarded under the non-pecuniary head i.e. Rs.1,00,000/- towards inconvenience, hardship, discomfort, frustration, mental stress and Rs.50,000/- towards loss of amenities of life was one and the same. It is urged that since the Appellant proved that there was breach of conditions of policy as the driver did not hold a valid and effective

licence on the date of accident, the Insurance Company had no liability to pay and should not have been made liable to pay and then recover from the owner. Reliance is placed on **National Insurance Co. Ltd. v. Parvathneni and Anr.,** (2009) 8 SCC 785 wherein the Hon'ble Supreme Court expressed reservations about the correctness of decisions in **National Insurance Co. Ltd. v. Yellamma, Samundra Devi v. Narendra Kaur,** (vide SCC p. 64, para 16); **Oriental Insurance Co. Ltd. v. Brij Mohan,** (vide SCC p. 64, para 13); **New India Insurance Co. v. Darshana Devi,** (vide SCC p. 424, para 21). Yet unless these decisions are reconsidered the same will hold the fields.

3. During inquiry before the Tribunal, it was established that the Respondent No.1 lost complete vision in her left eye and the compensation under item 5 and 6 in para 12 above totaling Rs. 1,50,000/- in the circumstances cannot be said to be excessive. I do not find any ground to interfere with the award. The appeal is accordingly dismissed.

4. The award amount deposited with the Registrar General shall be released to Respondent No.1 along with interest forthwith. The statutory amount, if any, deposited by the Appellant shall also be released to the Appellant.

ILR (2012) I DELHI 757
CS (OS)

NIRANJAN LAL GUPTA & ANR. ....PLAINTIFFS

VERSUS

GURMEET SINGH BAWEJA & ORS. ....DEFENDANTS

(V.K. JAIN, J.)

CS (OS) NO. : 2969/2011 DATE OF DECISION: 05.12.2011

Code of Civil Procedure, 1908—Order XXXIX Rule 1&2—Election dispute—Election for the posts of President and vice President of Managing Committee of Defendant No.3 held by postal ballot from members across the country—Plaintiff No.1 and Plaintiff No.2 contested for President and Vice President respectively—During counting it was observed that some ballot papers had been tampered with by erasing the tick mark placed against the names of plaintiffs and putting tick mark against the names of Defendants No. 4&5 on ballot papers—Plaintiffs claimed that these tampered ballots be read in their favour—Defendant No.1 proceeded with declaring defendants No. 4&5 as President and Vice President—Plaintiffs contend that the rejected ballots be counted in their name—Held, prima facie it appears that the disputed ballot papers have been tampered with, but going by the claim of Plaintiffs, since these votes had been cast in presence of Plaintiffs, Election officer had no option but to reject the same and therefore, Plaintiffis connot claim themselves to be winning candidates—Since the dispute between the parties is only with respect to these ballots, which are invalid, vote having been cast in the presence of plaintiffs, there is no ground to order re-election at this stage and no case for interim injunction made out.

Important Issue Involved: Since the disputed votes had been cast in presence of Plaintiffs, Election Officer had no option but to reject the same.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. K.T.S. Tulsi, Mr . Raman Kapur, Sr. Advocates with Mr. Manish Kumar, Advocate for Plaintiff No.1 Mr. Aman Lekhi, Sr. Advocate with Mr. Amit Kumar, Advocate for Plaintiff No. 2.

FOR THE DEFENDANTS : Mr. Rajiv Nayyar, Sr. Advocate Mr.

Z. Anwer, Advocare for D-3 Mr. Maninder Singh, Sr. Advocate with Mr. P.S. Bindra & Mr. Harish Sharma, Advocate for D-4 & 5.

CASES REFERRED TO:

1. *Murray & CO.* vs. *Ashok Kr. Newatia & Anr.* (2000) 2 SCC 367.
2. *S.Raghbir Singh Gill* vs. *S.Gurcharan Singh Tohra & Ors.* 1980 Supp. SSC 53.

RESULT: Application Dismissed.

V.K. JAIN, J.

IA No. 18992/2011 (u/O 39 R.1&2 CPC)

1. Defendant No.3 of All India Motor Transport Congress is stated to be a body consisting of more than 5000 members, representing more than 01 lac transport companies and approximately 72 lac truckers, Light Motor Vehicles, buses, commercial vehicles etc. The Articles of Association of defendant No.3, which has been registered as a company, provides for formation of a Managing Committee consisting of not less than 15 and not more than 121 members to be elected zone-wise by its members. The members of the Managing Committee elect the President and Vice-Presidents of the body from amongst themselves, for the tenure of two years each. For the period 2011-13, plaintiff No.1 Mr. Niranjan Lal Gupta, defendant No.4 Mr. Bal Malkit Singh and one Mr. Nimesh J. Patel, all of whom are members of the Managing Committee filed the nominations for the post of President whereas plaintiff No.2 Mr. Harish Sabharwal and defendant No.5 Mr. Kultaran Singh Atwal filed nominations for the post of Vice-President from North Zone. Since Mr. Nimesh J. Patel withdrew his nomination, only plaintiff No.1 and defendant No.4 remained in the fray for the post of President. The election is held by postal ballots, the members of the Managing Committee being from all over India. Accordingly, ballot papers were sent to 109 elected members of the Managing Committee and 09 former Presidents, who were to cast vote for the aforesaid post. It is alleged in the plaint that out of total voters numbering 118, 60 cast their votes in presence of the plaintiffs by ticking on the ballot paper, since it was not a secret ballot. On 24th

November, 2011 during the process of counting, it was observed that some ballot papers had been tampered with by erasing/removing the tick mark placed against the names of the plaintiffs and putting a new tick mark against the names of defendants No. 4 & 5. It is alleged that the aforesaid tampering was done after dispatch of ballots by the voters and before the counting had begun. The plaintiffs lodged protest in this regard before the counting was complete. Defendant No.1, however, continued with the process of counting and declared defendants No. 4 & 5 elected to the post of President and Vice-President (North Zone) respectively. The case of the plaintiffs is that, had the rejected ballot papers been counted as the votes cast in their favour, they would have been elected President and Vice-President (North Zone) respectively of defendant No.3. The plaintiffs have sought a declaration declaring the election for the posts of President and Vice-President (North Zone) for the term 2011-13 to be illegal, null and void. They have also sought a direction to defendant No.1 to recount the votes taking into account the 08 rejected votes and declared them as the successful candidates for the aforesaid posts. They have also sought an injunction restraining defendants No. 4 & 5 for representing themselves as President and Vice President (North Zone) of defendant No.3. The Plaintiffs have also filed IA No. 18992/2011 seeking an interim injunction restraining the defendants No. 4 & 5 from taking charge on the post of President and Vice-President (North Zone) respectively and staying the operation of the result declared on 24th November, 2011.

2. The suit has been contested and the application opposed by defendants No. 3 to 5, though Written Statement is yet to be filed by them.

3. The dispute between the parties is with respect to 08 postal ballots for the post of President and 08 postal ballots for the post of Vice President (North Zone). The ballot box containing all the ballot papers was opened in the Court on 2nd December, 2011 in presence of the parties after they had seen the paper seals on it and satisfied themselves that there was no tampering with the box or the lock put on it. Ballot papers in question were taken out and were examined in the Court. It appears to me that on 07 out of 08 ballot papers for the post of President, initially, the tick mark was put against the name of plaintiff No.1 but later on that tick mark was erased and another tick mark against the name of

defendant No.4 was put. It also appears that on all the disputed ballot papers for the post of Vice President (North Zone) the voter had initially put tick mark against the name of plaintiff No.2 but later on that tick mark was erased and another tick mark was put against the name of defendant No.5. There can be two possibilities with respect to erasing of the tick marks initially put on these ballot papers and putting of other tick mark on them. The first possibility and which I feel is more likely is that someone who had access to the envelopes in which these ballot papers were sent by the voters, erased the marks which were initially put on them and put another mark against the name of defendant No.4 on the ballot papers for the post of President and against the name of defendant No.5 for the post of Vice-President (North Zone). To my mind, it is unlikely to be a mere coincidence that at least 08 voters who are casting votes from different places would conduct themselves in an identical manner by erasing the tick mark initially put by them and putting another mark against the name of the other candidate. Prima facie it appears to me that these ballot papers have been tempered with after they were dispatched by the voters. This obviously would have been done in connivance with the winning candidates, they being the only beneficiary of the tempering. The next question, which comes up for consideration is as to whether, at this stage, the Court should direct counting of the ballot papers in favour of the plaintiff or should direct re-election, on account of this tempering.

4. The specific case of the plaintiff is that 60 voters had cast their votes in their presence, meaning thereby that the tick mark against their names was put by those voters in their presence. The election for the post of President and Vice-President (North Zone) is not held up by show of hands. As per instructions issued by the Election Officer, voter was required to put the ballot paper in an envelope, flap of the envelope was to be gum pasted, preferably sealed, that envelope to be put it into another envelope which was to be sent to the Election Officer. The plaintiffs themselves have placed on record the letter dated 3rd November, 2011 sent by the Election Officer to all the voters, inclusive two ballot papers one for the post of President and other for the post of Vice President (North Zone). One of the instructions given to the voters requires them not to write or put any other mark on the ballot paper which may disclose his identity in which case the ballot is liable for cancellation. It would thus be seen that the polling process was to be

a secret process in which the voter was precluded from disclosing his identity and if he did so the ballot cast by him was liable to be rejected/ cancelled. If 60 voters out of 118 cast their vote in presence of the plaintiffs, as is specifically claimed by them, they by doing so disclosed their identity to the plaintiffs, which in turn, rendered their ballot liable to rejection/cancellation. The case of the plaintiffs in para 28 of the plaint is that the ballot was not a secret ballot and that is why 60 voters had cast their votes in their presence. This being contrary to the instructions contained in letter dated 3rd November, 2011 cannot be accepted. Had it not been a secret ballot, the voters would not have been instructed not to disclose their identity while casting their votes. It was contended by the learned Sr. Counsel for the parties that the ballot would be liable to be cancelled only if the voter writes something or puts any mark other than tick mark on the ballot paper and since there was neither any writing nor any other mark on the ballot papers at the time these 60 voters cast their ballot in favour of the plaintiffs, these ballot papers could not have been rejected. I, however, do not find any merit in this contention. It is quite evident from additional instruction (a) that the prohibition is against disclosure of identify of the voter, writing something or putting any other mark on the ballot paper being only two of the manner in which the identity of the voter could possibly be disclosed to the candidates. If the voters were precluded from disclosing their identity, it is immaterial whether they disclose it by writing something on the ballot paper or putting some mark on it or by casting vote in presence of a candidate or some other manner. Once, it is found that the voter has disclosed his identity the vote cast by him is liable to be rejected irrespective of the mode whereby the identity has been disclosed. Therefore, assuming averments made in the plaint to be correct, the Election Officer had no option but to reject these ballot papers in case the vote was cast in presence of the plaintiffs as is claimed by them. If these ballot papers are excluded from consideration as the Election Officer has done, though on a different ground, the plaintiffs cannot claim to be the winning candidates and defendants No. 4 & 5 would be the successful candidates for the post of President and Vice President (North Zone) respectively. Since the dispute between the parties is only with respect to these ballot papers, which, in my view, are invalid, vote having been cast in the presence of the plaintiff, there is no ground to order re-election at this interim stage itself.

5. The learned Senior Counsel for the plaintiffs during the course of arguments relied upon the decision of Supreme Court in **S.Raghbir Singh Gill v. S.Gurcharan Singh Tohra & Ors.** 1980 Supp. SSC 53 in support of his contention that the voters are not prohibited from disclosing their identity even during the process of casting their vote. A perusal of this decision would show that in election for members to Council of States, 08 MLAs who were detained under MISA, preferred to vote through postal ballots. The appellant and respondents No. 1 had received equal number of first preference votes, which was below the ascertained quota. The surplus first preference votes were added to the first preference votes polled by the appellant and he was declared elected. Respondents No. 2 & 3, who were sitting MLAs belonging to the opposition party, filed an Election Petition challenging the election of the appellant and it was alleged that the Returning Officer had tampered with the postal ballots. When the petition came up for hearing those who had cast their votes by post appeared as witnesses and were examined. The witnesses claimed that they had cast only the first preference votes in favour of respondent No.1 and had not indicated any other preferences. The Court held that the ballot papers were tampered with and were improperly received in favour of the appellant and improperly refused to respondent No.1. Recounting was ordered, in which respondent No.1 was declared elected and the election of the appellant was set aside. While dismissing the appeal preferred, Supreme Court observed that secrecy of ballot being is an indispensable adjunct of free and fair election and ordinarily this secrecy has to be guarded. Noticing that despite tampering with the ballot papers, the Returning Officer did not reject them as being invalid, the Court was of the view that if the circumstances permit and evidence of unquestionable character is available it would be perfectly legitimate for the Court, in an Election Petition, to ascertain for whom the vote was cast before it was tampered with and if it can be ascertained as a valid vote it must be accepted as such. The Court was of the view that it was the bounden duty of the Returning Officer, in view of sub rule 2 of Rule 56 of Conduct of Election Rules 1961, to ascertain the intention of the voter by finding out for whom the vote was cast and add the vote for the candidate for whom it was meant to be. It was noted that proviso to sub rule 2 of Rule 56 showed that the ballot paper could not be rejected merely on the ground that mark indicating vote was indistinct or made more than once, if the intention that the vote

shall be for a particular candidate clearly appears from the way the paper is marked. During the course of arguments, it was claimed by the appellant that the order passed by the High Court violated the mandate of Section 94 of Representation of The People Act which provides that no witness or other person shall be required to state for whom he had voted. The Court was of the view that Section 94 only prohibits compelling a witness to disclose, against his will, as to how he had voted and for whom he had voted and when questioned in this regard he can refuse to answer the question without incurring any penalty or forfeiture but if he chooses to open his lips of his own free will without any direct or indirect compulsion and waive the privilege nothing prevents him from disclosing how he voted. This judgment to my mind in the context of the case before this Court would mean that the voters who cast these disputed ballot papers, are at liberty, post elections, if they so desire, without any direct or indirect compulsion on them, to disclose to whom they had given their vote through these postal ballots. At this stage, there is no material on record except the claim of the plaintiffs is that as many as 60 voters had cast their votes in their favour in their presence. The plaintiffs have not filed the affidavits of those 60 voters who according to them had cast the votes in their favour. Moreover, even if these votes were cast in favour of the plaintiffs as is claimed by them, in view of additional instruction (a) to the voters, casting the votes in presence of the plaintiffs by itself rendered these postal ballots liable to rejection since by doing so they fail to maintain the secrecy of the polling process and contravened the instructions issued to them by the Election Officer, while signing the postal ballots to them. Casting a vote in the presence of a candidate, being altogether different from disclosing the option, post election, the decision in the case of **Raghbir Singh** (supra) does not apply. Prima facie, the plaintiffs have not able to make out a case for counting these disputed votes in their favour, for the purpose of deciding the interim application.

6. During the course of arguments it was submitted by the learned Senior Counsel for defendants No. 3 to 5 that defendants No. 4 & 5 have already taken over from the erstwhile incumbents and therefore there can be no question of restraining them from assuming charge of the office to which they were elected. This was strongly refuted by the learned Senior Counsel for the plaintiffs and relying upon the minutes of the

meeting of Transport Development Council held on 28th November, 2011 wherein the outgoing President Mr.G.R.Shanmugappa has signed as the President of AIMTC. Their contention was that had defendants No. 4 & 5 taken charge on 25th November, 2011 itself, the outgoing President would not have attended the meeting held on 28th November, 2011 and would not have described himself as the President of AIMTC while signing the minutes of the meeting. This was countered by the learned Senior Counsel for defendants No. 3 & 4, who stated that the outgoing President was duly authorized to represent defendant No.3 in the aforesaid meeting since notice of the meeting was received much before the results of the election were declared and according to them, describing himself as the President by Mr. G.R.Shanmugappa was only inadvertent. They also stated that after defendants No. 4 & 5 had taken charge of their respective offices, press release was duly issued in this regard, even before filing of the suit and the concerned banks were also intimated on 30th November, 2011. I, however, need not go into these aspects of the matter since I am of the view that the plaintiffs have failed to make out a prima facie case for counting these disputes ballot papers in their favour.

The learned Senior Counsel for the plaintiffs referred to decision of Supreme Court in **Murray & CO. v. Ashok Kr. Newatia & Anr.** (2000) 2 SCC 367 where the Court was of the view that making a false statement on oath constitutes criminal contempt. The contention was that by filing a forged and fabricated handing over and taking over report dated 25th November, 2011 the defendants No. 4 & 5 have rendered themselves liable to punishment for criminal contempt. This aspect, to my mind, cannot be gone into at this stage. Whether defendants No. 4 & 5 took charge on 25th November, 2011 - is a matter which requires recording of evidence and no firm view in this regard can be taken at this stage. I am of the view the whole of the process of the election need not be set at naught on account of tampering with these disputes ballot papers since the Election Officer has not taken them into consideration and they were in any case liable to be rejected.

7. For the reasons given in the preceding paragraphs I find no ground for grant of any interim order to the plaintiffs. The application is hereby dismissed.

CS(OS) No. 29692/2011

Written Statement be filed within the prescribed period. Replication, if any, can be filed within 04 weeks after getting the copy of the Written Statement.

The parties are directed to appear before the Joint Registrar on 24th January, 2012 for admission/denial of documents.

List before the Court on 22nd May, 2012 for framing of issues.

ILR (2012) I DELHI 766
WP (C) CM

EX. SI LAKHWINDER SINGH ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(ANIL KUMAR & SUDERSHAN KUMAR MISRA, JJ.)

WP (C) NO. : 3515/1997 & CM NO. : 16761-62/2011 **DATE OF DECISION: 07.12.2011**

Limitation Act, 1963—Section 5—Writ petition dismissed in default on 03/05/11—Restoration applicant under Sec. 5 of the Act—Application contended that his counsel expired in June, 2003 and although son of the counsel had contacted the petitioner, seeking instructions, but due to illness, the petitioner residing in Punjab could not come to Delhi and under these circumstances when the matter came up for hearing on 03/05/2011, neither the petitioner nor his counsel could appear which led to dismissal of writ petition in default—Despite opportunity the respondents did not file reply—Held, the applicant has been able to make

out sufficient cause, so both the applications allowed and writ petition restored.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Ms. Suresh Kumari, Advocate.

FOR THE RESPONDENT : Ms. Barkha Babbar, Advocate.

CASES REFERRED TO:

1. *State of Rajasthan and Another* vs. *Mohammed Ayub Naz* reported in 2006 I AD (SC) 308.
2. *Ex. Constable Akhilesh Kumar* vs. *The Director General, BSF & Ors.,* W.P.(C) No.6577/2002.
3. *Union of India* vs. *Ram Pal* reported in 1996 (2) SLR 297.
4. *Gauranga Chakraborty* vs. *State of Tripura* reported in (1989) 3 SCC 314.

RESULT: Application allowed.

ANIL KUMAR, J.

CM Nos.16761 & 16762/2011

These are the applications by the petitioner/applicant seeking setting aside of order dated 3rd May, 2011 dismissing the writ petition in default of appearance of petitioner and his counsel and for condonation of delay of 120 days in filing the application for restoration, under Section 5 of the Limitation Act. The petitioner/applicant has contended that the writ petition was filed through his counsel Sh.V.P.Sharma, Advocate, who had been perusing his case diligently.

The petitioner/applicant asserted that his counsel Sh.V.P.Sharma expired in June, 2003. Though the son of Sh.V.P.Sharma, Sh.Yogesh Sharma, had contacted him seeking instructions, however, the petitioner/applicant could not meet Sh.Yogesh Sharma as he was not keeping well and, consequently, he could not travel to Delhi, as he is a resident of Punjab.

In the circumstances, it is asserted that on 3rd May, 2011, when the matter came up for hearing, neither he nor his counsel could appear because Sh.V.P.Sharma had already died and he could not engage another counsel leading to dismissal of the writ petition in default of appearance of the petitioner/applicant and his counsel.

The petitioner/applicant has contended that non-appearance on his part is neither intentional or deliberate and is attributable to his ill health and the demise of his counsel Sh.V.P.Sharma. In the circumstances, there is sufficient cause as contemplated in law and in the facts and circumstances for setting aside the order dated 3rd May, 2011 dismissing the writ petition in default of appearance of the petitioner and his counsel and for condonation of 120 days delay in fling the application for restoration.

The notice of the application was issued to the respondents on 31st October, 2011 and four weeks. time was granted to the respondents to file the replies. Despite the time given by this Court, replies have not been filed nor any cogent reason disclosed for not filing the replies.

In the facts and circumstances, the averments made by the petitioner/applicant for setting aside the order dated 3rd May, 2011 dismissing the writ petition in default of appearance of the petitioner/applicant and his counsel and for condonation of 120 days delay in filing the application for restoration have remained unrebutted.

Considering the entirety of the facts and circumstances, the petitioner/applicant has been able to make out sufficient cause for setting aside the order dated 3rd May, 2011 dismissing the writ petition in default of appearance of the petitioner/applicant and his counsel and for condonation of 120 days delay in filing the application for restoration. Therefore, the applications are allowed. Delay of 120 days in filing the application for restoration is condoned, and the order of dismissal dated 3rd May, 2011 is set aside and the writ petition is restored to its original number.

W.P.(C) No.3515/1997

1. With the consent of the parties, the matter is taken up for hearing for disposal. The petitioner had been dismissed from service on account of his unauthorized absence for 99 days and considering his

profile. The action was taken under Section 11 of the BSF Act read with Rule 22 of the BSF Rules, and the trial was dispensed with and the petitioner was dismissed from service holding that trial was impractical and further retention of petitioner in service was undesirable.

2. The petitioner has challenged the order of his dismissal on the ground that no inquiry was held to find out the truthfulness of the allegation and the competent authority did not apply his mind for coming to the conclusion that it was inexpedient or impracticable to hold the inquiry under Section 19A of the BSF Act.

3. According to the petitioner, he remained absent from duty as he was sick for a long period and after recovery from sickness he contacted a large number of legal practitioners of his district to take legal assistance for taking steps against the order passed by the competent authority. The petitioner contended that he could file the petition challenging the order of dismissal dated 7th July, 1993 only in the year 1997, as he did not have enough money for litigation and he also sought condonation of delay in filing the writ petition. In the circumstances, the petitioner sought quashing of order dated 7th July, 1993 dismissing the petitioner from service and he has also sought a declaration that show cause notice dated 29th April, 1993 issued to him before his dismissal was illegal, unjust and against the principle of natural justice and against the mandatory provision of law. In the circumstances, the petitioner has sought reinstatement in the service along with all service benefits.

4. This has not been disputed by the petitioner that show cause notice dated 29th April, 1993 was issued to him detailing that he has been absent from duty from 5th November, 1990 to 12th February, 1991 and from 1st January, 1992 to 22nd April, 1992 without leave. What is contended is that the show cause notice was not served on him. The petitioner was asked to show cause as to why his service should not be terminated as his further retention in service is undesirable.

5. The petitioner did not reply to the show cause notice dated 29th April, 1993 and therefore, after considering the facts and circumstances and considering the material which was before the authorities, the order of dismissal dated 7th July, 1993 was passed.

6. Against the order of the dismissal dated 7th July, 1993, the petitioner filed an appeal dated 15th October, 1994 to the Director General,

Border Security Force contending that he fell sick on 5th November, 1990 and remained sick up to 12th February, 1991. The petitioner asserted that he had informed the concerned authority regarding the grant of sick leave, as he had not fully recovered. He contended that he fell sick again on 1st January, 1992 and remained sick up till 22nd April, 1992. However, despite his request he was not granted medical leave and he has been dismissed from service without holding any enquiry.

7. Regarding the show cause notice dated 29th April, 1993, the petitioner pleaded that notice was sent to his village address, however, at that time the petitioner was living at Delhi and therefore, he could not reply to the show cause notice dated 29th April, 1993. Along with the appeal, the petitioner did not file anything to show that in April, 1993 he was not living at address Village & Post Jallowal Colony, Bhogpur Sirwal, PS Bhogpur, District Jalandhar (Punjab) and was living at Delhi. No documents were filed to show that the petitioner was sick from 5th November, 1990 up till 12th February, 1991 and thereafter again from 1st January, 1992 to 22nd April, 1992. The petitioner also did not disclose the fact that he was not living in District Jalandhar (Punjab) and has been living at Delhi and that this fact was communicated by the petitioner to the respondents. The appeal filed by the petitioner against his order of dismissal was also dismissed.

8. The writ petition is contested by the respondents contending, inter-alia, various facts pertaining to the conduct of the petitioner which are enumerated hereinafter as under:-

> "a) while posted at Bhandosi Camp during Sept.89, the petitioner drove away the water tanker unauthorizedly outside the premises. The petitioner was given verbal warning by Commandant 25 Bn. BSF.
>
> b) again on 25th Jan 1990 at Bhondsi Range he drove the Govt. (Tata 7 Ton) unauthorizedly out of Bhondsi Camp. A C.O.I. was ordered in which the petitioner was found guilty and given a written warning by the Commandant.
>
> c) On 2nd July, 1990 he unauthorizedly and improperly brought a girl of ill-repute to his room in SO's Mess at Chhawla Camp and kept her for the night. For this act of indiscipline he was severely reprimanded by the Commandant.

d) During the absence of the SO w.e.f 05th Nov. 90 Frontier HQ BSF Jalandhar informed the unit that Sub Inspector Lakhwinder Singh was arrested by a CRPF Bn. at Jalandhar on 14.11.1990 on the charge of possessing an un-licensed mouser pistol. However, FTr HQ Jalandhar vide their Sig No.0/4578 dated 28.1.91 informed that the case against SI Lakhwinder Singh was dropped.

e) During his absence w.e.f 01.01.92 to 22.4.92 Addl. Commissioner of Police (Central Distt.) Delhi informed vide their letter dated 15.1.92 that the petitioner was apprehended in a drunken state from a brothel house at G.B.Road, Delhi. Further he had abused/misbehaved with a beat Const. of Delhi Police who was there on duty. A report was lodged vide DD No.80B dated 01.01.92 U/S 65 of D.P.Act at P.S.Kamla Market, Delhi.

f) In addition to the above, on various occasions the SO remained absent unauthorizedly from duty which was subsequently regularized by Comdt 25 Bn. BSF by treating the said period as 'dies non'."

9. Regarding dispensing with trial, it has been contended that the petitioner absented on 5th November, 1990 and reported back on 12th February, 1991. A Court of Inquiry/ROE was completed and the case was referred to higher Headquarter to convene a GFSC. The petitioner, however, absented on 1st January, 1992 to avoid disciplinary proceedings and reported back to the Unit on 22nd April, 1992. The disciplinary proceedings were started against him, however, the petitioner again absented himself and in the circumstances the competent authority was left with no option except to dismiss the petitioner from service administratively under the BSF Rules after providing all possible opportunities to urge anything he had to say against the proposed action.

