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(CONTAINS GENERAL INDEX)

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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.

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— 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.

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— 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

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CONSTITUTION OF INDIA, 1950—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—

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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.

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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.

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— 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.

DELHI RENT CONTROL ACT, 1958—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.

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— 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

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.

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

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

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*

MOTOR VEHICLES ACT, 1988—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

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*

RAILWAY CLAIMS TRIBUNAL ACT, 1987—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*

ILR (2012) I DELHI 1
OMP

COX AND KINGS INDIA LTD. ....PETITIONER

VERSUS

INDIA RAILWAY CATERING AND TOURISM CORP. LTD. ....RESPONDENT

(MANMOHAN SINGH, J.)

OMP NO. : 609/2011 AND I.A. NOS. : 13609/2011 & 13610/2011 & CCP (O) NO. : 76/2011

DATE OF DECISION: 06.09.2011

(A) Arbitration and Conciliation Act, 1996—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.

Let me now first deal with the first prayer made by the petitioner i.e. seeking stay of the operation of the respondent letter dated 12.08.2011 whereby the Joint Venture Agreement dated 10.12.2008 was terminated by the respondent on various reasons. No doubt, the petitioner has challenged the validity of termination as per details given in the petition. So the question in the present petition has arisen as to whether any of the parties had violated the conditions mentioned in the Joint Venture Agreement between the

parties. It is to be examined as to whether at this stage, when the agreement has been terminated/ rescinded by the respondent right or wrongly on account of purported fraud, can this Court go into the contentions of the parties and conclude that the said termination is invalid? **(Para 40)**

It is a settled law that the court while granting the interim measures under section 9 cannot arrive at the conclusive finding as to the fact that the agreement is validly terminated or it is invalid as it is for the arbitral tribunal to decide whether the termination was valid or invalid. As held by the Supreme Court and various Court that in case the party, who is seeking the interim order, has made out a prima facie case is entitled to take action for termination of agreement. Its validity at this stage of interim measure is only for the limited purpose as to whether any prima facie case is made or not. And in case no interim order is made, the party would suffer loss and injury which cannot be compensated by damages.

Therefore, in view of the settled law on the point involved, I am of the considered view that the scope of Section 9 does not allow the Court in the facts and circumstances of the present case, as mentioned above, to restore the Joint Venture Agreement which has been terminated/ rescinded by way the said fraud as alleged by the respondent in its letter dated 12.08.2011, doing this would mean nullifying the said termination. I feel that only remedy lies to challenge the validity by invoking the arbitration clause and claim damages, if any. However, at this stage of interim injunction as prayed in the second relief the said termination is to be examined for the limited purpose as to whether the petitioner has made out a prima facie case to pass such orders. Thus, the first prayer of the petition is disallowed. **(Para 41)**

This submission of the respondent is devoid of merit as by doing the interim measures this Court is not attempting to rewrite the agreement or to confer any leasehold rights in favour of the petitioner or JV company but rather in the

larger public interest which is going to effected by virtue of sudden stopping of the train, booking of which are already undertaken by the petitioner, there is no harm in continuing the said arrangement for some more period of time and more so when the parties have already earlier operated the said arrangement without the execution of the said lease deed. Accordingly, the said continuation of the arrangement which was previously operated upon does not confer any further rights in favour of any of parties as this court is aware that it is claim to be adjudicated upon by the arbitral tribunal. **(Para 56)**

Another reason which persuades this Court to continue such arrangement is that the booking for this season commenced from 8th May, 2011. The respondent cannot deny the fact that they were not aware about the said bookings already made as the respondents were in continuous communication with the petitioner since November 2010. Had the respondent got any intention to discontinue the Joint Venture Agreement in view of dispute arose between the parties in November, 2010 with regard to draft MoU to be executed between the respondent and Railways which according to the petitioner were inconsistent and against its interest to the MoU and Joint Venture Agreement between the parties, the agreement ought to have been terminated prior to the date of booking or with reasonable notice to the petitioner so as to not to indulge into further bookings of the said train. Rather it appears from the record that the respondent uptil 6th August, 2011 were suggesting the petitioner that the work on the train should be completed as soon as possible. In view of the said conduct of the parties and present situation, this Court is of the opinion if some interim arrangement is not made, there may be some serious repercussions as it is not merely the question of goodwill and reputation of the petitioner is at stake but the respondent also. Supreme Court in the case of **Mahabir Auto Stores vs. Indian Oil Corporation,** reported in (1990) 3 SCC 772, to some extent of similar situation in para

20 to 21 has held that in a situation between the parties procedure should be followed which will be reasonable, fair and just and that is the process which normally be accepted. Paras 20 and 21 are reproduced as under:

> ''20. Having regard to the nature of the transaction, we are of the opinion that it would be appropriate to state that in cases where the instrumentality of the state enters the contractual field, it should be governed by the incidence of the contract. It is true that it may not be necessary to give reasons but, in our opinion, in the field of this nature fairness must be there to the parties concerned, and having regard to the large number or the long period and the nature of the dealings between the parties, the appellant should have been taken into confidence. Equality and fairness at least demands this much from an instrumentality of the State dealing with a right of the State not to treat the contract as subsisting. We must, however, evolve such process which will work.
>
> 21. Therefore, we direct that the case of the respondent be put to the appellants, and let the respondent authorities consider afresh the submissions made by the appellant firm, namely, that the existing arrangement amounts to a contract by which the distributorship was continued in case of the appellant firm without any formal contract and further that the new policy of the Government introduced in December, 1982 would not cover the appellant firm and as such the appellant should continue. It will be sufficient, having regard to the nature of the claims, for the respondent authority to consider this aspect after taking the appellant firm into confidence on this aspect. Nothing further need be stated or required to be done and we give no 'directions as to whether reasons should be recorded or hereinafter should be given. In the facts and circumstances, it is not necessary to give oral hearing or record the reasons as such for

> the decision. The decision should be based on fair play, equity and consideration by an institution like IOC. It must act fairly.'' **(Para 58)**

In this light of above, let me now examine as to whether the petitioner has made out a case of relief of mandatory injunction. Admittedly, after completion of all formalities, the commercial operation of the ''Maharaja Express'' was flagged off on 20.03.2010. Upto April, 2011 the said train made 34 journeys. The season of this train is between September to April. The train is mainly booked by foreign tourists and such bookings are made much in advance. This train was awarded runner up in the Special Train Operators Category at the Conde Nast Traveller Readers' Travel Awards. There were following 10 competing trains:

> ''1. Hiram Bingham, Peru
> 2. RIRTL's Maharajas' Express
> 3. Orient Express
> 4. Rocky Mountaineer, Canada
> 5. The Blue Train, South Africa
> 6. The Old Patagonian Express
> 7. Palace on Wheels
> 8. Deccan Odyssey
> 9. Rocos Rail, South Africa
> 10. Royal Canadian.''` **(Para 60)**

(B) Code of Civil Procedure, 1908—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.

It is not in dispute that the Articles of Association are an agreement between the shareholders and the Joint Venture Company. The definition of the party includes the petitioner as well as the respondent. Since the Articles of Association is an agreement amongst the shareholders and the company itself, therefore, the petitioner and respondent are included therein The Memorandum and Articles have been signed by the respondent. **(Para 43)**

However, the petitioner and Joint Venture Company have filed two separate applications under Order 1 Rule 10 CPC for impleadment as respondent No.2. Mr Sandeep Sethi, the learned Senior Advocate, with Mr Abhimanyu Mahajan, Advocate, appeared in the matter on behalf of Joint Venture Company. Mr. Sethi says that in view of above, any arrangement or suggestion if made by this Court, his client would abide the same. He further says that he is prepared to go for arbitration for the dispute arose between the parties. **(Para 45)**

Therefore, prima facie it cannot be said that there is no arbitration between the Joint Venture Company and the parties in the present petition. The only shareholders and persons in management of the Joint Venture Company are the petitioner and the respondent. **(Para 46)**

Therefore, under Section 9 of the Arbitration and Conciliation Act, the Court has a jurisdiction to preserve the subject matter of the dispute in many forms depending upon the facts of each case and as per orders sought for. The Court is to decide by the order in the facts and circumstances of each case for purpose of passing such protection/ presentation. **(Para 49)**

It is also to be noted and an arguable case as to whether the JV Company is completely a third party as the said JV Company is the offshoot of the petitioner and the respondent. It is to be seen that the petitioner and respondents joined hands for some purpose of running the train jointly which was performed by the JV company being owned together by the petitioner and respondent at the ratio of 50 : 50. It is also a matter of fact that for the previous season the respondent itself has itself allowed the JV Company to run the train on its behalf. Moreover, the articles of association also show close connectivity, participation and nexus of the petitioner and respondent in the JV Company by providing the arbitration clause under Article 200. Therefore, at the prima facie stage, it cannot be said that the said JV company is to be treated an outsider to the dispute rather it is intricately connected with the parties. **(Para 51)**

Important Issue Involved: Section 9 of the Arbitration and Conciliation Act 1996 does not allow restoration of terminated Joint Venture Agreement.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr Ashok Desai, Sr. Advocate Mr. Mukul Rohtagi, Sr. Advocate Mr. Rajiv Nayar, Sr. Advocate. Mr. N.K. Kaul, Sr. Advocate with Mr. Peter Lobo, Mr. Rishi Agrawala, Mr. Mahesh Agarwal, Mr. Akshay Ringe and Mr. Nikhil Rohtagi, Advocates.

FOR THE RESPONDENT : Mr. G.E. Vahanvati, AG, Mr. A.S. Chandhiok, ASG/Sr. Advocate with Mr. Saurabh Aggarwal, Mr. Bhagat Singh, Mr. Abhijeet Sinha, Mr. Vidit Gupta & Mr. Yashwardhan Tiwari Advocate for the respondent. Mr. Sandeep Sethi, Sr. Advocate with

Mr. Abhimanyu Mahajan, Advocate for applicant in IA No. 13610/2011.

CASES REFERRED TO:

1. *Heritage Lifestyle & Developers Pvt. Ltd.* vs. *Amarvilla Co-operative Housing Society Lt.,* 2011(3) MhLJ 865.
2. *Bharat Catering Corporation* vs. *Indian Railway Catering and Tourism Corporation;* 164 (2009) DLT 530 (DB).
3. *Old World Hospitality Pvt. Ltd.* vs. *India Habitat Centre;* 73(1997) DLT 378.
4. *V.B. Rangaraj* vs. *V.B. Gopalakrishnan;* (1992) 1 SCC 160.
5. *Dorab Cawasji Warden* vs. *Coomi Sorab Warden;* (1990) 2 SCC 117.
6. *Mahabir Auto Stores* vs. *Indian Oil Corporation,* reported in (1990) 3 SCC 772.

RESULT: Petition disposed.

MANMOHAN SINGH, J.

1. The petitioner Cox and Kings India Ltd. (for short as C&K) has filed the present petition praying, inter alia, seeking stay of the operation of the respondent's letter dated 12.08.2011 seeking to terminate the joint venture agreement between the petitioner and the respondent and also from interfering or preventing the petitioner and the JV Company, i.e. Royale Indian Rail Tours Limited from operating the Luxury Tourist Train ''Maharaja Express'' and from obstructing the petitioner in operation of the JV Company and as a consequence from operating the bank accounts dealing with venders, suppliers and any third parties for smooth functioning of the luxury tourist train.

2. Few relevant facts are that the respondent floated an Expression of Interest for a joint venture partner for a luxury train project and to operate, manage and run the luxury tourist train on a Pan India Route within India in December, 2006. In June/July, 2007, Ministry of Railways (Rail Mantralaya), Railway Board, approved the proposal submitted by the respondent, i.e., Indian Railway Catering And Tourism Corporation Ltd. (hereinafter referred to as IRCTC) for running a Luxury Tourist

Train and broad principles for running the said train were set out in the letter dated 29.11.2007 addressed by the Indian Railways to the respondent which are reproduced as under:

> ''(a) The Respondent will own the rake;
>
> (b) The Respondent will pay to the Indian Railways the cost of maintenance and periodical over haul of the rake;
>
> (c) Railways be entitled to recover the haulage cost;
>
> (d) The Respondent with their associate agencies will manage on board/off board services, marketing, booking, pricing etc.''

3. The petitioner was selected to be a joint venture partner by the respondent for the operation of Luxury Tourist Train Project. After some discussion, on 11.01.2008 the respondent forwarded to the Indian Railways the draft Memorandum of Understanding which was proposed to be executed between the petitioner and respondent.

4. The respondent by letter dated 14.01.2008 stated that:

(a) the joint venture partner will bring in the funding for the project and the Luxury Tourist Train would be leased by the respondent to the JV Company on a 15 years lease term which can be extended by another 10 years on conditions mutually agreed between the petitioner and the respondent. As already mentioned, the JV Company is Royale Indian Rail Tours Limited (hereinafter referred to as ''JV Company/JVC or short as RIRTL).

(b) The petitioner and respondent are equal shareholders of the JV Company. The obligations of each of the joint venture partners were mentioned in the said letter.

(c) The estimated project cost was Rs.37.5 crores out of which an amount of Rs.7.5 crores was to be contributed by the Ministry of Tourism as a grant and an amount of Rs.15 crores was to be contributed as an advance leased rental by the petitioner as its share. Copy of the letter dated 14.01.2008 is already placed on record.

5. After approval of Indian Railways to the respondent a Memorandum of Understanding dated 10.07.2008 was executed between the petitioner and the respondent. In the said MoU dated 10.07.2008, it

was stated that the Ministry of Railways has given the permission to the respondent to own and operate the Luxury Tourist Train for the exclusive use of the JV Company for the period of 15 years and was renewable for a further period of 10 years. In the MoU, it was also stated that the JV Company (RIRTL) will manage the on board/off board services, marketing, booking, pricing etc. for the operation of the train on tracks with the Indian Railway was to be coordinated by the respondent. In the said MoU, it is clear that the respondent claimed that they are an extended arm of Indian Railways and they had an extensive network. The petitioner and respondent accordingly executed a Joint Venture Agreement dated 10.12.2008 recording in detail the terms of the agreement.

6. In the said agreement, it was also recorded that pursuant to the permission given by Indian Railways to the respondent to own and operate the Luxury Tourist Train consisting of approximately 23 coaches, the Joint Venture Company was formed.

7. Some of the relevant clauses of the Joint Venture Agreement are as follows:

> ''Article -1 gives the definitions to the terms and conditions of JVA.
>
> Article -2 describes the business objective of the JVC, Article – 2.2 deals with the Memorandum and Articles of the Company and the main object of the company is the business of acquiring, furnishing, maintaining, managing and operating luxury train with a view to market and sell holiday packages with such luxury train being the principle mode of transportation.
>
> Article -2.3 is a share capital of the company which is Rs.5 crores and both parties have equally contributed Rs.2.5 crores each.
>
> Article - 2.3.3.1 (c) talks about signing of contract documents and none of these contracts have been signed as of date save and except the contract for the on board hospitality services which was IRCTC's obligation has been out sourced to hospitality partner Ninth Dimensions Hotels and Resorts Pvt. Ltd. (better known as MAPPLE) who incidentally are also the hospitality partner and on board service providers to the Golden Chariot

being the other luxury tourist train operated in Karnataka, Goa and South India by K.S.T.D.C.

Article -3 specifies the term of the agreement and states as follows "*This agreement shall take effect upon its execution and shall continue to bind the parties initially for a period of 15 (fifteen) years from date of first commercial run of the train and thereafter renewable for a further period of 10 (ten) years, on mutually acceptable terms and conditions*''. It has been clearly stated that agreement shall continue to bind the parties for a period of 15 years from the date of first commercial run of the train and thereafter renewable for a further period of 10 years.

Article -5 deals with the provision of luxury train. This clause specifies that IRCTC has agreed to lease the train to the JVC. IRCTC would acquire the coaches/rake from the Indian Railways. The JVC shall design the interior concept at its cost and provide it to IRCTC. The JVC would coordinate to ensure whether the train is manufactured as per the specification and design.

Article -6 deals with the lease of the Luxury Train. IRCTC was to bear the cost of the train and lease it to the JVC for a period of 15 years from the dated of commercial run, renewable for a further period of 10 years. The JVC has paid IRCTC an advance payment of 50% of the (total cost of the train minus capital subsidy) towards lease charges (Advance Lease Charges) of the Luxury Train C&K shall provide unsecured loan to the tune of 50% of the (cost of the train capital subsidy) to the JV company and the proceeds shall be utilized by the JV Company towards payment of Advance Lease Charges to IRCTC for partially meeting the cost of the luxury train. The payment of advance lease charges is paid to IRCTC as per Article 6. The advance lease charges shall be adjusted against the annual lease charges payable to IRCTC in equal installments over a period of 15 (fifteen) years.

Maintenance of the luxury train as per Article 7. The JVC is responsible for bearing all expenses relating to operation and maintenance of the luxury train which includes maintenance of interior fittings and maintenance and replacement of soft interior.

Article – 7.2 relates to payment of haulage charges to Railways. The JVC is responsible for reimbursement of all payments made by IRCTC to Indian Railways towards haulage charges. The payment of haulage charges by JVC to IRCTC will be in accordance with to the payment condition laid down by Indian Railways and amount payable will be as demanded by Indian Railways from times to time. IRCTC was required to provide records and documents of haulage payments made by IRCTC to Indian Railways. Article – 8 : Unsecured Loans : C&K shall provide an unsecured loan for a period of 15 (fifteen) years of an amount which will be 50% of the total cost of the luxury train (i.e. cost of the coach shell and the interior fittings and furnishings – (minus) the capital subsidy available in relation to the luxury train project, as per the applicable tourism policy of the Central and State Governments. The provision of unsecured loan by CNK (the petitioner) to the JVC for a period of 15 years being 50% of the total cost of the luxury train as in Article 8.

The repayments of the unsecured loans was treated as an advance lease charges adjustable/amortized in 15 years.

Article - 9 dealt with the Technical Operation and maintenance of the luxury train on Indian Railways and the same were the responsibility of IRCTC. The JVC was to use booking engine of IRCTC. The JVC was to acquire the entire peripheral software for integrated front and back end office management from CNK. The JVC was responsible for obtaining necessary clearance and permission.

All internal facilities, itinerary was to be decided by the Joint Venture Company as per Article 10.

The income from the sale of packages and other services was to be the revenue of the Joint Venture Company as per Article 11.

The JVC was responsible for the tour packages and JVC through itself or through SLA market, promote train based tour packages to ensure luxury train potential fully realized and the luxury train is positioned as a premium luxury train. The JVC was responsible for all hospitality services. (Page 39)

A current account of the Joint Venture Company was to be operated and was to be maintained with joint signature of both parties of JVC as per Article 134.

The JVC was responsible for mobilizing funds as per Article – 14.

The JVC was to have nine Directors on its board, three Directors from IRCTC, three Directors from CNK and three independent Directors, one each to be appointed by IRCTC and CNK and third independent Director to be jointly by IRCTC and CNK. Article – 15.3 provided that the Chairman shall be the nominee of the IRCTC.

Article – 16 pertains to the meetings of the Board of JVC. The quorum at BOD meetings, adjourned meetings and Article – 16.5 (page 42) clearly stated that in case of equality of votes at the BOD meetings, the Chairman *SHALL NOT* have a casting or second vote.

Article – 17 pertains to the management of the JVC. As per Article 17.2 the management of the JVC was to be supervised by the Director Finance nominated by IRCTC and the Director Operations nominated by CNK. As per Article 17.6 certain agreement were was required to be executed by and between the company and IRCTC or CNK as the case may be. None of these agreements have been executed save and accept the agreement at Article – 17.6 (B), the agreement for providing on board services has been executed by the JVC with MAPPLE since IRCTC not having the international exposure and experience in providing Five Star super luxury fine dining opted to outsource the on board services of the luxury train to MAPPLE who are also the on board service providers to the Golden Chariot.

Article – 20 : The parties to the JVC were to make a detailed project report finalized itineraries higher and recruit staff make process for selling products and systems for collection of revenue and disbursement of the same.

As per Clause 24.2 provided the lock in period for holding shares was 15 years from the date of commencement of lease.

As per clause 24.3 if there was a shareholder's default then either of the party could sell the shares to the other at the preretirement provisions as provided under Article 24.3.''

8. As provided under the JV Agreement and MoU, the service agreement dated 05.03.2010 between the JV Company (RIRTL) and Ninth Dimension Hotel and Resorts Pvt. Ltd. (hereinafter referred to as ''MAPPLE Hotels'') was also executed for providing hospitality services on board and their respective roles and responsibilities were mentioned in the said agreement.

9. After completion of other formalities, the commercial operation of the Maharaja Express was flagged off by the Minister of Railways on 20.03.2010 at Kolkata station. It is the admitted position that upto April 2011, the said train, i.e., the Maharaja Express, 34 journeys were completed out of 4 journeys in the inaugural runs till 31.03.2010 and 30 journeys between April, 2010 to April, 2011.

10. In between, i.e., in November, 2010, the respondent forwarded the draft of lease agreement for lease of the Luxury Tourist Train to the petitioner who in the month of March/April, 2011 pointed out that the said draft of the lease was inconsistent with the arrangement between the parties including the terms of MoU and the JV Agreement. The petitioner submits that the respondent somewhere January 2011 forwarded a copy of the draft MoU proposed to be executed between the respondent and the Indian Railways which according to the petitioner was inconsistent with the terms of the JV Agreement.

11. The petitioner in para 14 of the petition has also given the detail of other inconsistencies pointed out to the respondent with the terms of the JV Agreement and also protested and objected to the said MoU which would, if executed, completely negate the terms of JV Agreement which was executed in the month of December 2008 and the MoU executed between the petitioner and the respondent in July, 2008.

12. The case of the petitioner is that the parties, i.e., the petitioner and the respondent, came together to form the JV Company which was set up specifically for the purpose of acquiring, furnishing, maintaining, managing and operating Luxury Tourist Train with a view to market and sell holiday packages. The terms were recorded in the MoU of July, 2008 and the JV Agreement and pursuant to the same, the petitioner had

invested a sum of more than Rs.45 crores in the said JV company.

It is submitted by the petitioner that the said MoU and JV Agreement were executed after the specific permission given by the Ministry of Railways, Government of India, which permitted the JV company to own and operate the Luxury Tourist Train during the period of 15 years as specified in the JV Agreement. The said agreement also recorded that the JV Company will manage, on board and off board services and in view of that the petitioner initially invested Rs.22.25 crores on the basis of the representation of the respondent and the Indian Railways. The petitioner submits that the entire arrangement between them was with the full consent and approval of the Indian Railways/Ministry of Railways. But, when the petitioner received the letter somewhere in January 2011 enclosing the Draft MoU between the respondent and the Indian Railways to change the entire meaning, modify and vary the terms of the arrangement entered between the petitioner and the respondent and the petitioner's role and position was sought to be diluted in the said Draft MoU, the petitioner has rightly raised the objections by letter dated 13.06.2011 with copy to Indian Railways who had full knowledge about the MoU as well as JV Agreement between the petitioner and the respondent and also having permitted the parties for the same. Therefore, the petitioner says that under no circumstances the Indian Railways now could seek to change the terms by executing an inter-se agreement between the Ministry of Railways and respondent which would seek to dilute the position of the petitioner.

13. It is alleged by the petitioner that now the respondent by letter dated 21.06.2011 addressed to the JV Company, i.e., RIRTL, claimed that the lease agreement and the haulage charges were payable by the JV Company. The petitioner submits that it was done in order to divert the attention of the petitioner from Draft MoU as the payment of haulage charges was an obligation on the respondent. The respondent and Indian Railways are now seeking to amend the terms of the JV Agreement by seeking to introduce a new policy.

14. In nutshell, according to the petitioner, the respondent after the gap of long time is seeking to change various terms by proposing the said document, the detail of which is given in para 21 of the petition. The petitioner states that the petitioner has paid advance loan of Rs.4 crores for payment of haulage charges for the period April to July, 2011.

15. There are many other grievances raised that the petitioner did not receive the bank statements of the JV Company for more than two and half years. The petitioner also set out the detail in which more than Rs.30.69 crores upto March 2010 have been paid by the petitioner towards the expenses and advance loan in the form of providing off board services, loans and expenses etc. and they have also incurred expenses towards off board services and loans amounting to Rs.16.92 crores from April 2010 to March 2011. The subsequent letters dated 11.07.2011, 04.08.2011, 05.08.2011 and 06.08.2011 were exchanged between the parties.

16. It is not in dispute that after the end of last season, the respondent on 18.04.2011 took the said train to the India Railways workshop for annual repairs and maintenance.

17. Learned Senior Counsel appearing on behalf of the petitioner has referred to few letters during the hearing of the petition, particularly the letter dated 04.08.2011 whereby the respondent referred to its earlier letters dated 07.07.2011 and called upon the petitioner to withdraw its protest relating to the execution of the MoU of June, 2011 between the Indian Railways and the respondent. Another letter dated 06.08.2011 was also referred wherein the suggestion was made by the respondent that the work on the train should be completed as early as possible.

18. However, learned Senior Counsel states that vide letter dated 12.08.2011 the respondent terminated the lease arrangement pursuant to the JV Agreement on various grounds mentioned in the said letters. Thereafter, the petition has been filed by the petitioner seeking relief of stay of operation of termination letter and another prayer is made that till end of this season i.e. April, 2012 , the arrangement which was continued, be maintained subject to any terms and conditions granted by the Court.

19. The petitioner submits that the act of termination by letter dated 12.08.2011 by the respondent would put the huge investment made by the petitioner into jeopardy and the goodwill and reputation would also be spoiled in the eyes of their travellers who are from overseas countries and the reputation of the Indian Government is also at stake. Therefore, it was stated that the letter of termination dated 12.08.2011 is arbitrary, illegal and void on various ground stated in the petition, thus, the interim order is sought.

20. The petitioner submits that the petitioner has been marketing the

bookings internationally and within India. The season of this train is between the months of September to April. The train is mainly booked by foreign tourists and the bookings are made much in advance. The JV company has received and his holding approximately 400 bookings for the current year upto December 2011. The said bookings have been made by various international travel companies. The said foreign tourists make their bookings either directly or indirectly through a travel agent after considering the services offered by the JV Company as stated on their website and the 100 of workers employed by the JV Company, who are connected with the train, would be jobless. All these factors show that at this stage the running of the train cannot be stopped without assigning any reason irrespective of the fact that the lease deed is not signed and JV stands terminated.

21. Article 30 of the JV Agreement provides the clause of dispute resolution by mutual negotiations otherwise, in the event of disputes remaining unresolved, the same are to be referred to the arbitration.

22. Lastly, the petitioner submits that the petitioner is entitled to specific performance of the JV Agreement which has no termination clause. It is also stated by the petitioner that though there is no formal lease agreement for the train executed between the respondent and JV Company but as per conduct of the parties and documents executed earlier and correspondence exchanged between the parties, the said lease is effective and subsisting by implication. The petitioner submits that as per Article 6 of the JV Agreement, it was provided that the lease will be for a period of 15 years from the date of first commercial run and the first commercial run took place on 06.03.2010. The lease rent was also paid in advance for the period of 15 years. Therefore, the prayer made in the petition is liable to be granted, otherwise, the petitioner would suffer grave harm and irretrievable injury. On the question of arrangement of seasons between September, 2011 to April, 2012, it is averred that the first batch of advance international bookings have been made for the ''Maharaja Express'' which is to run from 14.09.2011.

23. The last contention of the learned Senior Counsel for the petitioner is that there is no dispute that there are various claims of the respondent against the petitioner and JV Company and similarly the petitioner has various claims against the respondent company. But at this stage, some interim measures have to be made by the Court. Insofar as the merit of

the case is concerned, it is stated that claims and counter-claims have to be determined by the arbitral tribunal. Therefore, due to peculiar circumstances of the case and the fact that the said function of providing services to the foreign tourists who have already booked for the another season of the train cannot be put to prejudice due to the stalled relationships between the parties to the agreement, therefore, some arrangement has to be made by the Court so that the interest of the petitioner is not harmed in the eyes of their customers.

24. Mr Ashok Desai, the learned Senior Counsel for the petitioner, has also made a submission as to the possible interim arrangement which can be done at this stage including the appointment of the receiver and running the train under his supervision and depositing the part of the booking amount in the separate account but, the train may be allowed to run as per the earlier arrangement for this season and the petitioner would have no objection if one or two representatives of all concerned parties may also be allowed to act as observers in addition to above for the purpose of smooth running of the train. He has also agreed not to make further bookings for the next season, subject to any order if passed as per its own merit by the Arbitral Tribunal. He further states that the petitioner has no objection if any retired Judge of this Court or from Supreme Court be appointed as an arbitrator and time schedule be fixed so that the dispute between the parties be determined within the period of 3 to 6 months. All this arrangements have been suggested by Mr. Desai as without prejudice to the rights and contentions and claims to be raised by the parties before the arbitral tribunal.

25. The respondent has strongly contested the matter, inter alia, on the following grounds:

a. The petition is not maintainable as the same was filed on the basis of two letters on 12.08.2011 (termination letter) issued by the respondent by which the respondent for the reasons stated in the said letters terminated the Joint Venture Agreement entered between the petitioner and the respondent on 10.12.2008.

b. The Joint Venture Agreement is void as the consent of the respondent was obtained by fraud and misrepresentation and cannot be given effect to and is also unenforceable

and therefore, the petition would not be maintainable.

c. The petitioner in the matter in fact is seeking the stay the operation of one letter dated 12.08.2011 issued by the respondent to Joint Venture Company. The said Joint Venture Company is not a party to the proceedings and also not party to any arbitration agreement. Therefore, granting of any relief would be amounting to grant of a mandatory injunction and in any event, if losses are suffered by the petitioner it could be compensated in terms of money as the contract has been terminated between the parties on account of various breaches committed by the petitioner of the Joint Venture Agreement. In fact, the train was never operated in the manner as contemplated in the Joint Venture Agreement by the Joint Venture Company. Nor the petitioner had agreed to pass on the booking revenues to the Joint Venture Company and instead raised inflated debit notes.

26. It is stated by the respondent that by seeking the relief on the basis of the Joint Venture Agreement, the petitioner is trying to get a lease in favour of the Joint Venture Company, a third party who is not even a party to the present case and the agreement. The lease was never executed in favour of the said company. The rights of the petitioner cannot be beyond than what has been laid down in the Articles of Association of the Joint Venture Company. The relation between the Joint Venture Company and the respondent has already come to an end and has been terminated. Therefore, now the petitioner is attempting to create a right for use of the train which was never in the possession of the petitioner and the petitioner is not entitled to use the same in future as the respondent is the owner of the train. Thus, it is not open to the petitioner to claim any relief in relation to the train which is subject matter of the train withdrawal letters which were issued by the respondent to the Joint Venture Company being the owner of the train. It was also stated that earlier the Joint Venture Company was allowed to run the train on an ad-hoc arrangement, otherwise no terms and conditions of any lease arrangement were finalized, therefore, now the respondent is not inclined to continue with the said arrangement for the reasons stated in the said letter.

27. Mr. G.E. Vahanvati, the learned Attorney General of India, appearing on behalf of the respondent has referred to Articles 5 and 6 of the Joint Venture Agreement and argued that the respondent was merely to give the train on lease to the Joint Venture Company which was conditional subject to the terms and conditions being agreed upon between the respondent and the Joint Venture Company as well as payment of lease rental and after adjustment of the advance lease rental, haulage charges of the Railways etc. The said conditions are not fulfilled. Further as the terms and conditions of the lease were not finalized nor was the lease agreement executed between the parties, the dispute relating to train involving the Joint Venture Company cannot be resolved by the arbitration.

28. It is also argued by learned Attorney General that the petitioner has suppressed the material fact from this court when it is stated that the Joint Venture Company was incorporated after entering into the Joint Venture Agreement, though the said Joint Agreement Company was incorporated on 27.11.2008 prior to the date of Joint Venture Agreement dated 10.12.2008. The said Joint Venture Company was in fact in existence on the date of agreement. He argued that on this ground itself no relief should be granted as sought.

29. The learned Attorney General has argued that the petitioner had retained all revenues which is more than 18 crores in respect of bookings made by the journeys of the train already operated upto April, 2011. Even the revenue from the month of September, 2011, till April, 2012 has not been transferred to the Joint Venture Company. The petitioner had issued inflated bills towards ''off board services'' for the train totaling to Rs.21,36,98,595/- and unilaterally sought to adjust all the booking revenues which had been retained illegally by the petitioner against its own inflated bills/debit notes raised on Joint Venture Company and suo moto appropriated/adjusted the entire booking revenue of Rs.18.87 crores by keeping Rs.4.95 crores as commission and adjusting the balance of Rs.13,83,72,184/- in respect of the inflated and unauthorized bills/debit notes raised by the petitioner.

30. On the other hand, the respondent has not received any amount from the petitioner. Therefore, the respondent is no longer willing to permit the Joint Venture Company to use or operate the train for the reasons stated in the Train Withdrawal Letter. The question of use of train by the Joint Venture Company cannot be the subject matter of the

present proceedings. In fact, the petitioner is trying to directly or indirectly take over the complete control of the operations of the train, though the petitioner was never authorized to use the train. Mr Vahanvati, the learned Attorney General, has also argued that the petitioner has charged the Joint Venture Company commission at the rate of 30% on the total booking revenues of Joint Venture Company. The said rate of 30% is very higher.

31. Therefore, by the discontinuation of the permission granted for a limited period to Joint Venture Company to use the train, the petitioner will not suffer any losses. It is argued that the basic roles of the petitioner defined in the Joint Venture Agreement was to hand ''off board services''. As per Article 9 of the Joint Venture Agreement, the Joint Venture Company was to enter into service agreements with the petitioner for off board services and with the respondent for on board services. The agreement of the Mapple with the Joint Venture Company has no significance and cannot be subject matter of the proceedings as the petitioner and the respondent are not the parties of the said agreement.

32. It is argued that the respondent has not denied that as per Clause E of the MoU, the haulage charges were the liability of the respondent. The respondent was to pay the amount of haulage charges to the Ministry of Railways and the said amount was to be reimbursed to the respondent at actual but there was breach on the otherside.

33. The respondent has also given the detail of various defaults made by the petitioner in paras 47 to 51 of its reply. In para 53 of the reply, the respondent has also given the detail of the two financial projections and proposal from the petitioner which is reproduced as under:

		Projected Financials as per C&K Bid dated 16.04.2008	Projections given by C & K on 24.11.2011
1	Max Occupancy	905 (yr 5 onward)	65% (yr 5 onward)
2	Max Prices (USD/pax/day)	2150	2500

3	5 years cumulative P/L	36 Cr (profit)	-72 Cr (Loss)
4	Haulage Charge (Lakhs/ day)	5.3 Lakhs	6.0 Lakhs
5	On Board+Off Board	USD 146/head/day	USD 320/head/day
6	Agent Commission	20%	30%

34. It is also argued by the respondent that the investments made by the respondent are far greater than the petitioner. In para 70 of the reply it was referred by Mr. Vahanwati in support of his submission wherein the respondent has given the details about the investments made by the respondent, inter alia, in the following manner:

> ''(i) It was because of the respondent that the Ministry of Tourism gave a grant of Rs.12.37 crores to the respondent [under its scheme for PSU projects and distinct from PPP/private sector projects] which was also spent in the development of the train.
>
> (ii) No doubt a sum of Rs.18,50,00,000 [Rs.4.2 crores has been returned] was given by RIRTL [not the petitioner, since the Petitioner is charging interest for that amount on the joint venture company] to the respondent, but then about Rs.10.97 crores of that amount had to be paid to the Railways for haulage charges, Rs.3.33 crores was paid towards use of the train for the limited period, Rs.0.65 crores was spent towards the office space rentals of RIRTL and the balance of Rs.3.5 crores was only left after accounting the moneys with the respondent. Infact, the haulage charge amount is more than what has been adjusted [as Rs.1.54 crore more is to be paid to the railways] besides the license fee being 0.5% of the total revenues also has to be adjusted being the revenue share of respondent as per the bid of the petitioner.
>
> The respondent was to collect from RORTL and pass n the haulage charges to the Railways. Earlier RIRTL had paid around Rs.2.55 crores to the Railways and the respondent had paid about Rs.6.5 crores out of its own pocket. After the adjustment of the amounts, now the respondent has paid a further amount of Rs.4.46 crores and Rs.1.54 crores to the Railways for use of the train by RIRTL.

> (iii) Interestingly, while the amount had been advanced to the respondent by the RIRTL, the petitioner is claiming to have acquired an interest on the train operation on the basis of this amount. Remedy, if any, in respect of non-payment of monies owed by RIRTL to the petitioner, cannot be against the respondent.
>
> (iv) RIRTL did not pay the advance lease rental for 15 years as alleged. Only a part thereof was paid and those amounts have been adjusted against costs incurred for actual usage of the train by RIRTL in the manner mentioned above.
>
> (v) After adjustments, as mentioned above, a balance of Rs.3.5 crores was left with the respondent against the so-called ''advance rentals''. These amounts cannot, without prejudice to the other contentions of the respondent, be sufficient to cover operational expenses of the train any more, let alone until December, 2011. Infact, the actual haulage charge levied by the Ministry of Railways is much more than what has been adjusted besides the license fee being 0.5% of the total revenues also has to be adjusted being the revenue share of the respondent as per the bid of the petitioner, as such, this amount of Rs.3.5 crores would get reduced further.''

35. It is the further contention of the respondent that in the operation of the train till 19.04.2011, the respondent has only got the rental of the train amounting to Rs.3.3 crores out of total revenue of Rs.31.65 crores. The said money is either lying with the petitioner or the Joint Venture Company. The petitioner, on the other hand, has made substantial profits in terms of the commission from the booking amounting to Rs.5.15 crores and would also be making substantial profits out of the off board services, the detail of which is mentioned in the debit notes. The petitioner has also claimed interest on the said amount loaned to the Joint Venture Company amounting to Rs.1,56,15,154/-.

36. In nutshell, it is argued that the petitioner operated the train and has not paid the haulage charges to the respondent for payment to the Railways, a substantial portion of the amount of Rs.18.55 crores given to the respondent had to be adjusted towards haulage charges and rental and thus, leaving such a small amount with the respondent that any further operation of the train would result in liabilities of the haulage

charges. In view of the above said facts and circumstances, the learned Attorney General has made submissions that the petitioner is not entitled for any interim relief sought by it.

37. The learned Attorney General has also referred to the case of **Bharat Catering Corporation vs. Indian Railway Catering and Tourism Corporation;** 164 (2009) DLT 530 (DB) in support of his submissions. Para 17 of the said judgment is reproduced as under:

> ''17. Apart from merits, even otherwise, in our view, the scope and ambit of Section 9 do not envisage the restoration of a contract which has been terminated. The learned Single Judge, in our view, rightly held that if the petitioner is aggrieved by the letter of termination of the contract and is advised to challenge the validity thereof, the petitioner can always invoke the arbitration clause to claim damages, if any, suffered by the petitioner. It is not open to this Court to restore the contract under Section 9, which is meant only for the sole purpose of preserving and maintaining the property in dispute and cannot be used to enforce specific performance of a contract as such. A bare glance at the said Section will suffice to show that pending arbitration proceedings, the Court and the Arbitral Tribunal have been vested with the power to ensure that the subject matter of the arbitration is not alienated or frittered away. The provisions of Section 9, for the sake of convenience, are FAO(OS) 226/2009 Page No. 15 of 20 extracted below:-
>
> "9. Interim measures, etc. by Court.- A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-
>
> (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
>
> (ii) for an interim measure of protection in respect of any of the following matters, namely:-
>
> (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
>
> (b) securing the amount in dispute in the arbitration;

> (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
>
> (d) interim injunction or the appointment of a receiver;
>
> (e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

38. The respondent is not agreeable with the suggestions given by Mr Desai to allow the Joint Venture Company or the petitioner to run the train as per earlier arrangement or on the terms by him. It is argued that in case the suggestions of the petitioner are accepted, it will amount to writing a fresh contract which is not permissible in law and simultaneously he gave his own proposal without prejudice to the rights of the respondent in order to avoid any complication to be suffered by the tourists who have already made the booking till the date of this season. The respondent has made the following suggestions in order to honor the bookings as stated by the petitioner without prejudice to the rights and contentions of the parties:

(a) The train has to be run by the owner/ respondent. All the facility material including crockery, furnishings etc. which are in custody of the petitioner should be handover to respondent for executing this facility arrangement.

(b) All revenues arising therefrom without any deductions earned either by the petitioner or respondent may be deposited in the separate account from which expenditure will be funded.

(c) All the bookings may be allowed to the transferred to the respondents for honouring.

(d) All the on board or off board expenses and railway

payments may be allowed to be charged to this account. In this way, the amount will be sufficient to cover the expenses and there will be no need for further loans.

(e) The existing service providers may be retained.

As per the respondent, the arrangement can be acceded to only at the above terms in order to avoid any hardship and harassment to the tourists.

39. As far as termination of the Joint Venture Agreement is concerned, it is agreed that it would be subject to outcome of arbitral proceedings that may be initiated by the petitioner and all objections, claims and contentions of both sides be kept open before the arbitral proceedings.

40. Let me now first deal with the first prayer made by the petitioner i.e. seeking stay of the operation of the respondent letter dated 12.08.2011 whereby the Joint Venture Agreement dated 10.12.2008 was terminated by the respondent on various reasons. No doubt, the petitioner has challenged the validity of termination as per details given in the petition. So the question in the present petition has arisen as to whether any of the parties had violated the conditions mentioned in the Joint Venture Agreement between the parties. It is to be examined as to whether at this stage, when the agreement has been terminated/ rescinded by the respondent right or wrongly on account of purported fraud, can this Court go into the contentions of the parties and conclude that the said termination is invalid?

41. It is a settled law that the court while granting the interim measures under section 9 cannot arrive at the conclusive finding as to the fact that the agreement is validly terminated or it is invalid as it is for the arbitral tribunal to decide whether the termination was valid or invalid. As held by the Supreme Court and various Court that in case the party, who is seeking the interim order, has made out a prima facie case is entitled to take action for termination of agreement. Its validity at this stage of interim measure is only for the limited purpose as to whether any prima facie case is made or not. And in case no interim order is made, the party would suffer loss and injury which cannot be compensated by damages.

Therefore, in view of the settled law on the point involved, I am

of the considered view that the scope of Section 9 does not allow the Court in the facts and circumstances of the present case, as mentioned above, to restore the Joint Venture Agreement which has been terminated/ rescinded by way the said fraud as alleged by the respondent in its letter dated 12.08.2011, doing this would mean nullifying the said termination. I feel that only remedy lies to challenge the validity by invoking the arbitration clause and claim damages, if any. However, at this stage of interim injunction as prayed in the second relief the said termination is to be examined for the limited purpose as to whether the petitioner has made out a prima facie case to pass such orders. Thus, the first prayer of the petition is disallowed.

42. Now coming to the first contention raised by the respondent that the petition is not maintainable as the Joint Venture Company is not a party to the Joint Venture Agreement and, therefore, cannot be included within the ambit of arbitration.

43. It is not in dispute that the Articles of Association are an agreement between the shareholders and the Joint Venture Company. The definition of the party includes the petitioner as well as the respondent. Since the Articles of Association is an agreement amongst the shareholders and the company itself, therefore, the petitioner and respondent are included therein The Memorandum and Articles have been signed by the respondent.

44. The JV Company has a separate arbitration agreement between the petitioner and the respondent and Article 200 of the Articles of Association of the JV Company contains an arbitration clause. The Arbitration Clause, i.e., Article 200, of dispute resolution reads as under:

''200. Reference to an Arbitrator

IRCTC and C&K will endeavour to resolve by mutual negotiation any dispute, differences, controversy or claims arising out of or in relation to, this Agreement, including the scope, validity, existence and the interpretation thereof, the activities performed hereunder, or for the breach thereof, arising between them in connection with this Agreement.

(a) Any and all disputes differences, controversy or claims arising out of or in relation to, this Agreement, including the scope, validity, existence and the interpretation thereof, the activities

performed hereunder, or for the breach thereof, which cannot be satisfactorily resolved by mutual negotiation within ninety (90) days of issue of a notice by a party, shall be finally settled by arbitration, in accordance with the rules of Arbitration of Indian council of Arbitration (ICA) under....''

It is also pertinent to mention that the Articles of Association in the clause defines:

a. ''The Company'' or ''this Company'' means Royale Indian Rail Tours Limited.

b. ''Party'' means IRCTC or C&K as the case may be.

c. ''Parties'' in relation to this Company would include Cox and Kings (India) Limited and IRCTC.

45. However, the petitioner and Joint Venture Company have filed two separate applications under Order 1 Rule 10 CPC for impleadment as respondent No.2. Mr Sandeep Sethi, the learned Senior Advocate, with Mr Abhimanyu Mahajan, Advocate, appeared in the matter on behalf of Joint Venture Company. Mr. Sethi says that in view of above, any arrangement or suggestion if made by this Court, his client would abide the same. He further says that he is prepared to go for arbitration for the dispute arose between the parties.

46. Therefore, prima facie it cannot be said that there is no arbitration between the Joint Venture Company and the parties in the present petition. The only shareholders and persons in management of the Joint Venture Company are the petitioner and the respondent.

47. The Board of Directors of the said Joint Venture Company constitutes 3 nominees of the petitioner, 3 nominees of the respondent and 3 independent nominees. In the application it is stated that the consent to file the present application was given by 5 Directors out of 9 Directors of the Joint Venture Company. The copy of the Resolution approved by 5 Directors along with Articles of Association of the Joint Venture Company was annexed along with the application.

48. Section 9 of the Arbitration and Conciliation Act, 1996 reads as under:

"S. 9. Interim measures etc. by court. - A party may, before or

during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court:

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings: or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration:

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it." A plain reading shows that the Court has jurisdiction to pass orders until the Award is submitted for enforcement under Section 36 of the Act.

49. Therefore, under Section 9 of the Arbitration and Conciliation Act, the Court has a jurisdiction to preserve the subject matter of the dispute in many forms depending upon the facts of each case and as per orders sought for. The Court is to decide by the order in the facts and circumstances of each case for purpose of passing such protection/ presentation.

50. The proceedings in a court, as distinct from those before an arbitrator, are also between parties to an agreement/transaction only. Still, the practice of issuing interim orders/directions qua third parties exists.

51. It is also to be noted and an arguable case as to whether the JV Company is completely a third party as the said JV Company is the offshoot of the petitioner and the respondent. It is to be seen that the petitioner and respondents joined hands for some purpose of running the train jointly which was performed by the JV company being owned together by the petitioner and respondent at the ratio of 50 : 50. It is also a matter of fact that for the previous season the respondent itself has itself allowed the JV Company to run the train on its behalf. Moreover, the articles of association also show close connectivity, participation and nexus of the petitioner and respondent in the JV Company by providing the arbitration clause under Article 200. Therefore, at the prima facie stage, it cannot be said that the said JV company is to be treated an outsider to the dispute rather it is intricately connected with the parties.

52. In similar circumstances, the Bombay High Court in the judgment of **Heritage Lifestyle & Developers Pvt. Ltd. v. Amarvilla Co-operative Housing Society Lt.,** 2011(3) MhLJ 865, in para 14 observed as under:

> ''Admittedly, there is an arbitration clause between the parties, and there exist a arbitrable dispute as raised. The Scheme of Section 9 has been elaborated by the Apex Court in various judgments. It is now made clear that all the provisions of the Code of Civil Procedure which are necessary for passing an appropriate order under Section 9 needs to be taken note of which includes Section 9A, Order 37, Order 38, Order 39, Rules 1 and 2, Order 40 of CPC. Therefore, while passing any order under Section 9, apart from the facts and circumstances, the Court needs to consider all desired facets which are otherwise available for passing ad interim, interim and/or even mandatory order. There is no bar and if case is made out, I see there is no reason that the Court under Section 9, cannot pass such order, even against the person who is not the party to the agreement but specially when such third person is claiming protection or right through the party who is consenting party to the arbitration agreement.''

53. In **V.B. Rangaraj vs. V.B. Gopalakrishnan;** (1992) 1 SCC 160, it has been held that articles of association of a company are a contract binding upon the company and its shareholders. Therefore, in

the present case, the company itself is a party to the arbitration clause. Under Order 1 Rule 10(2), the Court has power to strike out or add parties at any stage of the proceedings either upon or without the application of either party and on such terms, as may appear to the Court to be just, order to add parties. Since the petitioner and respondent in the present case are co-shareholders of the Joint Venture Company, I feel that there is no harm if the Joint Venture Company be also added as respondent No.2. Therefore, the applications filed by the petitioner as well as the proposed respondent No.2 are allowed. The Joint Venture Company is impleaded as respondent No.2. The amended memo of parties as already filed is taken on record.

54. The next objection of the respondent that the Joint Venture Agreement was pre-existing on the date of the Joint Venture Agreement is without any substance since the subscribers to the Memorandum of Association of the Joint Venture Company are both, the petitioner and the respondent. It is not in dispute that the Joint Venture Company was incorporated on 24.11.2008, whereas the Memorandum of Understanding between the petitioner and the respondent containing the arbitration clause was executed on 10.07.2008. Admittedly the Joint Venture Company was incorporated for the purpose of same transaction.

55. Further submission of the respondent is that since a lease has not been executed between the Joint Venture Company and the respondent, there is no obligation on the respondent to provide the train to the Joint Venture Company. It is also argued that earlier the Joint Venture Company was allowed on the basis of ad-hoc arrangement. Admittedly, the lease is not executed between the parties and at the same time Joint Venture Agreement is terminated, the respondent, therefore, is not inclined to continue with the said arrangement any more in the absence of lease-deed.

56. This submission of the respondent is devoid of merit as by doing the interim measures this Court is not attempting to rewrite the agreement or to confer any leasehold rights in favour of the petitioner or JV company but rather in the larger public interest which is going to effected by virtue of sudden stopping of the train, booking of which are already undertaken by the petitioner, there is no harm in continuing the said arrangement for some more period of time and more so when the parties have already earlier operated the said arrangement without the

execution of the said lease deed. Accordingly, the said continuation of the arrangement which was previously operated upon does not confer any further rights in favour of any of parties as this court is aware that it is claim to be adjudicated upon by the arbitral tribunal.

57. In the case of **Old World Hospitality Pvt. Ltd. vs. India Habitat Centre;** 73(1997) DLT 378, this Court observed as under:

> (48) The argument on behalf of the defendant is that there has been no concluded contract. But a perusal of the Memorandum dated 5.4.1994 and the 'Draft Agreement' would show that the contract is 'symbiotic' containing not only reciprocal obligations, complete duties and responsibilities and parties had agreed and come to a complete understanding about the operations by the plaintiff. The further argument is that there has been no consent by the defendant. Section 2-H of the Contract Act states an agreement enforceable in law is a contract. Section 13 of the Contract Act defines consent "Two or more persons are said to consent when they agreed upon the same thing in the same sense". It is axiomatic that a contract is complete as a contract as soon as the parties have reached an agreement as to what to each of the essential terms is or with certainty be ascertained. It is an elementary principle:
>
> "IDCERTUM Est Quod Certum Reddi POTAST; Sed Id Magis Certum Est Quod De Semet Ipso Est Certum - that is certain which can be made certain, but that is most certain which is certain on the face of it. Nobody can dispute the proposition that a fair agreement to negotiate has no legal content. But that is not the position here, for a considerable length of time the parties had acted on the terms and conditions and nowhere it is stated by the defendant that the plaintiff acted beyond the terms of the agreement except staling that the bargain is not beneficial to the defendant. That is a different aspect which will be dealt with in the course of this judgment.''

58. Another reason which persuades this Court to continue such arrangement is that the booking for this season commenced from 8th May, 2011. The respondent cannot deny the fact that they were not aware about the said bookings already made as the respondents were in continuous communication with the petitioner since November 2010.

Had the respondent got any intention to discontinue the Joint Venture Agreement in view of dispute arose between the parties in November, 2010 with regard to draft MoU to be executed between the respondent and Railways which according to the petitioner were inconsistent and against its interest to the MoU and Joint Venture Agreement between the parties, the agreement ought to have been terminated prior to the date of booking or with reasonable notice to the petitioner so as to not to indulge into further bookings of the said train. Rather it appears from the record that the respondent uptil 6th August, 2011 were suggesting the petitioner that the work on the train should be completed as soon as possible. In view of the said conduct of the parties and present situation, this Court is of the opinion if some interim arrangement is not made, there may be some serious repercussions as it is not merely the question of goodwill and reputation of the petitioner is at stake but the respondent also. Supreme Court in the case of **Mahabir Auto Stores vs. Indian Oil Corporation,** reported in (1990) 3 SCC 772, to some extent of similar situation in para 20 to 21 has held that in a situation between the parties procedure should be followed which will be reasonable, fair and just and that is the process which normally be accepted. Paras 20 and 21 are reproduced as under:

> ''20. Having regard to the nature of the transaction, we are of the opinion that it would be appropriate to state that in cases where the instrumentality of the state enters the contractual field, it should be governed by the incidence of the contract. It is true that it may not be necessary to give reasons but, in our opinion, in the field of this nature fairness must be there to the parties concerned, and having regard to the large number or the long period and the nature of the dealings between the parties, the appellant should have been taken into confidence. Equality and fairness at least demands this much from an instrumentality of the State dealing with a right of the State not to treat the contract as subsisting. We must, however, evolve such process which will work.
>
> 21. Therefore, we direct that the case of the respondent be put to the appellants, and let the respondent authorities consider afresh the submissions made by the appellant firm, namely, that the existing arrangement amounts to a contract by which the distributorship was continued in case of the appellant firm without any formal contract and further that the new policy of the

Government introduced in December, 1982 would not cover the appellant firm and as such the appellant should continue. It will be sufficient, having regard to the nature of the claims, for the respondent authority to consider this aspect after taking the appellant firm into confidence on this aspect. Nothing further need be stated or required to be done and we give no 'directions as to whether reasons should be recorded or hereinafter should be given. In the facts and circumstances, it is not necessary to give oral hearing or record the reasons as such for the decision. The decision should be based on fair play, equity and consideration by an institution like IOC. It must act fairly.''

59. The petitioner has provided the booking summary for the period of September 2011 to April 2012. The advance booking was started for this season from 2nd week of May, 2011. Upto December, 2011 the total booking between September, 2011 and December, 2011 is 448 passengers which include 416 confirmed bookings, 22 time limit booking and 10 Fam booking and upto April, 2012, 53 are confirmed booking and 45 is of time limit booking.

60. In this light of above, let me now examine as to whether the petitioner has made out a case of relief of mandatory injunction. Admittedly, after completion of all formalities, the commercial operation of the ''Maharaja Express'' was flagged off on 20.03.2010. Upto April, 2011 the said train made 34 journeys. The season of this train is between September to April. The train is mainly booked by foreign tourists and such bookings are made much in advance. This train was awarded runner up in the Special Train Operators Category at the Conde Nast Traveller Readers' Travel Awards. There were following 10 competing trains:

''1. Hiram Bingham, Peru

2. RIRTL's Maharajas' Express

3. Orient Express

4. Rocky Mountaineer, Canada

5. The Blue Train, South Africa

6. The Old Patagonian Express

7. Palace on Wheels

8. Deccan Odyssey

9. Rocos Rail, South Africa

10. Royal Canadian.''

61. Thus, there is no force in the submission of the respondent that in order to preserve and restore the status quo, this Court cannot have the power to grant a mandatory injunction if the case of greater risk of injustice is made out for temporary period in order to preserve the status quo ante in the absence of executed lease-deed between the Joint Venture Company and respondent. The respondent's main grievance against the petitioner and Joint Venture Company is related to non-payment of monies and inflated bills raised by the petitioner and the amounts payable as per agreements. It is also not in dispute that the parties concerned have their respective claims and contentions against each other and the said disputes have to be determined by the Arbitral Tribunal. The claims of damages if suffered by the parties on account of breach and also to be determined when the arbitration clause is invoked. I agree with the submission of the respondent that a mandatory injunction cannot be passed normally but it is settled law that in cases involving the particular status which existed prior to the institution of the case or continuation of enjoyment of the property prior to the approaching of the court, the court can preserve the satus quo ante which may be in the form of mandatory injunction in order to enable the party to continue to enjoy the status for a period be it limited or otherwise subject to the satisfaction of the principles of grant of injunction. In **Dorab Cawasji Warden vs. Coomi Sorab Warden;** (1990) 2 SCC 117, the Apex Court, while holding that interlocutory mandatory injunction are usually granted to preserve the last uncontested status quo until the final hearing, in para held as under:

''16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against

whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trail. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.''

62. Therefore, after having considered the overall facts and surrounding circumstances of the matter and in order to strike the balance between the parties, I am of the view that it is fit case to appoint a receiver as a matter of interim measure, though this court is aware of the fact that normally the court should be slow in appointing a receiver in interim but in the present due to exceptional circumstances, where the parties are reluctant to go into cooperation mode on their own, the said requirement is necessitated else the irreparable loss shall ensue to the petitioner and to the public at large by discontinuation of the running of the train, bookings of which are already made. I hereby appoint Shri Sudhir Nandrajog, Senior Counsel of this Court, (Mobile No. 9810121790) as a receiver in the matter.

63. The present petition is thus disposed of with the following directions:

(a) For the period commencing from 14th September 2011 uptil 31st December 2011 which is the major period for which the bookings are effected by the petitioner and their agents in overseas countries, the train namely ''Maharaja Express'' Train shall continue to run for the said period under the supervision of the learned receiver as per the arrangement which was continuing at the earlier season.

(b) The petitioner shall deposit 50% of the total receipt of the sum against the bookings made upto 31.12.2011 without any deduction within four days in separate account to be

opened in the Nationalized Bank in the name of the respondent. The petitioner shall not withdraw any amount from the said account without the prior permission of the court or the arbitral tribunal. The said account will be maintained by the Receiver who will sign the cheques and make the payment to the respondent as per the direction (f) issued by this Court.

(c) The petitioner shall also deposit 50 % of the amount in the separate account maintained for the future bookings to be conducted by it uptill the December 2011 in the said account as stated in (b).

(d) The petitioner and the Joint Venture Company shall maintain the proper and true accounts pertaining to booking amounts, expenses incurred or to be incurred in future by them. The statement of accounts shall be filed before the Receiver every fortnightly for the purposes of the records.

(e) Subject to agreeing to the aforementioned directions, the respondent shall, after repair if any or maintenance, allow to run the train as per previous manner. The JV Company is also allowed to make the furnishing and other arrangements consequent upon the receiving the permission of the said train from respondent from 9th September 2011 onwards.

(f) The respondent/ Indian railways would be entitled to recover the haulage charges, on board expenses (only for the current period), operational and maintenance/ repairing expenses against the train which is going to run for the said interim period and the same can be paid by the Receiver after due consideration of the same from the deposit made in the separate account. If any shortfall is occurred, the respondent shall maintain the accounts and give the detail to the Receiver. The said amount shall be subject to the discussion and adjustment of the final award to be passed by the Arbitral Tribunal.

(g) As regards the remaining 50% booking amount retained by the petitioner, the same shall be subject to the maintenance of the accounts of the petitioner and JV

Company which shall be filed before learned Receiver. The said booking amount shall also be adjusted towards the expenses incurred or to be incurred in running the said train. Any shortfall of revenue beyond the said 50% amount shall form the subject matter of the claim before the Arbitral tribunal.

(h) Parties are granted liberty to approach the Court or the Arbitrator (if appointed) for modification of order in case the circumstances do arise. i) Authorized representatives of all concerned parties are allowed to co-operate with the Receiver in order to smooth running of train in question and can have joint meeting, if necessary. If the presence of Receiver is required at the site, he may exercise his discretion in this regard.

(j) The petitioner or any of his agents shall make not any further bookings for the next season which is, September, 2012 to April, 2013.

(k) The above said arrangement shall be treated as tentative in nature.

64. The Fee of the Receiver at the initial stage is fixed at Rs.50,000/- upto the first meeting. Thereafter, he shall be paid Rs.30,000/- per visit/ meeting which shall be paid by the petitioner only subject to the final adjustment.

65. Parties are free to take the necessary steps to resolve their respective disputes by appointment of Arbitral Tribunal. Arbitral Tribunal shall decide their disputes without the influence of the order passed in the matter. All rights and contentions of both sides before the Arbitral Tribunal will be kept open.

66. The order passed in the present petition shall have no bearing when the disputes are decided on merit. The present arrangement is made subject to outcome of arbitral proceedings.

67. The petition and all pending applications and contempt petition are accordingly disposed of without any further orders. No costs. 68. Copy of the order be given under the signature of the Court Master to the parties as well as to the Receiver.

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W.P. (C)

SHEO MURTI SHUKLA ....PETITIONER

VERSUS

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

(RAJIV SAHAI ENDLAW, J.)

W.P. (C) NO. : 6592/2011 DATE OF DECISION: 09.09.2011

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.

The question which arises for consideration is whether the refusal of the Sub-Registrar to even accept the documents for registration, can be said to be appealable under Section 72 (supra) to the Registrar. The counsels often contend that since no order in writing refusing registration has been issued / passed by the Sub Registrar, the remedy of appeal is not available and hence a writ petition would be maintainable. The Act, as aforesaid, does not empower the Sub-Registrar to at the threshold only, refuse to even accept the document. The Act requires the Sub-Registrar to

accept each and every document presented to him for registration and to issue receipt thereof and to thereafter proceed, either to register the document or, if finds the document to be not registrable, refuse registration by recording reasons therefor. The gravamen of the argument aforesaid is, whether such refusal which is in contravention of the procedure prescribed and is verbal and without reasons, can be said to be a refusal within the meaning of Section 72 of the Act, so as to be appealable. **(Para 6)**

In my opinion, a refusal to even accept the document for registration, is also a refusal of registration for grounds other than of denial of execution. Merely because such refusal is in a manner not contemplated under the Act would not make it anything other than refusal. I am unable to carve out any distinction between a refusal as contemplated under the Act and a refusal in a manner not contemplated under the Act. The effect of both, is the same. The only exception to Section 72 is when such refusal is on the ground of denial of execution. Thus refusal of registration by non acceptance at the threshold only of document would be covered by the refusal against which appeal is provided. Once the legislature has vested appellate powers in the Registrar to whom the Sub-Registrar is subordinate, it will be immaterial, whether such refusal is in accordance with the procedure prescribed or in violation thereof. **(Para 7)**

Important Issue Involved: A Registrar cannot refuse to accept a document. He is required to accept all documents and thereafter register or refuse to register recording reasons for refusal. A verbal refusal by sub registrar without recording reasons in writing is an appealable order under section 72 of the Registration Act 1908.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. S.R. Padhy, Advocate.

FOR THE RESPONDENT : Ms. Zubeda Begum, Advocate.

CASES REFERRED TO:

1. *K. Surender Rao* vs. *Govt. of Andhra Pradesh* MANU/AP/0881/2007.
2. *ANZ Grindlays Bank Plc.* vs. *Commissioner,* MCD 1995 (34) DRJ 492.
3. *P.E. Manjunath* vs. *Chitradurga Distt. Ambedkar Education Soceity* ILR 1990 KAR 2021.
4. *Hussain Abdul Rahman & Co.* vs. *Lakhmichand Khetsey* AIR 1925 Bom 34.

RESULT: Petition dismissed.

RAJIV SAHAI ENDLAW, J.

1. The petitioner avers that the respondent Sub-Registrar of Assurances, Sub-District-VI, Alipur, Delhi is refusing to accept the documents of cancellation of General Power of Attorney and cancellation of Will presented by the petitioner for registration. Mandamus is sought to the said Sub-Registrar to register the said documents.

2. In my opinion, this writ petition is not maintainable for the reason of the alternative remedy of appeal against the order of Sub-Registrar being available under the Registration Act, 1908. Though I have been taking the said view but find many such petitions being filed before this Court and there does not appear to be any pronouncement of this Court on the subject. It is thus deemed expedient to deal exhaustively with the subject.

3. Part XI of the Act deals with the ''Duties and Powers of Registering Officers''. Section 51 thereunder mandates the Registering Officer to maintain Book 2 titled ''Record of reasons for refusal to register''. Section 52 requires the Registering Officer to issue to the person presenting a document for registration a receipt for the same. Sections 58 to 70 prescribe the procedure to be followed when a document is admitted to registration.

4. Part XII of the Act deals with ''Refusal to Register''. Section 71 thereunder requires the Sub Registrar, refusing to register a document, except on the ground that the property to which it relates is not situated

within his sub-district, to make an order of refusal and record his reasons for such order in Book No.2 and endorse the words ''registration refused'' on the document and to furnish to the applicant, the copy of the reasons recorded for refusing registration.

5. Section 72 provides for, ''Appeal to the Registrar from orders of Sub-Registrar refusing registration on ground other than denial of execution''; the appeal is required to be preferred within 30 days from the date of the order and the Registrar is empowered to reverse or alter the order appealed against; if the Registrar directs the documents to be registered, the Sub Registrar is mandated to obey the same and register the document. However, if registration is refused by the Registrar also, Section 77 provides for a suit for a decree directing the document to be registered.

6. The question which arises for consideration is whether the refusal of the Sub-Registrar to even accept the documents for registration, can be said to be appealable under Section 72 (supra) to the Registrar. The counsels often contend that since no order in writing refusing registration has been issued / passed by the Sub Registrar, the remedy of appeal is not available and hence a writ petition would be maintainable. The Act, as aforesaid, does not empower the Sub-Registrar to at the threshold only, refuse to even accept the document. The Act requires the Sub-Registrar to accept each and every document presented to him for registration and to issue receipt thereof and to thereafter proceed, either to register the document or, if finds the document to be not registrable, refuse registration by recording reasons therefor. The gravamen of the argument aforesaid is, whether such refusal which is in contravention of the procedure prescribed and is verbal and without reasons, can be said to be a refusal within the meaning of Section 72 of the Act, so as to be appealable.

7. In my opinion, a refusal to even accept the document for registration, is also a refusal of registration for grounds other than of denial of execution. Merely because such refusal is in a manner not contemplated under the Act would not make it anything other than refusal. I am unable to carve out any distinction between a refusal as contemplated under the Act and a refusal in a manner not contemplated under the Act. The effect of both, is the same. The only exception to Section 72 is when such refusal is on the ground of denial of execution. Thus refusal

of registration by non acceptance at the threshold only of document would be covered by the refusal against which appeal is provided. Once the legislature has vested appellate powers in the Registrar to whom the Sub-Registrar is subordinate, it will be immaterial, whether such refusal is in accordance with the procedure prescribed or in violation thereof.

8. The limitation provided in Section 72 of presenting the appeal within 30 days from the date of the order would not limit the otherwise wide amplitude of the appellate power. It cannot be urged that an appeal under Section 72 lies only when there is an order, date whereof is visible and not where refusal is verbal and by non acceptance at the very threshold of the documents. Appeal against such verbal refusal is also to be preferred within 30 days. A person seeking registration of document, unless refused, would not prefer an appeal and thus an appeal to Registrar, without copy of reasons for refusal, and merely on averment of verbal refusal, would lie. Significantly, no form of appeal is prescribed.

9. The Registrar is not only the Appellate Authority of Sub-Registrar but under Section 68, also has supervisory powers over the Sub-Registrar. Section 68 requires every Sub-Registrar to perform the duties of his office under the superintendence and control of the Registrar in whose district the office of such Sub-Registrar is situated and Section 68(2) empowers the Registrar to issue (whether on complaint or otherwise) any order consistent with the Act which he considers necessary in respect of any act or omission of any Sub-Registrar subordinate to him. It therefore follows that against the refusal of the Sub-Registrar to even accept the documents for registration, not only can the Registrar be approached in his appellate jurisdiction but even in his supervisory jurisdiction and the Registrar when so approached is required to deal with the complaint and to issue the necessary orders / directions to the Sub-Registrar.

10. The Division Bench of the Bombay High Court as far back as in **Hussain Abdul Rahman & Co. Vs. Lakhmichand Khetsey** AIR 1925 Bom 34 was also concerned with the difference between refusal of registration and refusal to accept the document for registration. It was held that there is no difference between the two inasmuch as in effect it amounts to refusal to register the documents and the ultimate remedy whereagainst is a suit under Section 77 of the Act. It was held that the expression ''refusing to admit a document to registration'' in Section 72

is comprehensive enough to include not only a refusal to register but a refusal to accept a document for registration and even a refusal to accept registration is appealable under Section 72. I respectfully concur with the said view.

11. The Andhra Pradesh High Court in **K. Surender Rao Vs. Govt. of Andhra Pradesh** MANU/AP/0881/2007 was also concerned with writ petitions impugning the action of the Sub-Registrar of raising repeated objections to registration. The said High Court also held that under the Act, the Sub-Registrar was obligated to either register the document or to refuse registration and in which event the remedy of appeal would be available.

12. Mere non existence of a written order does not negate the maintainability of a statutory appeal. It was so held by the Division Bench of the Karnataka High Court though in the context of some other statute, in **P.E. Manjunath Vs. Chitradurga Distt. Ambedkar Education Soceity** ILR 1990 KAR 2021. Even this High Court, in the context of appeals before the Appellate Tribunal MCD, has in **ANZ Grindlays Bank Plc. V. Commissioner, MCD** 1995 (34) DRJ 492 held that the appeal lies even in the absence of any order of demolition / sealing having been passed or served.

13. A complete machinery for redressal of grievance as made in this petition being available under the Act, I am loath to entertain the writ petition without the petitioner even availing the remedies prescribed under the Act. It is settled principle of law that availability of alternative efficacious remedy is a ground for refusing to entertain the writ petition.

14. The writ petition is therefore held to be not maintainable and is dismissed with liberty to the petitioner to avail of the alternative remedies aforesaid. No order as to costs.

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W.P. (C)

COMMISSIONER OF POLICE, DELHI ....PETITIONER

VERSUS

H.C. LAXMI CHAND ....RESPONDENT

(ANIL KUMAR & SUDERSHAN KUMAR MISRA, JJ.)

W.P. (C) NO. : 22584/2005 DATE OF DECISION: 09.09.2011

Constitution of India, 1950—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.

In the order dated 17th May, 2001 except stating that the acquittal is based on technical grounds, no reason had been given as to why the acquittal is allegedly based on the technical ground. The tribunal while setting aside the order passed by the petitioner reopening the disciplinary proceedings relying on the exception in Rule 12 had referred to a decision of another Coordinate Bench in OA No.2640/2002, titled as **'Vijender Singh v. Commissioner of Police'** decided on 24th July, 2003 where it was held that once evidence had been allowed to be produced and the

evidence adduced is not sufficient, then in such circumstances, the acquittal of the accused would be an acquittal and not an acquittal on technical ground. Citing some of the instances of technical acquittal it was held that it would be acquittal on technical grounds, if an unauthorized person files a complaint or the petition fails before a court or it fails on technical aspect e.g. there is no proper sanction, or the report has not been lodged by the competent authority, or there is such other procedural flaw which may prompt the criminal Court to put an end to the prosecution case. Then in such circumstances acquittal will be a technical acquittal. However, in such cases of technical acquittal the prosecution may still be in a position to come back to the court after rectifying the technical flaw. But if the acquittal is after appreciation of evidence adduced against the accused, the prosecution or State cannot go back and initiate another criminal case against the accused or bring more evidence on the same charges. The learned counsel for the petitioner has not been able to demonstrate in the facts and circumstances that the acquittal of the respondent is on technical grounds, even though the criminal court had perused the evidence of all the witnesses and did not find sufficient evidence to conclude on the guilt of the respondent. The Court did not think it appropriate to rely on the testimony of the PW9 Narain Singh, one of the witnesses of the alleged recovery, in view of the other witnesses of recovery becoming hostile and not supporting the prosecution version. The prosecution did not even challenge the order of the acquittal of the respondent in appeal. No precedent has also been cited on behalf of the petitioner to establish that in such circumstances as in the case of the respondent, acquittal can be construed as a technical acquittal. **(Para 34)**

The next plea raised on behalf of the petitioner for reopening the departmental proceedings against the respondent was on the ground that the two witnesses who had turned hostile were won over by the respondent. There is no presumption in law that if a witness has turned hostile, he/she has been

won over by the accused. In W.P.C.623/2009, titled as '**Govt. of NCT of Delhi and Others v. Jag Saran**' decided on 25th May, 2005, it was held that the accused cannot be saddled with the liability of the prosecution witness turning hostile, nor it can be assumed that the accused won over the said witness unless there are cogent facts and circumstances on the basis of which such inferences can be drawn. In Manu/DE/2455/2009, **Govt. of NCT of Delhi v. ASI Karan Singh**, the accused was acquitted on account of lack of evidence in support of charges of rape against him as all the witnesses including the prosecutrix had not supported the prosecution case. The Disciplinary Authority, however, invoking the Rule 12 (b) of the Delhi Police (P&A) Rules, 1980 initiated the departmental proceeding on the premise that the witnesses had been won over by the accused. The High Court had held that there was no finding recorded by the criminal Court that the witnesses who had turned hostile had been won over by the accused nor was there any material before the Disciplinary Authority to come to the conclusion that the witnesses had been won over by the accused so as to invoke Rule 12 (b) of the Delhi Police (P&A) Rules, 1980 and in the circumstances, the disciplinary proceedings against the accused were quashed. In **Khurshid Ahmad** (Supra) the prosecutrix had turned hostile and refused to identify the charged officer and the other persons, who had allegedly sexually assaulted her. The prosecutrix who had turned hostile was cross examined by public prosecutor. The Court had held that normally the witnesses which are won over are given up by the prosecution and not produced in the Court; and a witness who is produced in the Court but does not support the case of the prosecution, is termed as a 'hostile witness'. The law permits such witness to be asked questions by the party producing him which are generally put by the opposing party. The evidence of a witness who has turned hostile cannot be discarded in its entirety merely on the ground that the witness turned hostile. The evidence of a hostile witness can still be relied upon, if otherwise found trustworthy. Therefore, a witness

who turns hostile cannot be termed as a witness who has been won over. It was further held that such a witness is a witness who suppresses the truth and to elicit the truth, an opportunity is given to the opposing party to address questions in the nature of cross examination. Therefore, merely because a witness has turned hostile it does not lead to an inference that he had been won over by the opposing party unless there is finding to that effect by the competent Court or some other material to establish that fact. The order of the petitioners in the circumstances that the witnesses who had turned hostile had been won over cannot be sustained. **(Para 36)**

Important Issue Involved: (A) Department proceedings and Criminal proceedings can proceed simultaneously; however, if both are based on identical and similar set of facts and involve a complicated question of law and fact, the departmental proceedings may be stayed till the conclusion of criminal case.

(B) In cases of technical acquittal the prosecution may still be in a position to come back to the Court after rectifying the technical flaw. But if the acquittal is after appreciation of evidence adduced against the accused, the prosecution / State cannot go back and intiate another criminal case against the accused or bring more evidence on same charges.

(C) There is no presumption in law that if a witness has turned hostile he/she has been won over by the accused. Merely because a witness has turned hostile, it does not lead to an inference that he had been won over by the opposing party unless there is finding to that effect by the competent Court or some other material to establish that fact.

[Vi Ku]

APPEARANCES:

FOR THE PETITIONER : Mr. Bhupesh Narula, Advocate.

FOR THE RESPONDENT : Mr. Anil Singhal, Advocate.

CASES REFERRED TO:

1. *Harvir Singh* vs. *Union of India & Anr.,* 166(2010) DLT 474.
2. *ASI Ravinder Kumar and Ors.* vs. *Union of India & Ors,* MANU/DE/0174/2010.
3. *Joginder Singh* vs. *Government of NCT of Delhi & Ors.,* MANU/DE/1823/2010.
4. *Govt. of NCT of Delhi and Others* vs. *Jag Saran* W.P.C.623/2009.
5. *Govt. of NCT of Delhi* vs. *ASI Karan Singh* Manu/DE/2455/2009.
6. *Commissioner of Police & Ors* vs. *SI Karuna Sagar,* MANU/DE/2253/2009.
7. *Khurshid Ahmad* vs. *State of Haryana & Ors,* W.P(C) No.1689/2009.
8. *Dilwar Singh* vs. *Commissioner of Police & Anr,* MANU/DE/3203/2009.
9. *V. Jayapalan* vs. *Commissioner of Police & Ors,* 149(2008) DLT 674.
10. *Noida Entrepreneurs Assn.* vs. *Noida & Ors,* AIR 2007 SC 1161.
11. *G.M.Tank* vs. *State of Gujarat & Anr.,* 2006(3) SCT 252.
12. *Government of NCT of Delhi & Ors.* vs. *Satyadev Singh,* W.P(C) No.4431-33/2005 decided on 21st April, 2005.
13. *Vijender Singh* vs. *Commissioner of Police, Original Application* No.2640 of 2002 decided on 24th July, 2003.
14. *Govt. of NCT of Delhi & Ors* vs. *Rajpal Singh,* 100 (2002) DLT 385.

15. *Secretary, Ministry of Home Affairs & Anr* vs. *Tahir Ali Khan Tyagi,* MANU/SC/0540/2002.
16. *Ex Constable Vinod Kumar* vs. *Union of India through the Secretary, Ministry of Home Affairs & Anr.,* MANU/DE/1117/2002.
17. *HC Laxmi Chand* vs. *Joint Commissioner, Delhi Police & Ors.* O.A. No.2634 of 2002.
18. *Sh. Daya Nand & Anr* vs. *Commissioner of Police & Ors,* 93(2001) DLT 563.
19. *Gurdev Singh* vs. *State of Punjab & Anr,* (1975) 77 PLR 112.
20. *Inspector General of Police* vs. *Amrik Singh,* AIR 1973 Punjab & Haryana 314.
21. *Harbans Lal Nihal Chand* vs. *Superintendent of Police, Karnal & Ors.,* AIR 1969 Punjab & Haryana 131.

RESULT: Petition dismissed.

ANIL KUMAR, J.

1. The petitioner, Commissioner of Police, has challenged the order dated 25th May, 2005 passed by the Central Administrative Tribunal, Principal Bench, New Delhi, titled as **'H.C. Laxmi Chand v. Government of NCT of Delhi'**, allowing the original application of the respondent and setting aside the order of punishment dated 28th July, 2003 passed by the Disciplinary Authority awarding the forfeiture of 4 years of approved service permanently and also setting aside the Appellate order dated 11th October, 2004 dismissing the appeal of the respondent.

2. Brief facts to comprehend the controversies are that one Lal Bahadur S/o Gorakh Bahadur, a domestic servant of Sh.Shanker Lal Sangwani S/o Sh.Prahlad Rai Sangwani, a resident of Plot No.34, Kanwar Nagar, Jaipur, Rajasthan had committed theft in the house of his owner and had left for Delhi along with some jewelry and other articles.

3. The respondent along with Constable Sheel Bahadur was posted on Picket Duty at Farash Khan, S.N.Marg, Delhi on 28th May, 1995. They checked the belongings of Lal Bahadur who was allegedly in possession of the stolen goods. The allegation was made that the stolen

goods were taken by the respondent and Const. Sheel Bahadur from Lal Bahadur. A departmental enquiry was ordered against the respondent and Constable Sheel Bahadur by order dated 21st June, 1995 on the allegation that the respondent as well as Constable Sheel Bahadur on finding that Lal Bahadur was in possession of stolen goods, instead of producing him before the senior officers, had kept all the valuable articles and cash with themselves and let off Lal Bahadur without taking any legal action.

4. The alleged act of the respondent and the other Constable came to light when SI Narain Singh of Police Station Subhash Chowk, Jaipur (Rajasthan) visited the Police Station Lahori Gate, Delhi and arrested the respondent on the disclosure statement of and identification by Lal Bahadur who was the main accused in FIR No.83/1995 under Section 381 and 411 of the Indian Penal Code, P.S.Subhash Chowk, Jaipur.

5. It was alleged that the goods which were stolen by Lal Bahadur and which were subsequently taken from him by the respondent and Constable Sheel Bahadur, were allegedly recovered from them as well. The respondent and Constable Sheel Bahadur were accused of extortion and criminal misappropriation of stolen property and having committed a breach of trust and also having tarnished the image of the whole police department in the eyes of the public by failing to maintain the integrity and devotion to duty and in acting in a manner very unbecoming of police officers, which was also in contravention of CCS (Conduct) Rules, 1964.

6. The respondent was placed under suspension by DCP/North District by Order No.4008-30/HAP-N dated 9th June, 1995. The departmental enquiry was directed to be conducted on a day to day basis. Summary of allegations, list of witnesses and list of documents were prepared and supplied to the respondent. During the departmental proceeding, the respondent did not admit the allegations made against him. During the departmental proceedings on behalf of the department various witnesses were examined.

7. During the pendency of the departmental proceeding, the respondent and his co-defaulter filed an original application No.1636 of 1995 before the Tribunal against the departmental enquiry initiated against them. As per the directions of the Tribunal by order dated 1st July, 1996 the departmental enquiry was kept in abeyance, till the decision in the

criminal case as on the same charge and evidence the Criminal case was pending against the respondent.

8. The suspension case of the respondent was reviewed as FR No.53 and he was reinstated and his suspension was revoked vide order No.1057-76/HAP/North dated 13th February, 2001.

9. The criminal case No.234/1995, titled as **'State of Rajasthan v. Lal Bahadur & Ors.'** was decided by the Additional Chief Judicial Magistrate, Jaipur by order dated 22nd January, 2001 and he exonerated the respondent of charges under Section 414 and 411 of the Indian Penal Code. Learned Magistrate held that the main issue in the case was whether stolen goods were recovered from the respondent and Constable Sheel Bahadur. The main accused Lal Bahadur who had allegedly stolen the goods from his owner had been declared a proclaimed offender. The Magistrate perused the testimonies of PW1 Mahesh Kumar, PW2 Smt. Mayawati, PW3 Shankar Lal, PW4 Prema Ram, PW5 Bhori Lal, PW6 Vijay, PW7 Ramesh Kumar, PW8 Anoop Singh, PW9 Narain Singh, PW10 Ram Krishan and PW11 Bijender and held that on the basis of the testimonies on these witnesses nothing could be proved against the respondent and co-accused Constable Sheel Bahadur. The statement of PW9 Narain Singh, the witness of the alleged recovery was disbelieved, as the other witnesses of recovery PW7 Ramesh Kumar and PW8 Anoop Singh had turned hostile and refuted the allegations of the prosecution that the recovery had been made from the respondent. It was held that there was no evidence available on the records which could corroborate the statement of PW9 Narain Singh and consequently, it was held that the prosecution had failed to prove the charges against the respondent and therefore the co-accused Constable Sheel Bahadur as well as the respondent were acquitted.

10. After acquitting of the respondent, the petitioner reopened the disciplinary proceedings which were in abeyance under the provisions of Rule 12 of the Delhi Police (Punishment & Appeal) Rules, 1980. The Rule 12 of Delhi Police (Punishment & Appeal) Rules, 1980 is as under:-

> ''12. Action following judicial acquittal- When a police officer has been tried and acquitted by a criminal court, he shall not be punished departmentally on the same charge or on a different charge upon the evidence cited in the criminal case, whether actually led or not unless:-

(a) the criminal charge has failed on technical grounds, or

(b) in the opinion of the court, or on the Deputy commissioner of Police the prosecution witnesses have been won over; or

(c) the court has held in its judgment that an offence was actually committed and that suspicion rests upon the police officer concerned; or

(d) the evidence cited in the criminal case discloses facts unconnected with the charge before the court which justify departmental proceedings on a different charge; or

(e) additional evidence for departmental proceedings is available.''

The said rule does not permit departmental proceedings in a case where an employee is acquitted in criminal case after his trial on the same evidence. However, the said rule carves out five exceptions to this general principle.

11. By order dated 17th May, 2001 passed by the Deputy Commissioner of Police, North District, Delhi, Rule 12 was invoked to conclude the departmental proceedings against the respondent. While invoking Rule 12, it was held that during trial two witnesses had turned hostile as they were won over by the respondent and hence the acquittal was on technical grounds. Consequently, it was ordered that the departmental enquiry in respect of the respondent be reopened. In the enquiry proceedings three witnesses namely, Constable Ram Krishan, HC Prema Ram and SI Narain Singh were not examined. According to the allegations of the petitioner, despite sincere efforts made by the enquiry officer, these three witnesses could not be examined as they were not found residing at the addresses given by them. The petitioner further asserted that on the basis of the testimonies of the PWs, the enquiry officer concluded that the charges framed against the respondent stood proved and submitted its findings to the Disciplinary Authority. Thereafter the Disciplinary Authority served copies of the same on the respondent and Constable Sheel Bahadur by order dated 6th February, 2002 with a direction to produce their defense witnesses as well as defense statement. Three defense witnesses were examined on behalf of the respondent. On the basis of the testimonies recorded before the Inquiry Officer, and the defense representations it was held by the Disciplinary Authority that the

charges against the respondent and his co-defaulter were proved. The Disciplinary Authority also held that in the criminal case the respondent was acquitted only on account of certain witnesses turning hostile.

12. A copy of the enquiry report was provided to the respondent and after considering the representation made by the respondent against the enquiry report, the Disciplinary Authority imposed the punishment of forfeiture of 4 years of approved service permanently by order dated 28th July, 2003. The Disciplinary Authority referred to the testimonies and observed that the seizure memo was prepared in the barrack of Police Station Lahori Gate, Delhi, which was signed by IO Ramesh, Anoop Singh, the respondent, Constable Sheel Bahadur and Constable Prema Ram. It was held that though Ramesh and Anoop Singh had appeared during the criminal trial, they had turned hostile and they could not be traced in the departmental proceedings, however Constable Prema Ram had admitted and upheld the signatures and contents of the seizure memo.

13. Aggrieved by the punishment awarded by the Disciplinary Authority, the respondent preferred an appeal to the Appellate Authority, Joint Commissioner of Police/Northern Range. The appeal was dismissed by order dated 12th July, 2002 by the Appellate Authority. Against the order of the punishment and the dismissal of appeal by order dated 12th July, 2002, the petitioner filed an Original Application being O.A. No.2634 of 2002, titled as '**HC Laxmi Chand v. Joint Commissioner, Delhi Police & Ors.**'. The Administrative Tribunal vide judgment dated 26th May, 2003 quashed the order of the punishment, as well as, the order of the Appellate Authority dated 12th July, 2002 and remitted the matter back to the Disciplinary Authority for reconsidering the matter from the stage the penalty order was passed.

14. Pursuant to remitting the matter back to the Disciplinary Authority and on considering the PHQ's circular dated 16th April, 2002 relating to the clarification of Rule 8 (d)(ii) of the Delhi Police (Punishment & Appeal) Rules, 1980, the matter was reconsidered and by order dated 28th July, 2003 the punishment of forfeiture of 4 years of approved service permanently was awarded to the petitioner resulting in the reduction of his pay from Rs.4050/- per month to Rs.3710/- per month in the time scale of Rs.3200-85-4900/- and his suspension period from 6th June,

1995 to 12th February, 2001 was also ordered to be treated as period not spent on duty for all intents and purposes.

15. Against the order dated 28th July, 2003, the petitioner filed an appeal which was dismissed by the Appellate Authority by order dated 11th October, 2004.

16. Aggrieved by the order dated 28th July, 2003 passed by the Disciplinary Authority and order dated 11th October, 2004 passed by the Appellate Authority dismissing the appeal, the respondent filed an Original Application being O.A. No. 2664/2004 under Section 19 of the Administrative Tribunal Act, 1956 contending inter-alia, that the respondent was acquitted by the criminal court on merits and not on any technical ground. It was also asserted that the criminal court did not give any finding that the witnesses were won over by the respondent and they had turned hostile on account of respondent winning them. The respondent contended before the Tribunal that merely because the witnesses had turned hostile, it would not lead to a conclusive inference that the witnesses had been won over by the respondent. Consequently, the order dated 17th May, 2001 of reopening the enquiry under Rule 12 of Delhi Police (Punishment & Appeal) Rules, 1980 was not in consonance with the said provision, as neither was it a criminal case against the respondent dismissed on technical grounds, nor was there any basis for the Deputy Commissioner to infer that the prosecution witnesses had been won over by the respondent. The order dated 17th May, 2001 passed by the Deputy Commissioner of Police, North District reopening the enquiry under Rule 12 of Delhi Police (Punishment & Appeal) Rules, 1980 is as under:-

> ''A joint departmental enquiry against HC Laxmi Chand No.77/N and Const. Sheel Bahadur No.736/N ordered vide this office order No.4213-50/HAP/North dated 21.06.95 was held in abeyance vide this office order No.7719-22/HAP/North dated 01.07.96 till the finalization of case FIR No.83/95 u/s 381/411 IPC PS Subhash Chowk, Jaipur, Rajasthan, registered against them. The case has been finalized by the court of Sh. Brijesh Purohit, RJS, Jaipur, Rajasthan. **During trial two witnesses turned hostile as they were won over by the defaulters. The acquittal is based on technical grounds.** The DE against HC Lalxmi Chand No.77/N is hereby re-opened in terms of Rule 12 (A) of Delhi Police (Punishment & Appeal) Rules, 1980 and entrusted to Inspr. Ganga Singh, DIU/North who will submit his findings to the under signed expeditiously. Const. Sheel Bahadur No.736/N, the co-defaulter has already been dismissed from service in another DE vide this office order No.10975/HAP/North dated 8-12-98. The DE in respect of Const. Sheel Bahadur No.736/N, will be re-opened in case he comes in service on some appeal/revision/ tribunal orders etc.
>
> (SANDEEP GOEL)
> DEPUTY COMMISSIONER OF POLICE,
> NORTH DISTRICT, DELHI''

17. The respondent contended that since he was acquitted of the charges on merit, it was against the principle of natural justice to punish the respondent on the same allegations and charges based on the same evidence from which he had been exonerated by a competent Court of law. The respondent also challenged the punishment imposed upon him by order dated 28th July, 2003 on the ground that the material witnesses, namely Ramesh Kumar, Anoop Singh and accused Lal Bahadur on whose alleged disclosure statements the respondent was arrested, were not examined. The respondent contended that though these witnesses were available, they were deliberately not examined as the department knew that they would not support the false allegations levelled against the respondent.

18. The Original Application filed by the respondent before the Central Administrative Tribunal, Principal Bench was contested by the petitioner contending inter-alia that after reopening the disciplinary proceedings against the respondent under Rule 12 of the Delhi Police (Punishment & Appeal) Rules, 1980, the enquiry was entrusted to Inspector Ganga Singh who had examined two witnesses on behalf of the department and the opportunity to cross-examine the said witnesses was given to the respondent and Constable Sheel Bahadur. It was asserted on behalf of the petitioner that 7 PWs were to be examined but three witnesses of the department did not join the enquiry despite efforts made by the Enquiry Officer, since they were not found residing at the address given by them. It was contended that on the basis of the evidence on record, the charges were framed and the respondent had submitted the list of his witnesses

as well as the defense statement. The statement of the three defense witnesses were recorded and on the basis of the evidence on record and on perusing the judgment of the criminal court in the case of FIR 83/95, under Sections 381/411 of the Indian Penal Code, PS Subhash Chowk, Jaipur (Rajasthan), the Enquiry Officer held that the charge against the respondent was proved. The Disciplinary Authority too agreed with the findings of the enquiry officer and awarded the forfeiture of 4 years of approved service permanently and appeal filed against the order of punishment was also dismissed.

19. The petitioner contended that the acquittal of the applicant in the criminal case was not on merit. Regarding the allegation that the witnesses had been won over, nothing was alleged in the reply filed before the Tribunal nor any explanation and the reasons to come to such a conclusion, except pleading in para 5.3 that there was nothing amounting to violation of Rule 12 of Delhi Police (Punishment & Appeal) Rules, 1980 in initiating and finalizing the departmental proceeding against the respondent. The Tribunal after considering the pleas and contentions of the parties, by order dated 25th May, 2005 allowed the original application of the respondent holding that Rule 12 of the Delhi Police (Punishment & Appeal) Rules, 1980 does not permit the opening of the departmental proceedings where an employee has been acquitted by a criminal court, unless the exceptions carved out in the said rule are made out in the facts and circumstances of the case. The Tribunal also relied on the case of **Vijender Singh v. Commissioner of Police,** Original Application No.2640 of 2002 decided on 24th July, 2003 holding that if the decision is arrived at on the basis of the evidence on record in such a case if the charge is not substantiated or the evidence is insufficient, it will not be acquittal on technical grounds. It was held that once the evidence had been allowed to be produced and is not forthcoming, it would be an acquittal rather than an acquittal on technical grounds. As to what acquittal on technical ground means the Tribunal held that failure on technical grounds would be if an unauthorized person files a complaint or if there is no proper sanction or if the report has not been lodged by a competent authority or on account of any procedural flaw which may prompt the court to put an end to prosecution case, then only it will be an acquittal on the technical grounds. It was further held that in such cases prosecution or the State may still be in a position to come to the court after removing the said technicalities. However, where the evidence is allowed and for

some reasons it does not prove the charge framed or the testimonies of the witnesses who turned hostile for some reasons is not reliable, the prosecution and the State cannot come and file another case on the same charge. If the criminal court takes note of the evidence on record and for want of evidence holds that the charge is not proved it will not be an acquittal on technical ground and the exception carved out under Rule 12 (a) of the Delhi Police (Punishment & Appeal) Rules, 1980 cannot be invoked. On perusing the order of the criminal court, the Tribunal had held that the order dated 22nd January, 2001 was on perusal of the evidence and the acquittal pursuant to the perusal of the evidence by the criminal Court could not be construed as an acquittal on technical grounds. The Tribunal had further held that if the statement of Narain Singh PW9 could not be relied on without any corroboration, it will not be construed as a dismissal of the criminal case on technical grounds. In para 10 of the judgment impugned by the petitioner, the Tribunal had held as under:-

> ''10. Identical would be the position herein. We have already given the brief resume pertaining to the acquittal of the appellant at Jaipur. Perusal of the order passed by the Learned Court clearly reveals that the acquittal was on appreciation of evidence. The Learned Court did not deem it appropriate to convict the applicant on the statement of Narain Singh, PW-9 because there was no corroboration forthcoming to the said statement. Therefore, it cannot be taken that the criminal case failed because of any technical ground to which we have referred to above already but it failed because the Learned Court appreciated the evidence of the witnesses and held that the charge stood not proved. Resultantly, the contention of the respondents cannot be accepted.''

The Tribunal, in the circumstances, had set aside the order of the Disciplinary Authority dated 28th July, 2003 and the Appellate Authority order dated 11th October, 2004 on the ground that the disciplinary proceedings could not be reopened under Rule 12 of Delhi Police (Punishment & Appeal) Rules, 1980.

20. The petitioner has challenged the order of the Tribunal dated 25th May, 2005 in the present writ petition inter-alia on the grounds that the charges leveled against the respondent and Constable Sheel Bahadur amounted to gross misconduct, dishonesty and dereliction in performance

of duty by the respondent in contravention of the CCS Conduct Rules, 1964 which were not looked into or probed by the ACJM, Jaipur and therefore, the acquittal of the respondent was on different charges and hence it would not debar the petitioner from holding the departmental enquiry. It was further contended that the standard of proof required in disciplinary proceedings is different from the standard of proof required in criminal cases. Relying on Rule 12 of the Delhi Police (Punishment & Appeal) Rules, 1980, it was contended that the said rule could be invoked and departmental proceeding could be reopened if in the opinion of the Deputy Commissioner of Police the prosecution witnesses have been won over. It was contended that the prosecution witnesses Sh.Anoop Singh and Sh.Ramesh Chand had turned hostile as they had been won over by the respondent and therefore, under Rule 12 of the Delhi Police (Punishment & Appeal) Rules, 1980 the departmental proceeding could be reopened. Relying on the statement of PW9 Narain Singh, it was contended that his testimony unambiguously disclosed the facts which justified the departmental proceeding on the different charges of breach of trust, dishonesty, dereliction of duty and loss of confidence etc. It was also contended that the additional evidence during the departmental enquiry was sufficient to prove the charges levelled against the respondent. Refuting the inferences drawn by the Tribunal that the statement of PW9 Narain Singh was not corroborated by PW7 Ramesh Chand and PW8 Anoop Singh, resulting in acquittal of the respondent, it is contended that it could only be inferred as an acquittal on technical grounds as corroboration was not required in respect of the statement of PW9 Narain Singh in peculiar circumstances. The petitioner also contended that the failure of the criminal charges on technical ground has not been defined and in such eventuality, acquittal on technical grounds depends on the facts and circumstances of each individual case. The counsel for the petitioner has relied on **Harbans Lal Nihal Chand v. Superintendent of Police, Karnal & Ors.,** AIR 1969 Punjab & Haryana 131; **Gurdev Singh v. State of Punjab & Anr,** (1975) 77 PLR 112; **Inspector General of Police v. Amrik Singh,** AIR 1973 Punjab & Haryana 314; **Sh. Daya Nand & Anr v. Commissioner of Police & Ors,** 93(2001) DLT 563; **Govt. of NCT of Delhi & Ors v. Rajpal Singh,** 100 (2002) DLT 385; **Secretary, Ministry of Home Affairs & Anr v. Tahir Ali Khan Tyagi,** MANU/SC/0540/2002; **Ex Constable Vinod Kumar v. Union of India through the Secretary, Ministry of Home Affairs &**

Anr., MANU/DE/1117/2002; **Noida Entrepreneurs Assn. v. Noida & Ors,** AIR 2007 SC 1161; **V.Jayapalan v. Commissioner of Police & Ors,** 149(2008) DLT 674; **Dilwar Singh v. Commissioner of Police & Anr,** MANU/DE/3203/2009; **Harvir Singh v. Union of India & Anr.,** 166(2010) DLT 474; **ASI Ravinder Kumar and Ors v. Union of India & Ors,** MANU/DE/0174/2010 and **Joginder Singh v. Government of NCT of Delhi & Ors.,** MANU/DE/1823/2010.

21. The respondent contested the petition on the same grounds which were raised before the Tribunal and relied on the pleas and contentions raised in the original application before the Tribunal. The counsel for the respondent has relied on **Government of NCT of Delhi & Ors v. Satyadev Singh,** W.P(C) No.4431-33/2005 decided on 21st April, 2005; **G.M.Tank v. State of Gujarat & Anr,** 2006(3) SCT 252; **Commissioner of Police & Ors v. SI Karuna Sagar,** MANU/DE/2253/2009; **Khurshid Ahmad v. State of Haryana & Ors,** W.P(C) No.1689/2009 decided by Punjab & Haryana High Court on 16th July, 2009; **Govt. of NCT of Delhi v. ASI Karan Singh,** MANU/DE/2455/2009 and **Govt. of NCT of Delhi & Ors. v. Jag Saran,** W.P(C) No.623/2009 decided on 25th May, 2010.

22. This Court has heard the learned counsel for the parties in detail, as well as, perused the record which was before the Tribunal and also directed the petitioner to produce the copies of the testimonies of PW7 and PW8, namely Ramesh Chand and Anoop Singh, witnesses of the recovery who had turned hostile in the criminal case. The precedents relied on by the counsel for the petitioners are distinguishable. None of the precedents have laid down that if the acquittal of an accused is on account of insufficiency of evidence because of witnesses turning hostile, then it has to be construed as technical acquittal.

23. In **Harbans Lal Nihal Chand** (Supra) the employee was not punished departmentally on the same charges and so the Court had not gone into the question of whether the different charges upon which he was punished was based ''upon the evidence sought in the criminal case'' or not. It was held that the case fell within the category of cases excluded by clauses (a), (b) and (c) from the purview of sub rule 1 of the Rule 16.3 as the criminal charges had failed because the investigating officer did not prove the handwriting of the defaulter by an expert

evidence and so it was agreed that this was an omission of a technical nature during the investigation and thus it was held that the employee had escaped conviction in the criminal proceedings merely because of a technical flaw in the investigation of the case. In **Gurdev Singh** (Supra) the question involved was whether the acquittal of the employee under Section 247 of the Code of Criminal Procedure, barred the institution of the departmental proceeding against him. It was admitted in that case that the charges and the evidence in support of the prosecution and in the departmental enquiry were the same, as in the criminal complaint. The Criminal complaint was however dismissed in default and it consequently led to the acquittal of the delinquent employee. In the criminal case the complainant had not appeared on the date of hearing, as a result of the absence of the complainant, the order of the acquittal had to be passed under Section 247 of the Code of Criminal Procedure. Thus it was held that it was a case where the criminal charge fell on technical ground as the charge had fallen on account of the absence of complainant on the date of hearing and not because the charge had been enquired into, but had not been substantiated. It was also held that another trial could be held in the criminal Court against the employee on the same charge, as the acquittal under Section 247 of the Code of Criminal Procedure would not bar the departmental proceedings being taken against him in respect of the same charge and on the same evidence. In **Inspector General of Police v. Amrik Singh** (Supra) the criminal charge against the employee had failed on a technical ground because the Magistrate had refused to record the evidence of the two prosecution witnesses who were available and without recording their evidence he had expressed the opinion, that he would not convict the respondent on their testimony. As a result of which the employee was acquitted since the available prosecution evidence was shut out by the Magistrate and it was not because no evidence had been led against him as the Magistrate refused to record any evidence in the case. In the circumstances, it was held that the acquittal of the employee by the Magistrate was not only contrary to the procedure prescribed in the Code of Criminal Procedure but was also without jurisdiction. In the circumstances, it was held that the criminal charge against the employee fell on a technical ground and the disciplinary action could be taken against the delinquent under clause (a) of Rule 16.3 (1) of the Punjab Police Rules, 1934.

24. In **Daya Nand and Anr** (Supra) decided by a Division Bench

of this Court it was held that the order of discharge in a criminal case does not amount to an order of acquittal. The distinction was culled from Section 227 and 232 of the Criminal Procedure Code itself. In the circumstances it was held that Rule 12 of the Delhi Police (P&A) Rules, 1980 could be invoked for initiating departmental proceedings against the delinquent employee. In **Government of NCT of Delhi & Ors v. Rajpal Singh** (Supra) a Division Bench of this Court had held that only in the event that the departmental proceedings had not been initiated and/or the same had not culminated in the imposition of punishment, could Rule 12 of Delhi Police (P&A) Rules, 1980 be attracted. It was further held that only because an appeal was pending against the order passed in the departmental proceedings it could not mean that the order of punishment passed by the Disciplinary Authority remained under animated suspension and that for all intent and purport the same would remain operative. It was held that the principle that an appeal is a continuation of a proceeding has nothing to do with the interpretation of Rule 12 as the same has to be interpreted literally.

25. In **Secretary, Ministry of Home Affairs and Anr v. Tahir Ali Khan Tyagi** (Supra) the Supreme Court had held that departmental inquiry and criminal proceeding can run simultaneously and departmental proceeding can also be initiated even after acquittal in a criminal proceeding, particularly when the standard of proof in a criminal proceeding is completely different from the standard of proof that is required to prove the delinquency of a Government servant in a departmental proceeding. It was further held that under Rule 12 of Delhi Police (Punishment and Appeal) Rules, 1980 departmental proceeding could also be initiated, if in the opinion of the Court the prosecution witnesses are found to be won over. In **Ex Constable Vinod Kumar** (Supra) the employee was acquitted not on the ground that there was no evidence against him but on the basis of a compromise affected between the complainant and the employee. On account of the compromise the criminal Court compounded the offence. In the appeal the Appellate Court considered the factum of acquittal, however declined to set aside the punishment as the employee was acquitted only on the basis of the compromise. In the circumstances it was held that departmental action could be taken against the employee and therefore, the punishment of dismissal from the service for his corrupt activities was upheld. It was held in the circumstances that Rule 12 of Delhi Police (P&A) Rules, 1980 was not applicable as the rule

applies to a case where a police officer has been tried and acquitted by a criminal Court and is subsequently punished departmentally on the same charge or a different charge on the same evidence cited in the criminal case whether actually led or not. In the said case the police officer was proceeded against departmentally and his services were terminated by way of punishment, before he was acquitted by the criminal Court not on merits but on the basis of a compromise and compounding of the offence.

26. In **Noida Entrepreneurs Assn.** (Supra) dropping of enquiry on the ground that enquiry was not required after consideration of CBI enquiry report was held to be illegal and the order dropping the enquiry was quashed. It was held that there would be no bar to proceed simultaneously with the departmental enquiry and trial of a criminal case, unless the charge in the criminal trial is of grave nature involving complicated questions of fact and law. In **V.Jayapalan** (Supra) the police official was acquitted in the criminal case based on technical grounds due to non compliance with Sections 42 and 50 of NDPS Act. In these circumstances it was held that the disciplinary proceedings could be initiated under Rule 12 of the Delhi Police (P&A) Rules, 1980 and that the departmental proceeding was not without jurisdiction. In Dilwar Singh (Supra) a Division Bench of this Court had held that departmental proceedings and proceedings in a criminal case can proceed simultaneously, as there is no bar in their being conducted simultaneously, though separately. However, if departmental proceedings and criminal cases are based on identical and similar set of facts and involve a complicated question of law and fact, then it would be desirable to stay the departmental proceeding till the conclusion of the criminal case. In this case the police official was dealt with departmentally and dismissed from service, however, in the criminal case he was acquitted subsequently in appeal on account of delay in registration of FIR. In the circumstances it was held that the acquittal on account of delay in registration of FIR would not be a valid ground to absolve the police official of the consequences of the disciplinary proceedings.

27. In **Harvir Singh** (Supra) an order was passed under Article 311(2) of the Constitution of India dispensing with the departmental enquiry on the ground that it was not reasonably practicable to hold such an enquiry. The delinquent in this case was working as a constable and

he was involved in the theft of several cars. The criminal case filed against the delinquent official, however, resulted into either his discharge or acquittal and based on the discharge/acquittal the police official sought setting aside of his order of dismissal and his reinstatement in service. The application of the police official was rejected and aggrieved by this an original application was filed, which was allowed by the Tribunal and the Tribunal had ordered the reinstatement of petitioner in the service. However no orders were passed with regard to consequential benefits. Before the High Court the grievance of the petitioner was limited to the grant of consequential benefits. On considering the matter, the High Court was of the view that the order of reinstatement passed by the Tribunal though was erroneous, however, did not perceive it to be prudent to interfere with the order of the Tribunal since the police official had already been reinstated pursuant to the order of the Tribunal and had been working for 15 years and there was nothing against him during his working for 15 years. In these circumstances, the order of the Tribunal setting aside the order of dismissal passed under Article 311(2) (b) was not interfered with.

28. In **ASI Ravinder Kumar** (Supra) it was held that there were no grounds to stay the departmental proceedings against the delinquent police official against whom the criminal proceedings were also pending. Considering the facts and circumstances of the case, it was held that as the purpose of departmental enquiry and of criminal prosecution is different and on distinct aspects, they can be allowed to continue simultaneously, except where complicated questions of law are involved in the criminal trial and in the departmental proceedings. In **Joginder Singh** (Supra) it was noticed that the acquittal of the police official was not a case of clean acquittal as the observations made while acquitting reflected that there was manipulation in the certificate which was produced by the police official for availing the employment with Delhi Police. In the circumstances, it was held that the police official was not entitled for the benefit of Rule 12 of Delhi Police (P&A) Rules, 1980. Consequently the pleas and contentions raised on behalf of the petitioners are not supported by any of the precedents relied by them.

29. Per contra in **Satyadev Singh** (Supra), relied on by the counsel for the respondent, a Division Bench of this Court had held that the charged officer was acquitted on appreciation of evidence by the Session

Judge who had held that the evidence was insufficient to convict the charged officer and had acquitted him by giving him the benefit of doubt. Considering the acquittal of the charged officer on giving him the benefit of doubt, it was held that none of the exceptions as provided in Rule 12 of the Delhi Police (P&A) Rules, 1980 were attracted. In the said case clause (b) of Rule 12 was specifically and solely relied on, however it was held that the said exception was not attracted, on the ground that though the witness had turned hostile in his examination, however, he had supported the prosecution case during the cross examination. Therefore, it could not be alleged that the said witness was won over by the charged officer. In **G.M.Tank** (Supra) a public servant had been charged criminally and departmentally for possessing assets disproportionate to his known source of income. In the departmental enquiry he was found guilty and the order of dismissal was passed, however, he was acquitted in the corruption case. Witnesses in the departmental enquiry and in the criminal case were the same and in the circumstances order of dismissal from service was set aside without back wages as the charged officer had already retired. The Supreme Court had held that normally where the accused is acquitted honorably and completely exonerated of the charges it would not be expedient to continue the departmental enquiry on the very same charges on the same set of facts and evidence. In the said case the order of dismissal was passed on 21st October, 1982 whereas the Criminal Court had acquitted him on 30th January, 2002. The Supreme Court had held that though the findings recorded in the domestic enquiry was found to be valid by the Courts below, when there is an honorable acquittal of the employee during the pendency of proceeding challenging the dismissal, the same requires to be taken note of.

30. In **SI Karuna Sagar** (Supra) a Division Bench had held that after the criminal Court examined all the witnesses and thereafter closed the evidence, since no material had come out from the witnesses who had already been examined and, therefore, even the statement of formal witnesses and the statement of accused was not recorded under Section 313 of Criminal Procedure Code and after going through the statements under Section 161 of Criminal Procedure Code and the statements recorded before the trial Court and after declaring the witnesses hostile and considering cross examination of hostile witnesses by public prosecutor,

if nothing had come out from the proceedings before the trial Court, then there could be no rationale to conduct departmental enquiry as nothing adverse would come out against the charged officer from the same set of witnesses. The Court had noticed that it was not the case of the department that they have some additional documents in possession which they would rely upon in the departmental enquiry and in the circumstances no further departmental action could be taken against the charged officer and thus the writ petition filed by the department against the order of the Tribunal setting aside the decision of the department to proceed against the charged officer under Section 12 of the Delhi Police (P&A) Rules, 1980 was dismissed.

31. In **Khurshid Ahmad** (Supra) on perusal of the copy of the judgment of acquittal by the criminal Court, it had transpired that even the prosecutrix had turned hostile and refused to identify the charged officer and the other persons, who had allegedly sexually assaulted her. The prosecutrix who had turned hostile was cross examined by public prosecutor and even the father of the prosecutrix had not stated much against the charged officer. The Court had held that normally, the witnesses which are won over are given up by the prosecution and not produced in the Court, and a witness who is produced in the Court but does not support the case of the prosecution, is termed as a 'hostile witness'. The law permits such witness to be asked questions by the party producing him which are generally put by the opposing party. The evidence of a witness who has turned hostile cannot be discarded in its entirety merely on the ground that the witness turned hostile. The evidence of a hostile witness can still be relied upon, if otherwise found trustworthy. Therefore, it was held that it would be difficult to brand a witness who turns hostile, to be a witness who has been won over. It was further held that such a witness is a witness who suppresses the truth and to elicit the truth, an opportunity is given to the opposing party to address questions in the nature of cross examination. **It was therefore, held that merely because a witness has turned hostile it does not lead to an inference that he had been won over by the opposing party unless there is finding to that effect by the competent Court or some other material to establish that fact.** In the said case it was held that since the evidence in the criminal trial and the version in the departmental proceedings were the same, therefore, there being no difference, the delinquent officer could not be made to suffer a different finding which is not even supported

by the evidence led in the departmental proceedings. Similarly in **ASI Karan Singh** (Supra) a Division Bench of this Court had held that while acquitting the delinquent officer the Sessions Judge did not record any finding that the witnesses were won over and, therefore, findings recorded by the disciplinary authority that the prosecutrix and her family members were won over was without any basis. It was further held that if the guilty police officer is tried and acquitted by the criminal Court, he cannot be punished departmentally on the same charge or for a different charge based on the same evidence which is cited in the criminal case unless acquittal has resulted on the grounds as mentioned in Clauses (a) to (e) of Rule 12 of Delhi Police (P&A) Rules, 1980. In **Jag Saran** (Supra) since the allegations in the FIR against the delinquent officer were the same as the charges made against him, the disciplinary inquiry was kept in abeyance till the finalization of the criminal proceedings. Rather the charged officer was acquitted by the criminal Court also on account of some of the prosecution witnesses turning hostile. This Court had held that the department had not been able to substantiate that the prosecution witnesses who had turned hostile, had been won over by the charged officer and, therefore, the department could not initiate the departmental proceedings under Rule 12(b) of the said Rules.

32. The respondent had been charged in the departmental proceeding for the same allegation for which he was charged in the criminal trial. The witnesses who were examined in the criminal case, some of them were also examined in the departmental proceedings, after acquittal of the respondent in the criminal case. The witnesses who had turned hostile in the criminal case were not examined on account of the fact that they could not be allegedly traced by the petitioners despite alleged efforts made by them. The departmental proceedings which were initiated against the respondent were directed to be kept in abeyance as the criminal case against the respondent was based on identical and similar set of facts and the charges in the departmental proceedings and before the criminal court against the respondent were almost identical.

33. The criminal Court acquitted the respondent holding that the main accused Lal Bahadur is absconding and there was no evidence against the respondent from the statement of PW1 Mahesh Kumar, PW2 Smt.Mayawati, PW3 Shankar Lal, PW4 Prema Ram, PW5 Bhori Lal, PW6 Vijay, PW10 Ram Krishan & PW11 Bijender on the basis of which

anything could be proved against the respondent and establishing his culpability. The statement of PW9 Narain Singh, alleged to be a witness of recovery was not relied on since the other important witnesses of recovery, namely, PW7 Ramesh and PW8 Anoop Singh had turned hostile and had not supported the story of the prosecution regarding recovery of stolen articles from the respondent. In the circumstances, it was held that there was no evidence available on the record which could corroborate the statement of PW9 Narain Singh, and thus, the prosecution failed to prove the charge against the respondent and consequently, acquitted the respondent from the charges under Section 414 and 411 of the Indian Penal Code. The petitioners even after the acquittal of the respondent by the criminal court, revived the departmental proceedings by invoking the exceptions carved out under Section 12 of the Delhi Police (P&A) Rules, 1980 contending that the criminal charge had failed on technical ground and that the prosecution witnesses had been won over by the respondent.

34. In the order dated 17th May, 2001 except stating that the acquittal is based on technical grounds, no reason had been given as to why the acquittal is allegedly based on the technical ground. The tribunal while setting aside the order passed by the petitioner reopening the disciplinary proceedings relying on the exception in Rule 12 had referred to a decision of another Coordinate Bench in OA No.2640/2002, titled as **'Vijender Singh v. Commissioner of Police'** decided on 24th July, 2003 where it was held that once evidence had been allowed to be produced and the evidence adduced is not sufficient, then in such circumstances, the acquittal of the accused would be an acquittal and not an acquittal on technical ground. Citing some of the instances of technical acquittal it was held that it would be acquittal on technical grounds, if an unauthorized person files a complaint or the petition fails before a court or it fails on technical aspect e.g. there is no proper sanction, or the report has not been lodged by the competent authority, or there is such other procedural flaw which may prompt the criminal Court to put an end to the prosecution case. Then in such circumstances acquittal will be a technical acquittal. However, in such cases of technical acquittal the prosecution may still be in a position to come back to the court after rectifying the technical flaw. But if the acquittal is after appreciation of evidence adduced against the accused, the prosecution or State cannot go back and initiate another criminal case against the accused or bring

more evidence on the same charges. The learned counsel for the petitioner has not been able to demonstrate in the facts and circumstances that the acquittal of the respondent is on technical grounds, even though the criminal court had perused the evidence of all the witnesses and did not find sufficient evidence to conclude on the guilt of the respondent. The Court did not think it appropriate to rely on the testimony of the PW9 Narain Singh, one of the witnesses of the alleged recovery, in view of the other witnesses of recovery becoming hostile and not supporting the prosecution version. The prosecution did not even challenge the order of the acquittal of the respondent in appeal. No precedent has also been cited on behalf of the petitioner to establish that in such circumstances as in the case of the respondent, acquittal can be construed as a technical acquittal.

35. Consequently, the inferences on behalf of the petitioner in its order dated 17th May, 2001 invoking sub section (a) of Rule 12 of the Delhi Police (Punishment & Appeal) Rules, 1980 cannot be sustained and it cannot be held that the acquittal of the respondent was on technical grounds so as to give jurisdiction to the petitioner to re-open the departmental proceedings which were kept in abeyance on account of the pendency of the criminal case against the respondent on the same charges.

36. The next plea raised on behalf of the petitioner for reopening the departmental proceedings against the respondent was on the ground that the two witnesses who had turned hostile were won over by the respondent. There is no presumption in law that if a witness has turned hostile, he/she has been won over by the accused. In W.P.C.623/2009, titled as '**Govt. of NCT of Delhi and Others v. Jag Saran**' decided on 25th May, 2005, it was held that the accused cannot be saddled with the liability of the prosecution witness turning hostile, nor it can be assumed that the accused won over the said witness unless there are cogent facts and circumstances on the basis of which such inferences can be drawn. In Manu/DE/2455/2009, **Govt. of NCT of Delhi v. ASI Karan Singh**, the accused was acquitted on account of lack of evidence in support of charges of rape against him as all the witnesses including the prosecutrix had not supported the prosecution case. The Disciplinary Authority, however, invoking the Rule 12 (b) of the Delhi Police (P&A) Rules, 1980 initiated the departmental proceeding on the premise that the witnesses

had been won over by the accused. The High Court had held that there was no finding recorded by the criminal Court that the witnesses who had turned hostile had been won over by the accused nor was there any material before the Disciplinary Authority to come to the conclusion that the witnesses had been won over by the accused so as to invoke Rule 12 (b) of the Delhi Police (P&A) Rules, 1980 and in the circumstances, the disciplinary proceedings against the accused were quashed. In **Khurshid Ahmad** (Supra) the prosecutrix had turned hostile and refused to identify the charged officer and the other persons, who had allegedly sexually assaulted her. The prosecutrix who had turned hostile was cross examined by public prosecutor. The Court had held that normally the witnesses which are won over are given up by the prosecution and not produced in the Court; and a witness who is produced in the Court but does not support the case of the prosecution, is termed as a 'hostile witness'. The law permits such witness to be asked questions by the party producing him which are generally put by the opposing party. The evidence of a witness who has turned hostile cannot be discarded in its entirety merely on the ground that the witness turned hostile. The evidence of a hostile witness can still be relied upon, if otherwise found trustworthy. Therefore, a witness who turns hostile cannot be termed as a witness who has been won over. It was further held that such a witness is a witness who suppresses the truth and to elicit the truth, an opportunity is given to the opposing party to address questions in the nature of cross examination. Therefore, merely because a witness has turned hostile it does not lead to an inference that he had been won over by the opposing party unless there is finding to that effect by the competent Court or some other material to establish that fact. The order of the petitioners in the circumstances that the witnesses who had turned hostile had been won over cannot be sustained.

37. Considering the entirety of the facts and circumstances, this Court does not find any illegality, irregularity or un-sustainability in the order of the Tribunal dated 25.5.2005 setting aside the order dated 17th May, 2001 of the petitioners so as to interfere with the same in exercise of its jurisdiction under Article 226 of the Constitution of India. The writ petition is therefore, without any merit and it is dismissed. All the pending applications are also disposed of. The parties are, however, left to bear their own costs

ILR (2012) I DELHI 73
C.M. (M)

PUNEET KAUR **...PETITIONER**

VERSUS

INDERJIT SINGH SAWHNEY **....RESPONDENT**

(J.R. MIDHA, J.)

C.M. (M) NO. : 79/11 & **DATE OF DECISION: 12.09.2011**
C.M. NO. : 1756/11

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.

In the facts and circumstances of this case, both the parties are directed to file their respective affidavits of assets, income and expenditure from the date of the marriage up to this date containing the following particulars:-

7.1 **Personal Information**

(i) Educational qualifications.

(ii) Professional qualifications.

(iii) Present occupation.

(iv) Particulars of past occupation.

(v) Members of the family.

(a) Dependent.

(b) Independent.

7.2 **Income**

(i) Salary, if in service.

(ii) Income from business/profession, if self employed.

(iii) Particulars of all earnings since marriage.

(iv) Income from other sources:-

(a) Rent.

(b) Interest on bank deposits and FDRs.

(c) Other interest i.e. on loan, deposits, NSC, IVP, KVP, Post Office schemes, PPF etc.

(d) Dividends.

(e) Income from machinery, plant or furniture let on hire.

(f) Gifts and Donations.

(g) Profit on sale of movable/immovable assets.

(h) Any other income not covered above.

7.3 **Assets**

(i) Immovable properties:-

(a) Building in the name of self and its Fair Market Value (FMV):-

– Residential.

– Commercial.

– Mortgage.

– Given on rent.

– Others.

(b) Plot/land.

(c) Leasehold property.

(d) Intangible property e.g. patents, trademark, design, goodwill.

(e) Properties in the name of family members/HUF and their FMV.

(ii) Movable properties:-

(a) Furniture and fixtures.

(b) Plant and Machinery.

(c) Livestock.

(d) Vehicles i.e. car, scooter along with their brand and registration number.

(iii) Investments:-

(a) Bank Accounts – Current or Savings.

(b) Demat Accounts.

(c) Cash.

(d) FDRs, NSC, IVP, KVP, Post Office schemes, PPF etc.

(e) Stocks, shares, debentures, bonds, units and mutual funds.

(f) LIC policy.

(g) Deposits with Government and Non-Government entities.

(h) Loan given to friends, relatives and others.

(i) Telephone, mobile phone and their numbers.

(j) TV, Fridge, Air Conditioner, etc.

(k) Other household appliances.

(l) Computer, Laptop.

(m) Other electronic gadgets including I-pad etc.

(n) Gold, silver and diamond Jewellery.

(o) Silver Utensils.

(p) Capital in partnership firm, sole proprietorship firm.

(q) Shares in the Company in which Director.

(r) Undivided share in HUF property.

(s) Booking of any plot, flat, membership in Co-op. Group Housing Society.

(t) Other investments not covered by above items.

(iv) Any other assets not covered above.

7.4 **Liabilities**

(i) OD, CC, Term Loan from bank and other institutions.

(ii) Personal/business loan

(a) Secured.

(b) Unsecured.

(iii) Home loan.

(iv) Income Tax, Wealth Tax and Property Tax.

7.5 **Expenditure**

(i) Rent and maintenance including electricity, water and gas.

(ii) Lease rental, if any asset taken on hire.

(iii) Installment of any house loan, car loan, personal loan, business loan, etc.

(iv) Interest to bank or others.

(v) Education of children including tuition fee.

(vi) Conveyance including fuel, repair and maintenance of vehicle. Also give the average distance travelled every day.

(vii) Premium of LIC, Medi-claim, house and vehicle policy.

(viii) Premium of ULIP, Mutual Fund.

(ix) Contribution to PPF, EPF, approved

superannuation fund.

(x) Mobile/landline phone bills.

(xi) Club subscription and usage, subscription to news papers, periodicals, magazines, etc.

(xii) Internet charges/cable charges.

(xiii) Household expenses including kitchen, clothing, etc.

(xiv) Salary of servants, gardener, watchmen, etc.

(xv) Medical/hospitalization expenses.

(xvi) Legal/litigation expenses.

(xvii) Expenditure on dependent family members.

(xviii) Expenditure on entertainment.

(xix) Expenditure on travel including outstation/foreign travel, business as well as personal.

(xx) Expenditure on construction/renovation and furnishing of residence/office.

(xxi) Any other expenditure not covered above.

7.6 **General Information regarding Standard of Living and Lifestyle**

(i) Status of family members.

(ii) Credit/debit cards.

(iii) Expenditure on marriage including marriage of family members.

(iv) Expenditure on family functions including birthday of the children.

(v) Expenditure on festivals.

(vi) Expenditure on extra-curricular activities.

(vii) Destination of honeymoon.

(viii) Frequency of travel including outstation/foreign travel, business as well as personal.

(ix) Mode of travel in city/outside city.

(x) Mode of outstation/foreign travel including type of class.

(xi) Category of hotels used for stay, official as well as personal, including type of rooms.

(xii) Category of hospitals opted for medical treatment including type of rooms.

(xiii) Name of school(s) where the child or children are studying.

(xiv) Brand of vehicle, mobile and wrist watch.

(xv) Value of jewellery worn.

(xvi) Details of residential accommodation.

(xvii) Value of gifts received.

(xviii) Value of gifts given at family functions.

(xix) Value of donations given.

(xx) Particulars of credit card/debit card, its limit and usage.

(xxi) Average monthly withdrawal from bank.

(xxii) Type of restaurant visited for dining out.

(xxiii) Membership of clubs, societies and other associations.

(xxiv) Brand of alcohol, if consumed.

(xxv) Particulars of all pending as well as decided cases including civil, criminal, labour, income tax,

excise, property tax, MACT, etc. with parties name. **(Para 7)**

Important Issue Involved: In order to ensure just disposal of an application under Section 24, Hindu Marriage Act, both the parties can be directed to file their respective affidavits of assets and liabilities containing the particulars enlisted in the order.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Ashok Chhabra with Mr. Sunjayjyoti Singh Paul, Advocates.

FOR THE RESPONDENT : Respondent in person.

CASES REFERRED TO:

1. *Jayant Bhargava* vs. *Priya Bhargava,* 181 (2011) DLT 602.
2. *Bharat Hegde* vs. *Saroj Hegde,* 140 (2007) DLT 16.
3. *Jasbir Kaur Sehgal (Smt.)* vs. *District Judge, Dehradun and Ors.,* reported at V (1998) SLT 551, III (1997) CLT 398 (SC), II (1997) DMC 338 (SC) and (1997) 7 SCC 7).

RESULT: With directions to file affidavits and documents, matter relisted for hearing.

J.R. MIDHA, J.

CM(M)No.79/2011 and CM No.1756/2011

1. The petitioner has challenged the order dated 26th November, 2010 whereby her application for maintenance under Section 24 of the Hindu Marriage Act was dismissed by the learned Trial Court.

2. The petitioner claimed maintenance and litigation expenses from her husband on the ground that she was unable to maintain herself and her two children aged 13 and 16 years. The petitioner averred that she was not gainfully employed and was receiving interest income of about

Rs. 8,000/- to Rs. 10,000/- per month from the investments whereas the monthly expenses of the children were to the tune of Rs. 25,000/- per month. The petitioner further averred that the respondent was running the business of transport in the name of Bakshi Transport Service and his income was more than Rs.2,00,000/- to Rs.3,00,000/- per month.

3. The respondent contested the above application before the learned Trial Court on the ground that the respondent was unemployed and had no income. The respondent averred that he was living like a pauper and had no money even for two proper meals a day. He also stated that he had no shelter. The respondent also alleged that the petitioner's annual income was Rs. 3,00,000/- per month from three sources, namely Rs. 1,00,000/- to Rs. 2,00,000/- per month from business, Rs.60,000/- per month from salary and Rs. 20,000/- per month from interest.

4. The learned Trial Court believed the respondent and held that there was no material record to show that the respondent had any income and, therefore, the petitioner's application was dismissed.

5. In **Bharat Hegde v. Saroj Hegde,** 140 (2007) DLT 16, this Court laid down the following principles for fixing the maintenance under Section 24 of the Hindu Marriage Act:-

> ''4. Right to maintenance is an incident of the status from an estate of matrimony. Interim maintenance has an element of alimony, which expression in its strict sense means allowance due to wife from husband on separation. It has its basis in social conditions in United Kingdoms under which a married woman was economically dependent and almost in a position of tutelage to the husband and was intended to secure justice to her.
>
> 5. Section 24 of the Hindu Marriage Act goes a step further inasmuch as it permits maintenance to be claimed by the husband even against the wife.
>
> 6. While considering a claim for interim maintenance, the court has to keep in mind the status of the parties, reasonable wants of the applicant, the income and property of the applicant. Conversely, requirements of the non applicant, the income and property of the non applicant and additionally the other family members to be maintained by the non applicant have to be taken

into all. Whilst it is important to insure that the maintenance awarded to the applicant is sufficient to enable the applicant to live in somewhat the same degree of comfort as in the matrimonial home, but it should not be so exorbitant that the non applicant is unable to pay.

7. Maintenance awarded cannot be punitive. It should aid the applicant to live in a similar life style she/he enjoyed in the matrimonial home. It should not expose the non applicant to unjust contempt or other coercive proceedings. On the other hand, maintenance should not be so low so as to make the order meaningless.

8. Unfortunately, in India, parties do not truthfully reveal their income. For self employed persons or persons employed in the unorganized sector, truthful income never surfaces. Tax avoidance is the norm. Tax compliance is the exception in this country. Therefore, in determining interim maintenance, there cannot be mathematical exactitude. The court has to take a general view. From the various judicial precedents, the under noted 11 factors can be culled out, which are to be taken into consideration while deciding an application under Section 24 of the Hindu Marriage Act. The same are:

1. Status of the parties.

2. Reasonable wants of the claimant.

3. The independent income and property of the claimant.

4. The number of persons, the non applicant has to maintain.

5. The amount should aid the applicant to live in a similar life style as he/she enjoyed in the matrimonial home.

6. Non-applicant's liabilities, if any.

7. Provisions for food, clothing, shelter, education, medical attendance and treatment etc. of the applicant.

8. Payment capacity of the non applicant.

9. Some guess work is not ruled out while estimating the income of the non applicant when all the sources or correct sources are not disclosed.

10. The non applicant to defray the cost of litigation.

11. The amount awarded under Section 125 Cr.PC is adjustable against the amount awarded under Section 24 of the Act.'' (Emphasis Supplied)

6. In **Jayant Bhargava v. Priya Bhargava,** 181 (2011) DLT 602, this Court laid down the factors to be taken into consideration for ascertaining the income of the spouse. The relevant portion of the judgment is reproduced hereunder:-

''12. It is settled position of law that a wife is entitled to live in a similar status as was enjoyed by her in her matrimonial home. It is the duty of the courts to ensure that it should not be a case that one spouse lives in a life of comfort and luxury while the other spouse lives a life of deprivation, poverty. During the pendency of divorce proceedings the parties should be able to maintain themselves and should be sufficiently entitled to be represented in judicial proceedings. If in case the party is unable to do so on account of insufficient income, the other spouse shall be liable to pay the same. (See **Jasbir Kaur Sehgal (Smt.) v. District Judge, Dehradun and Ors.,** reported at V (1998) SLT 551, III (1997) CLT 398 (SC), II (1997) DMC 338 (SC) and (1997) 7 SCC 7).

13. A Single Judge of this Court in the case of **Bharat Hegde v. Saroj Hegde,** reported at 140 (2007) DLT 16 has culled out 11 factors, which can be taken into consideration for deciding the application under Section 24 of Hindu Marriage Act.

14. Further it has been noticed by the Courts that the tendency of the spouses in proceedings for maintenance is to not truthfully disclose their true income. However, in such cases some guess work on the part of Court is permissible.

15. The Supreme Court of India in the case of **Jasbir Kaur (Smt.)** (supra), has also recognized the fact that spouses in the proceedings for maintenance do not truthfully disclose their true income and therefore some guess work on the part of the Court is permissible. Further the Supreme Court has also observed that

''considering the diverse claims made by the parties one inflating the income and the other suppressing an element of conjecture and guess work does enter for arriving at the income of the husband. It cannot be done by any mathematical precision''.

16. Although there cannot be an exhaustive list of factors, which are to be considered in guessing the income of the spouses, but the order based on guess work cannot be arbitrary, whimsical or fanciful. While guessing the income of the spouse, when the sources of income are either not disclosed or not correctly disclosed, the Court can take into consideration amongst others the following factors:

(i) Life style of the spouse;

(ii) The amount spent at the time of marriage and the manner in which marriage was performed;

(iii) Destination of honeymoon;

(iv) Ownership of motor vehicles;

(v) Household facilities;

(vi) Facility of driver, cook and other help;

(vii) Credit cards;

(viii) Bank account details;

(ix) Club Membership;

(x) Amount of Insurance Premium paid;

(xi) Property or properties purchased;

(xii) Rental income;

(xiii) Amount of rent paid;

(xiv) Amount spent on travel/ holiday;

(xv) Locality of residence;

(xvi) Number of mobile phones;

(xvii) Qualification of spouse;

(xviii) School(s) where the child or children are studying when parties were residing together;

(xix) Amount spent on fees and other expenses incurred;

(xx) Amount spend on extra-curricular activities of children when parties were residing together;

(xxi) Capacity to repay loan.

17. These are some of the factors, which may be considered by any court in guesstimating or having a rough idea or to guess the income of a spouse. It has repeatedly been held by the Courts that one cannot ignore the fact that an Indian woman has been given an equal status under Articles 14 and 16 of the Constitution of India and she has a right to live in dignity and according to the status of her husband. In this case, the stand taken by the Respondent with respect to his earning is unbelievable.''

7. In the facts and circumstances of this case, both the parties are directed to file their respective affidavits of assets, income and expenditure from the date of the marriage up to this date containing the following particulars:-

7.1 **Personal Information**

(i) Educational qualifications.

(ii) Professional qualifications.

(iii) Present occupation.

(iv) Particulars of past occupation.

(v) Members of the family.

(a) Dependent.

(b) Independent.

7.2 **Income**

(i) Salary, if in service.

(ii) Income from business/profession, if self employed.

(iii) Particulars of all earnings since marriage.

(iv) Income from other sources:-

(a) Rent.

(b) Interest on bank deposits and FDRs.

(c) Other interest i.e. on loan, deposits, NSC, IVP, KVP, Post Office schemes, PPF etc.

(d) Dividends.

(e) Income from machinery, plant or furniture let on hire.

(f) Gifts and Donations.

(g) Profit on sale of movable/immovable assets.

(h) Any other income not covered above.

7.3 **Assets**

(i) Immovable properties:-

(a) Building in the name of self and its Fair Market Value (FMV):-

– Residential.

– Commercial.

– Mortgage.

– Given on rent.

– Others.

(b) Plot/land.

(c) Leasehold property.

(d) Intangible property e.g. patents, trademark, design, goodwill.

(e) Properties in the name of family members/HUF and their FMV.

(ii) Movable properties:-

(a) Furniture and fixtures.

(b) Plant and Machinery.

(c) Livestock.

(d) Vehicles i.e. car, scooter along with their brand and registration number.

(iii) Investments:-

(a) Bank Accounts – Current or Savings.

(b) Demat Accounts.

(c) Cash.

(d) FDRs, NSC, IVP, KVP, Post Office schemes, PPF etc.

(e) Stocks, shares, debentures, bonds, units and mutual funds.

(f) LIC policy.

(g) Deposits with Government and Non-Government entities.

(h) Loan given to friends, relatives and others.

(i) Telephone, mobile phone and their numbers.

(j) TV, Fridge, Air Conditioner, etc.

(k) Other household appliances.

(l) Computer, Laptop.

(m) Other electronic gadgets including I-pad etc.

(n) Gold, silver and diamond Jewellery.

(o) Silver Utensils.

(p) Capital in partnership firm, sole proprietorship firm.

(q) Shares in the Company in which Director.

(r) Undivided share in HUF property.

(s) Booking of any plot, flat, membership in Co-op. Group Housing Society.

(t) Other investments not covered by above items.

(iv) Any other assets not covered above.

7.4 **Liabilities**

(i) OD, CC, Term Loan from bank and other institutions.

(ii) Personal/business loan

(a) Secured.

(b) Unsecured.

(iii) Home loan.

(iv) Income Tax, Wealth Tax and Property Tax.

7.5 **Expenditure**

(i) Rent and maintenance including electricity, water and gas.

(ii) Lease rental, if any asset taken on hire.

(iii) Installment of any house loan, car loan, personal loan, business loan, etc.

(iv) Interest to bank or others.

(v) Education of children including tuition fee.

(vi) Conveyance including fuel, repair and maintenance of vehicle. Also give the average distance travelled every day.

(vii) Premium of LIC, Medi-claim, house and vehicle policy.

(viii) Premium of ULIP, Mutual Fund.

(ix) Contribution to PPF, EPF, approved superannuation fund.

(x) Mobile/landline phone bills.

(xi) Club subscription and usage, subscription to news papers, periodicals, magazines, etc.

(xii) Internet charges/cable charges.

(xiii) Household expenses including kitchen, clothing, etc.

(xiv) Salary of servants, gardener, watchmen, etc.

(xv) Medical/hospitalization expenses.

(xvi) Legal/litigation expenses.

(xvii) Expenditure on dependent family members.

(xviii) Expenditure on entertainment.

(xix) Expenditure on travel including outstation/foreign travel, business as well as personal.