10. The respondents also relied on a decision dated 21st March, 2006 in W.P.(C) No.6577/2002, **'Ex. Constable Akhilesh Kumar v. The Director General, BSF & Ors.',** holding that if a Govt. servant is absent from duty for long period without intimation to the Govt., the authorities are entitled to invoke provision of Section 11 (2) of the BSF Act. It was further held that once a show cause notice is issued regarding the tentative opinion as required, nothing further was required to be done

as reply to the notice was not given. The observations of the Coordinate Division Bench in **Ex. Constable Akhilesh Kumar** (supra), are as under:-

"Being aggrieved of the aforesaid action this writ petition is filed on which we have heard the learned counsel appearing for the parties. Counsel for the petitioner has submitted before us that the petitioner was on leave and he was receiving medical treatment for a head injury. On going through the record we find that the petitioner had undergone surgery for Arachanoid Cyst Temporal Lobe. However after the said period the petitioner joined 30 Bn. BSF on 27th October, 1995. The petitioner for the said period i.e. from 1st June, 2000 to 16th July, 2000 was found to be roaming here and there as stated by his own father. It is also indicated from the said report submitted by the police that the petitioner was not interested to rejoin duties. The petitioner belongs to a disciplined force and therefore it was incumbent upon him to inform the respondents regarding his absence even if there was any difficulty for the petitioner to rejoin the duties. He ignored all notices issued to him by the respondents directing him to rejoin his duties. Having no other alternative, action has been taken against the petitioner in accordance with the provision of Section 11 of the BSF Act. Under similar circumstances actions taken by the respondents exercising power under the same provision of law have been upheld. In that regard our attention is drawn to a Division Bench decision of this Court in Ex.Ct.Raj Kishan v. Union of India and Others - CWP No.7665/2001, disposed of on 4th September, 2002. In the said decision also a similar issue came up for consideration before this Court. It was held in the said decision that since the show cause notice issued to the petitioner was in accordance with law and incorporated the opinion of the Commandant that retention of the petitioner in service was undesirable and since his trial by security force court was held to be inexpedient and impracticable and therefore there is no illegality or irregularity in passing the impugned order. Similar is the situation in the present case also. Competent authority in the show cause notice recorded that retention of the petitioner in service was undesirable and his trial by security force court was inexpedient and impracticable. Cases of **Gauranga Chakraborty v.State of Tripura** reported in (1989)

3 SCC 314 and **Union of India v. Ram Pal** reported in 1996 (2) SLR 297 were also referred to wherein it was held that the power exercised by a Commandant under Section 11(2) read with Rule 177 was an independent power which had nothing to do with the power exercisable by a security force court and once show cause notice was issued in terms thereof, no further inquiry was required to be held if the delinquent person failed to reply to the notice and to deny the allegations in the process. Our attention is also drawn by the counsel appearing for the petitioner to a medical certificate dated 4th February, 2001 which is placed on record in support of his contention that the petitioner was indisposed during the entire period during which he was allegedly absent unauthorisedly. The said medical certificate is issued by CMO, Fategarh. On going through the said medical certificate we find that he was advised rest for the period from 12th July 2000 to 4th February 2001 which is the period during which he was unauthorisedly absent. The said certificate does not state that the petitioner had undergone any surgery in the said hospital of the CMO Fategarh. It was only a certificate stating that he was suffering from post operative arachanoid cyst with eplileptic seizure and advised rest for the aforesaid period. The said operation as already indicated was done in the year 1992 and we do not find any reason given in the said certificate for advising rest to the petitioner for such a long period. Except for that medical certificate no other contemporaneous record is placed on record to show that he was ever admitted to any hospital nor any document is placed on record to show and indicate that he was purchasing medicines or he was even examined as an out door patient around the same time. We have already referred to the report of the police from which it is indicated that the petitioner was not in the hospital for the father of the petitioner would have definitely given such a statement to the police if it would have been so. Therefore the aforesaid medical certificate does not inspire confidence and cannot at all be relied upon. Considering the facts and circumstances of this case we are of the considered opinion that ratio of the aforesaid decisions of this Court as also of the Supreme Court are squarely applicable to the facts and circumstances of this case as in the present case also the

independent power vested in the Commandant under Section 11(2) read with Rule 177 was exercised after issuing show cause notice to the petitioner in terms thereof. Therefore we hold that no further inquiry was required to be held in view of the fact that the petitioner has failed to file any reply to the show cause notice and to deny the allegation in the process. In a recent decision of the Supreme Court in **State of Rajasthan and Another v. Mohammed Ayub Naz** reported in 2006 I AD (SC) 308 the Supreme Court after referring to many other precedents has held that absenteeism from office for prolong period of time without prior permission by the Government servant has become a principal cause of indiscipline which have greatly affected various Government services. It is also held that in order to mitigate the rampant absenteeism and willful absence from service without intimation to the Government the Government has promulgated a rule that if the government servant remains willfully absent for a period exceeding one month and if the charge of willful absence from duty is proved against him, he may be removed from service. The Supreme Court held that the order of removal from service passed in the said case was the only proper punishment to be awarded in view of the fact that Government servant was absent from duty for long period without intimation to the Government. **Ram Pal** (supra) is also a case where action was taken by the respondents under the provisions of Section 11(2). In the said decision it was held that once a show cause notice is issued recording tentative opinion as required, nothing further was required to be done in the said case as the employee did not reply to the notice. Therefore it was held that as there was no denial of the allegation nor was there any request for holding an inquiry, therefore the action taken is justified."

11. This Court has heard the learned counsel for the parties. The learned counsel for the petitioner, Ms.Suresh Kumari, has primarily contended that the show cause notice dated 29th April, 1993 was not served on the respondent as he was not living in District Jalandhar, Punjab at that time and, therefore, on the basis of the said show cause notice the petitioner could not have been dismissed. Learned counsel for the petitioner, however, has not denied that the address given in the show

cause notice dated 29th April, 1993 is the address of the petitioner in the record of the respondents. Nothing has been produced by the petitioner to show that the petitioner had intimated to the respondents that he would not be available or living at his address at District Jalandhar, Punjab, and he had shifted to Delhi. In the circumstances, notice sent at the said address cannot be denied by the petitioner on the ground that at the time when the show cause notice dated 29th April, 1993 was issued, he was not living at the said address. The burden was on the petitioner to rebut that notice could not have been received by him in 1993 at the said address. Petitioner has not produced anything to show where the petitioner was living in April/May 1993. The petitioner in the circumstances has failed to rebut the presumption that the notice sent to him at his address as given in the official record could not be served on him. The plea of the petitioner that the show cause notice was not served on him cannot be accepted and is repelled in the facts and circumstances.

12. Though the petitioner has alleged that he was sick and undergoing treatment, however, no details have been given by him about his alleged ailments and which clinic/hospital he was undergoing treatment. Merely on the bald allegation of the petitioner that he was sick and confined to the bed, it cannot be inferred that he could not do his duties or was unable to come and join the duty. No documents such as medical certificates, medical prescriptions or any other relevant documents have been produced by the petitioner which would reflect any semblance of truthfulness of his allegation that he was ill and incapable of joining and performing his duties. Even on earlier occasions, the petitioner had been absent without leave. From the facts disclosed by the respondents which have not been amply denied by the petitioner, it is apparent that he is a chronic defaulter. The petitioner had allegedly driven away the water tanker unauthorizedly outside the premises. On 25th January, 1990, he had again repeated the same act. He was given a written warning. The petitioner had improperly brought a girl of ill-repute to his room in SO's Mess at Chhawla Camp and he had kept her for the night and for this action he was severely reprimanded by the Commandant. The petitioner was also arrested at Jalandhar on the charge of possessing an unlicensed 'mauser' pistol and he was apprehended in a drunken state from a brothel house at G.B.Road, Delhi and he had abused/misbehaved with a beat Constable of Delhi Police who was on duty.

13. In the entirety of the facts and circumstances, if it has been held that the trial of the petitioner by a Security Force Court is impracticable and his further retention is undesirable, the same cannot be faulted in the facts and circumstances. Learned counsel for the petitioner has also not raised any other ground except that the show cause notice was not received by the petitioner, as he was not living in April/May, 1993 in District Jalandhar, Punjab but had shifted to Delhi. This fact has not been established by the petitioner, nor anything has been produced which would show that the petitioner could not be served with the show cause notice. In the totality of the facts and circumstances, the petitioner has failed to make out any perversity or such illegality or irregularity in the order dated 7th July, 1993 passed by the respondents which would require any interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

14. The writ petition, in the facts and circumstances, is without any merit, and it is, therefore, dismissed. The parties are, however, left to bear their own costs.

ILR (2012) I DELHI 776
CRL. APPEAL

CUSTOMS ....APPELLANT

VERSUS

KONAN JEAN ....RESPONDENT

(MUKTA GUPTA, J.)

CRL. APPEAL NO. : 1098/2011 DATE OF DECISION: 12.12.2011

Narcotics Drugs and Psychotropic Substance Act, 1985—Section 21, 22, 23 & 28—Appellant challenged judgment acquitting Respondent for offences punishable under Section 21, 22, 23 & 28 of Act—As

per prosecution, Respondent was apprehended by Air Custom officer at IGI Airport, New Delhi, on suspicion of carrying Heroin concealed in 70-75 capsules inside his body—On permission from learned Duty Magistrate, Respondent was taken in RML Hospital where he ejected 77 capsules—After complying with the provisions of the Act, Respondent was arrested and on conclusion of investigations, he was charge sheeted—Learned Special Judge found various discrepancies in prosecution case and thus acquitted Respondent—Acquittal challenged urging, no discrepancy in link evidence which was duly proved by prosecution beyond reasonable doubt—Held:- A criminal trial is a quest for truth—The prosecution is required to prove its case beyond reasonable doubt and not by way of perfect proof free from all blemishes.

A criminal trial is a quest for truth. The prosecution is required to prove its case beyond reasonable doubt and not by way of perfect proof free from all blemishes. Thus, I find the judgment of the learned Trial Court acquitting the Respondent as illegal and perverse. The same is set aside. The Respondent is convicted for offences under Sections 21(c), 23(c) and 28 of the NDPS Act. **(Para 21)**

Important Issue Involved: A criminal trial is a quest for truth—The prosecution is required to prove its case byond reasonable doubt and not by way of perfect proof free from all blemishes

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. P.C. Aggarwal Advocate.

FOR THE RESPONDENT : Mr. S.K. Sethi, Advocate.

CASES REFERRED TO:

1. *Ram Singh* vs. *Central Bureau of Narcotics,* 2011 (3) JCC Narcotics 140.
2. *Balbir Kaur* vs. *State of Punjab* AIR 2009 SCC 3036.
3. *State of Rajasthan* vs. *Daul* 2009 (4) JCC Narcotics 206.
4. *State of Haryana* vs. *Mai Ram* 2009 (3) JCC Narcotics 106.
5. *Okwun Udensi* vs. *Custom* 2008 (1) JCC Narcotics 13.
6. *Ajmer Singh* vs. *State of Haryana* 2008 (3) JCC Narcotics 188.
7. *Siddiqua* vs. *NCB,* 2007 (1) JCC Narcotics 22 Delhi.
8. *Gita Lama Tamang* vs. *State of (G.N.C.T.) of Delhi,* 2006 (3) JCC Narcotics 197.
9. *M. Prabhulal* vs. *Assistant Director of DRI,* 2003 (3) JCC 1631 SC.

RESULT: Appeal allowed.

MUKTA GUPTA, J.

1. The Respondent was acquitted by the Learned Special Judge for offences punishable under Section 21, 22, 23 and 28 of the Narcotics Drugs and Psychotropic Substance Act (in short NDPS Act) by the impugned judgment dated 28th March, 2011. Aggrieved by the impugned judgment the Appellant preferred the leave to appeal petition which was granted vide order dated 20th August, 2011. The Learned Special Judge had directed the Respondent to furnish bond in terms of Section 437-A Cr.P.C. However, since the Respondent has not been able to furnish the bond, hence he is in custody. Thus, this appeal was taken up for hearing by this Court.

2. Briefly the case of the prosecution is that on 13th March, 2007 the Respondent was going to Bangkok by flight No. AI-348 from IGI Airport New Delhi carrying one black colour stroller hand bag of ECHOLACE brand with no check-in baggage. The Respondent was wearing an overcoat during summer season which seemed unusual. Due to suspicion he was intercepted at the customs counter. On inquiry, he replied that he was carrying only US $ 2000 and Indian Rs. 450/- and denied carrying any Narcotics Drugs. Not being satisfied by the reply of the Respondent, the Air Custom Officer Shri Jarnail Singh, the Complainant

decided to examine the hand bag and the person of the Respondent in the presence of panch witnesses. Notices under Section 102 of the Customs Act and Section 50 of the NDPS Act were served on the Respondent apprising him of the legal right available to him. The Respondent did not want to get himself examined by a Gazetted Officer or a Magistrate and thus the Air Custom Officer examined him. The overcoat worn by the Respondent revealed some hand stitches, thus it was further examined. On thorough examination of the overcoat, one capsule type substance concealed in the inner side of the overcoat was found and the same was tested on Ionscan Barringer scanner which tested positive for presence of Narcotic Drugs i.e. Heroin and THC. On cutting open the capsule white powdery substance was found wrapped in plastic packing. A small sample of the same gave positive test for Narcotic drug i.e. heroin. On further questioning the Respondent admitted that around 70-75 capsules of similar nature were concealed in his body. Thus he was taken to the hospital where he ejected 77 capsules from 13th March, 2007 to 14th March, 2007 on 4 different occasions in the presence of Doctors on duty and Custom Officers. On 15th March, 2007 in the presence of panch witnesses the aforesaid capsules were cut open and all contained white powdery substance which on testing was found to be heroin. Total weight of the heroin recovered from the Respondent was 14 gms + 1073 gms i.e. 1087 gms. The recovered drug was seized and sealed by the Customs Officers. Samples were drawn and sent to CRCL which reported the samples to be positive for presence of heroin. On a complaint being filed the prosecution witnesses and the accused were examined resulting in the passing of the impugned order.

3. Learned counsel for the Appellant contends that there has been due compliance of Section 50 of the NDPS Act and in fact learned Special Judge also held that the compliance of Section 50 NDPS Act has been done by the Appellant. It is also stated that Sections 55 and 57 of the NDPS Act have been duly complied with. Further statements of witnesses are supported by the voluntary statement of the Respondent recorded under Section 67 of the NDPS Act which is admissible in evidence. Reliance in this regard is placed on **M. Prabhulal Vs. Assistant Director of DRI,** 2003 (3) JCC 1631 SC and **Ram Singh v. Central Bureau of Narcotics,** 2011 (3) JCC Narcotics 140.

4. Learned counsel for the Appellant strenuously contends that

there is no discrepancy in the link evidence as observed by the Learned Trial Court. It is stated that all the panch witnesses and the Doctors could not be examined at the trial as they were not available at the given addresses. However, the statements of these witnesses recorded under Section 67 of the NDPS Act vide Ex.PW1/U1, PW1/V1 PW3/B, PW3/D & PW3/E have been proved. Reliance is placed on **Ajmer Singh Vs. State of Haryana** 2008 (3) JCC Narcotics 188; **State of Haryana Vs. Mai Ram** 2009 (3) JCC Narcotics 106. Since as per Section 53-A of the NDPS Act these are relevant statements, the contention of the Respondent that the prosecution failed to prove in whose presence recovery of 77 capsules were effected is untenable. It is contended that the finding of the Learned Trial Court regarding discrepancy in collection of the samples and deposition thereof with the CRCL is erroneous. Learned counsel refers to the testimony of PW1, PW5, PW7 and PW10. Reliance is placed on **Siddiqua Vs. NCB,** 2007 (1) JCC Narcotics 22 Delhi, **Gita Lama Tamang v. State of (G.N.C.T.) of Delhi,** 2006 (3) JCC Narcotics 197.

5. It is contended that the finding of the Learned Special Court that there was discrepancy with regard to marking of the samples in the forwarding letter is erroneous. Three samples were drawn from the first recovery and marked as A1, A2 and A3. Sample mark A1 was sent to CRCL along with test-memo and forwarding letter dated 15th March, 2007. As per the receipt obtained from CRCL, sample A1 had been received. It is stated that inadvertently in the forwarding letter dated 15th March, 2007 it has been written that sample mark A has been sent instead of sample mark A1. Similarly, with regard to other set of recovery, samples mark B1, B2 and B3 were drawn and sample B1 was sent to CRCL along with test memo and forwarding letter dated 16th March, 2007, however, the same mistake occurred and instead of B1, sample mark A was mentioned inadvertently in the forwarding letter. It is contended that since the forwarding letters were prepared on the same computer at the same time, this error occurred. However from the testimonies of PW1, PW5, PW7, PW10 and other evidence on record, it is clear that samples A1 and B1 were sent to CRCL and not the sample mark A. Reliance is also placed on **Balbir Kaur Vs. State of Punjab** AIR 2009 SCC 3036; **State of Rajasthan Vs. Daul** 2009 (4) JCC Narcotics 206 and **Okwun Udensi Vs. Custom** 2008 (1) JCC Narcotics 13.

6. It is next contended that the Learned Trial Court laid undue emphasis on the discrepancy in the weight of the samples sent to the CRCL. The discrepancy in the weight has been duly explained by PW10. The link evidence has been duly proved by the prosecution beyond reasonable doubt. It is thus prayed that the impugned judgment be set aside and the Respondent be convicted and sentenced for the offences charged.

7. Learned counsel for the Respondent on the other hand contends that neither the panch witnesses nor the Doctors have been examined before whom alleged capsules were ejected. The Respondent in his statement under Section 313 Cr.P.C. and the retraction application dated 28th March, 2007 has stated that he was beaten and tortured by Custom authorities and was made to sign on blank documents. No MLC of the Respondent was placed on record to disprove this fact. Further even PW1 in his statement before the Court has stated that one original notice under Section 50 of the NDPS Act was prepared, however, thereafter copy of the same was not prepared. According to the PW1 original notice was served on the Respondent and was also mentioned in jamatalashi. He also stated that the notice given along with the complaint is also an original one. Thus, serving of original notice is also doubtful. No separate notice has been prepared in compliance of Sections 102 & 103 of the Customs Act. The recovery of one capsule from the overcoat is doubtful as the Respondent was not wearing any overcoat at the relevant time. Further, PW1 in his statement has stated that coat was made of leather whereas the coat produced in Court was of cloth fabric and not leather. The alleged contraband recovered from the capsule found in the overcoat was not sent to the CRCL since sample A1 was not sent. Thus, the sole testimony of PW1 in this regard cannot be relied upon.

8. It is further contended that even the recovery of 77 capsules from the Respondent is doubtful. No MLC, X-ray, CT Scan or any medical document has been placed on record. Even the OPD slip does not mention the fact that the capsules were ejected before the Customs Officers. The Doctors in whose presence the capsules were ejected have not been examined. Further the order of the Learned Metropolitan Magistrate under Section 103, Customs Act has also not been complied with. The testimony that samples were drawn from 77 capsules was also doubtful. The only explanation with the Appellant is that there was a typographical

error which is not possible. Further the test memos were prepared on the 15th March, 2007 and not on 13th March, 2007. They were not deposited in the malkhana. Samples mark A1, A2 and A3 and remaining case property were not deposited in the malkhana on 13th March, 2007. PW1 has admitted in his statement before the Court that he neither remembers the time of taking/drawing nor of depositing the seal affixed on the samples and the case property. There is no evidence as to who handed over the samples to PW4. The samples received by the CRCL had mark A and not mark A1. PW11 has stated that he had not given any permission or authority for taking sample A1 to the CRCL. Thus, the prosecution has failed to discharge the onus. Hence, there is no infirmity in the impugned order. The appeal be thus dismissed.

9. I have heard learned counsel for the parties.

10. In his testimony PW1 Jarnail Singh, Inspector Custom has stated that on 13th March, 2007 he was on duty in the Departure Hall, IGI Airport, New Delhi when the Respondent was to go to Bangkok by Air India Flight No. AI-348. He was carrying one black colour stroller hand bag of ECHOLACE make. He had no check-in baggage. The Respondent was wearing an overcoat in summer which raised suspicion. He was asked whether he was carrying any Indian currency, foreign currency or narcotic drugs in his baggage or person to which he replied that he was carrying only US $ 2000 and Indian Rs. 450/- and no Narcotics Drugs. Since PW1 was not satisfied, he called two independent witnesses and again asked the accused whether he was carrying any foreign or Indian currency or any contraband. A notice under Section 102 of the Customs Act being Exhibit PW1/A was served on him and the Respondent was given an option for search of his baggage and person in the presence of a Magistrate or a Gazette Officer. Since he replied in negative, his endorsement was put on the said notice and in the presence of panch witnesses the stroller baggage was examined but nothing incriminating was recovered. Thereafter the Respondent was taken to the preventive room of the customs and a notice under Section 50 NDPS Act was served upon him being Ex. PW1/B and he was explained that he has a right to be searched in the presence of a Gazette Officer or a Magistrate, however the Respondent replied in the negative. The endorsements of the PW1, accused and the panch witnesses have been duly proved. On examination of the overcoat it was observed that

the bottom had been stitched by hand and thus, the same was opened. On opening one capsule was found concealed in the inner layer of the beige (khaki) overcoat. On examining the capsule with a machine, it gave positive test for narcotic drug. On cutting of the capsule, white colour substance was recovered which was tested with the help of field testing kit which gave positive result for heroin. The same was weighed and found to be 14 grams. Three samples of 2 grams each were taken from this. The samples were marked as A1, A2 and A3 and the remaining substance was kept in a plastic pouch and sealed with the cloth, stitched and sealed with the custom seal over a paper slip bearing the signatures of the concerned signatories of the panchnama. The overcoat was also taken into possession vide memo Ex. PW1/C.

11. PW1 has further stated that the Respondent was asked whether he had any further substance to which he replied that he had concealed 70-75 more capsules in his body. The currency of US $ 2,000 and Rs. 450/- and the hand bag were returned to the accused, however, the travelling documents, that is, the air ticket, boarding pass were seized. Thereafter in view of the disclosure of the Respondent of having concealed capsules, he was taken to the learned Duty Magistrate and an application under Section 103 of the Customs Act was filed before the learned Duty Magistrate being Ex. PW1/G. The learned Duty Magistrate permitted the Respondent to be admitted in RML hospital for medical assistance, X-ray and CT Scan. Thereafter the Respondent was admitted to RML hospital where he remained till 14th March, 2007. The Respondent ejected 29 capsules in the first instance and 28 capsules at the second time on 13th March, 2007. Thereafter on 14th March, 2007 the Respondent ejected 13 capsules and subsequently 7 capsules. Thus in all 77 capsules were ejected which were kept in four plastic jars, wrapped with adhesive tapes and sealed with the seal of "CMO RML HOSP". Since the Respondent had not slept for 34 hours, he was feeling sleepy and was thus permitted to take rest. The information with regard to the recovery of the capsules from the Respondent was sent to Senior Officer in compliance of Section 57 of the NDPS Act. The seizures on 13th and 14th March besides the doctors were also witnessed by two other Air Custom Officers, that is, Rajiv Gupta and Amit Khanna. After the Respondent had taken rest as requested by him, further proceedings were started on 15th March, 2007 when two panch witnesses were called to witness the proceedings and were informed about the facts of the case. The hospital issued two

certificates indicating the above said recoveries and a discharge certificate showing the discharge of the Respondent from the hospital on 14th March, 2007. The said certificates were exhibited as Ex. PW1/I. In the presence of the two independent witnesses, four plastic jars were cut open and 29, 28, 13 and 7 capsules were taken out. The entire proceedings were signed by the panch witnesses. All the 77 capsules were cut open with the help of blade and they were found to contain white powdery substance suspected to be heroin. After homogenising the substance, it was kept in plastic bag. It weighed 1073 grams and was valued at Rs. 1,03,73,000/-. Three samples of 5 grams each were taken for testing which were marked as B1, B2 and B3 and rest of the contraband was also sealed with the customs seal by keeping in double transparent bags. The recovered white powder, four plastic jars and adhesive tapes were sealed with the custom seal No. 6. The Superintendent, Customs recorded the statement of the Respondent on 13th March, 2007 and 15th March, 2007. The Respondent was formally arrested. The report under Section 57 NDPS Act Ex. PW1/O was sent to senior officers. Thereafter the entire case property, jamatalashi, packing material and personal belongings were deposited through DR Nos. Ex. PW1/P to Ex.PW1/T respectively. The goods were received by Shri K.C. Gupta, ACO (SDO) which were sealed. The samples were sent to CRCL by Shri Rajiv Kumar, ACO. The statements of panch witnesses were recorded under Section 67 of the NDPS Act, which were duly exhibited. The test memos were prepared in triplicate on 15th March, 2007 for the recoveries effected on 13th March, 2007 and 14th March, 2007. The two tests reports were duly received and exhibited as Ex.PW10/A and Ex.PW10/B along with their remnant samples. All these articles were duly exhibited during the evidence of this witness and marked as Ex. P1 to P36. The statements of the doctors were also recorded under Section 67 of the NDPS Act.

12. A perusal of the testimony of PW1 and Exhibit PW1/B shows that the Respondent was duly informed about his legal right to be searched before a Gazette Officer or a Magistrate, which he declined. Further notice under Section 102 of Customs Act informing the Respondent about the fact that if he so desires his search could be conducted before a Gazette Officer or a Magistrate was also given vide Exhibit PW1/A which was also declined by him. Further Section 103 of the Customs Act was also complied with as an application was moved to the learned Metropolitan Magistrate being Exhibit PW1/G on which the learned Duty

Magistrate referred to CMO, RML for medical assistance, X-ray, CT Scan as advised by the doctor and the Respondent was directed to be produced before the concerned Court after the procedure. Exhibits PW1/I, PW1/J and PW1/K, which are discharge summary and OPD registration cards, show that the Respondent ejected 29, 28, 13 and 7 capsules on 13th and 14th March, 2007. Further the testimony of PW1 with regard to the capsules ejected by the Respondent is corroborated by PW8 Rajiv Kumar Gupta and PW13 Amit Khanna in whose presence the Respondent ejected capsules on 14th March, 2007.

13. Learned counsel for the Respondent has strenuously stated that the samples were kept illegally from 13th March, 2007 by PW1 in his custody as he did not deposit the same in the safe custody. The sequence of events as narrated by PW1 clearly shows that on 13th March, 2007 one capsule was recovered, which was tested and the Respondent disclosed being in possession of 70-75 capsules in his body. An application was made to the learned Metropolitan Magistrate under Section 103 of the Customs Act. Thereafter, the Respondent was taken to RML Hospital from where he was discharged at 3.10 PM on 14th March, 2007 and taken to IGI Airport. The request of the Respondent for rest being tired was quite natural and further proceedings could not be carried out on humanitarian ground on 14th March, 2007. Thus the proceedings were deferred to 15th March, 2007 when the Respondent got up after taking rest. The Appellant has satisfactorily explained the sequence of events. PW1 has stated that the samples and the case property were kept in the safe custody and nothing has been brought out in cross-examination to suggest that during this period PW1 tempered with the recovered substance. Even in the application under Section 103, Customs Act filed before the learned Metropolitan Magistrate it has been stated that one capsule has been recovered from the Respondent.

14. The primary reasons for acquittal by the learned Special Judge were that the samples sent to CRCL were marked as A and not A1 and B1 in view of the covering letters Exhibit PW4/D and PW4/A and that the same samples which were duly recovered and sealed were sent have not been proved by the prosecution i.e. the link evidence has not been proved. The mentioning of sample A in the covering letter was inadvertent due to typing mistake and is not an error which goes to the root of the matter especially in view of the fact that the Respondent has not cross-

examined PW-1 on this aspect. Further a perusal of Exhibits PW4/B, 4/C, 4/E and 4/F shows that it was the samples marked A1 and B1 which were sent to the CRCL. This testimony of PW1 is corroborated by PW10 Shri S.K. Mittal, Chemical Examiner. He states that he had received sample packets marked A1 and B1 with seals intact. There is no doubt that there is an error in the forwarding letter which states that sample A is being sent, however the CRCL form annexed thereto clearly states that the samples sent to the laboratory were A1 and B1. The finding of the Learned Trial Court that there is no cogent evidence on record that sample mark A1 which was drawn at the spot from the substance recovered on 13th March, 2007 was sent to the CRCL as in the forwarding letter Ex.PW4/A the sample which was sent to CRCL for analysis is mentioned as mark A and not mark A1, is perverse.

15. Further the difference in the weights of samples sent to the CRCL has also been explained by PW10 in his cross-examination. He has clarified that in test memo Section 1 the weight of the sample is mentioned as 2 gms whereas in Section 2 it was mentioned as 3.5 gms. The witness has clarified that Section 1 of the test memo is filled by the ACO whereas Section 2 is filled in the laboratory and the weight 3.5 gms includes the weight of the wrapper. Further the gross weight of 2.7 gms mentioned in the report Exhibit PW10/A is the weight of remnant sample along with the wrapper. Similarly in his report Exhibit PW10/B the gross weight is mentioned as 5.5 gms. The witness has clarified that in Section 1of the test memo the weight of the sample is mentioned as 5 gms and in Section 2 it is mentioned as 7 gms. The witness has stated that Section 1 of the test memo is filled by the ACO whereas Section 2 is filled in the laboratory and the weight 7 gms includes the weight of the wrapper. Thus, from the testimony of this witness, it is clear that there is no difference in the weights of the samples sent. Thus, the finding of the learned Trial Court on this count is also erroneous.

16. The learned Trial Court has held that there is no concrete evidence on record as to who handed over the custody of the representative sample to PW4 Rajeev Kumar for carrying the same to the CRCL. As regards the receipt and sending of the samples mark A1 and B1 to the CRCL is concerned, PW4 Rajeev Kumar has stated that on 15th March, 2007 he received a letter Ex.PW4/A relating to sample A1 authorizing him to deposit the sample with the CRCL. He was handed over one sealed

sample containing representative sample by the Investigating Officer. Though he initially stated to be by the Superintendent but immediately clarified it to be by the Investigating Officer. PW4 Rajeev Kumar has also stated that on 16th March, 2007 he was again authorized by Shri Ravinder Singh in terms of letter Ex.PW4/D to take the sample for testing to CRCL. Letter Ex.PW4/D is related to sample B1 though it mentioned sample A, however in the test memos Ex.PW4/E it is clearly stated that sample mark B1 was being sent. PW4 Rajeev Kumar had further brought the register of the SDO(A) which contained the entry No. 3027 dated 16th March, 2007. According to Ex.PW4/H, PW4 received the sample mark B1 for onward transmission to CRCL. Further PW10 Sh. S.K.Mittal, Chemical Examiner from the CRCL has stated that he received the sample mark A1 and B1 which were found to be positive for heroine (diacetylmorphine) and reports regarding the same were Ex.PW10/A and PW10/B .

17. Much emphasis has been laid by the Learned Trial Court on the fact that the representative samples mark A1, A2 and A3 and the remaining case property were not deposited with the Malkhana on 13th March, 2007 itself and was kept by PW1 in his own custody till 15th March, 2007. It may be noted that the facts of each case have to be looked on the basis of their peculiar circumstances. Learned Special Judge has held that PW1 in his cross-examination has stated that Panchnama proceedings were over on 13th March, 2007 at 6.00 PM and then he reached the house of Duty Magistrate at 8.30 PM but still he failed to explain why the case property and the samples were not deposited. PW1 was put this question and he replied that the accused had concealed some capsules in his body, due to fever the said capsules may have bursted and due to shortage of time he could not deposit the above said case property and samples with the SDO(A) on the same day. Whenever an investigation is conducted minute by minute explanation of the sequence of events cannot be given meticulously. Before going to the Learned Metropolitan Magistrate the PW1 was also required to prepare the application under Section 103 of the Customs Act besides briefing the counsel and arranging the vehicle, security etc. The Trial Court could not have assumed and come to the conclusion that the recording of the statement of the accused could have been postponed as there was no urgency therein. All that has to be considered is that even if the samples were in the custody of PW1, whether he has been able to prove that they were not tempered with.

PW1 in his cross-examination has stated that the samples drawn on 13th March, 2007 were not deposited in the custody of SDO(A) but were retained by him in his safe custody in the locker, since the accused was to be taken to the hospital.

18. Learned Trial Court has further observed that the test memos Ex.PW4/C mentions the date of drawl and date of dispatch of sample as 13th March, 2007 and the testimony of PW1 has failed to explain such discrepancy. According to the Learned Trial Court if the test memo was prepared on 15th March, 2007 then the date of dispatch of the sample could not have been mentioned as 13th March, 2007. A perusal of the test memo undoubtedly shows that the date of drawl and dispatch of sample is 13th March, 2007, however, PW4 has stated in his testimony that he deposited the sample on 15th March, 2007 against receipt. Further PW4 has not been cross-examined on this count.

19. The finding of the Learned Trial Court that the test memo Ex.PW4/C was prepared without obtaining Custom seal No.6 from the custodian of the seal and the same could not be deposited by PW4 Rajeev Kumar Superintendent at about 12.00 Noon when the seal was taken by PW1 J.S. Saimpla Inspector Custom after 12.40 PM, is also erroneous. PW4 Rajeev Kumar, Superintendent has stated that he deposited the sample with CRCL at about 12 noon. PW1 has stated clearly that the sample A1 was sent to CRCL in the morning hours of 15th March, 2007. He has further stated that the sample B1 could not be sent to CRCL on that day i.e. 15th March, 2007 as the proceedings relating to the aforesaid recovery continued till late hours in the evening. He has further stated that on 15th March, 2007 the proceedings started at 9.30 AM and were concluded at 12.40 PM. On this basis, the learned Trial Court has assumed that the seal was taken by PW1 after 12.40 PM. From the evidence of the PW1 it is evident that he took the customs seal No.6 on the 13th and 15th March, 2007 and returned the same on the same day after conclusion of proceedings.

20. The statements of the PW1 is corroborated by the statement of the Respondent recorded under Section 67 of the NDPS Act by PW2. The Respondent has retracted the said statement on 28th March, 2007 and has stated that the same was taken from him under duress, by beating and torturing physically and mentally. It may be noted that the Respondent was taken to Hospital immediately after his apprehension and

admitted therein. A perusal of the OPD cards of the Respondent being Exhibits PW1/J and PW1/K do not show that the Respondent had received any injury. Further the statement was recorded on 15th March, 2007 and the Respondent was produced before the learned ACMM on 15th March, 2007 itself wherein no injury was pointed out by him and the learned ACMM sent him to judicial custody after getting medically examined.

21. A criminal trial is a quest for truth. The prosecution is required to prove its case beyond reasonable doubt and not by way of perfect proof free from all blemishes. Thus, I find the judgment of the learned Trial Court acquitting the Respondent as illegal and perverse. The same is set aside. The Respondent is convicted for offences under Sections 21(c), 23(c) and 28 of the NDPS Act.

ILR (2012) I DELHI 789
FAO

JAFFAR ABBAS **....APPELLANT**

VERSUS

MOHAN & ORS. **....RESPONDENTS**

(G.P. MITTAL, J.)

FAO NO. : 274/1999 **DATE OF DECISION: 19.12.2011**

Motor Vehicles Act, 1988—Appellant sought enhancement of compensation in respect of injuries suffered by him in a motor accident which led to amputation—Appellant claimed that due to his injuries his chances of promotion have been hampered and his compensation was barely enough to cover his medical expenses. Held—In assessing compensation during accident cases, a reasonable and compassionate view must be taken and the court must be liberal in determining quantum—Compensation increased and accordingly appeal allowed.

The Appellant was working as a Constable in Delhi Police. He is working as an Assistant Sub-Inspector now. In the case of **Ward v. James,** (1965) 1 All ER 563 (CA) the Queen's Bench held as under: -

> "(iii) Loss during his shortened span. – Although you cannot give a man so gravely injured much for his 'lost years', you can, however, compensate him for his loss during his shortened span, that is, during his expected 'years of survival'. You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to a back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet Judges and juries have to do the best they can and give him what they think is fair. No wonder they find it well nigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The Judges have worked out a pattern, and they keep it in line with the changes in the value of money." **(Para 4)**

In a latest judgment of Supreme Court in **Yadava Kumar v. National Insurance Co. Ltd.,** (2010) 10 SCC 341 it was observed that while assessing compensation in accident cases the High Court or the Tribunal must take a reasonable and compassionate view of things. The Court must be liberal in determination of quantum of compensation and not niggardly as in a free country law must value life and limb on a generous scale. Para 17 of the report is extracted hereunder: -

> "The High Court and the Tribunal must realise that

there is a distinction between compensation and damages. The expression compensation may include a claim for damages but compensation is more comprehensive. Normally damages are given for an injury which is suffered, whereas compensation stands on a slightly higher footing. It is given for the atonement of injury caused and the intention behind grant of compensation is to put back the injured party as far as possible in the same position, as if the injury has not taken place, by way of grant of pecuniary relief. Thus, in the matter of computation of compensation, the approach will be slightly more broad based than what is done in the matter of assessment of damages. At the same time it is true that there cannot be any rigid or mathematical precision in the matter of determination of compensation." **(Para 5)**

In the case of **Raj Kumar v. Ajay Kumar & Anr.,** (2011) 1 SCC 343, it was held that where a Claimant suffers a permanent disability as a result of injuries the assessment of compensation under the head of loss of future earning would depend upon the effect and impact of his permanent disability on his earning capacity. Para 13 & 14 of the report are extracted hereunder: -

"13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier

carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'loss of future earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not be found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity." **(Para 6)**

Important Issue Involved: In case where a claimant suffers a permanent disability, the assessment of quantum of compensation would depend on present and future impact.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. H.R. Khan Suhel, Advocate. with Ankit Mishra & Anchit Upadhyay, Neeraj Singh, Advocate.

FOR THE RESPONDENTS : Mr. Kanwal Chaudhary, Advocate.

CASES REFERRED TO:

1. *Raj Kumar* vs. *Ajay Kumar & Anr.,* (2011) 1 SCC 343.
2. *Yadava Kumar* vs. *National Insurance Co. Ltd.,* (2010) 10 SCC 341.
3. *Ward* vs. *James,* (1965) 1 All ER 563 (CA).

RESULT: Appeal Allowed.

G. P. MITTAL, J.

1. The Appellant Jaffar Abbas, who was working as a Constable in Delhi Police seeks enhancement of compensation in respect of the injuries suffered by him in a motor accident, which took place on 11.06.1981. The Appellant was getting a salary of Rs. 489.56 paise per month. His left leg was amputated and he suffered 40% disability in relation to his left lower limb. He claimed a compensation of Rs. 5,00,000/-. The Motor Accident Claims Tribunal (the Tribunal) awarded a compensation of Rs. 80,000/-, which is tabulated hereunder: -

Sl. No.	Head of Compensation	Compensation granted by the Tribunal
1.	Pain & suffering	Rs. 20,000/-
2.	For purchase of medicines, conveyance and special diet	Rs. 7,000/-
3.	Loss of leave (187 days)	Rs. 3,000/-
4.	Loss of future earning capacity	Rs. 40,000/-
5.	Loss of career prospects	Rs. 10,000/-
	Total	**Rs. 80,000/-**

2. There is no challenge to the finding on the negligence, thus I have to assess whether the compensation awarded is just and fair.

3. The Tribunal in detail dealt with the injuries suffered by the Appellant while discussing issue No.2, I would extract relevant portion of the impugned award hereunder: -

> "In support of this claim, petitioner examined himself as PW7 and also examined Doctor from Safdarjung Hospital PW6 and a witness of service record from his office as PW2. Petitioner in his evidence has reported that he remained in hospital for about two months in which period he was operated two times. Thereafter, another operation was performed on 31.5.85. He remained on leave for a period of one year. Due to injuries received by him, he was given light duties. He deposed that he spent Rs. 60,000/- to Rs. 70,000/- on medicines, conveyance, special diet etc. It is further deposed that due to this accident, his promotion has been affected. As he suffered disability to the extent of 40% as his left foot has been amputated in the hospital. In cross-examination, he further deposed that in the hospital he was admitted on 14.6.81 and after the first operation, a skin grafting operation was performed and this treatment existed second time. Thereafter, he remained on special leaves without pay. He admitted that he has not filed the bills of treatment in Court or any bills of conveyance or special diet.
>
> 5. PW6 Dr. Sardar Singh who was a Orthopedic Surgeon in Safdarjung hospital deposed that he attended on the petitioner as it was a case of crush injury of left foot. He was operated on 22.6.81 and a gangrene affected fore-foot was amputated. He was again operated by him on 10.6.85 for a persistent wound infection. He deposed that now the patient was without forefoot on the left side. He proved the discharge slip in the hands of Dr. Vinod Sakhija as PW6/A and various statement papers running in 17 pages as Ex. PW4/1 and Ex. PW6/B. He deposed that the wound is still persists as a skin is very weak and gave way three or four months and needs permanent dressing. According to him this was a case of permanent disability vide certificate issued from LNJP hospital. Permanent disability is assessed 40%. He

recommended special diet to the patient after each operation. In cross-examination he stated that 40% disability was in relation to the whole body."

4. The Appellant was working as a Constable in Delhi Police. He is working as an Assistant Sub-Inspector now. In the case of **Ward v. James,** (1965) 1 All ER 563 (CA) the Queen's Bench held as under: -

"(iii) Loss during his shortened span. – Although you cannot give a man so gravely injured much for his 'lost years', you can, however, compensate him for his loss during his shortened span, that is, during his expected 'years of survival'. You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to a back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet Judges and juries have to do the best they can and give him what they think is fair. No wonder they find it well nigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The Judges have worked out a pattern, and they keep it in line with the changes in the value of money."

5. In a latest judgment of Supreme Court in **Yadava Kumar v. National Insurance Co. Ltd.,** (2010) 10 SCC 341 it was observed that while assessing compensation in accident cases the High Court or the Tribunal must take a reasonable and compassionate view of things. The Court must be liberal in determination of quantum of compensation and not niggardly as in a free country law must value life and limb on a generous scale. Para 17 of the report is extracted hereunder: -

"The High Court and the Tribunal must realise that there is a distinction between compensation and damages. The expression compensation may include a claim for damages but compensation is more comprehensive. Normally damages are given for an injury which is suffered, whereas compensation stands on a slightly higher footing. It is given for the atonement of injury caused and

the intention behind grant of compensation is to put back the injured party as far as possible in the same position, as if the injury has not taken place, by way of grant of pecuniary relief. Thus, in the matter of computation of compensation, the approach will be slightly more broad based than what is done in the matter of assessment of damages. At the same time it is true that there cannot be any rigid or mathematical precision in the matter of determination of compensation."

6. In the case of **Raj Kumar v. Ajay Kumar & Anr.,** (2011) 1 SCC 343, it was held that where a Claimant suffers a permanent disability as a result of injuries the assessment of compensation under the head of loss of future earning would depend upon the effect and impact of his permanent disability on his earning capacity. Para 13 & 14 of the report are extracted hereunder: -

"13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his

left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'loss of future earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not be found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity."

7. The Appellant as PW-1 deposed that he remained in the hospital for about 2 months during which he was operated upon. Second operation was performed on 31.05.1985. His treatment is still continuing and he had to take leave for about a year. It is also deposed that he spent Rs. 60,000/- to Rs. 70,000/- on medicines, conveyance and special diet. Due to this accident, his promotion was affected. PW-2 SI Shiv Dhan Sharma apart from proving the leave record of the period 1981 to 1986 deposed that after the accident 3 – 4 promotional tests held by the department could not be taken by the Appellant on account of the injuries in his left leg. This is an old case where the accident took place in the year 1981. No positive evidence was brought on record during inquiry before the Tribunal as to how his promotion was affected and how much it was delayed. Though, it was stated during the course of arguments that the Appellant's batchmate had long back been promoted as Sub-Inspector but there is no evidence on record in this regard. It is borne out from the record that the Appellant's treatment continued for quite a long time and PW-2's testimony that he could not take 3 – 4 promotional tests held by the department cannot be easily brushed aside. So, I have to make a guess work that his promotion was delayed say by at least about 5 years and he suffered financial loss also on account of the same.

8. As stated earlier the Appellant was working as a Constable in Delhi Police. He cannot drive a motorcycle; he cannot even drive a bicycle. He cannot run. He will always have difficulty even in walking.

9. The Appellant who was working as a Constable in Delhi Police and was entitled to reimbursement of medical expenses / medicines obtained from an authorized hospital. He has not led any evidence nor any bill placed on record in respect of the treatment which was not paid by his employer. Still a person cannot preserve all the bills and I would assume that he spent something on the treatment.

10. In view of the injuries suffered and the treatment/operations underwent by the Appellant, I would attempt to award the compensation as tabulated hereunder: -

Sl. No.	Head of Compensation	Compensation granted by the Tribunal	Compensation granted by this Court
1.	Pain and suffering	Rs. 20,000/-	Rs. 20,000/-
2.	Medicines, conveyance & special diet	Rs. 7,000/-	Rs. 5,000/- (medicines) Rs. 2,000/- (conveyance) Rs. 5,000/- (special diet)
3.	Loss of earning capacity because of delayed promotion	Rs. 40,000/-	Rs. 40,000/-
4.	Loss of leave (187 days)	Rs. 3,000/-	Rs. 3,000/-
5.	Career prospects	Rs. 10,000/-	Rs. 10,000/-
6.	Disfigurement		Rs. 25,000/-
7.	Loss of amenities and expectation in life		Rs. 50,000/-
	Total	**Rs. 80,000/-**	**Rs. 1,60,000/-**

11. The enhanced amount of compensation i.e. Rs. 80,000/- shall carry interest @ 7.5% per annum from the date of filing of the petition till the realization of the amount. Respondent No.3 New India Assurance Co. Ltd. is directed to deposit the enhanced compensation within six weeks. 25% of the enhanced compensation along with proportionate interest shall be released forthwith. Rest of the amount shall be held in a Fixed Deposit in UCO Bank, Delhi High Court Branch, New Delhi for a period of 3 years.

12. The appeal is allowed in above terms.

ILR (2012) I DELHI 799
CM (M)

LAL CHAND PUBLIC CHARITABLE TRUST ....PETITIONER

VERSUS

DELHI WAKF BOARD & ORS. ....RESPONDENTS

(INDERMEET KAUR, J.)

CM (M) NO. : 2166/2006 DATE OF DECISION: 19.12.2011

Code of Civil Procedure, 1908—Order XXII Rule 10—Suit filed by the plaintiff M/s DLF Universal Ltd. aganist five defendants including respondent no. 1 Delhi Wakf Board, stating inter alia that the piece of land measuring 1410 Sq. Yards forming part of the land of the petitioner had been encroached by the respondents—Written statement filed by the respondents—Respondent no.1 contended therein that it already had a decree dated 29.01.1983 in its favour and since the decree that remained unchalllenged the land now was in his share—Applicant herein namely Lal Chand Public Charitable Trust filed an application under Order XXII Rule 10 in 1996 while the suit had been filed in 1982 stating therein that after a settlement deed dated 1989, the MCD became owner of the said land—Submitted that MCD is not contesting this suit as in another litigation between the parties it had allowed the case to be dismissed in default—If case is not contested it would suffer the same fate—It would result in jeopardizing its interest as it was lessee in respect of the said land—Held, Order XXII Rule 10 postulates that suit can be continued by the person on whom the petitioners interest has devolved which in this case is MCD and not the Applicant who had been a lessee since 1963 in the said land and his status not changed since then.

This submission of the learned counsel for the respondent has considerable force. It is an admitted fact that the applicant Lal Chand Public Charitable Trust was a lessee in the suit premises, the earlier lessor being the plaintiff M/s DLF Universal Ltd. which had leased out these premises to the applicant on 31.8.1963. By virtue of the agreement dated 24.7.1989 entered between the MCD and M/s DLF Universal Ltd the status of the lessee i.e. the applicant Lal Chand Public Charitable Trust still remains the same; he continues to be a lessee; the status of the owner had changed hands; earlier owner was the plaintiff M/s DLF Universal; now in terms of the settlement dated 24.7.1989 the MCD has become the new owner. Provisions of Order XXII Rule 10 of the Code in this scenario cannot come to the aid of the present applicant as Order XXII Rule 10 of the Code specifically postulates that the suit can be continued by the person upon whom the plaintiff's interest has devolved which in this case is the MCD and not the present applicant. There is admittedly no devolution of interest in favour of the applicant who continues to be a lessee which status has been given to him since 1963. **(Para 7)**

Important Issue Involved: An application under Order XXII Rule 10 CPC can be filed only by a person upon whom the plaintiff's interest has devolved and not by any other person including the person who may otherwise have interest in the property.

[La Ga]

APPEARANCES:

FOR THE PETITIONER : Mr. Arvind Nigam Sr. Advocate with Ms. Mandeep Kaur, Advocate.

FOR THE RESPONDENT : Mr. Sanjeev Sindhwani, Advocate for R-1. Mr. Arjun Harkauli Advocate for R-2. Mr. Umesh Aggarwal, Advocate for R-6.

CASES REFERRED TO:

1. *Amiteshwar Anand* vs. *Virender Mohan Singh* 2006(1) SCC 148.
2. *Dhurandhar Prasad Singh* vs. *Jai Prakash University & Ors.* (2001) 6 SCC 534.
3. *State of Kerala* vs. *Sridevi* JT 2000 (4) SC 391.

RESULT: Dismissed.

INDERMEET KAUR, J. (Oral)

1. Order impugned is the order dated 18.8.2006 which is the order of the appellate court endorsing the finding of the trial court dated 23.9.2004 wherein the application filed by the applicant namely Lal Chand Public Charitable Trust under Order XXII Rule 10 read with Section 151 of the Code of Civil Procedure had been dismissed. These are two concurrent findings by the two courts below.

2. At the outset, it is submitted by the learned counsel for the respondent that this court is sitting in its power of superintendence under Article 227 of the Constitution of India and unless and until there is a manifest illegality or gross error which has led to a miscarriage of justice no interference is called for. It is in this background that the arguments

advanced by the learned counsel of for the parties have been appreciated.

3. The record shows that the present suit has been filed by the plaintiff M/s DLF Universal Ltd. against five defendants i.e. Delhi Wakf Board who had been arrayed as defendant no.1 and defendants no.2 to 5 who are private parties. This is a suit for possession. Contention of the plaintiff is that colony namely Greater Kailash was developed by the predecessor interest of the plaintiff. A piece of land measuring 1410 sq. yards forming part of the land of the plaintiff has been encroached upon by defendants no.2 and 5 through defendant no.1. A decree for possession of the aforenoted suit property has been prayed for. Written statement was filed by the defendants. The contention of defendant no.1 is that he has already got a decree dated 29.01.1983 in his favour qua the suit land; this decree has remained unchallenged and this land now falls to his share. Defendants no.2 to 5 have supported the stand of defendant no.1.

4. Present application under Order XXII Rule 10 of the Code has been filed by the applicant namely Lal Chand Public Charitable Trust. This application has been filed on 13.9.1996. Suit has been filed on 18.11.1982. By virtue of this application, it has been contended that a settlement deed dated 24.7.1989 had been arrived at between the MCD and the DLF Universal Ltd; in terms of this settlement the MCD has become the owner of this suit land where the applicant i.e. Lal Chand Public Charitable Trust is a lessee; in this scenario the applicant Lal Chand Public Charitable Trust has sought prayer for substitution as plaintiff in place of the present plaintiff; alternate prayer is that Lal Chand Public Charitable Trust be made a co-plaintiff and the MCD be also arrayed as a defendant.

5. This contention was hotly contested and has suffered two adverse orders as noted supra i.e. order dated 23.9.2004 which was the first order passed by the Civil Judge and subsequent order of the appellate court dated 18.8.2006 vide which the appellate court had endorsed the finding of the trial judge dismissing the application. The vehement argument of the learned counsel for the applicant is that in terms of this settlement of 24.7.1989 (which was between the DLF Universal Ltd and the MCD) the right of the applicant has been recognized as a lessee (Clause-I internal page 3 of the aforenoted settlement); contention being that this document is an undisputed document; undisputed fact thus being that Lal Chand Public Charitable Trust is a lessee in the suit property and as such

his interest being in jeopardy; he has right to be heard in the present case; he has accordingly made the prayer as noted supra. To support his submission learned counsel for the petitioner has placed reliance upon a judgment of the Apex Court reported in 2006(1) SCC 148 **Amiteshwar Anand Vs. Virender Mohan Singh** as also another judgment of the Apex Court reported in (2001) 6 SCC 534 **Dhurandhar Prasad Singh Vs. Jai Prakash University & Ors.** that plain language of Rule 10 of Order 22 does not suggest that leave can be sought by that person alone upon whom the interest is devolved; contention being that not only the assigner or the assignee but other persons whose interest has been effected can file an application under Order 22 Rule 10 of the Code to continue the suit; submission being that the MCD is not contesting the suit as in another litigation between the parties it had allowed the case to be dismissed in default; if this case is not contested and it also suffers the same fate; the interest of the present petitioner who has been recognized as a lessee of the MCD will be hazardously effected; even otherwise to save multiplicity of litigation it would be appropriate that the present petitioner is permitted to join the proceedings.

6. These contentions have been refuted. Learned counsel for the respondent has pointed out that the application has been filed under Order XXII Rule 10 of the Code which necessarily postulates that there must be an assignment, creation or devolution of interest during the pendency of the suit pursuant to which the applicant can seek a prayer under the aforenoted provision of law. Contention being that even as per the settlement agreement dated 24.7.1989 the MCD is the successor in interest of the plaintiff and not the applicant, the applicant i.e. Lal Chand Public Charitable Trust is only a lessee and in fact this status of the applicant as a lessee has been recognized right from 1963 i.e. even before the filing of the present suit; status of the applicant i.e. Lal Chand Public Charitable Trust has since not changed. Thus this provision does not come to his aid.

7. This submission of the learned counsel for the respondent has considerable force. It is an admitted fact that the applicant Lal Chand Public Charitable Trust was a lessee in the suit premises, the earlier lessor being the plaintiff M/s DLF Universal Ltd. which had leased out these premises to the applicant on 31.8.1963. By virtue of the agreement dated 24.7.1989 entered between the MCD and M/s DLF Universal Ltd

the status of the lessee i.e. the applicant Lal Chand Public Charitable Trust still remains the same; he continues to be a lessee; the status of the owner had changed hands; earlier owner was the plaintiff M/s DLF Universal; now in terms of the settlement dated 24.7.1989 the MCD has become the new owner. Provisions of Order XXII Rule 10 of the Code in this scenario cannot come to the aid of the present applicant as Order XXII Rule 10 of the Code specifically postulates that the suit can be continued by the person upon whom the plaintiff's interest has devolved which in this case is the MCD and not the present applicant. There is admittedly no devolution of interest in favour of the applicant who continues to be a lessee which status has been given to him since 1963.

8. Even presuming that the second argument of the learned counsel for the applicant is accepted and the present application under Order XXII Rule 10 of the Code be treated as an application under Order 1 Rule 10 of the Code, the prayer made cannot be granted to the applicant. Admittedly the applicant is relying upon a settlement dated 24.7.1989 pursuant to which the status of ownership has been accorded to the MCD. The present application has been filed on 13.9.1996 i.e. after a lapse of almost seven years. The contention of the applicant is the reason for delay is that in this intervening an appeal had been filed which had reached the Apex Court and was finally disposed of on 06.02.1991. Even as per his own contention this appeal had been dismissed by the Apex Court on 06.2.1991. At the cost of repetition this application has been filed on 13.9.1996 i.e. after a lapse of almost five years even after 06.2.1991. The Apex Court in JT 2000 (4) SC 391 **State of Kerala Vs. Sridevi** had observed that although there is no specified period of limitation for making an application under Order 1 Rule 10 of the Code, if at all any application is necessary the same should be filed within three years as is the limitation prescribed under Article 137 of the Limitation Act. Applying the aforenoted ratio this application is hopelessly bared by time.