(xx) Expenditure on construction/renovation and furnishing of residence/office.

(xxi) Any other expenditure not covered above.

7.6 **General Information regarding Standard of Living and Lifestyle**

(i) Status of family members.

(ii) Credit/debit cards.

(iii) Expenditure on marriage including marriage of family members.

(iv) Expenditure on family functions including birthday of the children.

(v) Expenditure on festivals.

(vi) Expenditure on extra-curricular activities.

(vii) Destination of honeymoon.

(viii) Frequency of travel including outstation/foreign travel, business as well as personal.

(ix) Mode of travel in city/outside city.

(x) Mode of outstation/foreign travel including type of class.

(xi) Category of hotels used for stay, official as well as personal, including type of rooms.

(xii) Category of hospitals opted for medical treatment including type of rooms.

(xiii) Name of school(s) where the child or children are studying.

(xiv) Brand of vehicle, mobile and wrist watch.

(xv) Value of jewellery worn.

(xvi) Details of residential accommodation.

(xvii) Value of gifts received.

(xviii) Value of gifts given at family functions.

(xix) Value of donations given.

(xx) Particulars of credit card/debit card, its limit and usage.

(xxi) Average monthly withdrawal from bank.

(xxii) Type of restaurant visited for dining out.

(xxiii) Membership of clubs, societies and other associations.

(xxiv) Brand of alcohol, if consumed.

(xxv) Particulars of all pending as well as decided cases including civil, criminal, labour, income tax, excise, property tax, MACT, etc. with parties name.

8. Both the parties are also directed to file, along with affidavit, copies of the documents relating to their assets, income and expenditure from the date of the marriage up to this date and more particularly the following:-

(i) Relevant documents with respect to income including Salary certificate, Form 16A, Income Tax Returns, certificate from the employer regarding cost to the company, balance sheet, etc.

(ii) Audited accounts, if deponent is running business and otherwise, non-audited accounts i.e. balance sheets, profit and loss account and capital account.

(iii) Statement of all bank accounts.

(iv) Statement of Demat accounts.

(v) Passport.

(vi) Credit cards.

(vii) Club membership cards.

(viii) Frequent Flyer cards.

(ix) PAN card.

(x) Applications seeking job, in case of unemployed person.

9. The affidavit and documents be filed within a period of four weeks with an advance copy to opposite parties who shall file their response within two weeks thereafter.

10. List for hearing on 9th November, 2011.

11. Both the parties are directed to remain present in Court on the next date of hearing along with all original documents relating to their assets, income and expenditure.

12. This Court appreciates the valuable assistance rendered by Ms. Prem Lata Bansal, Senior Advocate.

13. Copy of this order be sent to the Principal District Judge for being circulated to the concerned judges dealing with matrimonial cases.

14. Copy of this order be given dasti to learned counsels for both the parties under signature of Court Master.

ILR (2012) I DELHI 90
W.P. (C)

YARO KHAN @ AHMAD SHAH ....PETITIONER

VERSUS

U.O.I. & ORS. ....RESPONDENTS

(RAJIV SAHAI ENDLAW, J.)

W.P. (C) NO. : 2599/2007 DATE OF DECISION: 12.09.2011
AND W.P. (C) NO. : 4112/2007

Constitution of India, 1950—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.

Notice of W.P.(C) No.2599/2007 was issued on the aforesaid argument only and the respondents were directed to verify the authenticity of the said Birth Certificate issued by the Government of Nagaland on which the petitioner relies. The same order was reiterated on 12.01.2011. **(Para 15)**

The Birth Certificate produced by the petitioner shows the birth on 10.01.1950 of a male named Yaro Khan at Dimapur with the name of the father as Alim Khan and of the mother as Shap Paro, with permanent address as Dimapur, Nagaland and the date of Registration as 07.09.2006. It is thus not as if the birth, of which the said Certificate has been issued, was registered contemporaneously; rather the Registration is after 56 years of the birth. **(Para 17)**

Important Issue Involved: When the Court in the judgments in the earlier two writ petitions 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—The principle of res judicata is based on two age old principles, namely that it is in the interest of the State that there should be an end to litigation and that no one ought to be vexed twice in a litigation—The plea of res judicata is not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation—This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating issues which have become final.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Bahar U. Barqi, Advocate.

FOR THE RESPONDENTS : Mr. Ravinder Aggarwal, Advocate Ms. Zubeda Begum & Ms. Sana Ansari, Advocates for R-4.

CASES REFERRED TO:

1. *Krishnadevi Malchand Kamathia* vs. *Bombay Environmental Action Group* (2011) 3 SCC 363.
2. *M. Nagabhushana* vs. *State of Karnataka* (2011) 3 SCC 408.
3. *Louis De Raedt* vs. *Union of India and Others* AIR 1991 SC 1886.
4. *Usman* vs. *Hindustan Machine Tools Ltd.* 1987 (2) K.L.T. 1028.
5. *Abdus Samad* vs. *State of West Bengal* AIR 1973 SC 505.
6. *Joseph Pothen* vs. *State of Kerala* AIR 1965 SC 1514.
7. *Hans Muller of Nurenburg* vs. *Superintendent, Presidency Jail, Calcutta and Others* AIR 1955 SC 367.

RESULT: Petition dismissed.

RAJIV SAHAI ENDLAW, J.

1. The petitioner, in W.P.(C) No.2599/2007 seeks a declaration that he is an Indian citizen by birth and a direction to the respondents to treat him as an Indian national by birth; he also impugns the order dated 13.04.2006 of his deportation from India and seeks to restrain the respondents from taking any action towards his deportation.

2. W.P.(C) No.4112/2007 has been filed impugning the order of cancelling / impounding the Indian passport earlier issued to the petitioner and seeks a mandamus for issuance of a fresh passport to the petitioner.

3. Notice of both the petitions was issued and vide interim order dated 04.04.2007 in W.P.(C) No.2599/2007, which continues to be in force, deportation of the petitioner was stayed.

4. The counsel for the petitioner has argued with reference to W.P.(C) No.2599/2007 and has stated that the result thereof would determine the fate of W.P.(C) No.4112/2007 also.

5. It is not for the first time that the order of deportation of the petitioner has been issued. 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 15.05.1998 was issued. The same was challenged by the petitioner by filing Crl. W.P. No.397/1998. It was the case of the petitioner in that petition 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 nationality in any other country and was born, brought up, nurtured and had grown up in India.

6. Crl. W.P. No.397/1998 was contested by pleading, 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.

7. The aforesaid Crl. W.P. No.397/1998 was disposed of vide judgment dated 21.08.1998 of the Division Bench of this Court. It was held, 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.

8. 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. It was again the claim of the petitioner that he was an Indian national having been born in Guwahati on 10.01.1950 and cannot be treated as an alien.

9. The said Crl. Writ Petition No.1107/1998 was dismissed by a Division Bench of this court vide judgment dated 17.02.1999. It was held:

''The contention of the petitioner that he is an Indian Citizen and was born in India is belied from the fact that he had made an application for grant of Indian citizenship and also an application for permission to stay in India. Learned counsel for the petitioner submitted that the petitioner was misguided in making the application. It is significant to note that the petitioner does not claim to have moved any application to the concerned authorities withdrawing his earlier application seeking Indian Citizenship and permission to stay in India. It is also not his case that he had made application to the concerned authorities clarifying the position that as he was born in India and is an Indian citizen the application for grant of Indian Citizenship and the application seeking permission to stay in India

were made under a wrong advice. It appears that the plea that the petitioner had made the said applications on a wrong advice is an afterthought. The petitioner having applied for Indian Citizenship and for grant of permission to stay in India and having acquired Afghan passport repels the contention of the petitioner that he is an Indian citizen. In **Abdus Samad Vs. State of West Bengal** AIR 1973 SC 505, where the appellant had made an application under Section 5(1)(a) of the Citizenship Act, 1955, for being registered as a Citizen of India, it was held that the application for registration as an Indian Citizen totally repels any plea of citizenship of the appellant. Thus, the claim of the appellant that he had come to Calcutta in 1914 and therefore, at the commencement of the Constitution he became a citizen under Article 5 (c) of the Constitution did not find favour with the Apex Court.

Learned counsel for the respondent has invited our attention to the International Driving Licence of the petitioner bearing No.7159 issued at Kabul by Kabul Traffic Licence Department and Identity Card No.237658 of the petitioner issued by the Royal Government of Afghanistan on September 30, 1338 (..... Nov. 1958). As against this, the petitioner has not placed on record any material or evidence to show that he was born at Guwahati. We are also not impressed by the submission of the learned counsel for the petitioner that the passport produced by the first respondent as that of the petitioner was never issued by the State of Afghanistan. It is well settled that an alien cannot have a right of permanent abode in India. In **Louis De Raedt Vs. Union of India and Others** AIR 1991 SC 1886, it was held that the fundamental right of the foreigner is confined to Article 21 and does not include the right to reside and settle in this country. In **Hans Muller of Nurenburg Vs. Superintendent, Presidency Jail, Calcutta and Others** AIR 1955 SC 367, the Supreme Court held that the power of the Government in India to expel foreigners is absolute and unlimited and there is no provision in the constitution fettering this discretion.''

10. The petitioner preferred Special Leave Petition (Crl.) No.674/1999 against the judgment aforesaid of the Division Bench of this Court and Crl. W.P.No.25/2006 before the Apex Court which were dismissed in limine.

11. However notwithstanding the dismissal aforesaid, it appears that the petitioner was not deported; according to the counsel for the

respondents, because the petitioner had gone ''underground'' and which is controverted by the counsel for the petitioner. However, vide order dated 13.04.2006 impugned in W.P.(C) No.2599/2007, the Ministry of External Affairs, New Delhi requested the Embassy of the Islamic State of Afghanistan in New Delhi to prepare necessary travel documents for deportation of the petitioner.

12. Notwithstanding the findings aforesaid of the Division Benches of this Court in the earlier two writ petitions preferred by the petitioner, the petitioner by way of this writ petition seeks declaration of his Indian citizenship, relying on, i) Certificate of Birth dated 07.09.2006 issued by the Department of Economics and Statistics of the Government of Nagaland under Section 17 of the Registration of Births & Deaths Act, 1969 and ii) a letter dated 16.01.2003 purportedly of the Embassy of the Transitional Islamic State of Afghanistan at New Delhi to the Ministry of Home Affairs, Government of India.

13. The counsel for the petitioner contends that the Birth Certificate establishes the petitioner having been born in India and the letter dated 16.01.2003 (supra) establishes that the Afghan passport which the petitioner was stated to be holding had in fact not been issued by the Government of Afghanistan.

14. The counsel for the petitioner has further contended, that Crl. Writ Petition No.1107/1998 was dismissed because the petitioner had then been unable to prove his birth in India; that since now the petitioner has been able to establish his birth in India making him an Indian citizen by birth, the petitioner is entitled to the declaration aforesaid.

15. Notice of W.P.(C) No.2599/2007 was issued on the aforesaid argument only and the respondents were directed to verify the authenticity of the said Birth Certificate issued by the Government of Nagaland on which the petitioner relies. The same order was reiterated on 12.01.2011.

16. A status report has been filed by the respondents and to which response has been filed by the petitioner.

17. The Birth Certificate produced by the petitioner shows the birth on 10.01.1950 of a male named Yaro Khan at Dimapur with the name of the father as Alim Khan and of the mother as Shap Paro, with permanent address as Dimapur, Nagaland and the date of Registration as 07.09.2006.

It is thus not as if the birth, of which the said Certificate has been issued, was registered contemporaneously; rather the Registration is after 56 years of the birth.

18. It has been enquired from the counsel for the petitioner as to on what basis, the aforesaid birth was got registered i.e. what was produced before the Registrar of Births to show that the birth in fact had taken place. Neither is there any pleading in the petition or proof to the said effect, nor is the counsel for the petitioner able to state so.

19. It has further been enquired from the counsel for the petitioner as to whether the Registrar of Births, Government of Nagaland was informed of the judgment (supra) in the writ petition earlier preferred by the petitioner holding that the petitioner was not a citizen of India. The answer is in the negative; it is stated that the petitioner was not required to so disclose.

20. The status report filed by the respondents of verification of the Birth Certificate aforesaid, though does not controvert the issuance of the Birth Certificate but states that the documents on the basis of which the said Birth Certificate is stated to have been issued are shown as misplaced in the office of the Registrar of Births of the Government of Nagaland. It is also stated that neither Yaro Khan nor his father Alim Khan were found enrolled in the electoral list of Dimapur on or before 1963 and the other enquiries to ascertain the parentage, domicile and activities etc. or of residence of Dimapur did not yield any result.

21. The petitioner in his response to the aforesaid status report has emphasized that the issuance of the Birth Certificate is not disputed; it is stated that it was the responsibility of the Government of Nagaland to preserve the records on the basis of which the Certificate was issued; that since the petitioner till the year 1963 was only 13 years of age, the question of his name appearing in the electoral rolls did not arise; that he had vide legal notice dated 30.05.2011 to the authorities in Nagaland disclosed that he along with his parents was residing in the rooms of Bari Masjid, Dimapur.

22. I have again enquired from the counsel for the petitioner that even if the documents on the basis of which the Birth Certificate aforesaid was issued have been misplaced from the office of the Registrar of Births, Government of Nagaland, certainly the petitioner would be in

possession of the documents by furnishing which the registration was obtained. The counsel for the petitioner states that he has no instructions.

23. The Registration of Births and Deaths Act, 1969 under which the Birth Certificate aforesaid has been issued was itself enacted after 19 years of the birth of the petitioner and came into force in the State of Nagaland on 1st October, 1971. The same requires a birth to be notified immediately and in Section 13(1) thereof permits registration on intimation within 30 days of occurrence; registration thereafter but within one year of occurrence is permitted only with the written permission of the prescribed authority and any registration which has not been registered within one year of occurrence can be only registered by a Magistrate of the first class or a Presidency Magistrate after verifying the correctness of the birth or death. The registration on 7th September, 2006 of the birth on 10th January, 1950, as in the present case could thus under Section 13(3) of the 1969 Act have been only on an order made by a Magistrate. Neither any such order has been disclosed nor any other explanation furnished. I also entertain serious doubts as to whether registration at all of births occurred prior to coming into force of the 1969 Act could have been made under the said Act and Certificate thereof issued. There is nothing to show that the 1969 Act is retrospective or requires any record to be maintained of the births of prior to the coming into force thereof. I find the Division Bench of the Kerala High Court in **Usman Vs. Hindustan Machine Tools Ltd.** 1987 (2) K.L.T. 1028 to have held that the 1969 Act is prospective and regulates only the events that have taken place after coming into force thereof and does not permit registration of a birth occuring prior to coming into force of the Act. I am in respectful agreement with the said view. I may notice that prior to the 1969 Act also, registration inter alia of births was governed by the Births, Deaths and Marriages Registration Act, 1886. I am however unable to find that the said Act extended to the State / Union Territory of Nagaland or to the State of Assam of which Nagaland was earlier a part. Rather, it is stated in the A.I.R. Manual Civil & Criminal 5th Edn. 1989 that the State of Assam had a separate legislation of registration. No document issued under the contemporaneous law of the births, of the birth if any of the petitioner has been produced.

24. The letter dated 16.01.2003 of the Government of Afghanistan refers to Mr. Yaro Khan as originally an Afghan national and now

possessing Indian nationality. It certifies that the Afghan passport purportedly in the name of Mr. Yaro Khan, had not been issued by the Govt. of Afghanistan. The petitioner on the basis of the said letter contends that the passport on the basis whereof he was in the earlier round of litigation held to be an Afghan national, has in fact not been issued by the Govt. of Afghanistan. Upon it being enquired from the counsel for the petitioner as to how the petitioner, if originally an Afghan national as mentioned in the said letter, is shown to have acquired Indian citizenship, the counsel states that in fact the passport to which the said letter pertains was not issued qua the petitioner but qua another person also named Yaro Khan but son of Nik Mohammad. Reliance in this regard is placed on another letter dated 03.07.1998 issued by Embassy of Islamic State of Afghanistan. It has been enquired as to why the petitioner is relying on the said document if according to the petitioner the same does not pertain to him. No satisfactory answer has again been forthcoming. Also, the letter dated 03.07.1998 was available at the time of earlier litigation and cannot be said to be a fact not available then.

25. I am of the view that the 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*. The principle of *res judicata* is based on two age old principles, namely that it is in the interest of the State that there should be an end to litigation and that no one ought to be vexed twice in a litigation. The doctrine of *res judicata* is common to all civilized systems of jurisprudence. The principle of finality of litigation is based on high principle of public policy. In the absence of such a principle, great oppression may result under the colour and pretence of law inasmuch as there will be no end to litigation and a rich malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. The plea of *res judicata* is not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating issues which have become final (see **M. Nagabhushana Vs. State of Karnataka** (2011) 3 SCC 408). The petitioner herein is

also found to be such a litigant who has by repetitive litigation succeeded in thwarting his deportation for the last more than one decade.

26. Moreover in the present case the Birth Certificate and the letter from the Embassy of Afghanistan are highly suspect as aforesaid. Mere production thereof would not entitle the petitioner to again seek an opportunity to establish his citizenship of India. This court would not allow its process to be abused. The contention of the petitioner that since the genuineness of the Birth Certificate is not disputed, till the Registrar of Birth traces the documents on the basis whereof registration was effected he cannot be deported, cannot be accepted when the Birth Certificate is found to have been issued in violation of the Rules for issuance thereof. The Courts cannot be fooled and the Statute mocked at. The law, as Mr. Bumble (in Oliver Twist) said, ''is a ass – a idiot''. Now to accept the contention of the petitioner and to start an enquiry as sought would vindicate Mr. Bumble. Recently also, in **Krishnadevi Malchand Kamathia Vs. 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.

27. I have also enquired from the counsel for the petitioner whether in the matter of claim of citizenship, there can be said to be any exception to the rule of *res judicata*. The counsel of course answers in the affirmative but without any support. He rather seeks adjournment to study the question raised by this Court. I am not inclined to grant any adjournment. It is for the petitioner to make out and prepare a case and no hearing would attain finality if the counsels are permitted adjournments as sought. It may be noted that it is only under threat meted out on the last date of vacation of the interim order being enjoyed by the petitioner that the arguments are being heard today.

28. I however find the Supreme Court in **Joseph Pothen Vs. State of Kerala** AIR 1965 SC 1514 to have observed that though every citizen whose fundamental right is infringed by the State has a fundamental right to approach the Court for enforcing his right but if by a final decision of a competent Court his title to property has been negatived, he ceases to have the fundamental right in respect of that property and therefore, can no longer enforce it and the doctrine of *res judicata* may be invoked.

29. The counsel for the respondents have also argued that the falsity in the case of the petitioner is apparent from the inconsistencies in the pleadings in the earlier writ petitions and now of the petitioner; that while in the earlier writ petitions, it was unequivocally stated that the petitioner was born at Guwahati in the year 1952; it has now been stated that he was born at Nagaland; that while earlier it was said that he was residing here since the age of 10, it is now stated that he was born here; that in the contemporaneous applications, it was stated that he was originally an Afghan national.

30. The counsel for the petitioner of course has responded that the petitioner is illiterate and acted as per advice from time to time and Nagaland was earlier a part of Assam.

31. I am unable to buy the aforesaid arguments also. The petitioner in the earlier petitions categorically gave the place of his birth as Guwahati but is now claiming the same to be Dimapur. The counsel for the petitioner has also argued that the earlier application for citizenship was on wrong advice. Such arguments cannot be allowed to defeat the ends of justice. The petitioner has approached this Court in the exercise of equity jurisdiction and his conduct disentitles him to any relief.

32. There is thus no merit in W.P.(C) No.2599/2007. The claim of the petitioner for declaration of being an Indian citizen by birth is barred by the principles of res judicata and the new documents furnished by the petitioner are not found, as aforesaid, to help the petitioner. W.P.(C) No.2599/2007 is accordingly dismissed. Consequently, W.P.(C) No.4112/2007 is also dismissed.

33. The petitioner under interim orders of this Court has enjoyed stay of deportation and this Court while disposing of the petition is required to balance equities and to ensure that the petitioner upon dismissal of the petitions is deported. However, opportunity has to be given to the petitioner to avail his remedies in law. The counsel for the petitioner seeks protection for 60 days. The same is allowed.

34. However, to safeguard that the petitioner does not now disappear and in the event of his remedies against this judgment failing, is deported, it is directed to the petitioner to report to the SHO, Police Station having jurisdiction over the area of Balli Maran where the petitioner is stated to be residing everyday at 1600 hours. Upon the petitioner failing to so

report, the SHO concerned is directed to immediately take the petitioner into custody. Unless there is a stay of deportation of the petitioner, the respondents to deport the petitioner immediately after the expiry of 60 days.

35. The petitioner is also burdened with costs of Rs. 50,000/- of these petitions payable to the respondents within four weeks of today.

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FAO

BHAGWATI DEVI AND ORS. ....APPELLANTS

VERSUS

D.T.C. AND ANR. ....RESPONDENTS

(REVA KHETRAPAL, J.)

FAO NO. : 235/1991 DATE OF DECISION: 13.09.2011

Motor Vehicles Act, 1988—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.

The testimonies of the aforesaid witnesses could not be shaken in cross-examination and I am, therefore, inclined to agree with the submission of Mr. Goyal that the assessment of the income of the deceased by the learned Tribunal is not correct. I see no reason to disbelieve the testimonies of PW8 and PW11, the wife and the father of the deceased respectively, that the deceased was contributing a sum of ' 2,000/- per month towards household expenses. However, even assuming there is a slight exaggeration on the part of the aforesaid witnesses, in my view, the deceased could not have been earning less than Rs. 1,500/- per month. 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. **(Para 7)**

In the case of **Smt. Sarla Verma and Ors. vs. Delhi Transport Corporation and Anr.** (2009) 6 SCC 121, the Supreme Court has tabulated the appropriate multipliers to be applied for augmenting the multiplicand constituting the loss of dependency of the appellants, keeping in view the age of the deceased. 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). Thus calculated, the total loss of dependency of the appellants works out to Rs. 21,600/- x 17 = Rs. 3,67,200/-, which may be rounded off to Rs. 3,67,500/- (Rupees three lakh sixty seven thousand and five hundred only). **(Para 8)**

Apart from the aforesaid amount of pecuniary damages, I am inclined to hold that the appellants are entitled to a sum of Rs. 2,500/- towards the funeral expenses and last rites of the deceased. The appellants are also held entitled to receive a sum of Rs. 5,000/- each towards the loss of consortium, towards the loss of love and affection of the deceased and towards the loss of the estate of the deceased, that is, in all a sum of Rs.3,85,000/- (Rupees three lacs and eighty five thousand only) is awarded to the appellants. **(Para 9)**

[Vi Ba]

APPEARANCES:

FOR THE APPELLANTS : Mr. Navneet Goyal, Advocate.

FOR THE RESPONDENTS : Ms. Sushma Sachdeva, Advocate.

CASE REFERRED TO:

1. *Smt. Sarla Verma and Ors.* vs. *Delhi Transport Corporation and Anr.* (2009) 6 SCC 121.

RESULT: Appeal allowed.

REVA KHETRAPAL, J.

1. The appellants in this appeal are the legal representatives of the deceased Ramesh Kumar, who seek to assail the judgment and award dated 23.08.1991 passed by the learned Motor Accident Claims Tribunal, Delhi, whereby a sum of ' 1,44,000/- with interest at the rate of 12% per annum from the date of the filing of the petition till the date of the realisation, was awarded to the appellants on account of the unfortunate death of the said Ramesh Kumar in a road accident.

2. The concise facts are that on 02.09.1984, the deceased was going on a three-wheeler scooter bearing No.DER-1887 from Vishwas Nagar via Wazirabad bridge, and after coming on Alipur Road had taken a turn for reaching Rajpur Road, when he was hit by a Delhi Transport Corporation bus bearing No. DEP-8356, driven recklessly and negligently by the respondent No.2. A claim Petition under Section 92-A and Section 110-A of the Motor Vehicles Act, 1939 was filed by his legal representatives claiming a sum of Rs. 10,00,000/- by way of compensation, which culminated in the passing of the aforesaid award. The main ground of challenge to the award is that the award has not been passed in accordance with the well-settled principles of law and resultantly the appellants have been awarded a very meager amount as compensation for the death of the deceased, who was a young man of 26 years and the sole bread-earner of the appellants being his widow, his four minor children and his parents.

3. Mr. Navneet Goyal, the learned counsel for the appellants, has assailed the award principally on four grounds:

(i) The learned Tribunal erred in taking the income of the deceased on the date of his demise to be in the sum of Rs. 750/- per month whereas, in fact, it stands established on record that the deceased was earning a sum of Rs. 2,000/- per month on the said date. The assessment of the average annual income of the

deceased is also not in accordance with law as the future prospects of increase in the income of the deceased have not been taken into consideration.

(ii) The learned Tribunal though has made no deduction towards the personal expenses of the deceased, a deduction of one-fifth of the income of the deceased towards his personal expenses and maintenance would be justified.

(iii) The learned Tribunal erred in applying the multiplier of 16 instead of the multiplier of 17, which is the appropriate multiplier keeping in view the fact that the deceased was in the age group of victims between 26 to 30 years of age.

(iv) No non-pecuniary damages whatsoever and no funeral expenses have been awarded to the appellants by the learned Tribunal.

4. In order to substantiate his aforesaid contentions, Mr. Goyal, the learned counsel for the appellants, has taken me through the testimonies of the PW8 - Smt. Bhagwati Devi, the widow of the deceased; PW1 – Pramod Kumar, an independent witness and a cloth vendor; PW2 -Nand Kishore, a three-wheeler scooter driver; PW3 – Anil Kumar, who was also engaged in the same business as the deceased of selling clothes in weekly bazaars and PW5 – Gokul Parsad, an official from R.T.O Office Rajpur Raod, Delhi, who proved on record the licence issued in favour of the deceased for driving a three-wheeler scooter and motorcycle valid for the period from 24.10.1983 to 23.10.1986; and PW11 – Udai Raj Giri, the father of the deceased. He argued that the cumulative effect of the testimonies of these witnesses is that it stands established beyond any doubt that the deceased was engaged in the business of selling clothes in weekly bazaars in the evenings, thereby earning a sum of Rs. 50/- to 60/- per day. He had also purchased a three-wheeler scooter which he used to drive in the mornings in order to supplement his earnings. PW8 - the widow of the deceased and PW11 – the father of the deceased, categorically stated on oath that the deceased was contributing a sum of Rs. 2,000/- per month towards the household expenses. PW11 clarified that the deceased used to earn Rs. 50/- to Rs. 60/- per day by driving three-wheeler scooter and Rs. 50/- to Rs. 60/- per day by sale of clothes in the 'patri' bazaars. The testimony of this witness is borne out by the

tehbazari receipts (Exhibit PW11/2 to Exhibit PW11/52) and receipts of purchase of clothes (Exhibit Pw11/53 to Exhibit PW11/69) and the driving licence (Exhibit PW5/1) of the deceased authorizing him to drive a three-wheeler scooter.

5. PW11 also proved on record the fact that the three-wheeler scooter bearing No. DER-1887 had been purchased by the deceased from one Shri Jai Kishan for a sum of Rs. 17,900/-, out of which Rs. 4,900/- was paid as advance vide receipt dated 28.08.1984 Exhibit PW11/1. He also proved on record the 'tehbazari' receipts issued by Municipal Corporation of Delhi as Exhibit PW11/2 to Exhibit PW11/52 for the 'patri' sales carried out by the deceased at the various weekly bazaars and the receipts of purchase of clothes including petticoats, blouse pieces and saree falls from 'Shiv Rubia House' as Exhibit PW11/53 to Exhibit PW11/69. He stated that after the demise of the deceased, the three-wheeler scooter purchased by him was returned to the vendor, Shri Jai Kishan as the appellants were not able to pay the balance amount of Rs. 13,000/- owed to the said Shri Jai Kishan while the sum of Rs. 4,900/- paid as advance along with Rs. 100/- paid towards insurance policy and other expenses were retained by the said Jai Kishan for meeting repair expenses of the three-wheeler scooter.

6. The aforesaid testimonies of PW8 and PW11 are corroborated by the testimonies of PW1 – Pramod Kumar, PW2-Nand Kishroe, PW3 – Anil Kumar and PW5-Gokul Parsad. PW1 and PW3 have both stated that the deceased was selling clothes in weekly bazaars held at Shastri Nagar, Jahangirpuri, Rani Bagh, Malka Ganj, Ashok Vihar, Kishan Ganj, Railway Colony etc., at a profit margin of around 25%, earning thereby Rs. 50/- to 60/- per day. PW2 deposed that the deceased used to ply his three-wheeler in the mornings and in the evenings he used to sit in the weekly 'patri' bazaars for selling clothes. PW5, an official from the office of R.T.O., Rajpur Road, Delhi proved on record the driving licence bearing No.83/R-6606 (Exhibit PW5/1) issued in the name of the deceased for driving a three-wheeler scooter and motorcycle.

7. The testimonies of the aforesaid witnesses could not be shaken in cross-examination and I am, therefore, inclined to agree with the submission of Mr. Goyal that the assessment of the income of the deceased by the learned Tribunal is not correct. I see no reason to disbelieve the testimonies of PW8 and PW11, the wife and the father of

the deceased respectively, that the deceased was contributing a sum of ‘ 2,000/- per month towards household expenses. However, even assuming there is a slight exaggeration on the part of the aforesaid witnesses, in my view, the deceased could not have been earning less than Rs. 1,500/ - per month. 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.

8. In the case of **Smt. Sarla Verma and Ors. vs. Delhi Transport Corporation and Anr.** (2009) 6 SCC 121, the Supreme Court has tabulated the appropriate multipliers to be applied for augmenting the multiplicand constituting the loss of dependency of the appellants, keeping in view the age of the deceased. 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). Thus calculated, the total loss of dependency of the appellants works out to Rs. 21,600/- x 17 = Rs. 3,67,200/-, which may be rounded off to Rs. 3,67,500/- (Rupees three lakh sixty seven thousand and five hundred only).

9. Apart from the aforesaid amount of pecuniary damages, I am inclined to hold that the appellants are entitled to a sum of Rs. 2,500/- towards the funeral expenses and last rites of the deceased. The appellants are also held entitled to receive a sum of Rs. 5,000/- each towards the loss of consortium, towards the loss of love and affection of the deceased and towards the loss of the estate of the deceased, that is, in all a sum of Rs.3,85,000/- (Rupees three lacs and eighty five thousand only) is awarded to the appellants.

10. The award amount is accordingly enhanced by a sum of Rs. 2,41,000/-. The enhanced amount shall enure solely to the benefit of the

appellant No.1, the widow of the deceased, the parents of the deceased having died during the pendency of the appeal. The appellants are also held entitled to receive interest at the rate of 7.5% per annum on the enhanced amount from the date of the filing of the petition till the date of the realisation. The respondent No.1 is directed to deposit the entire award amount as enhanced by this Court along with the interest thereon, after adjusting the amount already paid, if any, with the Registrar General of this Court within 30 days from the date of the passing of this order.

11. The appeal is allowed in the aforesaid terms.

12. There shall be no order as to costs.

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CRL. A.

BALJEET VERMA AND SMT. BABLI ....APPELLANTS

VERSUS

STATE ....RESPONDENT

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

CRL. A. NO. : 836/2011, CRL. M. (BAIL) NO. : 1195/2011 CRL. A. NO. : 618/2011, CRL. M. (BAIL) NO. : 858/2011

DATE OF DECISION: 14.09.2011

Indian Penal Code, 1860—Sections 302—Appellants challenged their conviction under Section 302/34 IPC urging, dying declaration made sole basis of conviction, was unbelievable—Held: Court can rely on dying declarations to convict an accused. But dying declaration should “*inspire full confidence of the Court in its truthfulness and correctness. The Court, however,*

has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination.

At the same time, over the years, judgments have emphasized the necessity of exercising caution, and the Supreme Court has evolved guidelines that are to be taken into consideration, which include:

(1) the Court's satisfaction that the statement was made voluntarily and without influence; or possibility of tutoring;

(2) that the maker of the declaration was in conscious and fit state of mind;

(3) that as far as practicably possible, it must be recorded or taken down in the words of the maker;

(4) That the Court is satisfied, from the facts proved and the surrounding circumstances, about the veracity of the contents of the dying declaration

(5) that dying declaration stand on the same footing as other pieces of evidence, and has to be tested in the light of all available circumstances. **(Para 12)**

Important Issue Involved: Court can rely on dying declarations to convict an accused. But *dying declaration shoul "inspire full confidence of the Court in its truthfulness and correctness. The Court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination*.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANTS : Ms. Anu Narula, Advocate.

FOR THE RESPONDENT : Sh. Sanjay Lao, APP.

CASES REFERRED TO:

1. *Laxmi* vs. *Om Prakash,* (2001) 6 SCC 118.
2. *Dadu Lakshmi Reddy* vs. *State of A.P.* AIR 1999 SC 3255).
3. *Paparambaka Rosamma* vs. *State of A.P.* 1999 (7) SCC 695).
4. *State of Orissa* vs. *Bansidhar Singh* 1996 (2) SCC 194].
5. *State of UP* vs. *Ramesh Sagar Yadav* AIR 1985 SC 416.
6. *Khushai Rao* vs. *State of Bombay* AIR 1958 SC 22.

RESULT: Appeals allowed.

S. RAVINDRA BHAT (OPEN COURT)

1. These appeals are directed against a judgment and order of the learned Additional Sessions Judge, Delhi dated 01.03.2011 in S.C. No. 101/2008; the appellants were convicted for the offences punishable under Sections 302/34 IPC and sentenced to undergo life imprisonment, and also directed to pay fine.

2. The prosecution alleged that on 09.09.2007, the accused Appellants, acting further to their common intention, poured kerosene oil on Ms. Anuradha, and set her on fire, resulting in her death, the next day, on 10.09.2007, at 06.30 AM. It was alleged that Anuradha was trying to get a grill fixed on the staircase of the house where she lived with her husband and small children; their premises were located on the first floor of 217, Madipur J.J. Colony, which belonged to her father-in-law. It was alleged that the Appellants, her mother-in-law, sisters-inlaw, mother-in-law's sister, and her husband, who used to have altercation with Anuradha and her husband, decided to kill her, and therefore, poured kerosene on her and set her afire. Anuradha was first taken to the Balaji Hospital, and later shifted to Safdarjung Hospital. The prosecution alleged that her mother, PW-1 had heard her narrating the incident, in which she had implicated the Appellants; it was also alleged that a dying declaration was recorded by the police, PW-18, after the attending doctor had declared her fit to make a statement. The husband, PW-2 had, according to the prosecution, also witnessed the dying declaration so recorded.

3. After conducting investigations, and filing the report, implicating the Appellants, the Trial Court charged them with committing the offences alleged. They denied role or any liability, and claimed trial. The prosecution examined 19 witnesses, besides producing several exhibits. After considering them, the Trial Court held the accused – Appellants guilty, convicted them for the offences alleged against them, and sentenced them in the manner described previously in this judgment.

4. Learned counsel for Jamuna argued that the entire prosecution story was unbelievable, and the Trial Court erred in convicting the Appellants. It was submitted that the so-called dying declaration should not have been believed, and made the sole basis of the findings contained in the impugned judgment. Elaborating on the submission, counsel submitted that the prosecution story itself was that the deceased and her husband had strained relations with the latter's parents and his family. In fact, they resided in separate premises, i.e. at 219, Madipur J.J. Colony. If this fact were true, the occasion for the members of the deceased's parents-in-law's family to reach the premises where she lived, with her husband never arose.

5. It was next submitted that the doctor who issued the first MLC (Ex. PW-6/A), Dr. Sanjay Kaushik, PW-6 clearly admitted in his deposition about having stated, in the document, that the patient (Anuradha) was ''drowsy'' – which was separately marked ''Z''. This was written in the first instance when the patient was taken to the Emergency Ward of the hospital. Yet, inexplicably, he wrote – at point ''Y'' that the patient was conscious and oriented. This was a vital discrepancy which the prosecution was unable to explain, and was fatal to the entire case against the accused. Counsel next urged that the contents of the dying declaration were unbelievable, having regard to the normal conduct of human beings. It was submitted that the deceased said that one of her sisters-in-law brought a bottle of kerosene oil; thereupon other four accused joined her to hold the bottle, poured its contents, and then set her afire. Contending that this was not only an improbability, but entirely false; learned counsel said that the scaled site plan, Ex. PW-3/A produced by the prosecution showed that the story was highly improbable. It was alleged that the place where seven persons, including the six accused, were holding the deceased, and setting her on fire, in a narrow and cramped place, was utterly unbelievable.

6. It was next urged that the deceased's husband, PW-1, though

cited as a prosecution witness, and allegedly examined during investigation, did not support its case at all. Counsel submitted that though he corroborated the theory of a quarrel with his parents, he deposed during examination that upon being asked why the incident happened, Anuradha said ''karna parha'' (it had to be done), implying that she had set herself afire. Learned counsel submitted that in view of the strained relationship between PW-1 and his father, he had been asked to leave the premises; he had asked for accommodation by about 5 months or so. In the meanwhile, the deceased wished to get a grill fixed, at the staircase, because their children were small, and could have fallen down. This was objected to by the accused, and apparently led the deceased to commit suicide. It was urged that the so-called dying declaration was suspicious, since PW-1 never mentioned that he heard the deceased allegedly making it. In other words, according to counsel, PW-1's evidence about his signatures having been obtained on several sheets of paper, meant that the entire documentation, including the so called dying declaration, was prepared before hand, and he was made to sign on it. 7. It is next submitted by learned counsel that the Trial Court failed to see that the deceased had a clear motive to implicate all her husband's family, in view of the admitted dispute over property. The death was in all probability a suicide, which was attempted as a threat to intimidate them (the deceased's in-laws). Learned counsel urged that the conspectus of circumstances pointed to the prosecution manipulating the facts with the intention of implicating all the in-laws of the deceased. This was sought to be corroborated – by the husband, PW-1, who initially alleged that his wife had been murdered. However, for reasons best known, he did not support the story later. It was emphasized that though the Courts can solely rely on an uncorroborated dying declaration, yet, care and caution has to be exercised, and independent support as to the making, and veracity of such statements should be sought whenever available. If the intrinsic materials do not support the dying declaration, the Court should not return a conviction.

8. Ms. Anu Narula, learned counsel for the other Appellants, argued that the impugned judgment cannot be sustained. Counsel reiterated that the utter improbability of the involvement of six persons in the allegedly burning apart, the conviction in the present case was not sustainable, as no motive could be ascribed to the sister and brother-in-law of Jamuna, who did not even live with them. Also, the implication of the two young

sisters-in-law in the crime – which was not concededly dowry harassment – was inexplicable, and unbelievable. It was also submitted that the dying declaration was suspect, because it contained the deceased's signature, which was impossible, since PW-6 deposed that Anuradha had suffered 100% burns, on her hands and feet.

9. The learned APP, on the other hand, submitted that the dying declaration was corroborated by the testimonies of PW-1 and PW-2, submitting that though the husband, PW-2 had turned hostile in part, yet, he agreed to having a dispute with his father over the property occupied by him, and that he was asked to leave it. PW-2 also admitted that he and the deceased wanted to fix a grill, to protect their children from falling down, whilst on the staircase. These admissions in fact corroborated the dying declaration, which was about the deceased's attempt to get the grill fixed, resulting in her quarrel with the accused, and later pouring Kerosene and setting her on fire. PW-1, the deceased's mother supported the prosecution story fully, about Anuradha mentioning the circumstances surrounding the burn injuries and the role played by the accused.

10. As can be gathered from the above discussion, the prosecution mainstay in this case was the dying declaration said to have been made by Anuradha, before she passed away. That document, recorded by the police, was produced as Ex. PW-2/D; the relevant extract from the Trial Court judgment, reads as follows:

''XXXXXX XXXXXX XXXXXX

> That on the date of the incident her relatives masi sas Babli and her mausera sasur Baljeet had come from Madangir. She had got fixed one iron grill for the safety of her two small children, regarding which her mother-in-law, Jamuna, father-in-law Uma Shankar (since deceased), Nanand Poonam and Arti and his mamere sas and sasur, who had come from Madangir, and all of them were objecting to the said iron grill and at around 07.00 pm when she did not agree with them, all of them became angry and started quarrelling with her and Nanand Poonam came with the bottle of kerosene oil and thereafter Babli, Baljeet also caught hold the bottle of kerosene oil along with Poonam and thereafter Baljeet poured the kerosene oil over her, and Baljeet lighted the match and put her on fire. While all of them had caught hold of her and she stated that all of them had done so in order to kill her.
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> XXXXXX XXXXXX XXXXXX"

11. The prosecution story is that the incident occurred at about 07.00 PM; Anuradha was taken first to the Balaji Hospital, from where she was shifted to the Safdarjung Hospital. Her mother, PW-1, claims to have been told about the incident while Anuradha was in Balaji Hospital itself; the police, PW-18, recorded it. The concerned doctor, PW-6, deposed that he endorsed the statement, and signed on it, at point PW-6/B. The prosecution also relies on the signature of PW-2, the husband, at Point A on Ex. PW-2/D and his endorsement, that *''yahe bayan mere samne diya hai''*. Further, it is said that the husband, PW-2 corroborated the deceased's statement recorded in the dying declaration about a quarrel regarding the property no. 217, and her attempt to have grill fixed, which ultimately led to the ghastly burning incident. The issue is, whether the prosecution had discharged its burden of proving the dying declaration to have been made voluntarily, consciously, and truthfully, regarding the incident which resulted in Anuradha's death, as found by the Trial Court.

12. The learned APP is right in his submission that Courts can rely on dying declarations to convict an accused. At the same time, over the years, judgments have emphasized the necessity of exercising caution, and the Supreme Court has evolved guidelines that are to be taken into consideration, which include:

(1) the Court's satisfaction that the statement was made voluntarily and without influence; or possibility of tutoring;

(2) that the maker of the declaration was in conscious and fit state of mind;

(3) that as far as practicably possible, it must be recorded or taken down in the words of the maker;

(4) That the Court is satisfied, from the facts proved and the surrounding circumstances, about the veracity of the contents of the dying declaration

(5) that dying declaration stand on the same footing as other pieces of evidence, and has to be tested in the light of all available circumstances.

[Ref. **Khushai Rao v. State of Bombay** AIR 1958 SC 22; **State of UP v. Ramesh Sagar Yadav** AIR 1985 SC 416; **State of Orissa v. Bansidhar Singh** 1996 (2) SCC 194].

13. It is equally well settled that a dying declaration is not a deposition in Court, and its credibility cannot be tested through cross-examination. Therefore, there cannot be a presumption that the maker of the statement would tell the truth: (**Dadu Lakshmi Reddy v. State of A.P.** AIR 1999 SC 3255). For the same reason, the Court has to consider the statement of all the witnesses supporting it – (**Paparambaka Rosamma v. State of A.P.** 1999 (7) SCC 695).

14. The Supreme Court, in **Laxmi v. Om Prakash**, (2001) 6 SCC 118 observed that :

> ''XXXXXX XXXXXXX XXXXXX
>
> One of the important tests of the reliability of the dying declaration is a finding arrived at by the court as to satisfaction that the deceased was in a fit state of mind and capable of making a statement at the point of time when the dying declaration purports to have been made and/or recorded. The statement may be brief or longish. It is not the length of the statement but the fit state of mind of the victim to narrate the facts of occurrence which has relevance.
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> XXXXXX XXXXXX XXXXXX''

In the larger, five member Bench of the Supreme Court in Laxman v. State of Maharashtra, 2002 (6) SCC 710, the entire matter was put in perspective, in the following manner:

> ''XXXXXX XXXXXX XXXXXX
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> The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may

> affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirement of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon

provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

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15. A careful analysis of the evidence in this case would show that while there is no doubt that Anuradha's family had a dispute with her in-laws, and there existed perhaps considerable tension between the two families, some important features, which have not been explained by the prosecution, stand out. The first set of these, pertain to the making of the dying declaration. PW-1's testimony about being told the facts relating to the incident by the deceased, is brief. However, the official version was deposed to by PW-18, who claims to have recorded the dying declaration. Here, PW-2's version is crucial; he admits having been made to sign on the dying declaration. (Ex.PW-2/D), and beneath the endorsement, that it had been recorded in his presence. However, he did not state that the contents of the dying declaration, in his deposition, or that it was recorded in his presence; the prosecution was constrained to cross examine him, on this aspect, after leave was granted by the court. The doctor, PW-6 stated that he had certified that the injured was conscious and capable of recording the statement, and even stated that it was recorded in his presence. He admitted that the endorsement in the MLC was also that the patient was drowsy, which meant that she could not give any statement. Significantly, though he stated having certified about the mental capacity, and even having been present, when the statement was recorded, his testimony is silent as to what was stated by the deceased. These features, in the opinion of the court are sufficient to cast a serious doubt about whether the declaration was recorded in the manner alleged by the prosecution, and whether the deceased made it.

16. The second set of circumstances, which has to be considered, in the light of the evidence on the record, is whether the attending circumstances point to the dying declaration (assuming it to be so, as found by the Trial Court) stated the truth. Firstly, the deceased lived independently of her in-laws, in fact the house, located on the first floor, belonged to the father-in-law. Therefore, having regard to the nature of the relationship between the parties, there was little occasion for the deceased and to interact socially with her in-laws, or for them, to have

come to her premises. Secondly, if the quarrel erupted, about the staircase, it would have occurred there, or near the vicinity of the premises; the deceased nowhere stated that she was dragged into the house, kerosene doused over her, and set on fire. Thirdly, the premises where the mishap occurred is in the midst of a J.J. cluster , i.e. a lower middle class colony, predominated by tenements. There is evidence that the ground floor -of the premises where the deceased lived, were tenanted. The incident occurred around 07.00 PM; one of the witnesses, whose PCO was used to intimate the police, deposed that a lot of people had gathered, after a cry was taken up that a fire incident took place. Fourthly, PW-2, the deceased's husband, cited as a witness, did not support the theory of the dying declaration; he said that when asked, the deceased said that it was necessary for her to do it (set fire), implying that it was an attempt to commit suicide. This version is important, because it is at variance with the testimony of PW-1 and PW-18. It casts a doubt on the truthfulness of the dying declaration. Fifthly, and perhaps most crucially, the description of the incident, wherein five persons are alleged to have held a kerosene oil bottle, and poured the contents over the deceased, defies logic. It is not the prosecution case that the deceased was particularly strong or well built. If indeed, there had been an incident, at most three people could have been sufficient to subdue the deceased, and do what she alleged. Yet, she ''roped in'' all manner of people, including two wholly unconnected individuals, i.e. the sister of Jamuna, (the mother-in-law) and her husband, who concededly lived separately and could have had no common motive with Jamuna. Equally, the involvement of Jamuna's two unmarried daughters, is an improbable circumstance, which cannot be believed.

17. On an application of the standard indicted in **Laxman** (supra), i.e. that the dying declaration should *''inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination...*'' this court is of the opinion that the prosecution story about the dying declaration – both vis-a-vis its making, as well as the truth of its contents, cannot be believed, having regard to the overall circumstances in this case. The appeal, therefore, has to succeed. The Appellants are directed to be released forthwith. The appeals and all pending applications are allowed in the above terms.

ILR (2012) I DELHI 121
FAO

PRABHU DAYAL & ORS. ....APPELLANTS

VERSUS

UNION OF INDIA ....RESPONDENT

(VALMIKI J. MEHTA, J.)

FAO NO. : 174/2009 DATE OF DECISION: 15.09.2011

Railway Claims Tribunal Act, 1987—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.

Important Issue Involved: An eye-witness to an accident (who is a good Samaritan) cannot be dismissed by the Tribunal as not a trustworthy witness and an obliging witness and a blatant liar and a 'planted' witness, when no interest has been shown with respect to this concerned person who took the trouble of not only trying to stop the train but subsequently informed the railway police and accompanied the police back to the spot of the incident.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANTS : Mr. N.K. Gupta with Ms. Vidhi Gupta

& Mr. Prateek Kohli, Advocates.

FOR THE RESPONDENT : Mr. Jitendra Kumar Singh, Advocate.

CASE REFERRED TO:

1. *Parisa Anjali & Ors.* vs. *UOI* 2010 (IV) ACC 99.

RESULT: Appeal allowed.

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this First Appeal under Section 23 of the Railway Claims Tribunal Act, 1987 is to the impugned judgment of the Railway Claims Tribunal dated 2.4.2009 which dismissed the Claim Petition filed by the parents of the deceased, one Sh.Rakesh Kumar who is said to have died in an untoward incident of falling from a train near Tilak Bridge Railway Station, New Delhi on 14.1.2008.

2. The facts as stated in the complaint by the appellants were that the deceased had purchased a ticket for travel from Ghaziabad to Palwal and had boarded the Vaishali Express at Ghaziabad, and which train was going to New Delhi. It was further stated in the Claim Petition that when the train reached near Tilak Bridge Railway Station, the deceased Sh. Rakesh Kumar on account of a strong jerk of the train lost his balance and fell down from the moving train which resulted in his death on the spot. The respondent/Railways contested the case and pleaded that the deceased was not a bonafide passenger and in fact no ticket was purchased by the deceased. It was 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.

3. The Railway Claims Tribunal has arrived at a finding that the deceased did not have a valid ticket because a subsequent sentence was written in the Jamatalaashi report, Ex.AW1/3 that a ticket was recovered, and which sentence the Railway Claims Tribunal has found to be an interpolation. The Railway Claims Tribunal then held that even assuming that deceased had purchased a ticket, the said ordinary ticket cannot be used for travel in the Vaishali Express which is a super fast train and therefore the deceased cannot be said to be a bonafide passenger of the

train in question. The Railway Claims Tribunal has disbelieved the statement of the eye-witness AW2, one Sh. Lokesh Kumar who deposed that he was travelling in the train along with the deceased and the deceased died on account of fall from the train and for which incident though he raised the hue and cry, the train did not stop and therefore on reaching the New Delhi Railway Station he informed the police and returned back to the spot with the police. The Railway Claims Tribunal has disbelieved the statement of eye-witness, AW2 Sh. Lokesh on the different grounds including that there was no prior acquaintance with the deceased and that no statement of the witness AW2 recorded by the police forthcoming. The Railway Claims Tribunal has held that the eye-witness was a 'planted' witness and a blatant liar/obliging witness. Another adjective used for this witness is that this witness is not a trustworthy witness.

4. In my opinion, the Railway Claims Tribunal has clearly fallen into an error in dismissing the Claim Petition. The conclusion of the Railway Claims Tribunal that the deceased had not purchased a ticket is incorrect, and as will be shown in the latter part of this judgment on account of reports of the authorities of the respondent itself. On the aspect that Ex.AW2 is not a trustworthy witness and an obliging witness and a blatant liar and a 'planted' witness, these adjectives are unjustified as no interest has been shown with respect to this concerned person who took the trouble of not only trying to stop the train but subsequently informed the railway police and accompanying the police reached back to the spot of the incident. Further no rule has been placed on record that if an ordinary ticket is purchased for travel, then such a person cannot travel in a super fast train. Lastly no evidence was at all led by the railways to rebut the evidence in affirmative which was led on behalf of the appellants before the Railway Claims Tribunal.

5. In my opinion, the Railway Claims Tribunal has fallen into a grave error in holding that the deceased did not have a valid purchased ticket simply because the line at the end of Jamatalaashi report, Ex.AW1/3 mentioned that a ticket of travel from Ghaziabad to Palwal found, is in smaller letters than the other letters. I have seen the Jamatalaashi report, Ex.AW1/3 and the handwriting of the last line which is in small letters is very much in the handwriting of the author of the document itself. Merely because this last line is added in small letters cannot mean that this was not a genuine part of the report. If this last line is allegedly

interpolated to show that the deceased had a ticket, then really, the respondent ought to have summoned the author of the DD entry no.6/7A dated 14.1.2008 with respect to the Jamatalaashi report, Ex. AW1/3, to establish this alleged fact and which admittedly was not done. In any case, no doubt remains of the deceased having travelled with a valid ticket inasmuch as the report dated 18.12.2008 of the Railway Protection Force gives a specific report of the ticket number showing that the deceased was in fact travelling as per a valid railway ticket.

I therefore hold that the Railway Claims Tribunal was not justified in arriving at a finding that the deceased had not purchased a ticket for travel. I therefore hold that the deceased had purchased a ticket, the number of which is mentioned not only in the Jamatalaashi report, Ex. AW1/3 but also in the report of the Railway Protection Force dated 18.12.2008. Finally I may note that the ticket of travel was filed and exhibited before the Railway Claims Tribunal as Ex. AW1/2.

6. Once it is held that the deceased had a valid ticket for travel from Ghaziabad to Palwal, the only issue which will remain was whether the deceased died on account of a fall from the train and was there an untoward incident within the meaning of that expression in Section 123(c) of the Railways Act, 1989. In this regard, the Railways 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. The fact that the deceased however fell down from the train therefore cannot be an issue. That the deceased fell down from the train is also again confirmed by the report dated 17.12.2008 issued by the Railway Protection Force which states that the deceased had fallen down from Vaishali Express. Of course this report once again states that the deceased tried to get down from the running train and therefore died as a result of his own fault.

7. The issue therefore is as to whether the deceased fell down from a moving train or in fact was trying to get down from a running train. Admittedly, the Railways have led no evidence whatsoever. Even there is no DD entry or FIR of any Railway police official or any other Railway employee who had immediately reached the spot and was told that death was caused because the deceased was trying to get down from the train. Therefore, 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 whom I would call a good samaritan and not a blatant liar/planted witness/untrustworthy witness/or obliging witness and which adjectives have been used by the Railway Claims Tribunal. This witness has deposed in his affidavit that he raised a hue and cry for the train to stop and in fact he informed the police at New Delhi Railway Station of the incident and came back with the police at the spot. Firstly, all this could not have been a make-believe story, and if allegedly it was a make-believe one, the onus of proof had shifted on to the respondent/Railways once the eye-witness AW2 deposed with regard to the deceased having died on account of a fall from the train. The Railways ought to have led its rebuttal evidence but no such rebuttal evidence was led on behalf of the Railways. I may also note that if the Railways/respondent wanted to establish that the deceased in fact was trying to get down from a running train, then, surely, it could have led evidence that the death took place when the train was at the station itself, however as already referred to above, evidence of not a single witness was led on behalf of the respondent. I, therefore, hold that the deceased in fact died on account of a fall from the train and not because he was trying to get down from the train. I am persuaded to hold so keeping also in mind the fact after all the deceased was a bonafide passenger with a proper ticket of travel.

8. The Railway Claims Tribunal has also arrived at an incorrect finding that if there is death of a person by falling from a train, the incident will not be an untoward incident if the ticket in question is a general ticket and the travel was in a train which was a super fast train. No such rule has been relied upon before the Railway Claims Tribunal and no such rule has been relied before me that a person with a valid train ticket of travel, cannot travel in the general compartment of a second class of a super fast train. I am fortified in my view by a decision of a learned single Judge of the Andhra Pradesh High Court in the case reported as **Parisa Anjali & Ors. vs. UOI** 2010 (IV) ACC 99, and in which judgment the learned single Judge of the Andhra Pradesh High Court has held that merely because the ticket was not of that particular train in which the deceased was travelling, would not mean that the deceased was not a bonafide passenger of the train from which he fell down. I respectfully concur with the views of the Andhra Pradesh High

Court in the case of **Parisa Anjali** (supra).

9. In view of the above, the impugned judgment dated 2.4.2009 of the Railway Claims Tribunal is set aside. The appellants are held 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 7 & + % per annum simple. I have seen the order sheets of the Railway Claims Tribunal and which show that considerable delay was caused by the Railways in taking many opportunities to file the written statement and which was filed on the fifth opportunity. Ordinarily, I would have granted interest at 9% per annum simple, however, considering the overall facts and circumstances of the case and that interest would be payable from 2.4.2008 I find that interest at 7 & 1/2 % per annum simple will serve the interest of justice in the present case. The appeal is therefore allowed in terms of the aforesaid. The Trial Court record be sent back.

ILR (2012) I DELHI 127
CRL. M.C.

DIRECTORATE OF REVENUE INTELLIGENCE ....PETITIONER

VERSUS

BITOREN DOLORES FERNANDEZ ....RESPONDENT

(SURESH KAIT, J.)

CRL. M.C. NO. : 2970/2011 DATE OF DECISION: 16.09.2011
& CRL. M.A. NO. : 10476/2011
(STAY)

Narcotics & Psychotropic Substances Act, 1985—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.

I note that the prosecution had argued in **Rahul Saini** (supra) that even by taking purity percentage of diacetylmorphine (heroin) of 19.4% into consideration, the purity weight of contraband substance recovered from the accused would still be a commercial quantity, as is also argued in the present case, however, this argument of the prosecution was discarded by the Court in view of the doubts having been raised about the identity of the contraband substance recovered from the accused and tested vide the said reports. **(Para 16)**

The issue of change of colour or purity has already been dealt in catena of cases as discussed above. Purity in percentage may be due to some other factors like lapse of time and place of storage etc. but the variation in the present case is tremendous and same cannot be explained by mere passage of time. Additionally, the doubt is with regard to the substance which was actually recovered from the accused and tested subsequently. **(Para 28)**

Important Issue Involved: Where there is a huge difference between the first result of the sample and the second result of the sample resulting in the doubt as to the identity of the contraband substance recovered, whether or not according to the second sample commercial quantity can be said to have been recovered, is immaterial for the purpose of considering the application for bail of an accused.

[La Ga]

APPEARANCES:

FOR THE PETITIONER : Mr. Satish Aggarwala and Mr. Sushil Kaushik, Advocates.

FOR THE RESPONDENT : Mr. Rahul Tyagi and Mr. V.V.P. Singh, Advocates.

CASES REFERRED TO:

1. *Augustin* vs. *State Criminal MC.* No.2467/2010.

2. *Lily Lam* vs. *DRI, Crl.MC.* No.2604/2010.
3. *NCB* vs. *Maroof Bakare Criminal* M.A.No.1640/2009.
4. *Anil Kumar* vs. *NCB,* 2008(3) JCC (Narcotics).
5. *Customs* vs. *Ahmad Urkapa* Crl.M.C.No.1731/2007 & Crl.M.C. No.6050/2007 decided on 04.02.2009.
6. *Nihal Khan* vs. *State (Govt of NCT of Delhi)* 2007 Crl LJ 2074.
7. *Ram Narayan* vs. *State* Manu/DE/0837/2005 decided on 29.08.2006.
8. *Ranjitsing Brahmajeetsingh Sharma* vs. *State of Maharashtra And another:* AIR 2005 SCW 2215.

RESULT: Petition dismissed.

SURESH KAIT, J.

1. Vide the instant petition, the petitioner – DRI has challenged the order dated 24.08.2011 passed by learned Trial Court, whereby, the respondent/ accused has been admitted on bail.

2. Mr.Satish Aggarwala, learned counsel for the petitioner submits that while granting the bail, learned Trial Court has not recorded its opinion as required under Section 37 of the NDPS Act. Same is reproduced as under:-

> ‘‘**37. Offences to be cognizable and non-bailable.**-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for [offence under section 19 or section 24 or section 27-A and also for offence involving commercial quantity] shall be released on bail or on his own bond unless -
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing

that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations are granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.]''

3. Learned counsel for the petitioner further submits that as per Section 1(b)(ii) of the Act, where the Public Prosecutor opposes the application, and if the Court is satisfied that there are reasonable grounds for believing that accused is not guilty of such offences, and that he is not likely to commit any offence while on bail.

4. Learned Trial Court has taken the fact into consideration, that the respondent is facing a trial for commission of offence punishable under Section 21(c) of the NDPS Act with regard to the possession of 1.987 kgs. of heroin and also for the offences punishable under Section 29 read with Section 23 of the Act i.e. being a party to a criminal conspiracy to export the above said contraband substance out of India. The quantity of 1.987 kgs. of heroin is a commercial quantity because in the table notified under the said Act quantity of 250 gms. only has been declared to be a commercial quantity of heroin.

5. It is admitted case of both the parties that the respondent/accused could not be released on bail in view of the provisions as contained under Section 37 of the NDPS Act, unless there are reasonable grounds for believing that she is not guilty of such offence and that she is not likely to commit any such offence while on bail.

6. The bail application was filed by the respondent/ accused on the ground that during investigation of the case, the samples taken from the above contraband substance and were sent to Central Revenues Control Laboratory (hereinafter referred as 'CRCL') for testing and vide report of the CRCL, which has been brought on record Ex.PW7/A, the percentage of diacetylmorphine (heroin) in the above sample has been opined to be 86%. During trial of the case one application was moved on behalf of accused for drawing a fresh sample out of the remaining case property and retesting thereof because of some changes observed in the colour and texture etc. of the contraband substance.

7. While moving the above stated application for bail, the respondent / accused relied upon the proposition of law as laid down by this Court in **Nihal Khan Vs. State (Govt of NCT of Delhi)** 2007 Crl LJ 2074; **Customs Vs. Ahmad Urkapa** Crl.M.C.No.1731/2007 & Crl.M.C. No.6050/2007 decided on 04.02.2009. **Anil Kumar Vs. NCB,** 2008(3) JCC (Narcotics) and **Lily Lam Vs. DRI,** Crl.MC. No.2604/2010, wherein the applications were allowed and released on bail.

8. On application a fresh sample from the remaining case property was also drawn in the trial Court on 23.02.2011. In CRCL report regarding examination thereof, the percentage of diacetylmorphine (heroin) has been stated to be 41.3%. In view of above, a major discrepancy was found in the percentage count of diacetylmorphine (heroin) in the above two samples.

9. Ld. counsel for the Respondent/accused has argued before trial court that, in view of the above two test reports that there are serious doubts regarding the substance which was allegedly recovered from the respondent / accused and the same was decided vide the said reports. Learned counsel for accused has relied upon in view of the proposition of law as laid down by this Court in **Ram Narayan Vs. State** Manu/DE/ 0837/2005 decided on 29.08.2006 wherein it was held that in cases of vast difference, between the percentage of diacetylmorphine (heroin) in the two test reports it becomes doubtful that the samples were taken from the same bags which were recovered from the accused and hence, as submitted that accused could be released on bail, despite provisions of Section 37 of the Act as the conditions contained therein are satisfied.

10. Learned counsel for the petitioner has argued on behalf of the DRI before the Trial Court in context of Section 37 of the Act, which talks about the bars and rigors; hence the respondent / accused cannot be released on bail and the above differences in the purity of the percentage count of the diacetylmorphine (heroin) in the two test reports was not of much consequences.

11. Further argued that even if percentage of diacetylmorphine (heroin) in the second test report, taken into consideration, still the purity weight of contraband substance recovered from the respondent/accused, will still be a commercial quantity.

12. Further argued that being a foreigner, respondent/accused can

always jump the bail and abscond from the proceedings.

13. In **Ram Narayan** (supra) recovery of 1.5 kgs of heroin was effected from the accused and the percentage of diacetylmorphine (heroin) in the report of FSL was opined to be 1.08%. While considering a plea of bail of the accused in the said case and in view of the bars and rigors contained in Section 37 of the Act, had made the following observations:-

> ''I have considered the arguments advanced by the learned counsel for the petitioner as well as the learned counsel for the State. In so far as the applicability of Section 37 of the NDPS Act is concerned, without going into the question of percentage of the Heroin found in the substance, it may be assumed that the same is applicable in this case. However, the fact that Section 37 of the NDPS Act applies to a particular case does not mean that the accused in such a case would not be entitled to bail per se. What is necessary for the court examining the question of grant of bail where Section 37 applies is that the court should be satisfied having regard to the material available on record that there are sufficient grounds that the petitioner may not be convicted. If the probabilities are that the petitioner may not be convicted, the Court can grant bail subject to the further condition being satisfied that the petitioner is not likely to commit any offence while on bail. However, if the court is satisfied looking at the probabilities of the case that the petitioner is likely to be convicted, the question of grant of bail would not arise. This is what has been held by the Supreme Court in the case of **Ranjitsing Brahmajeetsingh Sharma V. State of Maharashtra And another:** AIR 2005 SCW 2215 while considering the provisions of Section 21 of the Maharashtra Control of Organised Crime Act, 1999. The provision of Section 21 of the latter act are in pari material with the provisions of Section 37 of the NDPS Act.
>
> ... ...
>
> ... ...
>
> In the backdrop of the foregoing principles, I find that the differences in the test results of the samples taken from the very same packet case doubts on the issue as to whether the case property is the same as what is alleged to have been recovered

> from the petitioner. This is not a definite finding and that would come at the time of trial. However, on the basis of the materials brought on record, there is every likelihood that the petitioner may not be convicted in this case. It is further to be examined as to whether there is any likelihood of the petitioner committing any offence while on bail. In this regard, the Supreme Court in the aforesaid decision, held that the satisfaction of the court as regards the likelihood of not committing any Offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. It is further held that since it is difficult to predict the future conduct of the accused, the Court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and the manner in which he is alleged to have committed the offence. The present petitioner has no criminal antecedents and nothing has been indicated to show that the petitioner has a propensity to commit any offence under the NDPS Act.''

14. Thereafter, in **Rahul Saini** (supra) also the above mentioned proposition of law laid down in **Ram Narayan** (supra) were again reiterated and had again considered a plea for bail to an accused in the case of recovery of 1.5 kgs of diacetylmorphine (heroin). In the said case, the purity percentage of diacetylmorphine (heroin) was opined in the first test report to be 54.9% and in the second test report of sample drawn in the Court, the same was opined to be 19.4% only. While, observing the above to be a huge difference, the accused was directed to be released on bail, despite the bars contained in Section 37 of the NDPS Act, on the ground that in the given facts and circumstances, there are reasonable doubts as to what recovery having been made and as also to the connection between the alleged recovery and the accused.

15. It was argued on behalf of the prosecution that in **Rahul Saini**(supra) that the above difference in purity percentage of the diacetylmorphine (heroin) may be due to some other facts like lapse of time etc., but the above contention was rejected by the Court on the grounds that the variation was tremendous and the same cannot be explained by mere passage of time and further, while holding that the question is not only of the difference in the purity percentage, but the doubt is with regard to the substance which was actually recovered from

the accused and was tested subsequently.

16. I note that the prosecution had argued in **Rahul Saini** (supra) that even by taking purity percentage of diacetylmorphine (heroin) of 19.4% into consideration, the purity weight of contraband substance recovered from the accused would still be a commercial quantity, as is also argued in the present case, however, this argument of the prosecution was discarded by the Court in view of the doubts having been raised about the identity of the contraband substance recovered from the accused and tested vide the said reports.

17. I further note that learned Trial Court has considered all pleas taken by learned counsel for DRI, however, the Trial Court notwithstanding the bars and restrictions contained in Section 37 of the NDPS Act, as in the instant case also there is a huge difference, between two test reports regarding the percentage of diacetylmorphine (heroin) and the first test report it has been stated to be 86%, whereas in the second test report, the same has been opined to be 41.3% in view of the above discussion, learned Trial Court found serious doubts regarding the substance recovered from the accused and that tested in CRCL.

18. The Trial Court has also considered that the respondent / accused is not previously involved in any such case under the NDPS Act. Therefore, the Trial Court did not find any likelihood of commission of any similar offence by the accused in future; in the given facts and circumstances of the case. Learned Trial Court has also considered the arguments of the prosecution regarding the apprehension of the absconding of the accused being a foreigner and this cannot be a ground to deny bail to her, if she is otherwise entitle to the same.

19. To rebut the contention of learned counsel for petitioner, learned counsel for respondent / accused has given the instances of two cases wherein this Court vide order dated 09.04.2009 in Criminal MC No.436/ 2009 and Criminal M.A.No.1640/2009 '**NCB Vs. Maroof Bakare** wherein the release of foreigner on bail was made, subject to certain conditions to ensure the presence of the accused during trial. Further submits that in Criminal MC. No.2467/2010 **Augustin Vs. State** decided on 15.09.2010 has attended the entire trial and thereafter undergone sentence. Also in **NCB Vs. Maroof Bakare** (supra) the accused attended the entire trial before the lower Court and, thereafter, despite he was released on bail, finally acquitted by the Trial Court. He has stated at Bar that he appeared

in above two cases on behalf of the accused therein.

20. In the instant case, while admitting the respondent/ accused on bail, she was directed to be released on bail after furnishing a personal bond in the sum of Rs. 50,000/- with two sureties of the like amount each to the satisfaction of the Trial Court.

21. The Trial Court, keeping in mind that the accused is a foreigner and apprehensions being raised regarding her absconding from the proceedings; following conditions were imposed:-

''(i) That a look out circular shall be issued by the complainant/ concerned officer of DRI so that the applicant/accused is not in a position to leave this country from any port at all;

(ii) The Embassy/High Commission of the country, to which the applicant/accused belongs, is directed not to issue any travel document of the applicant/accused during the pendency of this case and without the no objection to be given by this Court and as undertaking in this regard shall be furnished by an authorised officer of the Embassy/High Commission concerned in this court before the bail bond furnished on behalf of the applicant/accused in terms of this order is accepted by this court; and

(iii) The applicant/accused shall report at the office of DRI, Delhi Zone Unit, CGO Complex, Lodhi Road, New Delhi, once in a every week and shall not leave Delhi without the permission of this Court.

22. Vide order dated 06.09.2011, petitioner – DRI was directed to produce some literature on the aspect that – Whether with the passage of time does the colour and purity of the samples get changed?

23. Pursuant to the said order, learned counsel for petitioner, has produced a photocopy of letter dated 09.09.2011 issued from the Director (Revenue Laboratories),CRCL to Shri R. K. Sharma, Additional Director General, (Directorate of Revenue Intelligence), Delhi Zonal Unit, Lodhi Road, New Delhi and have given the following observations:-

''1) There are no guidelines of CRCL functions for second test in respect of the narcotic drugs.

2) a) Illicit seized NDPS materials of natural, semi-synthetic in

origin i.e. Opium, Charas, Ganja and Heroin etc non-homogeneous in nature, hence, if re-sampled, sample variation in contents of active substances can occur.

b) If re-sampling is done after a gap of considerable duration, then great variation in percentage of active content may occur, which could be due to the following reasons:

(i) Improper storage(Deterioration due to effect of light, variation in temperature and humidity etc.)

(ii) Natural products are prone to get infected with bacterial and fungal micro-organisam, which may cause a change in chemical composition, thereby it may decompose, partly or fully.''

24. Additionally, learned counsel for petitioner has produced ''Studies on the degradation of heroin'' from Forensic Science International 67 (1994) 147-154. Same reads as under:-

''Studies on the degradation of heroin'' The question of the possible change in the heroin content of a given sample of putative heroin-containing brown powder, from chemical de-gradation of its di-acetyl morphine content, frequently arises whilst giving testimony in courts in cases involving heroin in Sri Lanka.

Sample	Ini-tial	End of 1st week	End of 2nd week	End of 3rd week	End of 4th week	End of 5th week	Decrease in heroin % age
01	87.2	87.2	87.2	87.2	87.2	87.2	
02	43.9	21.6	5.4	3.2	2.3	0.7	98.4
03	44.7	30.3	13.4	9.4	6.2	3.8	91.5
04	33.1	26.6	18.4	15.2	12.8	8.2	75.2
05	47.5	20.2	3.4	2.1	1.2	0.3	99.4
06	53.3	15.5	4.7	3.4	2.0	0.0	100.0
07	32.1	25.9	14.1	8.5	6.4	4.2	86.9
08	55.3	51.2	32.2	22.3	16.8	10.3	81.4
09	55.7	26.3	7.4	4.3	1.1	0.0	100.0
10	35.5	28.3	19.5	15.2	11.8	9.4	73.5
Average	44.6	27.3	13.2	9.3	6.7	4.1	90.8

Discussion

The analytical results showed that for methanolic solutions at ambient temperatures (26 OC) the degradation of heroin during the 5-week period resulted in an average decrease in its heroin content by 90.8 %. Complete degradation of the heroin content of all samples was observed at the end of the eighth week, while the heroin contents of four samples were completely degraded at the end of the seventh week, four at the end of sixth seek and two samples at the end of fifth week.

Under refrigerated conditions (6-8 OC), the degradation of heroin during the 5-week period resulted in an average decrease in its heroin content by 69.7%.

Conclusions:

This means that the significance of the present work is enhanced in the numerous cases where 'seizures' involve small quantities of heroin. The reason being that the quantity of heroin contained in a sample analysed after several weeks would be appreciated less than was present at the time of seizure, and might well result in a significantly reduced penalty.''

25. Learned counsel for petitioner has not pointed out that if the impugned order is bad in law or finding of the learned Trial Court is perverse. The Trial Court has considered the facts and material placed before it; and this case is fully covered by **Rahul Saini**(supra) on change of colour plus percentage. Further submits that literature produced by learned counsel for petitioner is a report on 'dissolved powder' whereas the contraband substance in the present case is a powder form, therefore, material produced in the Court by learned counsel for petitioner has no relevance.

26. Additionally, learned counsel for respondent/ accused has drawn the attention of this Court to the *Panchnama* dated 14.12.2008. As per the *Panchnama* the packet was found to contain white colour powder. He has also drawn the attention of this Court to the deposition of PW5 Mrs.Anju Singh, IO/DRI wherein she has stated that on opening a yellow colour envelop/packet, one transparent polythene packet was taken out having written 'A' and same is stapled. On opening the same, one packet

was taken out and it was wrapped with black colour adhesive tape and same was containing while colour powder substance.

27. Further, it is deposed that said polythene pouch was containing substance having earth (Matiala) colour. As submitted above, the colour of the substance was found to be different from the substance recovered from the respondent/ accused. Further submitted that colour of the sample changed only in one packet and not in other packet. Therefore, the sample sent to laboratory and the percentage is totally doubtful.

28. The issue of change of colour or purity has already been dealt in catena of cases as discussed above. Purity in percentage may be due to some other factors like lapse of time and place of storage etc. but the variation in the present case is tremendous and same cannot be explained by mere passage of time. Additionally, the doubt is with regard to the substance which was actually recovered from the accused and tested subsequently.

29. In my view, the Trial Court has dealt with all the issues raised by the learned counsel for petitioner. The conditions imposed by learned Trial Court are such, it may be very difficult for the respondent/accused to leave country or will not repeat the offence in these circumstances.

30. In view of above discussion, I find no discrepancy in the impugned order passed by the Trial Court.

31. The Jail authorities are directed to release the respondent/accused forthwith, subject to due compliance of the order of the Trial Court passed on 24.08.2011.

32. Accordingly, Criminal M.C. 2970/2011 & Criminal M.A.No.10476/2011 are hereby dismissed with no order as to costs.

ILR (2012) I DELHI 140
CM(M)

MR. HARSHA GUPTA ....PETITIONER

VERSUS

M/S. INSULATION & ELECTRICAL PRODUCTS (P) LTD. ....RESPONDENT

(INDERMEET KAUR, J.)

CM (M) NO. : 79/2003 & CM (M) NO. : 8171/2010 DATE OF DECISION: 19.09.2011

Delhi Rent Control Act, 1958—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.

Section 27 of the DRCA prescribes the manner and the mode in which the rent has to be paid by the tenant in case the landlord refuses to accept the rent tendered by him within the specified period; in such a case the tenant is required to deposit rent in the court of Rent Controller by giving the necessary particulars as required under Section 27(2). Courts have time and again held that the rent which has been deposited somewhere else and not as per the procedure prescribed under Section 27 is no 'tender' of rent within the meaning of Section 14(1)(a) and would amount to a non-payment of rent. **(Para 18)**

Important Issue Involved: (A) If the tenant is not sure about his landlord, if this is the confusion, provisions of Section 27 of the DRCA should be resorted to by him and tenant is mandated to deposit the rent in the Court of Rent Controller.

(B) If no reply has been furnished to the legal notice, it is an implied admission of the specific averment made in the notice.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Vivek Sood, Advocate.

FOR THE RESPONDENTS : Mr. A.S. Chandihok, Sr. Advocate with Mr. S.C. Sharma, Mr. Bhagat Singh and Mr. Vidit Gupta, Advocate.

CASES REFERRED TO:

1. *Adbul Razak* vs. *Mangesh Rajram Wagle,* (2010) 2 SCCC 432.
2. *Sarla Goel & Ors.* vs. *Kishan Chand* (2009) 7SCC 658.
3. *Sarla Goel and others* vs. *Kishan Chand* (2009) 7 SCC 658.
4. *Atma Ram* vs. *Shakuntala Rani* (2005) 7 SCC 211.
5. *Sant Ram* vs. *Janki Parshad* 85 (2000) DLT 41.
6. *M/s Bhagwan Dass Yashpal* vs. *Wasu Ram & Ors.* RLR 2(2000) 424.
7. *Jai Manmohan Kapoor* vs. *Kedar Nath Sekhri* AIR CJ IX 1991(2).
8. *Smt. Prakash Mehra* vs. *K.L. Malhotra* reported in AIR 1989 SC 1652.
9. *Rakesh Kumar & Anr.* vs. *Hindustan Everest Tool Ltd.* (1988) 2 SCC 165.

10. *Shri Ram Samp* vs. *Shri Sultan Singh etc.* AIR (1977) CJ 552.

11. *Ram Sarup* vs. *Sultan Singh* AIRCJ 1977 (2) 552.

12. *Privy Council Harihar Banerji & Ors.* vs. *Ramshashi Roy & Ors.* AIR 1918.

RESULT: Allowed.

INDERMEET KAUR, J.

1. Eviction petition under Section 14 (1) (a) of the Delhi Rent Control Act (hereinafter referred to as the DRCA) had been filed by the petitioner i.e. Harsh Gupta. The suit property comprises of a portion of property bearing No. 30, Shivaji Marg, Najafgarh Road Industrial Area, New Delhi as depicted in the site plan filed along with the petition. Respondent was stated to be a tenant residing there at a monthly rent of Rs.300/-. The initial landlord was Smt. Vidyawati, she had been paid rent up to 30.11.1999. On 26.11.1999, she had executed a registered gift deed qua the suit property in favour of her grandson i.e. the petitioner; this had been intimated to the tenant vide letter dated 10.01.2000 dispatched on 31.01.2000 (page no. 19) and received by the tenant on 02.02.2000. Vide this letter the erstwhile landlord had informed the tenant that the rent after 01.12.1999 should be paid to her grandson i.e. Harsh Gupta.

2. Further admitted fact is that the tenant on 13.02.2000 had sent a rent cheque for the month of December 1999 to Smt. Vidyawati but that cheque was not enchased by the petitioner as the change of the status of the landlord had already been intimated to the tenant.

3. On 19.02.2000, a legal notice was sent by the landlord to the tenant which was received on 29.02.2000. Thereafter, the present eviction petition had been filed by the landlord on 30.01.2003 under Section 14(1) (a) of the DRCA claiming that the tenant had defaulted for three consecutive months i.e. from December 1999 up to February 2000 and thereafter further from March 2000 to May 2000 and was thus liable to be evicted under Section 14(1) (a) of the DRCA. It is also undisputed that vide letter dated 05.06.2000 the tenant had paid a sum of Rs.900/- as rent from December 1999 to February 2000; for the months of March to May 2000 rent was sent by another cheque amounting to Rs. 990/-; for the months of June and July rent was sent vide letter dated 06.07.2000.

4. Learned counsel for the petitioner has drawn attention of this court to the written statement wherein the tenant has admitted that on 19.02.200 rent was due for December and January; vehement contention being this is a clear and unequivocal admission made by the tenant that up to 19th February, 2000 rent was due for the months of December and January meaning thereby that admittedly up to 19.02.2000 no rent had been paid for December and January; rent had also become due for the month of February as rent was always being paid in advance and as such three consecutive defaults had arisen making the tenant liable to be evicted forthwith.

5. Contention of the petitioner is three fold. It is submitted that the order of the RCT holding that the petitioner had never averred that the rent is payable in advance is dislodged by the averments made by the landlord in his eviction petition wherein in sub clause (VI) of para 18 (a) it has specifically been averred that the rent for each month was payable by the respondent to the petitioner in advance; submission being that this finding of the ARC is clearly perverse and is liable to be set aside. Attention has been drawn to the legal notice dated 19.02.2000 where the arrears of rent had been demanded from the respondent for the period from 01.12.1999 to 29.02.2000 and a specific contention had been raised that the rent was payable in advance. Submission is that no reply has been filed to this notice; this is a deemed admission; attention has also been drawn to the letter dated 05.06.2000 sent by the respondent to the petitioner where the ''subject'' makes a reference to the legal notice dated 19.02.2000; contention being that vide this communication dated 05.06.2000 (Ex.AW-1/R8) the respondent has admitted the receipt of the contents of the legal notice dated 19.02.2000; his tendering the cheque dated 27.05.2000 vide this letter dated 05.06.2000 for the period of December, 1999 to February, 2000 was clearly beyond the period prescribed; this was also admittedly after the period of 15.05.2000. Learned counsel for the petitioner has also placed reliance upon a Judgment of the Delhi High Court reported in AIRCJ 1977 (2) 552 **Ram Sarup Vs. Sultan Singh** to support his submission that even if the rent was sought at an enhanced amount in the legal notice, it would not affect its validity; contention being that even if the rent had been asked at the enhanced rent of Rs.330/- per month, it would not affect the validity of the notice. Reliance has been placed upon (1988) 2 SCC 165 **Rakesh Kumar & Anr. Vs. Hindustan Everest Tool Ltd.** to support his submission that

the notice has to be read in the common sense point of view bearing in mind as to how such a notice is understood by an ordinary people. For the same proposition reliance has also been placed upon a decision of the Privy Council reported in AIR 1918 **Privy Council Harihar Banerji & Ors. Vs. Ramshashi Roy & Ors.** The judgment of a Bench of J&K High Court report in AIR CJ IX 1991(2) **Jai Manmohan Kapoor Vs. Kedar Nath Sekhri** has also been cited to support this same submission. It is submitted that on all counts, the tenant has defaulted in making timely payment of rent; there being three consecutive defaults for the months of December, 1999 to February, 2000, the ARC had rightly ordered the eviction of the tenant; the impugned order holding otherwise suffers from an illegality; it is liable to be set aside. It is further pointed out that the tenant has to strictly comply with the provisions of Section 27 of the DRCA and if he is confused about the actual person to whom the rent has to be paid provisions of Section 27 of the DRCA mandate that the rent should be deposited by the tenant in the court of the ARC; the word ''may'' as occurring in Section 27 has been construed to be read as ''shall''; this is mandatory provision. For this proposition reliance has been placed upon (2009) 7SCC 658 **Sarla Goel & Ors. Vs. Kishan Chand**. It is pointed out that in the judgment of Apex Court reported in (2005) 7 SCC 211 **Atma Ram Vs. Shakuntala Rani** where the tenant had paid rent under the provisions of Punjab Relief of Indebtedness Act, 1934 , the benefit had not been granted to the tenant; it has been held by the Supreme Court that this amounted to a willful default on his part; provisions of Section 27 of the DRCA had to be adhered to in the absence of which he could not claim any benefit. It is submitted that the provisions of Section 26 of the DRCA had also been interpreted by the Apex Court which merely provides a facility to the tenant to pay rent up to the 15th day of the next following month for which it is payable; it does not however mean that the rent does not become due and payable by the end of the calendar month. For the same proposition reliance has also been placed upon RLR 2(2000) 424 **M/s Bhagwan Dass Yashpal Vs. Wasu Ram & Ors.** It is pointed out that in this case the tenant has admittedly not availed of the provision of Section 27 of the DRCA; he is in default for three executive months

6. This contention of the learned counsel for the landlord that the rent was being paid in advance had found favour with the Additional Rent Controller. Placing reliance upon the provisions of Section 26 of DRAC

Rent Controller had noted that the rent for January 2000 was payable till 15.02.2000; rent from February 2000 had become due by the beginning of the month and by all means after 15.02.2000; legal notice was dated 19.02.2000; tenant was found to be in default for three consecutive months. The eviction order was passed in favour of the petitioner and against the respondent.

7. The Tribunal in appeal set aside the order of the ARC; the Tribunal noted that the contentions of the petitioner did not advance the submission that the rent was being paid by the tenant in advance. The Tribunal was of the view that there were no three consecutive defaults; rent was due only for the months of December 2000 and January 2001. The Tribunal had also noted that even as per the case of the landlord the tenant had sent rent on 13.02.2000 for the month of December and although that cheque had not been encashed by the landlord on the premise that gift of the property had already been effected by the erstwhile owner in favour of the present petitioner yet the landlord having retained that cheque, the tenant was held not to be a defaulter; the order of the ARC was set aside; eviction petition was dismissed.

8. This order of the Tribunal is the subject matter of the present petition. Vehement arguments have been addressed by the respective parties.

9. At the outset learned counsel for the respondent has pointed out that this Court is exercising its jurisdiction under Article 227 of the Constitution; the writ court is not an appellate court and unless and until a jurisdictional error has been committed by the ARCT, the High Court exercising its supervisory power under Article 227 of the Constitution should not interfere with the order of the Court below. There is no dispute to this proposition. In the judgment of the Apex Court reported in (2010) 2 SCCC 432 **Adbul Razak Vs. Mangesh Rajram Wagle,** the Apex court had reiterated the principles which have to be kept in mind by a court exercising its jurisdiction under Article 226 or 227 of the Constitution. The purpose of the supervisory jurisdiction under Article 227 of the Constitution is for keeping the subordinate Courts within the bounds of their jurisdiction; if the subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or

grave injustice has been occasioned thereby the High court may step in to exercise its supervisory jurisdiction; thus unless and until there is a patent error which is self evident on the face of the record the court should be slow in interfering with the order of the court below.

10. On merits, it has been submitted that no default has been committed by the tenant; submission being that the rent was not payable in advance; to substantiate this submission attention has been drawn to the testimony of the petitioner wherein it is pointed out that no such averment has been made. In the alternate, it is argued that even presuming that the rent was payable in advance, rent had admittedly been paid to the landlady –Vidyawati for the month of December; this was under the bona fide impression that she continued to be the landlady; this cheque was also retained by the petitioner and this has been admitted by the petitioner in his cross-examination; even presuming that the payment had been made to a wrong person, in these circumstances, it would have been incumbent upon the petitioner to have returned the cheque to the tenant but he did not do so. In the legal notice sent on 19.02.2000 since only the legally recoverable rent could have demanded; at best demand could have been for the rent for the months of January and February and that too, if the rent was payable in advance; rent for the month of December already stood paid; there were no three consecutive defaults. To support this submission qua the notice of demand reliance has been placed upon the judgment reported in 85 (2000) DLT 41 titled as **Sant Ram vs. Janki Parshad** which had followed the ratio of the judgment of **Smt. Prakash Mehra vs. K.L. Malhotra** reported in AIR 1989 SC 1652. It is submitted that the legal notice has even otherwise made a demand for the enhanced rent; in terms of the provisions of 6(A) read with Section 8 of the DRCA, this enhanced rent could have been recovered only after 30 days from the date on which this notice was served i.e. 30 days after 29.2.2000. It is pointed out that the petitioner has even otherwise not submitted that the so called gift deed which was purported to have been executed by his grand-mother in his favour; in fact, the petitioner is not clear as to whether it was a gift deed or an assignment deed; attention has been drawn to the parts of the eviction petition where reference has been made in the petition at one point to a gift deed and at another stance, to an assignment deed; petitioner himself being confused, in these circumstances, the payment of rent to the landlady for the month of December was purely a bonafide payment; it

was a bonafide 'tender' of rent within the meaning of Section 14(1)(a) of the DRCA; impugned order in no manner suffers from any infirmity.

11. In this back ground the contentions advanced by the respective Senior Counsels appearing on behalf of the respective parties shall be considered.

12. Record has been perused.

13. Certain facts are undisputed. The respondent was a tenant of the landlord Vidyawati; rate of rent was Rs.300/- per month; it was an oral tenancy; this tenancy had been created by Vidyawati in favour of the respondent. The present petition is a petition under Section 14(1)(a) of the DRCA. Contention of the petitioner is that three consecutive defaults in payment of rent had been made by the respondent/tenant. It is not in dispute that the benefit of Section 14(2) of the DRCA has already been afforded to the respondent in terms of the earlier order of this Court dated 18.2.1982. On 10.1.2000 Vidyawati had written a letter (Ex.AW-1/1) to the respondent/tenant informing him that vide a registered gift deed dated 26.11.1999 the suit premises which were under the tenancy of the respondent have since been gifted to her grandson Harsh Gupta son of Lalit Kumar; in the letter it was stated by Vidyawati that she desired that arrears of rent from 01.12.1999 should be paid to Harsh Gupta only and the respondent should attorn to Harsh Gupta as the landlord and to pay all arrears of rent as also future rents to him alone. This letter was dispatched on 31.1.2000 which is evident from the acknowledgement card (Ex.AW-1/4); it is also not in dispute that this letter was received by the respondent/tenant on 02.2.2000(Ex.AW-1/6). Legal notice dated 19.2.2000 (Ex.AW-1/21) was sent by petitioner to the respondent/tenant demanding arrears of rent from 01.12.1999 to 29.2.2000. This letter was sent by the advocate on behalf of Harsh Gupta. In this letter it was categorically stated that Vidyawati has created a registered gift deed in his favour by virtue of which the rent has to be received by the petitioner; the rent was being paid in advance for each month by the seventh day of each month; a sum of Rs. 900/- is due from the respondent for the months intervening December 1999 to 29.2.2000 at the rate of Rs.300/- per month. This notice further stipulated that the petitioner under the provisions of Section 6(A) of the DRCA is seeking to enhance the rent by 10% and within 30 days from the date of this notice the enhanced rate of rent Rs. 330/- per month shall have to be tendered by

the respondent. This notice was dispatched on 28.2.2000 (Ex.AW-1/10); it was received by the tenant on 29.2.2000 (Ex.AW-1/20). This notice was however not replied to.

14. The question which has to be answered is whether three consecutive defaults have been committed by the respondents for the months of December 1999, January 2000 and February 2000 and if so whether the order of ARC decreeing the petition of the petitioner was the correct approach or whether the order of the ARCT upsetting the order of the ARC had construed it correctly.

15. This Court has also to address the argument as to whether the rent was payable by the tenant in advance or whether the rent fell due after the end of the tenancy month and the provisions of Section 26 of the DRCA protect the tenant.

16. In the eviction petition filed by the petitioner, para 18(a) clearly states that the rent for each months is payable by the respondent to the petitioner in advance. The RCT returning a finding that this has not been averred by the petitioner in his eviction petition is an illegal perception of the facts; in fact, the RCT had premised his findings largely on this basis holding that there was no specific averment by the petitioner that the rent of each month is payable by the respondent in advance. This finding returned on this premise is against the record and is liable to be set aside. Legal notice dated 19.2.2000 had also specifically averred that the rent was being paid by the tenant to Vidyawati in advance i.e. by the seventh day of the each month. Legal notice had admittedly been received by the defendant on 29.2.2000 but he had chosen not to file any reply.

17. Record further shows that on 13.2.2000 the respondent had remitted a sum of Rs. 300/- as rent for the month of December 1999 to Vidyawati; this cheque had been sent in the name of Vidyawati although it was well within the knowledge of the respondent/tenant that vide registered gift deed the property already stood transferred by Vidyawati to her grandson Harsh Gupta and this had been intimated to the tenant vide communication dated 10.1.2000 which had been received by the tenant on 02.2.2000; yet in spite thereof on 13.2.2000 the tenant still chose to send the rent to Vidyawati. This cheque was admittedly not encashed. This had been informed to the tenant on 19.2.2000 in the legal notice wherein it was reiterated that the rent has to be paid not to

Vidyawati but to Harsh Gupta w.e.f. 01.12.1999 in view of the fact that Vidyawati had executed a gift deed of this property in favour of Harsh Gupta and this is not a legal tender of rent. In spite of this intimation which had been received on 29.2.2000 rent still remained unremitted.

18. Section 27 of the DRCA prescribes the manner and the mode in which the rent has to be paid by the tenant in case the landlord refuses to accept the rent tendered by him within the specified period; in such a case the tenant is required to deposit rent in the court of Rent Controller by giving the necessary particulars as required under Section 27(2). Courts have time and again held that the rent which has been deposited somewhere else and not as per the procedure prescribed under Section 27 is no 'tender' of rent within the meaning of Section 14(1)(a) and would amount to a non-payment of rent. This has been reiterated by the Apex Court in **Atma Ram Vs. Shakuntala Rani** (2005) 7 SCC 211 In this case the tenant had deposited the rent under the provisions of the Punjab Relief of Indebtedness Act, 1934; it was held by Apex Court that this would not be a valid deposit by the tenant and would be construed as a default at it was not a tendering of the rent in the manner as required by law. In this context, the Apex Court had inter alia as under:

> 17. It will thus appear that this Court has consistently taken the views that in Rent Control Legislations if the tenant wishes to take advantage of the beneficial provisions of the Act, he must strictly comply with the requirements of the Act. If any condition precedent is to be fulfilled before the benefit can be claimed, he must strictly comply with that condition. If he tails to do so he cannot take advantage of the benefit conferred by such a provision.
>
> .....
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> .. The Act, therefore, prescribes what must be done by a tenant if the landlord does not accept rent tendered by him within the specified period. He is required to deposit the rent in the Court of the Rent Controller giving the necessary particulars as required by Sub-section (2) of Section 27, There is, therefore, a specific provision which provides the procedure to be followed in such a contingency. In view of the specific provisions of the Act it would not be open to a tenant to resort to any other procedure. If the rent is not deposited in the Court of the Rent Controller

as required by Section 27 of the Act. and is deposited somewhere else, it shall not be treated as a valid payment/tender of the arrears of rent within the meaning of the Act and consequently the tenant must be held to be in default.

19. In the judgment of **Sarla Goel and others Vs. Kishan Chand** (2009) 7 SCC 658 the Apex Court had construed the word ''may'' as appearing in Section 27 of the DRCA as ''shall''; it has been construed to be mandatory; i.e. the procedure as prescribed under Section 27 of the DRCA has to be strictly followed in all those cases where either landlord refuses to accept the rent or the tenant is not sure as to whom the rent is payable i.e. either to A or B. The ratio being that if the tenant wishes to avail of the beneficial legislation of the DRCA in order to seek a protection under its cover he ought to strictly follow the procedure contained therein.

20. In the instant case it is on record that the rent for the month of December 1999 had been tendered to a wrong person i.e. to Vidyawati when the tenant had specific knowledge about the fact that Vidyawati has since gifted this property to Harsh Gupta; the rent was now payable to Harsh Gupta; this was the communication addressed by Vidyawati herself to her tenant which was received by the tenant on 02.2.2000; yet on 13.2.2000 he still chose to pay the rent for December 1999 to Vidyawati. This fact was brought to his notice even in the legal notice dated 19.2.2002 which was received by him on 29.2.2000 but he did not pay any heed. He in fact even did not reply to the said notice. The RCT has made a wrong assumption that this was a bonafide and a genuine mistake committed by the tenant; it the tenant was not sure about his landlord i.e. whether it was Vidyawati or Harsh Gupta; if this was the confusion, provisions of Section 27 of the DRCA should have been resorted to by him and the tenant was mandated to have deposited the rent in the court of Rent Controller; he chose not to do so.

21. Record also shows that the rent was payable in advance. This is clearly averred in the eviction petition as also in the legal notice; no reply having been furnished to the legal notice in spite of the specific averment having been made in this notice; it is an implied admission. That apart the RCT had also noted that the letters Ex.AW-1/R-1 to Ex.AW-1/R-6 show that the rent was being tendered in advance; Ex.AW-1/R-4 is the rent for the month of October which has been sent on 04.10.2000;

Ex.AW-1/R-3 is the rent for November which has been sent in advance on the 7th day of the month and Ex.AW-1/R-2 is the rent for December which has been sent on 13.12.2000; rent for January 2001 had also been sent on 05.1.2001. There is no doubt that these documents are after the date of the filing of the present petition; yet this does not deflect from the conduct of the tenant which conduct was that he was paying the rent before the 7th day of each calendar month i.e that the rent was being paid in advance. This is amply borne out.

22. If the rent was payable in advance, admittedly rent for the month of December 1999, January 2000 and February 2000 became due on or before 15.2.2000; this rent had not been paid till 05.6.2000 {when the tenant tendered his rent vide his letter dated 05.6.2000 (Ex.AW-1/R-8)} the tenant was guilty of having committed three consecutive defaults. It is also not in dispute that the benefit of Section 14(2) has already been availed for by the tenant. The tenant is thus liable to be evicted under Section 14(1)(a) of the DRCA.

23. For the sake of arguments, even it if is assumed that the rent was not payable in advance and it was payable by the end of the month, even then the tenant has to suffer a decree. Legal notice had admittedly been received by the tenant on 29.2.2000; this legal notice was dated 19.2.2000 and had been dispatched on 28.02.2000 (Ex. AW-1/?). In this legal notice it had been informed to the tenant that rent for the month of December 1999, January 2000 and February 2000 is due and payable. This letter having been received on the last date of the calendar month of February, even assuming that the rent fell due on the last date of the month, on the date of the receipt of this notice rent for three consecutive months i.e. December 1999 to February 2000 was due, payable and legally recoverable from the tenant.

24. The contention of the tenant that this legal notice is not valid as the legal notice has to make a demand for the rent which is legally recoverable and the notice dated 19.2.2000 does not include legally recoverable rent for the month of February is an argument which is noted to be rejected.

25. In **Rakesh Kumar** (surpa) in an eviction petition under Section 14(1)(a) of the DRCA a similar question had cropped up for decision. In this case the petition had been filed under Section 14(1)(a) of the DRCA;

in spite of direction of the Rent Controller to deposit the monthly rent by the 15th day of each month, the tenant failed to pay; eviction order was passed; this was affirmed by the RCT. The High Court has set aside the order holding that there was no proper notice of demand to pay arrears of rent in terms of the proviso to section 14(1)(a) of the DRCA; this order was assailed before the Apex Court. The legality and the validity of the legal notice was the subject matter of challenge. The Apex Court had inter alia noted as under:

> ''9. In view of the statutory provision which has been set out before it appears that for obtaining recovery of possession under the Act there must be relationship of landlord and tenant between the parties, and that the tenant must have been in arrears of legally recoverable rent on the date of the notice of demand, and that a notice of demand had been served upon the tenant in the manner provided under Section 106 of the Transfer of Property Act, but the tenant neither pays nor tenders the rent within two months from the service of demand.
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> 10. On reading the notice along with the letter dated 1st June, 1982 it appears that the respondent was in arrears of rent for the months mentioned hereinbefore and was intimated that in default of payment of rent the eviction would follow in accordance with law. This is the proper way of reading the notice and in our view the appropriate logical way in which notices of such type should be read. These notices must be read in common sense point of view bearing in mind how such notices are understood by ordinary people. That is how the appellant, it appears from the reply and the background of the previous letter to be mentioned hereinafter understood the notice.
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> 11. More or less, a similar notice was considered by the Delhi High Court in **Shri Ram Samp v. Shri Sultan Singh etc.** AIR (1977) CJ 552 where Mr. Justice V.S. Deshpande, as the learned Chief Justice then was, held that the notice of the landlord stating therein about the arrears of rent and threatening to file a petition for eviction against the tenant was sufficient and the learned Judge held that the notice of demand could be expressed or implied and the conduct of the landlord showed that the demand was implied. We are in respectful agreement with the approach

> to such type of notices taken by the High Court in that case.''

This was with regard to the notice dated 19.4.1982. Apex Court had also noted that prior to the notice dated 19.4.1982 there was another notice dated 08.3.1982, contention being that in this notice of 08.3.1982 demand for the rent for the month of February could not have been issued on 08.3.1982. In this context the Apex court had answered as follows:

> ''....It may be so. We are not concerned with the facts of this case whether the notice was legal but how the parties have understood. There is clear notice of demand as it appears from the terms set out hereinabove. We have been shown the chart at Page No. 77 of the present records which indicate how belated attempts were made to pay certain arrears.''

26. It is thus clear that the notice has to be construed in the manner in which it is understood by the tenant.

27. In this case notice dated 19.2.2000 was received by the tenant on 29.2.2000; this notice clearly informed him that the rent is payable in advance i.e. by the 7th day of each calendar month and as such by the 7th day of the February rent is due and payable for the month of December 1999, January 2000 and February 2000. This was specifically stated in the said notice. Even assuming for the sake of argument that the rent was not payable in advance even then rent for the month of December 1999 and January 2000 had definitely become due on the date when the notice dated 19.2.2000 was sent;; rent for the month of February 2000 had also become due as the tenant received this notice on 29.2.2000 and he fully understood its implication. It was a notice of demand for all the three consecutive months i.e. December 1999 to February 2000. Tenant, however, did not pay this rent even after a period of two months. Rent from December 1999 to February 2000 was remitted only by a communication dated 5.6.2000 which was after a period of two months as envisaged under Section 15(1) of the DRCA. It is also not in dispute that the benefit of Section 14(2) of the DRCA has already been availed of by the tenant once vide the benefit accorded to him by the order of the ARC dated 18.12.1982.

28. The judgments relied upon by learned counsel for the respondent reported as **Prakash Mehra and Sant Ram** (supra) are clearly

distinguishable. The judgment of **Prakash Mehra** (Supra) was cited with approval in the subsequent judgment of Sant Ram.

In the case of Prakash Mehra, the rent was admittedly payable in advance; the landlord had sent a legal notice dated 07.05.1976 to the tenant; on the date of receipt of the notice, rent for the months of April and May, 1976 had fallen due; on 13.05.1976, the respondent sent a bank draft which the landlord refused which was presented twice-over; the High Court had noted that a valid legal tender of rent had been made by the tenant by the draft sent on 13.05.1976 and the second draft sent on 11.06.1976 which was in answer to the legal notice making a demand for arrears of rent for the aforenoted two months; notice was satisfied. In para 7, the Apex Court had noted inter-alia as follows:-

> ''The arrears due cannot be extended to rent which has fallen due after service of notice of demand.''

This ratio has been followed in the case of **Sant Ram**. In both the judgments what is decipherable is that arrears due means only those arrears which have been fallen due up to the date of the receipt of the notice; it cannot be extended to rent which has fallen due after service of notice of demand; in the instant case, notice of demand had admittedly been served upon the tenant on 29.02.2000; on 29.02.2000 rent for the month of February, 2000 had become due; this is in the context of both situations; i.e. if the rent was payable in advance or in the alternate even if rent had become due on the last day of calendar month; these judgments thus do not come to the aid of the respondent.

29. The tenant having committed three consecutive defaults was thus liable to be evicted. Order of the RCT has mis-interpreted both the factual and legal position. The factual and legal position as is evidence from the record have been mis-construed which has caused a grave injustice to the landlord; the illegality is patent and self-evident. This finding calls for interference; order of the RCT is set aside. Order of the ARC decreeing the eviction petition is restored.

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W.P. (C)

EX. GNR. NARESH KUMAR ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(PRADEEP NANDRAJOG & SUNIL GAUR, JJ.)

W.P. (C) NO. : 3828/2010 DATE OF DECISION: 19.09.2011

Constitution of India, 1950—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.

On the facts of the instant case it assumes importance to note that the petitioner was enrolled on 18.3.2005 and he was admitted at the Army Hospital on 1.11.2006 and prior thereto his abnormal behaviour was detected while he was serving. His abnormal behaviour was detected within a year of his joining and having not worked 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 the 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. **(Para 26)**

Important Issue Involved: If disability is neither attributable to nor aggravated by military service then military person is not entitled to disability pension.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Col. S.R. Kalkal, Advocate.

FOR THE RESPONDENTS : Mr. Sumeet Pushkarna and Mr. Jitendera Kumar, Advocates with Mr. Arvind, Clerk from ARTY Record.

CASE REFERRED TO:

1. *Controller of Defence Accounts (Pension) & Ors.* vs. *S.Balachandran Nair* 2005 (4) SCT 607.

RESULT: Petition dismissed.

PRADEEP NANDRAJOG, J.

1. Serving in the Indian Army is no child's play. It requires a body and mind of steel. Notwithstanding medical fitness to be a condition for securing every public employment, its importance is of greater value when employment is sought in the Indian Army and thus nobody is enrolled or commissioned in the Indian Army without being subjected to a rigorous physical fitness test as also medical fitness and only the best in body and mind are inducted in the Army. This is the preamble statement of learned counsel for the petitioner.

2. The petitioner was enrolled in the Indian Army as combatant soldier and was attached to the regiment of Artillery at Bikaner on 18.3.2005 and needless to state, before his enrolment was subjected to a physical endurance test as also a medical examination which he successfully cleared i.e. he was declared physically and medically fit for being a member of an Armed Force.

3. He had hardly served for about a year and 8 months, when he was detected with abnormal behaviour and his utterances showed that he was having hallucinations. He claimed that he was in communication with the soul of a dead friend. He became argumentative and in spite of counseling his behaviour did not change. He was sent on leave for 20 days and on return showed no improvement and one day threatened to run away from the quarter guard with his rifle. The day next he threw his identity card at the Subedar Major and at a Sainik Samellan he demanded to be sent back for recruit training. It was obvious that the superior officers found that the petitioner was having a psychiatric problem

and thus he was produced before a Psychiatrist before whom petitioner admitted that his father had taken him to a Civil Psychiatrist and he was given medication. The petitioner was hospitalized and his behaviour was observed in the ward. It was noticed that petitioner used to wander aimlessly, slept poorly and claimed that his body and mind were controlled by the soul of his dead friend. He responded to treatment but was opined to be a vulnerable person. It be highlighted that petitioner was admitted in the Army Hospital on 1.11.2006 and brought before an Invaliding Medical Board on 9.1.2007 where he was assessed as a case of Schizophrenia and percentage of disability assessed was 30% for life. It was opined that the disability was neither attributable to nor aggravated by military services.

4. Accordingly, the petitioner was discharged from service with effect from 04.02.2007 i.e. after he had served for 1 year, 10 months and 14 days.

5. The petitioner applied for disability pension on the ground of being placed in low medical category resulting in his being invalidated from service, which claim was rejected on 6.7.2007 on the ground that the disability was neither attributable to nor aggravated by military service.

6. Petitioner claims to have filed an appeal followed by a legal notice to which he received a reply of being entitled to no disability pension and thus petitioner claims that he was compelled to take recourse to a legal remedy.

7. Petitioner filed Writ Petition (C) No.719/2008 in this Court which was disposed of vide order dated 20.08.2008 with the direction that the petitioner be produced before an Appeal Medical Board to assess his disability and cause thereof. Accordingly, Appeal Medical Board was constituted which assessed the disability of the petitioner to be 30% for life and it opined that since the petitioner was posted to a peace station, the disability was neither attributable nor aggravated by military service. It was opined that the disability could not be detected at the time of enrolment as it was asymptomatic at the time. Aggrieved by the opinion of the Appeal Medical Board the petitioner filed WP(C)No.856/2009 before this Court which was transferred for adjudication to the Armed Forces Tribunal since the subject matter of claim fell within the jurisdiction of the said Tribunal.

8. Vide order dated 28.10.2009, the Armed Forces Tribunal dismissed petitioner's claim to be paid disability pension. Instant petition lays a challenge to the decision of the Tribunal wherein the Tribunal has concurred with the opinion of the Appeal Medical Board. It may be noted that various petitions of different persons were decided by the same order, some of whom have been granted relief and the petitioner has been denied relief. Qua the petitioner the discussion is to be found in paragraph 12 to 18 of the impugned decision.

9. In a nut shell, the Tribunal has highlighted that Schizophrenia was detected for the first time in May 2006 i.e. just after 1 year of petitioner having served and that though the exact cause of Schizophrenia was not known, it was important to note that the petitioner had served in a peace station and during his service had never encountered any hostile situation which could trigger Schizophrenia. The Tribunal thus opined that it could not be said that Schizophrenia from which petitioner suffered was attributable to or aggravated by service. The Tribunal duly considered Rule 14(b) of the Entitlement Rules of 1982 and Regulation 173 of the Pension Regulations 1961 pertaining to the Army and we would be dealing with the submissions with reference to the Rules and Regulations relied upon by the petitioner.

10. The case of the petitioner rests on the sole argument that at the time of his enrolment in the Indian Army no disability was detected during his medical examination. The petitioner relies upon clause 5 and 6 of the Entitlement Rules under the caption ***Entitlement Rules for Casualty Pensionary Awards 1982***, which reads as under:''

> 5. The approach to the question of entitlement to casualty pensionary awards and evaluation of disabilities shall be based on the following presumptions:
>
> Prior to and during service
>
> (a) A member is presumed to have been in sound physical and mental condition upon entering service except as to physical disabilities noted or recorded at the time of entrance.
>
> (b) In the event of his subsequently being discharged from service on medical grounds any deterioration in his health which has taken place in due to service.

> 6. Disablement or death shall be accepted as due to military service provided it is certified by appropriate medical authority that:
>
> (a) the disablement is due to a wound, injury or disease which(i) is attributable to military service, or
>
> (ii) existed before or arose during military service and has been and remains aggravated thereby. This will also include the participating/hastening of the onset of a disability.
>
> (b) The death was due to or hastened by
>
> (i) a wound, injury or disease which was attributable to military service; or
>
> (ii) the aggravation by military service of a wound injury or disease which existed before or arose during military service.''

11. We highlight that the argument is that vide para (a) of Clause 5, a member i.e. a force personnel is presumed to be in sound physical and mental condition upon entering service except those which are recorded at the time of entry and by virtue of clause (b) it has to be presumed that deterioration in health is due to service.

12. We proceed our discussion by highlighting that issue of disability pension is to be discussed with reference to Regulation 173 of Army Pension Regulation 1961 (Part-1) which reads as under:

> ''173.Unless otherwise specifically provided a disability pension consisting of service element and disability element may be granted to an individual who is invalided out of service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20 per cent or over.
>
> The question whether a disability is attributable to or aggravated by military service shall be determined under the rule in Appendix II.''

13. Thus, it is clear that disability pension has to be sanctioned if an individual is invalided out of service on account of disability assessed at 20% or above but is attributable to or aggravated by military service.

The claim of the petitioner can now be well understood. Since the Medical Board has assessed his disability to be more than 20% and the exact cause of Schizophrenia which disabled the petitioner has not been detected, he would be entitled to the benefit of the presumption as per clause (a) of Clause 5 under the caption 'Entitlement Rules for Casualty Pensionary Awards 1982'.

14. Learned counsel for the respondent relied upon the decision of the Supreme Court reported as 2005 (4) SCT 607 **Controller of Defence Accounts (Pension) & Ors. Vs. S.Balachandran Nair** to urge that the Supreme Court has categorically held that unless there is a positive finding that the disablement is due to or aggravated by military service, no claim for disability pension can be raised.

15. As is to be noted hereinabove claim for disability pension is sustainable under Regulation 173 of the Army Pension Regulations 1961, which has been extracted hereinabove in para 12 above and relevant would it be to highlight that the second para of the Regulation highlights that the question whether a disability is attributable to or aggravated by military service shall be determined under the Rule in Appendix II. The said Appendix II has been noted by the Supreme Court in the aforenoted decision and it reads as under:

> ''2. Disablement or death shall be accepted as due to military service provided it is certified that
>
> (a) The disablement is due to wound, injury or disease which(i) is attributable to military service; or
>
> (ii) existed before or arose during military service and has been and remains aggravated thereby:
>
> (b) the death was due to or hastened by-
>
> (i) a wound, injury or disease which was attributable to military service, or
>
> (ii) the aggravation by military service of a wound, injury or disease which existed before or arose during military service. Note:The Rule also covers cases of death after discharge/invaliding from service.
>
> 3. There must be a casual connect ion between disablement or death and military service for attributability or aggravation to be conceded.
>
> 4. In deciding on the issue of entitlement all the evidence, both direct circumstantial, will be taken into account and the benefit or reasonable doubt will be given to the claimant. This benefit will be given more liberally to the claimant in field service case.''

16. What would be attributable to service in relation to disability, being the subject matter of Regulation 423 of the Pension Regulations, the Supreme Court noted the same in its decision and we reproduce the same. It reads as under:

> ''423. *Attributability to Service*:
>
> (a) For the purpose of determining whether the cause of a disability or death is or is not attributable to service, it is immaterial whether the cause giving rise to the disability or death occurred in an area declared to be a Field Service/Active Service area or under normal peace conditions. It is, however, essential to establish whether the disability or death bore a causal connection with the service conditions. All evidence both direct and circumstantial, will be taken into account and benefit of reasonable doubt, if any, will be given to the individual. The evidence to be accepted as reasonable doubt, for the purpose of these instructions should be of a degree of cogency, which though not reaching certainty, nevertheless carry the high degree of probability. In this connection, it will be remembered that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. If the evidence is so strong against an individual as to leave only a remote possibility in his favour, which can be dismissed with the sentence "of course it is possible but not in the least probable" the case is proved beyond reasonable doubt. If on the other hand, the evidence be so evenly balanced as to render impracticable a determinate conclusion one way or the other, then the case would be one in which the benefit of doubt could be given more liberally to the individual, in cases occurring in Field Service/ Active Service areas.
>
> (b) The cause of a disability or death resulting from wound or injury, will be regarded as attributable to service if the wound/

injury was sustained during the actual performance of "duty" in armed forces. In case of injuries which were self inflicted or duty to an individual's own serious negligence or misconduct, the Board will also comment how far the disability resulted from self-infliction, negligence or misconduct. (c) The cause of a disability or death resulting from a disease will be regarded as attributable to service when it is established that the disease arose during service and the conditions and circumstances of duty in the armed forces determined and contributed to the onset of the disease. Cases, in which it is established that service conditions did not determine or contribute to the onset of the disease but influenced the subsequent course of the disease, will be regarded as aggravated by the service. A disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service if no note of it was made at the time of the individual's acceptance for service in the armed forces. However, if medical opinion holds, for reasons to be stated that the disease could not have been detected on medical examination prior to acceptance for service, the disease will not be deemed to have arisen during service.

(d) The question, whether a disability or death is attributable to or aggravated by service or not, will be decided as regards its medical aspects by a medical board or by the medical officer who signs the death certificate. The medical board/medical officer will specify reasons for their/his opinion. The opinion of the medical board/medical officer, in so far as it relates to the actual cause of the disability or death and the circumstances in which it originated will be regarded as final. The question whether the cause and the attendant circumstances can be attributed to service will, however, be decided by the pension sanctioning authority.

(e) To assist the medical officer who signs the death certificate or the medical board in the case of an invalid, the C.O. unit will furnish a report on:

(i) AFMS F-81 in all cases other than those due to injuries.

(i) IAFY-2006 in all cases of injuries other than battle injuries.

(f) In cases where award of disability pension or reassessment

of disabilities is concerned, a medical board is always necessary and the certificate of a single medical officer will not be accepted except in case of stations where it is not possible or feasible to assemble a regular medical board for such purposes. The certificate of a single medical officer in the latter case will be furnished on a medical board form and countersigned by the ADMS (Army)/DMS (Navy)/DMS (Air)."

17. In a nut shell the Supreme Court brought out, with reference to clause (c) of Regulation 423, that if the Medical Board holds that the disease could not have been detected on medical examination prior to acceptance of service, the disease will not be deemed to have arisen during service. Further, with reference to Appendix II, the Supreme Court opined that disablement shall be treated as attributable to military service if clause (a) or (b) i.e. the situations contemplated therein existed.

18. Thus, to put it plain and simple, as per the decision of the Supreme Court, if the cause of the disablement was not capable of being detected on medical examination at the time of enrolment it would not be treated as deemed to have arisen due to service.

19. Mr.S.R.Kalkal learned counsel for the petitioner urges that the respondents misled the Supreme Court by not drawing their attention that with effect from 22.11.1983, on the subject of disability pension, the Entitlement Rules called '*Entitlement Rules for Casualty Pensionary Awards 1982*' had come into force and the same had superseded Appendix II to the Pension Regulation 173 with retrospective date 1.1.1982.

20. Indeed we find that the submission of Sh.S.R.Kalkal is correct. It appears that for reasons unknown, neither party drew the attention of the Supreme Court to the 'Entitlement Rules for Casualty Pensionary Awards 1982' which certainly, vide para (a) of Clause 5 casts the onus against the Army Authorities.

21. But we find that the Entitlement Rules notified on 22.11.1983, having retrospective effect from 1.1.1982, provide vide clause 14(b) thereof, as under:''

14. (b) If medical authority holds, for reasons to be stated, that the disease although present at the time of enrolment could not have been detected on medical examination prior to acceptance

for service, the disease, will not be deemed to have arisen during service. In case where it is established that the conditions of military service did not contribute to the onset of adversely affect the course of disease, entitlement for casualty pensionary award will not be conceded, even if the disease has arisen during service.''

22. It be highlighted by us that the language of clause 14(b) of the Entitlement Rules relied upon by Sh.S.R.Kalkal is pari-materia with clause (c) of Pension Regulations 423 which was considered by the Supreme Court.

23. The position therefore would be that if the claim has to be considered under the *Entitlement Rules for Casualty Pensionary Awards 1982*. the presumption under para (a) of clause 5 thereof has to be raised qua such disabilities which are capable of being detected at the time of enrolment and as per para (b) of clause 14 a disease which could not have been detected on medical examination at the time of enrolment would not be deemed to have arisen during service. Harmoniously reading the two, the presumption under para (a) of clause 5 would relate to such diseases which are capable of being detected during medical examination at the time of enrolment and those diseases which are not capable of being so detected would not result in any such presumption being raised.

24. Thus, notwithstanding that the Supreme Court was misled into considering Appendix II to Pension Regulation 173 which has since been replaced by the *Entitlement Rules for Casualty Pensionary Awards 1982*, the position with respect to such diseases which are opined to be incapable of being detected at the time of enrolment would be the same as per the decision of the Supreme Court in **S.Balachandra Nair's** case (supra).

25. Now, it is extremely difficult to detect a mental disorder which is not permanent. A bipolar mood disorder or Schizophrenia does not render a person insane or mad. The moods fluctuate from time to time and it may happen that at the time of enrolment the person is in the positive state of mind and thus the negative phase is not detected.

26. On the facts of the instant case it assumes importance to note that the petitioner was enrolled on 18.3.2005 and he was admitted at the Army Hospital on 1.11.2006 and prior thereto his abnormal behaviour was detected while he was serving. His abnormal behaviour was detected

within a year of his joining and having not worked 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 the 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.

ILR (2012) I DELHI 168
FAO

BIMLA GUPTA & ORS. ....APPELLANTS

VERSUS

MAHINDER SINGH AND ORS. ....RESPONDENTS

(REVA KHETRAPAL, J.)

FAO NO. : 51/1991 AND CM NO. : 1012/2001 **DATE OF DECISION: 26.09.2011**

Motor Vehicles Act, 1988—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.

Having heard the learned counsel for the parties, I am inclined to agree with the contention of Mr. Sharma, the learned counsel for the respondent No.3, that the learned Tribunal rightly did not take into account the prospects of future increase in the income of the deceased. The deceased was a self-employed person, being a Government contractor, and as held by the Supreme Court in the case of **Smt. Sarla Verma and Ors. vs. Delhi Transport Corporation and Anr.** (2009) 6 SCC 121, where the deceased is self-employed, the Courts will usually take into account only the actual income of the deceased at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances. The question which arises for consideration is whether the present case can be said to fall in the category of a rare and exceptional case involving special circumstances. The income-tax assessment orders of the deceased placed on record (Ex.PW2/1 to Ex.PW2/3) clearly show that the net income of the deceased for the year 1979-80 was less than his income for the assessment year 1978-79. Further, the total income of the deceased for the year 1980-81, though was marginally more than for the year 1979-80, was nevertheless less than that for the year 1978-79. This being so, the contention of Mr. Goyal, that the future prospects of advancement of the deceased in his career should be sounded in terms of

money to augment the multiplicand, cannot be accepted. I am, therefore, constrained to hold that the learned Tribunal rightly assessed the income of the deceased to be in the sum of Rs. 3,000/- per month for the assessment year 1980-81 after deducting the rental income of Rs. 9,628/- from the total income, that is, Rs. 45,386/- minus Rs.9,628/- = Rs. 35,758/-, rounded off to Rs. 36,000/-.

(Para 6)

Important Issue Involved: In case the deceased is self employed, Court usually takes into account only the actual income of the deceased at the time of death.

[La Ga]

APPEARANCES:

FOR THE APPELLANTS : Mr. Navneet Goyal, Advocate.

FOR THE RESPONDENTS : Mr. Ram N. Sharma, Advocate for the Respondent No.3.

CASES REFERRED TO:

1. *New India Assurance Co. Ltd.* vs. *Vimal Devi and Ors.,* 2010 ACJ 2878 (SC).
2. *Smt. Sarla Verma and Ors.* vs. *Delhi Transport Corporation and Anr.* (2009) 6 SCC 121.
3. *New India Assurance Co. Ltd.* vs. *C.M. Jaya and Ors.* MANU/SC/0031/2002 : (2002) 2 SCC 278.
4. *Oriental Insurance Co. Ltd.* vs. *Cheruvakkara Nafeessu and Others,* 2001 ACJ 1.
5. *Amrit Lal Sood* vs. *Kaushalya Devi Thapar,* 1998 ACJ 531.
6. *Amrit Lal Sood and Anr.* vs. *Kaushalya Devi Thapar and Ors.* (1998) 3 SCC 744.
7. *New Asiatic Insurance Co. Ltd.* vs. *Pessumal Dhanamal Aswani and Others,* 1958-65 ACJ 559.

RESULT: Compensation enhanceds.

REVA KHETRAPAL, J.

1. By way of this appeal, the appellants seek to assail the judgment and award of the learned Motor Accidents Claims Tribunal dated 4th December, 1990 on the ground that a very meagre amount of compensation has been awarded to them which deserves to be enhanced. It is also prayed that the liability of the Insurance Company may be held to be unlimited and the Insurance Company may be ordered to pay the entire amount of compensation payable to them.

2. The appellant No.1 is the widow and the appellants No.2, 3 and 4 are the sons of one Shri Jagan Nath Gupta, who met with a road accident on 12.05.1980, resulting in his demise. The appellants No.5 and 6 are the parents of the deceased. In the claim petition filed by them, it is asserted by the appellants that the deceased was aged about 31 years at the time of his unfortunate death and was a Government contractor, working as a partner of M/s. Jagan Nath Ashok Kumar. The income of the deceased in the Claim Petition is stated to be in the sum of Rs. 4,500/- per month at the time of his death in the accident. The appellants claimed a sum of Rs. 10 lakhs as compensation from the respondent No.1, the driver of the offending truck, the respondent No.2, the owner of the said truck and the respondent No.3, M/s. Oriental Insurance Co. Ltd. with whom the truck in question was insured by the respondent No.2. The learned Tribunal, after holding an enquiry, concluded in favour of the appellants that the deceased Jagan Nath had received fatal injuries in the accident on 12.05.1980 on account of the rash and negligent driving of truck No.DHG-612 by the respondent No.1, and held the respondents liable to pay compensation to the appellants in the sum of Rs. 4,32,000/- with interest at the rate of 6% per annum from the date of the filing of the petition till the date of realisation. The learned Tribunal, however, held the liability of the Insurance Company to be limited to the extent of Rs. 50,000/- and directed the respondent No.1 and 2 to pay the award amount exceeding Rs. 50,000/- alongwith proportionate interest thereon.

3. Feeling aggrieved, the appellants have preferred the present appeal seeking an award of Rs. 10 lakhs with interest at the rate of 15% per annum.

4. Arguments were addressed by Mr. Navneet Goyal, the learned

counsel for the appellants, who assailed the award on the following grounds:

(i) The learned Tribunal erred in not taking into account the future prospects of the deceased despite the fact that the deceased was a Government contractor and an income-tax assessee, and there was documentary evidence on record to show that his income was increasing year by year.

(ii) The learned Tribunal erred in deducting one-third (1/3rd) of the income of the deceased towards his personal expenses, whereas keeping in view the fact that the deceased had six dependent family members, a deduction of not more than one-fourth (1/4th) of his income towards his personal expenses was justified.

(iii) The learned Tribunal ought to have granted interest at the rate of 15% per annum and, in any case, not less than 9% per annum, whereas the learned Tribunal has awarded interest at the rate of 6% per annum on the award amount.

(iv) No amount whatsoever was awarded by the learned Tribunal for the funeral expenses of the deceased and towards non-pecuniary damages.

5. Mr. Ram N. Sharma, the learned counsel for the respondent No.3-Insurance Company, on the other hand, sought to support the award on the ground that the award was just and fair to the appellants, and in consonance with the guidelines laid down by the Supreme Court from time to time. Mr. Sharma invited the attention of this Court to the income-tax assessment orders for the assessment years 1978-79 (Ex.PW2/1), 1979-80 (Ex.PW2/2) and 1980-81 (Ex.PW2/3), to contend that the said assessment orders clearly showed that the net income of the deceased was Rs. 39,589/- for the assessment year 1978-79, Rs. 36,151/- for the assessment year 1979-80 and Rs. 38,540/- for the assessment year 1980-81, which income included rental income from a factory building from M/s. Gupta Industries in the sum of Rs. 9,628/-. He contended that the said amount of Rs. 9, 628/- is to be excluded for the purpose of computing the income of the deceased, in view of the fact that the legal representatives of the deceased were still receiving the said rental income. Mr. Sharma also contended that the deceased was a self-employed person and his

income-tax returns clearly showed that his income was on the descending scale and there was, therefore, no question of taking into account any future increase in the income of the deceased, as sought for by the appellants. As regards the multiplier adopted by the learned Tribunal for augmenting the multiplicand constituting the loss of dependency of the appellants, Mr. Sharma contended that the learned Tribunal had erroneously applied the multiplier of 18, and that 16 is the appropriate multiplier which should have been applied keeping in view the fact that the deceased was admittedly in the age group of 31 to 35 years of age.

6. Having heard the learned counsel for the parties, I am inclined to agree with the contention of Mr. Sharma, the learned counsel for the respondent No.3, that the learned Tribunal rightly did not take into account the prospects of future increase in the income of the deceased. The deceased was a self-employed person, being a Government contractor, and as held by the Supreme Court in the case of **Smt. Sarla Verma and Ors. vs. Delhi Transport Corporation and Anr.** (2009) 6 SCC 121, where the deceased is self-employed, the Courts will usually take into account only the actual income of the deceased at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances. The question which arises for consideration is whether the present case can be said to fall in the category of a rare and exceptional case involving special circumstances. The income-tax assessment orders of the deceased placed on record (Ex.PW2/1 to Ex.PW2/3) clearly show that the net income of the deceased for the year 1979-80 was less than his income for the assessment year 1978-79. Further, the total income of the deceased for the year 1980-81, though was marginally more than for the year 1979-80, was nevertheless less than that for the year 1978-79. This being so, the contention of Mr. Goyal, that the future prospects of advancement of the deceased in his career should be sounded in terms of money to augment the multiplicand, cannot be accepted. I am, therefore, constrained to hold that the learned Tribunal rightly assessed the income of the deceased to be in the sum of Rs. 3,000/- per month for the assessment year 1980-81 after deducting the rental income of Rs. 9,628/- from the total income, that is, Rs. 45,386/- minus Rs. 9,628/- = Rs. 35,758/-, rounded off to Rs. 36,000/-.

7. I am, however, inclined to agree with and uphold Mr. Goyal's

contention that keeping in view the fact that the deceased was survived by his widow, three minor children and parents, the learned Tribunal ought to have made a deduction of not more than one-fourth (1/4th) of the income of the deceased towards his personal expenses and maintenance. Thus calculated, the loss of dependency of the appellants would have worked out to Rs. 2,250/- per month or say Rs. 27,000/- per annum. It is the settled position of law that this multiplicand must be augmented by the use of an appropriate multiplier in accordance with the age of the deceased. In this context, Mr. Goyal very fairly conceded that the multiplier for the age group of deceased persons between 31 and 35 years of age in consonance with the judgment of the Supreme Court rendered in the case of **Sarla Verma** (supra) was the multiplier of 16 (instead of the multiplier of 18 applied by the Tribunal). Applying the multiplier of 16 to the multiplicand of Rs.27,000/-, the total loss of dependency of the appellants works out to Rs. 4,32,000/-.

8. I also find justification in the grievance of the learned counsel for the appellants that no amount whatsoever has been awarded by the learned Tribunal for the funeral expenses of the deceased and under any of the non-pecuniary heads. The appellants are accordingly awarded a sum of Rs. 2,000/- towards funeral expenses and a further sum of Rs. 2,500/- each under the heads of loss of consortium, loss of estate and loss of love and affection of the deceased, that is, in all Rs. 4,41,500/-, which may be rounded off to Rs. 4,42,000/-. On the aforesaid amount, the appellants are held entitled to interest at the rate of 9% per annum from the date of the filing of the petition till the date of realisation. It is clarified that interest at the flat rate of 9% per annum is awarded keeping in view the fact that the rate of interest from the year 1980 till date has varied from 18% per annum to 6% per annum.

9. The only other aspect of the matter which remains to be considered is the contention of the learned counsel for the appellants that even assuming the liability of the Insurance Company to be a limited one as pleaded by the respondent No.3, the appellants, being third parties, are nevertheless entitled to receive the entire amount of compensation from the Insurance Company. Reliance is placed by Mr. Goyal in this regard on Section 96 of the Motor Vehicles Act, 1939 read with the avoidance clause captioned 'Avoidance of Certain Terms and Rights of Recovery' contained in the insurance policy as well as the 'Important Notice' in the

Schedule to the Policy, Ex.RW1/1. The avoidance clause states that nothing in the policy or any endorsement thereon shall affect the right of any person indemnified by the policy or any other person to recover an amount under or by virtue of the provisions of the Act. It also provides that the insured will repay to the Company all sums paid by it which the Company would not have been liable to pay but for the said provisions of the Act. The 'Important Notice' mentions that any payment made by the Company by reason of wider terms appearing in the certificate in order to comply with the Motor Vehicles Act, 1939 is recoverable from the insured. It also specifically refers to the avoidance clause.

10. In **New Asiatic Insurance Co. Ltd. vs. Pessumal Dhanamal Aswani and Others,** 1958-65 ACJ 559, the Supreme Court interpreted the avoidance clause and the important notice as follows: (ACJ, P.565, paras 21 and 22)

> ''21. The Act contemplates the possibility of the policy of insurance undertaking liability to third parties providing such a contract between the insurer and the insured, that is, the person who effected the policy, as would make the company entitled to recover the whole or part of the amount it has paid to the third party from the insured. The insurer thus acts as security for the third party with respect to its realising damages for the injuries suffered, but vis-a-vis the insured, the company does not undertake that liability or undertake it to a limited extent. It is in view of such a possibility that various conditions are laid down in the policy. Such conditions, however, are effective only between the insured and the company, and have to be ignored when considering the liability of the company to third parties. This is mentioned prominently in the policy itself and is mentioned under the heading 'Avoidance of certain terms and rights of recovery', as well as in the form of 'an important notice' in the Schedule to the policy. The avoidance clause says that nothing in the policy or any endorsement thereon shall affect the right of any person indemnified by the policy or any other person to recover an amount under or by virtue of the provisions of the Act. It also provides that the insured will repay to the company all sums paid by it which the company would not have been liable to pay but for the said provisions of the Act. The 'Important Notice' mentions that any payment made by the company by reason of

> wider terms appearing in the certificate in order to comply with the Act is recoverable from the insured, and refers to the avoidance clause.
>
> 22. Thus the contract between the insured and the company may not provide for all the liabilities which the company has to undertake vis-a-vis the third parties, in view of the provisions of the Act. We are of opinion that once the company had undertaken liability to third parties incurred by the persons specified in the policy, the third parties' right to recover any amount under or by virtue of the provisions of the Act is not affected by any condition in the policy. Considering this aspect of the terms of the policy, it is reasonable to conclude that proviso (a) of para 3 of section II is a mere condition affecting the rights of the insured who effected the policy and the persons to whom the cover of the policy was extended by the company, and does not come in the way of third parties' claim against the company on account of its claim against a person specified in para. 3 as one to whom cover of the policy was extended.''

11. In **Amrit Lal Sood v. Kaushalya Devi Thapar,** 1998 ACJ 531, the Supreme Court, placing reliance upon the case of **New Asiatic Insurance Co. Ltd.** (supra), reiterated that the avoidance clause is effective only between the insured and the Insurance Company and not a third party. In paragraph 14 of the Report, it observed thus:

> ''14. The above clause does not enable the insurance company to resist or avoid the claim made by the claimant. The clause will arise for consideration only in a dispute between the insurer and insured. The question whether under the said clause the insurer can claim repayment from the insured is left open. The circumstance that the owner of the vehicle did not file an appeal against the judgment of single judge of the High Court under the Letters Patent may also be relevant in the event of a claim by the insurance company against the insured for repayment of the amount. We are not concerned with that question here.''

12. In **Oriental Insurance Co. Ltd. vs. Cheruvakkara Nafeessu and Others,** 2001 ACJ 1 again the question before the Supreme Court was:

''What is the extent of liability of an insurance company towards the third party as per section 95(2)(b) of Motor Vehicles Act, 1939 (hereinafter called 'the Act'), and what are its rights in case of payment of an amount in excess of the limits of the liability under the insurance policy vis-a-vis the insured?''

On a consideration of the avoidance clause of the policy and Section II of the policy dealing with ''Liability to Third Party'', the Supreme Court observed: (ACJ, P.3)

''A conjoint reading of all the terms of the policy of insurance executed in this case indicate that the total extent of liability of the insurance company is Rs.50,000/- but the company is liable to indemnify the insured against all sums including claimant's costs and expenses which insured becomes liable to pay and nothing in the policy affects the right of any person indemnified by the policy or any other person to recover an amount under or by virtue of the provisions of section 96 of the Act. However, the insured is liable to repay to the company all sums paid by the company which the company would not have been liable to pay but for the condition of liability relating to third party.''

13. In a recent decision of the Supreme Court in **New India Assurance Co. Ltd. vs. Vimal Devi and Ors.,** 2010 ACJ 2878 (SC), where the Insurance Company filed an appeal before the Supreme Court aggrieved by the High Court order directing the Insurance Company to pay the entire compensation amount of Rs. 4,90,000/- along with interest to the claimants and then to recover the amount beyond its liability of Rs.50,000/- from the owner of the vehicle involved in the case, the Supreme Court dealt with the matter as follows:

''3. Mr. K.L. Nandwani, learned Counsel appearing for the insurance company, submitted that the liability of the Appellant being limited to Rs. 50,000/-, the High Court was in error in making such a direction. In respect of the submission, he relied upon a Constitution Bench decision of this Court in **New India Assurance Co. Ltd. v. C.M. Jaya and Ors.** MANU/SC/0031/2002 : (2002) 2 SCC 278.

4. Mr. M.R. Calla, learned senior counsel appearing for the Respondent, in his reply submitted that the reliance placed on the

Constitution Bench decision was misplaced and the Appellant overlooked the finer point of distinction made in the decision in C.M. Jaya. He submitted that in the case in hand, the High Court had noticed the Avoidance Clause in the policy which was in the following terms:

AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY.

Nothing in this Policy or any Endorsement hereon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicle Act, 1939, Section 96.

But the Insured shall repay to the company all sums paid by the company which the company would not have been liable to pay but the said provisions.

5. The Avoidance Clause came up for consideration before a three Judges Bench of this Court in **Amrit Lal Sood and Anr. v. Kaushalya Devi Thapar and Ors.** (1998) 3 SCC 744. In its decision in that case this Court observed:

13. In the policy in the present case also, there is a clause under the heading:

AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY" which reads thus:

Nothing in this policy or any endorsement hereon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act, 1939, Section 96. BUT the insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the said provisions.

14. The above clause does not enable the insurance company to resist or avoid the claim made by the claimant. The clause will arise for consideration only in a dispute between the insurer and the insured. The question whether under the said clause the insurer can claim repayment from the insured is left open. The

circumstance that the owner of the vehicle did not file an appeal against the judgment of the Single Judge of the High Court under the letters patent may also be relevant in the event of a claim by the insurance company against the insured for repayment of the amount. We are not concerned with that question here.