9. Applicant on no count deserves any relief. Dismissed.

ILR (2012) DELHI 805
MAC APP

PANNA LAL & ORS. ....APPELLANT

VERSUS

ANJIT KUMAR JHA & ORS. ....RESPONDENT

(G.P. MITTAL, J.)

MAC APP. NO. : 106/2011 DATE OF DECISION: 22.12.2011

Motor Vehicle Act, 1988—Appellant seeks enhancement of compensation in respect of deceased's re-employment and pension—The Tribunal had determined that only the handicapped Appellant No. 3 was dependent and not the husband and the son—Respondent No. 3 claimed that income tax was incorrectly taken and thus the compensation would differ. Held—Since the dependent by deceased on herself was her handicapped daughter, the amount spent on personal expenses would be less 1/3rd income instead of 5% was liable to be deducted—Compensation calculated accordingly—Further, income tax also deducted—Award calculated. Amount accordingly.

I agree with the learned counsel for the Appellants that in the circumstances when the deceased was getting salary of Rs. 26,795/- per month apart from transport allowance of Rs. 2160/- per month and a pension of about Rs. 7,000/- she would not spent 50% of her income towards her personal living expenses, in view of the fact that the deceased had to look after a handicapped daughter. The mother would save the maximum amount of her income and spend it on her handicapped child. In the circumstances of the case, I am of the view that one-third of the amount ought to have been

deducted towards her personal expenditure. **(Para 5)**

The income tax for the assessment year 2010-11 on an income of Rs. 4,55,515/- would be about 15,000/- though the deceased was alive till 7th August, i.e. for a period of four months only in the AY-2010-11. Considering all this, the liability of tax for eight months in the year 2010-11 and for nine months in the next year would be about Rs. 25,000/-. **(Para 7)**

Important Issue Involved: In case where dependant is handicapped, personal expenses of deceased would reduce in lieu of dependant expenditure.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Manish Maini, Advocate.

FOR THE RESPONDENTS : Mr. L.K. Tyagi, Advocate. For R-3.

RESULT: Appeal allowed.

G.P. MITTAL, J. (ORAL)

1. The Appellant claims enhancement of compensation for the death of Smt. Tripta who was re-employed as a teacher in the MCD. The deceased at the time of the accident was getting a salary of Rs.28,955/- including Rs. 2160/- per month towards transport allowance. In addition, the deceased Smt. Tripta was also getting a pension of Rs. 6990/- per month.

2. The Motor Accident Claims Tribunal (the Tribunal) by the impugned award dated 08.10.2010 held that only Appellant No.3 Ms. Ritu was dependant on the deceased as she was handicapped. The husband and the son were not financially dependants. The Tribunal, therefore, took the deceased's net salary as Rs. 26,795/-, deducted 50% towards personal expenses of the deceased and computed loss of dependency for the period of 17 months of re-employment as Rs. 2,27,800/-. Thereafter, the Tribunal went on to add a sum of Rs. 2,52,000/- towards the loss

of household services, which would have been rendered by the deceased after her retirement. A total compensation of Rs. 5,42,300/- was awarded.

3. At the time of hearing of the Appeal a short submission has been made by the learned counsel for the Appellants. It is submitted that the deceased had worked as a teacher all her life. Deceased was re-employed and would not have spent half of the amount which she would be earning towards her personal expenses, particularly when she had a handicapped daughter (Appellant No.3).

4. On the other hand, it is urged by the learned counsel for respondent No.3 Bharti Axa General Insurance Company Limited that while computing the loss of income, no provision was made for payment of the income tax.

5. I agree with the learned counsel for the Appellants that in the circumstances when the deceased was getting salary of Rs. 26,795/- per month apart from transport allowance of Rs. 2160/- per month and a pension of about Rs. 7,000/- she would not spent 50% of her income towards her personal living expenses, in view of the fact that the deceased had to look after a handicapped daughter. The mother would save the maximum amount of her income and spend it on her handicapped child. In the circumstances of the case, I am of the view that one-third of the amount ought to have been deducted towards her personal expenditure.

6. The deceased would have got a total salary of Rs. 4,55,515/- for 17 months for which she was still to work and was liable to pay income tax.

7. The income tax for the assessment year 2010-11 on an income of Rs. 4,55,515/- would be about 15,000/- though the deceased was alive till 7th August, i.e. for a period of four months only in the AY-2010-11. Considering all this, the liability of tax for eight months in the year 2010-11 and for nine months in the next year would be about Rs. 25,000/-.

8. The loss of income for 17 months minus income tax of Rs. 25,000/- comes to Rs. 4,30,000/-. If one-third is deducted towards personal expenses, the loss of dependency comes to Rs. 2,87,010/- instead of Rs. 2,27,800/-.

9. The compensation is enhanced by Rs. 60,000/- which shall carry

interest @ 7.5% per annum from 1.12.2010 till the date of payment.

10. Respondent No.3 Insurance Company is directed to deposit the enhanced amount along with the interest within six weeks with Registrar General of this Court. On deposit the entire amount shall be converted into FDR for a period of five years in the name of Appellant No.3. Appellant No.3 shall be entitled to be paid quarterly interest till the date of maturity of the FDR.

11. The Appeal is allowed in above terms.

12. Pending application stands disposed of.

ILR (2012) DELHI 808
LPA

PROF. RAM PRAKASH ....APPELLANT

VERSUS

BANGALI SWEET CENTRE ....RESPONDENT

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

LPA NO. : 768/2011 DATE OF DECISION: 22.12.2011

Code of Civil Procedure, 1908—Order XVI—Appellant in the pending suit filed an application for payment of rent from October 2008, in terms of the lease deed before Civil Judge—Which was dismissed. Appeal preferred against the said order was also dismissed. However as per the modified order Court directed the respondent to deposit in Court within one month an amount calculated at the rate of Rs. 30,000 per month, from October 2008 till 6th August, 2009. That the said amount was further directed to be kept in a fixed deposit and to abide by the final decision of the Court.

Respondent preferred a Special Leave Petition, which was dismissed, however compliance of order dated 6th August 2009, was extended by two weeks without prejudice to the right of the parties. Appellant filed Contempt Case (Civil) No. 789/2009 against respondent for not complying with the order dated 6th August, 2009. The same was however dismissed *in limine* on 12th October, 2009. The same was however dismissed *in limine* on 12th October, 2009 observing that since the order dated 6th August, 2009 was in the nature of direction under Order XVA of the CPC, the remedy of the appellant was by way of execution and not by way of contempt. The appellant thereafter applied for execution of the order dated 6th August, 2009/30th October, 2009 and it was in fact in pursuance to the said execution that the amount came to be deposited as aforesaid by the Respondent. Thereafter the appellant filed an application being CM No. 15956/2011 in the disposed of Contempt Case (Civil) No. 789/2009 again seeking release of the amount. The said application was also dismissed by the learned Single Judge vide order dated 26h August, 2011, again in view of the direction in the order dated 6h August, 2009 being for deposit of the amount in the Court and there being no direction for release thereof to the appellant, which was challenged. Held: When the action of a party/litigant before the Court is found to be irrational, illogical and injurious to the others, to not come to the rescue of a litigant in such a situation would not be rendering justice for which the Courts have been set up. Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. It is the duty of the Court, as a policy, to set the wrong right and not allow the perpetuation of the wrongdoing— Deposited amount directed to be released immediately.

Though there is merit in the contention of the counsel for

the respondent as to the maintainability of this appeal but we have wondered whether we, as dispensers of justice to the consumers thereof, find our hands to be so tied so as to convert into reality what was said by Charles Dickens in a work of fiction Oliver Twist that "law is a ass". We are constrained to observe that if, we, owing to the shackles aforesaid do not grant the relief if found to be due to the appellant, would be doing disservice rather than service. We are also forced to wonder whether we should always be guided by logic when human behavior and transactions on which we are to adjudicate and do justice are not always logical and are irrational and misguided. When the action of a party/litigant before the Court is found to be irrational, illogical and injurious to the others, to not come to the rescue of a litigant in such a situation would not be rendering justice for which the Courts have been set up. Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. It is the duty of the Court, as a policy, to set the wrong right and not allow the perpetuation of the wrongdoing. **(Para 17)**

Important Issue Involved: Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. It is the duty of the Court, as a policy, to set the wrong right and not allow the perpetuation of the wrongdoing.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Appellant-in-Person.

FOR THE RESPONDENT : Ms. Neha Jain, Advocate for Mr. Mohit Gupta, Advocate.

CASES REFFERRED TO:

1. *Krishnadevi Malchand Kamathia* vs. *Bombay Environmental Action Group* (2011) 3 SCC 363.

2. *M.S. Grewal* vs. *Deep Chand Sood* (2001) 8 SCC 151.

3. *Busching Schmitz Private Ltd.* vs. *P.T. Menghani* (1977) 2 SCC 835.

RESULT: Appeal allowed.

RAJIV SAHAI ENDLAW, J.

1. In this intra court appeal, the appellant who appears in person impugns the order dated 26th August, 2011 of the learned Single Judge dismissing the application filed by the appellant in Contempt Case (Civil) No.789/2009 seeking release of the amounts deposited by the respondent in terms of order dated 6th August, 2009 as modified vide order dated 30th October, 2009 in CM (M) No.703/2009 preferred by the appellant.

2. Notice of the appeal was issued and we have heard the appellant in person and the counsel for the respondent.

3. The respondent was a tenant under the appellant in a portion of Premises No.B-48, South Extension Part-1, New Delhi-49 on the terms and conditions contained in registered Lease Deed dated 1st May, 2007. The said Lease Deed was for a term from 1st August, 2007 to 31st July, 2010, on rent of Rs. 30,000/- per month from 1st August, 2007 to 31st July, 2009 and the rent of Rs. 34,500/- per month from 1st August, 2009 to 31st July, 2010.

4. The appellant in or about January, 2009 filed a suit inter alia for (i) recovery of rent from October, 2008 to January, 2009 amounting to Rs. 1,20,000/- (ii) recovery of interest thereon of Rs. 4,500/- (iii) compensation/damages of Rs. 20,000/-, besides costs etc. The respondent filed a counter claim in the said suit contending inter alia that the respondent had vide its letter dated 25th June, 2008 intimated to the appellant of its intention to vacate the premises on 31st July, 2008; that the appellant however refused to take possession of the premises; that on 24th August, 2008 it was orally mutually agreed that the respondent shall not vacate the premises and continue to occupy the same till November, 2008 and vacate the premises on 30th November, 2008; that it was further orally agreed that the appellant shall adjust the security deposit of Rs. 90,000/- in monthly rent for the months of September, 2008 to November, 2008; that the appellant however did not take possession on 30th

November, 2008 also; that the respondent was as such not liable to pay any rent or other charges with respect to the premises from 1st December, 2008; however owing to the appellant having not taken possession, the respondent has had to incur expenses of securing the premises and towards electricity and water charges thereof; the respondent thus made a counter claim for recovery of Rs. 1,72,642/- from the appellant.

5. The appellant, in the aforesaid suit, filed an application for payment of rent from October, 2008 in terms of the Lease Deed. The said application came to be dismissed by the Court of the Civil Judge before whom the suit and the counter claim aforesaid were pending.

6. Aggrieved from the aforesaid order of the Civil Judge, CM (M) No.703/2009 (supra) was preferred by the appellant in this Court.

7. This Court vide order dated 6th August, 2009 as modified on 30th October, 2009 in CM (M) No.703/2009, observing that the plea of the respondent of oral agreement in contravention of the registered Lease Deed (as per which the security deposit was to be refunded only at the time of vacation of the premises by the respondent) and further observing that it was highly unlikely that in view of other claims of the appellant against the respondent, the appellant would have agreed to adjustment of the security deposit, and in view of the fact that the possession of the premises was got delivered before this Court on 6th August, 2009, directed the respondent to deposit in the Court within one month an amount calculated at the rate of Rs. 30,000/- per month, from October, 2008 till 6th August, 2009. The said amount was further directed to be kept in a fixed deposit and to abide by the final decision in the suit.

8. The respondent preferred Special Leave Petition No.30950-30953/2009 to the Apex Court against the orders dated 6th August, 2009/30th October, 2009 in CM (M) No.703/2009 (supra). The Special Leave Petition was dismissed vide order dated 14th December, 2009; the time for compliance of the order dated 6th August, 2009 was however extended by two weeks without prejudice to the rights of either parties.

9. We are informed that in pursuance thereto, a sum of '3,06,000/- was deposited by the respondent in the Court of the Civil Judge in December, 2009.

10. At this stage, it may be mentioned that upon the respondent not

complying with the order dated 6th August, 2009 (supra), the appellant filed Contempt Case (Civil) No.789/2009 (supra). The same was however dismissed *in limine* on 12th October, 2009 observing that since the order dated 6th August, 2009 was in the nature of direction under Order XVA of the CPC, the remedy of the appellant was by way of execution and not by way of contempt and giving liberty to the appellant to take appropriate proceedings.

11. The appellant thereafter applied for execution of the order dated 6th August, 2009/30th October, 2009 and it was in fact in pursuance to the said execution that the amount came to be deposited as aforesaid by the respondent. The Civil Judge however vide order dated 28th May, 2011 refused to release the amount so deposited by the respondent to the appellant on the ground that this Court had in CM (M) (supra) directed the amount to be deposited in the Court and subject to decision of the suit and thus the appellant was not entitled to release of the amount till the decision of the suit. Aggrieved therefrom the respondent preferred CM (M) 739/2011 to this Court. The same was however dismissed on 7th July, 2011, again owing to the order dated 6th August, 2009 (supra) directing the amount to be deposited in the Court and holding that the appellant was not entitled to release thereof till the decision of the suit.

12. It was thereafter that the appellant filed an application being CM No.15956/2011 in the disposed of Contempt Case (Civil) No.789/2009 again seeking release of the amount. The said application was also dismissed by the learned Single Judge vide order dated 26th August, 2011, again in view of the direction in the order dated 6th August, 2009 (supra) being for deposit of the amount in the Court and there being no direction for release thereof to the appellant.

13. It is the aforesaid order which is now under challenge before us.

14. Needless to state that the aforesaid multiple proceedings are attributable partly to the fact that the appellant who is 82 years of age, is pursuing the litigation in person.

15. The only argument of the counsel for the respondent is that this appeal is not maintainable. It is contended that no intra Court appeal lies against the dismissal of a contempt petition and would not lie against the

dismissal of an application moved in a dismissed contempt petition.

16. On the contrary the appellant urges that inspite of the clear provision of the registered Lease Deed, he is without rent provided in the Lease Deed till the admitted date of vacation of premises before the Court. He also contends that notwithstanding the direction of this Court in order dated 6th August, 2009 (supra), the amount deposited by the respondent in the Court of the Civil Judge was not kept in a fixed deposit causing further loss to him. He thus seeks a direction for the respondent to also compensate him for interest etc.

17. Though there is merit in the contention of the counsel for the respondent as to the maintainability of this appeal but we have wondered whether we, as dispensers of justice to the consumers thereof, find our hands to be so tied so as to convert into reality what was said by Charles Dickens in a work of fiction Oliver Twist that "law is a ass". We are constrained to observe that if, we, owing to the shackles aforesaid do not grant the relief if found to be due to the appellant, would be doing disservice rather than service. We are also forced to wonder whether we should always be guided by logic when human behavior and transactions on which we are to adjudicate and do justice are not always logical and are irrational and misguided. When the action of a party/litigant before the Court is found to be irrational, illogical and injurious to the others, to not come to the rescue of a litigant in such a situation would not be rendering justice for which the Courts have been set up. Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. It is the duty of the Court, as a policy, to set the wrong right and not allow the perpetuation of the wrongdoing.

18. The Supreme Court in **M.S. Grewal v. Deep Chand Sood** (2001) 8 SCC 151 noticed that the judicial attitude has taken a shift from the old draconian concept and the traditional jurisprudential system – affectation of the people has been taken note of rather seriously and the judicial concern thus stands on a footing to provide relief to an individual when needed. It was held that Law Courts will lose their efficacy if they cannot possibly respond to the needs of the society – technicalities there might be many but the justice oriented approach ought not to be thwarted on the basis of such technicality since technicality cannot and ought not to outweigh the course of justice. Much earlier, Krishna Iyer, J. in

Busching Schmitz Private Ltd. v. P.T. Menghani (1977) 2 SCC 835 held that the principle of unconscionability clothes the Court with the power to prevent its process being rendered a parody. Recently also, in **Krishnadevi Malchand Kamathia v. Bombay Environmental Action Group** (2011) 3 SCC 363, the Supreme Court observed that justice is only blind or blindfolded to the extent necessary to hold its scales evenly; it is not, and must never be allowed, to become blind to the reality of the situation, lamentable though that situation may be.

19. This Court in the order dated 6th August, 2009/30th October, 2009 was concerned only with an interim direction as to payment and not with the release thereof; the matter was at large before the learned Civil Judge. The said direction was made owing to the unambiguous provision of the registered Lease Deed. The emphasis at that time was to make the respondent cough up the money.

20. We have today enquired from the counsel for the respondent whether the respondent has any order of attachment before judgment in the counter claim preferred against the appellant. The counsel for the respondent has fairly stated that no such order has been sought. It is not in dispute that the possession of the premises was delivered to the appellant before the Court only on 6th August, 2009. We fail to see as to why the appellant who had taken care to register the transaction of lease should not be entitled to the benefit thereof and/or to the rent thereunder till the date of actual vacation of the premises. The counter claim of the respondent against the appellant for having not taken possession of the premises earlier etc. is yet to established. This Court has in order dated 6th August, 2009 (supra) already observed that the said plea of the respondent being contrary to the registered document, the onus on the respondent to prove the same is heavy. If the respondent succeeds in discharging the said onus and becomes liable to recovery of any money from the appellant, it can always recover the same. However for the said reason we cannot deprive the appellant of the monies due to him under the registered Lease Deed and which were got deposited in the Court. We may also notice that Order XVA was incorporated in the Civil Procedure Code in Delhi for doing this kind of justice only and it was for this reason only that the contempt petition filed by the appellant was dismissed.

21. We therefore find the opposition by the respondent before the Court of the Civil Judge to the release of the said amount to the appellant to be irrational and injurious to the appellant and unconscionable and consider it our imperative duty to direct release of the said amount to the appellant.

22. As far as the grievance of the appellant of the amount being not kept in fixed deposit as directed is concerned, the appellant is given liberty to agitate the same before the Court which was directed to keep the amount in a fixed deposit. Further, in these proceedings we cannot adjudicate the claims of the appellant against the respondent for further interest etc. The appellant shall have liberty to agitate the same before the appropriate fora / Court.

23. The appeal is therefore allowed, the Court of the Civil Judge, Delhi before whom the amount aforesaid were deposited, to release the amount together with interest if any accrued thereon to the appellant forthwith.

24. In the facts aforesaid, no order as to costs.

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

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ARBITRATION ACT, 1940 AND ARBITRATION & CONCILIATION ACT, 1996—Applicability—Disputes between the parties culminated into award dated 12.08.96, wherein money was awarded in favour of appellant along with interest from date of award till date of payment or decree, whichever earlier—Both parties understood that the award was governed by the Act of 1940 as the reference was made prior to coming into force of 1996 Act—Appellant filed application under Sec. 14 & 17 of the 1940 Act, in which Hon'ble Singh Judge vide order dated 27.05.2002 held that in view of law prevaliling by way of apex Court judgment, the award enforceable as decree withoutany application as it is 1996 Act that was applicable and since no objections were filed under Sec. 34 of 1996 Act within time, the objections were dismissed—Neither side challenged order dated 27.05.2002, which became final and the appellant filed execution proceedings in which respondent on 12.06.2003 paid the awarded money with interest calculated from date of award till 27.05.2002—Thereafter, the appellant claimedinterest from 27.05.2002 to 12.06.2003, but withdrew the application—Thereafter, the apex court gave a re-thought to the then existing legal position, effect where of was that the award in question was liable to be governed by the 1940 the Act, under which interest was liable to be paid only till expiry of 90 days from award, so respondent under Sec. 151 CPC claimed that interest paid for period beyond 90 days from date of award till 27.05.2002 was excess payment and liable to be refunded—Hon'ble Single Judge allowed the application—Appeal—Held, order dated 27.05.2002 was based on the then prevalent legal position and since the respondent did not challenge the said order, the way others did not to bring about change in legal position now respondent cannot be allowed to make grievance

and reopen the closed litigation—Also held, the date of decree remains the same as date of award but the decree is not enforceable for a period of 90 days in view of Sec.36 of 1996 Act, which is a window given to the judgment debtor to make payment failing which rigours of enforecement would come into play, so interest is liable to be paid till decree is satisfied.

K.R. Builders Pvt. Ltd. v. *DDA* *541*

— Section 9—Scope in petition for stay of termination of Joint Venture Agreement—Memorandum of Understanding (MOU) was executed between Respondent and Petitioner—Respondent gave permission to Petitioner to own and operate luxury tourist train for exclusive use of Joint Venture Company—Joint Venture Agreement executed—Commercial operation commenced in March 2010—In November 2010, the Respondent forwarded draft of lease agreement for luxury train—Petitioner pointed out that draft was inconsistent with the MoU and JVA—Petitioner submitted that draft MoU submitted in 2011 sought to change and modify the entire arrangement—In August 2011, the Respondent terminated the lease agreement—Article 30 of JVA provided that disputes were to resolved by first mutual negotiations and thereafter by arbitration—JVA did not have a termination clause—Petitioner contended that lease subsists by implication—Claims and counter claims to be adjudicated by arbitral tribunal—Respondent contended that petition was not maintainable—JVA void as consent was obtained by fraud—Petitioner sought stay of termination letter issued to JVC when JVC is not made party to the proceedings—Inquiry, if any, can be compensated by money—Train did not operate in a manner contemplated in the JVA—Dispute relating to operation cannot be resolved by arbitration—Also that Petitioner did not pay haulage charges to Respondent—Any further operation would result in liabilities—Suggested that train be run by owner/Respondent—Revenues without deduction by either party be deposited in separate account—Bookings may be transferred

to Respondent on board and off board expenses may be allowed to be charged on this account—Existing service providers may be retained—Termination would be subject matter of arbitration. Held—While granting interim relief under section 9, Court cannot give conclusive finding as to the fact that agreement was validly terminated or not, to be decided by arbitral Tribunal—Scope of Section 9 does not allow restoration of JVA; would amount to nullifying the termination—Only remedy lies in challenging the validity by invoking arbitration clause and claim damages—Prayer for interim injunction disallowed—However, in large but public interest-there is no harm in continuing the arrangement for some time would not confer any further rights in favour of the parties—Fit case for appointment of receiver as interim measure.

Cox and Kings India Ltd. v. *India Railway Catering and Tourism Corp. Ltd.* *1*

— Section 34—Limitation—Award dated 20.03.10 aganist Petitioner pronounced and certified copies sent by the Arbitral Tribunal by registered post to Petitioner's corporate office in Delhi, which was the address in the cause title of proceedings before the Tribunal and also in the OMP before the Hon'ble High court—Respondent filed application under Sec. 33(4) of the Act and notice was served on the counsel for Petitioner on 26.04.10, so on 17.05.10 counsel for Petitioner appeared before the Tribunal and claimed that the Petitioner had not received copy of award, but this contention was rejected by the Tribunal on 31.05.10 observing that postal receipts and AD cards were on record—Tribunal passed amended award on 09.09.10 and again sent certified copies to the parties by registered post on 01.10.10—Petitioner's Project Director at Salem wrote letter requesting for formal copy of amended award, in reply where of Secretary to the Tribunal informed having already sent the same, but without prejudice to rights of parties, another was sent and the same was received by the Petitioner on 20.12.10—Petition challenging the award filed

on 15.03.11, and as per Petitioner, the objections are within time—Held, the memo of parties before the Arbitral Tribunal as well as the OMP indicated address of the Petitioner as its corporate address in Delhi, where the award and the amended award were sent by registered post by the Tribunal—In the absence of Petitioner informing any other address for dispatch of communications, it was not the duty of the Tribunal to make enquiries about proper adddress of parties for the purposes of communications—As such, the Arbitral Tribunal fully complied with Sec. 31(5) of the Act—Further, proceedings under Sec. 33 also show that parties knew about passing of award and Petitioner knew of sending of award to its Delhi office, but Petitioner made no efforts to send the same to its Salem office—Accordingly, Petition held time barred.

National Highways Authority of India v. *M/s. Bhageeratha Engineering Ltd.* *548*

ADMINISTRATIVE TRIBUNALS ACT, 1985—Section 3(q) and 19—Constitution of India, 1950—Article 323A—Writ petition filed challenging withdrawal of recognition to Petitioner Associations and consequential orders by which office bearers of Petitioner Associations transferred from their postings at New Delhi—Objection raised to maintainability of writ petition—Plea taken, since petition concerns a 'service matter' petitioner should approach Central Administrative Tribunal (CAT)—Per contra plea taken, recognition of association of employees would not fall within 'service matters'—Merely because incidental effect of withdrawal of recognition of Petitioner Associations is that their office bearers would not be able to demand that they remain posted in Delhi, central issue in writ petition would not become a 'service matter' for CAT to adjudicate upon it—Held—When word 'whatsoever' is read with words 'all matters relating to condition of his service', it is clear that words 'service matters' have to be given broadest possible meaning and would encompass all matters relating to conditions of service—

Immediate and direct effect of impugned order is that office bearers of Association who earlier may have enjoyed preferential treatment regarding his place of posting would no longer have that privilege—Question of validity of impugned order would therefore certainly be a matter pertaining to 'conditions of service' and would clearly therefore fall within ambit of 'service matter'—Preliminary objection raised as to maintainability of present petition in present form upheld.

Association of Radio and Television Engineering Employees and Ors. v. *Union of India and Ors.* *180*

— Section 19—Petitioner appeared in Limited Departmental Competitive Examination for promotion—All candidates securing 50% marks in each of two papers were to be declared successful and eligible for promotion—Petitioner was shown to have secured 49% marks in first paper and 58% marks in second paper and not declared successful—Case of petitioner that correct answer was in option (c) which he had exercised but in answer key correct answer has been erroneously given against option (b)—Answer of petitioner was marked wrong and no marks awarded therefore—Application of petitioner dismissed by Administrative Tribunal noticing that Rule 15 relating to Departmental Examinations specifically prohibits re-evaluation of answer sheet—Order challenged before High Court—Plea taken, present case is not a case of re-evaluation but of re-computation and of correction of mistake—Per contra plea taken, if matter is to be reopened, it needs to be reopened qua all candidates who had appeared in examination which is not possible as answer sheets have since been weeded out—Held—Rule prohibiting re-evaluation framed with respect to essay type answers cannot be said to be applicable to answer to multiple choice questions—Once it is established that answer is correct, error in not giving marks for same is error akin to a mistake/ re-totaling which under Rules of examination also is permitted—Right to inspect answer sheets carries with it a right to seek judicial review of error/mistake and is intended to eliminate arbitrariness and injustice—Instead of being

declared successful, owing to mistake/error of respondents themselves, petitioner has been declared unsuccessful—This Court in exercise of powers of judicial review is not called upon to undertake any exercise of re-appreciation/ re-assessment of answers of petitioner but to only correct obvious mistake—Petitioner declared successful in examination and declared eligible for promotion in pursuance thereto w.e.f. date when others similarly situated as him were promoted with all consequential benefits.