15. In the result, we hold that the insurance company is also liable to meet the claim of the claimant and satisfy the award passed by the tribunal and modified by the High Court. The judgment of the High Court insofar as it exonerates the insurance company (5th Respondent herein) from the liability, is set aside. The award passed by the Division Bench of the High Court can be enforced against the 5th Respondent also. The appeal is allowed to the extent indicated above. The parties will bear their respective costs.

6. Mr. Calla further submitted that in C.M. Jaya and Ors. a Constitution Bench of this Court indeed held that in a policy for limited liability it was not open to the Court to direct the insurance company to make any payment beyond the amount of the limited liability but it took note of the decision in Amrit Lal Sood with approval. He referred to paragraphs 10 and 16 of the judgment in C.M. Jaya where the decision in Amrit Lal Sood is noticed with approval.

7. The Avoidance Clause in the policy in this case makes all the difference and the direction of the High Court to the Appellant, insurance company to make payment of the full amount of compensation to the claimants and to recover its dues from the owner of the vehicle is directly in accordance with that Clause. In our view, the submission of Mr. Calla is well founded. The Appellant in this case can derive no benefit from the decision in C.M. Jaya. 8. We find no merit in these appeals. These are dismissed.''

14. In view of the aforesaid law enunciated by the Hon,ble Supreme Court, it is directed that the respondent No. 3 – Insurance Company shall pay the enhanced amount of compensation as awarded hereinabove to the appellants, after deducting the amount, if any, already paid by the Insurance Company, within 30 days of the passing of this order by

depositing the same with the Registrar General of this Court. The Insurance Company shall be entitled to recover the amount paid by it in excess of its liability from the respondents No.1 and 2, the driver and owner of the offending truck respectively in accordance with the law.

15. The appeal is allowed in the above terms. CM No.1012/2001 also stands disposed of.

16. There shall be no order as to costs.

17. Records of the Claims Tribunal be sent back forthwith.

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W.P.(C)

ASSOCIATION OF RADIO AND TELEVISION ENGINEERING EMPLOYEES AND ORS. ....PETITIONERS

VERSUS

UNION OF INDIA AND ORS. ....RESPONDENTS

(S. MURALIDHAR, J.)

W.P.(C) NO. : 6981/2011 DATE OF DECISION: 27.09.2011
CM NO. : 16022/2011 & 16346/2011

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.

The phrase ''all matters relating to the condition of his service'' appearing in the substantive part of Section 3(q) ATA is very significant. It is indicative of the kinds of disputes that can be taken before the Administrative Tribunals for adjudication. The words 'as respects' have also to be read in the context of 'all matters'. If so read, along with clauses (i) to (v) which follows the words 'as respects', it is clear that the matters are not limited to those specified in Clauses (i) to (iv) of Section 3(q) ATA. Also, addition of the word 'whatsoever' to the words 'any other matters' in Clause (v) of Section 3(q) ATA is significant. When the word 'whatsoever' is read with the words ''all matters relating to the condition of his service'', it is clear that the words ''service matters'' have to be given the broadest possible meaning and would encompass all matters relating to conditions of service of an employee. **(Para 16)**

Important Issue Involved: (A) The doctrine of *ejusdem generis* does not automatically apply to restrict the scope of words used in a statute, if otherwise the legislative intent is clear. The doctrine will be applied only where the legislative intent is manifest that the general terms shall not be given a broader meaning than required.

(B) All service matters concerning conditions of service of employees of either the central or the state government should, in the first instance, be taken before the Administrative Tribunals for adjudication.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Jayant Bhushan, Senior Advocate with Mr. Sanjai Pathak and Mr. Gautam Talukdar, Advocates.

FOR THE RESPONDENTS : Mr. Rajeev Sharma with Mr. Sahil Bhalaik, Advocates for R-2 to R-5. Mr. Sachin Datta, CGSC with Mr. Abhimanyu Kumar for R-1/UoI.

CASES REFERRED TO:

1. *Union of India* vs. *Surjeet Sangwan* 2009 INDLAW DEL 2943.
2. *Smt. Babli* vs. *Govt. of NCT of Delhi* 2002 Lab IC 4.
3. *Union of India* vs. *Rasila Ram* (2001) 10 SCC 623.
4. *All India PO and Rms Accountants Association* vs. *Union of India* 1999 INDLAW (CAT) 179.
5. *Jage Ram* vs. *State of Haryana* 1971 (1) SCC 671.
6. *Tribhuwan Parkash Nayyar* vs. *Union of India* AIR 1970 SC 540.
7. *Kavalappara Kottarathil Kochuni* vs. *State of Madras* AIR 1960 SC 1080.

8. *Lila Vati Bai* vs. *State of Bombay* AIR 1957 SC 521.

9. *In Re: Sir Stuart Samuel (1913) AC 514 and Brownsea Haven Corporation Ltd.* vs. *Poole Corporation* (1958) 1 All ER 205.

10. *Tillmans & Co.* vs. *SS Knutsford Ltd.* (1908) 2 KB 385.

11. *Indian National NGOs* vs. *Secretary Ministry of Defence* [reported in Full Bench Judgments of CAT Volume III at page 128].

RESULT: Not maintainable.

S. MURALIDHAR, J.

1. An interesting question of law concerning the interpretation of the expression ''service matters'' defined in Section 3(q) of the Administrative Tribunals Act, 1985 ('ATA') arises for consideration in this petition.

2. The Association of Radio and Television Engineering Employees ('ARTEE'), All India Radio and Doordarshan Technical Employees Association ('ADTEA') and Programme Staff Association of All India Radio & Doordarshan ('PSA') have filed this petition seeking a large number of reliefs. The principal challenge is to an order dated 8th September 2011 issued by the Secretariat of Prasar Bharti, Respondent No. 2, which reads as under:

> ''It has been decided that as no association of employees of AIR and Doordarshan falls in the category of recognized associations, no so called office bearer of any of these employees associations is to be extended any preferential treatment.
>
> 2. All employees of Prasar Bharati are to be treated in a fair and transparent manner and the same principles as relates to service conditions, transfers, posting, opportunities, etc should apply to each employees equally.
>
> 3. This policy should be applied absolutely without any distinction and no departure or interference should be allowed in its implementation.
>
> 4. It is further clarified that the earlier circular No. B-12017/7/2008-WL dated 18.12.2008 of DG: AIR be treated as ab-initio null and void and therefore withdrawn with immediate effect.
>
> 5. The issue with the approval of the Competent Authority.''

3. A preliminary objection was raised by Mr. Rajeev Sharma, learned counsel for Respondent No. 2, as regards the maintainability of this writ petition in this Court. The submission is that inasmuch as the present petition concerns a 'service matter' the Petitioners should approach the Central Administrative Tribunal ('CAT') constituted under the ATA.

4. Mr. Jayant Bhushan, learned Senior counsel appearing for the Petitioners submits that the impugned order essentially concerns the withdrawal of recognition accorded to the Petitioner Associations. An incidental effect is the withdrawal of an earlier circular dated 18th December 2008 which stipulated that the posting of office bearers of a recognized associations/union at the zonal and national level should ''as far as possible'' remain ''undisturbed.'' The submission is that the recognition earlier granted to the Petitioner Associations by virtue of an order dated 22nd February 2010 issued by Respondent No. 2, directing maintenance of status quo as regards the issue of recognition of associations/unions of the All India Radio ('AIR'), cannot be sought to be withdrawn by the impugned order.

5. Mr. Bhushan states that although the Petitioners are aggrieved by a large number of orders issued by Respondent No. 2, including orders transferring employees from one station to another, the Petitioners are confining the scope of the present petition to the extent that the impugned order dated 8th September 2011 withdraws recognition to the Petitioner Associations, and the consequential orders by which the office bearers of the Petitioner Associations have been transferred from their posting at New Delhi.

6. Referring to Section 3(q) ATA, Mr. Bhushan submits that the recognition of an association of employees would not fall within the ambit of 'service matters'. Invoking the rule of *ejusdem generis*, he submits that when read as a whole, the provision makes it clear that the words ''any other matter whatsoever'' occurring in Section 3(q)(v) have to be read *ejusdem generis* with the matters specified in the preceding Clauses (i) to (iv) of Section 3(q) ATA. His submission is that the phrase ''all matters relating to the condition of his service'' appearing in the

main portion of Section 3(q) has to be read as being controlled by the words ''as respects'' preceding the enumeration of the specific matters set out in Section 3(q)(i) to (iv). The 'other matters' referred to in Section 3(q)(v) would have to be of the same genus as the matters referred to in Section 3(q)(i) to (iv) ATA. According to him the addition of word 'whatsoever' at the end of Section 3(q)(v) would make no difference to this position. Mr. Bhushan places reliance on certain passages from the book **Principles of Statutory Interpretation** by Mr. G.P. Singh. Referring to the decision of the Division Bench of this Court in **Smt. Babli v. Govt. of NCT of Delhi** 2002 Lab IC 4 which in turn relied upon in the decision of the Supreme Court in **Union of India v. Rasila Ram** (2001) 10 SCC 623, it is submitted that the question whether the government employees were entitled to retain government accommodation allotted during their service tenure can bring a dispute before the CAT was answered by this Court in the negative. The said decision has recently been followed by another Division Bench of this Court in **Union of India v. Surjeet Sangwan** 2009 INDLAW DEL 2943 where it was held that the CAT did not have jurisdiction to adjudicate a demand raised by an Estate Officer to recover damage/rent in relation to premises which was the subject matter of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 ('PP Act'). Specific to the issue of recognition of associations/unions, Mr. Bhushan relies upon a judgment of the Full Bench of the CAT in **Indian National NGOs v. Secretary Ministry of Defence** [reported in Full Bench Judgments of CAT Volume III at page 128] which in turn has been followed by the CAT at Lucknow in **All India PO and Rms Accountants Association v. Union of India** 1999 INDLAW (CAT) 179. He points out that the Full Bench of the CAT held that notwithstanding the question of recognition of Associations being subject matter of the Central Civil Services (Recognition of Service Association) Rules 1959 ['CCS (RSA) Rules'] as modified by the CCS (RSA) Rules, 1993 the issue of recognition of an Association would not come within the ambit of 'service matters' under Section 3(q) ATA. On the rule of ejusdem generis, Mr. Bhushan places reliance on **In Re: Sir Stuart Samuel** (1913) AC 514 and **Brownsea Haven Corporation Ltd. v. Poole Corporation** (1958) 1 All ER 205. He submits that merely because an incidental effect of the withdrawal of recognition of the Petitioner associations is that their office bearers would not be able to demand that they remain posted in Delhi, the central issue in this writ

petition would not become a 'service matter' for the CAT to adjudicate on it. In other words, the CAT cannot by a sidewind adjudicate the question regarding non-recognition of the employee associations, when it otherwise does not have jurisdiction to deal with such an issue.

7. Mr. Rajeev Sharma, learned counsel for Respondent No. 2, on the other hand, refers to Article 323A of the Constitution and the Statement of Objects and Reasons ('SOR') of the ATA to highlight the legislative intent in enacting the ATA. This was to provide for adjudication by the Administrative Tribunals ''of disputes and complaints with respect to recruitment and conditions of service of persons appointed of public services and posts in connection with the affairs of the Union or of any State...'' It is submitted that the rule of ejusdem generis is not meant to be applied in a mechanical way. It is only a subsidiary rule of construction, constituting an exception to the general rule of plain construction. Referring to the decision of the Supreme Court in **Lila Vati Bai v. State of Bombay** AIR 1957 SC 521, followed in **Jage Ram v. State of Haryana** 1971 (1) SCC 671, it is submitted that where the plain meaning of the statute is clearly discernible, a restricted meaning need not be given particularly where the context and the object of the statute do not require it. It is further submitted that the claim of an office bearer of an association or union to be posted at a certain place by virtue of holding such office would certainly constitute a ''condition of his service'' and, therefore, would definitely fall within the ambit of ''service matters'' under Section 3(q) ATA.

8. Mr. Sharma, pointed out that the President of Petitioner No. 1 Association in his individual capacity along with certain other employees has already approached the CAT by filing OA No. 3455 of 2011 challenging the specific order of transfer. However, there is no challenge in the said application to the order dated 8th September 2011 withdrawing recognition of the Petitioner Associations. He added that the CAT has not passed any interim order in the matter. He submitted that the CAT would have jurisdiction to examine whether in the context of the conditions of service of the office bearers of the Petitioner Associations being adversely affected, the order dated 8th September 2011 was validly issued.

9. Since the arguments largely centre around the applicability of the rule of *ejusdem generis* it would be useful to begin this discussion by referring to the relevant passages from the classic work, Principles of

Statutory Interpretation by Mr. G.P. Singh [12th Ed., 2010, Lexis Nexis Butterworths Wadhwa]. The rule itself is explained in the following words: (@ 504-505)

> ''When particular words pertaining to a class, category or genus are followed by general words, the general words are construed as limited to things of the same kind as those specified. This rule which is known as the rule of *ejusdem generis* reflects an attempt ''to reconcile incompatibility between the specific and general words in view of the other rules of interpretation that all words in a statute are given effect if possible, that a statute is to be superfluous''. The rule applies when '(1) the statute contains an enumeration of specific words; (2) the subjects of enumeration constitute a class or category; (3) that class or category is not exhausted by the enumeration; (4) the general terms follow the enumeration; and (5) there is no indication of a different legislative intent'. If the subjects of enumeration belong to a broad based genus as also to a narrower genus, there is no principle that the general words should be confined to the narrower genus.''

10. Mr. G.P. Singh, in the aforementioned book, discusses the interpretation of the word 'whatsoever' following certain general words. Referring to the decision in **Tillmans & Co. v. SS Knutsford Ltd.** (1908) 2 KB 385 and **Brownsea Haven Properties**, he notes that the mere use of that word ''does not exclude the application of ejusdem generis principle.'' Referring to the decision in **Kavalappara Kottarathil Kochuni v. State of Madras** AIR 1960 SC 1080 and **Tribhuwan Parkash Nayyar v. Union of India** AIR 1970 SC 540, Mr. G.P. Singh further observes as under: (@ 512-513)

> ''The rule of *ejusdem generis* has to be applied with care and caution. It is not an inviolable rule of law, but it is only permissible inference in the absence of an indication to the contrary, where context and the object and mischief of the enactment do not require restricted meaning to be attached to words of general import, it becomes the duty of the courts to give those words their plain and ordinary meaning. As stated by Lord Scarman [**Quazi v. Quazi** (1979) 3 All ER 897]; ''If the legislative purpose of a statute is such that a statutory series should be read *ejusdem generis*, so be it, the rule is helpful. But, if it is not, the rule is more likely to defeat than to fulfill the purpose of the statute. The rule like many other rules of statutory interpretation, is a useful servant but a bad master''. So a narrow construction on the basis of *ejusdem generis* rule may have to give way to a broader construction to give effect to the intention of Parliament by adopting a purposive construction.''

11. In **Lila Vati Bai v. State of Bombay** the Supreme Court explained in the context of Section 6 of the Bombay Land Requisition Act, 1948 ('BLR Act') that the words 'or otherwise' used in the Explanation (a) to Section 6 BLR Act intended to cover other cases which may not come within the meaning of the preceding clauses and that the legislative intent was to ''cover all possible cases of vacancy occurring due to any reason whatsoever.'' Consequently, ''far from using those words ejusdem generis with the preceding clauses of the explanation, the legislature used those words in an all inclusive sense.'' Elaborating further, it was observed that the rule of ejusdem generis should not be applied to whittle down the scope and ambit of the provisions of a statute where the legislative intent was to the contrary. Further, it was observed as under: (AIR @ 529)

> ''The rule of ejusdem generis is intended to be applied where general words have been used following particular and specific words of the same nature on the established rule of construction that the legislature presumed to use the general words in a restricted sense; that is to say, as belonging to the same genus as the particular and specific words. Such a restricted meaning has to be given to words of general import only where the context of the whole scheme of legislation requires it. But where the context and the object and mischief of the enactment do not require such restricted meaning to be attached to words of general import, it becomes the duty of the courts to give those words their plain and ordinary meaning. In our opinion, in the context of the object and mischief of the enactment there is no room for the application of the rule of ejusdem generis. Hence it follows that the vacancy as declared by the order impugned in this case, even though it may not be covered by the specific words used, is certainly covered by the legal import of the words "or otherwise".''

12. The above decision was followed by the Supreme Court in **Jage Ram v. State of Haryana** where the Court interpreted the scope of Section 17(2)(c) of the Land Acquisition Act, 1894. In paras 13 to 15 it was observed as under: (SCC @ 676-677)

> ''13. The *ejusdem generis* rule is not a rule of law but is merely a rule of construction to aid the courts to find out the true intention of the legislature. If a given provision is plain and unambiguous and the legislative intent is clear, there is no occasion to call into aid that rule *ejusdem generis* rule is explained in *Halsbury's Laws of England* (3rd Edn.) Vol. 36 p. 397 paragraph 599 thus:
>
> > ''As a rule, where in a statute there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified, although this, as a rule of construction, must be applied with caution, and subject to the primary rule that statutes are to be construed in accordance with the intention of Parliament. For the ejusdem rule to apply, the specific words must constitute a category, class or genus; if they do constitute such a category, class or genus, then only things which belongs to that category, class or genus fall within the general words ....''
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> 14. It is observed in *Craies on Statute Law* (6th Edn.) p. 181 that:
>
> > ''The ejusdem generis rule is one to be applied with caution and not pushed too far, as in the case of many decisions, which treat it as automatically applicable, and not as being, what it is, a mere presumption in the absence of other indications of the intention of the legislature. The modern tendency of the law, it was said, is "to attenuate the application of the rule of ejusdem generis". To invoke the application of the ejusdem generis rule there must be a distinct genus or category. The specific words must apply not to different objects of a widely differing character but to something which can be called a class or kind of objects.''

> 15. According to *Sutherland Statutory Construction* (3rd Edn.) Vol. II p. 395, for the application of the doctrine of ejusdem generis, the following conditions must exist.
>
> (i) The statute contains an enumeration by specific words;
>
> (ii) The members of the enumeration constitute a class;
>
> (iii) The class is not exhausted by the enumeration;
>
> (iv) A general term follows the enumeration and
>
> (v) There is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires.''

13. The law as explained by the Supreme Court in the above decisions makes it clear that the doctrine of *ejusdem generis* does not automatically apply to restrict the scope of words used in a statute, if otherwise the legislative intent is clear. The doctrine will be applied only where the legislative intent is manifest that the general terms shall not be given a broader meaning than required.

14. In the context of the ATA, which has been enacted with reference to Article 323A of the Constitution, it is plain that the legislative intent is that all service matters concerning conditions of service of employees of either the central or the state government should, in the first instance, be taken before the Administrative Tribunals for adjudication. In the above context, the language of Section 3(q) is such that a broad meaning has to be given to the expression 'service matters'.

15. Section 3(q) ATA reads as under:

> **''Section 3. Definitions (q)** - "service matters", in relation to a person, means all matters relating to the conditions of his service in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or, as the case may be, of any corporation [or society] owned or controlled by the Government, as respects-
>
> (i) remuneration (including allowances), pension and other retirement benefits;

(ii) tenure including confirmation, seniority, promotion, reversion, premature retirement and superannuation;

(iii) leave of any kind;

(iv) disciplinary matters; or (v) any other matter whatsoever;''

16. The phrase ''all matters relating to the condition of his service'' appearing in the substantive part of Section 3(q) ATA is very significant. It is indicative of the kinds of disputes that can be taken before the Administrative Tribunals for adjudication. The words 'as respects' have also to be read in the context of 'all matters'. If so read, along with clauses (i) to (v) which follows the words 'as respects', it is clear that the matters are not limited to those specified in Clauses (i) to (iv) of Section 3(q) ATA. Also, addition of the word 'whatsoever' to the words 'any other matters' in Clause (v) of Section 3(q) ATA is significant. When the word 'whatsoever' is read with the words ''all matters relating to the condition of his service'', it is clear that the words ''service matters'' have to be given the broadest possible meaning and would encompass all matters relating to conditions of service of an employee.

17. In the context of the present case, there can be no manner of doubt that Respondent No. 2 has sought to bring about two consequences simultaneously. The first is to direct that ''no association of employees of AIR and Doordarshan falls in the category of recognized associations.'' The second, as a direct consequence, is that ''no so called office bearer of any of these employees associations is to be extended any preferential treatment.'' It is plain, therefore, that the impugned order dated 8th September 2011 came to be issued only so that office bearers of the employee Associations are not extended any preferential treatment. What that preferential treatment is, is plain from the contents of the impugned order. Para 2 states that ''All employees of Prasar Bharti are to be treated in a fair and transparent manner and the same principles as relates to **service conditions, transfers, posting,** opportunities, etc. should apply to each employee equally.'' Then it proceeds to state that the order dated 18th December 2008 issued by the Director General of the AIR ''be treated as ab-initio null and void and therefore withdrawn with immediate effect.'' As already noticed, the order dated 18th December 2008 had stated that office bearers at zonal and national levels of recognized associations should, as far as possible, not be disturbed from their places

of posting. It is nobody's case that issues concerning transfers and postings are not ''service matters'' although they have not been specifically enumerated as such in Section 3(q) (i) to (iv) ATA. The immediate and direct effect of the impugned order dated 8th September 2011 is that an office bearer of an Association who earlier may have enjoyed preferential treatment regarding his place of posting would no longer have that privilege. In fact para 2 of the impugned order dated 6th September 2011 itself expressly indicates that it concerns the 'service conditions' of the office bearers of the Associations. The question of validity of the impugned order dated 6th September 2011 would therefore certainly be a matter pertaining to 'conditions of service' and would clearly therefore fall within the ambit of 'service matters' in Section 3(q) ATA.

18. It is a moot question whether a simpliciter issue concerning recognition of an association of employees in terms of CCS (RSA) Rules can be entertained by the CAT as a 'service matter'. Such a question was answered in the negative by the Full Bench of the CAT in **Indian National NGOs v. Secretary Ministry of Defence**. However, as far as the present case is concerned, there should no difficulty for the CAT to examine the validity of the impugned order dated 8th September 2011 insofar as it denies the office bearers of the Petitioner Associations preferential treatment in the matter of their postings and transfers. It is a composite question that the CAT would be called upon to answer when approached by the Petitioner Associations.

19. At this juncture it must be noted that Mr. Bhushan submitted that only an 'individual' and not an 'association' could file an application before the CAT. This submission is not borne out on a contextual interpretation of the words ''a person aggrieved'' occurring in Section 19 ATA. Those words have to be understood in the context of the dispute concerning the impugned order dated 6th September 2011 when brought before the CAT. The ATA itself does not define the word 'person'. Under Section 3(42) of the General Clauses Act, 1897 'person' would include an association of individuals as well. When the context of the dispute before the CAT so requires the words 'a person aggrieved' occurring in Section 19 ATA could include an association of individuals as well.

20. The cases sought to be relied upon by Mr. Bhushan in the context of Section 3 (q) ATA require to be dealt with. The facts in

Union of India v. Rasila Ram (decided by the Supreme Court), which was followed in the **Babli** case by the Division Bench of this Court, related to proceedings under the PP Act. The PP Act is a special enactment. Section 15 thereof bars the jurisdiction of all civil courts. In that context it was observed by the Supreme Court in **Rasila Ram** as under:

> ''Once, a Government servant is held to be in occupation of a public premises as an unauthorised occupant within the meaning of Eviction Act, and appropriate orders are passed thereunder, the remedy to such occupants lies, as provided under the said Act. By no stretch of imagination the expression, "any other matter," in Section 3(q)(v) of the Administrative Act would confer jurisdiction on the Tribunal to go into the legality of the order passed by the competent authority under the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971.''

21. The facts both in **Babli** as well as **Surjeet Sangwan** arose in the context of proceedings under the PP Act. These decisions are plainly distinguishable in their application to the facts of the present case.

22. Consequently, this Court upholds the preliminary objection raised by counsel for Respondent No. 2 as to the maintainability of the present petition in the present form, even after its scope was sought to be restricted by learned Senior counsel for the Petitioners.

23. It is clarified that notwithstanding the fact that some of the individual employees, including the President of Petitioner No. 1 in his individual capacity, have already approached the CAT with applications challenging the individual transfer orders, the Petitioner Associations can file applications before the CAT questioning the validity of the impugned order dated 8th September 2011 on the ground that it adversely affects the conditions of service of the office bearers of the Petitioner Associations.

24. For the aforementioned reasons, this Court holds that the Writ Petition (Civil) No. 6981 of 2011 is not maintainable in its present form in the first instance in this Court. It is dismissed as such. It is clarified that it would be open to the Petitioners to approach the CAT, in the manner indicated hereinbefore, for relief. CM No. 16022 of 2011 is also

therefore dismissed. Resultantly, no order is required to be passed in CM No. 16346 of 2011 and it is disposed of as such.

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CRL. (A)

RAM PARSHAD **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

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

CRL. (A) NO. : 146/1998 **DATE OF DECISION: 30.09.2011**

(A) Indian Penal Code, 1860—Section 34, 302, 304—Appeal preferred against judgment convicting appellant under Section 302/34 IPC—As per appellant, he was impleaded in false case and everything was manipulated to help complainant to falsely implicate him—Moreover, single blow inflicted on deceased which landed on the abdomen causing her death not covered under Section 302 but could only be under Section 304 Part II as appellant did not have any intention to cause death—Held:- There is no rule of universal application that whenever one blow is given 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.

In this case, the weapon used is a *Churri* with a 9-1/2 inches blade. The injury was caused on a vital part of the body i.e. abdomen. It is nowhere shown that the knife accidentally or unintentionally fell on that part of the body. The depth of the injury was 9 cms. The depth of the injury (i.e. 9 cms) indicates the force used by the Appellant in inflicting injury. Thus as per **Jagtar Singh v. State of Punjab,** 1983 Crl.L.J. 852, the Appellant's act would amount to murder unless his case falls under exception IV. **(Para 26)**

(B) Indian Penal Code, 1860—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.

The cause of quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is also not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender

must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. **(Para 30)**

Important Issue Involved: There is no rule of universal application that whenever one blow is given 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.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. N. Hariharan Amicus Curiae with Mr. Vaibhav Sharma, Advocate. Mr. Varun Deshwal, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP for the State.

CASES REFERRED TO:

1. *Bangaru Venkata Rao* vs. *State of A.P.,* 2008 Crl.L.J. 4353.
2. *A. Maharaja* vs. *State of Tamil Nadu,* 2008 (17) SCC 173.
3. *Shaikh Azim* vs. *State of Maharashtra,* 2008 (11) SCC 695.
4. *Pulicherla Nagaraju @ Nagaraja Reddy* vs. *State of AP,* 2006 Crl.L.J. 3899.
5. *State of Rajasthan* vs. *Dhool Singh,* 2004 Crl.L.J. 931).
6. *Bikau Pandey & Ors.* vs. *State of Bihar,* AIR 2004 SC 997.
7. *Prakash Chand* vs. *State of H.P.,* 2004 (11) SCC 381.

8. *Deepak Sharma* vs. *State of Delhi,* Criminal Appeal No.45/1998.

9. *Mahesh* vs. *State of M.P.,* 1996 Crl.L.J. 4142.

10. *Surinder Kumar* vs. *Union Territory, Chandigarh,* (1989) 2 SCC 217.

11. *Jagtar Singh* vs. *State of Punjab,* 1983 Crl.L.J. 852.

RESULT: Appeal partly allowed.

G. P. MITTAL, J.

1. This Appeal impugns the judgment dated 25.10.1997 and order on sentence dated 27.10.1997 (in Sessions Case No.50/1997) whereby the Appellant was convicted for offences punishable under Sections 302/324Indian Penal Code (IPC). He was sentenced to undergo life imprisonment and to pay fine of Rs. 500/- for the offence punishable under Section 302 IPC or in default of payment of fine to undergo SI for one week. He was further sentenced to undergo RI for two years for the offence punishable under Section 324 IPC. The sentences were to run concurrently.

2. In nutshell, the prosecution case is that on 06.09.1991, at about 7:00 AM Raju (PW-1) was returning from a public lavatory. He allegedly splashed water in front of Ram Parshad's shop. The latter took offence to it. Ram Parshad abused on Raju and chased him saying why he had thrown water there. Raju got frightened and rushed into his house. He narrated Ram Parshad's behaviour to his parents. Raju's mother Shanti Devi (the deceased) suggested to his father Ramji Lal to call someone from the neighbourhood. It is alleged that while Ramji Lal had gone to call the neighbours, Ram Parshad reached Raju's house armed with a *Churri*. The Appellant gave a *lalkaara* that he would not spare anyone on that day. The Appellant gave a *Churri* blow to Raju's mother's left armpit. He (Raju) raised an alarm and intervened to save his mother. At this, Ram Parshad gave a knife blow in Raju's abdomen. In the meanwhile, his father Ramji Lal also reached home and tried to rescue Raju. The Appellant gave a *Churri* blow on the left side of his father's stomach. It is alleged that Ram Parshad's mother Batto Devi also reached the spot armed with a danda, and gave a blow with it on Raju's mother's head. Ramji Lal (Ram Parshad's father) gave a *lathi* blow on Raju's father's

right elbow. It is alleged that in the meanwhile, Narayan and Gopal reached the spot and rescued them.

3. Shanti Devi (the deceased) and her husband Ramji Lal were removed to AIIMS. Raju was first taken to Mool Chand Hospital and then was removed to AIIMS. On receipt of DD No.23-A Ex.PW-8/B6, SI Prem Singh reached the spot. Having come to know that the injured were taken to AIIMS, he went there. He recorded Raju's statement Ex.PW-1/A and made his endorsement Ex.PW-25/D for registration of an FIR for the offence punishable under Section 307/34 IPC. After giving her initial treatment, Shanti was shifted to Safdarjung Hospital. She succumbed to the stab injuries and was declared dead at 11:30 AM and the case was converted to the offence punishable under Sections 302/307/34 IPC. Dr. G.K. Chaubey conducted autopsy on Shanti Devi's dead body. He found:-

> ''a stab wound over left chest size 3 x 1 cm going downwards and medially piercing through lower lobe of left lung, pericardium and left ventricle of heart. Depth of wound was 9 cm. Because of injuries there was collecting blood inside chest approx. 2 to 3 liters and also blood collected surrounding heart underneath pericardium. Margins were clean cut. Both angles acute. Injury was ante mortem and fresh before death." He opined cause of death ''due to hemorrhagic shock and cardiac tamponade collection of blood over heart so that heart does not pump. The injury on the chest was found to be sufficient to cause death in the ordinary course of nature.''

4. In order to establish its case, the prosecution examined 27 witnesses.

5. PW-1 Raju, PW-2 Ramji Lal, PW-5 Chet Ram, and PW-6 Kalyan Singh are the material witnesses.

6. In his examination under Section 313 Cr.P.C., the Appellant denied having caused to Shanti, Ramji Lal or Raju. He stated that on 12.08.1990 Raju caused injuries to him. A compromise was arrived at in the said case. After the compromise, a false complaint was filed against him by Raju. He (the Appellant) filed an application to the SHO. Raju threatened him for lodging a report with the SHO and implicated him in the case falsely.

7. The Trial Court did not attach much importance to the discrepancies about apprehension of the culprit at the spot, discrepancy regarding duration of time between the death and the postmortem examination; absence of danda injury on Shanti Devi's head and believing the prosecution version vis-a-vis the Appellant, he was convicted under Section 302/324 IPC.

8. Batto Devi (Ram Parshad's mother) was acquitted of the charges on the ground that the role assigned to her i.e. giving *danda* blow on Shanti Devi's head was not established as no head injury was found on Shanti Devi's body either in the MLC prepared in AIIMS or in the postmortem report Ex.PW-18/A, conducted in Safdarjung Hospital. The Trial Court found that there was possibility of embellishment and roping in Batto Devi falsely. Since the trial against Ramji Lal had abated (as he died during the trial) and the Batto Devi's acquittal is not the subject matter of this Appeal, we need not go into the question about the role attributed to Ramji Lal (now deceased) and Batto Devi (already acquitted).

9. In cross-examination PW-18 G.K.Chaubey ruled out the possibility of the injury on the Shanti Devi's person to be self sustained or self inflicted. There is no reason to doubt PW-18's testimony and his report Ex.PW-18/A. It is, therefore, established that Shanti Devi's death was homicidal.

10. We have heard Mr. N. Hariharan learned counsel for the Appellant, Mr. M.N.Dudeja, learned APP for the State and have considered the record.

11. It is urged by the learned counsel for the Appellant that he was implicated in the case falsely, on account of his previous animosity with PW-1 Raju. It is emphasized that as per prosecution version the *rukka* was sent to the Police Station for registration of an FIR at 10:20 AM whereas according to PW-10 Constable Dalbir Singh, the IO reached the hospital after 10:55 AM. It is urged that existence of the FIR in these circumstances is doubtful and thus, the possibility of the Appellant being falsely implicated in the case on account of previously enmity cannot be ruled out. It is contended that according to the prosecution, the injury was caused by the Appellant to Shanti Devi when she was standing on the steps and if this is to be believed, the movement of the knife would have been upward, whereas in this case, the movement of the knife is

from the upper part to lower part of the body. The learned counsel contended that infact the fight occurred elsewhere with some others who were apprehended at the spot and the Appellant was implicated in the case falsely later (according to the prosecution version recorded in DD No.23-A Ex.PW-9/A, the culprit was apprehended at the spot). No explanation has been given by the prosecution that if the culprit was so apprehended then why he was allowed to go by the police. It is urged that as per the postmortem examination the time since death was 16 hours. The postmortem examination was conducted at about 3:00 PM which belies the prosecution version; the MLC, indicated that Shanti Devi died at 11:30 AM. It is contended that everything was manipulated to help the complainant to falsely implicate the Appellant.

12. On the other hand, learned APP argued that two injured witnesses PWs 1 and 2 who were the son and husband of Shanti Devi respectively would not have falsely implicated the Appellant and allow the real culprit to go scot free. With regard to the discrepancy in the duration since death and the postmortem examination, it is urged that there was some clerical mistake on the part of the autopsy surgeon (PW-18). In view of the discharge summary Ex.Pw-18/B-10 there cannot be any manner of doubt that Shanti Devi was declared dead at 11:30 AM. It is contended that the culprit had not been apprehended by the police and the DD No. No.23-A Ex.PW-9/A would only show that members to the public had caught the attackers. It was explained by PW-20 ASI Rajpal that the assailants who caused the injuries ran away into the crowd.

13. It is evident from the MLC Ex.PW-21/B that Raju was brought to AIIMS by Chet Ram and admitted by Constable Dalbir Singh (PW-10). Information was sent by Constable Dalbir Singh (PW-10) by DD No.17-B recorded at 10:55 AM to that effect. As a Constable posted in AIIMS casualty, it was the duty of the Constable Dalbir Singh to pass information regarding admission of various injured in medico-legal cases. It is true that Constable Dalbir Singh admitted in his cross-examination that the IO reached the hospital after 10:55 AM. A duty Constable attends to various injured/sick persons who are admitted in the casualty in medico legal cases. He is not concerned with the recording of statements of the injured by the IOs but information regarding his admission would have been passed on by him only at 10:55 AM. The duty Constable was not aware of the facts and it was on the presumption that he had given the

information to the IO only at 10:55 AM. The IO, in the natural course would reach the hospital thereafter and that is the reason why PW-10 stated in cross-examination that the IO reached the hospital only after 10:55 AM.

14. SI Prem Singh, the initial IO was quite clear that he reached the house No.115, H Block, Tigri along with Constable Dasrath on receipt of DD No.23-A. This DD entry was received by him at 8:05 AM. SI Prem Singh deposed to being informed that the injured were taken to the hospital. He and Constable Dasrath proceeded to the hospital where he saw that Shanti, Raju and Ramji Lal were admitted. He testified that Shanti was unfit to make a statement. He recorded Raju's statement Ex.PW-1/A. Rukka Ex.PW-25/D revealed that it was dispatched to the Police Station at 10:20 AM and the FIR was recorded at the Police Station by DD No.9-A on the same day at 10:50 AM. It is important to note that the injured Ramji Lal and Shanti were removed to AIIMS by PW-4 Bhagwati whereas Raju was taken to the hospital by PW-5 Chet Ram. Raju and Chet Ram were not aware that Shanti Devi and Ramji Lal had been taken to AIIMS, therefore, Chet Ram first took Raju to Mool Chand hospital and from there he was removed to AIIMS. PW-5's testimony on this aspect was not challenged in cross-examination. Thus, there is no doubt that Raju was first taken to Mool Chand hospital. When SI Prem Singh reached the hospital on finding that no eye witness was available at the spot, he recorded Raju's statement at about 10:00 AM. Thus, it cannot be said that the existence of the FIR is doubtful. It cannot be said, merely on the basis of PW10 Constable Dalbir Singh's testimony that the IO reached the spot after 10:55 AM.

15. Similarly, the contention raised on Appellant's behalf that the real culprit was allowed to escape and he was falsely implicated is without any substance. DD No.23-A (Ex.PW-18/B-6) discloses that after the stabbing incident the assailant was captured. PW-20 ASI Rajpal of PCR infact reached the spot on the basis of information regarding stabbing given to the Police Control Room. In cross-examination by the learned APP, the witness clarified that the offenders apprehended by the public managed to escape into the crowd. Thus, the culprit's escape was not from the police custody but from the hands of the public. Just because the culprit escaped into the crowd, it cannot be inferred that the Appellant was falsely implicated in the case. The stabbing incident is established by

PWs 1 and 2's statement which is corroborated by PWs 4 and 5's testimonies and the medical evidence.

16. Raju (PW-1) has given the cause of quarrel. We find no reason to disbelieve PW-1's and PW-2's testimonies. We do agree that the testimonies of PWs 1 and 2, who were injured in the incident, cannot be doubted. PW-1 being the son and PW-2 being the husband of deceased Shanti Devi would not allow the real culprit to escape punishment.

17. The learned counsel for the Appellant took us through PWs 1 and 2's testimonies and urged that they have contradicted each other. It is contended that what can be inferred from PW-1's testimony is that his father PW-2 did not see the attack on the deceased and PW-1, whereas, PW-2 claims to have witnessed it. PW-1 deposed that the Appellant had made a grievance about PW-1's splashing water outside his shop. The Appellant abused and chased him. PW-1 rushed towards his house and on reaching home, he informed his parents about the Appellant's behaviour. He deposed that his mother (Shanti Devi) suggested to his father to call someone from the neighbourhood. His father went to call Gopal and Narayan. In the meanwhile, the Appellant came outside their house armed with a *Churri* and threatened to kill them to put an end to the entire dispute. His mother was standing at the door of the shop. The Appellant inflicted a *Churri* blow on her left armpit. When he tried to intervene and save his mother, the Appellant gave a *Churri* blow on the left side of his abdomen. His mother ran out crying. At that point of time his father reached the spot. The Appellant gave a *Churri* blow on the left side of his father's abdomen too.

18. About the actual incident PW-2 Ramji Lal testified that his wife Shanti Devi asked him to call someone from the neighbourhood. He went to call his neighbour Gopal. On his return, he saw the Appellant giving a *Churri* blow to his wife's left armpit. When he reached her, he found her in a pool of blood. His son Raju was also bleeding from his abdomen. When he tried to help his wife, the Appellant gave a *Churri* blow to his armpit too.

19. In our opinion, the testimonies of PWs 1 and 2 cannot be said to be at variance to each other. Rather they are consistent and natural. While injuries were being inflicted by the Appellant on Shanti and PW-1 Raju, he (Raju) might not have seen his father approaching him.

Obviously, his attention was towards the assailants. There were just three injuries one each inflicted on the deceased and PWs 1 and 2. Thus, the whole incident might have taken just a few minutes. Therefore, PW-1's not mentioning that his father was present when his mother Shanti was given a *Churri* blow by the Appellant or when he (PW-1) was inflicted a *Churri* blow in his abdomen, would show that his testimony was natural and has given the correct sequence of events. We do not agree that PWs 1 and 2's testimonies are contradictory on the incident.

20. Learned counsel for the Appellant tried to demonstrate that if someone stands at the doorstep and the assailant approached him/her and inflicted a knife blow while he (the assailant) is two steps below, the movement of the knife would be from upwards. In this case, it is argued the movement of the knife was downward from above which was not possible and therefore, whole incident became doubtful. We do not agree with the contention. PW-18 Dr. G.K. Chaubey, who conducted the autopsy on Shanti's dead body, was not cross-examined on this aspect. Of course, it is a matter of evidence that at the time of incident Shanti was standing at the door and the street level was 2/3 steps down. Yet, we do not know as to how the actual blow was inflicted. The doctor has also not given any opinion how the injury was caused. In the circumstances, we are not inclined to attach importance to the arguments advanced on the Appellant's behalf.

21. There is some discrepancy regarding the duration of time since death and the postmortem examination. The postmortem examination was conducted by PW-18 Dr. G.K. Chaubey on 07.02.1991 at 3:00 PM and he gave the time since death to be 16 hours. A perusal of the death summary Ex.PW-18/B-10 reveals that the patient Shanti was shifted to Safdarjung Hospital on 06.02.1991 at 10:55 AM. At about 11:00 AM, she started gasping. She was given some treatment and cardiac massage. Despite all measures, she could not be revived and was declared dead at 11:30 AM. In view of the death summary, there cannot be any doubt that Shanti expired at 11:30 AM on 06.02.1991. In the face of this evidence, which cannot be challenged, the opinion of the doctor that the time since death was 16 hours at the time of postmortem examination at 3:00 PM on the next day cannot be accepted. There could not have been any manipulation either in the death summary on the injuries suffered by Shanti. The Appellant, therefore, cannot make capital out of this discrepancy in the postmortem report Ex.PW-18/B-9.

22. In **Bikau Pandey & Ors. v. State of Bihar,** AIR 2004 SC 997, it was held that merely because the witnesses happened to the deceased's relatives, was not a ground to reject their testimonies. The fact that both PWs 1 and 2 were injured in the incident establishes their presence at the spot at the time. We are conscious of the fact that PW-21 Dr. Alpna Sinha admitted in her cross-examination that the possibility of injury on PWs 1 and 2 to be self inflicted could not be ruled out, that would not mean that the injury was self inflicted. Smt. Shanti received a very serious injury which ultimately proved fatal. She and PW-2 were removed to the hospital together. It cannot be believed that while Shanti was inflicted a serious injury 9 cm deep downward and medially piercing through lower lobe of left lung, pericardium and left ventricle of heart, PWs 1 and 2 would be busy in inflicting injuries on themselves. The nature of injuries on PWs 1 and 2 was not proved for want of doctor's opinion. These were, therefore, taken to be simple by the Trial Court. Thus, it is established that the Appellant had inflicted fatal injury on Shanti and simple injuries on PWs 1 and 2.

23. The Appellant was convicted under Section 302 IPC as the injury on Shanti was found to be sufficient to cause death in the ordinary course of nature. It is contended on Appellant's behalf that what is proved on record is that there was a quarrel between the Appellant and PW-1 in regard to splashing water in front of the Appellant's shop by PW-1. While PW-1 rushed to his house, he was chased and abused by the Appellant. Although, PW-1 deposed that the Appellant had strained relations with them, yet the cause of it has not been revealed. What can be inferred from PW-1's deposition is that there was some ill will between the Appellant and PW-1. PW-1's splashing water in front of the Appellant's shop (even if unintentional) was the cause for the Appellant's rage. It is urged by the learned counsel for the Appellant that he inflicted just a single blow on Shanti. Unfortunately, the blow landed on the abdomen causing her death. The Appellant did not have any intention to cause Shanti's death and thus, he ought not to have been convicted under Section 302 IPC. Rather, the Appellant by his act could be attributed a knowledge that his act was likely to cause Shanti's death and thus, he could have been convicted under Section 304 Part II IPC. It is urged that in any event the act of the Appellant is covered under exception IV to Section 300 IPC as the injury was inflicted on Shanti without pre-meditation in a sudden fight in the heat of passion, upon a sudden

quarrel. The fact that only a single blow was given would bear testimony to the fact that the Appellant did not take any undue advantage nor acted in a cruel or unusual manner.

24. It is well settled that the plea whenever death is on account of a single blow, the offence would be under Section 304 and not under Section 302 IPC is not tenable (**Pulicherla Nagaraju @ Nagaraja Reddy v. State of AP,** 2006 Crl.L.J. 3899; **State of Rajasthan v. Dhool Singh,** 2004 Crl.L.J. 931).

25. In the case of **Bangaru Venkata Rao v. State of A.P.,** 2008 Crl.L.J. 4353 it was held that:-

> ''there is no rule of universal application that whenever one blow is given section 300 IPC is ruled out. It would depend upon the facts of each case, the weapon used, sized 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.''

26. In this case, the weapon used is a *Churri* with a 9-1/2 inches blade. The injury was caused on a vital part of the body i.e. abdomen. It is nowhere shown that the knife accidentally or unintentionally fell on that part of the body. The depth of the injury was 9 cms. The depth of the injury (i.e. 9 cms) indicates the force used by the Appellant in inflicting injury. Thus as per **Jagtar Singh v. State of Punjab,** 1983 Crl.L.J. 852, the Appellant's act would amount to murder unless his case falls under exception IV.

27. As we have already discussed above the circumstances leading to the murderous attack on Shanti, the starting point was splashing of water in front of the Appellant's shop by PW-1 Raju. This led to the Appellant hurling abuses and chasing him. The Appellant almost immediately reached deceased's doorsteps. Thus, there could not be any pre-planning or pre-meditation. Perhaps, the Appellant wanted to inflict injury only on Raju's person but it seems that Shanti came in the way as she wanted to save her son from the Appellant's wrath which led to the Appellant's inflicting injury on Shanti's person.

28. In **Deepak Sharma v. State of Delhi,** Criminal Appeal No.45/1998, decided by us on 9th March, 2011, the deceased's son i.e. PW-4 teased the Appellant calling him '*Kala Kauva*' (black crow). The Appellant had a grievance with PW-4's mother i.e. the deceased would always come to her sons (i.e. PWs 2 and 4) rescue and would support them. This Court held that the Appellant would be entitled to the benefit of exception IV to Section 300 IPC and would be guilty under Section 304 Part I IPC instead of Section 302 IPC. We would like to extract Para 16 of the report hereunder:-

> ''16. It is apparent from the above, that the Supreme Court has held that where the incident leading to the fatal attack, is preceded by a trivial quarrel, and the assault is limited to a single, though fatal blow, without any history of malice, or previous ill well between the deceased and the assailant, even a short while, i.e a few minutes elapse between the quarrel, the accused leaving the scene, and returning armed, the attack may not amount to murder, but would be covered by Section 304. In the present case too, the quarrel between the appellant and the deceased's sons, was due to a trivial reason. Although PW-2 and PW-4 denied having teased or laughed at the appellant, refusing his suggestion, the independent testimony of PW-5 somewhat supports his (the appellant's) version about some irritant or provocation, particularly the allusion to the two boys (PW-2 and PW-4) always quarrelling with him. The appellant is consistently shown to have used the word ''Himayat'' to PW-4 and the deceased. There is no reason to disbelieve PW-5. In fact, this version is closer to that of the line of questioning, on behalf of the appellant, that the boys had teased him. He, therefore, went home, and returned within about 3-4 minutes. He tried to assault Ajaypal; the deceased tried to prevent him; he attacked her. PW-4 thereafter tried to intervene; he too was attacked. All these facts do not suggest pre-meditation, or a previous history of ill will between Deepak and the deceased's family. He launched an attack on the deceased, when he thought that she would prevent him from assaulting Ajaypal. Both she and PW-4 were given single blows, when they tried to prevent his attack. These facts, viewed cumulatively do call for the applicability of Exception 4 to Section 300, IPC, as to amount to culpable homicide, covered

by the first part of Section 304.''

29. To invoke Exception IV to Section 300 IPC, the accused has to show that *''(i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner.''*

30. The cause of quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is also not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner.

31. In **Surinder Kumar v. Union Territory, Chandigarh,** (1989) 2 SCC 217; it was observed that, *''where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly.''*

32. In **Prakash Chand v. State of H.P.,** 2004 (11) SCC 381, there was a quarrel between the deceased and the accused when the accused's dogs entered the deceased's kitchen. Consequent to the verbal altercation that ensued, the accused went to his room, took out his gun and fired a shot at the deceased, as a result of which pellets pierced the chest of the deceased, resulting in his death. It was held by the Supreme Court *that proper conviction of the accused would be under Section 304 Part I of IPC and not under Section 302 thereof.*

33. In **Shaikh Azim v. State of Maharashtra,** 2008 (11) SCC 695, the deceased and his son were present at their house along with other family members. They noticed some filth thrown in the backyard of their house from the side of the house of the accused and expressed their displeasure in this regard. The family members of the accused also abused them. One of the accused held a stick, the other held an iron rod and the third accused was armed with a stick went out of their house and gave blows on the head of the deceased. When his son rushed to his rescue, the accused also gave injuries to him with iron rod and sticks. The deceased succumbed to the injuries caused to him. It was held that *the appropriate conviction of the appellant/accused would be under Section 304 Part I of the IPC.*

34. In the case of **Mahesh v. State of M.P.,** 1996 Crl.L.J. 4142, the Appellant arrived along with the cattle at the field. There was no premeditation for the assault. In para 4, the Supreme Court held as under:-

> 4.....At the spot, there was an altercation between the parties and in the sudden fight, after the deceased objected to the grazing of the cattle, when possibly hot words or even abuses were exchanged between the parties, the appellant gave a single blow with the pharsa on the head of the deceased. The statement of the appellant and the suggestions given on his behalf to the prosecution witnesses that there was an attempt to assault the deceased with a Parena, which was with the deceased, does not appear to be improbable. Thus, placed as the appellant and the deceased were at the time of the occurrence, it appears to us that the appellant assaulted the deceased in that sudden fight and after giving him one blow took to his heals. He did not cause any other injury to the deceased and therefore it cannot be said that he acted in any cruel or unusual manner. Admittedly, he did not assault PW-2 or PW-6 who were also present also with the deceased and who had also requested the appellant not to allow his cattle to graze in the field of PW-1. This fortifies our belief that the assault on the deceased was made during a sudden quarrel without any premeditation. In this fact situation, we are of the opinion that Exception-4 to Section 300 IPC is clearly attracted to the case of the appellant and the offence of which the appellant can be said to be guilty would squarely fall under Section 304 (Part-I) IPC. The trial court, under the circumstances, was justified in convicting him for the said offence and the High Court, in our opinion, fell in error in interfering with it and that too without dispelling any of the reasons given by the trial court. The judgment of the High Court convicting the appellant for an offence under Section 302 IPC cannot be sustained and we accordingly set it aside and instead convict the appellant for the offence under Section 304 (Part-I) IPC''.

35. In **A. Maharaja v. State of Tamil Nadu,** 2008 (17) SCC 173, the Supreme Court highlighted that the origin of the dispute was not

material but the subsequent conduct of the parties puts them in respect of the guilt upon equal footing. There is mutual provocation and aggression and it is difficult to apportion the share of blame on each of the party. We would like to extract part of Para 10 of the report in **A. Maharaja** (supra) hereunder:-

> ''10. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to do deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. 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 had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter... ... ...''

36. In this case, the incident took place in the morning hours. The cause of quarrel was trivial as PW-1 splashed some water in front of the Appellant's shop. The Appellant might have picked up the Churri lying in his shop. Obviously, he acted in the heat of passion. The fact that only

a single blow was given indicates that the Appellant did not act in a cruel or unusual manner. In the circumstances, the Appellant would be entitled to benefit of exception IV to Section 300 IPC.

37. In the result, the Appeal is partly allowed. The Appellant's conviction under Section 302 IPC is altered to the one under Section 304 Part I IPC. As per the nominal roll, the Appellant has already served sentence for eight years and eight months. No purpose would be served by sending the Appellant again to jail. In the facts and circumstances, the Appellant is sentenced to undergo imprisonment for the period already undergone for the offence punishable under Section 304 Part I IPC and to pay fine of Rs. 500/- or in default of payment of fine, to undergo Simple Imprisonment for one week.

38. The conviction and sentence for the offence under Section 324 IPC for causing injuries to Raju and Ramji Lal is maintained. As per the order of the Trial Court, the sentences were to run concurrently and thus the Appellant has already served his sentence under Section 324 IPC too. The Appellant is permitted to deposit the fine by 15th October, 2011 (if not deposited already), failing which he shall serve the simple imprisonment for one week as stated earlier.

39. The Registry shall transmit the Trail Court records and this judgment forthwith to ensure compliance.

ILR (2012) I DELHI 211
CRL. M.C.

SHIV CHARAN & ORS. ....PETITIONERS

VERSUS

STATE ....RESPONDENT

(SURESH KAIT, J.)

CRL. M.C. NO. : 2668/2006 DATE OF DECISION: 03.10.2011

Indian Penal Code, 1860—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.

The law is also settled and in view of Section 195 of Code of Criminal Procedure, if the offences are covered under Section 172 to 188 then as is provided under Section 195 (1) being the offences of the non-cognizable nature. Therefore, the police has no power to register and to investigate the case without prior permission of the concerned Magistrate. **(Para 29)**

Important Issue Involved: 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.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Satish Tamta, Advocate with Ms. Nisha Narayanan, Advocate.

FOR THE RESPONDENT : Ms. Rajdipa Behura, APP for State.

CASES REFERRED TO:

1. *Virender Chopra* vs. *State of Delhi* [2006] 4 Crimes 488.
2. *Pankaj Agarwal* vs. *State of Delhi and Anr.* 2001 (4) Scale 235.
3. *Gurvinder Singh* vs. *State* 1996(63) DLT 104.
4. *State of Orissa* vs. *Saratchandra Sahu and Anr.* 1996 (8) SC 806.
5. *Vasudev* vs. *State* 1984 (2) Crimes 599.
6. *Daulat Ram* vs. *State of Punjab* AIR 1962 SC 1206.

RESULT: Petition disposed of.

SURESH KAIT, J. (Oral)

1. Vide the instant petition, the petitioner has prayed as under:-

> ''Set aside the order dated 31.01.2004 passes by Sh. S.K. Sharma, Metropolitan Magistrate, New Delhi and quash the proceedings in case titled ''State Vs. Shiv Charan Gupta and others'' pending in the court of Sh. Chandrashekhar, Metropolitan Magistrate, Delhi.''

2. The facts in brief are, on 21.08.2003 an FIR No.399/03 under Section 186/353/506/34 IPC was registered at P.S. Defence Colony on the statement of Sh.Atul Kumar Nasa, Drug Inspector.

3. During the investigation conducted by the police, Section 22(3) Drugs and Cosmetics Act, 1940 was also added. Accordingly, the charge-sheet was filed in the concerned Court, who took cognizance on 31.01.2004, thereafter, the matter was proceeded further.

4. The petitioner challenged the cognizance order dated 31.01.2004 by the instant Crl.M.C. and on the first day i.e. 08.05.2006 the proceedings were stayed till further orders and finally vide order dated 19.02.2008 an interim order passed on 08.05.2006 was made absolute.

5. On 21.08.2003 at about 04:00 PM Sh.Atul Kumar Nasa, Drugs Inspector and his colleagues, as part of their official duty visited the premises M/s Shiv Shore, Shop No.20, Defence Colony Market, New Delhi. Three persons were present in the shop namely, one Shiv Charan Gupta @ Ajay, Brij Mohan Gupta @ Anil and Devendra Kumar Gupta. All the above mentioned three persons prevented Sh.Atul Kumar, Drugs Inspector from inspecting and examining the purchase and sale records etc. They physically pushed Sh.Atul Kumar Nasa out of the shop, further they threatened him by using abusive language. Thereafter, an FIR was lodged on the complaint made by Sh.Atul Kumar and the accused persons were arrested, and thereafter, they were released on bail.

6. Learned counsel for the petitioner raised legal issues that, Section 32 of the Drugs and Cosmetics Act, 1940 provide cognizance of offence as under:-

> ''**Cognizance of offences:-** (1) No prosecution under this Chapter shall be instituted except by:-
>
> (a) an Inspector; or
>
> (b) any gazetted officer of the Central Government or a State Government authorized in writing in this behalf by the Central Government or a State Government by a general or special order made in this behalf by that Government; or
>
> (c) the person aggrieved; or
>
> (d) a recognised consumer association whether such person is a member of that association or not.
>
> (2) Save as otherwise provided in this Act, no court inferior to that of a Court of Session shall try an offence punishable under this Chapter.
>
> (3) Nothing contained in this Chapter shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this Chapter.''

7. Further he submits that under Section 22(3) if any person wilfully obstructs an Inspector in the exercise of the powers conferred upon him by or under this Chapter [or refuses to produce any record, register or other document when so required under clause (c) of sub-section (1)] he shall be punishable with imprisonment which may extend to three years, or with fine, or with both.

8. Under Section 3 (e) (II) the definition of Drugs Inspector is given which reads as under:-

> ''Inspector'' means
>
> (i) in relation to [Ayurvedic, Siddha or Unani] drug, an Inspector appointed by the Central Government or a State Government under Section 33G; and
>
> (ii) in relation to any other drug or cosmetic, an Inspector appointed by the Central Government or a State Government under section 21;]''

9. Learned counsel has pointed out that under Section 186 IPC provides as under:-

> ''**Obstructing public servant in discharge of public functions:-** Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment of either description for a terms which may extend to three months, or with fine which may extend to five hundred rupees, or with both.''

10. Further he submits that Section 195 (1)(a) Cr.P.C. also provides as under:-

> ''195 (1) (a).....(i) of any offence punishable under sections 171 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or
>
> (ii) of any abetment of, attempt to commit, such offence, or
>
> (iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;''

11. The learned counsel has pointed out that afore mentioned Section 195 (1) (a) is covering the offence under Section 172 to 188 and the present case is falling under Section 186, therefore this Section is relevant in the instance case to adjudicate the issue.

12. He has argued that the instant case should have been filed by the concerned public servant i.e. Drugs Inspector and the police was not competent to lodge the FIR and file the charge-sheet. The offence under Section 186 IPC is of the non-cognizable nature, therefore the police has no power to register and investigate the case without prior permission of the concerned Magistrate.

13. Admittedly, the instant case has been filed by the SHO, Defence Colony, police registered the FIR No.339/2003 and matter was proceeded and finally filed the charge-sheet before the Court. Thereafter the Magistrate has also taken cognizance vide order dated 31.01.2004 on the challan filed by the police.

14. Mr.Satish Tamta, learned counsel for the petitioner relied upon the judgment of his Court titled as **Vasudev Vs. State** 1984 (2) Crimes 599 on the similar issue. In the case of **Vasudev** (supra) the challan was submitted by the SHO, PS Lahori Gate in the concerned Court for the offence under Section 186 IPC.

15. The background of the facts given was that on 22.11.1981, the SDM, Local Health Authority along with a Drugs Inspector and some other staff went to Shradhanand Market for the purpose of taking samples of food-stuff. They wanted to ensure whether any adulterated stuff was being sold. As they approached three shops bearing Nos.D-2, D-4 and D-6, the owners of the first two shops did not allow them to take any sample, and rather put the shutters of their shops on. Thus they defeated the raiding party from taking any sample. The case was registered. Taking cognizance of the case, the SHO filed the challan in the trial Court and thereafter two accused were summoned. The said order was challenged under section 482 Cr.P.C. and following three issues were raised:-

> ''(i) There could not be a joint trial of the owners of the two shops, No.D-2 and D-4 as the alleged offences committed by them, were separate and distinct and dis not arise out of the same transaction.
>
> (ii) It is pointed out that the offence under Section 186 Indian Penal Code is non-cognizable, and therefore, the police could not have investigated the same, and the proper course was to have referred the complainant to the Magistrate concerned. This was not done. In this regard, reference is made to Section 155 Criminal Procedure Code.
>
> (iii) It is contended that in terms of Section 195 Criminal Procedure Code, cognizance of an offence under Section 186 Indian Penal Code could have been taken by the court on a complaint by the public servant alone, or an officer under whom he was working. No such complaint, it is pleaded, was filed by the SDM who was heading the raiding party.''

16. In para 4 of the judgment it was observed that investigation in the case by the police office was wholly incompetent and the law did not permit the SHO to proceed with the same unless he had specifically obtained permission from the Magistrate having power to try such case,

or commit the case for trial. Under Section 155 Cr.P.C. in this regard is quite explicit. In fact, sub-section (2) prohibits the police officer to investigate a non-cognizable case without the permission of the Magistrate concerned. When this is the position of law, the investigation and the filing of the challan in the present case must be struck down.

17. In para 6 of the said judgment the Court has observed that the proceedings for an offence under Section 186 IPC could not have been into motion if there had been a formal complaint lodged with the court concerned by the public servant who had been obstructed in the discharge of his public duties, or against whom an offence had been committed. In fact, there was an absolute bar in terms of the language used in Section 195 Cr.P.C. The same issue was also decided in a case of **Daulat Ram Vs. State of Punjab** AIR 1962 SC 1206.

18. The Court has further observed in para 8 of the judgment in **Vasudev** (supra) that the alleged offence of not allowing raiding party to take samples and abused with the raiding team by the shopkeepers are distinct and separate. There was no commonality between them. When the raiding party was went to one of the shops, and the owner declined and not allow the samples to be taken, the offence so far as he was concerned, was complete. Similarly, the offence by the other shopkeeper was independent and separate. It is not the mere going of a raiding party at a market place and seeing several persons committing certain offences, not jointly but independently and not in furtherance of any common intention which render the different offences as one transaction. The transaction as referred to in Section 223 Cr.P.C. has to be looked at from the point of view of offences committed, and not the complainant who had happened to proceed on an errand of general check-up. The joint trial of the two accused, therefore, was entirely misplaced. Accordingly, the proceedings pending in the trial Court was quashed.

19. Ms. Rajdipa Behura, learned APP for State, submits that under Section 155(2) of Cr.P.C., no police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

20. Further submits that in the present case, apart from the non cognizable offence, offence under Section 353 (2) of Indian Penal Code, 1860 is cognizable, therefore, when two offences are made, one is cognizable and another is non cognizable, the complaint case is not

required. Police has to lodge FIR and file the Charge-sheet.

21. She has relied upon a Judgment of this court passed in **Virender Chopra Vs. State of Delhi** [2006] 4 Crimes 488. She has referred on paras Nos. 2,3 & 5 which are reproduced as under :-

> ''2. The learned Counsel for the petitioners made three submissions. His first submission was that Section 20-A does not apply at all inasmuch as the petitioners are not license holders. The second submission is that Section 25 of the said Act would also not apply even on the basis of allegations contained in the FIR. His third and final submission was that Section 20 of the said Act refers to an offence which is bailable and non-cognizable. He submitted that if Sections 20-A and 25 of the said Act are not made out then the charge under Section 20 by itself cannot survive inasmuch as the offence under Section 20-A is non-congnizable and no permission under Section 155(2) of the Code of Criminal Procedure, 1973 of the Magistrate has been taken. Therefore, the entire investigation with regard to the offence under Section 20 of the said Act is illegal and no charge can be framed on the basis of an illegal investigation.
>
> 3. Mr Malik, who appears on behalf of the State, submitted that Section 25 of the Act is clearly made out inasmuch as Section 25(c) deals with commission of mischief. He submitted that mischief has been defined in Section 425 of the IPC and the acts alleged to have been committed by the petitioners would fall within the scope of mischief and, Therefore, Section 25 of the Indian Telegraph Act, 1885 is clearly attracted on the basis of allegation contained in the FIR and the Charge-sheet. Therefore, according to him, the charge has been rightly framed under Section 25 of the said Act. Insofar as the submission with regard to the offence under Section 20 is concerned, he submitted that because the charge under Section 25 has been rightly framed, the fact that Section 20 was a non-cognizable offence and that no permission under Section 155(2) of the Cr.P.C. had been taken, would not come in the way of the Investigating Agency in view of the clear provisions of Section 155(4) of the Code which stipulates that where a case relates to more than one offence and at least one is cognizable, the case shall be deemed

to be a cognizable notwithstanding that the other offences are non-cognizable. Therefore, it is his submission that the offence under Section 25 being cognizable, the entire case would be deemed to be cognizable notwithstanding the fact that the offence under Section 20 is non-cognizable. He also submitted that the charge under Section 20A was also rightly framed as there was a contravention of the provisions of Section 4 of the Indian Telegraph Act, 1885.

5. With regard to the submissions on Section 25, I am in agreement with the submissions made by Mr. Malik, who appears on behalf of the State. His submission was that the case could be covered under Section 25(c) of the person intending to commit mischief and thereby damaging, removing, tampering with or touching any battery, machinery, telegraph lines, post or other things whatever being part of or used in or about any telegraph or in the working thereof. A reference to the FIR indicates that there are allegations that the telegraph lines of MTNL were also illegally utilised. In my view, insofar as the allegations are concerned, they make out a case for framing a charge under Section 25(c) read with the definition of "telegraph" in Section 2(1AA) and the description of 'mischief' under Section 425 of the IPC. Of course, Mr. Luthra submitted that instead of MTNL lines it was actually the broadband service of Bharti Telecom which was allegedly utilised by the petitioners by bypassing the VSNL gateway as per the prosecution case. This, in my view, is a matter of evidence and cannot be disposed of at this stage. The allegations contained in the FIR and the Charge-sheet indicate the usage of MTNL lines and, Therefore, would come within the definition of utilisation of any telegram facility. In my view, prima facie, the charge under Section 25 of the Indian Telegram Act, 1885 can be framed and has been rightly framed."

22. Further submits that under Section 155(4) of the Code of Criminal Procedure, where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable.

23. Learned APP has relied upon another Judgment of Hon'ble Supreme Court in a case of **State of Orissa Vs. Saratchandra Sahu**

and Anr. 1996 (8) SC 806, wherein the police filed Charge-sheet for the offences under Section 494/498 Indian Penal Code, 1860. Section 494 is not cognizable, only section 498 A is cognizable. To support her arguments, she has referred to paras 9,10, 12 & 14 of the above cited cases, which are reproduced as under:-

"9 The High Court relied upon the provisions contained in Clause (c) and held that since the wife herself had not filed the complaint and Womens Commission had complained to the police, the Sub-Divisional Judicial Magistrate, Anandpur could not legally take cognizance of the offence. In laying down this proposition, the High Court forgot that the other offence namely, the offence under Section 498A I.P.C. was a cognizable offence and the police was entitled to take cognizance of the offence irrespective of the person who gave the first information to it. It is provided in Section 155 as under :-

"155. Information as to non-cognizable cases and investigation of such cases.—

(1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer, the informant to the Magistrate.

(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable."

10 Sub-section (4) of this Section clearly provides that

where the case relates to two offences of which one is cognizable, the case shall be deemed to be a cognizable case notwithstanding that the other offence or offences are non-cognizable.

12. Sub-section (4) of Section 155 is a new provision introduced for the first time in the Code in 1973. This was done to overcome the controversy about investigation of non-cognizable offences by the police without the leave of the Magistrate. The statutory provision is specific, precise and clear and there is no ambiguity in the language employed in Sub-section (4). It is apparent that if the facts reported to the police disclose both cognizable and non-cognizable offences, the police would be acting within the scope of its authority in investigating both the offences as the legal fiction enacted in sub-Section (4) provides that even non-cognizable case shall, in that situation, be treated as cognizable.

14. The High Court was thus clearly in error in quashing the charge under Section 494 IPC on the ground that the Trial court could not take cognizance of that offence unless a complaint was filed personally by the wife or any other near relation contemplated by Clause (c)of the proviso to Section 198 (1).''

24. Learned counsel for the petitioner has argued that Section 195 of Cr.P.C talks about offences covered under Section 172 to 188. He submits that the other Sections have not been mentioned under Section 195, therefore, when any offence is committed, which does not fall under Section 172 to 188, then the complaint case is required to be filed in the court. The police cannot take the cognizance of the same.

25. Admittedly, on 08.01.2004, Challan was presented before the court and by order dated 31.01.2004, cognizance was taken to summon the accused and notice to surety.

26. Learned counsel for the petitioner has rebutted the submissions made by learned APP and submits that this court has already decided this issue in a case of **Gurvinder Singh Vs. State** 1996(63) DLT 104 and has held as under:-

''8. I think these observations and caution note spell out by the Supreme Court squarely apply to the facts of this case. Can the facts of this case it would hardly be possible to separate the element of insult on the so called assault because the two are so interwoven in the episode, that they become merged one with the other. Hence by adopting and resorting to the device of Section353 which is a camouflage the prosecution could not evade the provisions of Section 195 Criminal Procedure Code in this case. The facts have to be considered as a whole. There cannot be splitting up of the facts. Considering the acts as a whole if these disclose an offence for which a special complaint is necessary under the provision of Section 195, Criminal Procedure Code the Court cannot take cognizance of the case at all unless that special complaint had been filed. In the instant case the very act of obstruction lies in the alleged assault and use of criminal force. In substance the offence in question would fall in the category of Section 195, Criminal Procedure Code and it was not open to by-pass its provisions even by choosing to prosecute under Section353/506 Indian Penal Code Mr.R.D.Jolly as pointed above had conceded that charge on the facts of this case under Section 353 Indian Penal Code is not made out because the public servant was not prevented or deterred in the discharge of his official duties.''

27. As the present case is concerned, the FIR No. 399/2003 was registered under Sections 186/353/506/34 Indian Penal Code, 1860. During investigation Section 22 (3) of Drugs and Narcotics Act 1940 were also added. Accordingly, the Charge-sheet was filed in the concerned Court. The concerned Court took the cognizance on 31.01.2004, thereafter, the matter was proceeded further.

28. The law is settled on the issue that, if a case relates to more than one offence and at least one is cognizable, the case shall be deemed to be cognizable notwithstanding that the other offences are non-cognizable as is provided under Section 155(4) of Code of Criminal Procedure.

29. The law is also settled and in view of Section 195 of Code of Criminal Procedure, if the offences are covered under Section 172 to 188 then as is provided under Section 195 (1) being the offences of the non-cognizable nature. Therefore, the police has no power to register and to

investigate the case without prior permission of the concerned Magistrate.

30. In the instant case, Section 353 of Indian Penal Code, 1860 is also applicable against the petitioner. In view of a Judgment passed by the Supreme Court in **AIR 1966 SC 177(5)**, where the court has analyzed the provisions of Section 353 of Indian Penal Code, 1860 and Section 186 of Indian Penal Code, 1860 and held that the two are distinct offences and the quality of the offences are also different, the Apex Court was of the opinion that in relation to provisions of Section 353 of Indian Penal Code, 1860 would equally apply to the provisions of Section 332 of Indian Penal Code, 1860. This being the position, the Apex Court quash the criminal proceedings so far as the Charges under Section 186 of Indian Penal Code, 1860 is concerned and directed that the Criminal proceedings would continue so far as the charges under Sections 332/ 34 of Indian Penal Code, 1860 are concerned, as has been opined in a case of **Pankaj Agarwal Vs. State of Delhi and Anr.** 2001 (4) Scale 235.

31. As far as the offence under Section 186 is concerned, there is absolute bar in terms of Section used in Section 195 of Cr.P.C., the same issue was also decided in a case of **Daulat Ram**(supra) and in a case of **Vasudev**(supra).

32. In my opinion the present case is squarely covered by **Pankaj Agarwal**(supra), and also the decision taken in the above mentioned case is applicable to the case in hand.

33. Consequently, the proceedings under Section 186 of IPC are quashed. For the remaining offences, the trial court shall proceed further as per law.

34. Accordingly, order dated 31.10.2004 passed by the Trial court is modified. Needless to mention that, the stay granted by this court stands vacated.

35. The petitioner is directed to appear before the learned Trial court on 20.10.2011 for directions.

36. Criminal M.C. 2668/2006 is disposed of accordingly.

37. No order as to costs.

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CRL. A.

SAPNA TALWAR & ANR. ....APPELLANTS

VERSUS

STATE ....RESPONDENT

(BADAR DURREZ AHMED & MANMOHAN SINGH, JJ.)

CRL. A. NO. : 357/2009 & 421/2009 **DATE OF DECISION: 12.10.2011**

Indian Penal Code, 1860—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.

It is settled law that in the case of circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. **(Para 23)**

It has been held in many decided cases that when a case of the prosecution is based on circumstantial evidence, such evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilt is to be drawn, are to be cogently and firmly established. Secondly, those circumstances should be of a definite tendency of unerringly pointing towards the guilt of the accused. Thirdly, the circumstances, taken cumulatively, should form a chain so complete that there is no escaping the conclusion that within all human probability the crime was committed by the accused and none else. In other words the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt. (See **Hanumanth Govind Nargundkar & Anr. v. State of M.P.,** AIR 1952 SC 343; **Chandmal and Anr. v. State of Rajasthan,** AIR 1976 SC 917 and **Sharad Birdi Chand Sarda v. State of Maharashtra,** (1984) 4 SCC 116). **(Para 24)**

Important Issue Involved: The welll known rules governing circumstantial evidence are that:- (a) the circumstantial 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 cirsumstances; (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 hypothese, other than that of guilt of the accused.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANTS : Mr. K.B. Andley, Sr. Advocate with Mr. M.L. Yadav, Advocate.

FOR THE RESPONDENT : Mr. Sanjay Lao, Addl. Standing Counsel.

CASES REFERRED TO:

1. *Sharad Birdi Chand Sarda* vs. *State of Maharashtra,* (1984) 4 SCC 116).
2. *Chandmal and Anr.* vs. *State of Rajasthan,* AIR 1976 SC 917.
3. *Hanumanth Govind Nargundkar & Anr.* vs. *State of M.P.,* AIR 1952 SC 343.

RESULT: Appeals disposed off.

MANMOHAN SINGH, J.

1. These two appeals are directed against impugned judgment dated 08.04.2009 and subsequent order on sentence date 20.04.2009 delivered by Additional Sessions Judge, North East District, Delhi in case No. 50/2006, FIR No. 191/2002, P.S. Vivek Vihar, whereby the appellants Sapna Talwar and Satyajeet were convicted under Section 302 IPC and were sentenced to rigorous imprisonment for life, they were also convicted under Section 365 IPC and were sentenced to undergo simple imprisonment for five years and pay a fine of Rs. 1000/- in default of which to undergo simple imprisonment for three months. Further, appellants Sapna Talwar and Satyajeet were also convicted under Section 201 IPC and were to undergo simple imprisonment for two years and pay a fine of Rs. 500/- in default of which to undergo simple imprisonment for one and a half months. Appellant Yunus was only convicted for an offence under Section 120 B IPC. In addition, Sapna Talwar and Satyajeet have also been sentenced under Section 120 B IPC and all three of them were to undergo rigorous imprisonment for life for offence under the abovementioned provision.

2. All the aforesaid sentences were to run concurrently and all the three were given benefit of Section 428.

3. The facts as per the prosecution's case are that on 13.07.2002

one Laxman Dass informed the police that his younger brother Vijay Kumar (hereinafter referred to as the deceased) was missing, he said that 12.07.2002 at about 1:00 pm, his brother was to meet one person from Haridwar in the Meridian Hotel, Delhi but that meeting was not held and since then his brother was missing. During the investigation police interrogated Yunus the appellant herein, who stated that appellants Sapna and Satya Jeet had departed to Lucknow. The police contacted the Lucknow Railway police and both the accused persons were arrested at the Lucknow Police Station by the local Railway police at Lucknow.

4. Thereafter, on 22.07.2002, both the accused persons were brought to Delhi by the Delhi Police officials. They made disclosure statements. Thereafter, it was discovered that the appellant Sapna was an employee of the deceased and had got the job on the recommendation of Satyajeet. It is alleged that the deceased used to sexually exploit appellant Sapna. Therefore, to take revenge, Sapna married Satyajeet with an under taking that both of them would kill the deceased Vijay kumar, therefore, both of appellants hatched a conspiracy and were joined by their co-accused Yunus, a friend of Satyajeet in their plan. It is alleged that appellant Yunus gave the other appellants his mobile phone to be used with other SIM card and also provided them with a country made pistol (katta) which was used by them to kill the deceased.

5. As per the prosecution story, on 12.07.2002 accused Sapna enticed the deceased to come to meet her near the C.B.S.E. building at about 6:30 pm where they kept having fun for some time. Thereafter, both the accused persons, Satyajeet and Sapna accompanied the deceased in his car to Ghaziabad border where they purchased liquor and all of them started having it. Then Sapna administered sleeping pills in the liquor of the deceased and when he became unconscious they went to Dadri through Bulandshahar highway and on reaching a small canal, they tied him, then took him out and repeatedly hit him on his head with their country made pistol and then strangulated him to death with a string. They threw his body in that same canal with the help of one unknown passerby and left for Haridwar. For the next few days the accused persons kept fleeing from one place to another and during this time they were duly assisted and supported by the accused Yunus who at last after giving a sum of Rs. 1000/- made them board the train to Lucknow.

6. On being arrested by the police, the accused Sapna and Satyajeet made their disclosure statements, Ex.PW 20/A and Ex.Pw 20/B respectively, pursuant to that on 23.07.2002 the police took them to the spot and they pointed out the place vide memo Ex. PW 4/B. A site plan Ex. PW 4/C was also prepared of the place where they had thrown the body of the deceased. The said place was under the jurisdiction of Jarchha Police, whose officials had already recovered the dead body of the deceased on 16.07.2002, its panchnama Ex. PW 26/A was prepared and the body was sent for postmortem examination which was conducted on 17.07.2002.

7. As per the postmortem report of PW-1 Dr. P.C. Aggarwal, death was due to coma as a result of ante mortem injuries 3-4 days prior to the date of postmortem examination.

8. Thereafter, a chargesheet under sections 365/364/302/201/ 120-B/34 IPC read with section 25 of the Arms Act against all the three accused persons was filed.

9. The learned ASJ after examining the testimonies of 48 witnesses held the three accused, namely Sapna Talwar, Satyajeet @ Lovely and Yunus guilty of hatching a conspiracy to cause death of the deceased, and has delivered the impugned judgment on 08.04.2009 and subsequent order on sentence dated 20.04.2009. The details of the offences are mentioned in para No.1 of this judgment.

10. Being aggrieved by the said judgment of conviction and order on sentence, the appellants filed the present appeal, inter-alia, on the grounds which can be summarized as follows:

11. In Criminal Appeal No.357/2009 filed by the appellants, namely, Sapna Talwar, Satyajeet @ Lovely, the following are the main grounds for appeal which have been raised:-

(i) The case of the prosecution is based upon circumstantial evidence, but the chain is not complete.

(ii) The trial Court has considered the alleged disclosure statements of the appellants as their legal confessions, which is against the basic concept of criminal jurisprudence.

(iii) Admittedly, there was nothing to recover in pursuance of the disclosure statements of the appellants, therefore, the so-called disclosure statements of the appellants became inadmissible in law.

(iv) Since the dead body of the deceased Vijay Kumar was not seen by any of his relatives and was cremated in their absence and the identity of the dead body was established by clothes found on the dead body, therefore, the possibility of Vijay Kumar's clothes being planted cannot be ruled out.

(v) The medical evidence like post-mortem etc. pertaining to the deceased has not been fully proved.

(vi) There is no clear evidence on record to prove the motive on the part of any of the appellants for committing the said crime and there is also no evidence to show as to how the appellant Yunus is connected with the other two appellants and as to why he helped them in running away from justice.

12. In Criminal Appeal No.421 of 2009 filed by the appellant Yunus, the following are the main grounds:-

(a) No public witness was joined at any point of time, like at the time of recovery or at the time of the arrest of the appellants or subsequent thereof, though the members of the public were, admittedly, present at that time.

(b) The impugned order is totally based on inadmissible evidence.

(c) There is no legal evidence on record to hold that the appellant Yunus is responsible for the offence punishable under Section 120B IPC.

(d) The appellant Yunus had denied the suggestion for providing the country-made pistol to the other two accused, as there was no reason to do so. Admittedly, as per the report of the ballistics expert, the said pistol was not in a working condition. Therefore, it makes no sense to hold that the present appellant provided the weapon of offence.

(e) The disclosure statements of accused Sapna Talwar, Satyajeet @ Lovely being inadmissible in law cannot be considered, unless independent corroboration is provided by the prosecution.

(f) The mobile phone alleged to have been provided by the present appellant also has no concern with the crime, as the same has not been proved to have been used by the co-accused.

13. The statements of all the three accused persons were recorded under Section 313 Cr.P.C. All of them stated that they were innocent.

14. Two defence witnesses were examined, namely, DW-1 Mohd. Mehmood son of Salim Mohd., and DW-2 Rashid son of Abdul Wahid, on behalf of the accused Yunus in support of his defence.

15. The prosecution in order to prove the charges against the appellant examined following 48 witnesses :

PW -1 Dr. P.C. Aggarwal : He conducted autopsy on the dead body of deceased Vijay Bajaj on 17.07.2002.

PW -2 Gurpreet (hostile): Mobile shop owner to whom the accused allegedly sold the mobile phone of the deceased.

PW -3 Laxman Dass Bajaj : He is the complainant, brother of the deceased.

PW -4 Vishal Rajpal : Deceased was his uncle.

PW -5 Momim : He is allegedly known to the accused Satyajeet and on 16.07.02 latter requests him that his family members had ousted him and his wife Sapna. He allowed both to stay on the night of 16.07.2002.

PW -6 Ashok Rana : He is the friend of Vijay Bajaj and on 12.07.02 in the afternoon he allegedly saw a girl (Sapna) who sat in the car of Vijay Bajaj at petrol pump, Dilshad Garden.

PW -7 Sushil Sharma : Deceased was his class fellow. He allegedly saw the girl with deceased at 1.00 to 1.30 pm on 12.07.2002.

PW -8 Ms. Vineeta Bajaj : She is the wife of deceased Vijay Bajaj.

PW -9 Shahid (hostile): Accused Yunus allegedly made request to him to make arrangement of a room for stay of Sapna and Satyajeet on 15.07.2002.

PW -10 Gyan Singh : On 17.07.02 accused Satyajeet and Sapna allegedly stayed in his lodge.

PW -11 Anil Kumar (Manager) : On 14.07.02 Accused Satyajeet and Sapna allegedly stayed in his hotel Pelican, D-1, Patel Nagar-II, Ghaziabad.

PW -12 Manoj Kumar : In his presence Vishal and Ramesh allegedly identified the clothes of the deceased in PS Jarcha.

PW -13 Ramesh Chand : He is a cousin of the deceased.

PW -14 Ramesh Kumar : He is an employee in the company of the deceased.

PW -15 Vikrant Arora : He is the friend of deceased Vijay Bajaj and allegedly received the telephone call from the deceased at about 7.00 p.m. on 12.07.2002.

PW -16 Sanjeev Kumar : Deceased was his maternal uncle.

PW -17 R.K. Singh, Nodal Officer, Bharti Airtel.

PW -18 Ct. Satpal Tyagi : He handed over zero FIR, statement of complainant and copy of DD No.29 A to the duty officer of PS Vivek Vihar.

PW-19 Shiv Ram Giri : He is the owner of Shiv Chhaya Guest House, Haridwar where accused Satyajeet and Sapna allegedly stayed in the name of Surender Singh and Paramjeet Kaur on 13.07.02 and left the same on 14.07.02 at 7.00 am.

PW-20 HC Yogender Singh : On 21.07.02 he alongwith IO SI Yasbeer Singh, SI Anand Swaroop, Lady HC Chammo Khan went to Lucknow Jail for investigatin of this case.

PW-21 Ct. Preetam Singh : On 21.07.02 he joined the investigation and went to Hindon Mortuary, Ghaziabad alongwith

IO SI Yasbeer Tyagi.

PW -22 HC Satyaver Singh : In the intervening night of 13 and 14, July 2002 he was posted as duty officer in PS Vivek Vihar and received the copy of zero FIR registered in PS Mansarowar Park through SI Anwar.

PW -23 Ct. Pushpa Singh : On 19.07.02 She was posted in PS GRP Char Bagh, Lucknow where she along with SI R.B. Singh and Ct. Neeru Shukla searched the accused persons at Charbagh railway station.

PW -24 Ct. Neeru Shukla ....Do...

PW -25 Ct. Krishan Bihari Chaubey ....do...

PW -26 SI Ranjeet Prasad Diwakar ...do...

PW -27 SI Brijpal Singh PS Khanpur, District Bullandshahar, UP : On 16.07.02 he was posted in PS Jharcha and complainant Raj Kumar came to his PS and gave a written information about dead body of an unknown person lying near a drain at Veerpura. He prepared a panchnama Ex.PW-27/A and seized the shirt and shoes of the deceased and also seized the dead body in a cloth pullanda and got the dead body photographed.

PW -28 SI Yashbir Singh : On 14.07.02 he took up the investigation of this case and on 23.07.02 the investigation of this case was transferred from him.

PW -29 Kallu (hostile): He is the father of accused Yunus.

PW -30 Sri Bhagwan Singh : He is the owner of parking slot at Har ki Paudi, Haridwar where the accused allegedly parked their vehicle i.e. Maruti Zen against a slip.

PW -31 SI Mahesh Kumar : Draftsman

PW -32 Mohd Islam : He was the compounder in Haq Medical Centre from where accused Sapna Talwar allegedly got the tablets of Diazepam.

PW -33 Tara Singh (hostile): He is the owner of medical store situated at S-2, Anupam Apartment, Shop No.4, Vrindavan Garden,

Sahibabad. On 25.07.02 accused Sapna allegedly purchased 10 tablets of Diazepam and one injection (calmpose) and one syringe.

PW -34 SI Dharampal Singh : On 19.07.02 he was posted in PS GRP, Charbagh, Lucknow and searched for the accused persons there.

PW -35 Raj Kumar : On 16.07.02 he intimated in PS Jharcha about the dead body lying in the drain near an exhaust water pipe.

PW -36 Ashok : On 16.07.02 on the direction of police he brought out the dead body from the drain and signed the panchnama Ex.PW26/A.

PW-37 HC Gurnam Singh : On 24.09.02 he deposited the six sealed pullandas to MHCm.

PW -38 Akhtar : On 16.07.02 he signed the panchnama of dead body Ex.PW-26/A.

PW -39 SI Rishi Ram : On 19.07.02 he was posted as Head Moharrir in PS Kotwali, Haridwar. On that day SI N.P. Singh deposited one Maruti Zen car with him. On 24.07.02 IO came to him with the accused persons and seized the said car vide seizure memo Ex.PW28/C.

PW-40 SI R.B. Singh : He was the (thana prabhari) PS GRP, Char Bagh, Lucknow. He arrested the accused Sapna and Satyajeet there and seized one wrist watch, one sim card and cash Rs.6200/-.

PW-41 Ct. Jai Prakash : On 16.07.02 he was posted in PS Jharcha and at about 1-1.30 pm one Raj Kumar came to him and informed about one dead body lying in a culvert near village Veerpura.

PW -42 HC Chammo Khan : On 21.07.02 he alongwith SI Yashbir Singh, HC Yogender, SI Anand Swaroop went to GRP railway station, Lucknow and arrested both accused persons who were already in the Lucknow Jail.

PW-43 HC Hira Lal MHC(M), who deposed that on 21.07.2002

he made several entries with regard to depositing of pullandahs and the Maruti Car in the Malkhana.

PW-44 SI Anwar Khan : In the intervening night of 12th and 13th July, 2002 one Mr. V.K. Bajaj gave information that his brother Vijay was missing. DD 29A was recorded in this regard and handed over to him for investigation.

PW -45 ACP Ram Niwas : On 23.07.2002 investigation of this case was handed over to him.

PW -46 Retired HC Chattar Singh : On 16.07.2002 he was posted in PS Jharcha and one Ram Kumar gave him information about a dead body lying in a drain near Village Veerpura. He was also witness to the identification of wearing clothes of the deceased by the relatives.

PW-47 SI Raja Ram Singh Yadav : He was the Moharrir in PS GRP, Charbagh, Lucknow.

PW-48 Ct. Om Pal Singh : On 16.07.02 he was posted in PS Jharcha and an information was received in said PS that one dead body was lying in a drain. Thereafter, he along with HC Brijpal, Ct. Jai Prakash went to that place. The dead body was taken out and got photographed.

16. Since there is no eye-witness to the murder, the case revolves around the circumstantial evidence of last seen and the recovery of the material as per the story of the prosecution.

17. The sequence of events date-wise as per the case of the prosecution are as under:-

(a) PW-18 Const. Satpal Tyagi who was posted in Police Station MS Park, registered the Zero FIR and also recorded the statement of the complainant, i.e. PW-3 the elder brother of the deceased. DD No.29A was also registered.

(b) In his statement recorded before the Court, PW-3 deposed that on 12.07.2002 his younger brother Vijay Bajaj had gone to market for business. He was also supposed to accompany him, but he could not accompany him as he had to attend the Kirya of the mother of his friend. His brother had gone to collect money from 5-6 persons. The

last person was Manoj Jain of Shivalik Pharmaceuticals, Haridwar who was to meet his brother at Hotel Maridian, Delhi. At about 5.15 p.m. his brother rang up and informed that Manoj had not come to the hotel. During the night, the other brothers came to know that the deceased Vijay Bajaj had not returned. He lodged the report Ex.PW3/A and his statement was recorded by the police during the evening time of 13.07.2002. His apprehension was that his brother had been kidnapped. PW-6Ashok Rana deposed that he is running the business under the name and style of Rana Tours and Travels at Balbir Nagar, Shahdara. He knew Sushil Sharma who is residing near to his house. He was on friendly terms with Vijay Bajaj. He knew Vijay Bajaj for the last about 7-8 years prior to his death. On 12.07.2002 in the afternoon, while he was going to UP Border and on the way at the petrol pump, Dilshad Garden, he saw Vijay Bajaj had made one girl to sit in his car and then he left. Sushil Sharma PW-7 made a statement that he knew Vijay Bajaj being his class-fellow. On 12.07.2002 at about 1.30/2.00 p.m. he and Ashok were on the motor-cycle and following the car of Vijay Bajaj who gave lift in his car to a girl at Dilshad Garden near Petrol Pump and then they left. PW-15 Vikrant Arora who is the friend of the deceased Vijay Bajaj since college days, deposed that on 12.07.2002 at about 7.00 p.m. he received a telephone call from the mobile phone of the deceased Vijay Bajaj who requested him for his car stating that his (Vijay Bajaj) car had broken up being heated up and he was present at Vivek Vihar itself. At this, he told Vijay Bajaj to go to his house and pick up his car. However, on his return, he found that the deceased did not come to his house to pick up his car. PW-14 Ramesh Kumar Sharma who is the last seen witness before the death of the deceased as per the case of the prosecution has deposed that he has been working as an Accountant for the last about 8-9 years with Sheetal Bottle Glass Company. On 12.07.2002 at about 8.00/8.15 p.m. when the bus by which he was travelling, was stopped at the red light of

Surya Nagar, he was standing on the footrest of the bus, he noticed that vehicle of the deceased Vijay Bajaj was also standing on the red light of Surya Nagar. Vijay Bajaj was having his Zen Maruti Car bearing No.DL-3C-N-1042. In that car, Vijay was sitting on the driver seat and on the back seat, one lady was sitting and near the driver seat one boy was also sitting in that car. He asked from Vijay as to whether he was going to his house, then he replied that he was going to somewhere else.

(c) PW-30 Sri Bhagwan Singh who was managing Pantdeep Parking Slot situated at *Har ki Paudi* at Haridwar, has deposed that on 13.07.2002 at about 7.00 a.m., a Maruti Zen blue colour Car came to in that parking slot and it was parked there against a slip issued by him. However, nobody came there to claim the said vehicle back for 5-6 days. One man and a lady had parked the said car there. After about 15 days, the police came to him for investigation and both the above said persons who had parked that vehicle were also with the police. The police recorded his statement after interrogation. PW-19 Shivram Giri who is the owner of the Guest House at Haridwar deposed that on 13.07.2002 one Surender Singh son of Amarjeet Singh came to his Guest House along with his wife Paramjeet Kaur and stayed there upto 14.07.2002. They left at 7.00 a.m. on 14.07.2002. PW-11 Anil Kumar deposed that he was the Manager of Hotel Pelican. On 14.07.2002 one Rahul along with one lady had come to his hotel and stayed there. They disclosed their address as D-603, Ashok Nagar, Delhi. They were allotted room No.106. They left the hotel on 15.07.2002 at about 8.00 a.m. PW-5 Momim deposed that on 16.07.2002 at about 10 p.m. accused Satyajeet disclosed to me that his family members had ousted him and his wife after beating them and they be allowed to stay at his house. Although, initially he refused him, but, at their persistent request, both were allowed by him to stay in the house on 16.07.2002. They left in the morning. PW.10 Gyan Singh who is running a lodge situated at Railway Road, Choti Bajaria, Ghaziabad,

has deposed that on 17.07.2002 at about 11.00 p.m. one boy and one girl came to his lodge. The boy had disclosed his name as Surender Singh.

(d) PW-27 SI Brijpal Singh deposed that on 16.07.2002 he was posted at P.S. Jarchar, District Gautam Budh Nagar. The complainant Raj Kumar came to the police station and gave a written information about the dead body of an unknown person lying near a drain (nala) at Veerpura. He along with the other police officials reached the spot. He prepared a Panchnama Ex.PW27/A. He seized the shirt and shoes of the deceased vide seizure memo Ex.PW27/B signed by him at point 'A'. Photographs of the dead body were taken which are Ex.PW27/C and Ex.PW27/D. The dead body was sent to dead house for postmortem through Const. Jai Parkash.

(e) The postmortem was conducted on 17.07.2002 and the cremation of the deceased was done on 19.07.2002 by the police. The eye-witnesses of the dead body at the spot were examined as PW-35, PW-36 and PW-41.

(f) PW-28 SI Yashbir Singh deposed that after having received the details of mobile phones contacted through the mobile phone of the deceased, the details are Ex.PW17/A to Ex.PW17/D, he came to know about accused Yunus. The said accused Yunus was interrogated by him on 19.07.2002 at his house. Accused Satyajeet and Sapna were known to have left Delhi on that very night. He informed all these facts to DCP East Sh. Arvind Deep who contacted DCP GRP Railways. The latter gave information about arrest of both the accused, Sapna and Satyajeet.

(g) PW-23 Const. Pushpa Singh, PW-24 Const. Neeru Shukla, PW-25 Const. Krishan Bihari Chaubey, PW-26 SI Ranjeet Prasad Diwakar, PW-34 SI Dharampal Singh and PW-40 SI R.B.Singh deposed that both the accused Sapna Talwar and Satyajeet @ Lovely were lodged in the police lock-up after apprehending them from the Chahar Bagh Railway Station, Lucknow.

(h) PW-31 SI Mahesh Kumar prepared a scaled site plan

Ex.PW31/A. PW-39 SI Rishi Ram deposed that on 19.07.2002 the Car was deposited and entry in register No.19 at Serial No.88 was made being copy thereof as Ex.PW39/A.

(i) PW-44 HC Chhamo Khan posted at LG House, Delhi deposed that on 21.07.2002 he was posted in P.S. Vivek Vihar. On that day, he along with other police officials took the custody of the accused Sapna and Satyajeet from Lucknow jail after taking permission from the Court. The disclosure statement was made by the accused Satyajeet @ Lovely and Sapna before PW-20 HC Yogender Singh being Ex.PW20/A (of accused Satyajeet) and Ex.PW20/B (of accused Sapna). They were arrested through arrest memos prepared by the I.O. being Ex.PW20/C (of accused Satyajeet) and Ex.PW20/D (of accused Sapna). Both of them were brought in Delhi on 22.07.2002 and produced in the Court of ACMM, Karkardooma Courts and were remanded by the Court in eight days police custody.

(j) On 23.07.2002 investigation of this case was taken by PW-45 ACP Ram Niwas Vashisht and he interrogated both the accused, namely Sapna Talwar and Satyajeet @ Lovely. According to him, they led the police to a place near Dadri, UP and pointing out memo in this regard is Ex.PW4/A signed by him at point 'C'. He prepared the site plan Ex.PW4/C.

(k) The accused again took the investigator and his team to another place near a canal which was at a distance of about 2-2+ km from that place. Pointing out memo in this respect is Ex.PW4/B. He prepared the site plan of that spot which is Ex.PW4/D. Thereafter, they went to police station Jharcha. He inspected the record of the Malkhana Moharrar. One Vishal and another Kishan met them there in the police station. They identified the deceased from his photo, shoes and wearing clothes. The clothes of the deceased were sealed and were opened before them for the purpose of identification and later on those were sealed again.

(l) On 24.07.2002, both the accused Sapna Talwar and Satyajeet @ Lovely led them to Haridwar at Har Ki Paudi. PW-45 received the Car Maruri Zen on superdari from the concerned SHO and thereafter, accused took them to a parking lot near *Har Ki Paudi* and pointed out a place. Pointing out memo Ex.PW28/B was prepared. The said accused then led them to a hotel Shivchhaya at Haridwar and pointed out the same. The Owner/Manager of the said hotel identified both the accused and handed over the photocopy of relevant entry in his guest register which is Ex.PW19/A. PW-45 prepared memo about seizing of the said Car which is Ex.PW28/C.

(m) On the way to Delhi, he received the information about co-accused Yunus about his presence in his house in Delhi. The accused took the team to the house of Yunus who was interrogated by PW-45. He made the disclosure statement Ex.PW21/A and brought out one country-made pistol .315 Bore and five cartridges two of which were live, after bringing the same from an almirah in his house. He seized the same. Sketech of these weapons were prepared by him which are Ex.PW4/J (of the country-made pistol) and Ex.PW4/K (cartridges). He filled up the CFSL form and the case property was deposited in the Malkhana. All the three accused were lodged in lockup. On 25.07.2002 Yunus was produced in the Court from where he was remanded in judicial custody.

(n) Thereafter, the accused Sapna Talwar and Satyajeet @ Lovely took them to Anupam Apartment, Vranda Garden and point out a chemists shop.

(o) On 26.07.2002 both the accused were again interrogated by him. They led the police party to shop No.S4, BS Complex, GT Road, Ghaziabad. Accused Satyajeet pointed out that shop. One Gurpreet met there who had purchased the mobile phone of the deceased and he identified both the accused.

(p) On 27.07.2002 and 28.07.2002 after interrogation both the accused took the police to Hotel Pelican, Ghaziabad

where the Manager Anil Kumar produced the photocopy of the guest register which is Ex.PW4/L and its seizure memo is Ex.PW4/M. His statement was also recorded in this regard.

(q) Thereafter, both the accused led the police party to shop No.1 in the name of R.K.Batteries where one Shahid met them. He identified both the accused and his statement was recorded.

(r) On 28.07.2002 accused Sapna had handed over her wearing top (shirt) which was seized vide seizure memo Ex.PW4/O signed by PW-45 at point 'C'.

(s) On the same day, he picked up blood from the back door of the car from its inside by scrapping the same with blade. The seizure memo in this regard is Ex.PW4/P. After completion of the investigation, he prepared the challan of this case. The result from the FSL was received which is Ex.PW45/B.

Medical Evidence

18. Let us now consider the medical evidence. The dead body of the deceased, when sent for postmortem examination by the Jarcha police was examined by PW-1 Dr. P.C. Aggarwal. During the course of postmortem examination, this witness found:-

(i) A lacerated wound of 4 cm x 2 cm bone deep on the back side of the head, 10 cm behind left ear.

(ii) Occipital bone was found fractured.

(iii) A defused tranatic swelling 10 cm x 6 cm in area on the right side head just above ear was also found and the bone was also fractured from this point.

On internal examination this doctor found:-

(iv) The brain was liquefied and a blood clot was present.

(v) Death was due to coma as a result of ante mortem injuries 3-4 days prior to the date of autopsy. And this autopsy was conducted on 17.07.02.

19. So, as per medical evidence, the death of Vijay Bajaj was due

to coma as a result of antemortem injury.

FSL REPORT

20. The FSL report Ex.PW45/B dated 21.02.2003 on the Parcel 5 and Parcel 6 reads as under:

> ''Parcel No.5: One country made pistol .315'' bore marked exhibit 'F1'.
>
> Parcel No.6: One 8 mm/.315'' cartridge marked exhibit 'A1' and four improvised cartridges marked exhibits 'A2 to A5'.''

21. Similarly, another FSL report dated 29.01.2003 was received. As far as exhibit '3' gauze cloth piece, the species of original is 'Human', but no reaction/remark is shown for ABO Group. The description of the articles contained in the parcel is given along with the result of analysis. The same reads as under:

DESCRIPTION OF ARTICLES CONTAINED IN PARCEL

Parcel '1. : One sealed cloth parcel sealed with the seal of ''D.Singh U.P.P.'' containing exhibits '1a' and '1b'.

Exhibit '1a' : One dirty shirt

Exhibit '1b' : One pair of shoes

Parcel '2' : One sealed cloth parcel sealed with the seal of ''D. Singh U.P.P. containing exhibits '2a' and '2b'.

Exhibit '2a' : One dirty foul smelling pants with belt.

Exhibit '2b' : One dirty foul smelling underwear

Parcel '3' : One sealed cloth parcel sealed with the seal of ''RNV'' containing exhibit '3', kept in a plastic container.

Exhibit '3' : Gauze cloth piece having brown stains described as ''blood lifted car''

Parcel '4' : One sealed cloth parcel sealed with the seal of ''RNV'' containing exhibit '4'.

Exhibit '4' : One shirt described as ''TOP''

Parcel '5' : One sealed cloth parcel sealed with the seal of ''RNV'' said to contain 'Desi Katta' sent in original to Ballistics Division

Parcel '6' : One sealed cloth parcel sealed with the seal of ''RNV'' containing exhibit '6'

Exhibit '6' : Five bullets

RESULT OF ANALYSIS

1. Blood was detected on exhibit '3'
2. Blood could not be detected on exhibits '1a', '1b', '2a', '2b', '4' and '6'.
3. Report of serological analysis, in original, is attached herewith.

22. As per impugned judgment, the prosecution has proved following circumstances against the accused persons :

(i) They were seen together with the deceased at the night of 12.07.2002. In the morning both the accused persons parked the vehicle of the deceased with blood stains of the deceased on it in a parking lot at Haridwar and stayed in a hotel under fictitious identity.

(ii) Their disclosures led to the discovery of dead body of deceased Vijay and it was found to have the same injuries as were disclosed by the accused persons to have been inflicted on his head.

(iii) The dead body was found at the same place where the accused disclosed to have thrown it in the jurisdiction of PS Jarcha.

(iv) With the help of the wearing apparels and other articles the dead body was a uniquely and unambiguously identified as that of the deceased Vijay Bajaj, particularly consequent to the identification by PW-4 Vishal Rajpal.

(v) In the ensuing morning the accused Sapna and Satyajeet were found present in the town of Haridwar with the car of the deceased Vijay Bajaj in which they were seen accompanying the deceased just prior to the incident.

(vi) This car was found to be having blood on its rear right door. The possession of the car of the deceased Vijay and that too with the presence of blood stains, found from the constructive possession of the accused Satyajeet and Sapna, transmit a burden on the accused persons to show the circumstances in which that car and those blood stains on the door of the car appeared. But that burden was never discharged by the accused persons.

(vii) Accused persons Sapna and Satyajeet have been shown by the prosecution to be running from one place to the other after causing death of the deceased Vijay Bajaj. And that too under varying fictitious identities. U/s 10 Evidence Act this is a relevant fact and the accused persons could never discharge the burden so cast upon them to show the necessity of assuming fictitious identifies and being in a state of restless running from here to there after the death of accused Vijay Bajaj was caused.

(viii) Prior to this, the prosecution was able to prove that Sapna was making efforts of collecting Diazepam sleeping pills. It was shown that such pills were procured also. Some of such pills were found from the possession of Sapna and Satyajeet at Lucknow which were seized by that police vide document Ex.PW 23/A. Here the accused Sapna was found in possession of 'Calmpose' pills which are used to induce sleep. 'Calmpose' is the brand name of the same generic chemical known as Diazepam. Prosecution had shown that they were used to impair the deceased Vijay Bajaj.

(ix) Both the accused persons were duly sheltered and assisted by the third accused Yunus during their hightailing from one point to the other. It showed the extent of robust association between all these three accused persons.

(x) Subsequently also the accused persons Sapna and Satyajeet were arrested as per the information provided by the third accused Yunus. Right from the time when Yunus provided Katta to the accused Sapna and Satyajeet for causing death of Vijay Bajaj, Yunus remained in their contact until

they both left for Lucknow. This proved the scope, extent and liability of the complicity of accused Yunus in the commission of this offence.

(xi) The accused persons took the phone of the deceased Vijay Bajaj and sold it for Rs.3300/- at the shop of PW 2 Gurpreet Singh.

(xii) The disclosure statements of the accused persons Satyajeet and Sapna were recorded at two places. Initially at Lucknow in a document Ex.PW-23/A on 19.07.02 and thereafter in Delhi in documents Ex.PW-20/A & B on 21.07.02.

23. The case of the prosecution against the appellants was based on circumstantial evidence. It is settled law that in the case of circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person.

24. It has been held in many decided cases that when a case of the prosecution is based on circumstantial evidence, such evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilt is to be drawn, are to be cogently and firmly established. Secondly, those circumstances should be of a definite tendency of unerringly pointing towards the guilt of the accused. Thirdly, the circumstances, taken cumulatively, should form a chain so complete that there is no escaping the conclusion that within all human probability the crime was committed by the accused and none else. In other words the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt. (See **Hanumanth Govind Nargundkar & Anr. v. State of M.P.,** AIR 1952 SC 343; **Chandmal and Anr. v. State of Rajasthan,** AIR 1976 SC 917 and **Sharad Birdi Chand Sarda v. State of Maharashtra,** (1984) 4 SCC 116).

25. 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.

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.

26. 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.

LAST SEEN EVIDENCE

27. As per the testimony of PW-14 Ramesh Kumar Sharma, the ''last seen'' witness, on 12.07.2002 at about 8:00/8:15 p.m., his bus, plying on route No.333, stopped at red light of Surya Nagar. At that point of time Vijay Bajaj was in his Zen Maruti Car bearing No.DL-3C-N-1042. He was sitting on the driver seat. One lady was sitting near the driver seat. One boy was also sitting in that car. He asked Vijay as to whether he was going to his house, and then he replied that he was going somewhere else. Thereafter, he caught the bus and left the place. He correctly identified the boy and girl, who were seen by him in the car with Vijay, in Court as Sapna and Satyajeet. His statement was also recorded by the police as PW-14/DA on 14.07.2002.

28. Prior to this, PW-6 Ashok Rana had also seen deceased Vijay with the accused Sapna on 12.07.2002 at the Petrol Pump, Dilshad Garden as he was on his motorcycle. Another witness PW-7 Sushil Sharma, friend of deceased, in his testimony deposed that at about 1:30/ 2:00 p.m. when he and one Ashok Rana were on the motorcycle, they saw the deceased along with one girl at Dilshad Garden near Petrol Pump. Similarly, PW-15 deposed that on 12.07.2002 at about 7:00 p.m., he received a telephone call from the mobile phone of the deceased who asked him to give his car as his car had broken.

29. PW-8 Vineeta Bajaj, the wife of the deceased, also deposed that on 12.07.2002, she was in touch with her husband whole day on his

mobile phone and at about 8:30 p.m. she contacted her husband on his mobile phone No. 9810015012 and he told her that he is coming back in 15 minutes. PW-17 R.K. Singh, Nodal Officer, Bharti Airtell, produced the prints out/call details of mobile phone of the deceased and others. The said details show that the last call received by the deceased was at 20:59:23 on 12.07.2002 and there was no response on that number of the deceased on 13.07.2002 onward.

In view of above, it is clear that PW-14 Ramesh Kumar Sharma had seen the deceased alive at about 8:15 p.m. and the prosecution was able to prove the same in evidence.

30. PW-32 Mohd. Islam deposed in court that accused Sapna took a delivery of five Diazepam tablets from his shop and the said medicine was procured by her without a valid prescription of Doctor. PW-34 SI Dharampal Singh, posted in Police Station GRP Shajahanpur, U.P., deposed that Sapna and Satyajeet were taken into custody on the basis of interrogation and on being searched one SIM card was recovered.

31. PW-30 Sri Bhagwan Singh who was managing Pantdeep Parking Slot situated at *Har ki Paudi* at Haridwar, has deposed that on 13.07.2002 at about 7.00 a.m., a Maruti Zen blue colour Car came into that parking slot and it was parked there against a slip issued by him. However, nobody came there to claim the said vehicle for 5-6 days. One man and a lady had parked the said car there. After about 15 days, the police came to him for investigation and both the above said persons who had parked that vehicle were also with the police. The police recorded his statement after interrogation.

32. PW-19 Shivram Giri, PW-11 Anil Kumar, PW-9 Shahid, PW-5 Momin and PW-10 Gyan Singh are the persons who provided the accommodation to Sapna Talwar and Satyajeet @ Lovely during 13.07.2002 to 18.07.2002. Their testimonies and details are mentioned as under:

13.07.2002 — PW-19 Shivram Giri

PW-19 Shivram Giri deposed that he along with his son was running a guest house in the name of Shive Chhaya Guest House situated at Upper Road, Haridwar, Uttranchal and on 13.07.2002 one Surender Singh, s/o Amarjeet Singh, along with his wife Paramjeet Kaur came to their

guest house. An entry in this regard was made in the register at serial No.4045 and they stayed in their guest house upto 14.07.2002 and they left the same at 7:00 a.m. He also deposed that some officials of U.P. police came to him on 24.07.2002 and he identified and pointed out towards Sapna and Satyajeet, who were present in court, as having accompanied the said police officials.

14.07.2002 — PW-11 Anil Kumar

PW-11 Anil Kumar deposed that on 14.07.2002 one Rahul along with one lady came to their hotel and stayed there. During that period, he was working as Manager in Hotel Pelican, D-1, Patel Nagar-II, Ghaziabad. They made an entry in guest register at about 11:50 p.m. and room No.106 was allotted to them. They disclosed their address as D-603, Ashok Nagar, Delhi, and left the hotel on 15.07.2002 at about 8:00 a.m. He further deposed that when the police had brought boy and girl in the hotel on 28.07.2002, he came to know about their names as Satyajeet and Sapna. In cross-examination, he admitted that there was no initial/signatures on the cutting/overwriting. He clarified that it happened due to change of the room.

15.07.2002 — PW-9 Shahid

PW-9 Shahid was declared as hostile who gave the testimony that he does not know anything about this case. He also denied the suggestion of the prosecution and denied the fact that before the police on 15.07.2002 he offered to keep Satyajeet and Sapna in a room behind his shop. As per the prosecution case, Yunus, who was running a shop near his shop, came to his shop with one boy and lady and asked him to provide the accommodation. His statement was also recorded by the police as Mark PW-9/A wherein he confirmed that on 15.07.2002 at about 9:00 p.m. Yunus, who was running a shop near his shop, brought one boy and girl with a request to allow them to stay with him for night only. On their persistent requests, he allowed them to stay for the night and they left on 16.07.2002 at 7:00 a.m.

16.07.2002 — PW-5 Momin

PW-5 Momin deposed that he has a shop of Raju Electronics. He knew Satyajeet @ Lovely for the last 4-5 years. On 16.07.2002 at about 10:00 p.m., accused Satyajeet along with Sapna came to his house at

387, Ashok Vatika, Loni Road Pasonda, U.P. Satyajeet disclosed to him that his family members and ousted him and they be allowed to stay in his house. At the first instance, he was reluctant. However, on their persistent requests, he allowed them to stay in the house of Iddu, his maternal uncle's son at Morta village. They stayed there only for one night and left in the morning. He also correctly identified Satyajeet and Sapna who were present in the court. It is pertinent to mention here that despite opportunity being being granted to the appellants, there was no cross-examination on their behalf.

17.07.2002 — PW-10 Gyan Singh

PW-10 Gyan Singh deposed that he is running a lodge situated at Railway Road, Choti Bajaria, Ghaziabad. On 17.07.2002 at about 11:00 p.m., one boy and one girl came to his lodge. The boy had disclosed his name in the register as Surender Singh, resident of

B-44, Ajanta Apartment, Lucknow. He identified both of them in court.

18.07.2002 – PW-9 Shahid

As per the case of the prosecution, till 14.07.2002 the family members/relatives of the deceased had not expressed their doubt upon anyone as culprit. As per the family members, there was one telephone bearing No.9810695421 which was known to be belonging to accused Sapna from which calls were made on that phone of Airtel. On verification from Airtel about the ownership of phone of Sapna, PW-28 came to know about the address of Sapna. It was of Nand Nagri. The mother of the accused, namely, Geeta Talwar, met PW-28 on that day. Sister of the accused, namely, Jyoti and brother, namely, Ahsok @ Sonu, were also present in the house at that time. He had visited the house on 14.07.2002 at about 5:00/5:30 p.m. He also made an entry about his departure in the Police Station. Through these call details, he came to know about accused Yunus. He was interrogated by him 19.07.2002 at his house. On interrogation, he came to know that accused Satyajeet and Sapna already left Delhi on that very night. He informed all these facts to DCP East Sh. Arvind Deep who contacted DCP GRP Railways, Lucknow and latter gave information about the arrest of the said accused Sapna and Satyajeet.

33. PW-26 SI Ranjeet Prasad Diwakar deposed that on 19.07.2002, he was posted in GRP Charbagh. At about 8:00-8:30 a.m. SI R.B. Singh met him in the Police Station and told about an information from Delhi about two accused, one boy and one girl, who had absconded from Delhi. He had also disclosed their names as Satyajeet @ Lovely and Sapna Talwar. He along with other team members went to Railway Station Charbagh in search of said accused. At Platform No.1 near parcel godown, they say one boy and one girl sitting behind bags of parcels. When they inquired from them about their whereabouts, accused Satyajeet told his name as Vinod and Sapna told her name as Shalu. They asked them to show their railway tickets. As the boy was bringing out his railway ticket from his pocket, some documents fell down on the ground. One of these was a driving licence in the name of Satyajeet. This raised doubt about his identity. On further interrogation, both admitted their names as Satyajeet and Sapna Talwar. On being searched, accused Sapna was found having one grey coloured bag containing Rs.6200/-, one SIM card Airtel, one wrist watch Titan, one vial of some injection and one train ticket. The boy was found having one wrist watch Titan and driving licence in the name of Satyajeet. All these documents were seized vide document Ex.PW23/A. On the vial a chit was affixed which bore the inscription ''Calmpose'' on it and the train ticket was dated 18.07.2002 from Ghaziabad Junction to Lucknow. The identity card contained photo of Satyajeet. Ex.PW-23/A arrest memo-cum-disclosure statement was prepared at the time of arrest. The police also recorded the statements of PW-23 Constable Pushpa Singh as Ex.PW23/DA, PW-24 Constable Neeru Shukla as Ex.PW24/DA, PW-25 Constable Krishan Bihari Choubey as Ex.PW25/DA and PW-26 Ranjeet Prasad Diwakar as Ex.PW-26/DA.

34. After the arrest of Sapna and Satyajeet on 19.07.2002 at lunch, they were lodged in jail. PW-28 SI Yashbir Singh applied for permission in the court of MM, Karkardooma Court, Delhi, to bring the said accused persons to Delhi. The copy of application is Ex.PW-28/A. Both the accused were brought to Delhi by him and were produced before the court in Delhi and both were remanded to police custody for eight days.

In the disclosure statements recorded on 21.07.2002, they informed that they could get the dead body of deceased Vijay recovered from a small canal. On the basis of the disclosure statements Ex.PW-20/A (Satyajeet) and Ex.PW-20/B (Sapna), they were arrested on the same

day. The arrest memos are Ex.PW-20/C (Satyajeet) and Ex.PW-20/D (Sapna).

35. The prosecution proved that prior to their arrest on 16.07.2002, the dead body was recovered within the jurisdiction of Police Station Jarcha. The clothes of the dead body were also identified by the family members, particularly PW-4 Vishal Rajpal. Before the arrival of Delhi Police at Police Station Jarcha, a dead body had already been recovered by Jarcha police on the above mentioned place and a Panchnama Ex.PW-26/A was prepared and the dead body was sent for postmortem examination. PW-27 SI Brij Pal Singh seized the shirt and shoes of the deceased vide Ex.PW-27/B, photographs Ex.PW-27/C and Ex.PW-27/D were also taken. Thereafter, the dead body was cremated by the Jarcha Police on 19.07.2002.

36. Mr Andley, the learned Senior Counsel appearing on behalf of the appellants Sapna Talwar and Satyajeet, has argued that the findings of the trial court are not sustainable, inter alia, on two grounds, namely, that the learned trial judge who delivered the judgment considered the alleged disclosure statements of the appellants as their confessions which is against the law and secondly, nothing was recovered in pursuance to the disclosure statements. Thus, the disclosure statements are not admissible in law.

We must mention here that no doubt while delivering the impugned judgment, the learned trial judge at various places has referred to disclosure statements as confessional statements, which is not permissible. And, it is settled law that only that part of a disclosure statement made by an accused to a police officer is admissible which leads to a discovery of a fact. In the present case, although the dead body had already been found when the disclosure statements were recorded, we must not lose sight of the fact that the dead body was found by UP Police and that fact was not in the knowledge of Delhi Police which came to know about the same only when the disclosure statements of the accused were recorded. We do not agree with the submissions of the learned Senior Counsel for the appellants that there was no discovery of facts in this matter. This will be apparent from what is mentioned below.

37. After disclosure statements made by the accused Sapna Talwar and Satyajeet @ Lovely before Delhi Police on 21.07.2002, the accused

persons thereafter led PW-45 ACP Ramniwas Vashisht and his team to a place near Dadri, U.P. on 23.07.2002 and pointed out a place where site plan was prepared and also took them to another place near a Canal which was at a distance of about 2-2+ kilometers from that place. Pointing out memo in this respect is Ex.PW4/B and site plan was also prepared at the spot which is Ex.PW-4/D.

38. Thereafter, they went to Police Station Jarcha and inspected the record of Malkhana Moharrir. One Vishal and another Kishan met them there in the Police Station and they identified the deceased from his photo, shoes and wearing clothes. The clothes of the deceased were sealed and were opened before them for the purpose of identification and they were again sealed.

39. On 24.07.2002, both the accused led them to Haridwar at Har Ki Podi and from local Police Station a car Maruti Zen was received from the SHO and both pointed out the place of which pointing out memo is Ex.PW-28/B was prepared. The accused thereafter led the team to Hotel Shiv Chhaya and pointed out the same. The hotel manager handed over photocopy of relevant entry in the guest register which is Ex.PW-19/A. His statement was also recorded. The seizure memo of the car Ex.PW-28/C was also prepared and while returning to Delhi, both accused took them to the house of Yunus at 1743, Gali No.1, Islam Nagar, Ghaziabad, who was present in his house.

40. On the basis of the disclosure statement Ex.PW-21/A, Yunus allegedly brought out a country-made pistol .315 bore and five cartridges, two of which were live, from an almirah and the said material was seized. The sketches of these weapons were prepared as Ex.PW-4/J (country-made pistol) and Ex.PW-4/K (cartridges). Seizure memo in this regard is Ex.PW-4/G. All these articles were kept in pullandah and sealed by seal of RNV.

41. On 25.07.2002, both the accused then took the team to Subzi Mandi, Chander Nagar. Accused Satyajeet pointed out one shop of Chander Bhan. Thereafter, they led the team to Haq Clinic number 7A, Dilshad Garden, Delhi, where the statement of Islam was recorded.

42. On 26.07.2002, both the accused led the team to shop No.S4, BS Complex, GT Road, Ghaziabad. Accused Satyajeet pointed out that shop. One Gurpreet met them there who identified both the accused and

statement of Gurpreet was also recorded.

43. On 28.07.2002, they led the team to Hotel Pelican, Ghaziabad and pointed out the same. The Manager-cum-Receptionist Anil Kumar met them there. He identified both the accused as the same who stayed there in the name of Rahul and his wife. The photocopy of the guest register produced by the manager is Ex.PW-4/L. The seizure memo in this regard is Ex.PW-4/M. Thereafter, both the accused led the team to Krishna lodge, Railway Road, Ghazibad, where Mr Gyan Prasad Yadav, Manager of the said lodge, met them. He identified both the accused as the same persons who stayed there in the name of Surender Singh and his wife.

44. During the course of investigation, when the vehicle parked at Haridwar was examined, it was found to have blood stains on the rear right door which was lifted vide seizure memo Ex.PW-4/P and subsequently, this was confirmed to be human blood by the FSL report.

45. It is pertinent to mention here that for the period from 13.07.2002 to 18.07.2002, there was no explanation on behalf of the appellants Sapna Talwar and Satyajeet @ Lovely that why they were moving from one place to another.

46. From the aforesaid incriminating material and circumstances, it is clearly established by the prosecution that the murder of Vijay Bajaj was committed by Sapna Talwar and Satyajeet @ Lovely.

47. We concur with the view taken by the learned trial judge that PW-14 is the 'last seen' witness who had last seen Vijay Bajaj alive in the company of the accused Sapna Talwar and Satyajeet @ Lovely.

48. The prosecution has also been able to establish that accused Sapna Talwar and Satyajeet @ Lovely committed the offence under Section 201 IPC because they had caused the death of the deceased and after having the knowledge of the said fact, they caused disappearance of evidence after offence of murder by throwing the dead body in the water. The offence under Section 365 IPC is, however, not established.

49. In view of the testimonies of the witnesses, it is clear that the prosecution has been able to establish on record beyond reasonable doubt that both the accused Sapna Talwar and Satyajeet @ Lovely have

committed the offences under Section 302 r/w 120B and 201 IPC.

CASE AGAINST YUNUS IN CRL. APPEAL NO.421/2009

50. The case of prosecution against Yunus was that in order to kill the deceased Vijay Kumar, the accused Sapna and Satyajeet hatched a conspiracy. They joined Satyajeet's friend Yunus in their plan and received his mobile phone which could be used with other SIM card of Sapna. They also received a country-made pistol/katta and some cartridges also from Yunus. PW-18 SI Yashbir Singh from the call details came to know about accused Yunus and he was interrogated on 19.07.2002 at his house.

51. As per the case of prosecution, on 24.07.2002, both accused Satyajeet and Sapna led the police to Haridwar for the purpose of recovery of the articles. When PW-45 and his team along with accused Satyajeet and Sapna were returning from Haridwar to Delhi and they crossed Ghaziabad, PW-45 ACP Ramniwas Vashisht received secret information about co-accused Yunus that he was present in his house. Both accused Satyajeet and Sapna took the team to the house of Yunus who was present in his house and after interrogation, he made a disclosure statement Ex.PW-21/A.

52. The accused Yunus allegedly brought out one country-made pistol .315 bore and five cartridges, two of which were live, from an almirah in his house. Thereafter, he was arrested on 24.07.2002 and he was charged with Sections 25, 54 and 59 of Arms Act and Section 120 B IPC.

53. The trial court, after discussing various provisions of the Arms Act, came to the finding that the charges against the accused persons stand not proved. However, Yunus was held guilty of having conspired with Satyajeet and Sapna. The relevant details given by the trial court are as under:

(i) A mobile phone was recovered from the possession of accused Yunus. Its IMEI number was 449652426331480 and it was seized vide Ex. No.PW-4/H. It was this mobile phone which Yunus provided to accused Satyajeet and Sapna and in which Sapna used her SIM card of number 9810695421. PW-17 R.K. Singh appeared in the court

and produced documents Ex.PW-17/A to Ex.PW-17/B. In these documents Ex.PW-17/A and Ex.PW-17B are the specific documents to this effect.

(ii) Accused Satyajeet and Sapna disclosed that Yunus was in contact with them. And that Yunus provided them money which was seized at Lucknow vide document Ex.PW23/A and he also provided them the railway ticket for Lucknow.

(iii) Yunus made a disclosure statement Ex.PW-21/A before the police that he had arranged a ticket for the accused Satyajeet and Sapna and had helped them in boarding a train to Lucknow. When the police worked upon this information, the accused Sapna and Styajeet were arrested by the railway police at Lucknow. According to the trial court this showed that the information furnished by the accused Yunus was correct.

These purported circumstances seen together, in the view of the trial court, clearly established that the accused Yunus was in contact with Sapna and Satyajeet and that he was assisting them; he was providing all the material and instrumental help to them; he provided a telephone and on its disruption a second one also. He also provided them a Katta.

54. The case of Yunus before the trial court was that no public witness was joined at the time of recovery or at the time of arrest of Yunus. His case is that in fact, he was lifted from his house and he was illegally confined in Police Station from 19.07.2002 till 24.07.2002 and on 19.07.2002, no public witness was allowed to become witness at the time of recovery, if any, and no public witness was there at the time of recovery.

55. The statement of PW-29, father of the Yunus, was also recorded in the intervening night of 18.07.2002 and 19.07.2002 at about 3.00 a.m. The father of the Yunus was examined as a prosecution witness and was declared as a hostile. He deposed that in the intervening night of 18.07.2002 and 19.07.2002, when he was sleeping in his house, 12-13 persons entered his house from the side of roof. All of them took away Yunus, his son, who was sleeping at the roof of their house. He followed them. On his asking, they did not disclose their identities but stated that they

were taking away Yunus to Delhi. He stated that the Police did not record his statement in the case and on 20.07.2002, when he went to the Police Station Vivek Vihar, the police took his signatures on six blank papers and he identified his signatures on documents Ex.PW4/G and PW4/H at point C. He was cross examined by the Special Public Prosecutor for the State and he denied all the suggestions made by him before the court.

56. The defence witnesses DW-1 Mohd. Mehmood and DW-2 Rashid were examined by the appellant Yunus. They deposed that they are neighbours of the family of Mohd. Yunus and in the intervening night of 18.07.2002 and 19.07.2002 at about 2:30-3:00 a.m., they saw police officials on the gate and they overpowered Yunus and took him down to the street. The neighbours also gathered there. The police officials informed that they were taking Yunus to Delhi for some inquiry.

57. The learned trial judge in his impugned judgment acquitted him of charges under the Arms Act against him as the same stood not proved. However, he was held guilty of offence punishable under Section 120 B read with Section 34 IPC and was awarded imprisonment for life for the said offence.

58. In nutshell, the case of prosecution against the Yunus is that he provided the katta and five cartridges to the main accused, particularly, Satyajeet, who is his friend and also alleged to have provided a mobile phone to Sapna. As per the story of prosecution, Sapna used the said mobile after putting in her own SIM card and he provided money to the accused as per Ex.PW-23/A.

59. After having gone through the testimonies of all the witnesses and the documents on record, we do not agree with the finding of the learned trial judge that any case against the Yunus under Section 120 B IPC is made out as the prosecution has not established its case under this provision against Yunus. Our findings are as under:

a. Yunus denied the suggestion for providing country-made pistol to the other two accused persons. As per the FSL report, the said pistol was not in working condition. Therefore, it creates doubt in our mind. It makes no sense to hold that Yunus provided the weapon of offence.

b. There is no clear evidence to prove the motive on the part of the Yunus, how Yunus is connected with the other two

appellants, namely, Sapna and Satyajeet and why he would help them.

c. In so far as evidence of PW-2 Gurpreet Singh, owner of mobile shop, is concerned, he is a hostile witness and he did not recognize him and has not supported the prosecution case against Yunus.

d. PW-4 Vishal Rajpal, a relative of deceased, has not deposed anything against Yunus.

e. PW-29, his father, who was produced as prosecution witness, confirmed the case of Yunus that he was lifted from the house on 19.07.2002. He was also declared hostile witness.

f. PW-28 SI Yashbir Singh, who came to the house of Yunus for interrogation on 19.07.2002, had not stated anything against Yunus with regard to arrest, search, seizure or recovery of any article in his chief. At the time of interrogation on 19.07.2002, despite availability of members of public, no public witness was involved.

g. As per call details between 03.07.2002 to 17.07.2002, Ex.PW-17/A to Ex.PW-17/D, there is no evidence of any call from alleged mobile phone of Yunus bearing No. 9810810882 to the mobile phone No. 9810015012 of the deceased or the alleged mobile phone No. 9810695421 of Sapna Talwar.

h. Admittedly, PW-28 SI Yashbir Singh deposed to have interrogated Yunus in the night of 19.07.2002 at his house, but, there is nothing available on record in this regard about the statement of Yunus or any other witness. PW-28 SI Yashbir Singh deposed that he interrogated Yunus on 19.07.2002 on the basis of the call details from the office of Airtel on 14.07.2002. PW-17 R.K. Singh of Airtel deposed that the police had collected the call details Ex.PW-17/A to Ex.PW-17/D on 23.07.2002, then how on the basis of call details Yunus was interrogated on 19.07.2002, i.e., prior to receipt of call details on 23.07.2002.

i. PW-45 ACP Ramniwas Vashisht deposed in cross-examination that he did not remember the date when SI Yashbir collected call details. He did not remember the number of telephone of which call details were taken.

j. PW-28 SI Yashbir Singh in his testimony stated that one Mujib had given mobile phone to accused Yunus but said Mujib was not produced as a witness nor his statement was recorded.

k. No expert's opinion or doctor's opinion, who conducted the postmortem, was obtained regarding the use of alleged katta to commit the said offence.

l. PW-45 ACP Ramniwas Vashisht stated that they had parked their vehicle at a distance of 100 yards before the house of accused Yunus while PW-21 stated that they had parked their vehicle at a distance of 500-600 yards in north side from the house of the accused Yunus.

m. PW-4 Vishal Rajpal in his cross-examination deposed that they reached there, the doors of the house of Yunus were open while PW-45 ACP Ramniwas Vashisht stated that the main gate was closed when they went there. The doors were opened by Yunus from inside.

n. PW-45 ACP Ramniwas Vashisht stated that three or four persons had entered inside the house and rest of them remained outside. PW-21 Constable Pritam Singh stated that they all entered into the house of the accused.

o. PW-21 Constable Pritam Singh deposed in his cross-examination that there was one almirah of wood having size 2'x5' in that room whereas PW-45 ACP Ramniwas Vashisht stated in his cross-examination that the almirah was affixed in the rear wall of the room which was made of steel being of average size.

p. PW-21 Constable Pritam Singh stated in his cross-examination that seizure memos were in the handwriting of SI Yashbir Tyagi while PW-4 Vishal Rajpal stated that seizure memo, sketch of country-made pistol and cartridges, personal search memo of accused Yunus, site plan and arrest memo were made by PW-45 ACP Ramniwas Vashisht.

60. We find it difficult to believe that Yunus would have kept the katta and cartridges with him if the same were returned by Satyajeet and Sapna on their return to Delhi on 18.07.2002 after committing the murder of deceased Vijay Bajaj, particularly, when he was allegedly in close contact with the accused as per the case of the prosecution and in all circumstances, was aware about the progress of the investigation. Therefore, it would be highly unnatural on the part of Yunus to have retained a weapon in his house after having knowledge.

61. There is no direct or indirect evidence on record to connect the accused Yunus with the alleged offence. The prosecution version in this case is doubtful as the prosecution did not join any independent witness as attesting witness to the alleged disclosure statement as well as recovery. The disclosure statement without any discovery of fact is also meaningless. Non-joining of public witness as attesting witness smacks of malafide and makes prosecution version more doubtful. The prosecution is not able to establish chain of circumstances so complete to connect the accused Yunus with the alleged offence.

62. For all these reasons, we are of the clear view that the prosecution has not been able to bring home its case against Yunus as there are many missing links and chain is far from complete. The prosecution was failed to prove any case against him under Section 120 B IPC. Therefore, we cannot hold him to be guilty merely on the basis of suspicions raised by the prosecution.

63. The impugned judgment and order of sentence against Yunus are set aside and he is acquitted of all charges in this case. His appeal is allowed and he be set at liberty forthwith.

64. The appeal filed by appellants Sapna Talwar and Satyajeet @ Lovely is dismissed except to the extent that they stand acquitted of the charge under Section 365 IPC.

ILR I (2012) DELHI 259
MAC. APP.

RAMESH CHANDER ....APPELLANT

VERSUS

GANESH BAHADUR KAMI & ORS. ....RESPONDENTS

(REVA KHETRAPAL, J.)

MAC. APP. NO. : 255/2008 DATE OF DECISION: 12.10.2011

Motor Vehicles Act, 1988—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.

The findings rendered in the aforesaid judgment, in my opinion, leave no manner of doubt that it is the effective control and actual possession of the vehicle in question on the date of the accident which is the determining factor. Registration of a vehicle at the most is one of the several factors to be kept in mind while determining the question of ownership of the vehicle. In the present case, in view of the evidence adverted to hereinbefore, there is, in my view, not an iota of proof to suggest that the vehicle was in the

possession and control of the appellant on the date of the accident. Indubitably, the appellant was the financier of the vehicle. Indubitably also, he had got the vehicle released on superdari, but the mere circumstance of his getting the vehicle released on superdari is by itself not sufficient to hold that he was the owner of the vehicle, more so, when his explanation for having the vehicle released on superdari and subsequently purchasing the same was that the respondent No. 4 had never paid the hire installments in time and had habitually defaulted in payment of the same, leaving him with no other option and the said explanation is unrebutted on record. **(Para 16)**

Important Issue Involved: The determining factor to arrive at liability of owner to compensate in accident cases is effective control and actual possession of the erring vehicle on the date of accident.

[Gi Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Harvinder Singh with Ms. Vidhi Gupta, Advocates.

FOR THE RESPONDENTS : Mr. Ramesh Kumar, Advocate for the Insurance Company.

CASES REFERRED TO:

1. *Godavari Finance Company* vs. *Degala Satyanarayanamma and Ors.* (2008) 5 SCC 107.
2. *National Insurance Co. Ltd.* vs. *Deepa Devi and Ors.,* (2008) 1 SCC 414.
3. *Ganesh Bahadur Kami & Anr.* vs. *Raj Pal & Ors.* Suit No.267/2007.
4. *Mohan Benefit Pvt. Ltd.* vs. *Kachraji Raymalji and Ors.,* (1997) 9 SCC 103.
5. *Rajasthan State Road Transport Corporation* vs. *Kailash Nath Kothari and Ors.,* (1997) 7 SCC 481.

RESULT: Appeal allowed.

REVA KHETRAPAL, J.

1. This appeal is directed against the judgment and award of the Motor Accidents Claims Tribunal, Delhi dated 15.11.2007 as modifed by order dated 18.01.2008 passed in Suit No.267/2007 titled as ''**'Ganesh Bahadur Kami & Anr. vs. Raj Pal & Ors.**''.

2. Concisely, the facts are that on 27.09.2004, the respondents No.1 and 2 filed a Claim Petition under Section 166 read with Section 140 of the Motor Vehicles Act, 1988, claiming compensation for the untimely demise of one Shri Nar Bahadur Kami, on 20.10.1996, in a road accident allegedly caused on account of the rash and negligent driving of a TSR bearing No.DL-1R 5965 driven by the respondent No.3 wherein the appellant was impleaded as owner of the vehicle, and it was asserted that at the time of the accident the TSR was being driven by the respondent No.3-driver under the instructions, supervision and employment of the appellant.

3. In response to the notice of the institution of the petition, the appellant filed his written statement, denying any liability to pay the claimed amount to the respondents No.1 and 2, and submitting therein that he was not the registered owner of the aforesaid TSR on the date of the accident, nor he was in control of the vehicle, nor was the driver of the TSR under his employment or control. Soon thereafter, an application was filed by the respondents No.1 and 2/claimants under Order I Rule 10 read with Section 151 CPC, for impleading one Ramhit, son of Sukhari Ram as the owner of the vehicle on the ground that this fact was not known to them earlier. The said application was allowed by the Claims Tribunal and the owner Ramhit was impleaded as the party-respondent in the Claim Petition. On 09.05.2006, however, he [(Ramhit) (who is the respondent No.4 herein] was proceeded *ex parte* and issues were framed. Significantly, no issue was framed by the learned Tribunal on the question as to whether the appellant on the date of the accident was in possession and control of the vehicle in order to be treated as an owner thereof.

4. The learned Tribunal thereafter proceeded to conduct an enquiry and after recording its findings on the basis of evidence adduced, passed its award on 15.11.2007, granting a sum of Rs. 3,54,000/- as compensation to the respondents No.1 and 2 (claimants), which was subsequently

modified to Rs. 2,45,000/- by the learned Tribunal by its order dated 18.01.2008, on a review application filed by the appellant under Section 114 read with Section 151 of the Code of Civil Procedure for reduction of the awarded amount by deducting an appropriate sum towards the personal expenses of the deceased. As regards the liability to pay compensation, the learned Tribunal held that the appellant to be jointly and severally liable to pay compensation to the claimants along with the respondents No.3 and 4 on the basis of its finding that even though the vehicle was formally transferred in the name of the appellant on a subsequent date, the appellant was in actual physical control of the vehicle on the date of the accident.