D.P.S. Chawla v. *Union of India & Ors.* *340*

CODE OF CIVIL PROCEDURE, 1908—Order IX Rule 7—Application filed ten years after the defendants were proceeded ex parte—Default explained only on the ground that the defendants are housewives, who had engagged a lawyers and were not aware of the proceedings—Held, mere engaging the lawyers does not take away duty of the litigant to prosecute the case diligently, so trial Court rightly dismissed the application under Order IX Rule 7 CPC.

Smt. Madhurika Sharma & Ors. v. *Smt. Bhagwati Devi Sharma & Anr.* *538*

— Section 115, 151 Order 9 Rule 43 Rule 1(c)—Application to restore divorce petition which was dismissed in default, dismissed because of non compliance of direction to liquidate liability towards arrears of maintenance ammount—Respondent filed application under Section 151 CPC for restoration of divorce petition and paid part of arrears of maintenance and undertook to pay balance in three months—Matrimonial Court allowed application and restored divorce petition—Order challenged before High Court—Plea taken, Trial Court committed jurisdictional error by invoking power under Section 151 CPC to restore divorce petition filed by respondent when only remedy available to respondent was to file appeal—Order dismissing application for restoration of divorce petition was passed on merits and could not have been recalled by Trial Court in exercise of its inherent power—

Held—Application under Order 9 Rule 4 was rejected only for want of payment of maintenance amount and since respondent could be said to have paid said amount with said undertaking there was no reason left for Court to deny prayer of respondent to seek restoration of his divorce petition—Matrimonial disputes need to be adjudicated on its merits; substantive rights of parties cannot be defeated by adopting a hypertechnical approach, that too on basis of procedural niceties—Procedural laws are handmaids of justice and cannot come in way of advancing cause of justice—No merit in petition which is hereby dismissed.

Neeta Mehra v. *Sanjay Mehra*..... *645*

— Section 100—Second appeal—Suit for mandatory and prermanent injunction filed by Appellant praying for decree directing Respondent no.1 to remove unauthorized construction in the shop and to further restrain him from carrying out any further construction therein—Suit filed inter-alia on the ground that father of the Respondent no.1 had given an undertaking to remove unauthorized construction before the Hon'ble Division Bench by an earlier order dated 22.08.1975—It was alleged that appellant come into possession after the death of his father and despite an undertaking given by his father, had raised unauthorized construction on the roof of the shop—Appellant though had filed his affidavit in evidence and had also been partly examined but he could not appear further because of his illness, being aged—Fresh affidavit filed by his son as attorney—suit dismissed by Trial Court observing that attorney had not deposed anywhere that he had personal knowledge about the facts of the case—First Appellate Court also dismissed the appeal—Held, as a special power of attorney son of Appellant was authorized to depose in place of his father—Neither his evidence could be rejected nor an adverse inference drawn on the ground that plaintiff himself had not appeared as his own witness—The question to be considered only was whether attorney holder son of plaintiff had deposed something which was only in the personal knowledge of the

plaintiff or some act to which only plaintiff was privy to—The factum of the undertaking being given to the Division Bench could not have been something exclusively in the personal knowledge of Appellant alone—The Copy of order of Hon'ble Division Bench proved on record by son of Appellant as his attorney.

Shri Durga Dass Banka v. *Shri Ajit Singh & Ors.* ... *607*

— Section 96—Limitation Act, 1963—Section 5—Suit for declaration and permanent injunction filed for restraining the appellant from abolishing the suit property and interfering in the peaceful possession—Trial Court vide judgment dated 01.05.2010 decreed the suit—Appellant filed appeal after a delay of 78 days with application under Section 5 of limitation Act—Earlier counsel changed—New counsel requested earlier counsel to hand over the record—Provided only 26.06.10—Inspection report dated 07.01.2005 found missing—Certified copy made available on 28.07.2010 Held—The words 'sufficient cause as appearing in Section 5 of the Limitation Act have to be construed liberally so as to advance substantial justice to the parties; a litigant should not be shut out at the threshold and be deprived of the opportunity to be heard on merits; dealy may be condoned provided that the applicant is able to furnish a sufficiently justifiable explanation for his delay— No hard and fast rule can be laid down—Each case has to be decided on its factual matrix—Unless there is lack of bona fides or a total inaction or negligence on the part of the litigant, the protection of Section 5 should not be deprived to a party, mistake of a counsel may also amount to a sufficient cause for condonation of delay; it is always a question of fact—In the instant case, keeping in view the explanation furnished by the learned counsel for the petitoner the petitioner should not be declined a hearing on merits for the fault which at best is attributable to his counsel—Order set-aside.

New Okhla Industrial Development Authority v. *KM Paramjit & Anr.* *617*

— Section 96; Indian Contract Act, 1872—Section 74—Suit of Appellant/proposed buyer for recovery of earnest money paid under Agreement to sell, dismissed—HELD—Claim to forfeit amount is a claim in the nature of liquidated damages under Section 74 of Contract Act—Seller under an agreement to sell cannot forfeit amount unless loss is pleaded and proved by him on account of breach of contract—Appeal allowed—Suit decreed.

Anand Singh v. *Anurag Bareja & Ors.* *728*

— Order VII Rule 11—Petition against rejection of application u/o 7 Rule 11—Suit for damage on account of libel and slander-whether plaint discloses cause of action—Held—Defendant's contention that alleged defamatory statement is protected by an absolute privilege indeed a defense raised by Defendant—Court precluded from going into the same while dealing with application u/O 7 R. 11—Held Cause of action is bundle of facts—Only after trial it will be known whether averments qualify as absolute privilege or not Petition Dismissed.

Dr. Bimla Bora v. *Dr. Shambhuji* *747*

— Order XXXIX Rule 1&2—Election dispute—Election for the posts of President and vice President of Managing Committee of Defendant No.3 held by postal ballot from members across the country—Plaintiff No.1 and Plaintiff No.2 contested for President and Vice President respectively—During counting it was observed that some ballot papers had been tampered with by erasing the tick mark placed against the names of plaintiffs and putting tick mark against the names of Defendants No. 4&5 on ballot papers—Plaintiffs claimed that these tampered ballots be read in their favour—Defendant No.1 proceeded with declaring defendants No. 4&5 as President and Vice President—Plaintiffs contend that the rejected ballots be counted in their name—Held, prima facie it appears that the disputed ballot papers have been tampered with, but going

by the claim of Plaintiffs, since these votes had been cast in presence of Plaintiffs, Election officer had no option but to reject the same and therefore, Plaintiffis connot claim themselves to be winning candidates—Since the dispute between the parties is only with respect to these ballots, which are invalid, vote having been cast in the presence of plaintiffs, there is no ground to order re-election at this stage and no case for interim injunction made out.

Niranjan Lal Gupta & Anr. v. *Gurmeet Singh Baweja & Ors.* *757*

— Order XXII Rule 10—Suit filed by the plaintiff M/s DLF Universal Ltd. aganist five defendants including respondent no. 1 Delhi Wakf Board, stating inter alia that the piece of land measuring 1410 Sq. Yards forming part of the land of the petitioner had been encroached by the respondents—Written statement filed by the respondents—Respondent no.1 contended therein that it already had a decree dated 29.01.1983 in its favour and since the decree that remained unchalllenged the land now was in his share—Applicant herein namely Lal Chand Public Charitable Trust filed an application under Order XXII Rule 10 in 1996 while the suit had been filed in 1982 stating therein that after a settlement deed dated 1989, the MCD became owner of the said land—Submitted that MCD is not contesting this suit as in another litigation between the parties it had allowed the case to be dismissed in default—If case is not contested it would suffer the same fate—It would result in jeopardizing its interest as it was lessee in respect of the said land—Held, Order XXII Rule 10 postulates that suit can be continued by the person on whom the petitioners interest has devolved which in this case is MCD and not the Applicant who had been a lessee since 1963 in the said land and his status not changed since then.

Lal Chand Public Charitable Trust v. *Delhi Wakf Board & Ors.* *799*

— Order VI Rule 17—Eviction petition by respondent seeking eviction of petitioner from ground floor of premises bearing no. 138-A, Golf Links, New Delhi, on the ground of bonafide requirement for residence of its Director Amit Deep Kohli—Leave to defend filed on 23.07.10—Application seeking amendment of the leave to defend filed on 09.05.2011—Amit Deep Kohli is a Director in other holding companies of the petitioner—Other properties available with Company for residence—Tenant is an old lady staying alone—Petitioner submitted, Landlord was a construction company carrying on construction activity—Other properties were commercial flats not part of Delhi—Application seeking leave to defend dismissed—Petition—Held—The facts which were sought to be incorporated by amendment i.e. that the landlord Company was a part of a huge Real Estate Group of Companies having several properties in their name were all facts known to the tenant—These facts were pre-existing i.e. existing at the time when the application for leave to defend was filed; if such an application is permitted the whole purpose and intent of the provisions of Section 25 B (4) would be defeated as the specifically stipulated period for filing an application for leave to defend within 15 days would be given a go by and by permitting the amendment there would be an automatic extension of time for filing the application for leave to defend—This could not and was not the intend of the statute.

Ms. Madhu Gupta v. *M/s. Gardenia Estates (P) Ltd.* *558*

— Order XVI—Appellant in the pending suit filed an application for payment of rent from October 2008, in terms of the lease deed before Civil Judge—Which was dismissed. Appeal preferred against the said order was also dismissed. However as per the modified order Court directed the respondent to deposit in Court within one month an amount calculated at the rate of Rs. 30,000 per month, from October 2008 till 6th August, 2009. That the said amount was further directed to be kept in a fixed deposit and to abide by the final decision of

the Court. Respondent preferred a Special Leave Petition, which was dismissed, however compliance of order dated 6th August 2009, was extended by two weeks without prejudice to the right of the parties. Appellant filed Contempt Case (Civil) No. 789/2009 against respondent for not complying with the order dated 6th August, 2009. The same was however dismissed *in limine* on 12th October, 2009. The same was however dismissed *in limine* on 12th October, 2009 observing that since the order dated 6th August, 2009 was in the nature of direction under Order XVA of the CPC, the remedy of the appellant was by way of execution and not by way of contempt. The appellant thereafter applied for execution of the order dated 6th August, 2009/30th October, 2009 and it was in fact in pursuance to the said execution that the amount came to be deposited as aforesaid by the Respondent. Thereafter the appellant filed an application being CM No. 15956/2011 in the disposed of Contempt Case (Civil) No. 789/2009 again seeking release of the amount. The said application was also dismissed by the learned Single Judge vide order dated 26th August, 2011, again in view of the direction in the order dated 6th August, 2009 being for deposit of the amount in the Court and there being no direction for release thereof to the appellant, which was challenged. Held: When the action of a party/litigant before the Court is found to be irrational, illogical and injurious to the others, to not come to the rescue of a litigant in such a situation would not be rendering justice for which the Courts have been set up. Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. It is the duty of the Court, as a policy, to set the wrong right and not allow the perpetuation of the wrongdoing—Deposited amount directed to be released immediately.

Prof. Ram Prakash v. *Bangali Sweet Centre*..... *808*

— Order 1 Rule 10(2)—Maintainability of Petition without arraying JVC as party—Article of Association-agreement between shareholders and JVC—Hence Petitioner and

Respondent are included—JVC has separate arbitration agreement as Article 200 of Article of Association—Therefore prima facie it cannot be said that there is no arbitration between the JVC and the parties in the present petition—Only shareholders and persons in management of the JVC are the petitioner and the respondent—Under 9 the Court has jurisdiction to preserve subject matter of the disputes—Under Order 1 Rule 10(2), the Court has power to strike out or add parties at any stage—Respondent and Petitioner are shareholders of JVC—Therefore JVC be impleaded as Respondent No.2.

Cox and Kings India Ltd. v. *India Railway Catering and Tourism Corp. Ltd.* *1*

— Order X and Order XXI Rule 41 (2)—Application for grant of interim maintenance during pendency of divorce petition dismissed on ground that petitioner has nowhere stated that she is not earning anything or income earned by her is not sufficient for her to support herself—Order challenged before High Court—Plea taken, merely because petitioner in her application did not specifically plead that she was not having any independent income for her sustenance, it should not have deprived petitioner of grant of interim maintenance as from total reading of averments made by her in divorce petition it was manifest she had stated that she was financially dependent on her parents which would mean she had no independent source of income—Held—A mere omission on part of petitioner to plead that she has no independent source of income cannot deny her relief of interim maintenance—Family Court should have given fresh opportunity to petitioner to file a fresh affidavit disclosing her income and her exact financial status and even Court had ample powers to take statements of parties under Order X of CPC and even parties could have been directed to file affidavit in terms of Form No. 16A Appendix E under Order XXI Rule 41 (2) CPC—Approach adopted by learned Family Court is totally insensitive which is not expected of a Court charging functions of a

Family Court where more humane and sensitive approach in required—Matter remanded back for fresh decision—Petitioner directed to file a better affidavit disclosing her correct financial status in said affidavit—Petition disposed of.

Chitra v. *Pankaj Kashyap* *382*

— Order VII Rule 11 and Section 151—Hindu Adoption and Maintenance Act, 1956—Section 18—Code of Criminal Procedure, 1973—Section 125—Order of Trial Court whereby a decree of divorce under Section 13(2) (iii) of Hindu Marriage Act was passed, challenged in appeal before High Court—Plea taken, order passed under Section 125 of Cr. PC was interim order and based on that, Matrimonial Court could not have granted decree of divorce—Order which gives a right to wife to seek divorce is a final and not interim order—Held—A bare look at Section 13(2) (iii) would manifest intention of legislature as two separate expressions have been used in said Section i.e. 'decree' and 'order' which would necessarily mean either interim or final order—Intention of legislature is to give a right to wife to invoke said provision in case where even interim order has been passed in proceedings under Section 18 of H.M. Act of Section 125 of Cr. PC—If contention of counsel for appellant is accepted then purpose of section would be negated as wife who seeks a decree of divorce under said Section would have to wait till a final order under Section 18 or Section 125 is passed which would certainly mean insisting on inevitably long waiting period which is not object of this Section—No merits in appeal which is hereby dismissed.

Satinder Singh v. *Bhupinder Kaur* *347*

CODE OF CRIMINAL PROCEDURE, 1973—Section 204, 256—Respondent filed complaint under Section 402, 406, 506 IPC against petitioner—In pre Summoning evidence, he examined himself and one more witness who was not named in list of witnesses as his witness—Summoning order was

passed by learned Metropolitan Magistrate and case was listed for pre-Summoning evidence—Aggrieved by summoning order, petitioner challenged it and urged, one of the witness namely Sh. Raj Singh examined at pre summoning stage, was not named in list of witnesses which caused injustice to respondent—Also, on other grounds summoning was bad in law—Held:- Non-compliance of Section 204 (1A) is not an illegality which renders subsequent proceedings null & void, but it is a curable irregularity—If no prejudice is caused to accused, trial shall not be vitiated.

Ved Prakash v. *Sri Om* *598*

— Section 313—Petitioner convicted under Section 379/34 IPC for committing theft of a pipe and a copper plate from solar system installed at terrace of barrack No. 5, New Police Lines, Kingsway Camp—Petitioner challenged his conviction in Court of learned Additional Sessions Judge which was upheld but he was ordered to be released on probation—Aggrieved by said judgment, petitioner preferred revision urging, during trial he was not represented through legal aid counsel which caused him great prejudice—Also, testimony of prosecution witnesses were inconsistent and contrary which did not inspire confidence—Held :- The Courts employ the concept of prejudice to aid in remedying the injustice—Not examining accused persons strictly in compliance to Section 313 Cr.P.C. is grave—The opportunity granted under Section 313 Cr.P.C. must be real and non illusionary—Questions must be so framed as to give to accused clear notice of cricumstances relied upon by prosecution, and an opportunity to render such explanation as he can of that circumstance—Each question must be so framed that accused can understand it and appreciate what use the prosecution desires to make of the same agnist him—Accused not examined strictly in compliance of S.313 and was not given opportunity to cross examine witnesses—Material prejudice caused to occused—Acquited.

Prem Kumar v. *State* *693*

— Section 125—Order of Trial Court whereby a decree of divorce under Section 13(2) (iii) of Hindu Marriage Act was passed, challenged in appeal before High Court—Plea taken, order passed under Section 125 of Cr. PC was interim order and based on that, Matrimonial Court could not have granted decree of divorce—Order which gives a right to wife to seek divorce is a final and not interim order—Held—A bare look at Section 13(2) (iii) would manifest intention of legislature as two separate expressions have been used in said Section i.e. 'decree' and 'order' which would necessarily mean either interim or final order—Intention of legislature is to give a right to wife to invoke said provision in case where even interim order has been passed in proceedings under Section 18 of H.M. Act of Section 125 of Cr. PC—If contention of counsel for appellant is accepted then purpose of section would be negated as wife who seeks a decree of divorce under said Section would have to wait till a final order under Section 18 or Section 125 is passed which would certainly mean insisting on inevitably long waiting period which is not object of this Section—No merits in appeal which is hereby dismissed.

Satinder Singh v. *Bhupinder Kaur*..... *347*

— Sections 155, 195, 482—Drugs & Narcotics Act, 1940—Section 22, 32—FIR for offences punishable under Section 186/353/506/34 IPC registered in Police Station Defence Colony on statement of Drug Inspector alleging, on 21.08.2003 at about 4 p.m., he along with his colleagues as part of their official duty visited premises M/s Shiv Store, Defence Colony Market, New Delhi—Three persons present in shop prevented Inspector from inspecting and examining purchase and sale records, they physically pushed him out of the shop and threatened him by using abusive language—Thus, FIR lodged on complaint by Drug Inspector—Accused persons arrested and bailed out—Subsequently during further investigation Section 22(3) Drugs & Cosmetics Act added and learned Metropolitan Magistrate took cognizance on charge

sheet—Petitioner challenged cognizance and urged Section 186 IPC is non cognizable therefore police had no power to register and investigate case without prior permission of concerned Metropolitan Magistrate—Held:- Proceedings for an offence punishable under Section 186 IPC could not be put into motion without a formal complaint lodged with the Court concerned by the public servant who had been obstructed in discharge of his public duties or against whom an offence is committed—The proceedings under Section 186 IPC quashed and for remaining offences the trial court was directed to proceed as per law.

Shiv Charan & Ors. v. *State* *211*

— Section 374 (2)—Indian Penal Code, 1860—Sections 302, 201 and 34—Murder case—No eye witness—Based upon circumstantial evidence of last seen and recovery of material—Evidence of previous enmity and recovery of blood smeared soil, earth control with other material like blood smeared brick, blood smeared rope and other exhibits at the instance of accused persons—Ld. ASJ held the appellants guilty and convicted them for the offences punishable u/s 302/201/34 IPC and sentenced—Appeal challenging that there are material contradictions on all the important aspects—Possibility of deceased having met with an accident cannot be ruled out—Chain of circumstances not complete—Held—The well known rule governing circumstantial evidence are that:- (a) the circumstances from which the inference of guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances; (b) the circumstance should be of a determinative tendency unerringly pointing towards collectively, are incapable of leading to any conclusion, on a reasonable hypothesis, other than that of the guilt of the accused—No doubt, the Courts have also added two riders to the aforesaid principle namely, (i) there should be no missing links but it is not that every one of the links

must appear on the surface of the evidence, since some of these links can only be inferred from the proved facts and (ii) it cannot be said that the prosecution must meet each and every hypothesis put forward by the accused however far-fetched and fanciful it may be.

Riken Alias Diken v. *State* *305*

— Section 374 (2)—Indian Penal Code, 1860—Sections 302, 201 and 34—Murder case—No eye witness—Based upon circumstantial evidence of last seen and recovery of material—Evidence of previous enmity and recovery of blood smeared soil, earth control with other material like blood smeared brick, blood smeared rope and other exhibits at the instance of accused persons—Ld. ASJ held the appellants guilty and convicted them for the offences punishable u/s 302/201/34 IPC and sentenced—Appeal challenging that there are material contradictions on all the important aspects—Possibility of deceased met with an accident cannot be ruled out—Chain of circumstances not complete—Held—It is a well established legal principle that in a case based on circumstantial evidence where an accused offers a false explanation in his statement under Section 313 Cr. P.C. in respect of an established fact, the said false denial could supply a missing link in the chain of circumstances appearing against him.

Riken Alias Diken v. *State* *305*

— Section 374 (2)—Indian Penal Code, 1860—Sections 302, 201 and 34—Murder case—No eye witness—Based upon circumstantial evidence of last seen and recovery of material—Evidence of previous enmity and recovery of blood smeared soil, earth control with other material like blood smeared brick, blood smeared rope and other exhibits at the instance of accused persons—Ld. ASJ held the appellants guilty and convicted them for the offences punishable u/s 302/201/34 IPC and sentenced—Appeal challenging that there are material contradictions on all the important aspects—Possibility of

deceased met with an accident cannot be ruled out—Chain of circumstance not complete—Held—From the evidence provided by the prosecution, it is clear that the accused in pre-planned manner committed murder of Ramesh Rai—The evidence of the prosecution is trustworthy with respect of the proof of motive as it has been proved on record that all accused persons had earlier also assaulted the deceased on the occasion of Holi in village—PW-7 Ranjeet Singh, an independent witness, stated that at the instance of accused persons, blood stained shirt, T-shirt, blood stained brick affixed with hair, rope etc were recovered—The recovery of the said articles connected the accused persons with the crime and proved the guilt beyond all reasonable doubt—There is overwhelming circumstantial evidence to show that the accused committed the crime—Appeals dismissed.

Riken Alias Diken v. *State*..... *305*

CONSTITUTION OF INDIA, 1950—Article 226—Petitioner/ Appellant Licensee of a shop and also of an area behind the shop containing all drainage including gully traps and manholes with underground drainage pipeline for waste water to be taken to municipal drains—License cancelled in respect of the said area behind the shop because of the Petitioner/Appellant not providing access through his shop to the said area as per the term of the license—During submissions it was urged on behalf of the petitioner / Appellant that Petitioner was willing to give undertaking to provide access to the said area for maintenance, cleaning etc.—Held, location of the area shows that it was a common area within the meaning of Delhi Apartments Ownership Act, 1986—Though this was not the reason for the cancellation of the license but the Court in exercise of powers under Article 226 of the Constitution of India, cannot grant relief contrary to law—It being the common area Court can not confer an exclusive right in respect of the said area to the Petitioner / Appellant.

Mohan Singh v. *Union of India & Ors.*..... *705*

— Article 226—Delhi Municipal Corporation Act, 1957—Section 345 A—Premises bearing No. 147-B, Gujjar Dairy, Gautam Nagar, New Delhi were registered under the National Capital Territory of Delhi (Incredible India) Bed & Breakfast Establishment Registration and Regulation Act, 2007—Respondent served notice upon the petitioner that property is being used for commerical purpose in violation of sanctioned use—Called upon to stop the misuse otherwise it would be sealed—Petition challenged the notice—Respondent contends—Premises visited by Monitoring Committee appointed by Supreme Court of India on 14.09.2011 and directed MCD to seal the subject premises—Held—Any Action on the part of respondent/MCD to seal subject premises without the petitioner being afforded a personal hearing, would amount to violation of principles of natural justice, praticularly when the settled law is that rules of natural justice must be read into Section 345-A of the DMC Act—It is clear that neither has the petitioner been heard on the issue of misuse of premises, subject matter of the notice dated 18.09.2011 issued by the respondent/MCD under Section 345-A of the DMC Act, nor has he been afforded an opportunity to submit any representation, much less be heard on the issue of ownership of land on which the built-up structure stands, which was the subject matter of the noting dated 03.10.20111, made by a member of the monitoring Committee.

Rajinder Rai v. *MCD and Ors.*..... *453*

— Writ—Prevention of Corruption Act, 1988—Section 19—Sanction for prosecution accorded for offence committed in Mumbai—FIR registered in Mumbai—Charge sheet filed before Special Judge, Mumbai—Territorial jurisdiction—Copy of formal order of sanction not made available—Earlier, on more that one occasion sanction to prosecute not granted—Grant of sanction challenged as arbitrary and malafide and amounts to review of earlier decisions—Held—Court at Delhi does not have territorial jurisdiction to entertain the petition—

Challenge could be made before the Special Judge—Sanction order contains detailed for according the sanction—The sanction could not have issued by anyone below the Minister, the matter never gone in the past to the Minister—Case does not fall in the category of extreme and rare nor there is any ex-facie illegality in the sanction accorded—Petition dismissed with costs.

Santosh Kumar Jha v. *UOI & Ors.* *473*

— Art. 226 Writ—Tender—interpretation of commercial contract—Petitioner challenged the order dated 04.10.2010 scrapping/cancelling tender no.6724/T-138/08-09/SPL/24, as petitioner was L-1 of respondent no.1, vide writ petition no. 8252/2010, Respondent no.1, took the plea that he exercised its right as owner under Article 28.1 of the Tender document—Writ petition withdrawn with liberty to take recourse to legal remedy in accordance with law—Respondent no.1 with respondent no.2 and respondent No. 3 floated fresh tender no. 6724/T-183/10-11/SKG/28 with amendment pertaining to clause 8.1.1.1. dealing with past experience of the bidder in executing a similar work—Challenged the amendement in clause 8.1.1.1 plea of malice, arbitrariness, unresonablenes and lack of fairness—Held—Respondent no.1 withheld completion report received from Dy. Chief Engineer-IV Mus Car Nicobar island while seeking independent input from respondent no.2—Raised certains queries followed by series of letters—integrity of the entire process was suspect—Decision of respondent no.1 dated 04.10.2010 fraught with malice in law, contrary to the principles of fairness, equity and good conscience—Amended clause 8.1.1.1 bad in law.

RDS Projects Ltd. v. *Jai Ratangiri Gas and Power Pvt. Ltd. & Ors.* *490*

— Article 227—Securities and Exchange Board of India Act, 1992—Sections 24 (1) and 27 Respondant filed a complaint before Ld. CMM for the offence under Section 24(1) and 27

of the Act against M/s. Master Green Forest Ltd—Allegations that accused company was operating collective investment scheme—Raised huge amount from General Public in contravention of the Act and Regulation—There were allegations against the promoters/Directions and the persons responsible for the day to day affairs of the company, who actively connived with each other in the commission of offence—Only company was arrayed as an accused—ld. ACMM vide its order dated 15th December 2003 observed—Perusal of the complaint discloses commission of offence Punishable under Section 24 (1) and 27 of the Act and accordingly, all the accused be summoned for 21 February 2004—Petitioners filed the present petition seeking quashing of the proceedings pending against them—Petitioners contended—Petitioners were not arrayed as accused—No summons were issued to them vide order dated 15.12.2003—In the garb of filing fresh addresses of accused, complainant filed the list of the directors—Trial Court issued the summons without application of mind—As no summons were issued at the first instance, petitioner should not have been summoned as directors except as provided under Section 319 Cr.P.C—Respondent contended that no case for quashing is made out—Ingredients in the complaint discloses commission of cognizable offence against petitioners also—Held—Indubitably, the Court takes cognizance of the offence and not the offenders—No doubt in the memo of parties filed along with the complaint only the company was made an accused however, perusal of the order dated 15th December, 2003 summoning the accused shows that the Learned ACMM has used the word "accordingly all the accused be summoned for 21st February, 2004" the use of these words show that the Learned ACMM was conscious of the fact that besides the accused company i.e M/s. Master Green Forest Limited there were other accused also—Further the complaint clearly stated that the Directors and Promoters of the company who were the persons in-charge and responsible for the day-to-day

affairs of the Company and all of them actively connived with each other for the commission of the offence—Thus, the role of promoters and Directors was specifically mentioned in the complaint—It was further mentioned that accused company and its promoters and Director in-charge and responstble to the accused company for the conduct of its business were liable for the violations of the accused company as provided under Section 27 of the SEBI Act—Thereafter opportunities were giving to Respondent to furnish the details so that process could be issued aganist the accused—Thus, it is not as if all of a sudden vide the order dated 13th October, 2006 the accused were summoned. In view of the facts of the present case the contention of the Petitioner that the summons having not been issued in the first instance by the Learned magistrate, the Learned Additional Sessions Judge could not have issued the summons unless the stage under Section 319 Cr.P.C. was arrived at, deserves to be rejected.