5. Aggrieved from the aforesaid finding of the Tribunal, the present appeal has been preferred by the appellant to contend that at the time of the accident, the appellant was not in possession and control of the TSR, nor the driver of the TSR was employed by the appellant, and, therefore, the learned Tribunal has wrongly held the appellant to be jointly and severally liable along with the owner and the driver of the TSR to pay compensation along with interest thereon to the respondents No.1 and 2.

6. The sole issue which arises for consideration in this appeal, as contended by Mr. Harvinder Singh, the learned counsel for the appellant, is whether the appellant as the financier of the vehicle of which the respondent No.4 was the registered owner at the time of the accident could be held liable to pay compensation to the respondents No.1 and 2, merely on account of the fact that he had taken the offending vehicle/ TSR on superdari on 21.10.1996 from Police Station Pahar Ganj.

7. Mr. Harvinder Singh, the learned counsel for the appellant, contended that on the date of the accident, the appellant was the financier of the vehicle and the respondent No.4 Ramhit was the registered owner, and that the respondent No.4 remained the registered owner till the vehicle was transferred in the name of the appellant in the record of the Transport Authority on 30.12.1996 on the basis of a sale letter given by the respondent No.4 dated 16.11.1996. He further contended that the transfer fee for the aforesaid transfer of the vehicle was deposited on 20.12.1996 vide receipt No.850982 (Ex.R2W2/B). Prior to the transfer of this vehicle, he stated, the appellant's name was endorsed as financier by the concerned Transport Authority on 14.02.1994 vide receipt of the Transport Authority Ex.R2W2/D, and the said hire-purchase endorsement

remained in favour of the appellant upto 20.12.1996, i.e., the date on which the vehicle was transferred to the appellant on the basis of the sale letter given by the respondent No.4. With regard to the superdginama, the learned counsel for the appellant, contended that the appellant had got released the offending vehicle on superdari on 21.10.1996 only for the reason that the respondent No.4 was a habitual defaulter who did not pay the instalments regularly and in time and was always in arrears. Thus, there was no other option available with the appellant as the financier of the vehicle, but to take the vehicle on superdari from the concerned Police Station.

8. In order to buttress his aforesaid contentions, the learned counsel for the appellant has taken me through the evidence adduced before the learned Claims Tribunal to contend that there is not an iota of evidence suggestive of the fact that the appellant was the owner of the offending vehicle, or was in possession or control thereof on the date of the accident, or the employer of the driver who had caused the accident. He pointed out that only three witnesses had been examined by the claimants, namely, PW1 Shri Ganesh Bahadur Kami, PW2 Shri Prem Bahadur and PW3 Shri Dhan Bahadur. All the said witnesses had identified the dead body of the deceased and the claimants had thereafter closed their evidence. The appellant had examined himself as R2W1 by tendering in evidence his examination-in-chief by way of affidavit (Ex.R2W1/A), wherein he had stated on oath that on the date of the accident, i.e., on 20.10.1996, the respondent No.4, namely, Ramhit was the registered owner of the TSR in question and was in possession of the said vehicle for all purposes. It was further stated therein that he had purchased the said TSR from the respondent No.4 on 16.11.1996, i.e. after the date of the alleged accident, and that the TSR had been transferred in his name on 30th December, 1996 on the basis of the sale letter and other documents. The respondent No. 4, namely, Ramhit, the registered owner had not paid the instalments regularly and in time and was in arrears, therefore, under such circumstances there was no option with him (RW-1) but to take the vehicle on superdari on 21.10.1996 from the police of Police Station Pahar Ganj, New Delhi.

9. The learned counsel for the appellant next drew my attention to the testimony of R2W2, Shri Dinesh Verma, an official from the Transport Department, who was summoned by the appellant with the record pertaining to the ownership of Vehicle No. DL-1R 5965 (TSR). He

deposed that as per the record of the Transport Department, the said vehicle was transferred in the name of the appellant on 20th December, 1996 and now stood registered in the name of the appellant. He further stated that in October, 1996, this vehicle was registered in the name of Sh. Ramhit (respondent No.4) and proved on record the computerized copy of the relevant record of the Transport Department as Exhibit R2W2/A, and the relevant pages including the sale letter of the vehicle dated 16.11.1996 as Exhibit R2W2/B.

10. Mr. Harvinder Singh, the learned counsel for the appellant contended that in view of the fact that the testimonies of the appellant (R2W1) and the official witness from the Transport Department (R2W2) were unchallenged and unassailed on record, the appellant was not liable to pay any compensation to the respondents No.1 and 2. The registered owner of the vehicle, at the time of the accident, who was the respondent No.4 alone was liable to pay the same. The appellant undisputedly was not the registered owner on the date of the accident nor the offending vehicle was in his possession on the date of the accident. Moreover, at the time of the accident, the appellant was the financier, which fact stands proved from the testimony of R2W2, who proved on record the Registration Certificate of the vehicle dated 14.03.1991 [Exhibit R2W2/C (three sheets)] issued in the name of the respondent No.4, the original receipt of hire-purchase dated 14.02.1994 (R2W2/D), the endorsement entry made in favour of the appellant on the third page of the Registration Certificate (Exhibit R2W2/C) on 14.02.1994 and the removal of the said Registration Certificate endorsement in favour of the appellant on 20th December, 1996 (Exhibit R2W2/B). It also stands established on record that after removal of the hypothecation entry, a fresh Registration Certificate as also a fresh permit was issued in the name of the appellant, both of which were proved in evidence as Exhibit PW1/9.

11. To counter the aforesaid contentions of the learned counsel for the appellant, Mr. Ramesh Kumar, on behalf of the respondents No.1 and 2, raised a two-fold contention. First, the non-production of the hire-purchase agreement gives rise to an adverse inference against the appellant. Second, the mere fact that the appellant got the vehicle released on superdari on the very next day after the accident, that is, on 21st October, 1996 leads to the legal presumption that the vehicle belonged to him. The said legal presumption, he contended, is further strengthened by the fact that the appellant became the registered owner subsequently, in December, 1996.

12. It was also contended by the learned counsel for the respondents No. 1 and 2 that the appellant having filed a review petition for the reduction of the quantum of compensation, and the learned Tribunal having reduced the award amount to Rs. 2,45,000/- alongwith interest at the rate of 7.5 per cent per annum by its order dated 18.01.2008, is now estopped from challenging the judgment and award of the learned Tribunal once again by filing an appeal before this Court. He urged that if the appellant had any grievance against the award, he, having filed an application before the learned Tribunal for reduction of the award amount, could have additionally challenged his liability to pay the award amount. This not having been done by him, it is not open to him to now challenge the findings of the learned Tribunal by filing an appeal.

13. Before dealing with the respective contentions of the parties, it is deemed expedient even at the risk of repetition to highlight a few necessary facts. On the date of the accident, that is, on 20th October, 1996, admittedly the registered owner was the respondent No.4, Ramhit, but there existed an agreement between the respondent No.4, Ramhit and the appellant whereby and whereunder the appellant was financing the purchase of the TSR by the respondent No.4. The respondent No.4 has not contested the case either before the learned Tribunal or before this court. There is, thus, on record the unrebutted testimony of the appellant, who appeared in the witness box as R2W1 to depose that he was neither the registered owner nor in possession or control of the TSR in question. There is also on record the unrebutted testimony of R2W2, the witness from the Transport Department, who has placed on record the computerized copy of the record of the Transport Department, which shows that on the date of the accident, the vehicle in question was registered in the name of the respondent No.4 and was transferred in the name of the appellant on 20th December, 1996. It has also been established that there exists in the records of the concerned Transport Authority the Registration Certificate in favour of the respondent No.4, which carries an endorsement to the effect that on the date of the accident the vehicle in question was hypothecated in favour of the appellant. There also exists on record the fact that with effect from 20.12.1996, the vehicle was registered in the name of the appellant. There is also on record the superdarinama dated 21.10.1996 to show that the vehicle was got released by the appellant on superdari immediately after the accident.

14. Adverting now to the question as to whether the appellant on the basis of the aforesaid documents can be held liable to pay compensation to the respondents No.1 and 2, the answer to the same, in my opinion, must be held to be in the negative. I say so for the reason that there is unrebutted and unrefuted evidence on record to show that on the date of the accident the appellant was not the registered owner of the vehicle in question nor he was in possession and control thereof. There is also nothing on record to suggest that the vehicle was plying under his instructions or that the driver was his employee, who was working under his supervision and control. The superdarinama alone, in my opinion, is of no avail to the respondents No.1 and 2, more so as the registered owner of the vehicle on the date of the accident, namely, the respondent No.4 has neither contested the claim petition nor the present appeal in order to deny the ownership or the possession of the offending vehicle.

15. The findings rendered by the Supreme Court in the case of **Godavari Finance Company Vs. Degala Satyanarayanamma and Ors.** (2008) 5 SCC 107, which is heavily relied upon by the learned counsel for the appellant, are apposite in this regard. In the said case, the question before the Supreme Court was whether a financier could be said to be an owner of a motor vehicle financed by it within the meaning of Section 2(30) of the Motor Vehicles Act, 1988. The facts were that the appellant, M/s Godavari Finance Company, was impleaded in the proceedings on the premise that it was the financier of the vehicle which caused the accident. As the vehicle was the subject matter of a hire-purchase agreement, the appellant's name was mentioned in the registration book. Notwithstanding, the Supreme Court, setting aside the judgments of the learned Tribunal and of the High Court holding that the appellant as a registered owner was liable for payment of compensation, held that in the case of a motor vehicle which is subjected to a hire-purchase agreement, the financier cannot ordinarily be treated to be the owner. The Supreme Court further observed as under:- (SCC, pages 110-112)

> ''12. Section 2 of the Act provides for interpretation of various terms enumerated therein. It starts with the phrase "Unless the context otherwise requires". The definition of "owner" is a comprehensive one. The interpretation clause itself states that the vehicle which is the subject matter of a Hire Purchase Agreement, the person in possession of vehicle under that agreement shall be the owner. Thus, the name of financier in the

Registration Certificate would not be decisive for determination as to who was the owner of the vehicle. We are not unmindful of the fact that ordinarily the person in whose name the Registration Certificate stands should be presumed to be the owner but such a presumption can be drawn only in the absence of any other material brought on record or unless the context otherwise requires.

13. In case of a motor vehicle which is subjected to a hire purchase agreement, the financier cannot ordinarily be treated to be the owner. The person who is in possession of the vehicle, and not the financier being the owner would be liable to pay damages for the motor accident.

14. x x x x x

15. x x x x x

16. The question came up for consideration before this Court in **Rajasthan State Road Transport Corporation v. Kailash Nath Kothari and Ors.,** (1997) 7 SCC 481 where the owner of a vehicle rented the bus to Rajasthan State Road Transport Corporation. It met with an accident. Despite the fact that the driver of the bus was an employee of the registered owner of the vehicle, it was held: (SCC P.488, Para 17)

> ''17.....Driver of the bus, even though an employee of the owner, was at the relevant time performing his duties under the order and command of the conductor of RSRTC for operation of the bus. So far as the passengers of the ill-fated bus are concerned, their privity of contract was only with RSRTC to whom they had paid the fare for travelling in that bus and their safety therefore became the responsibility of the RSRTC while travelling in the bus. They had no privity of contract with Shri Sanjay Kumar, the owner of the bus at all. Had it been a case only of transfer of services of the driver and not of transfer of control of the driver from the owner to RSRTC, the matter may have been somewhat different. But on facts in this case and in view of Conditions 4 to 7 of the agreement (supra), the RSRTC must be held to be

> vicariously liable for the tort committed by the driver while plying the bus under contract of the RSRTC. The general proposition of law and the presumption arising therefrom that an employer, that is the person who has the right to hire and fire the employee, is generally responsible vicariously for the tort committed by the employee concerned during the course of his employment and within the scope of his authority, is a rebuttable presumption. If the original employer is able to establish that when the servant was lent, the effective control over him was also transferred to the hirer, the original owner can avoid his liability and the temporary employer or the hirer, as the case may be, must be held vicariously liable for the tort committed by the employee concerned in the course of his employment while under the command and control of the hirer notwithstanding the fact that the driver would continue to be on the payroll of the original owner. The proposition based on the general principle as noticed above is adequately rebutted in this case not only on the basis of the evidence led by the parties but also on the basis of Conditions 6 to 7 (supra), which go to show that the owner had not merely transferred the services of the driver to RSRTC but actual control and the driver was to act under the instructions, control and command of the conductor and other officers of RSRTC.''

17. The question again came up for consideration recently before this Court in **National Insurance Co. Ltd. v. Deepa Devi and Ors.,** (2008) 1 SCC 414. This Court in that case was dealing with a matter where the vehicle in question was requisitioned by the State Government and while holding that the owner of the vehicle would not be liable it was opined: (SCC Page 417, Para 10)

> ''10. Parliament either under the 1939 Act or the 1988 Act did not take into consideration a situation of this nature. No doubt, Respondents 3 and 4 continued to be the registered owners of the vehicle despite the fact that the same was requisitioned by the District Magistrate in exercise of the power conferred upon him under the

Representation of the People Act. A vehicle is requisitioned by a statutory authority, pursuant to the provisions contained in a statute. The owner of the vehicle cannot refuse to abide by the order of requisition of the vehicle by the Deputy Commissioner. While the vehicle remains under requisition, the owner does not exercise any control thereover. The driver may still be the employee of the owner of the vehicle but he has to drive it as per the direction of the officer of the State, who is put in-charge thereof. Save and except for legal ownership, for all intent and purport, the registered owner of the vehicle loses entire control thereover. He has no say as to whether the vehicle should be driven at a given point of time or not. He cannot ask the driver not to drive a vehicle on a bad road. He or the driver could not possibly say that the vehicle would not be driven in the night. The purpose of requisition is to use the vehicle. For the period the vehicle remains under the control of the State and/or its officers, the owner is only entitled to payment of compensation therefor in terms of the Act but he cannot not (sic) exercise any control thereupon. In a situation of this nature, this Court must proceed on the presumption that the Parliament while enacting the 1988 Act did not envisage such a situation. If in a given situation, the statutory definitions contained in the 1988 Act cannot be given effect to in letter and spirit, the same should be understood from the common sense point of view.''

In so opining the Court followed **Kailash Nath Kothari** (supra).

18. The legal principles as noticed hereinbefore, clearly show that the appellant was not liable to pay any compensation to the claimants.''

16. The findings rendered in the aforesaid judgment, in my opinion, leave no manner of doubt that it is the effective control and actual possession of the vehicle in question on the date of the accident which is the determining factor. Registration of a vehicle at the most is one of the several factors to be kept in mind while determining the question of ownership of the vehicle. In the present case, in view of the evidence

adverted to hereinbefore, there is, in my view, not an iota of proof to suggest that the vehicle was in the possession and control of the appellant on the date of the accident. Indubitably, the appellant was the financier of the vehicle. Indubitably also, he had got the vehicle released on superdari, but the mere circumstance of his getting the vehicle released on superdari is by itself not sufficient to hold that he was the owner of the vehicle, more so, when his explanation for having the vehicle released on superdari and subsequently purchasing the same was that the respondent No. 4 had never paid the hire installments in time and had habitually defaulted in payment of the same, leaving him with no other option and the said explanation is unrebutted on record.

17. The reliance placed by the learned counsel for the respondents No. 1 and 2 on the decision of the Supreme Court rendered in the case of **Mohan Benefit Pvt. Ltd. versus Kachraji Raymalji and Ors.,** (1997) 9 SCC 103, is also misplaced. The facts in the said case are clearly distinguishable. In the said case, the conclusion of the Tribunal, which was affirmed by the High Court in appeal, was that the real documents executed between the parties at the time of the alleged loan had been kept back from the court with ulterior motive and, in that situation, all possible adverse inferences should be drawn against the appellant. On consideration of the aforesaid facts, the Supreme Court held that the High Court was justified in drawing adverse inference against the financier and in mulcting liability on the financier alongwith the owner and the driver on the ground that had the documents, which reflected the true relationship between them been produced, they would have ''exploded'' the case of the financier. In the instant case, the facts are altogether different. There is a clear endorsement on the Registration Certificate of the respondent No.4 to show that the appellant was the financier of the vehicle in question. Furthermore, the evidence adduced by the appellant to show that he was neither in possession of the vehicle nor the vehicle was plying under his supervision and control is unrebutted on record. It is nobody's case that any ''real documents'' have been suppressed by the appellant. True, the hire-purchase /hypothecation agreement is not on record. But the endorsement of hypothecation on the Registration Certificate of the vehicle is proved by the appellant by adducing the evidence of the concerned witness from the Transport Authority, which is unassailed on record.

18. In view of the aforesaid, the inevitable conclusion, in my opinion, is that the appellant on the date of the accident was only the financier of the vehicle and no liability can be fastened upon him. Resultantly, the appeal succeeds and it is held that the appellant shall not be liable for payment of the award amount to the respondents No.1 and 2. The respondents No.1 and 2 shall, however, be at liberty to recover the same from the respondent No.4, the registered owner of the offending vehicle as on the date of the accident.

19. The appeal stands disposed of accordingly.

20. Records of the Claims Tribunal be sent back to the concerned Tribunal forthwith.

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MANJU KUMAR **....APPELLANT**

VERSUS

STATE N.C.T. OF DELHI **....RESPONDENT**

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

CRL. A. NO. : 702/2007, 334/2008, 87/2009, 395/2009 & 649/2010 **DATE OF DECISION: 17.10.2011**

Indian Penal Code, 1860—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.

In this case, the investigation revealed the involvement of several accused persons. There was a large time gap between Rathi's apprehension (who was the first one to be arrested) and the other Appellants. The trial commenced while some of the accused had not been arrested. (In fact, some were not apprehended at all. Sunder and Deepak passed away during trial). Obviously, after another accused was made to join the same trial it was necessary to examine the 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. Obviously, an accused who was earlier not facing trial the same could not be identified by a witness because of his absence. The examination-in-chief of a witness of the incident would be necessary to identify the culprit. It seems that this lost sight of the Court and the Public Prosecutor and this is why statement dated 29.08.2005 of Shri Ved Pal Singh, Counsel for Jayant was recorded. It is true that the proper course in such a situation was to move an application under Section 311 Cr.P.C. to recall a witness for further examination. No

such application seems to be on record. At least, none has been pointed out to us. But, then the question is whether there is any prejudice to the Appellant Jayant. He did have the opportunity to cross-examine PW-4. **A.R. Antulay** (supra) is not attracted to the facts of this case. In that case the question before the Supreme Court was whether it was necessary to have investigation under Section 5-A of the Prevention of Corruption Act, 1947. It was held that a Special Judge was entitled to entertain a private complaint without directing an investigation under Section 5-A of the P.C. Act 1947. Thus, the contention raised that Section 5-A of the P.C. Act 1947 has to be followed in the case of even a private complaint did not find favour with the Supreme Court. **Antulay** (supra) thus does not help the Appellant. Section 137 and 138 lays down the procedure for examination of the witnesses. In the case of **Banwari v. State of U.P.**1962 (Sup. 3) SCR 180 it was held that a trial is not vitiated by any procedural error when no prejudice is caused to the accused. Since the Appellant has not been able to show any prejudice, he cannot be permitted to make a grievance that PW-4 could not have been re-examined after his counsel had given a consent to read the examination-in-chief previously recorded (before Appellant Jayant was sent up to face trial). **(Para 49)**

Important Issue Involved: 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.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. R.P. Luthra, Ms. Nandita Rao, Mr. Kaushik Dey, Mr. Bhambhani with Ms. Nisha Bhambhani, Mr. Mr. S.K. Sharma, Mr. Ankur Chibber, Advocates.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP for the State.

CASES REFERRED TO:

1. *State of Rajasthan* vs. *Kashi Ram,* AIR 2007 SC 144.
2. *Sahdavan* vs. *State* 2003 (1) SCC 534.
3. *Subramany* vs. *State* 2003 (10) SCC 185.
4. *Malkhan Singh* vs. *State of M.P.* 2003 (5) SCC 746.
5. *Padala Veera Reddy* vs. *State of A.P.,* AIR 1990 SC 79).
6. *A.R.Antulay* vs. *Ramdas Sriniwas Nayak* 1984 (2) SCC 500.
7. *Chetham Veethl Ammad* vs. *Taluk Land Board* (1979) 3 SCR 839.
8. *Banwari* vs. *State of U.P.*1962 (Sup. 3) SCR 180.
9. *Hanumanth Govind Nargundkar* vs. *State of M.P.* AIR 1952 SC 343.
10. *Nazir Ahmad* vs. *King-Emperor* AIR 1936 PC 253 (2).
11. *Taylor* vs. *Taylor* (1876) 1 Ch D 426.

RESULT: Appeals disposed of.

G.P. MITTAL, J.

1. Criminal Appeal Nos. 702/2007, 334/2008, 87/2009 and 395/2009 arise out of the judgment dated 18.09.2007 and order on sentence dated 09.10.2007 whereby the Appellants Jayant, Yashpal and Devendri were convicted under Section 365/396 of the Indian Penal Code (IPC); the Appellant Manju Kumar was convicted for the offence punishable under Section 412 IPC. In Criminal Appeal No.649/2010 the Appellant Sanjay Singh Rathi (hereinafter referred to as 'Rathi') impugns the judgment dated 09.04.2010 and the order on sentence dated 16.04.2010 whereby

he was convicted for the offence punishable under Section 365/396 IPC. All Appellants except Manju Kumar were sentenced to undergo imprisonment for life for the offence punishable under Section 396 IPC. They were sentenced to undergo Rigorous Imprisonment (RI) for five years for the offence punishable under Section 365 IPC. Appellant Manju Kumar was sentenced to undergo RI for four years. Sentence of fine was also imposed on the Appellants.

2. These appeals relates to the abduction of one Ajay (the deceased), his murder and dacoity of the Tata Sumo No.DL-1CG-7774 on 05.11.2002 which he used to ply as a taxi for his living. On 05.11.2002 (*Vishwakarma* day after Diwali) at about 1:30 PM Naresh (PW-1) was cleaning his vehicle outside his Shop Kanojia Tour & Travels. Gulab Singh (PW-2) was present in his shop in Block No.17, Kalyanpuri. He too was cleaning the counter of his shop. According to the prosecution, the Appellants Rathi and Jayant approached him for hiring his vehicle to go to Khurja whereas the Appellants Yashpal, Devendri and Gajendri (since deceased) waited across the road, at a distance of 10-12 ft. from PWs 1 and 2. PW-1 refused to take them to their destination. Gulab Singh (PW-2) over heard the conversation between Naresh and Rathi and wanted to oblige his friend Ajay, who owned a Tata Sumo vehicle and used to ply it as a taxi. Gulab Singh went to Ajay, whose house was just two minutes walk from his (PW-2's) shop. Ajay reached PW-2's shop and talked to the intending passengers. Gaytri Devi (PW-4) also reached the spot to persuade her son Ajay not to go on that day. Ajay was willing to go and told his mother the he would be back by night. Ajay brought his Tata Sumo. The Appellants Rathi, Jayant, Yashpal, Devendri and co-accused Gajendri sat in the vehicle and left for their destination.

3. Ajay did not return as promised. When PW-3 Devi Prasad (Ajay's father) reached home at night his wife Gaytri Devi told him that although Ajay had not returned, despite his promise to be back by 8:00 PM. It is alleged that after waiting sufficiently long for his son to return, a missing person report was lodged by Devi Prasad with the Kalyanpuri Police Station on 07.11.2002. Information was given by PW-3 to his brother-in-laws PW-10 Khem Chand and PW-11 Mahender on 06.11.2002 that Ajay went to Khurja in his Tata Sumo with the passengers, on 05.11.2002 and did not return to Delhi. A statement Ex.PW-3/A was made to the police on 07.11.2002 regarding the incident. An FIR was registered by

the police. PW-10 Khem Chand and PW-11 Mahender were also worried about disappearance of their nephew along with the Tata Sumo. They made a frantic search for him. PW-10 called up his brother Raj Kumar (PW-9) to come to his house in the Tata 407 and they started searching for their nephew. On 07.11.2002 Khem Chand, Mahender and Raj Kumar (PW-9, an employee of PW-11) spotted the Tata Sumo belonging to Ajay near the telephone exchange in village Nehrupur, Khurja. They noticed two mechanics carrying out some repairs. Their nephew Ajay was not present in the Tata Sumo. PW-10 became suspicious and approached the nearby PCO, belonging to Chawi Rajan (PW-14) and made a call to the Police Control Room. The PCR did not bother to attend to the call and in the meanwhile PWs 9,10 and 11 noticed Tata Sumo moving. PW-10 and 11 asked their driver (PW-9) to chase the Tata Sumo. It is alleged that due to heavy traffic on the road they could not immediately catch up with Tata Sumo and went a little ahead. When they returned to reach the Tata Sumo, they saw it parked on a road near *Munda Khera Chauraha*. PW-10 made a phone call to PS Khurja Kotwali. The police reached the spot after considerable time. Neither the deceased Ajay nor any passenger came there. During interrogation the police came to know that the two boys from the Tata Sumo had left on a black motorcycle parked near the STD booth. The said motor cycle had the words ''Police'' and ''*Mohabatein*'' written on the number plate.

4. On 11.11.2002 a dead body was recovered from the fields of village *Nangla Shekhu* by Inspector V.K.Singh of UP Police. While he was making *Punchnama* in respect of the dead body, Gaytri Devi (PW-4) the deceased's mother too reached there along with some others. The dead body was found in a highly decomposed state. At that time it was found to be clothed in a shirt, a vest, an underwear, a jeans and one shoe, on the right leg. There were two rings in the finger and a thread tied around the right wrist. Although, the face of the dead body was unrecognizable due to decomposition and injuries, yet, PW-4 was able to identify the dead body of her son Ajay from the articles found on the body. The Delhi Police was informed. Autopsy on the dead body was performed on 12.11.2002 by Dr. Sarvodaya Kumar. On examination, the doctor found the dead body to be that of someone, aged about 22 years with average built. Apart from multiple incised wounds in front of the chest and upper half of the abdomen, he noticed an incised wound 18 cms x 6 cms trachea deep just below the hyoid. He gave the cause of

death as shock and hemorrhage as a result of ante mortem injuries. The duration of the death was given to be five to seven days before the date of conducting postmortem examination i.e. 12.11.2002.

5. SI Dharambir Gautam (PW-53) took up the investigation. It came to light that motorcycle bearing No.UP-20-0435 was involved in the crime. A search of the motorcycle revealed that it was registered in the name of the Appellant Rathi, a Constable in the U.P. police, posted in District Line Bijnore. He was interrogated and a mobile phone and a chip were recovered from his possession. The registration certificate of the motorcycle was seized.

6. On 26.11.2002, the Appellant Rathi was arrested. The Appellants Yashpal and Devendri were arrested on 07.02.2003 while they were in custody in another case from PS Shahdara. Devendri's disclosure led to recovery of a gold chain (Ex.P-1) from her house. Appellant Manju Kumar was arrested on 09.03.2003 and the deceased's sim card was recovered from him. The Appellant Jayant was arrested on 05.06.2003. Co-accused Gajendri and Raj Kumar were also arrested. Gajendri, however, expired and Raj Kumar was declared a Proclaimed Offender during the trial. Co-accused Deepak and Sunder too died during the trial and proceedings against them were dropped.

7. Appellants Manju Kumar, Devendri, Jayant and Rathi refused to participate in the TIP on the ground that they had been shown to the witnesses. Appellant Yashpal joined the TIP and was identified by Gaytri Devi.

8. By the impugned judgments dated 18.09.2007 and 09.04.2010 the Trial Court found that the prosecution case against the Appellants Rathi, Yashpal, Jayant, Devendri and Manju Kumar had been established beyond reasonable doubt. They were convicted and sentenced in the manner described earlier.

9. Co-accused Meer Singh and Devender were also prosecuted for the offence punishable under Section 212/34 IPC. They were, however, acquitted of the charges on the ground that the prosecution did not lead any evidence to connect them with the offence.

10. To bring home the guilt of the accused, the prosecution examined 53 witnesses during trial. PW-1 Naresh, PW-2 Gulab Singh, PW-4 Smt.

Gaytri Devi, PW-5 Sohanpal Singh, PW-9 Raj Kumar, PW-10 Khem Chand, PW-11 Mahender, PW-14 Chawi Rajan, PW-15 Dharmender Kumar, PW-21 Inspector K.P. Singh, PW-39 SI V.K. Sharma, PW-46 Lady Constable Poonam and PW-53 SI Dharambir Gautam are crucial witnesses for disposal of these appeals.

11. PW-1 Naresh testified that he was engaged in the business of hiring out taxis. He ran a shop in the name of ''*Kanojia Tours and Travel*'' from his residence. On 05.11.2002 at about 1:00/1:30 PM he was present in front of his shop and was cleaning his vehicle. At that time, two persons came to him and expressed their desire to hire his vehicle to go to Khurja to bring a patient by night. He deposed that two persons approached him whereas three persons were standing across the road. The witness identified the Appellant Rathi (and one associate) as the person who approached him to hire the vehicle whereas the Appellants Yashpal, Devendri and co-accused Gajendri (since deceased) were standing across the road. He deposed to having refused to take his vehicle as it was *Vishwakarma day*. His neighbour Gulab heard the conversation and told them that one Ajay used to drive his Tata Sumo as a taxi. Gulab called Ajay. Ajay reached there and had conversation with the two persons and thereafter went to bring his vehicle, which he used to park at Phase-III, Kalyanpuri. After 15-20 minutes, Ajay came back with his vehicle. He deposed that Ajay's mother also reached there and pleaded with him not to go. Ajay, however, told his mother that he would return the same night. He deposed that all the five persons (including the two ladies) sat in the vehicle and left.

12. PW-2 Gulab Singh deposed that on 05.11.2002 at about 1:30 PM he was cleaning the counter of his shop. Two persons approached Naresh to hire his vehicle for going to Khurja. They told him that they had to bring a patient and return by night. Naresh refused to ply his vehicle. Since he (PW-2) overheard this conversation, he asked the two persons to wait as he would find out if Ajay was available at his house. He brought Ajay to the spot. He deposed that Yashpal @ Satpal, Devendri and Gajendri (since deceased) were standing across the road while Rathi and Jayant asked Naresh to take his vehicle to Khurja. The Appellants were identified by the witness in Court.

13. PW-4 Gaytri Devi (the deceased's mother) stated that on 05.11.2002 his son was present in the home at 1:30 PM. Gulab came to

her house and told Ajay that there were some passengers for him. At Gulab's instance her son was prepared to take those passengers to their destination. Ajay took four passengers in his vehicle, out of whom two were ladies. She explained that the Appellant Rathi sat next to the driver's seat whereas Gajendri and Devendri sat on the rear seat along with Manju Kumar. She explained that Yashpal @ Satpal was also identified by her as the person who boarded her son's vehicle. The witness was recalled to testify about the facts after arrest of the Appellant Jayant. In her deposition, Gaytri Devi clarified that it were accused Jayant, Yashpal @ Satpal, Devendri @ Sunita, Gajendri (since deceased) and Rathi who boarded her son's vehicle and left for Khurja.

14. PW-5 Sohan Pal Singh is a witness to the recovery of the deceased's gold chain at Appellant Devendri's instance from her house in Rajeev Garden, Loni, Ghaziabad, U.P.

15. PW-10 Khem Chand is the deceased's maternal uncle. He got information about the deceased's not returning home on 05.11.2002 with his Tata Sumo from Ajay's father (PW-3) on 06.11.2002. He deposed to making inquiries about his nephew and the Tata Sumo at the local Police Station and in the surrounding areas but not being able to get any clue. He testified that when he failed to get any information, he summoned his brother Mahender (PW-11) who reached his house in his Tata 407. He along with Mahender and Raju made search for the deceased and the Tata Sumo in their Tata 407. They saw two mechanics repairing the Tata Sumo. He did not find his nephew Ajay in it. He became suspicious and made a call to the PCR from a nearby PCO. The Control Room officials ignored his call and they noticed the Tata Sumo moving. He asked the driver of Tata 407 to reverse the vehicle and chase the Tata Sumo. Due to heavy traffic, they went ahead and when they reversed Tata Sumo was seen parked on the road near *Munda Khera Crossing*. He made a phone call to Khurja Kotwali. The police arrived there and seized the Tata Sumo and certain articles from it. The testimonies of PW-9 Raj Kumar and PW-11 Mahender, support this version.

16. PW-14 Chawi Rajan is the PCO's owner from where PW-10 made a call to the PCR. He corroborated PW-10's testimony on this count but did not support the prosecution about noticing a Hero Honda Splendor with three occupants going near the Tata Sumo on 07.11.2002 at 08:30 AM. He was cross-examined on this aspect by the learned APP.

PW-15 Dharmender Kumar corroborated PW-14's testimony regarding the making of a call by PW-10 from the PCO.

17. On 07.11.2002 PW-21 Inspector K.P. Singh was posted as SHO PS Khurja. On receipt of information from Khem Chand (PW-10) regarding parking of the Tata Sumo in front of LIC office, GT Road, Khurja, Bulandshahar, he reached there and waited for the occupants for seven hours. He deposed that nobody went there. The Tata Sumo was searched. He was told that the Tata Sumo was involved in a criminal case registered in PS Kalyanpuri. He sent an intimation to Kalyanpuri Police Station and the Tata Sumo along with the articles recovered from it were seized by the Delhi Police official by memo Ex.PW-21/B.

18. PW-39 SI V.K. Sharma was posted as a Sub Inspector in PS Kalyanpuri at the time of the incident. At the instance of SI Dharambir Gautam (PW-53) he obtained call details in respect of certain numbers.

19. PW-52 SI B.D. Sharma (Retired) was posted at PS Khurja Dehat on 11.11.2002. He deposed that on receipt of information from Narender Kumar, resident of village *Nangla Shekhu* that a dead body was lying in *Arhar* fields he reached the spot and found a highly decomposed body lying there. Maggots were crawling over it. Most of the face was missing either on account of decomposition or on account of the maggots. The body was clothed in a striped shirt and blue jeans. There was one black shoe on right leg. There were two iron rings in the ring finger and the little finger. There was one gold ring in the ring finger with the words 'AK'. He conducted the inquest proceedings. During this time, Gaytri Devi (PW-4) with three-four persons reached the spot. On seeing the ring, shoe and clothes Gaytri Devi and other persons identified the dead body to be of her son Ajay Kumar. He sent the dead body along with the clothes, rings and the shoe worn by it to the Govt. Hospital Bulandshahar for autopsy. The IO from the Delhi Police also reached the spot and requested him to get a DNA test to be done on the dead body. He got photographs Ex.PW-52/1-6 of the dead body.

20. PW-53 SI Dharambir Gautam is the IO of the case. He testified that on 08.11.2002 the case was registered on the statement Ex.PW-3/A (of the complainant Devi Prasad). He, along with the complainant and ASI Aftab Ahmed went to Khurja pursuant to information that Tata Sumo No.DL-1CG-7774 was seized by the police of PS Khurja Kotwali.

He seized the articles consisting of two bags full of clothes, one hot case and one mobile phone. There was no trace of the deceased Ajay. Since the vehicle was wanted in the case, it was taken into possession by memo Ex.PW-20/B. He contacted PWs Chawi Rajan and Dr. Dharmender of Nehrupur village and recorded their statements. He came to know about involvement of motor cycle No.UP-20F-0435 black colour Splendor in the case. During investigation it was discovered that the motorcycle was registered in the name of one Sanjay Singh Rathi, a Constable in the UP police and posted at Police line Bijnore. He testified that on 11.11.2002 on receipt of information from PS *Khurja* (Dehat) regarding recovery of a dead body, he reached there and saw police officials and the deceased's family members, namely, Gaytri Devi and Khem Chand, present there. The dead body was identified by Gaytri Devi on the basis of the clothes, rings, *Kalava* (thread on the wrist), gold ring and a shoe worn by the deceased to be of her son Ajay. On 12.11.2002 he collected call details of Ajay's mobile phone number 9811676042 and came to know that SIM card of this number was used on 08.11.2002 on a mobile set having IEMI number 32308351753730 and the handset was earlier under operation, on mobile phone number 9811732971. On receiving the details, it was found that the number was continuously connected with mobile phone numbers 9837370253 and 9837158882. He obtained the call details of mobile phone number 9837370253 from Escotel Meerut through Constable Surender. (Though, in the disclosure statement the Appellant Rathi gave details how the mobile phones which were in various names were being used by him yet the same is inadmissible in evidence as no discovery was effected in pursuance of the said disclosure statement. The evidence of the call details, therefore, is not of much relevance.)

21. PW-53 SI Dharambir Gautam testified that on 23.11.2002 he, with other police officials reached Bijnore police lines to interrogate the Appellant Rathi. He met Reserve Inspector Yogender Pratap Singh of the police lines and obtained the attendance sheet of the Appellant Rathi. It was revealed that he (Rathi) was on leave from 04.11.2002 to 06.11.2002. He obtained his mobile SIM card with connection number 9837370253 and seized the registration certificate of his motor cycle number UP-20F-0435. The Appellant refused to join the investigation further due to sickness he therefore, served a notice under Section 160 Cr.P.C. to join investigation on 25.11.2002 at Delhi.

22. PW-53 deposed that on 25.11.2002 the Appellant Rathi did not join the investigation. He contacted Bijnore police lines and came to know that Rathi was on leave. On 26.11.2002 he, and SI V.K Sharma and other police officials went to village Nangla Ibrahimpur and arrested the Appellant. He made disclosure statement Ex.PW-6/C which led to recovery of a shoe belonging to the deceased from the fields in Village Nangla Shekhu. He testified that the Appellant Rathi's face was muffled and an application for conducting Test Identification Parade (TIP) was moved before the Magistrate. The Appellant refused to join the TIP. During police remand (on 01.12.2002) he was identified by PWs Gaytri Devi, Naresh and Gulab to be the man who got the vehicle booked on 05.11.2002. On analysis of the call details of the Appellant Rathi it was revealed that he used the SIM card of mobile number 9811732971 in his handset (bearing IMEI number 350019347205649). It revealed the location of the user was at *Khora* (Delhi) between 09:11 to 09:15 on 05.11.2002.

23. PW-53 stated that on 30.01.2003 the TIP of the shoe recovered at Rathi's instance was conducted. Gaytri Devi correctly identified the shoe. The witness deposed that on 05.02.2003 he came to know of the arrest of Yashpal and Devendri in case FIR No.27/2003 of PS Shahdara. They were produced before the Court pursuant to a production warrant. He interrogated and arrested them in the case. The Appellant Devendri refused to join the TIP whereas Yashpal agreed to participate in it. Gaytri Devi correctly identified Yashpal in the TIP. Thereafter Yashpal refused to join TIP by the other witnesses. On 08.02.2003 Devendri made a disclosure statement Ex.PW-18/A leading to recovery of a gold chain of deceased Ajay from her room in Rajeev Garden, Loni in the presence of public witnesses Sohanpal Singh and Subhash. She pointed out the place of hiring the Tata Sumo i.e. Kanojia Tours & Travels where Gaytri Devi identified Devendri. He deposed that on 18.02.2003 PWs Gulab and Naresh went to the Police Station and identified Yashpal. He recorded their statements in this regard. On 24.02.2003 the gold chain was correctly identified by Gaytri Devi (PW-4). The witness deposed about the arrest of the Appellant Manju Kumar and recovery of the SIM card of mobile number 9811676042 (belonging to the deceased).

24. In their statements under Section 313 Cr.P.C. the Appellants denied the evidence appearing against them on the record and pleaded false implication. The Appellant Rathi took the plea that on 05.11.2002 he was away to Bijnore along with his family. His wife was 7+ months

pregnant. His wife and son were not well. He spent the whole of the Diwali day with his family. On 23.11.2002 at about 5:00 PM SI Dharambir Gautam met him and wanted his help as the mobile in his name was being used in the case and involvement of his brother Sunder Rathi was suspected. He took five day's leave and accompanied SI Dharambir Gautam to Delhi. He was brought to PS Kalyanpuri and was not allowed to go anywhere. He was shown to the deceased's mother and other public witnesses. He stated that he was implicated in the case falsely as his brother Sunder Rathi (since dead) was a gangster in UP. The Appellant Rathi examined his wife Geeta Devi (DW-1) in his defence to prove the defence version.

25. Appellants Yashpal, Jayant and Devendri merely denied the prosecution's allegations and pleaded false implication. Appellant Manju Kumar took the plea that co-accused Yashpal was a tenant in PW Smt. Pinkesh's house. There was a dispute between them regarding payment of rent and vacation of the rented room. He being neighbour sided with her as a result of which Yashpal got annoyed with him and implicated in the case falsely.

26. We have heard Mr.R.P. Luthra, learned counsel for the Appellant Manju Kumar, Ms. Nandita Rao, Advocate for the Appellant Devendri, Mr.P.K. Dey, Advocate for the Appellant Jayant, Mr. A.J. Bhambhani, Advocate for the Appellant Yashpal, Mr. S.K. Sharma, Advocate for the Appellant Sanjay Singh Rathi and Mr.M.N.Dudeja learned APP for the State and have perused the record.

27. There is no dispute about Ajay having been taken away by some people in his Tata Sumo to go to Khurja on 05.11.2002 on the pretext of bringing a patient. The testimonies of the three witnesses i.e. PWs 1, 2 and 4 on this count was not challenged during their cross-examination. There is ample evidence on record to prove hiring of the Tata Sumo from Ajay on 05.11.2002, its chase by PWs 9, 10 and 11 and its recovery at Khurja on 07.11.2002. There is serious dispute raised by the Appellants with regard to Ajay's death i.e. identification of the dead body and identification of the culprits.

28. First, we would deal with identification of the dead body. The DNA report dated 28.04.2004 given by D.S. Negi, Technical Examiner, DNA fingerprinting Laboratory, Govt. of India, Hyderabad is inconclusive.

It is argued by the learned counsel for the Appellants that the femur bone is one of the longest bone in a human body which was taken from the body for DNA fingerprinting. If the femur bone really belonged to Ajay, there was no difficulty in DNA matching with the blood sample of the deceased's parents (PWs 3 and 4). The result of DNA examination is extracted hereunder: -

> ''The source of the above exhibits were subjected to DNA isolation. The source of exhibit C (femur bone) yielded partial DNA profile. DNA profiles were prepared from the sources of exhibits A and B (blood samples of Smt. Gayatri Devi and Shri Devi Prasad). Since complete DNA profile from the source of exhibit C (femur bone) is essential for analysis, the result is inconclusive.''

29. The Hyderabad DNA fingerprinting Laboratory is the most prestigious institute in the Science of DNA fingerprinting. The report by D.S. Negi extracted above, indicates that the source 'C' i.e. femur bone of the dead body yielded partial DNA profile and thus the result was inconclusive. The prosecution did not rely on the report as it was not positive. The witness was not called for cross-examination to challenge the conclusion. Thus, the defence cannot be allowed to say that the report dated 28.04.2004 of D.S. Negi was inconclusive only on account of the fact that source 'C' did not belong to the source 'A' and 'B' and therefore, the DNA did not match. In our view, since the DNA report is inconclusive, the Court has to consider the other evidence to find out if the identity of the dead body was established. From the report it cannot be concluded that it was not Ajay's dead body.

30. PW-52 SI B.D. Verma got the information from Narender Kumar resident of Village Nangla Shekhu regarding presence of a dead body in the *Arhar* fields. When the SI along with the two Constables reached the *Arhar* fields, he found the dead body in a highly decomposed state and that maggots were crawling over it. He deposed that it was difficult to decipher where were injuries on the dead body. Most of the face was missing due to decomposition or on account of maggots. He deposed about a thread tied around the right wrist; there were two iron rings in the ring finger as well as in the littler finger; there was one gold ring in the ring finger containing the word 'AK'. When he was going ahead with the inquest proceedings, the deceased's mother Gaytri (PW-

4) reached there along with three-four people. On seeing the gold ring, the shoe and the clothes Gaytri Devi identified the dead body as that of Ajay.

31. It is important to note that Gaytri Devi (PW-4) identified the dead body from the articles found on the dead body i.e. the rings, clothes and the shoe.

32. It is urged by the learned counsel for the Appellants that Gaytri Devi was unsure on seeing the dead body if it was that of Ajay. The identification of articles found on the dead body is discrepant, since in the rukka (Ex.PW-3/A) it was stated by the deceased's father that the Ajay was wearing an *ACTION* brand sport shoe at the time he left whereas a black shoe was allegedly found on the right foot of the dead body. It is contended that as the prosecution alleged the motive for commission of the crime to be robbery, it is highly improbable that the culprits would not remove the three rings from the dead body. It is argued that the description of the clothes did not match with the one given in Ex.PW-3/A and in the absence of any positive finding by DNA fingerprinting it cannot be said that the body recovered was Ajay's dead body.

33. We do not agree with the arguments advanced on the Appellants' behalf. The motive for the offence indubitably was to rob the deceased's Tata Sumo. It was the culprits. ill-luck that they could not remove the vehicle beyond Khurja as the deceased's maternal uncle and their relations (PWs 9, 10 and 11) were informed about Ajay's disappearance with Tata Sumo on 06.11.2002. Initially, PW-10 made inquiries in PS Khurja and adjoining areas. Finding no clue, PWs 9,10 and 11 immediately started to search for the Tata Sumo's in their vehicle i.e. Tata 407. They combed the entire area (in Khurja) and the adjoining areas in their bigger vehicle with discerning eyes, all around as they were Ajay's close relatives and residents of Khurja. They were able to spot the vehicle as it was parked near telephone exchange Nehrupur (in Khurja) and two mechanics were carrying out repairs. Since Ajay was not found, they suspected something foul and called up the police from a nearby PCO. In the meanwhile, the Tata Sumo started moving and was ultimately seized by the Khurja Police when it was chased and information was given to the police by PWs 10 and 11. There is no reason for PWs 10 and 11 to invent any story regarding the Tata Sumo's seizure. Moreover, these

were corroborated by PW-21 Inspector K.P. Singh, he belonged to UP police and had no motive or reason to plant the articles found on the dead body. The non removal of the two iron rings and one gold/golden ring is not material as the culprits might have found it to be of not much value or there might be something else in their minds. The rings were found on the dead body in the natural course and were sufficient to identify the dead body; one of the rings bore Ajay's initial i.e. 'AK'.

34. Similarly, we do not find any material discrepancy in the shoe and the clothes on the dead body. A black shoe could also be a sport shoe manufactured by 'the Action' brand or any other manufacturer. In fact, the Court can take judicial notice that the sports shoes are manufactured in all colours including in black.

35. Gaytri Devi was frank enough to admit that the body was unidentifiable. As the face was chopped off with a cutting instrument the height of the body appeared to be less (than the height of Ajay). She was specific to having identified the dead body by the clothes and the ring. Gaytri Devi had no reason to falsely identify a dead body, claim it for last rites and abandon the search for her son. It was only because she was sure of herself that she positively identified it. We see no reason to disbelieve Gaytri Devi (PW-4) about identification of the dead body. It is clear that the motive for the deceased's abduction was to rob him of the vehicle which the culprits did accomplish by doing him (the deceased) to death and robbery of the articles worn by the deceased was not the motive for commission of the offence.

36. The death of Ajay being homicidal on account of multiple stab injuries was proved by PW-33 Dr. Sarvodaya Kumar. His testimony was not seriously challenged in cross-examination. The postmortem on the dead body was performed on 12.11.2002 and the time since death was given as 'five to seven days' which coincide with the deceased's abduction on 05.11.2002. It is proved beyond doubt that Ajay's death was homicidal.

37. This case solely rests on circumstantial evidence. The circumstances relied on by the Trial Court in returning the finding of the Appellants as guilty are:-

(A) Deceased was last seen alive with the Appellants.

(B) Recovery of a gold chain at the instance of Appellant Devendri in pursuance of her disclosure statement Ex.PW-

18/A.

(C) Recovery of deceased's black shoe at Appellant's Rathi's instance in pursuance of his disclosure statement Ex.PW-6/C.]

(D) Recovery of Ajay's sim card from Appellant Manju Kumar in pursuance of Yashpal's disclosure statement.

38. The standard of proof in case of circumstantial evidence is well settled. The circumstances from which conclusion of guilt is to be drawn must, in the first instance, be fully established; the circumstances should be of definite tendency unerringly pointing out towards the guilt of the accused; the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probabilities the offence was committed by the accused and none else and that the circumstances established must be incapable of explanation of any other hypothesis other than the guilt of the accused. (**Hanumanth Govind Nargundkar v. State of M.P,** AIR 1952 SC 343 and **Padala Veera Reddy v. State of A.P.,** AIR 1990 SC 79).

39. We would deal with the circumstances one by one.

CIRCUMSTANCE (A)

40. PWs 1, 2 and 4 were examined by the prosecution to prove this circumstance. PW-1 deposed that on 05.11.2002 at about 1:00/1:30 PM he was cleaning his vehicle in front of his residence. At that time two persons came to him and told him that they wanted to go to Khurja. He deposed about his inability to drive them to Khurja. He stated about the presence of Appellants Yashpal and Devendri (and Gajendri since deceased) across the road. He testified to the fact that Gulab Singh (PW-2) over heard the talks and wanted to oblige his friend Ajay who also plied his Tata Sumo as a taxi. This witness did not specifically depose about Appellant Jayant's presence at the spot though he did testify that there was one more person with the Appellant Rathi. All the Appellants except Jayant were identified by this witness. (It seems that the Appellant Jayant did not prefer to recall PW-1 for his examination and cross-examination advisedly as PW-1 did not name him and there was no question of his identification as Jayant was not facing trial at that time.)

41. PW-2 Gulab Singh deposed about Rathi's presence and in his subsequent examination (after Appellant Jayant was arrested and tried

with the other accused) about his presence too with Rathi for negotiations to hire the taxi and about presence of Yashpal, Devendri and Gajendri across the road. All the five accused i.e. the four appellants and deceased Gajendri were duly identified by this witness.

42. PW-4 Gaytri Devi did create some confusion about presence of the Appellant Jayant. She correctly identified Appellants Rathi, Yashpal, Devendri and deceased Gajendri. Initially, the Appellant Manju Kumar was identified as one of the persons who had accompanied others at the time of hiring Tata Sumo but in her cross- examination dated 13.10.2005 she clarified that in fact she had identified the persons standing behind Manju Kumar i.e. Appellant Yashpal as one of those and not Manju Kumar. PW-4 was further examined after framing of the charge against the Appellant Jayant and identified Jayant as one of the persons who was standing with the two ladies across the road.

43. It is urged by the learned counsel for the Appellants that PWs 1 and 2 are unreliable whereas PW-4 Gaytri Devi is interested being the deceased's mother. All of them had admitted having seen the Appellants in the Police Station. This was the reason the Appellants (except Yashpal) refused to join the TIP. The investigation carried out by the IO by showing the Appellants to the witnesses becomes tainted and in view of this and the contradictions in their testimonies it would be unsafe to place reliance on their testimonies to uphold the finding of guilt against the Appellants.

44. Of course, PWs 1, 2 and 4 admitted in their cross-examination having seen the Appellants either in the Police Station or at the shop of Kanojia Tours & Travels (in case of PW-4). This admission on PWs 1, 2 and 4's part has to be seen in terms of the prosecution case and PW-53 SI Dharambir's (the IO) testimony. The IO gave the details as to how each one of the Appellants was arrested, how the application was immediately moved for their TIP and they refused to participate therein except in the case of Yashpal who was identified by PW-4 and refused to join TIP vis-a-vis PWs 1 and 2. The IO gave specific dates when the witnesses were summoned (after refusal of the TIP) to identify the accused simply for his satisfaction that the persons arrested were the real culprits. PWs 1, 2 and 4's admission that they had seen the Appellants in the Police Station, gives credence to their testimonies and shows that the witnesses were not tutored and had deposed in a natural manner.

Otherwise the witnesses could have simply denied having seen the accused persons in the Police Station on different dates. Of course, the witnesses were not very exact about the dates when they saw each of the Appellants in the Police Station.

45. For instance, PW-4 Gaytri Devi deposed to having identified the Appellant Rathi in the Police Station after 15/20 days of the incident. This time of 15/20 days was given by this witness only by approximation. The testimony of this witness on this aspect was recorded on 02.09.2004 and the incident took place on 05.11.2002. After a gap of two years a witness is not expected to recall exactly as to when he/she saw an accused in the Police Station. PW-53 SI Dharambir Gautam was very specific when he gave the dates that on 27.11.2002 the Appellant Rathi was produced in the Court with his face muffled. He refused to join the TIP before the Magistrate. He was identified by the witnesses in PS Kalyanpuri on 01.12.2002. We have extracted earlier PW-53's testimony when he deposed about each of the dates, when the witnesses were shown the accused after their refusal to join TIP. As discussed earlier, the Appellant Yashpal was identified by PW-4 in the TIP and thereafter he refused to participate in the TIP to be conducted in respect of PWs 1 and 2. In the circumstances, we are not convinced that the Appellants were shown to the witnesses in the Police Station before they had refused to join the TIP. Rather, this exercise was done by the IO (PW-53) after the Appellants refused to participate in TIP.

46. It is well settled that identification by a witness in the Court is substantive evidence and identification in the TIP conducted during investigation can be used only as a corroborative piece of evidence. Normally, TIP is conducted during investigation to test the memory of a witness who has seen an accused committing the crime for the first time and to be an assured that the investigation proceeded in the right direction.

47. In this case, the deceased was enticed by the Appellants (except the Appellant Manju Kumar) in the broad day light (the time was 1:00/1:30 PM). There were negotiations between the two Appellants and PW-1 for hiring PW-1's vehicle in front of PWs 1 and 2's shop. PW-1 was not inclined to accompany the Appellants. Therefore, PW-2 wanted to see if the deceased would go and earn something for himself. According to the prosecution, PW-2 went to call Ajay whose house was just two

minutes walk from his (PW-2) shop. The deceased accompanied PW-2 to his shop, had negotiations with two of the Appellants and thereafter went to fetch his Tata Sumo. It is not a case where the culprits fled after committing the crime or that the witnesses just had their fleeting glimpse. The witnesses, particularly, PWs 1 and 2 would have seen them for at least 15/20 minutes. Thus, there was sufficient opportunity and time to imprint the culprits. facial features in the memories of PWs 1, 2 and 3. In these circumstances, it was not really necessary to have a TIP. We are supported in this view by the Supreme Court report in **Malkhan Singh v. State of M.P.** 2003 (5) SCC 746.

48. A technical objection was raised by Mr. P.K. Dey, learned counsel for the Appellant Jayant regarding admissibility of PW-4's examination dated 01.05.2007. The learned counsel pointed out that Shri Ved Pal Singh Advocate counsel for Appellant Jayant had given his consent for admitting PW-4's examination-in-chief recorded before the start of Jayant's trial (statement of the counsel was recorded on 29.08.2005). The learned counsel referred to Section 137 and 138 of the Evidence Act to emphasize that there has to be first examination-in-chief followed by the cross-examination of the witness. There could be re-examination thereafter, if need be. The examination-in-chief recorded on 01.05.2007, argued the learned counsel for Appellant Jayant, is illegal and cannot be admitted in evidence being violative of Section 137 and 138 of the Evidence Act. The learned counsel placed reliance on "**A.R.Antulay v. Ramdas Sriniwas Nayak** 1984 (2) SCC 500." Para 22 of the report which was specifically referred to is extracted hereunder:-

> ''22. Once the contention on behalf of the appellant that investigation under Section 5-A is a condition precedent to the initiation of proceedings before a Special Judge and therefore cognizance of an offence cannot be taken except upon a police report, does not commend to us and has no foundation in law, it is unnecessary to refer to the long line of decisions commencing from **Taylor v. Taylor** (1876) 1 Ch D 426, **Nazir Ahmad v. King-Emperor** AIR 1936 PC 253 (2) and ending with **Chetham Veethl Ammad v. Taluk Land Board** (1979) 3 SCR 839, laying down hitherto uncontroverted legal principle that where a statue requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.''

49. In this case, the investigation revealed the involvement of several accused persons. There was a large time gap between Rathi's apprehension (who was the first one to be arrested) and the other Appellants. The trial commenced while some of the accused had not been arrested. (In fact, some were not apprehended at all. Sunder and Deepak passed away during trial). Obviously, after another accused was made to join the same trial it was necessary to examine the 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. Obviously, an accused who was earlier not facing trial the same could not be identified by a witness because of his absence. The examination-in-chief of a witness of the incident would be necessary to identify the culprit. It seems that this lost sight of the Court and the Public Prosecutor and this is why statement dated 29.08.2005 of Shri Ved Pal Singh, Counsel for Jayant was recorded. It is true that the proper course in such a situation was to move an application under Section 311 Cr.P.C. to recall a witness for further examination. No such application seems to be on record. At least, none has been pointed out to us. But, then the question is whether there is any prejudice to the Appellant Jayant. He did have the opportunity to cross-examine PW-4. **A.R. Antulay** (supra) is not attracted to the facts of this case. In that case the question before the Supreme Court was whether it was necessary to have investigation under Section 5-A of the Prevention of Corruption Act, 1947. It was held that a Special Judge was entitled to entertain a private complaint without directing an investigation under Section 5-A of the P.C. Act 1947. Thus, the contention raised that Section 5-A of the P.C. Act 1947 has to be followed in the case of even a private complaint did not find favour with the Supreme Court. **Antulay** (supra) thus does not help the Appellant. Section 137 and 138 lays down the procedure for examination of the witnesses. In the case of **Banwari v. State of U.P.**1962 (Sup. 3) SCR 180 it was held that a trial is not vitiated by any procedural error when no prejudice is caused to the accused. Since the Appellant has not been able to show any prejudice, he cannot be permitted to make a grievance that PW-4 could not have been re-examined after his counsel had given a consent to read the examination-in-chief previously recorded (before Appellant Jayant was sent up to face trial).

50. The learned counsel for Appellant Jayant argued that further examination-in-chief of PW-4 was recorded on 01.05.2007 and 02.05.2007. A few lines of cross-examination of PW-4 was recorded on 02.05.2007 till 1:35 PM and further cross-examination of the witness was deferred for 2:00 PM. The opportunity to cross-examine the witness was closed by the trial Court at 2:00 PM without waiting for the Appellant's counsel who had to suddenly go to the High Court and returned at 2:30 PM. It is argued that an application under Section 311 Cr.P.C. was moved by the Appellant Jayant on 30.05.2007. The said application, however, remained undecided. We have perused the record. The application was put up before the learned Additional Sessions Judge on 30.05.2007 who made an endorsement ''keep on file''. We do not know as to what was in the mind of the Trial Court and why the application was not disposed of. There is nothing on record to show that the Appellant Jayant in any way placed any obstacle in examination of this or any other witness. The Appellant Jayant's counsel was present on 01.05.2007 when part of examination-in-chief was recorded. He was present on 02.05.2007 in the pre-lunch session when chief-examination was completed and part of cross-examination was recorded. Thus, there could not be any malafide on the part of the Appellant or his counsel in not appearing before the Court at 2:00 PM. The explanation given by the Appellant's counsel, in the circumstances, cannot be easily brushed aside. The application under Section 311 Cr.P.C. for recalling PW-4 ought to have been allowed.

51. So, in all fairness PW-4's testimony as against the Appellant Jayant has to be ignored as full opportunity was not given to him to cross-examine this witness. But, there is PW-1's testimony who clearly identified Jayant as the man who accompanied the Appellant Rathi and had negotiations with PW-1 and then the deceased for hiring Tata Sumo. Of course, PW-1 did not identify Jayant but his testimony was recorded when Jayant was not facing trial. He did say that there was one more person with the Appellant Rathi. Thus, PW-1 corroborates PW-2's testimony regarding Jayant's presence without naming him.

52. In view of foregoing discussion, it is established that Appellants Rathi, Yashpal @ Satpal, Devendri, deceased Gajendri and one more person took away deceased Ajay in his Tata Sumo No. DL-1CG-7774 and Ajay was not seen alive thereafter.

53. In the case of **State of Rajasthan v. Kashi Ram,** AIR 2007 SC 144 death of the Respondent's wife and his two daughters was proved to be homicidal caused by strangulation. It was established on record that the deceased was last seen alive in the Respondent's company on 03.02.1998 at her house. The prosecution also established that the house was found locked on the morning of 04.02.1998 and continued to remain locked till it was opened after removing the door on 06.02.1998. Throughout this period the Respondent was not to be seen and he was arrested only on 17.02.1998. It was observed that the Respondent did not give any explanation as to how he parted company with the deceased or where he was either at the time of his arrest or in the course of investigation. The Supreme Court held as under:-

> ''23.. ..... In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in **Re. Naina Mohd.** AIR 1960 Mad 218.''

54. A similar view was taken by a three Judges Bench of the Supreme Court in **Subramany v. State** 2003 (10) SCC 185.

55. In **Sahdavan v. State** 2003 (1) SCC 534 the Supreme Court held that if the prosecution on the basis of reliable evidence establishes that the missing person was last seen in the company of the accused and was never seen thereafter it was obligatory on the accused to explain as to how the missing person and the accused parted company.

56. The Appellants have failed to render any explanation as to how they parted company with the deceased. Rather, the prosecution has established additional links against some of the accused which we would advert to a little later. Suffice it to say that in the facts of the case, the circumstance of the deceased being last seen alive in Appellants Rathi, Devendri, Yashpal, deceased Gajendri and another person's company

coupled with the removal of Tata Sumo and attempt to its removal from Khurja is sufficient to draw an inference that these were the earlier stated Appellants who or anyone of them caused deceased's murder in order to rob the deceased of his Tata Sumo.

57. The learned counsel for the Appellant pointed out the discrepancy about the age of the child who was in Devendri's lap as deposed by PW-1 and Pw-2. The testimony of the witnesses was recorded after considerable lapse of time. It does not make the prosecution version false which is corroborated by two independent witnesses. Such discrepancies regarding minute details are bound to occur in the testimony of truthful witnesses who have not been tutored. We are not inclined to attach any importance to it.

CIRCUMSTANCE (B)

58. According to the prosecution, Appellant Devendri made a disclosure statement Ex.PW-18/A and in pursuance of the said statement led the police party headed by PW-53 to her house in Saraswati Vihar, Loni Ghaziabad, U.P. Sohan Pal Singh (PW-5) and Subhash were joined in the investigation by the IO. The Appellant took out the key lying beneath a brick and unlocked a room and took out a chain wrapped in a plain white paper from an iron box. PW-5 Sohan Pal Singh deposed that the iron box was lying on a slab. ASI Santosh Sharma (PW-18) corroborated PW-5's testimony. The IO (PW-53) corroborated PW-5's version and deposed about the seizure of the chain Ex.P-1. The chain Ex.P-1 was identified in the TIP conducted by PW-28 Sanjeev Kumar, Metropolitan Magistrate. A contention before the Trial Court was that nobody would keep the key of his/her house beneath a brick was repelled by the Trial Court holding:-

> ''..... In countryside people generally keep keys of their house at such places. They generally do not keep keys with them since possibility of its use by other members of family would be nil. If keys are kept at a particular place, where ordinarily outsiders would not suspect, other members of family can easily use it as and when necessity arises. Consequently, it is concluded that facts projected by Sohan Pal Singh satisfies standards of ordinary human behaviour. I do not find any abnormality in his testimony. ASI Santosh Sharma gives confirmation to facts testified by Sohan Pal Singh. Dharambir Gautam SI also speaks that Devendri

led to her tenanted accommodation in Loni. She picked up a key lying underneath a brick and opened her room. Chain Ex.P1 was recovered from a box, wrapped in a paper piece. As detailed above, these facts are not in contradiction of human behaviour.....''

59. It is not only in the urban areas but a practice prevalent even in the rural areas to keep the keys at a particular place outside the house so that other family members can easily open the lock and enter the house. We do not find any reason to disbelieve PW-5's testimony regarding recovery of gold chain Ex.P-1 belonging to the deceased at Appellant Devendri's instance.

CIRCUMSTANCE (C)

60. According to the prosecution, the Appellant Rathi, after his arrest on 26.11.2002 made a disclosure statement Ex.PW-6/C and pursuant to the disclosure statement led the police party headed by SI Dharambir Gautam (PW-53) and other police officials near the place of incident which led to recovery of a shoe Ex.P-6 which was identified by PW-4 Gaytri Devi in the judicial TIP. The recovery of the shoe is criticized by the learned counsel for the Appellant on the ground that the recovery is alleged to be from an open place which was at a distance of 30-40 ft. from the place of the recovery of the dead body. It is urged that it is highly improbable that the entire area near the dead body was not combed by the police officers from UP police and Delhi police at the time of recovery of the dead body. It is urged that the absence of an independent witness at the time of alleged recovery of the shoe would indicate that the same is planted by the IO. The Trail Court dealt with the contention as under:-

''31. There is another important piece of evidence which has come on record to link this accused with this crime is recovery of one shoe of the deceased at his instance on 26.11.02. As per PW-53, accused Sanjay Singh Rathi was apprehended on 26.11.02 from outside the fields of Nangla Ibrahimpur and he was interrogated and was arrested and during interrogation he made disclosure statement. Accused led them to the fields of Nangla Sekhu from where he got recovered one shoe and the said shoe was of left foot. The said shoe was sealed in a pullanda with seal

of DVG and was taken into possession vide seizure memo Ex.PW-6/D. PW-39 SI V.K.Sharma and PW-6 Ct. Pramod are other police officials who were accompanying IO PW-53 on 26.11.02 and they have supported IO regarding recovery of the shoe of left foot of deceased at the instance of deceased. IO/PW-53 was cross examined at length by accused regarding alleged recovery of shoe of the deceased at his instance. During his cross, PW-53 has stated that no receipt of shoe purchased by the deceased was given by the parents of the deceased and he does not know from where it was purchased and he did not make any inquiry in this regard from the parents of the deceased. The distance between place of recovery of shoe and of dead body is about 30-40 feet. No independent witness was available at the time of recovery of that shoe and nearby village from that spot is at a distance of about 1 kilometer. No intimation was given to the concerned PS mentioning the details of recovery. Ld. Defence counsel has assailed recovery contending that it was planted to implicate accused in this case and due to that very reason no public witness was joined at the time of alleged recovery. PW-53 has specifically stated that at the time of recovery no person was available and nearby village was around one kilometer from the spot. Law is settled that merely on the point of non joining of the public witnesses, at the time of recovery the testimony of police officials cannot be disbelieved. There is no presumption that police officials are liars. The evidence of police officials cannot be rejected merely because of his designation in the absence of evidence of malice against the accused. Reliance is placed upon AIR 1987 SC 98, case titled State of Assam vs. Muhim Barkataki & another. Statements of PW6, PW-39 and IO PW-53 are consistent and trustworthy regarding recovery of the shoe of deceased and at the instance of accused Sanjay Singh Rathi and Ld. Defence counsel has failed to discredit their statements on this point in any manner. In view of the above proposition of law, testimony of IO PW-53 regarding recovery of shoe of deceased Ajay at the instance of accused Sanjay Singh Rathi cannot be disbelieved.''

61. It is true that a shoe was not a valuable property to have been concealed anywhere by the Appellant. It must have been just flung away

by the Appellant on noticing that a shoe had fallen on the ground a little away from the dead body. The same must have been thrown away not with the purpose to conceal it. Since the facts were still fresh in the Appellant's memory the shoe was recovered pursuant to his disclosure statement by the Appellant Rathi. We find no reason to differ with the reasoning given by the Trial Court and believe that the shoe Ex.P-6 was recovered by the Appellant.

CIRCUMSTANCE (D)

62. According to the IO (PW-53) Appellant Yashpal was arrested on 12.02.2003. He disclosed that the deceased's SIM card was in possession of the Appellant Manju Kumar. In cross-examination the IO admitted that there was no mention in the disclosure statement Ex.PW-22/A that the SIM card was in possession of Manju Kumar. The IO admitted that on 11.11.2002 about coming to know that the deceased's SIM card was being used in another mobile phone. Obviously, the IO could have tried and must have tried to dial Ajay's number to find out who was in possession of the SIM card to know the complicity of the culprits in the crime. It is unbelievable that the IO would wait for the Appellant Yashpal's arrest on 07.02.2003 i.e. three months after the incident and would only then go for the recovery of the SIM card. Otherwise also since the alleged recovery was not in pursuance of the disclosure statement Ex.PW-22/A (there being no mention of Appellant Manju Kumar in Ex.PW-22/A) the same cannot be used against the Appellant Yashpal.