Daya Ram Verma & Ors. v. *Securities & Exchange Board of India* *527*

— Article 227—Securities and Exchange Board of India Act, 1992—Sections 24 (1) and 27—Respondent filed a coomplaint before Ld. CMM for the offence under Sections 24(1) and 27 of the Act against M/s Master Green Forest Ltd—Allegations that accused company was operating collective investment scheme—Raised huge amount from General Public in contravention of Act and Regulations—There were allegations against the promoters/Directions and the persons responsible for the day to day affairs of the company, who actively connived with each other in the commission of offence—Only company was arrayed as an accused—Ld. ACMM vide its order dated 15th December 2003 observed—Perusal of the complaint discloses commission of offence punishable under Section 24(1) and 27 of the Act and accordingly, all the accused be summoned for 21 February 2004—Petitioners filed the present petition seeking quashing of the proceedings pending against them—Petitioners

Contended—No specific role is assigned to them in the complaint—Merely stating that all the Directors and promoters connived with each other and were in-charge and responsible for the day-to day functioning of the company cannot fasten the vicarious liability on the petitioners—Respondent contended that no case for quashing is made out—Ingredients in the comlaint disclose commission of cognizable offence—Held—Complaint clearly stated that the promoters and Directors of the Company in-charge and responsible for the conduct of its affairs have connived with each other and have committed the offence—In the present case the offence alleged is of running a collective investment scheme contrary to the provisions of SEBI Act and Regulations—No doubt Section 27 of SEBI Act makes responsible all other Directors of the company who are responsible and in-charge of the day-to day affairs of the company, however in a case of conspiracy number of people can be involved and this is the allegation of the Respondent in the complaint. Thus, I find no merit in the contention that even on the facts of the present case no case for proceeding aganist the Petitioners are made out.

Daya Ram Verma & Ors. v. *Securities & Exchange Board of India* *527*

— Article 226—Writ —Narcotic Drugs and Psychotropic Substance Act, 1985 (NDPS Act)—Section 68(H) (I) Section 68 A(2) (d)—Section 68 B(g)—Section 68 j—Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988 (PITNDPS Act)—Section 3(1) and 10(1)—Detention order dated 26.07.1989 issued aganist Mohd. Azad @ Avid Parvez, brother of the petitioner—Detained w.e.f. 10.07.1991—Declaration u/s. 10(1) justifying detention beyond initial three months issued—Detention order dated 26.07.1989—challenged before Calcutta High Court—Unsuccessful—Special Leave Petition before the Supreme Court dismissed—Challenge to order u/s.10(1) successful—Detention beyond initial three months vitiated—show cause

notice u/s. 68 H (1) NDPS Act issued to the petitioner—reply submitted—Daclaration issued and properties forfeited to the Central Government vide order dated 16.10.1997—Appeal before the Appellant Authority—Dimissed vide order dated 07.06.1999—Order challenged through the present writ petition under Article 226—Plea that the properties were acquired by his father for him not taken before the Competent Authority nor before the Appellate Authority—No document filed either before the Competent Authority nor before the Appellate Authority —Held—Plea after thought—Cannot be raised for the first time in the Writ petition—The burden of proving that the property was not illegally acquired on the person affected—The consistent findings do not call for any interfernce—Petition dismissed with costs.

Zahid Parwez v. *UOI & Ors.* *566*

— Article 226—Petition to restrain the respondent/NDMC from removing the petitioner from the sites occupied by them till the enactment of an appropriate legislation, in terms of the directions issued by the Supreme Court in the case of Gainda Ram—Respondent contended—Simply because legislature has not enacted a law, it cannot be said that there existed a vacuum—In Sodan Singh case Supreme Court directed for immediate eviction of unauthorised squatters/hawkers—Held—On the question of how to ascertain the implication of a status order passed by a Court in the case of *Messrs Bharat Cocking Coal Limited* (supra), it was observed by the Supreme Court that the expression, 'status quo' is undoubtedly a term of ambiguity and at times, gives rise to doubt and difficulty and in case any party has any doubt on the meaning and the effect of the status quo order, the proper course for such a party would be to approach the Court that had passed the status quo order, to seek clarifications—It would not be appropriate for this Court to grant stay orders in the face of the status quo order dated 15.07.2011 passed by the Supreme Court—It was reiterated that any such order shall be an anti-thesis

to the orders of the Supreme Courts which must be respected both, in letter and spirit—In such circumstances, any interim orders to the petitioners declined —However, liberty granted to both the parties to apply to the Supreme Court for a clarification of the status quo order dated 15.07.2011 passed in the case of *Gainda Ram* (supra).

Shiv Nath Choudhary Ram Dass v. *NDMC & Ors.*... *578*

— Article 19 & 226—Petition seeking mandamus to direct resondent No. 1 to take appropriate steps so that respondent No. 2 i.e. All India Chess Federation does not ban/threaten to ban chess players, associating themselves with other chess associations—Petitioners were chess players registered with respondent No. 2—Petitioners being amateurs liked to play chess whenever an opportunity presented itself even in those tournaments not organised by respondent no. 2—Respondent No. 2 prohibited chess players registered with it from playing in any tournament/competition which did not have the approval of respondent No. 2—This is highly monopolistic and anti competitive and exploiting its dominant position to impose such unreasonable restriction on the rights of players—Respondent contended that there was statutory obligation on the part of respondent No. 1 to issue directions as sought for—Held—The definition of the expression 'enterprise' as used in the Competition Act read with definition of "service" thereof, clearly shows that the respondent no. 2 is an enterprise which is covered by the said provisions—The allegation against respondent no. 2 is that respondent no. 2, by virtue of its agreement with the petitioners, was seeking to control the provision of services which was causing adverse effect on competition within India, in as much as, the chess players registered with respondent no. 2 were not free to form another association or to organize tournaments and participate therein, without facing the consequence of losing their registration with respondent no. 2 which is the nationally recognized sports federation for the sports of chess—The power of this Court

under Article 226 of the Constitution of India extends to the issuance of appropriate directions, orders or writs for enforcement of any of the rights conferred by Part III of the Constitution or for any other purpose—Since in the present case the petitoner has brought to this Court's notice the aforesaid state of affairs in relation to respondent no. 2 the said aspects need thorough investigation under the provisions of the Competition Act by the Competition Commission—There could be breach of the petitioners fundamental right to freedom, resulting from the policies and practices of respondent No. 2, as guranteed under Article 19(1)(c) and 19(1)(g) of the Constitution of India—Directions issued to Competition Commission to enquire into the alleged contravention of the Provisions of Section of 3 and Section 4 by respondent no. 2 by its aforesaid constitutional provisions and conduct under Section 26 of the Competition Commission Act, 2002.

Hemant Sharma & Ors. v. *Union of India and Ors.* *620*

— Writ—Service matter—Delhi Police (Punishment & Appeal) Rules, 1980—Rule 12—Respondent along with Constable Sheel Bahadur apprehended Lal Bahadur with stolen articles, who was an accused in FIR No. 83/1995 u/s. 381/411 IPC P.S. Subhash Chowk, Jaipur, Rajasthan —Valuable articles and cash retained and Lal Bahadur let off without taking any legal action against him—Lal Bahadur apprehended by SI Narain Singh of PS Subhash Chowk, Jaipur—On his disclosure and identification the respondent was arrested—The Stolen articles recovered from them—Respondent placed under suspension w.e.f. 09.06.1995 and department enquiry initiated—Respondent challenged the initiation of department inquiry before the Tribunal—Departmental inquiry kept in abeyance till decision in criminal case as per direction of the Tribunal—Respondent acquitted in the criminal case vide order dated 22.01.2001—Suspension reviewed and revoked vide

order dated 13.02.2001—Disciplinary proceedings re-opened under Rule 12 Delhi Police (Punishment & Appeal) Rules 1980 on the ground that the acquittal in criminal case was on technical ground and not on merits and that the witnesses had been won over—Disciplinary authority on the findings of Enquiry Officer held the charges against the respondent proved—After considering the representation of the respondent punishment of forfeiture of 4 years of approved service permanently imposed—Appeal preferred to the Appellate Authority—Appeal dismissed vide order dated 12.07.2002—Respondent challenged this order before the Administrative Tribunal—Tribunal quashed the order and remitted the matter back for reconsideration from the stage of penalty order—Matter reconsidered and same punishment awarded—Appeal dismissed by the Appellate Authority vide order dated 11.10.2004—Respondent challenged this order before the Administrative Tribunal—The Tribunal held the acquittal in criminal case was not on technical grounds but on merits—exception carved out under Rule 12(a) cannot be invoked—Orders of the Disciplinary Authority and Appellate Authority set aside vide order dated 25.05.2005—Aggrieved by the order petitioner challenged the same through the writ petition—Held—The acquittal on perusal of the evidence of all the witness and finding it to be not sufficient to conclude the guilt of the accused, is not acquittal on technical grounds—There is no presumption in law that if a witness had turned hostile he/she had been won over by the accused—No illegality, irregularity in the order of the Tribunal—Petition dismissed.

Commissioner of Police, Delhi v. *H.C. Laxmi Chand* *46*

— Article 323A—Writ petition filed challenging withdrawal of recognition to Petitioner Associations and consequential orders by which office bearers of Petitioner Associations transferred from their postings at New Delhi—Objection raised to maintainability of writ petition—Plea taken, since petition

concerns a 'service matter' petitioner should approach Central Administrative Tribunal (CAT)—Per contra plea taken, recognition of association of employees would not fall within 'service matters'—Merely because incidental effect of withdrawal of recognition of Petitioner Associations is that their office bearers would not be able to demand that they remain posted in Delhi, central issue in writ petition would not become a 'service matter' for CAT to adjudicate upon it—Held—When word 'whatsoever' is read with words 'all matters relating to condition of his service', it is clear that words 'service matters' have to be given broadest possible meaning and would encompass all matters relating to conditions of service—Immediate and direct effect of impugned order is that office bearers of Association who earlier may have enjoyed preferential treatment regarding his place of posting would no longer have that privilege—Question of validity of impugned order would therefore certainly be a matter pertaining to 'conditions of service' and would clearly therefore fall within ambit of 'service matter'—Preliminary objection raised as to maintainability of present petition in present form upheld.

Association of Radio and Television Engineering Employees and Ors. v. *Union of India and Ors.* *180*

— Article 227—Initial Landlord VD had executed registered relinquishment deed in favour of petitioner and this fact intimated to tenant—Rent cheque sent to VD was not encashed as change of status of landlord had already been intimated to tenant—After serving legal notice, eviction petition was filed claiming tenant had defaulted for three consecutive months in payment of rent which was payable in advance—Additional Rent Controller (ARC) passed eviction order in favour of petitioner—Rent Control Tribunal (RCT) in appeal set aside order of ARC—Order challenged in High Court—Plea taken, order of RCT holding that petitioner had never averred that rent is payable in advance is dislodged by

averments made in eviction petition where it is specifically averred that rent for each month was payable in advance—If tenant was confused about actual person to whom rent has to be paid, rent should have been deposited by tenant in Court of ARC—Per contra plea taken, Writ Court is not Appellate Court and should not interfere with order of Court below—Rent was not payable in advance—Rent for one month was given to VD under impression that she continues to be landlady—Cheque given to VD was not sent back—Even if rent was payable in advance, there were no three consecutive defaults—Held—Purpose of supervisory jurisdiction under Article 227 of the Constitution is for keeping Subordinate Courts within bounds of their jurisdiction—Where Subordinate Court exercises jurisdiction in a manner not permitted by law, High Court may step in to exercise its supervisory jurisdiction—It is clearly averred in legal notice that rent was payable in advance, no reply having been furnished is implied admission—Even assuming that rent fell due on last date of month, on date of receipt of notice rent for three consecutive months was due, payable and recoverable from tenant—Rent which has been deposited somewhere else is no 'tender' of rent and would amount to non payment of rent—If tenant wishes to avail of beneficial legislation of DRCA in order to seek a protection under its cover he ought to strictly follow procedure contained therein—If tenant was not sure about his landlord, tenant was mandated to have deposited rent in Court of Rent Controller—Tenant was guilty of having committed three consecutive defaults—Order of RCT set aside.

Mr. Harsha Gupta v. *M/s. Insulation & Electrical Products (P) Ltd.* *140*

— Article 141—Assessing Officer (AO) rectified assessment order on ground that deduction allowed in assessment order was incorrect as loss suffered by assessee from export of trading goods ought to have been adjusted against 90% of export incentives and omission to do so in assessment order

was a mistake apparent from record which needed rectification—Appeal of assessee dismissed by CIT (Appeals)—Income Tax Appellate Tribunal (ITAT) allowed appeal of assessee holding that rectification order passed by AO amounted to review of his own assessment order and that there was no glaring, patent or obvious mistake apparent from record—Revenue filed appeal before High Court—Held—Loss suffered by assessee in export of trading goods is to be adjusted against export incentive, has been settled in favour of Revenue by Supreme Court in case of IPCA Laboratory Ltd.—Non consideration of judgment of Supreme Court and non application of ratio of said judgment to facts of present case, with reference to claim of assessee under Section 80HHC, is a glaring, patent and obvious mistake of law which can be rectified by resort to Section 154 of Act—There is no dispute regarding facts and no further investigation was required to gather any more facts—On admitted facts, applicability of judgment of Supreme Court was not capable of generating any elaborate or long drawn process of argument—Decision of Tribunal reversed.

The Commissioner of Income Tax-X v. *Satish Kumar Agarwal* *355*

— Article 14— General Clauses Act, 1897—Section 3 (42)—Respondent sought information of agreement/settlement between appellant and one AL—Public Information Officer (PIO) rejected application stating that information had no relationship to any public activity or interest—First appellate authority affirmed order of PIO—Central Information Commissioner (CIC) allowed appeal of respondent and directed appellant to provide information as available on record—Order challenged in High Court—Plea taken, petitioner a juristic entity is "person" in law—Fundamental rights guaranteed by Constitution of India are available not only to individual but also to juristic person—CIC is wrong in its conclusion that "personal information" can only relate to

individual —Per contra plea taken, petitioner being a public authority, every citizen is entitled to seek information in relation to its public activities and conduct—Rule is in favour of disclosure of information—Held—Expression "Personal information" used in Act does not relate to information pertaining to public authority to whom query for disclosure of information is directed—No public authority can claim that any information held by it is "personal"—There is nothing "personal" about any information, or thing held by public authority in relation to itself—Expression "personal information" used in Act means information personal to any other "person" that public authority may hold—It is that information pertaining to that other person which public authority may refuse to disclose, if that information has no relationship to any public activity or interest vis-a-vis public authority or which would cause unwarranted invasion of privacy of individual—If interpretation as suggested by petitioner were to be adopted, it would completely destroy very purpose of Act as every public authority would claim information relating to it and relating to its affairs as "personal information" and deny its disclosure—Act of entering into agreement with any other person/entity by a public authority would be public activity—Every citizen is entitled to know on what terms agreement/settlement has been reached by petitioner public authority with any other entity or individual—There is no merit in petition.

Jamia Millia Islamia v. *Sh. Ikramuddin* *398*

— Article 226—The Foreigners Act, 1946—Section 3(2)—The petition filed for seeking a declaration that the petitioner is an Indian citizen by birth and directing the respondents to treat him as an Indian national by birth—Also impugned the order dated 13.04.2006 of his deportation from India and seeks to restrain the respondent from taking any action towards his deportation—Prior thereto also, an order dated

05.05.1998 under Section 3(2) of the Foreigners Act, 1946 restraining the petitioner from remaining in India and directing him to depart from India latest by 15.5.1998 was issued—The same was challenged by the petitioner by filing Crl. W.P. No. 397/1998 on the ground that he was born in Guwahati on 13.01.1952; his father came from Pathtoonistan and his mother died when he was just nine months old; that he made an application with the authorities at Kamrup, Assam, for grant of Indian citizenship; that the order of deportation was bad since he was lawfully staying in india and since he was not having citizenship or nationally in any other country and was born, brought up, nurtured and had grown up in India—Respondent pleaded that the petitioner was holding a Afghan passport issued at Kabul; that he had however fraudulently obtained an Indian passport issued at Guwahati; that he is a kingpin in Hawala and Smuggling business and has amassed wealth through illegal means; that the very fact that he had applied for citizenship was indicative of his not being an Indian citizen; that the ration card and other documents fraudulently obtained by him by misrepresenting facts did not vest any rights in him—The aforesaid Crl. W.P. No. 397/1998 was disposed of vide judgment dated 21.08.1998 of the Division Bench of this Court holding that the very fact that the petitioner claims that he has applied for Indian citizenship was sufficient to repel his contention that he was an Indian citizen; that no material had been brought on record to show that he was born in India; rather the material on record showed that in 1962, he applied as a Pakhtoon national seeking permission to stay in India; that there was no question of having acquired citizenship by mere prolonged stay; that the very fact that he sought permission as a foreigner to stay in India falsified his stand of his being an Indian citizen; that he continued to be a foreigner and had no right to stay in India. However, finding that the order of deportation of the petitioner had been made without hearing him, the writ petition was allowed, the order of deportation set aside with liberty to the respondents to pass

a fresh order in accordance with law—Thereafter yet another order dated 18.12.1998 was issued by the respondent Foreigners Regional Registration Officer (FRRO) of deportation of the petitioner. The same was again challenged by the petitioner by filing Crl. Writ Petition No.1107/1998 which was again dismissed by Division Bench vide judgment dated 17.02.1999. Held—Birth Certificate and the letter from the Embassy of Afghanistan produced by petitioner are highly suspect—Mere production thereof would not entitle the petitioner to again seek an opportunity to establish his citizenship of India—Relief claimed by the petitioner of declaration that he is Indian citizen by birth is barred by the principles of res judicata—This Court having already in the Judgments in the earlier two writ petitions aforesaid preferred by the petitioner having held the petitioner to be not an Indian citizen, the Birth Certificate and the letter dated 16.01.2003 subsequently obtained by the petitioner do not relieve the petitioner from the bar of res judicata—Unless there is a stay of deportation of the petitioner, the respondents to deport the petitioner immediately after the expiry of 60 days—The petitioner is also burdened with costs of Rs. 50,000/- of these petitions payable to the respondents within four weeks of today.

Yaro Khan @ Ahmad Shah v. *U.O.I. & Ors.* *90*

— Article 226 and 227—Entitlement Rules for Casualty Pensionary Awards, 1982—Rule 14 (b)—Clauses 5 & 6—Pension Regulation, 173—Petitioner enrolled in the Indian Army as combatant soldier—Attached to the regiment of Artillery at Bikaner on 18.03.2005—Subjected to physical endurance test and medical examination—Successfully cleared—Served for about a year and 8 months—Detected with abnormal behavior—Showed that he was having hallucinations—Sent on leave for 20 days—On return showed no improvement—Superior officers found that the petitioner was having psychiatric problem—Petitioner produced before

Psychiatrist—Petitioner hospitalized and kept under observation—He was assessed as a case of Schizophrenia and percentage of disability was assessed as 30%—Petitioner was discharged from service w.e.f. 04.02.2007, after he had served for 1 year, 10 months and 14 days—Petitioner applied for disability pension on the ground of being placed in low medical category resulting in his being invalidated from service—Claim rejected on 06.07.2007 on the ground that disability was neither attributable to nor aggravated by military service—Writ petition no. 719/2008 filed—Disposed of with directions to produce the petitioner before an Appeal Medical Board to assess his disability and cause thereof—Appeal Medical Board constituted—Assessed the disability of the petitioner to be 30% for life and opined that since the petitioner was posted to a peace station, disability was neither attributable nor aggravated by military service—Disability could not be detected at the time of enrolment as it was asymptomatic at the time—Aggrieved by the opinion petitioner filed WP © no. 856/2009—That petition was transferred for adjudication to the Armed Forces Tribunal since the subject matter of claim fell within the jurisdiction of the said Tribunal—Armed Forces Tribunal dismissed the petitioner claim vide order dated 28.10.2009—Present writ petition—Held—On the facts of instant case it assumes importance to note that petitioner was enrolled on 18.3.2005 and he was admitted at the Army Hospital on 1.11.2006—Prior thereto this abnormal behaviour was detected while he was serving—His abnormal behaviour was detected within a year of his joining—Did not work in a disturbed area and always posted in a peace area, no incident took place when he was in service which could have triggered Schizophrenia—The small time gap between service being joined and abnormal behaviour being detected cannot be lightly brushed aside—It is not the case of petitioner that something happened while in service which made him a patient of Schizophrenia—As noted by us, the argument was advanced on the strength of para (a) of clause 5 of the *Entitlement Rules*

for Casualty Pensionary Awards 1982 and learned counsel was at pains to urge that the benefit of the presumption envisaged by said para would mean that unless there was proof that the Schizophrenia suffered by the petitioner was not attributable to military service, he had the benefit of the presumption that it was—The argument has ignored para (b) of clause 14 of the *Entitlement Rules for Casualty Pensionary Awards 1982* and the opinion of the Appeal Medical Board which observed that the disability *'could not be detected at the time of enrolment as it was asymptomatic at the time.'* Thus, we regretfully dismiss the writ petition but refrain from imposing costs.

— Article 227—Hindu Marriage Act, 1955—Section 13(1) (ia) and 24—Code of Civil Procedure, 1908—Order X and Order XXI Rule 41 (2)—Application for grant of interim maintenance during pendency of divorce petition dismissed on ground that petitioner has nowhere stated that she is not earning anything or income earned by her is not sufficient for her to support herself—Order challenged before High Court—Plea taken, merely because petitioner in her application did not specifically plead that she was not having any independent income for her sustenance, it should not have deprived petitioner of grant of interim maintenance as from total reading of averments made by her in divorce petition it was manifest she had stated that she was financially dependent on her parents which would mean she had no independent source of income—Held—A mere omission on part of petitioner to plead that she has no independent source of income cannot deny her relief of interim maintenance—Family Court should have given fresh opportunity to petitioner to file a fresh affidavit disclosing her income and her exact financial status and even Court had ample powers to take statements of parties under Order X of CPC and even parties could have been directed to file affidavit

in terms of Form No. 16A Appendix E under Order XXI Rule 41 (2) CPC—Approach adopted by learned Family Court is totally insensitive which is not expected of a Court charging functions of a Family Court where more humane and sensitive approach in required—Matter remanded back for fresh decision—Petitioner directed to file a better affidavit disclosing her correct financial status in said affidavit—Petition disposed of.

Chitra v. *Pankaj Kashyap* *382*

CUSTOMS ACT, 1962—Section 120—Respondents were apprehended on their arrival IGI Airport on suspicion of carrying some contraband substance—Notice under Section 50 of The Act and under Section 120 of Customs Act served upon them giving them an option to get themselves and their baggage searched before Gazetted Officer of Customs or a Magistrate—Respondents did not know either Hindi or English language, thus an official from KAM Airlines who knew language of Respondents, explained contents of notices to them—On Knowing contents, Respondents opted search by Custom Officer—On search of baggage, Heroin was found concealed in bottom portion of bag in cotton cloth belt—After fulfilling requirements of Act, Respondents were charge sheeted for offences punishable under Section 21, 23 & 28 of Act—On conclusion of trial, they were acquitted after finding lacunas in prosecution case and procedural safeguards contained in Section 50 of Act were not adhered to—Appellant challenged acquittal in appeal—It was urged on behalf of appellant that notice under Section 50 of Act was not required to be served upon Respondents as recovery was effected from hand bag and not from his person—Held:- Provisions of Section 50 of NDPS Act, are mandatory and non compliance renders recovery of illicit article suspect—Thus, non compliance of these provisions is viewed seriously and adverse inference is drawn against prosecution, particulary, when accused has denied that he has served any such notice

and it has created doubt with regard to truthfulness of prosecution witnesses.

Customs v. *Mohammad Bagour* *711*

DELHI MUNICIPAL CORPORATION ACT, 1957—Section 345 A—Premises bearing No. 147-B, Gujjar Dairy, Gautam Nagar, New Delhi were registered under the National Capital Territory of Delhi (Incredible India) Bed & Breakfast Establishment Registration and Regulation Act, 2007—Respondent served notice upon the petitioner that property is being used for commerical purpose in violation of sanctioned use—Called upon to stop the misuse otherwise it would be sealed—Petition challenged the notice—Respondent contends—Premises visited by Monitoring Committee appointed by Supreme Court of India on 14.09.2011 and directed MCD to seal the subject premises—Held—Any Action on the part of respondent/MCD to seal subject premises without the petitioner being afforded a personal hearing, would amount to violation of principles of natural justice, praticularly when the settled law is that rules of natural justice must be read into Section 345-A of the DMC Act—It is clear that neither has the petitioner been heard on the issue of misuse of premises, subject matter of the notice dated 18.09.2011 issued by the respondent/MCD under Section 345-A of the DMC Act, nor has he been afforded an opportunity to submit any representation, much less be heard on the issue of ownership of land on which the built-up structure stands, which was the subject matter of the noting dated 03.10.20111, made by a member of the monitoring Committee.

Rajinder Rai v. *MCD and Ors.* *453*

DELHI RENT CONTROL ACT, 1958—Section 25B, 14(1)(e)—Code of Civil Procedure, 1908—Order VI Rule 17—Eviction petition by respondent seeking eviction of petitioner from ground floor of premises bearing no. 138-A, Golf Links, New Delhi, on the ground of bonafide requirement for residence

of its Director Amit Deep Kohli—Leave to defend filed on 23.07.10—Application seeking amendment of the leave to defend filed on 09.05.2011—Amit Deep Kohli is a Director in other holding companies of the petitioner—Other properties available with Company for residence—Tenant is an old lady staying alone—Petitioner submitted, Landlord was a construction company carrying on construction activity—Other properties were commercial flats not part of Delhi—Application seeking leave to defend dismissed—Petition—Held—The facts which were sought to be incorporated by amendment i.e. that the landlord Company was a part of a huge Real Estate Group of Companies having several properties in their name were all facts known to the tenant—These facts were pre-existing i.e. existing at the time when the application for leave to defend was filed; if such an application is permitted the whole purpose and intent of the provisions of Section 25 B (4) would be defeated as the specifically stipulated period for filing an application for leave to defend within 15 days would be given a go by and by permitting the amendment there would be an automatic extension of time for filing the application for leave to defend—This could not and was not the intend of the statute.

Ms. Madhu Gupta v. *M/s. Gardenia Estates (P) Ltd.* *558*

— Section 14 (1)(e)—Eviction petition seeking eviction of tenant under Section 14(1) (e) of DRC Act had been filed—Application for leave to defend filed by tenant, dismissed—Order challenged in High Court—Plea taken, a perusal of summons clearly shows that there was a next date of hearing mentioned therein which was noted as 08.09.2009—Tenant was under a bona fide impression that he had to appear in Court on 08.09.2009 which he did—This had led to confusion in his mind which had been deliberately created which in turn amounts to a fraud—Impugned order in these circumstances not entertaining application for leave to defend to tenant holding

that it was filed beyond period of 15 day which period was counted w.e.f. 18.07.2009 suffers from a clear infirmity—Per contra plea taken, application for leave to defend has not been filed within stipulated period—Averments made in eviction petition are deemed to be admitted and landlord is entitled to a decree forthwith—Held—Summons sent to petitioner are in format which has been prescribed in third schedule of DRC Act—Name description, place of residence of tenant had been mentioned in these summons—Next date of 08.09.2009 written on top of summons states that it is next date of hearing—That does not take away text of what is contained in body of summons which clearly informed tenant that he must, on affidavit within 15 days of receipt of these summons, file application for leave to contest eviction petition failing which eviction petition shall stand decreed in favour of applicant/landlord—Along with these summons eviction petition had also been served upon petitioner—Summons sent cannot be said to be fraud which has been committed by petitioner—Petition without any merit.

Punjab Bearing Traders v. *Mohammad Jameel Khan Lodhi* *378*

— Section 6(A), 8, 14, (1) (a), 14(2), 15(2), 26 and 27—Constitution of India, 1950—Article 227—Initial Landlord VD had executed registered relinquishment deed in favour of petitioner and this fact intimated to tenant—Rent cheque sent to VD was not encashed as change of status of landlord had already been intimated to tenant—After serving legal notice, eviction petition was filed claiming tenant had defaulted for three consecutive months in payment of rent which was payable in advance—Additional Rent Controller (ARC) passed eviction order in favour of petitioner—Rent Control Tribunal (RCT) in appeal set aside order of ARC—Order challenged in High Court—Plea taken, order of RCT holding that petitioner had never averred that rent is payable in advance is dislodged by averments made in eviction petition where it is specifically

averred that rent for each month was payable in advance—If tenant was confused about actual person to whom rent has to be paid, rent should have been deposited by tenant in Court of ARC—Per contra plea taken, Writ Court is not Appellate Court and should not interfere with order of Court below—Rent was not payable in advance—Rent for one month was given to VD under impression that she continues to be landlady—Cheque given to VD was not sent back—Even if rent was payable in advance, there were no three consecutive defaults—Held—Purpose of supervisory jurisdiction under Article 227 of the Constitution is for keeping Subordinate Courts within bounds of their jurisdiction—Where Subordinate Court exercises jurisdiction in a manner not permitted by law, High Court may step in to exercise its supervisory jurisdiction—It is clearly averred in legal notice that rent was payable in advance, no reply having been furnished is implied admission—Even assuming that rent fell due on last date of month, on date of receipt of notice rent for three consecutive months was due, payable and recoverable from tenant—Rent which has been deposited somewhere else is no 'tender' of rent and would amount to non payment of rent—If tenant wishes to avail of beneficial legislation of DRCA in order to seek a protection under its cover he ought to strictly follow procedure contained therein—If tenant was not sure about his landlord, tenant was mandated to have deposited rent in Court of Rent Controller—Tenant was guilty of having committed three consecutive defaults—Order of RCT set aside.

Mr. Harsha Gupta v. *M/s. Insulation & Electrical Products (P) Ltd.* *140*

THE FOREIGNERS ACT, 1946—Section 3(2)—The petition filed for seeking a declaration that the petitioner is an Indian citizen by birth and directing the respondents to treat him as an Indian national by birth—Also impugned the order dated 13.04.2006 of his deportation from India and seeks to restrain the respondent from taking any action towards his

deportation—Prior thereto also, an order dated 05.05.1998 under Section 3(2) of the Foreigners Act, 1946 restraining the petitioner from remaining in India and directing him to depart from India latest by 15.5.1998 was issued—The same was challenged by the petitioner by filing Crl. W.P. No. 397/1998 on the ground that he was born in Guwahati on 13.01.1952; his father came from Pathtoonistan and his mother died when he was just nine months old; that he made an application with the authorities at Kamrup, Assam, for grant of Indian citizenship; that the order of deportation was bad since he was lawfully staying in india and since he was not having citizenship or nationally in any other country and was born, brought up, nurtured and had grown up in India—Respondent pleaded that the petitioner was holding a Afghan passport issued at Kabul; that he had however fraudulently obtained an Indian passport issued at Guwahati; that he is a kingpin in Hawala and Smuggling business and has amassed wealth through illegal means; that the very fact that he had applied for citizenship was indicative of his not being an Indian citizen; that the ration card and other documents fraudulently obtained by him by misrepresenting facts did not vest any rights in him—The aforesaid Crl. W.P. No. 397/1998 was disposed of vide judgment dated 21.08.1998 of the Division Bench of this Court holding that the very fact that the petitioner claims that he has applied for Indian citizenship was sufficient to repel his contention that he was an Indian citizen; that no material had been brought on record to show that he was born in India; rather the material on record showed that in 1962, he applied as a Pakhtoon national seeking permission to stay in India; that there was no question of having acquired citizenship by mere prolonged stay; that the very fact that he sought permission as a foreigner to stay in India falsified his stand of his being an Indian citizen; that he continued to be a foreigner and had no right to stay in India. However, finding that the order of deportation of the petitioner had been made without hearing him, the writ petition was allowed, the order

of deportation set aside with liberty to the respondents to pass a fresh order in accordance with law—Thereafter yet another order dated 18.12.1998 was issued by the respondent Foreigners Regional Registration Officer (FRRO) of deportation of the petitioner. The same was again challenged by the petitioner by filing Crl. Writ Petition No.1107/1998 which was again dismissed by Division Bench vide judgment dated 17.02.1999. Held—Birth Certificate and the letter from the Embassy of Afghanistan produced by petitioner are highly suspect—Mere production thereof would not entitle the petitioner to again seek an opportunity to establish his citizenship of India—Relief claimed by the petitioner of declaration that he is Indian citizen by birth is barred by the principles of res judicata—This Court having already in the Judgments in the earlier two writ petitions aforesaid preferred by the petitioner having held the petitioner to be not an Indian citizen, the Birth Certificate and the letter dated 16.01.2003 subsequently obtained by the petitioner do not relieve the petitioner from the bar of res judicata—Unless there is a stay of deportation of the petitioner, the respondents to deport the petitioner immediately after the expiry of 60 days—The petitioner is also burdened with costs of Rs. 50,000/- of these petitions payable to the respondents within four weeks of today.

Yaro Khan @ Ahmad Shah v. *U.O.I. & Ors.* *90*

HINDU ADOPTION AND MAINTENANCE ACT, 1956—Section 18—Code of Criminal Procedure, 1973—Section 125—Order of Trial Court whereby a decree of divorce under Section 13(2) (iii) of Hindu Marriage Act was passed, challenged in appeal before High Court—Plea taken, order passed under Section 125 of Cr. PC was interim order and based on that, Matrimonial Court could not have granted decree of divorce—Order which gives a right to wife to seek divorce is a final and not interim order—Held—A bare look at Section 13(2) (iii) would manifest intention of legislature

as two separate expressions have been used in said Section i.e. 'decree' and 'order' which would necessarily mean either interim or final order—Intention of legislature is to give a right to wife to invoke said provision in case where even interim order has been passed in proceedings under Section 18 of H.M. Act of Section 125 of Cr. PC—If contention of counsel for appellant is accepted then purpose of section would be negated as wife who seeks a decree of divorce under said Section would have to wait till a final order under Section 18 or Section 125 is passed which would certainly mean insisting on inevitably long waiting period which is not object of this Section—No merits in appeal which is hereby dismissed.

Satinder Singh v. *Bhupinder Kaur* *347*

HINDU MARRIAGE ACT, 1955—Section 24—Respondent contested application under Section 24 pleading that he was unemployed while petitioner was earning Rs. 3,00,000/- per month—Trial Court observed that there was no material on record to show that respondent had any income and dismissed application—Held, parties do not truthfully reveal their income and as such, both the parties were directed to file affidavits of their assets, income and expenditure from the date of marriage till date, containing the particulars elaborately enlisted in the order itself and to file documents of assets and liabilities enlisted in the order itself—Factors to be considered for assessing income of spouse enumerated.

Puneet Kaur v. *Inderjit Singh Sawhney* *73*

— Section 13(1) (ia), 13(2) (iii) and 28—Code of Civil Procedure, 1908—Order VII Rule 11 and Section 151—Hindu Adoption and Maintenance Act, 1956—Section 18—Code of Criminal Procedure, 1973—Section 125—Order of Trial Court whereby a decree of divorce under Section 13(2) (iii) of Hindu Marriage Act was passed, challenged in appeal before High Court—Plea taken, order passed under Section 125 of Cr. PC was interim order and based on that, Matrimonial Court could not have

granted decree of divorce—Order which gives a right to wife to seek divorce is a final and not interim order—Held—A bare look at Section 13(2) (iii) would manifest intention of legislature as two separate expressions have been used in said Section i.e. 'decree' and 'order' which would necessarily mean either interim or final order—Intention of legislature is to give a right to wife to invoke said provision in case where even interim order has been passed in proceedings under Section 18 of H.M. Act of Section 125 of Cr. PC—If contention of counsel for appellant is accepted then purpose of section would be negated as wife who seeks a decree of divorce under said Section would have to wait till a final order under Section 18 or Section 125 is passed which would certainly mean insisting on inevitably long waiting period which is not object of this Section—No merits in appeal which is hereby dismissed.

Satinder Singh v. *Bhupinder Kaur*..... *347*

— Section 13(1) (ia) and 24—Code of Civil Procedure, 1908—Order X and Order XXI Rule 41 (2)—Application for grant of interim maintenance during pendency of divorce petition dismissed on ground that petitioner has nowhere stated that she is not earning anything or income earned by her is not sufficient for her to support herself—Order challenged before High Court—Plea taken, merely because petitioner in her application did not specifically plead that she was not having any independent income for her sustenance, it should not have deprived petitioner of grant of interim maintenance as from total reading of averments made by her in divorce petition it was manifest she had stated that she was financially dependent on her parents which would mean she had no independent source of income—Held—A mere omission on part of petitioner to plead that she has no independent source of income cannot deny her relief of interim maintenance—Family Court should have given fresh opportunity to petitioner to file a fresh affidavit disclosing her income and her exact

financial status and even Court had ample powers to take statements of parties under Order X of CPC and even parties could have been directed to file affidavit in terms of Form No. 16A Appendix E under Order XXI Rule 41 (2) CPC—Approach adopted by learned Family Court is totally insensitive which is not expected of a Court charging functions of a Family Court where more humane and sensitive approach in required—Matter remanded back for fresh decision—Petitioner directed to file a better affidavit disclosing her correct financial status in said affidavit—Petition disposed of.

Chitra v. *Pankaj Kashyap* *382*

INCOME TAX ACT, 1961—Section, 80HHC, 143(3), 154, 254 (2), 260A—Constitution of India, 1950—Article 141—Assessing Officer (AO) rectified assessment order on ground that deduction allowed in assessment order was incorrect as loss suffered by assessee from export of trading goods ought to have been adjusted against 90% of export incentives and omission to do so in assessment order was a mistake apparent from record which needed rectification—Appeal of assessee dismissed by CIT (Appeals)—Income Tax Appellate Tribunal (ITAT) allowed appeal of assessee holding that rectification order passed by AO amounted to review of his own assessment order and that there was no glaring, patent or obvious mistake apparent from record—Revenue filed appeal before High Court—Held—Loss suffered by assessee in export of trading goods is to be adjusted against export incentive, has been settled in favour of Revenue by Supreme Court in case of IPCA Laboratory Ltd.—Non consideration of judgment of Supreme Court and non application of ratio of said judgment to facts of present case, with reference to claim of assessee under Section 80HHC, is a glaring, patent and obvious mistake of law which can be rectified by resort to Section 154 of Act—There is no dispute regarding facts and no further investigation was required to gather any more facts—On admitted facts, applicability of judgment of Supreme

Court was not capable of generating any elaborate or long drawn process of argument—Decision of Tribunal reversed.

The Commissioner of Income Tax-X v. *Satish Kumar Agarwal* *355*

— Section 5(2), 9(1) (i) 40(a) (i) (ia), 195 and 260A—Assessee had paid commission to its parent company on sales and amounts realized on export contracts procured by patent company for respondent assessee—Assessing Officer (AO) held parent company had business connection with respondent assessee in India and liable to be taxed in India of portion that accrues or arises in India—Income Tax Appellate Tribunal (ITAT) upheld order of C.I.T. (A) deleting addition of commission income made by AO—Order challenged before High Court—Plea taken, commission income earned by parent company had accrued in India or was deemed to accrue in India and therefore respondent assessee was liable to deduct tax at source and as there was failure, said expenditure should be disallowed—Held—AO was required to examine whether commission income is accruing or arising directly or indirectly from any business connection in India—Test which is to be applied is to examine activities in India and whether said activities have contributed to business income earned by non resident, which has accrued, arisen or received outside India—Business connection must be real and intimate from which income had arisen directly or indirectly—Question of business connection has to be decided on facts found by AO or in appellate proceedings—Facts found by AO do not make out a case of business connection—Appellate authorities have rightly held that "business connection" is not established—Appeal dismissed.

The Commissioner of Income Tax Delhi-IV, New Delhi v. *EON Technology P. Limited*..... *363*

— Section 260A—Assessee a limited company engaged, inter-alia, in the business of investment in shares—Assessee debited

loss on sale of shares amounting to Rs. 1,34,06,274/- as business loss—Assessee submited, it was an investment company and investing in shares of other companies, was its main business—Any Profit and loss on sale of shares accounted for business loss—AO was of the view that even an investment company could hold shares either as stock-in-trade or as an investment—In which particular segment assessee was holding particular shares would depend upon the initial purchase as that would reflect the intention of the Company to this effect—Assessing Officer rejected the contention of the assessee, on the grounds assessee has been consistenly showing these shares as investment in the Balance sheet filed with the returns of income—From the date of its purchase in 1997 till sold in 2004 there was no transaction of sale of these shares—Order of Assessing Officer affirmed by CIT(A)—Tribunal, however, allowed the appeal treating the sale of shares as business income taking into consideration first that sale of shares in earlier assessment year had been credited in revenue account of the assessee and second revenue had accepted this position in Assessment Year 2003-04—Held, as per Memorandum / Articles of Association investment in shares was one of the main objectives of the Company—Shares in question were alway shown as investment—Shares were treated as investment in every year till there sale in the Blance Sheet—Assessee was maintaining two portfolios, one was the investment portfolio and the other was the business portfolio—The shares in question were show in the investment portfolio—Once these factors are taken into account merely because in the previous year the sales transaction was reflected in the Profit & Loss Account and was not detected by the Assessing Officer, would not be sufficient to upset the findings of the Assessing Officer based on over all appreciation of facts—Appeal allowed.

The Commissioner of Income Tax-II New Delhi v. *Moderate Leasing & Capital Services Ltd.* *684*

— Section 260A—Assessee a private limited company—Assessing Offiicer while computing assessment u/s 143(3) made observation that assessee received share application money in cash from three private limited company in violation of section 269SS and therefore, should be treated as deposits and as a consequence of that liable for penalty under Section 271D—Plea raised by the assessee that the share application monies received by the Company pending allotment of shares do not amount to loan or deposit, accepted by CIT(A) and Tribunal—Appeal preferred by Revenue—Held, there is a distinction between loan and the deposit—In case of loan ordinarily the duty of the debtor is to seek out the creditor and to repay the money—A loan grants temporary use of money or temporary accommodation, whereas in case of deposits it is generally the duty of the depositor to go to the bank or the depositee and make a demand for it and the essence of the deposit is that there must be a liability to return it the party by whom the deposit was made on fulfillment of certain conditions—Receipt of share of application monies from the three private limited companies for allotment of shares in the assessee company cannot be treated as receipt of loan or deposit—Appeal declined to be admitted.

The Commissioner of Income Tax Delhi IV v. *I.P. India Pvt. Ltd.* *699*

INDIAN CONTRACT ACT, 1872—Section 74—Suit of Appellant/proposed buyer for recovery of earnest money paid under Agreement to sell, dismissed—HELD—Claim to forfeit amount is a claim in the nature of liquidated damages under Section 74 of Contract Act—Seller under an agreement to sell cannot forfeit amount unless loss is pleaded and proved by him on account of breach of contract—Appeal allowed—Suit decreed.

Anand Singh v. *Anurag Bareja & Ors.* *728*

INDIAN EVIDENCE ACT, 1873—Section 137, 138—Appellants Jayant, Yashpal, Sanjay Singh Rathi, Devender challenged their conviction under Section 365/396 IPC; Appellant Manju Kumar was aggrieved of his conviction under Section 412 IPC—Besides raising various grounds, appellant Jayant also raised technical objection qua admissibility of testimony of PW4—He urged that though his Advocate gave consent for admitting examination in chief of PW4 recorded prior to his trial but same was violative of Section 137 & 138 Evidence Act—Held:- Whenever an accused subsequently joins the trial it was necessary to examine witness/witnesses already examined afresh—Of course, an accused could give an option that any particular witness need not be recalled for examination provided the prosecution did not want to prove any particular fact against the additional accused who joined the trial later on—But if such accused failed to show that due to non recording of examination in chief of prosecution witness after he joined the trial afresh caused prejudice to him, he could not be permitted to make a grievance about it if his counsel had given a consent to read the examination-in-chief previously recorded.

Manju Kumar v. *State N.C.T. of Delhi* *271*

INDIAN PENAL CODE, 1860—Section 402, 406, 506—Code of Criminal Procedure, 1973-204, 256—Respondent filed complaint under Section 402, 406, 506 IPC against petitioner—In pre Summoning evidence, he examined himself and one more witness who was not named in list of witnesses as his witness—Summoning order was passed by learned Metropolitan Magistrate and case was listed for pre-Summoning evidence—Aggrieved by summoning order, petitioner challenged it and urged, one of the witness namely Sh. Raj Singh examined at pre summoning stage, was not named in list of witnesses which caused injustice to respondent—Also, on other grounds summoning was bad in law—Held:- Non-compliance of Section 204 (1A) is not an

section 300 IPC is ruled out—It would depend upon the facts of each case; the weapon used, size of the weapon, place where the assault took place, background facts leading to the assault, part of the body where the blow was given, are some of the factors which can be considered by the Court to form an opinion whether the case would fall under Section 304 or 302 IPC—Appellant entitled to benefit of Exception IV to Section 300 IPC—Conviction altered to one under Section 304 Part II, IPC.

Ram Parshad v. *State* *194*

— Section 302—Appeal preferred against judgment convicting appellant under Section 302/34 IPC—Appellant urged he is covered under Exception 4 to Section 300 IPC as injury was inflicted without pre-meditation in a sudden fight in the heat of passion, upon a sudden quarrel—Held:- A *'sudden fight'* implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other hand not aggravated it by his own conduct it would not have taken the serious turn it did. There is thus, mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter.

Ram Parshad v. *State* *194*

— Section 186, 353, 506, 34—Criminal Procedure Code, 1973—Sections 155, 195, 482—Drugs & Narcotics Act, 1940—Section 22, 32—FIR for offences punishable under Section 186/353/506/34 IPC registered in Police Station Defence Colony on statement of Drug Inspector alleging, on 21.08.2003 at about 4 p.m., he along with his colleagues as

part of their official duty visited premises M/s Shiv Store, Defence Colony Market, New Delhi—Three persons present in shop prevented Inspector from inspecting and examining purchase and sale records, they physically pushed him out of the shop and threatened him by using abusive language—Thus, FIR lodged on complaint by Drug Inspector—Accused persons arrested and bailed out—Subsequently during further investigation Section 22(3) Drugs & Cosmetics Act added and learned Metropolitan Magistrate took cognizance on charge sheet—Petitioner challenged cognizance and urged Section 186 IPC is non cognizable therefore police had no power to register and investigate case without prior permission of concerned Metropolitan Magistrate—Held:- Proceedings for an offence punishable under Section 186 IPC could not be put into motion without a formal complaint lodged with the Court concerned by the public servant who had been obstructed in discharge of his public duties or against whom an offence is committed—The proceedings under Section 186 IPC quashed and for remaining offences the trial court was directed to proceed as per law.

Shiv Charan & Ors. v. *State* *211*

— Section 302, 365, 201—Aggrieved appellants on their conviction for having abducted & Murdered one Vijay Kumar and thereafter concealing deadbody, preferred appeals—They urged, chain of circumstantial evidence not completed, identity of deadbody doubtful, motive not established by prosecution, thus, their conviction is bad in law—Held:- The well known rules governing circumstantial evidence are that:- (a) the circumstances from which the inference of guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances; (b) the circumstances should be of a determinative tendency unerringly pointing towards the guilt of the accused; and (c) the circumstances, taken collectively, are incapable of leading to any conclusion, on a reasonable hypothesis, other than that

of the guilt of the accused—Prosecution established circumstances against appellant Sapna Talwar and Stayajit @ Lovely for having committed offences under Section 302 read with Section 120B and 201 IPC, but prosecution could not establish charge under Section 365 IPC—Missing links found against appellant Yunus who acquitted of false charges.

Sapna Talwar & Anr. v. *State* *224*

— Section 365, 396, 412—Indian Evidence Act, 1873—Section 137, 138—Appellants Jayant, Yashpal, Sanjay Singh Rathi, Devender challenged their conviction under Section 365/396 IPC; Appellant Manju Kumar was aggrieved of his conviction under Section 412 IPC—Besides raising various grounds, appellant Jayant also raised technical objection qua admissibility of testimony of PW4—He urged that though his Advocate gave consent for admitting examination in chief of PW4 recorded prior to his trial but same was violative of Section 137 & 138 Evidence Act—Held:- Whenever an accused subsequently joins the trial it was necessary to examine witness/witnesses already examined afresh—Of course, an accused could give an option that any particular witness need not be recalled for examination provided the prosecution did not want to prove any particular fact against the additional accused who joined the trial later on—But if such accused failed to show that due to non recording of examination in chief of prosecution witness after he joined the trial afresh caused prejudice to him, he could not be permitted to make a grievance about it if his counsel had given a consent to read the examination-in-chief previously recorded.

Manju Kumar v. *State N.C.T. of Delhi* *271*

— Section 279, 304A—Petitioner sought setting aside of order upholding his conviction passed by trial Court for having driven the vehicle i.e. bus in rash and negligent manner, without waiting for passenger to get down which resulted death of passenger who fell down—Petitioner urged, that neither deceased nor his brother had informed driver of bus

that they intended to get down—Also, deceased did not get down at bus stop and was himself guilty of violating traffic rules—Held:- A rash act is primarily an over hasty act—It is opposed to a deliberate act. Still, a rash act can be a deliberate act in the sense that it was done without due care and caution—Culpable rashness lies in running the risk of doing an act with recklessness and with indifference as to the consequences. Criminal negligence is the failure to exercise duty with reasonable and proper care and precaution guarding against injury to the public generally or to any individual in particular. It is the imperative duty of the driver of a vehicle to adopt such reasonable and proper care and precaution—Petitioner had stopped bus at red light signal which turned to green immediately and he drove bus at a speed of 10 kmph—But deceased got down from bus without informing him—He carried something in his both hands, he fell down from bus as he jumped from moving bus—Thus, driver not rash & negligent in driving bus.

Devender v. *State* *299*

— Sections 302, 304 Part II—Appellant convicted for murder of his neighbour Rampal on basis of dying declaration of deceased and testimony of eye witnesses—Appellant challenged his conviction—As per prosecution, on day of incident appellant quarrelled with his family members under influence of liquor—His wife and mother raised alarm as he threatened to set himself on fire—Deceased went to his house and saw appellant having plastic bottle containing petrol which deceased tried to snatch—In struggle, petrol spilled over deceased as well as on floor—Appellant pushed deceased and bolted door, he lit match stick, threw it on deceased and ran away—Deceased sustained fire injuries and succumbed to injuries after two days—Appellant urged testimony of eye witness not reliable and even if dying declaration to be believed, it was at most, case of conviction under Section 304 Part II and not conviction under Section 302 IPC—Held:-

To prove conviction under Section 302 IPC, a calculated or pre-mediated intent on the part of person to kill deceased to be proved—However, appellant possessed knowledge that his act would result in such injuries on the deceased which in normal course of nature would result in his death—Conviction altered to be under Section 304 Part II IPC.

Amit Kumar v. *State (Govt. of NCT of Delhi)* *388*

— Sections 302, 201 and 34—Murder case—No eye witness—Based upon circumstantial evidence of last seen and recovery of material—Evidence of previous enmity and recovery of blood smeared soil, earth control with other material like blood smeared brick, blood smeared rope and other exhibits at the instance of accused persons—Ld. ASJ held the appellants guilty and convicted them for the offences punishable u/s 302/201/34 IPC and sentenced—Appeal challenging that there are material contradictions on all the important aspects—Possibility of deceased having met with an accident cannot be ruled out—Chain of circumstances not complete—Held—The well known rule governing circumstantial evidence are that:- (a) the circumstances from which the inference of guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances; (b) the circumstance should be of a determinative tendency unerringly pointing towards collectively, are incapable of leading to any conclusion, on a reasonable hypothesis, other than that of the guilt of the accused—No doubt, the Courts have also added two riders to the aforesaid principle namely, (i) there should be no missing links but it is not that every one of the links must appear on the surface of the evidence, since some of these links can only be inferred from the proved facts and (ii) it cannot be said that the prosecution must meet each and every hypothesis put forward by the accused however far-fetched and fanciful it may be.

Riken Alias Diken v. *State*..... *305*

— Sections 302, 201 and 34—Murder case—No eye witness—Based upon circumstantial evidence of last seen and recovery of material—Evidence of previous enmity and recovery of blood smeared soil, earth control with other material like blood smeared brick, blood smeared rope and other exhibits at the instance of accused persons—Ld. ASJ held the appellants guilty and convicted them for the offences punishable u/s 302/201/34 IPC and sentenced—Appeal challenging that there are material contradictions on all the important aspects—Possibility of deceased met with an accident cannot be ruled out—Chain of circumstances not complete—Held—It is a well established legal principle that in a case based on circumstantial evidence where an accused offers a false explanation in his statement under Section 313 Cr. P.C. in respect of an established fact, the said false denial could supply a missing link in the chain of circumstances appearing against him.

Riken Alias Diken v. *State*..... *305*

— Sections 302, 201 and 34—Murder case—No eye witness—Based upon circumstantial evidence of last seen and recovery of material—Evidence of previous enmity and recovery of blood smeared soil, earth control with other material like blood smeared brick, blood smeared rope and other exhibits at the instance of accused persons—Ld. ASJ held the appellants guilty and convicted them for the offences punishable u/s 302/201/34 IPC and sentenced—Appeal challenging that there are material contradictions on all the important aspects—Possibility of deceased met with an accident cannot be ruled out—Chain of circumstance not complete—Held—From the evidence provided by the prosecution, it is clear that the accused in pre-planned manner committed murder of Ramesh Rai—The evidence of the prosecution is trustworthy with respect of the proof of motive as it has been proved on record that all accused persons had earlier also assaulted the deceased on the occasion of Holi in village—PW-7 Ranjeet Singh, an independent witness, stated that at the instance of accused

persons, blood stained shirt, T-shirt, blood stained brick affixed with hair, rope etc were recovered—The recovery of the said articles connected the accused persons with the crime and proved the guilt beyond all reasonable doubt—There is overwhelming circumstantial evidence to show that the accused committed the crime—Appeals dismissed.

Riken Alias Diken v. *State*..... *305*

— Section 302—State preferred appeal against judgment acquitting Respondent for having committed offence punishable under Section 302 IPC—As Per prosecution, there were frequent marital discord and quarrels between Respondent and his deceased wife on account of meager livelihood of Respondent—On the day of incident, deceased asked Respondent if she could take up employment but Respondent lost his control, he lifted a club and started assaulting on her head which led to her death—Deceased told prosecution witness in course of their journey to hospital in PCR Van about the incident and clearly implicated her husband—Also, in MLC it was recorded *"alleged history of assault by husband"*—However, the said prosecution witness did not support the prosecution during trial and instead deposed that deceased fell and slipped down the stairs and thereby sustained injuries—It was urged on behalf of State that trial Court did not attach importance to significant facts i.e. MLC categorically pointed out to homicidal death on account of beatings given to deceased by husband—Post mortem report and deposition of Doctor revealed that death could be caused as result of injuries sustained on account of club blows—These facts were sufficient enough to record a conviction—Held:- In case of conflicting evidence about the nature of injuries sustained by deceased and the medical evidence being suggestive and not conclusive, acquittal is justified.

State v. *Ram Palat*..... *406*

— Sections 201, 302, 34—State preferred appeal against

judgment acquitting Respondents for offences punishable under Section 302/201/34 IPC—As per prosecution case, accused Ram Kumar and deceased were friends—15/20 days prior to incident accused went to house of deceased and made grievance to his parents that deceased was having illicit relations with his wife—He threatened to kill deceased if he would not desist from continuing with relationship—On day of incident, deceased seen in company of all the three accused persons—Around 8:30 p.m., some police personnels, while patrolling in same area, noticed some flames in open space behind MCD Primary School and saw three persons running from there—Those persons were chased and apprehended by police who came to be known as the three accused persons and they confessed the crime—At the time of apprehension, accused Ram Kumar was found carrying dagger, accused Shahid 5 litre petrol container and accused Sanjay purse containing diary and match box—Prosecution case rested on circumstantial evidence i.e. testimony of parents of deceased, last seen evidence, apprehension of accused near place of incidence with incriminating things—It was urged on behalf of State that prosecution adduced strong circumstantial evidence to prove guilt of accused persons—Held:- Where the evidence is of circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused—There must be a chain of evidence so far complete, as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused—Prosecution case if believed only raises suspicion that accused persons must have been responsible for committing deceased's murder; the suspicion however strong cannot take place of proof.

State v. *Ram Kumar & Ors.*..... *442*

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000—Section 15, 16—Appellant/accused was juvenile at the time of commission of murder, but suffered imprisonment for over 10 years, which is three times the maximum period prescribed under the Act—Not an appropriate case to send the appellant to Juvenile Justice Board as the same would be grave injustice—Conviction quashed.

Raju Chakravarthy v. *State of NCT of Delhi* *638*

— Section 15, 16—Appellant/accused was juvenile at the time of commission of murder, but suffered imprisonment for over 10 years which is three time the maximum period prescribed under the Act—Not an appropriate case to send the appellant to Juvenile Justice Board as the same would be grave injustice—Appellant not interested to challenge his conviction—Conviction upheld, sentence set aside and benefit of Sec. 19 of the Act, granted.

Prem Kumar v. *State* *681*

LAND ACQUISITION ACT, 1894—Sections 4, 6 & 48—Land measuring 80 bighas 7 biswas situated in village Rangpuri @ Malikpur Kohi (Vasant kunj) Tehsil Mehrauli notified under section 4 and 6 of the Act vide notification dated 23.01.1965 and 26.12.1965 respectively followed by an award passed in the year 1981—Petitioner alleged that possession of aforesaid land was not taken by the Government—Land purcahse by petitioner No. 3 Shri Ram Saroop Kuthuria as karta of HUF vide sale deed dated 18th April 1967 executed by Smt. Saroop devi, Smt. Sarjo and Smt. Bartho—Petitioner sought release of land under Section 48—Petitioner claimed to be running a school under the name and style of Kuthuria Public School since 1988 on the said land—Representation moved on 17.08.1995 01.01.1996 and 11.11.1996—No response to the representations—Petition seeking direction to direct the

respondents to decide the representations and not to demolish any part of building—Respondent contended—Possession of entire land taken except 9 Biswas where some built up structure was found—Petitioner No.3 purchased the land after notification under Section 4 of Act—Raised illegal construction during pendency of earlier writ petition without any sanction from the competent Authority—Representations were placed before De-notification committee—Rejected—Petitioners have no right—Held—Since De-notification Guidelines issued by the Government do not permit de-notification of land in question, which the petitioners purchased after issuance of notification under Section 4 of Land Acquisition Act, no ground exist to direct the Government either to de-notify this land or to re-consider the representations of the petitioners—The writ petition dismissed—The interim orders passed in favour of the petitioners during pendency of the writ petition are vacated.

Kathuria Public School v. *Union of India* *652*

LIMITATION ACT, 1963—Section 5—Writ petition dismissed in default on 03/05/11—Restoration applicant under Sec. 5 of the Act—Application contended that his counsel expired in June, 2003 and although son of the counsel had contacted the petitioner, seeking instructions, but due to illness, the petitioner residing in Punjab could not come to Delhi and under these circumstances when the matter came up for hearing on 03/05/2011, neither the petitioner nor his counsel could appear which led to dismissal of writ petition in default—Despite opportunity the respondents did not file reply—Held, the applicant has been able to make out sufficient cause, so both the applications allowed and writ petition restored.

EX. SI Lakhwinder Singh v. *Union of India & Ors.* *766*

— Section 5—Suit for declaration and permanent injunction filed for restraining the appellant from abolishing the suit property and interfering in the peaceful possession—Trial Court vide

judgment dated 01.05.2010 decreed the suit—Appellant filed appeal after a delay of 78 days with application under Section 5 of limitation Act—Earlier counsel changed—New counsel requested earlier counsel to hand over the record—Provided only 26.06.10—Inspection report dated 07.01.2005 found missing—Certified copy made available on 28.07.2010 Held—The words 'sufficient cause as appearing in Section 5 of the Limitation Act have to be construed liberally so as to advance substantial justice to the parties; a litigant should not be shut out at the threshold and be deprived of the opportunity to be heard on merits; dealy may be condoned provided that the applicant is able to furnish a sufficiently justifiable explanation for his delay— No hard and fast rule can be laid down—Each case has to be decided on its factual matrix—Unless there is lack of bona fides or a total inaction or negligence on the part of the litigant, the protection of Section 5 should not be deprived to a party, mistake of a counsel may also amount to a sufficient cause for condonation of delay; it is always a question of fact—In the instant case, keeping in view the explanation furnished by the learned counsel for the petitoner the petitioner should not be declined a hearing on merits for the fault which at best is attributable to his counsel—Order set-aside.

New Okhla Industrial Development Authority v. *KM Paramjit & Anr.* *617*

MOTOR VEHICLE ACT, 1988—Section 96 (2)(b)(ii)—Driving licence of offending driver was valid upto 23.01.1988 and he took the same from Court on 31.07.1989 for renewal, but in the intervening period, the accident in question occurred on 16.07.1988—Tribunal exonerated the insurance company on the ground that at the time of accident the offending driver did not hold a valid driving licence—Appeal—Held, insurance company connot be absolved of its liability to pay in the absence of evidence on record to show that the offending driver was disqualified from holding an effective driving

licence.

Ami Chand & Anr. v. *Jai Prakash and Ors.* *460*

— Appeal impugns order dated 24.03.2011 of the Motor Accidents Claims Tribunal (MACT)—Appellant denied liability as driver had no valid licenese at the time of accident and this constituted a breach of policy condition as proved by the insurance company—The compensation awarded under the non-pecuniary head towards inconvenience, hardship, discomfort frustration, mental stress and other compensation, towards loss of amenities of life are challenged as being one and the same. Held—The award of compensation under the different heads by the Tribunal was fair in light of the injuries suffered by the victim and the Court found no reason to interfere with award.

Bajaj Allianz General Insurance Co. Ltd. v. *Somveer Singh & Ors.* *754*

— Appellant sought enhancement of compensation in respect of injuries suffered by him in a motor accident which led to amputation—Appellant claimed that due to his injuries his chances of promotion have been hampered and his compensation was barely enough to cover his medical expenses. Held—In assessing compensation during accident cases, a reasonable and compassionate view must be taken and the court must be liberal in determining quantum—Compensation increased and accordingly appeal allowed.

Jaffar Abbas v. *Mohan & Ors.* *789*

— Appellant seeks enhancement of compensation in respect of deceased's re-employment and pension—The Tribunal had determined that only the handicapped Appellant No. 3 was dependent and not the husband and the son—Respondent No. 3 claimed that income tax was incorrectly taken and thus the

compensation would differ. Held—Since the dependent by deceased on herself was her handicapped daughter, the amount spent on personal expenses would be less 1/3rd income instead of 5% was liable to be deducted—Compensation calculated accordingly—Further, income tax also deducted—Award calculated. Amount accordingly.

Panna Lal & Ors. v. *Anjit Kumar Jha & Ors.* *805*

— 92-A and 110-A—Legal representatives of deceased Ramesh Kumar, who died on 02.09.1984 filed a claim petition claiming a sum of Rs. 10,00,000/-—Tribunal passed Award on 23.08.1991, wherein a sum of Rs. 1,44,000/- with interest at the rate of 12% p.a. from the date of filing of the petition till the date of realization, was awarded—Appeal seeking enhancement of amount—Appellants contended that Tribunal erred in taking income of the deceased as Rs. 750/- per month instead of considering the fact that he was earning Rs. 2,000/- per month and also applying the multiplier of 16 instead of 17—Deceased was in the age group of 26 to 30 years—Held—He was a young man of 26 years and had he not met with the unfortunate accident undoubtedly he would have earned more as a scooter driver (who falls in the category of a skilled worker) and also by selling garments in the various weekly bazaars—Thus, I am inclined to assess the average annual income of the deceased to be in the sum of Rs. 2,250/- per month [that is Rs. 1,500/- (current income) plus Rs. 750/- (anticipated increase in income) = Rs. 2,250/- per month]—Deducting one-fifth therefrom towards the personal expenses of the deceased (though no deduction had been made by the learned Tribunal), the average monthly loss of dependency of the legal representatives of the deceased works out to Rs. 1,800/- per month, that is Rs. 21,600/- per annum—In the present case, as noticed above, the deceased fell in the age group of victims between 26 to 30 years of age and thus the appropriate multiplier to be adopted would be the multiplier of 17, which is the multiplier approved of in the case of *Sarla Verma* (Supra)—In all a sum of Rs. 3,85,000/- (Rs. Three lacs and eighty five thousand only) is awarded to the appellants.

Bhagwati Devi and Ors. v. *D.T.C. and Anr.* *103*

— Section 168—Deceased a Govt. contractor died in a road accident—Claim petition filed by the widow appellant no.1 and sons appellant no.2, 3 and 4—Award challenged inter alia on the ground that future prospects of deceased despite he being a Govt. contractor and his income being increasing every year were not taken into account while passing the Award—Plea opposed by Insurance company that deceased was self employed and his income was actually decreasing—Held, in case of self employed Court usually takes into account only actual income of the deceased at the time of death and a departure from it is made only in exceptional cases—Income Tax assessment orders placed on record showed that the income of the deceased had been declining.

Bimla Gupta & Ors. v. *Mahinder Singh and Ors.*..... *168*

— Liability of financier of erring vehicle—Question raised in appeal was as to whether financier of the erring vehicle could be held liable to pay compensation merely on account of the fact that he had taken the erring vehicle on superdari when the registered owner habitually defaulted to pay the installments—Held, in view of testimony of the financier to the effect that he was neither the registered owner nor in possession or control of the erring vehicle, coupled with evidence of transport department that the erring vehicle was transferred in the name of financier subsequent to the accident, the superdaginama alone would not make the financier liable to pay compensation since the determining factor is the effective control and actual possession of the vehicle on the date of accident.

Ramesh Chander v. *Ganesh Bahadur Kami & Ors.* *259*

NARCOTICS DRUGS AND PSYCHOTROPIC SUBSTANCE ACT, 1985—Section 21, 22, 23 & 28—Appellant challenged judgment acquitting Respondent for offences punishable under Section 21, 22, 23 & 28 of Act—As per prosecution, Respondent was apprehended by Air Custom officer at IGI Airport, New Delhi, on suspicion of carrying Heroin concealed in 70-75 capsules inside his body—On permission from learned Duty Magistrate, Respondent was taken in RML Hospital where he ejected 77 capsules—After complying with the provisions of the Act, Respondent was arrested and on conclusion of investigations, he was charge sheeted—Learned Special Judge found various discrepancies in prosecution case and thus acquitted Respondent—Acquittal challenged urging, no discrepancy in link evidence which was duly proved by prosecution beyond reasonable doubt—Held:- A criminal trial is a quest for truth—The prosecution is required to prove its case beyond reasonable doubt and not by way of perfect proof free from all blemishes.

Customs v. *Konan Jean* *776*

— Section 21, 23, 28, 50, 57, 67—Customs Act, 1962—Section 120—Respondents were apprehended on their arrival IGI Airport on suspicion of carrying some contraband substance—Notice under Section 50 of The Act and under Section 120 of Customs Act served upon them giving them an option to get themselves and their baggage searched before Gazetted Officer of Customs or a Magistrate—Respondents did not know either Hindi or English language, thus an official from KAM Airlines who knew language of Respondents, explained contents of notices to them—On Knowing contents, Respondents opted search by Custom Officer—On search of baggage, Heroin was found concealed in bottom portion of bag in cotton cloth belt—After fulfilling requirements of Act, Respondents were charge sheeted for offences punishable under Section 21, 23 & 28 of Act—On conclusion of trial, they were acquitted after finding lacunas in prosecution case

and procedural safeguards contained in Section 50 of Act were not adhered to—Appellant challenged acquittal in appeal—It was urged on behalf of appellant that notice under Section 50 of Act was not required to be served upon Respondents as recovery was effected from hand bag and not from his person—Held:- Provisions of Section 50 of NDPS Act, are mandatory and non compliance renders recovery of illicit article suspect—Thus, non compliance of these provisions is viewed seriously and adverse inference is drawn against prosecution, particulary, when accused has denied that he has served any such notice and it has created doubt with regard to truthfulness of prosecution witnesses.

Customs v. *Mohammad Bagour* *711*

— Section 68(H) (I) Section 68 A(2) (d)—Section 68 B(g)—Section 68 j—Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988 (PITNDPS Act)—Section 3(1) and 10(1)—Detention order dated 26.07.1989 issued aganist Mohd. Azad @ Avid Parvez, brother of the petitioner—Detained w.e.f. 10.07.1991—Declaration u/s. 10(1) justifying detention beyond initial three months issued—Detention order dated 26.07.1989—challenged before Calcutta High Court—Unsuccessful—Special Leave Petition before the Supreme Court dismissed—Challenge to order u/s.10(1) successful—Detention beyond initial three months vitiated—show cause notice u/s. 68 H (1) NDPS Act issued to the petitioner—reply submitted—Daclaration issued and properties forfeited to the Central Government vide order dated 16.10.1997—Appeal before the Appellant Authority—Dimissed vide order dated 07.06.1999—Order challenged through the present writ petition under Article 226—Plea that the properties were acquired by his father for him not taken before the Competent Authority nor before the Appellate Authority—No document filed either before the Competent Authority nor before the Appellate Authority —Held—Plea after thought—Cannot be raised for the first time in the Writ petition—The

burden of proving that the property was not illegally acquired on the person affected—The consistent findings do not call for any interfernce—Petition dimissed with costs.

Zahid Parwez v. *UOI & Ors.* *566*

NARCOTICS & PSYCHOTROPIC SUBSTANCES ACT, — Section 37—Bail application filed by accused before the Court on the ground that samples taken of contraband substance during investigation gave percentage of diacetylmorphine (heroin) to be 86%—The fresh sample drawn during the trial gave the percentage to be 41.3% Bail granted by trial Court in view of major discrepancy found in the percentages of heroin in two samples casting serious doubt regarding the substance recovered from the accused—Trial Court also took into account that in view of no previous involvement in any such case under NDPS there was no likelihood of commission of any similar offence by the accused in future—According to trial Court accused being a foreigner could not be denied bail merely on apprehension of absconding if otherwise entitled to same—Trial Court imposed conditions considering accused was a foreigner to ensure that he could not abscond—Order of bail challenged on behalf of DRI inter alia on the ground under Section 37 unless the Court is satisfied there are reasonable grounds of believing that the accused is not guilty of such offence and is not likely to commit any offence while on bail—Also submitted that even if the second test report is taken into consideration still purity and weight of contraband recovered would be a commercial quantity—It was also submitted that the difference in purity percentage could occur due to other facts like lapse of time, improper storage, variation in temperature and humidity etc—Held, purity percentage change may occur due to some other factors like lapse of time, place of storage etc but the variation in the present case is tremendous and cannot be explained by mere passage of time—Argument that the purity weight of contraband substance recovered according to second sample would still

constitute a commercial quantity would be of no avail in view of doubts having been raised about the identity of the contraband substance recovered—Conditions imposed by the trial Court are such that it would be difficult for the accused to leave the country or repeat the offence in the given circumstances.

Directorate of Revenue Intelligence v. *Bitoren Dolores Fernandez* *127*

PREVENTION OF CORRUPTION ACT, 1947—Section 9 & 12—Petitioner preferred writ petition to seek quashing of proceedings initiated against him upon registration of case under Section 9 & 12 of Act—Written complaint made by DSP, CBI alleging, petitioner approached him through one person and offered him illegal gratification for clearing his name from a murder case which was being investigated by him—Complainant not willing to accept bribe, so lodged complaint with Joint Director AC (HQ) CBI, New Delhi—Accordingly, case registered against petitioner along with two others and trap was laid to apprehend them—Petitioner apprehended during trap laid for third time as in previous two traps, attempts to apprehend failed—Petitioner raised various arguments to allege his false implication, one of those being investigations, were done in violation of CBI manual which has force of law—It was urged, trap was conducted without authority of any CBI Director and thus, trap was illegal as per CBI manual—Held:- In case of complaint received against a Minister or Former Minister of Union Government, it must be put to Director CBI for proper orders—Without authorisation by CBI Director to lay a trap against such persons without any verification conducted, is violative of Para 8.8 of CBI Manual—Charge sheet and proceedings emanating therefrom quashed against petitioner.

Ripun Bora v. *State (Through CBI)* *412*

— Section 23—The challenge by means of this First Appeal is

to the impugned judgment of the Railway Claims Tribunal (RCT) which dismissed the Claim Petition filed by the parents of the deceased, who is said to have died in an untoward incident of falling from a train near Tilak Bridge Railway Station, New Delhi on account of a strong jerk of the train—The respondent/Railways pleaded that the deceased was not a bona fide passenger and in fact no ticket was purchased by the deceased—Also contended that assuming the ticket is shown to have been purchased, the ticket was a general ticket and not of a super fast train Vaishali Express and therefore the deceased cannot be said to be a bonafide passenger of the train Vaishali Express from which he is alleged to have fallen down and died—The Railway Claims Tribunal found that the deceased did not have a valid ticket—Deceased cannot be said to be a bonafide passenger of the train in question—RCT disbelieved the statement of eye-witness on different grounds including that there was no prior acquaintance with the deceased and that no statement of the witness recorded by the police forthcoming and held the eye-witness as a 'planted' witness and a blatant liar/obliging witness, not a trustworthy witness—Hence the present First Appeal. Held deceased had a valid ticket for travel from Ghaziabad to Palwal. Railway themselves filed a report dated 31.12.2008 of the DRMs office and as per which the deceased Sh. Rakesh Kumar fell down from the train while trying to get down from the train—On the one hand, there is absolutely no evidence led on behalf of the Railways of there being any presence of an eye-witness or a person who immediately reached the spot after the incident, to show that the deceased had tried to get down from a running train, on the other hand, the appellants have led the evidence of one Sh. Lokesh, and who is a good samaritan and not a blatant liar/planted witness/untrustworthy witness/or obliging witness—If allegedly he was a make-believe witness, the onus of proof had shifted on to the respondent/Railways once the eye-witness deposed but no rebuttal evidence was led on behalf of the Railways—Deceased

in fact died on account of a fall from the train and not because he was trying to get down from the train—The appellants entitled to the statutorily fixed compensation of Rs. 4,00,000/-. The appellants are also entitled to pendente lite and future interest till payment at 7½% per annum simple.

Prabhu Dayal & Ors. v. *Union of India* *121*

REGISTRATION ACT, 1908—Section 72—Refusal to accept documents for registration at threshold—Whether appealable—Writ petition filed aggrieved by the refusal of sub-registrar to accept documents of cancellation of General Power of Attorney and cancellation of Will—Contention was that there was no order in writing refusing registration—Appeal under section 72 was not available—Only efficacious remedy was writ of mandamus. Held—Writ petition not maintainable as alternative remedy of appeal available—Sub Registrar to accept each and every document presented—Issue receipt—Register or refuse registration by recording reasons—Refusal in contravention of procedure, verbal and without reason—Refusal within the meaning of section 72—Therefore, appealable.

Sheo Murti Shukla v. *State (Govt. of NCT of Delhi)* *40*

RIGHT TO INFORMATION ACT, 2005—Section 3, 8 (1) (j)—Constitution of India, 1950—Article 14— General Clauses Act, 1897—Section 3 (42)—Respondent sought information of agreement/settlement between appellant and one AL—Public Information Officer (PIO) rejected application stating that information had no relationship to any public activity or interest—First appellate authority affirmed order of PIO—Central Information Commissioner (CIC) allowed appeal of respondent and directed appellant to provide information as available on record—Order challenged in High Court—Plea taken, petitioner a juristic entity is "person" in law—Fundamental rights guaranteed by Constitution of India are

available not only to individual but also to juristic person—CIC is wrong in its conclusion that "personal information" can only relate to individual —Per contra plea taken, petitioner being a public authority, every citizen is entitled to seek information in relation to its public activities and conduct—Rule is in favour of disclosure of information—Held—Expression "Personal information" used in Act does not relate to information pertaining to public authority to whom query for disclosure of information is directed—No public authority can claim that any information held by it is "personal"—There is nothing "personal" about any information, or thing held by public authority in relation to itself—Expression "personal information" used in Act means information personal to any other "person" that public authority may hold—It is that information pertaining to that other person which public authority may refuse to disclose, if that information has no relationship to any public activity or interest vis-a-vis public authority or which would cause unwarranted invasion of privacy of individual—If interpretation as suggested by petitioner were to be adopted, it would completely destroy very purpose of Act as every public authority would claim information relating to it and relating to its affairs as "personal information" and deny its disclosure—Act of entering into agreement with any other person/entity by a public authority would be public activity—Every citizen is entitled to know on what terms agreement/settlement has been reached by petitioner public authority with any other entity or individual—There is no merit in petition.

Jamia Millia Islamia v. *Sh. Ikramuddin* *398*

PREVENTION OF CORRUPTION ACT, 1988—Section 19—Sanction for prosecution accorded for offence committed in Mumbai—FIR registered in Mumbai—Charge sheet filed before Special Judge, Mumbai—Territorial jurisdiction—Copy of formal order of sanction not made available—Earlier, on more that one occasion sanction to prosecute not granted—

Grant of sanction challenged as arbitrary and malafide and amounts to review of earlier decisions—Held—Court at Delhi does not have territorial jurisdiction to entertain the petition—Challenge could be made before the Special Judge—Sanction order contains detailed for according the sanction—The sanction could not have issued by anyone below the Minister, the matter never gone in the past to the Minister—Case does not fall in the category of extreme and rare nor there is any ex-facie illegality in the sanction accorded—Petition dismissed with costs.

Santosh Kumar Jha v. *UOI & Ors.* *473*

SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992—Sections 24 (1) and 27 Respondant filed a complaint before Ld. CMM for the offence under Section 24(1) and 27 of the Act against M/s. Master Green Forest Ltd—Allegations that accused company was operating collective investment scheme—Raised huge amount from General Public in contravention of the Act and Regulation—There were allegations against the promoters/Directions and the persons responsible for the day to day affairs of the company, who actively connived with each other in the commission of offence—Only company was arrayed as an accused—ld. ACMM vide its order dated 15th December 2003 observed—Perusal of the complaint discloses commission of offence Punishable under Section 24 (1) and 27 of the Act and accordingly, all the accused be summoned for 21 February 2004—Petitioners filed the present petition seeking quashing of the proceedings pending against them—Petitioners contended—Petitioners were not arrayed as accused—No summons were issued to them vide order dated 15.12.2003—In the garb of filing fresh addresses of accused, complainant filed the list of the directors—Trial Court issued the summons without application of mind—As no summons were issued at the first instance, petitioner should not have been summoned as directors except as provided under Section 319 Cr.P.C—

Respondent contended that no case for quashing is made out—Ingredients in the complaint discloses commission of cognizable offence against petitioners also—Held—Indubitably, the Court takes cognizance of the offence and not the offenders—No doubt in the memo of parties filed along with the complaint only the company was made an accused however, perusal of the order dated 15th December, 2003 summoning the accused shows that the Learned ACMM has used the word "accordingly all the accused be summoned for 21st February, 2004" the use of these words show that the Learned ACMM was conscious of the fact that besides the accused company i.e M/s. Master Green Forest Limited there were other accused also—Further the complaint clearly stated that the Directors and Promoters of the company who were the persons in-charge and responsible for the day-to-day affairs of the Company and all of them actively connived with each other for the commission of the offence—Thus, the role of promoters and Directors was specifically mentioned in the complaint—It was further mentioned that accused company and its promoters and Director in-charge and responstble to the accused company for the conduct of its business were liable for the violations of the accused company as provided under Section 27 of the SEBI Act—Thereafter opportunities were giving to Respondent to furnish the details so that process could be issued aganist the accused—Thus, it is not as if all of a sudden vide the order dated 13th October, 2006 the accused were summoned. In view of the facts of the present case the contention of the Petitioner that the summons having not been issued in the first instance by the Learned magistrate, the Learned Additional Sessions Judge could not have issued the summons unless the stage under Section 319 Cr.P.C. was arrived at, deserves to be rejected.

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— Sections 24 (1) and 27—Respondent filed a coomplaint before Ld. CMM for the offence under Sections 24(1) and 27 of the

Act against M/s Master Green Forest Ltd—Allegations that accused company was operating collective investment scheme—Raised huge amount from General Public in contravention of Act and Regulations—There were allegations against the promoters/Directions and the persons responsible for the day to day affairs of the company, who actively connived with each other in the commission of offence—Only company was arrayed as an accused—Ld. ACMM vide its order dated 15th December 2003 observed—Perusal of the complaint discloses commission of offence punishable under Section 24(1) and 27 of the Act and accordingly, all the accused be summoned for 21 February 2004—Petitioners filed the present petition seeking quashing of the proceedings pending against them—Petitioners Contended—No specific role is assigned to them in the complaint—Merely stating that all the Directors and promoters connived with each other and were in-charge and responsible for the day-to day functioning of the company cannot fasten the vicarious liability on the petitioners—Respondent contended that no case for quashing is made out—Ingredients in the comlaint disclose commission of cognizable offence—Held—Complaint clearly stated that the promoters and Directors of the Company in-charge and responsible for the conduct of its affairs have connived with each other and have committed the offence—In the present case the offence alleged is of running a collective investment scheme contrary to the provisions of SEBI Act and Regulations—No doubt Section 27 of SEBI Act makes responsible all other Directors of the company who are responsible and in-charge of the day-to day affairs of the company, however in a case of conspiracy number of people can be involved and this is the allegation of the Respondent in the complaint. Thus, I find no merit in the contention that even on the facts of the present case no case for proceeding aganist the Petitioners are made out.

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