63. Moreover, mere possession of a stolen property or a property belonging to a gang of dacoits is not sufficient to hold a person guilty of the offence punishable under Section 411/412 IPC. Section 411 and 412 are extracted hereunder:-

> **''411. Dishonestly receiving stolen property**
>
> Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both. (emphasis supplied)
>
> **412. Dishonestly receiving property stolen in the commission of a dacoity**
>
> Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoity, property which he knows or has reason to believe to have been stolen, shall be punished with [imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.'' (emphasis supplied)

64. Thus, to bring the case within the four corners of Section 411 the person who retains the stolen property must have knowledge or there must be reason to believe the same to be a stolen property. Similarly, to hold a person guilty under Section 412 IPC, the prosecution must prove that the person concerned knew or had reason to believe that the property was transferred by commission of dacoity or was received from a person whom he knew or had reason to believe to belong to a gang of dacoits. SIM card is not a valuable property. It can be bought for a mere Rs.50/- now. It might have been available for Rs.100/- or Rs.200/- in the year 2002 or 2003. There is every possibility that someone from the Appellants might have given the SIM card to be used by Manju Kumar either without any motive or malafide. In the absence of any evidence how and under what circumstances such property of insignificant value came to the possession of Appellant Manju Kumar, no inference can be drawn that he knew or had reason to believe that the card was property obtained by dacoity or was a stolen property. Appellant Manju Kumar who had already remained in custody for one year three months, in our view, is entitled to the benefit of doubt.

65. In view of the above discussion, the Criminal Appeal No.702/2007 preferred by the Appellant Manju Kumar is entitled to be allowed. The order of conviction and sentence concerning him is hereby set aside and he is accordingly acquitted. He is ordered to be set at liberty if not in detention in any other case. His personal bond and surety bond are discharged.

66. Criminal Appeal No.334/2008 preferred by Devendri, Criminal Appeal No.395/2009 preferred by Yashpal @ Satpal, Criminal Appeal No.649/2010 preferred by the Appellant Rathi and Criminal Appeal No.87/2009 preferred by the Appellant Jayant @ Amit respectively are without

any merit. They are liable to be dismissed.

67. The appeals are disposed of in above terms.

ILR (2012) I DELHI 299
CRL. REV. P.

DEVENDER **....PETITIONER**

VERSUS

STATE **....RESPONDENT**

(MUKTA GUPTA, J.)

CRL. REV. P. NO. : 484/2007 **DATE OF DECISION: 18.10.2011**

Indian Penal Code, 1860—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.

The essential ingredients to constitute an offence punishable under Section 279 IPC are that there must be rash and negligent driving or riding on a public way and the act must be so as to endanger human life or be likely to cause hurt or injury to any person. For an offence under Section 304A, the act of accused must be rash and negligent, which should be responsible for the death which does not amount to culpable homicide. The prosecution in the present case has failed to prove how the act of the Petitioner was rash or negligent to bring the same under the purview of Sections 279/304A IPC specially when the deceased was getting down at red light and not the regular bus stop. **(Para 8)**

Important Issue Involved: 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.

[Sh Ka]

APPEARANCES:

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

FOR THE RESPONDENT : Mr. Mukesh Gupta, APP.

CASE REFERRED TO:

1. *Mohammed Aynuddin* vs. *State of Andhra Pradesh,* (2000) 7 SCC 72.

RESULT: Appeal allowed.

MUKTA GUPTA, J. (ORAL)

1. By the present petition the Petitioner seeks setting aside of the order dated 17th July, 2007 passed by the learned Additional Session Judge upholding the order of conviction of the Petitioner passed by the learned Metropolitan Magistrate under Sections 304A and 279 IPC, though the order on sentence was modified. Learned Additional Sessions Judge reduced the sentence awarded to the Petitioner under Section 279 IPC to Rigorous Imprisonment for three months and a fine of Rs. 500/- and in default to further undergo Simple Imprisonment for five days and under Section 304A IPC, Rigorous imprisonment of nine months and a fine of Rs. 1,500/- and in default of payment of fine to further undergo simple imprisonment of 15 days. The learned Metropolitan Magistrate vide order dated 5th August, 2006 had sentenced the Petitioner to undergo Rigorous Imprisonment for 6 months for offence punishable under Section 279 IPC and a fine of Rs. 500/- and in default of payment of fine to undergo simple imprisonment for five days. Rigorous Imprisonment for 1 year and Rs. 1,500/- fine under Section 304A IPC, in default of payment of fine to undergo Simple Imprisonment for fifteen days.

2. Briefly the prosecution case is that on 28th January, 2000 at about 4.30–4.45 p.m. near Chhatta Rail Chowk Shahjad, the Petitioner was driving the bus bearing No. DL-1PA-4579 in a rash and negligent manner and without waiting for the passenger Naushad to get down he started the bus at a fast speed due to which Naushad fell down. Shahjad the brother of Naushad was present with him during this time. The bus was stopped after the crossing and Shahjad got down, came back to the place where his brother was lying. Nuashad was removed to Hindu Rao Hospital where he succumbed to injuries and died on 14th February, 2000. On the basis of the statement of Shahjad FIR was registered under Sections 279 IPC. After the death of Naushad Section 304A IPC was added. After completion of investigation charge sheet was filed. Learned

Metropolitan Magistrate after recording the prosecution evidence and statement of the accused convicted and sentenced him as mentioned above. Aggrieved by the judgment and order on sentence, the Petitioner preferred an appeal wherein the sentence was modified by the learned Additional Sessions Judge vide order dated 17th July, 2007.

3. Learned Counsel for the Petitioner contends that the impugned judgments are based on conjectures and surmises. Learned courts below failed to appreciate the fact that neither the deceased nor his brother Shahjad, the complainant had informed the driver that they intended to get down from the bus, where the deceased allegedly got down was not the bus stop and no passenger was supposed to get down from the bus. As per the admission of the complainant himself the deceased and the complainant were guilty of violating the traffic rules. Learned Counsel contended that no negligence or rashness has been proved by the prosecution. Learned Courts below have failed to take into consideration that in the post mortem report/MLC there is no mention of any crush injuries specially in the circumstances where the prosecution has claimed that the deceased was run over under rear wheel of the offending vehicle. The MLC was not proved by the prosecution nor any expert opinion was taken with respect to the injuries. The testimony of PW4 that is Shahjad is not trustworthy since he is an interested witness being the brother of the deceased and has lodged the complaint with an ulterior motive of claiming compensation. No passenger of the bus has been examined by the prospection to prove its case though it is stated that there were other passengers present in the bus when the alleged accident took place. Thus, in the absence of any evidence to support the Prosecution story and the fact that the injuries sustained by the deceased were because of his own negligence and fault, the impugned judgments are liable to be set aside.

4. Per contra learned APP for the State submits that impugned judgments suffer from no illegality. The Petitioner was arrested at the spot of the incident by the police. PW4, who was present along with the deceased, has completely supported the prosecution case and has duly identified the Petitioner. There are no contradictions in the testimony of witnesses and evidence placed on record clearly implicates the Petitioner. Hence the revision petition is liable to be dismissed.

5. I have heard the learned Counsels for parties and perused the record.

6. PW4 Shahjad the brother of the deceased has deposed that on 28th January, 2000 he along with his younger brother Naushad boarded Bus No.4579 from Sagar Pur from Old Delhi Railway Station. He sat on the seat behind the driver and the deceased was also on the same seat. At about 5.30 p.m. when the bus reached Chhatta Chowk both of them told the driver to de-board them at red light, he deboarded from the bus but when his brother tried to deboard from the bus the bus driver in a very high speed drove the bus due to which his brother fell on the road and came under the rear wheels of the bus. On this he raised an alarm to stop the bus and the bus was stopped there. The driver was apprehended by the police. He took his brother to Hindu Rao hospital where he died. This witness in his cross-examination has admitted that near about 20 passengers were present in the bus and the police did not record the statement of any other passenger before him.

7. PW2 HC Harnam Singh has deposed that on the relevant date he was posted at PS Kotwali and at about 5.00 p.m. on receipt of a call about the accident, he reached the spot. This witness in his cross-examination has stated that the accident did not happen in his presence and admitted that when they reached the spot the injured had already being removed to the Hospital. This witness has further stated that the spot is a busy place, having a traffic flow. The petitioner in his statement under section 313 CrPC has stated that when he stopped the bus at the red light signal as soon as he stopped the bus the signal turned to green. Consequently he drove the bus. At that time the speed of the bus was about 10 km/h. the deceased and his brother had not informed him before getting down at the red light signal. He has deposed that the deceased was carrying something in both his hands and fell down from the bus as he jumped from the moving bus.

8. The essential ingredients to constitute an offence punishable under Section 279 IPC are that there must be rash and negligent driving or riding on a public way and the act must be so as to endanger human life or be likely to cause hurt or injury to any person. For an offence under Section 304A, the act of accused must be rash and negligent, which should be responsible for the death which does not amount to culpable homicide. The prosecution in the present case has failed to

prove how the act of the Petitioner was rash or negligent to bring the same under the purview of Sections 279/304A IPC specially when the deceased was getting down at red light and not the regular bus stop.

9. The Hon'ble Supreme Court in **Mohammed Aynuddin vs. State of Andhra Pradesh,** (2000) 7 SCC 72 held that:

> '' 5. A passenger might fall down from a moving vehicle due to one of the following causes: It could be accidental; it could be due to the negligence of the passenger himself; it could be due to the negligent taking off of the bus by the driver. However, to fasten the liability with the driver for negligent driving in such a situation there should be the evidence that he moved the bus suddenly before the passenger could get into the vehicle or that the driver moved the vehicle even before getting any signal from the rear side.
>
> 6. A driver who moves the bus forward can be expected to keep his eyes ahead and possibly on the sides also. A driver can take the reverse motion when that driver assures himself that the vehicle can safely be taken backward.
>
> 7. It is a wrong proposition that for any motor accident negligence of the driver should be presumed. An accident of such a nature as would prima facie show that it cannot be accounted to anything other than the negligence of the driver of the vehicle may create a presumption and in such a case the driver has to explain how the accident happened without negligence on his part. Merely because a passenger fell down from the bus while boarding the bus no presumption of negligence can be drawn against the driver of the bus.
>
> 8. The principle of res ipsa loquitor is only a rule of evidence to determine the onus of proof in actions relating to negligence. The said principle has application only when the nature of the accident and the attending circumstances would reasonably lead to the belief that in the absence of negligence, the accident would not have occurred and that the thing which caused injury is shown to have been under the management and control of the alleged wrong doer.

9. 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.

10. Hence keeping in view the circumstances of the present case, the impugned order convicting the Petitioner is set aside. The Petitioner is acquitted of the charges punishable under Section 279/304A IPC. The petition is accordingly allowed. The bail bond and surety bond of the Petitioner are discharged.

Petition stands disposed of.

ILR (2012) I DELHI 305
CRL. A.

RIKEN ALIAS DIKEN ....APPELLANT

VERSUS

STATE ....RESPONDENT

(BADAR DURREZ AHMED & MANMOHAN SINGH, JJ.)

CRL. A. 747/2010, 748/2010 & 766/2010 **DATE OF DECISION: 21.10.2011**

(A) Code of Criminal Procedure, 1973—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.

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. **(Para 28)**

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. **(Para 29)**

(B) Code of Criminal Procedure, 1973—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.

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. **(Para 27)**

(C) Code of Criminal Procedure, 1973—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.

The accused Samunder is the real uncle of the accused Deepak and Riken @ Diken who are the real brothers. From the evidence provided by the prosecution, it is clear that the accused in pre-planned manner committed the 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 connects the accused persons with the crime and proved the guilt beyond all reasonable doubt. There is a clear evidence of PW-5 that the deceased left his dairy and went to attend the party on 06.06.2004. Thereafter, the accused did not come back. There is a positive evidence against Samunder as on his disclosure statement, blood stained shirt was recovered which contained human group B blood as per the FSL report. **(Para 33)**

Under these circumstances, the accused have committed the murder of deceased Ramesh Rai with ulterior motive to take the revenge. In our opinion, the trial Judge has given very cogent reasons for convicting the appellants. Therefore, the prosecution has been able to prove the guilt of the accused persons beyond reasonable doubt and all the circumstances have been proved. There is overwhelming circumstantial evidence to show that the accused committed the crime. We find no force in these appeals. **(Para 35)**

Important Issue Involved: (A) 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.

(B) The recovery of articles connected to the crime at the instance of accused persons proves the guilt of the accused persons beyond reasonable doubt.

[Vi Ba]

APPEARANCES:

FOR THE APPELLANT : Ms. Anu Narula, Advocate.

FOR THE RESPONDENT : Ms. Richa Kapoor, Addl. Standing Counsel for the State.

CASES REFERRED TO:

1. *Sharad Birdi Chand Sarda* vs. *State of Maharashtra,* (1984) 4 SCC 116).
2. *Chandmal and Anr.* vs. *State of Rajasthan,* AIR 1976 SC 917.
3. *Hanumanth Govind Nargundkar & Anr.* vs. *State of M.P.,* AIR 1952 SC 343.

RESULT: Appeals dismissed.

MANMOHAN SINGH, J.

1. These three appeals have been filed by the appellants, namely, Riken @ Diken, Deepak and Samunder under Section 374(2) of the Code of Criminal Procedure against the common judgment dated 19.02.2010 and the order on sentence dated 25.02.2010 by which the Additional Sessions Judge (West), Tis Hazari Courts, Delhi in S.C. No.111/1/08 convicted them under sections 302/201/34 IPC and sentenced them to rigorous imprisonment for life and to pay a fine of Rs.5000/- and in default, to undergo simple imprisonment for six months.

2. The main charge framed against all the three accused on 23.3.2005 was that all of them on 6.6.2004 at KM Pole No.7/29 Up railway track, near Railway Crossing, Gate No.5 Ram Pura, Delhi within the jurisdiction of PS Railway Sarai Rohilla with common intention to commit the murder of Ramesh, with intent to cause his death, committed the offence punishable under Section 302 with read with Section 34 of IPC.

3. <u>The case of the prosecution</u>

(i) That on 07.06.2004 a telephonic message was received from Sub-Station Shakur Basti, that a dead body of a male person is lying on the railway track, and the said information was endorsed vide DD No. 6 dated 07.06.2004. On receipt of this information, PW-14 ASI Sarabjeet Singh of GRP P.S. Sarai Rohilla, along with other police officials reached at Pole No. 7/29 near Rampura platform No. 5, where the dead body of a male person was found;

(ii) That the age of the deceased was about 30 to 35 years,

height 5.6.., wheatish complexion, and face was round. There were injuries on the head above the right ear, multiple injuries on head, right shoulder was broken and there were black spots around the neck. The other Senior Police officials also reached the spot. Blood stained stones and earth control stones from around the head and feet of the dead body were collected and deposited in malkhana after sealing with the seal of SS and were taken into possession vide memo EX-PW14/B.

(iii) That the deceased was wearing light blue shirt, white vest, light chocolate colour pant on which the mark of ''Prince Tailors, Singh Market Maner'' was affixed. There were clay and blood stains on the shirt of the deceased due to rain.

(iv) That the police recorded the statements of Badri, Abdul Hussain, Jugal Kumar Rai and Jitender Rai. Passersby were also interrogated, but, the identity of the body could not be established on that day neither the reason of death could be established. The dead body was kept in P.P. Kishan Ganj for identification and later on shifted to Subzi Mandi Mortuary.

(v) That the SSP, Patna, Bihar and SHO P.S. Maner were contacted through wireless and other authorities were also contacted through PCR, for the identification of the dead body.

(vi) That thereafter, on 11.06.2004, the brother of the deceased, PW-8 Jitender Rai came to the P.S. Sarai Rohilla along with his cousin Dinesh and his younger brother Tarkeshwar, where PW-14 ASI Sarabjeet Singh showed him a photograph of the deceased which he identified and said that the dead body was of his brother Ramesh Rai.

(vii) That the Police took them to the mortuary Sabzi Mandi and showed them the dead body, and they all identified the dead body to be of Ramesh Rai.

(viii) That Police recorded their statements. PW-8 Jitender Rai, told the police that they have enmity with Deepak, Riken @ Diken and their uncle Samunder and Shailesh and that

he has full confidence that Deepak, Riken @ Diken and their uncle Samunder have killed his brother to take revenge. He told the police that on several occasions they have had quarrels with the said persons in their village and about 2 years ago, a quarrel had taken place between his deceased brother Ramesh and accused Deepak at Rohini and Deepak had caused a brick injury on the nose of the deceased, on which a case was registered against Deepak at P.S. Rohini and he was even arrested in this case. Thereafter, his brother went to their native village on the occasion of Holi, and later on he came to know that his brother was badly beaten even in the village by the accused persons. The Panchayat was called and the Panchayat imposed a fine of Rs. 1000/- on accused Deepak as he had pleaded guilty. Thereafter the deceased and all the accused persons came back to Delhi and the accused persons told him that they had felt such disrespect in the village and now they will not spare Ramesh (deceased) and stated ''*Gaon mey hamari bahut Bezti ho gai hey or ab hamney kafan bandh liya hey or ab hum Ramesh ko chodengay nahi*''.

4. On 11.06.2004, Dr. K. Goel (PW-2) conducted the postmortem on the body of the deceased. The cause of death was asphyxia consequent upon ligature strangulation.

5. On 12.06.2004, the case was handed over to PW-27 Insp. Om Prakash Sharma who prepared the ruqqa and got the case registered vide FIR No. 36/2004 (EX-PW1/A). He went to the place of occurrence and prepared the site plan. Then he went to the dairy where the cousin of the deceased namely Dinesh was working and examined him under section 161 Cr. PC. During the examination Dinesh raised suspicion of the involvement of all the three accused persons. Thereafter, they went to Naharpur in search of the accused persons and apprehended accused Deepak from the dairy of Nahar Singh. On being interrogated, Deepak made a disclosure statement. Thereafter, they went to Britania Chowk, Ring Road in search of other accused persons and arrested Samunder and Riken.

6. The accused persons made disclosure statements and led the

police party to H. No. WZ14, Golden Park, Punjabi Bagh, the owner of the said house, namely PW-7 Ranjit Singh, was also called there and from there blood smeared soil, earth control along with other material like blood smeared brick, which had some hair stuck to it were recovered, all these items were sealed and with the seal of OPS and seized vide memo Ex-PW7/B. Insp. Om Prakash Sharma (PW-27) prepared the site plan of that place Ex-PW27/C.

7. On pointing out of the accused Riken, a blood smeared rope and piece of blood stained floor and other earth control were recovered from the way which goes to the railway track. Then the accused persons led the police party to a horse shed/tabela and got one red coloured T-shirt and a shirt recovered, and the same were also seized. Insp. Om Prakash Sharma (PW-27) prepared the site plan of each place.

8. After the committal proceedings were completed, charges were framed against the accused persons under section 302/201/34 IPC. The accused persons pleaded not guilty and preferred to contest the case.

9. In order to prove its case, the prosecution examined 27 witnesses out which nine were public witnesses and they were PW-3 Dinesh, PW-4 Lalit Kumar, PW-5 Smt.Shashi Sharma, PW-7 Ranjeet Singh, PW-8 Jitender Rai, Pw-9 Vinod Rai, PW- 12 Shivaji Rai, PW-15 Kailash Singh and PW-16 Jitender Kumar.

10. In the statements under Section 313 Cr.P.C. all the three appellants denied the allegations against them. They stated that they are innocent and that they had been falsely implicated.

11. After examining the evidence on record and considering the arguments of the parties, the learned ASJ in his judgment held that there was positive evidence against the accused persons which brought the inference that the proposed accused are the only perpetrators of the crime and that they committed the murder of Ramesh Rai with the ulterior motive to take revenge. Thus, he convicted all the three accused persons for the offence punishable under section 302/201/34 IPC.

12. The appellants, being aggrieved by the said judgment and order on sentence, have filed the present appeals.

13. Learned counsel for the appellants have raised common grounds of appeal, some of the relevant ones are as follows:

I. The Learned Trial Court has erred in not appreciating that the dead body was identified from a lable/sticker of a Tailor affixed on the pant. Thereafter the address of his house was traced.

However, no evidence which could give clue of the name or the address of the deceased or the said tailor has been examined.

II. The Learned Trial Court has erred in not appreciating that admittedly the deceased had gone to have the dinner in the company of some 'Shambhu' who was not implicated or produced as a witness.

III. The independent public witnesses have not supported the case of the prosecution.

IV. The Learned Trial Court has erred in not appreciating that the possibility of the deceased having met with an accident cannot be ruled out as the deceased was admittedly drunk and the weather was bad and he was apparently trying to jump the railway track.

V. There are material contradictions on all important aspects-arrest of the accused, recovery etc. The inconsistencies, discrepancies and contradiction in their statements make the prosecution case highly improbable.

VI. The alleged CD relied upon by the prosecution is not admissible in Law.

14. Since there is no eye-witness to the murder, the case revolves around the circumstantial evidence of last seen and the recovery of the material as per the case of the prosecution.

15. The prosecution in order to prove its case relied upon the testimonies of following witnesses who deposed as follows:

Rukka & FIR

(a) PW1 HC Savita deposed that she was the Duty Officer on 12.6.2004 at P.S. Sarai Rohilla and got registered the FIR at Sr. No.36 for the offence u/s 302/201 IPC. Copy of the same is Ex.PW1/A. She made endorsement about the registration of the case on the rukka vide Ex.PW1/B. She

also brought the original DD register No.12/B regarding registration of the case.

Medical and Scientific Evidence

(b) PW2 Dr. K. Goel conducted the post mortem on the body of Ramesh S/o Mala Rai on 11.6.2004 and as per his report Ex. PW-2/A the cause of death was asphyxia consequent upon ligature strangulation. Injuries No.1 to 5 were ante mortem. Injuries No.1 to 4 were caused by blunt force impact. Ligature marks i.e. injury No.5 was caused by some hard flexible material. Injury No.6 was postmortem in nature and was consistent with pressure over wrist to fasten them. Ligature pressure over neck was sufficient to cause death in ordinary course of nature. Mode of death was homicide. Time of death was about four and a half days. In his cross, PW2 stated that a ligature mark present around the neck was caused as ligature injury by some ligature material. Blunt force injury means the injury caused by such weapon of surface which is having no sharp edges. Injury number 5 mentioned in Ex.PW2/A was caused by some hard flexible material, which means a material like rope, some electric wire and other soft material. The skull bones were intact but there was one lacerated wound on the right temporal region. This was caused by blunt force impact. Semi digested food could not be described. Alcohol like smell was coming from the stomach. Death was not possible by poisoning.

Public Witnesses

(c) PW8 Jitender Rai identified the dead body of deceased from photographs showed on 9.6.2004 when he came to Delhi from Ambala. Thereafter on 11.6.2004 he alongwith his cousin Dinesh and younger brother Tarkeshwar identified the deceased at Subzi Mandi Mortuary and also told the police that Deepak, Riken @ Dikan and their uncle Samunder and Shailesh had enmity with the deceased.

(d) PW 3 Dinesh Rai also deposed regarding the enmity of the accused Deepak as he had earlier attacked deceased Ramesh Rai at the village and Delhi. Both hailed from the

same village in Bihar. Panchayat had earlier fined Rs.1,000/- on Deepak. The case was registered at PS Rohini Sector-8 on the complaint of Ramesh Rai deceased. He identified the deceased Ramesh initially from his pant thereafter at Subzi Mandi Mortuary. He suspected the hands of all the three accused persons in the murder of Ramesh as they earlier threatened Ramesh to kill him since Deepak was made to pay a fine by the Panchayat.

(e) PW9 Vinod Rai in fact corroborated the version of PW3 Dinesh Rai and PW8 Jitender Rai by deposing that on 17.3.2002 a panchayat was held in village Jivrakhan Tola in the matter of Deepak, Samunder, Riken and deceased Ramesh as they all working in Delhi and quarrel took place between deceased Ramesh on one side and Deepak, Samunder and Riken from other side at Delhi. Thereafter, they went back to the village Jivrakha Tola. A Panchayat was held at the house of Mukhia Kailash Singh and he headed the said Panchayat as Panch. Other members of the Panch, besides him, were Shivji Rai, Kalshwar Singh, Loknath Rai and Ramesh Rai. On 19.7.2004, one SI of Delhi Police along with two officials reached their village and they were called to the PS Maner. He told the facts of the Panchayat stated above and handed over the Panch Faisla to the police officer which was seized vide memo Ex.PW9/A. The Panch Faisla Ex.PW9/B bears his name at point A.

(f) PW 12 Shivji Rai who was also a member of the Panchayat made a deposition similar to that of PW 9 Vinod Rai and identified his thumb impression on Ex.PW9/B. PW 15 Kailash Singh being the Pradhan of the village also headed the Panchayat as Panch on 17.3.2002 wherein he decided the issue of quarrel between deceased Ramesh Rai and Deepak by imposing fine of Rs.1000/- on Deepak and Rs.51/- on deceased Ramesh Rai. The Panch Faisla was reduced in writing and handed over to police vide Ex.PW9/B, which bears his signatures at point C.

(g) PW-7 is an independent witness, who owned house

No.WZ 14, Golden Park, Rampura, Delhi. He deposed that he had not given any room on rent to Shambhu but, he had given his Milk Dairy to Shambhu on contract basis. He stated that on 12.06.2004, he was called by the police at Golden Park where all the accused were present and he identified them in Court. He stated that he was asked by the police to open the lock and he opened the shutter of the room. In his presence, police had lifted the blood from near the water tank, blood stained plaster and earth control from the spot and took them into possession by making a recovery memo Ex.PW7/A which bore signature at point A. One blood stained piece of floor and earth control were also lifted from near the wall of water meter vide memo Ex.PW7/B which also bore his signature at point B. Thereafter, the accused took the entire team near the Railway Track from where the blood stained earth and blood were lifted and one rope was also taken into possession and seized vide memo Ex.PW-7/C. One blood stained shirt and one T-shirt were also recovered at the instance of the accused persons from a Chhappar. The earth control was also lifted from near the TV Tower Polls vide memo Ex.PW-7/E.

Last Seen

(h) PW 5 Smt. Shashi Sharma is the wife of PW 4 Lalit Kumar and also deposed that on 6.6.2004 at about 8-8.30 pm Ramesh, had told her that he was going to Rampura to attend a party. Thereafter, Ramesh never returned to the house and on 12.6.2004 she came to know that Ramesh had died. No person of the name of Samunder, had come to their house in the afternoon to meet Ramesh on 6.6.2004, though before Police while recording her statement under Section 161 Cr.P.C., she stated that on 06.06.2004 in the afternoon, Samunder had come to their house to meet Ramesh.

(i) PW 4 Lalit Kumar @ Bindu Pehalwan deposed that the deceased Ramesh Rai was working at his dairy about 2-3 years prior to his death on 6.6.2004 he had told his wife

that he was going to take meal at some place. Thereafter, the deceased did not return to his work. Later on he came to know that the boy had died. He was declared hostile by Public Prosecutor and in cross examination of APP he denied that deceased Ramesh might have gone to the house of Shambhu for attending the party or on the next day, he came to know that Ramesh has been murdered and his dead body has been found near the Ram Pura Railway crossing.

Testimonies of other witnesses

(j) PW 10 Ct. Sunder Lal deposed that he alongwith Inderjeet Singh reached at the spot at Golden Park, Rampura, Delhi where all the three accused were with police officials and accused persons pointed out the place of incident. At the instance of IO Insp. Om Prakash he took eight photographs of the place of incident. He also proved the negatives of the photographs vide Ex.PW10A1 to A8 and print photographs vide Ex. PW10/A9 to PW10/A16.

(k) PW12 D.S. Meena, Station Superintendent, Railway Station, Shakur Basti had deposed that on 7.6.2004 the passenger train, Delhi Firozpur 341 which used to go from Old Delhi Railway Station to Firoz Pur via Shakur Basti Railway Station. On that day at about 7.25 am the driver of the said train informed him that a dead body is lying near railway crossing Rampur. 7/29 km of up track. He informed to HC Rajmal (In Charge of P.P. Kishan Ganj) GRP at about 7.30 am.

(l) PW 13 Ct. Daya Ram deposed that he joined the investigation alongwith Insp. Om Prakash, ASI Sarabjeet Singh, HC Hawa Singh and Ct. Ranbir Singh and they visited to pole No.KM 7/29, near Rampura Railway crossing where at the instance of ASI Sarbjeet, Insp. Om Parkash prepared a site plan and thereafter they went to the diary of Bindu Pehlwan. Where Ms. Shashi Sharma wife of Bindu Pehlwan @ Lalit Kumar met there, both were interrogated regarding the case and their statements were recorded. Thereafter at the instance of accused

Deepak they reached Chowk Britania Ring Road where two persons were standing at the Ring Road towards JJ Colony, Shakur Pur, they were pointed out by the accused Deepak towards Samunder and Riken @ Dikan. Accused Samunder was arrested vide memo Ex.PW13/D and accused Riken was arrested vide memo Ex.PW 13/E. The personal search of accused Riken was conducted vide memo PW13/F and of accused Samunder vide Ex.PW13/G. They were also interrogated by the IO and their disclosure statements were recorded vide Ex.PW13/H and J. Thereafter they all went to WZ-14 Golden park, Rampura, Delhi. The landlord of that house Ranjit Singh Khari was also present over there and he has also joined the investigation. Photographer Ct. Sunder Lal and Videographer HC Inderjeet were called at the spot on the direction of Investigating Officer Insp. Om Prakash Sharma. All the three accused persons pointed out the place of incident and pointing out memo was prepared on their instance vide Ex.PW13/K. On the direction of the IO the photography and videography of the place of incident was done. From the spot IO lifted blood stained soil and earth control sample and same were sealed with the seal of OPS in the pullanda and taken into custody vide memo Ex.PW7/A. At the instance of Deepak, one brick having blood stains as well as piece of the earth and earth control sample were lifted and sealed in pullanda with the seal of OPS and seized vide memo Ex.PW7/B. All the three accused took the police party to the railway track near a narrow path called 'Pagdandi' and accused persons disclosed that they kept a dead body there for a while. So, IO lifted the blood smeared soil and seized vide memo Ex.PW7/A. When they went forward by 15 paces by the side of the railway track there was a kiker tree at the spot, accused Riken pointed out one rassi/rope which was handing on the said tree and same was seized vide memo Ex.PW7/B. The accused persons then took them to the place where they allegedly threw the dead body near a pole KM7/29. The pointing out memo was prepared

by the IO and same is Ex.PW13/L. Thereafter, they against came behind the house WZ-14, Golden Park, Rampura, Delhi and accused Samunder and Deepak handed over one polythene bag containing one dirty shirt and a red colour T-Shirt having blood stains after taking out the same from Mezzanine/parchati from the 'pashuo ka Tabela' (the place where the animal used to be kept) and the same were sealed in pullanda with the seal of OPS and taken into possession vide memo Ex.PW13/M. The pointing out memo was prepared where the dead body was kept for a while and the same is Ex.PW13/N and pointing out memo of kiker wala tree is vide Ex.PW13/P. The seal after use was given to Choudhary Ranjit Singh Khari and they all came back to Police Station. The deposition of PW13 Ct. Daya Ram had been corroborated by PW14 ASI Sarabjit Singh, PW 20 Ct. Sukhram, PW 24 HC Hawa Singh, PW 25 Ct. Ranbir Singh and PW 27 Insp. O.P. Sharma in the deposition of and all of them have also proved the documents prepared during the course of investigation.

(m) PW-14 ASI Sarabjit Singh deposed that on 07.06.2004, he received DD No.6 which is Ex.PW-14/A and he along with Head Constable Hawa Singh, Constable Sukh Ram went to the spot, i.e., Pole KM 7/29, where he found that on the railway track one dead body of male lying between the railway track. He inspected the dead boy and got it photographed. He found that there was an injury near the left ear of the dead body and there was some ligature mark on the neck of the dead body of black colour. Due to rain in the night, the said ligature mark was not visible properly. He inspected the clothes of the dead body and there was sticker affixed on brown coloured pant in the name and style of Prince Tailor, Singh Market, Muner. He also lifted the blood smeared stones and earth control stone from the spot and took them into custody sealing the same vide Ex. PW-14/B. He also seized the hair from the brown coloured underwear make Amul Gold at the instance of crime team which is Ex.PW14/C. Thereafter,

Head Constable Hawa Singh was sent to Muner, Bihar, with the pant of the deceased for the identification of the dead body. Head Constable Hawa Singh came to Delhi on 10.06.2004 and he made his rival entry. Thereafter, the brother of the deceased was called and they dead body was identified. He also recorded the statement. He also recorded the statements of Badri, Abdul Hassan, Jugal Kumar Rai and Jitender Rai. The same are Ex.PW-14/E, Ex.PW-14/F, Ex.PW-14/G and Ex.PW-14/H. He conducted the inquest proceedings in respect of dead body and prepared the form No.25.35, the same is Ex.PW-14/J. Brief facts are Ex.PW-14/K and identification statement is Ex.PW-14/L. The dead body was handed over to brother Jitender Rai and its last rites vide receipt Ex.PW14/M. He made an application for getting post mortem to the Medical Superintendent, Aruna Asaf Ali Hospital. The application is Ex.PW-14/N. All the memos bore his signatures. At his instance, Inspector Om Prakash prepared the site plan of the place of incident, i.e., railway track.

(n) PW 17 Ct. Jaivir Singh is the Special Messenger who delivered a copy of the FIR to Ld. Ilaka Magistrate and Senior Officers.

(o) PW 18 Inspector Davinder Singh proved the scaled site plan of both the sites vide Ex. PW18/A.

(p) PW 19 SI Ajay Kumar, stated that on receiving the information he reached the railway track near railway crossing Rampura and found one dead body on the railway track having multiple injuries. He prepared his report and one copy was handed over to the IO Insp. Om Prakash Sharma.

(q) PW21 HC Devender Kumar being MHC (M) deposed that on 7.6.2004 ASI Sarabjit Singh deposited two sealed parcels containing hair, earth control and blood stained stones and soil and he made entry in register No.19 of Malkhana at Sl. No.272 vide Ex. PW21/A. On 10.6.2004 HC Hawa Singh deposited one pullanda containing one pant of deceased in the Malkhana and made the entry at Sl. No.273 the copy of same vide Ex.PW21/B. PW 21

further deposed that on 11.6.2004 ASI Sarabjit again deposited one sealed parcel with the seal of hospital alongwith sample seal belonging to the deceased alongwith visra box and he made entry at Sl. No.274 and the copy of same Ex.PW21/C. On 12.6.2004 Insp. Om Prakash deposited five sealed parcels in the Malkhana alongwith personal search of the accused persons. He made the entry in this respect at Sl. No.275 and photocopy of the same is Ex.PW21/D. The case property were sent to FSL Rohini on 14.7.2004 and the remaining one pullanda sent on 19.7.2004 vide RC No.49/21 and 55/21 respectively. The RC register and photocopy of the road certificate No.49/21 is Ex.PW21/E containing four pages.

(r) PW 22 HC Rajmal Singh was posted as Daily Diary writer at P.P. Kishanganj and he deposed that on 7.6.2004 at about 7.30 am, D.S. Meena informed that the driver of train No.341 Passenger, Delhi to Ferozpur informed about the dead body lying at Pole KM7/29 and the information was recorded vide DD No.6 and the copy of the said DD was entrusted to ASI Sarabjeet Singh who alongwith HC Hawa Singh and Ct. Sukhram went to the spot. On 10.6.2004 when he was doing the duty of DD writer at the said PP. Investigating Officer seized one pant of the deceased against the seizure memo Ex.PW22/A. The said pullanda was later on deposited in the Malkhana and copy of DD entry vide Ex.PW14/D.

(s) PW 23 Ct. Gangabir Singh deposed that on 12.6.2004 at about 3 pm Duty Officer WHC Savita handed over to him the copy of FIR No.36/04 alongwith the tehrir which he handed over to the Addl. SHO O.P. Sharma of P.S. Sarai Rohilla at about 3.30 pm at railway track near KM pole No.7/29 Rampura phatak where Insp. O.P. Sharma was already present alongwith ASI Sarabjit Singh, HC Hawa Singh, Ct. Ranbir and Ct. Daya Ram.

(t) PW 26 Ct. Vijay Singh proved the copy of the FIR No.32/02 P.S. Rohini dated 17.1.2002 u/s 341/323/34 IPC on the instruction of MHC(R) vide copy of FIR Ex.PW26/A.

(u) PW-27 Inspector Om Prakash Sharma almost corroborated the statements of PW-7 and PW-13. He deposed that after going through the documents, he made his endorsement on D.D. No.6 which is Ex.PW-27/A. He prepared the ruqqa and got the case registered vide FIR Ex.PW-1/A. He also prepared the site plan of the place Ex.PW-27/B. He stated that the deceased was working at Shakur Basti with Lalit @ Bindu Pahalwan, PW-4, who was running a dairy. At the dairy of Lalit @ Bindu Pahlwan, he and his wife Smt. Shashi Sharma were present. They were examined under Section 161 Cr.P.C. He also prepared the site plan of that place which is Ex.PW-27/C. The site of the place near Kikar tree is Ex.PW-27/D. He reiterated in his statement that all the accused led the police party including public persons to a stable behind house No.14, Golden Park, Rampura, Delhi, by saying that the clothes were hidden by them at that place. Thereafter, the accused Samunder took out one torn shirt having blood stains on both the shoulders on front and back sides. Accused Deepak took out one T-shirt from the place of underneath a plastic cover above the grass roof. These were seized vide memo Ex.PW-7/D.

On 24.07.2004, he sent 18 sealed parcels to FSL, Rohini, through constable Ranbir vide RC Ex.PW-21/E. On that day, 17 parcels were deposited and one parcel was returned back which was sent on 19.07.2004 to FSL, Rohini vide RC Ex.PW-27/F through Constable Ranbir. The parcel was the viscera box. The results of FSL were received which are Ex.PW27/G, Ex.PW27/H, Ex.PW27/I and Ex.PW27/J.

16. Ms. Anu Narula, the learned counsel appearing on behalf of the accused, has made the submissions that there are various material contradictions on important aspects regarding the recovery of the articles. The said inconsistencies, discrepancies and contradictions made in statements of the witnesses make the prosecution case highly improbable. The details of the same are given as under:

(a) As per the prosecution case, the rope was used in strangulating the deceased and the same was recovered at

the instance of the accused persons which was also used for committing the murder but not rope was shown to PW-2 Dr. K. Goel nor was his opinion sought by the Investigating Officer.

(b) PW-3 Dinesh Rai in his examination-in-chief stated that on 10.06.2004 police had shown him one blood stained pant and he identified the pant as having belonged to deceased Ramesh, his cousin. He suspected the hands of all the three accused persons as they earlier threatened the deceased to kill him. He did not give the date, month or year when such threat was extended or did not state as to whether any complaint was lodged against the alleged threat. He did not sign the Panchayat's Faisla, rather his conduct shows that he was interested in giving the deposition in rage and to take revenge by implicating the accused.

(c) PW-4 Lalit Kumar @ Bindu Pehalwan did not support the case of the prosecution and denied that Ramesh had told his wife Shashi that he was going to Rampura to attend a party and he would do the work on the next date. Therefore, chain of the prosecution was totally broken.

(d) PW-6 Head Constable Inderjeet Singh stated that on 12.06.2004, he along with Constable Sunder Lal, photographer, had gone to Golden Park, Rampura, Delhi. Investigating Officer was also present there. But during his cross-examination, he admitted that the video clip did not show witness Ranjeet Singh bringing a hammer, the polythene envelope and chair or charpai nor he stated anything against the accused persons. The chair and the charpai were not sealed in his presence.

(e) PW-13 Constable Daya Ram did not support the case of the prosecution, as in his cross-examination, he stated that he could not say if there was a constructed room and signed all the four papers prepared by the Investigating Officer.

(f) Shambhu was not cited as a witness so as to prove that the deceased attended the party and other accused persons

were also present there. The accused Samunder and Riken were not named anywhere either in the Panchayat Faisla or to the alleged conspiracy to kill the deceased Ramesh. There was no threat whatsoever from the accused Samunder and Riken @ Diken nor any of the witnesses stated except the disclosure statements of accused persons.

In nutshell, she argued that in the entire evidence produced by the prosecution, there is no specific allegation against the accused Samunder nor is there any allegation against him that what specific threat was ever extended to the deceased by him and in whose presence and when.

17. Ms. Richa Kapoor, the learned counsel appearing on behalf of the State, has argued that the prosecution has examined all the material witnesses who had completed the chain of evidence in all respects. She stated that the public witnesses Dinesh Rai, Jitender Rai, Shivaji Rai and Kailash Singh have proved that there was a strong enmity between the accused persons and the deceased and the accused persons had a grudge against the deceased Ramesh. Not only that, earlier also they assaulted the deceased in January 2002 at Naharpur, Sector 7, Rohini, in village at the occasion of Holi. As the fine was imposed upon the accused Deepak by the Panchayat which was organized by the village head Kailash Singh, PW-15, therefore, the accused felt disrespect in the village and according to the statement of PW-8 Jitender Rai, they tied the 'kaffan' on their heads to take the revenge from the deceased Ramesh.

Ms Richa Kapoor had also argued that all the accused persons had pointed out places of incidents, place of recovery and the place from where the dead body was recovered as well as the incriminating material including the rope which was used for strangulating the deceased and the same was recovered at the instance of the accused persons for committing the murder. Although during the course of arguments, she admitted that the rope was not shown to PW-2 Dr. K. Goel nor was his opinion sought. She argued that apart from the deposition of public witnesses, there is medical and scientific evidence which proves the guilt of the accused persons who had the motive to commit the murder of the deceased. Therefore, no interference in the impugned judgment is called for and all the three appeals are liable to be dismissed.

18. It is settled law that when a case of the prosecution is based on circumstantial evidence, such evidence must satisfy three tests. Firstly,

the circumstances from which an inference of guilt is to be drawn, are to be cogently and firmly established. Secondly, those circumstances should be of a definite tendency of unerringly pointing towards the guilt of the accused. Thirdly, the circumstances, taken cumulatively, should form a chain so complete that there is no escaping the conclusion that within all human probability the crime was committed by the accused and none else. In other words, the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt. (See **Hanumanth Govind Nargundkar & Anr. vs. State of M.P.,** AIR 1952 SC 343; **Chandmal and Anr. vs. State of Rajasthan,** AIR 1976 SC 917, and **Sharad Birdi Chand Sarda vs. State of Maharashtra,** (1984) 4 SCC 116)

19. The accused can be convicted on circumstantial evidence, provided the links in the chain of circumstances connects the accused with the crime beyond reasonable doubt, as per the decision in case titled as **Vijay Kumar Arora vs. State,** (2010) 2 SCC 353 (para 16.5).

20. As far as the hostile witness is concerned, no doubt, in the present case, PW-4 Bindu Pahalwan @ Lalit Kumar was declared hostile by the prosecution, as he resiled from his earlier statement to the police that prior to his death on 11.06.2004 the deceased had told his wife that he was going to take his dinner in Rampura. However, as observed in **State Vs. Ram Prasad Mishra & Anr.**:

> ''The evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but can be subjected to close scrutiny and the portion of the evidence which is consistent with the case of the prosecution or defence may be accepted.''

Similarly, in **Sheikh Zakir vs. State of Bihar,** AIR 1983 SC 911, the Supreme Court held that:

> ''It is not quite strange that some witnesses do turn hostile but that by itself would not prevent a Court from finding an accused guilty if there is otherwise acceptable evidence in support of the conviction.''

In **Himanshu alias Chintu vs. State (NCT of Delhi),** (2011) 2 SCC 36, the Supreme Court held that the dependable part of the evidence of a hostile witness can be relied on. So, in view of the settled law, the

Court can rely upon the dependable part of the evidence. PW-5 Smt. Shashi Sharma is the wife of PW-4 who deposed that on 06.06.2004 at about 8-8.30 p.m. the deceased had told her that he was going to Rampura to attend a party. The said part of the statement can be considered by this Court.

21. As per post mortem report Ex.PW-2/A, the result of external injuries and internal examination on the body of deceased were as under:

''EXTERNAL INJURIES

(i) Lacerated wound 2cmX1.5cm over upper part of left cheek about 3cm below the lateral end of left eye.

(ii) Lacerated wound 1.25X0.5cm over right angle of mandible.

(iii) Lacerated wound 3.5X0.5cm over right temporal region.

(iv) Few pressure abrasions seen over right anterior axillary fold.

(v) Ligature Mark. There were dark brownish coloured slightly depressed ligature pressure abrasion marks two in numbers running horizontally all around the neck completely on an below the apple of adan. Both the marks were apart each other varying in distance 0.25 to 1.75 cm at places. The width of each mark was allowed 0.75 to 09 cm. The skin above and below the marks was darker in colour.

(vi) There were oblique semi circular slightly depressed marks over outer aspects of both writs, about 0.75 cm wide showing no vital reaction on cut sections. (postmortem injuries).

INTERNAL EXAMINATION

There was faint sub-scalp bruising over right temporal region around injury No.3. Early changes of decomposition present in scalp tissues. Skull bones were intact Brain matter was soften due to decomposition.

On reflection of skin of neck there was subcutaneous and platysmal bruising was seen underneath the ligature marks and surrounding tissues. Deeper neck muscles were also bruised with effusion of blood in neck-layers. Signs of decomposition also seen in soft tissues of neck. There were fracture – subluxation of left greater cornua of hyoid bone and left superior horn of

thyroid cartilage with massive bruising around. Epiglottis larynx were bruised. Signs of decomposition were seen in tracheals mucosa. There was serosanguinous discharge seen in trachea.

All chest and abdominal viscera were intact with signs of decomposition. Stomach contained semi digested food with slight alcohol like smell.

22. In view of the testimony of PW-2 and report Ex.PW2/A, it is clear that the cause of death was asphyxia consequent upon ligature strangulation. Injuries No.1 to 5 were ante mortem. Injuries No.1 to 4 were caused by blunt force impact. Ligature marks i.e. injury No.5 was caused by some hard flexible material. Injuries No.6 was postmortem in nature and was consistent with pressure over wrist to fasten them. Ligature pressure over neck was sufficient to cause death in ordinary course of nature. Mode of death was homicide. Time of death was about four and half days. The result of FSL was received and are Ex.PW27/G,H,I and J. The sealed parcel remained in the custody of MHC(M). PW21 HC Devender Kumar testified that the parcel remained in his custody and in intact condition without any tempering by any one before and after receiving from the FSL Rohini and parcel sent through Ct. Ranbir PW25 and case property remained intact during the transit. The FSL report revealed the human blood on blood stained pieces of stone, piece of brick, blood stained cement material, piece of jute rope, shirt. The pants, shirt blood stained pieces of stone and teeth are of blood group 'B' as examined by Biological Department of Forensic Science Lab. The Physics department of FSL opined that on chemical examination of stomach and piece of small intestine and unidentified tissues they tested positive for the presence of ethyl alcohol.

23. The details of description of articles contained in parcels and results of analysis are given as under:

DESCRIPTION OF ARTICLES CONTAINED IN PARCELS

''Parcel '1' : One sealed cloth parcel sealed with the seal of 'SS' containing exhibit '1', marked as 'A'.

Exhibit '1' : Piece of stones having brown stains.

Parcel '2' : One sealed cloth parcel sealed with the seal of 'SS' containing exhibit '2' marked as 'A-I'.

Exhibit '2' : Pieces of stone described as 'Earth control stone'.

Parcel '3' : One sealed cloth parcel sealed with the seal of 'SS' containing exhibit '3', marked as 'B'.

Exhibit '3' : Piece of stones having brown stains.

Parcel '4' : One sealed cloth parcel sealed with the seal of 'SS' containing exhibit '4', marked as 'B-1'.

Exhibit '4': Pieces of stone described as 'Earth control stone'.

Parcel '5' : One sealed cloth parcel sealed with the seal of 'SS' containing exhibit '5', marked as 'C'.

Exhibit '5' : Few strands of hair.

Parcel '6' : One sealed cloth parcel sealed with the seal of 'OPS' containing exhibit '6', marked as 'D'.

Exhibit '6' : One pants having brown stains along with Mud.

Parcel '7' : One sealed cloth parcel sealed with the seal of 'OPS' containing exhibit '7', marked as 'I'.

Exhibit '7' : A piece of brick having brown stains along with few strands of hair.

Parcel '8' : One sealed cloth parcel sealed with the seal of 'OPS' containing exhibit '8', marked as '2'.

Exhibit '8' : Cemented material having brown stains described as Blood stained floor and plaster pieces.

Parcel '9' : One sealed cloth parcel sealed with the seal of 'OPS' containing exhibit '9', marked as '3'.

Exhibit '9' : Cemented material having brown stains described as 'Earth control sample of floor and plaster'.

Parcel '10' : One sealed cloth parcel sealed with the seal of 'OPS. containing exhibit '10., marked as '4'.

Exhibit '10' : Earthy material.

Parcel '11' : One sealed cloth parcel sealed with the seal of 'OPS.

containing exhibit '11', marked as '4A'.

Exhibit '11' : Earthy material.

Parcel '12' : One sealed cloth parcel sealed with the seal of 'OPS' said to contain exhibit '12', marked as '4B', sent in original to Physics Division of this Laboratory for examination.

Parcel '13' : One sealed cloth parcel sealed with the seal of 'OPS' containing exhibit '13., marked as '5'.

Exhibit '13' : A piece of jute rope.

Parcel '14' : One sealed cloth parcel sealed with the seal of 'OPS' containing exhibit '14', marked as '6'.

Exhibit '14' : One T-shirt.

Parcel '15' : One sealed cloth parcel sealed with the seal of 'OPS' containing exhibit '15', marked as '7'.

Exhibit '15' : One T-shirt having brown stains.

Parcel '16' : One sealed glass bottle sealed with the seal of 'KLS AAA HOSPITAL SUBZI MANDI MORTUARY DELHI' containing exhibit '16', marked as '8'.

Exhibit '16' : Two pieces of teeth having brown stains.

Parcel '17' : One sealed polythene bag parcel sealed sealed with the seal of 'KLS AAA HOSPITAL SUBZI MANDI MORTUARY DELHI' containing exhibit '17a', '17b', '17c' and '17d'.

Exhibit '17a': One damp foul smelling shawl having darker stains.

Exhibit '17b': One damp foul smelling shirt having darker stains.

Exhibit '17c': One damp foul smelling banian having darker stains.

Exhibit '17d': One damp foul smelling underwear having darker stains.

RESULTS OF ANALYSIS

1. Blood was detected on exhibits '1', '3', '6', '7', '8', '13', '15', '16', '17a', '17b', '17c' & '17d'.
2. Blood could not be detected on exhibits '2', '4', '9', '10', '11', & '14'.

3. Semen could not be detected on exhibit '5'.

4. On the basis morphological and microscopical characteristics the hair found in exhibits '5' & '7' were found to be human in origin. However no further opinion is offered from this Laboratory.

5. Regarding query No '16' based on Physical and morphological characteristics the teeth found in exhibit '16', were found to be human (i.e. incisior and canine teeth).

24. As per the report of the portion of exhibits were examined by using various serological techniques, the analysed results of which are given as under:

Exhibits	**Species of Origin**	**ABO Group/Remarks**
Blood stained '1' Blood stained pieces of stone	Human	No Reaction
'2' Pieces of stone (Control)	No Reaction	---
'3' Blood stained pieces of stone	Human	'B' Group
'4' Pieces of stone (Control)	No Reaction	---
'6' Pants	Human	'B' Group
'7' Piece of brick	Human	No Reaction
'8' Blood stained cemented material	Human	No Reaction
'9' Cemented material (Control)	No Reaction	---
'10' Earthy material	No Reaction	---
'11' Earthy material	No Reaction	---
'13' Piece of jute rope	Human	No Reaction

'15' Shirt	Human	'B' Group
'16' Teeth	Human	'B' Group
'17a' Shawl	No Reaction	---
'17b' Shirt	No Reaction	---
'17c' Banian	No Reaction	---
'17d' Underwear	No Reaction	---

25. A) Blood Group of the deceased

As per the seizure memo Ex.PW22/A, the pant of the deceased and as per memo Ex.PW27/E, two teeth of the deceased in glass bottle, and also one damp foul smelling shawl, shirt, baniyan and underwear having darker stains as exhibits 17a to 17d were sent to FSL for examination. As per the FSL report, the teeth were of human origin having ''B'' blood group. Similarly, the pant of the deceased contains the blood stains of the same group ''B''. As per the FSL report, the blood was detected from exhibits 17a to 17d, i.e. shawl, shirt, baniyan and underwear of the deceased.

B) Blood Group found in shirt etc.

PW-7 Ranjeet Singh who is an independent/public witness had deposed that the accused had got recovered one blood stained shirt and one T-shirt from a Chhappar and they were taken into possession vide memo Ex.PW7/D which bears his signatures at point A. PW-13 also corroborated the testimony of PW-7 by stating that the accused Samunder and Deepak handed over one polythene bag containing one dirty shirt and red colour T-shirt having blood stains to the place after taking out the same from Maizezine/Parchati from the *Pashuo ka tabela* (the place where the animal are used to be kept). The same were taken into possession vide memo Ex.PW13/M which bears his signatures. As per the disclosure statement, the shirt was belonging to Samunder and the T-shirt to Deepak.

PW-14 has made the similar statement before the Court that the accused persons took them to tabela (the place used to keep the animals) and from where one red T-shirt and one shirt were got recovered by the

accused Deepak and Samunder and the same were sealed with the seal of OPS and taken into possession. The shirt was Ex.PC belonging to Samunder and the T-shirt was of Deepak and the same is Ex.PD.

PW-27 also corroborated the statements of PW-7, PW-13 & PW-14, by deposing that all the accused persons led the police party including the public persons to a stable behind house No.14, Golden Park, Ram Pura, Delhi, by saying that the clothes were hidden by them at that place. The pointing out memo Ex.PW13/M was prepared. Thereafter, the accused Samunder took out one torn shirt having blood stains on both the shoulders on front and back. Accused Deepak took out one T-shirt from the place underneath a plastic cover and the same was seized vide memo Ex.PW7/D. The site plan was also prepared. However, in the statement recorded under Section 313 Cr.P.C. the accused persons denied the said recovery. As per the FSL report, the shirt submitted as exhibit-15 contained human blood of ''B'' group which matches the blood group of the deceased. The said shirt which was recovered on the basis of disclosure statement, was belonging to Samunder.

C) Blood-stained pieces of stone

PW-7 deposed that in his presence, the police had lifted blood from near the water tank, blood stained plaster, earth control from the sport and took them into possession by making a recovery memo vide memo Ex.PW7/A which bears his signatures at point-A. One blood stained piece of floor, earth control were also lifted from near the wall of water meter vide memo Ex.PW7/B which also bears his signatures at point-A. Thereafter, the accused had taken them near the railway track from where the blood-stained earth and blood were also lifted and one rope was taken into possession and seized vide memo Ex.PW7/C which also bears his signatures at point-A.

PW-13 reiterated the statement of PW-7 and deposed that from the sport the I.O. lifted blood-stained soil and earth control sample and the same were sealed with the seal of OPS in pullanda and taken into possession vide memo Ex.PW7/A which bears his signatures at point-B. At the instance of accused Deepak, one brick having blood stains as well as having some hairs passed on it along with blood stained as well as piece of the earth and earth control sample were lifted and sealed in pullanda with the seal of OPS and seized vide memo Ex.PW7/B which bears his

signatures at point-B. Thereafter, all the three accused took the police party to the railway track near small way called pagdandi and they disclosed that they kept a dead body there for a while. So, the I.O. lifted the blood smeared soil and taken into custody vide memo Ex.PW7/A. After going forward only upto 15 paces by the side of railway track, there was a 'keeker' tree. Accused Riken pointed out one rassi/rope which was hanging on the said tree. The same was taken into possession vide memo Ex.PW7/B.

PW-14 has also corroborated the statements of PW-7 & PW-13.

PW-27 deposed that at the instance of the accused persons, one blood-stained brick on which some hairs were stick, was recovered from the place in between water motor and the wall of the room. The brick was sealed with the seal of OPS and was seized vide memo Ex.PW7/B. He also lifted blood samples, blood-stained earth and earth control nearby the place where brick was lying and the same was seized vide memo Ex.PW7/B. He also prepared the site plan of that place, Ex.PW27/C. Thereafter, the accused persons led the police party via a pagdandi after travelling about 200 meters, they pointed a place near high tension tower by stating that they rest the body at this place while shifting the body from House No.14 to railway track. The pointing out memo Ex.PW13/N was prepared. At that place, blood was found lying on the ground. He lifted blood-stained soil and earth control and sealed them in separate parcel with the seal of OPS and were seized vide memo Ex.PW7/A. The parcels were given serial Nos.4 & 4A. Thereafter, the police team proceeded towards railway track. On the way, accused Riken pointed towards keeker tree where he had thrown the rope. He prepared the pointing out memo Ex.PW13/E. Accused Riken produced one rope having blood stains after taking it from keeker tree where it was entangled. The rope was measured as 7.5 feet and was sealed in a parcel with the seal of OPS and was seized vide memo Ex.PW7/C. It was also deposed that public witness PW-7 Ranjeet Singh was also with them. Thereafter, all the accused led the police party to railway track near kilometer pole No.7/29 and pointed the place on the railway track where the body was thrown by them. The pointing out memo Ex.PW13/L was prepared. The site of the place near keeker tree is Ex.PW27/D.

As per the FSL report, the blood-stained pieces of stone contained the human blood of ''B'' group. The blood was also detected as per the

analysis of the result on the pieces of stone having brown stains, a piece of brick having brown stains along with few strands of hair and cemented material having brown stains described as blood-stained floor and plaster pieces and a piece of jute rope. In some of the exhibits, no reaction was shown as per the report of the FSL. PW-14 in his testimony has also stated that due to rain in the night, some of the ligature marks could not be visible properly. He also stated that he inspected the cloth of the dead body and there was sticker affixed on brown coloured pant in the name and style of Prince Tailor, Singh Market, Muner. Thereafter, Head Constable Hawa Singh was sent to Muner, Bihar, with the pant of the deceased for the identification of the dead body. Head Constable Hawa Singh came to Delhi on 10.06.2004 and he made his rival entry. Thereafter, the brother of the deceased was called and they dead body was identified.

26. Further, the detail and result of examination of physical characteristics of the articles contained in ten parcels received by the Forensic Science Laboratory through Biology Division and sent to Additional SHO are given as under:

''DESCRIPTION OF ARTICLES CONTAINED IN THE PARCELS

Parcel No.1: One sealed envelope sealed with the seal of ''VSN FSL DELHI'' containing Exhibit-1.

Exhibit- 1 : Stone pieces having dark brown stains described as ''Blood Stained Stones''.

Parcel No.2 : One sealed envelope sealed with the seal of ''VSN FSL DELHI'' containing Exhibit-2.

Exhibit- 2 : Stone pieces described as ''Earth Control Stones''.

Parcel No.3 : One sealed envelope sealed with the seal of ''VSN FSL DELHI'' containing Exhibit-3.

Exhibit- 3 : Stone pieces having dark brown stains described as ''Blood Stained Stones''.

Parcel No.4 : One sealed envelope sealed with the seal of ''VSN FSL DELHI'' containing Exhibit-4.

Exhibit- 4 : Stone pieces described as ''Earth Control Stones''.

Parcel No.5 : One sealed envelope sealed with the seal of ''VSN FSL DELHI'' containing Exhibit-6.

Exhibit- 4 : One pant having dark brown stains with soil adhering to it.

Parcel No.8 : One sealed envelope sealed with the seal of ''VSN FSL DELHI'' containing Exhibit-8.

Exhibit- 8 : Cemented material described as ''Blood Stained Floor and plaster pieces''.

Parcel No.9 : One sealed envelope sealed with the seal of ''VSN FSL DELHI'' containing Exhibit-9.

Exhibit- 9 : Cemented material described as ''Earth control floor and plaster pieces''.

Parcel No.10: One sealed envelope sealed with the seal of ''VSN FSL DELHI'' containing Exhibit-10.

Exhibit- 10 : Soil described as ''Blood stained Soil''.

Parcel No.11: One sealed envelope sealed with the seal of ''VSN FSL DELHI'' containing Exhibit-11.

Exhibit- 11 : Soil described as ''Earth Control Soil''.

Parcel No.12: One sealed cloth parcel sealed with the seal of ''OPS'' containing Exhibit-12.

Exhibit- 12 : Soil described as ''Earth Control muddy Soil Sample''.

RESULTS OF EXAMINATIOIN

1. Exhibit-1 and Exhibit-2, were found to be possessing similar physical characteristics.
2. Exhibit-3 and Exhibit-4, were found to be possessing similar physical characteristics.
3. Soil adhering to Exhibit-6 and soil Exhibit-12, were found to be possessing similar physical characteristics.
4. Exhibit-8 and Exhibit-9, were found to be possessing similar physical characteristics.
5. Exhibit-10 and Exhibit-11, were found to be possessing

similar physical characteristics."

It is clear from examination of the results that Exhibits 1-4 and 6-12 were found to be possessing similar physical characteristics.

27. 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.

28. 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.

29. 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.

30. Admittedly, there are certain contradictions on the aspect of the arrest of the accused and recovery as well as the discrepancies and inconsistencies in the statements of the prosecution witnesses. It is also true that Shambhu was not produced as a witness who, according to the prosecution, hosted the dinner on the fateful day, i.e. 06.06.2007 where the deceased are alleged to have gone. However, it is settled law that such discrepancies do creep in when a witness deposes in a natural manner and if those do not go to the root of the prosecution story, then the same may not be given undue importance. The conviction of the accused can be passed even on the testimony of a solitary witness when the evidence is found otherwise reliable. In the present case, PW-7 is a public witness. Secondly as per the FSL report the same group of blood was found in the shirt of accused Samunder. The other recovery which

was made on the basis of disclosure statements of the accused in the presence of PW-7, PW-13, PW-14 & PW-27 is a reliable evidence which has been produced by the prosecution. They do not admit the submission of the accused that there was no independent witness who has supported the case of the prosecution. It is immaterial if the CD relied upon by the prosecution is not proved, but at the same time, the prosecution was able to prove the recovery made by the accused in their disclosure statements. The explanation given by the appellants/accused is totally false and frivolous that the fact of the deceased having met with an accident cannot be ruled out, or he was apparently trying to jump a railway track. The doctor who conducted the post mortem examination has clearly opined that the deceased was also strangulated. This clearly rules out the theory of accidental death. The evidence proved by the prosecution is totally different to the explanation given by the accused.

31. In the present case, in order to prove the enmity, the prosecution proved the 'Panchayat Faisla' Ex.PW-9/B and copy of the FIR No.32/2002, Police Station Rohini. The public witnesses had also deposed in this regard and also proved the said documents. Although the learned counsel for the accused made the statement at the bar that the case has been closed due to non-prosecution. The deceased Ramesh Rai was working at dairy of Lalit @ Bindu Pahalwan, PW-4/. At about 8/8:30 p.m., he left the dairy of Bindu Pahalwan and never returned to the house. This fact was confirmed by PW-5 Smt Shashi, wife of PW-4. It appears, therefore, that PW-5 was the last seen evidence of the deceased Ramesh Rai. PW-8 proved the enmity of the Deepak with deceased Ramesh Rai since 2002. The statement of the PW-8 was corroborated in the testimony of PW-3 Dinesh Rai, PW-9 Vinod Rai, PW-15 Kailash Singh and PW-12 Shivji Rai. The dead body of the deceased was lying at railway track near Rampura and the same was identified by sticker of Prince Tailor affixed on the brown coloured pant of Singh Market, Muner. PW-24 Head Constable Hawa Singh went to the village and met the relatives of the deceased who deposed with respect to the identification of the dead body. The accused persons made their disclosure statements before the police and led the police official to the room at WZ-14, Golden Park, where the alleged crime was committed and accused persons also led the police party and PW-7 Ranjeet Singh to the Paireri at HT Tower where the dead body was kept for a while. The rope was hanging on the kiker tree. They also led the police party to the railway track where the

dead body was lying. Accused got recovered one blood stained shirt and one T-shirt from the 'pashuo ka tabela' which were seized.

32. On the disclosure statement, rope, blood stained stone, earth controlled soil, blood stained shirt and T-shirt were recovered and examined in the FSL. The report of the FSL clearly showed that the deceased had human group B blood which was established from his teeth as well as from pant.

33. The accused Samunder is the real uncle of the accused Deepak and Riken @ Diken who are the real brothers. From the evidence provided by the prosecution, it is clear that the accused in pre-planned manner committed the 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 connects the accused persons with the crime and proved the guilt beyond all reasonable doubt. There is a clear evidence of PW-5 that the deceased left his dairy and went to attend the party on 06.06.2004. Thereafter, the accused did not come back. There is a positive evidence against Samunder as on his disclosure statement, blood stained shirt was recovered which contained human group B blood as per the FSL report.

34. Post-mortem report shows that the way the deceased was assaulted, it was not the work of single person because of the fact that the dead body was removed from one place to another place many times.

35. Under these circumstances, the accused have committed the murder of deceased Ramesh Rai with ulterior motive to take the revenge. In our opinion, the trial Judge has given very cogent reasons for convicting the appellants. Therefore, the prosecution has been able to prove the guilt of the accused persons beyond reasonable doubt and all the circumstances have been proved. There is overwhelming circumstantial evidence to show that the accused committed the crime. We find no force in these appeals.

36. Therefore, the appeals are dismissed.

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W.P. (C)

D.P.S. CHAWLA ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

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

W.P.(C) NO. : 6201/2011 DATE OF DECISION: 24.10.2011

The Administrative Tribunals Act, 1985—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.

The judgments relied upon by the Tribunal as also by the counsel for the respondents before us are relating to questions requiring essay type answers and do not relate to answers to multiple choice questions, as the subject question in the present case was. While in the evaluation of an essay type answer, subjective assessment of the examiner/evaluator assumes importance and is prohibited under the Rules, it cannot be said to be so in case of answers to multiple choice questions. In multiple choice questions, generally, there is only one correct answer and evaluation of such answers requires the examiner/evaluator to only evaluate whether the correct choice has been exercised by the examinee and if so to award marks therefor; there is no scope of controversy or possibility of different examiners awarding different marks for the correct choice exercised. In multiple choice questions, the examiner/evaluator strictly speaking is left with no role whatsoever and in fact most of the examinations with multiple choice questions have now substituted the examiners/evaluators with an Optical Mark Reader (OMR). Thus, the Rule prohibiting re-evaluation framed with respect to the essay type answers cannot be

said to be applicable to the answer to multiple choice questions. **(Para 15)**

Important Issue Involved: (A) The Rule prohibiting re-evaluation framed with respect to the essay type answers cannot be said to be applicable to the answer to multiple choice questions.

(B) Right to inspect answer sheets carries with it a right to seek judicial review of error/mistake to eliminate arbitrariness and injustice.

(C) In exercise of powers of judicial review re-appreciation/ re-assessment of answers cannot be undertaken but only obvious mistakes can be corrected.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Sudarshan Rajan, Mr. Hitesh Kumar Saini & Mr. Narender Pal Singh, Advocates.

FOR THE RESPONDENTS : Mr. Alakh Kumar, Advocate for BSNL.

CASES REFERRED TO:

1. *Secretary, All India Pre-Medical/Pre-Dental Examination, C.B.S.E.* vs. *Khushboo Shrivastava* 2011 (9) SCALE 63
2. *CBSE* vs. *Aditya Bandopadhyay* (2011) 8 SCC 497.
3. *H.P. Public Service Commission* vs. *Mukesh Thakur* (2010) 6 SCC 759
4. *Guru Nanak Dev University* vs. *Saumil Garg* (2005) 13 SCC 749.
5. *Manish Ujwal* vs. *Maharishi Dayanand Saraswati University* (2005) 13 SCC 744.

6. *Pramod Kumar Srivastava* vs. *Bihar Public Service Commission* AIR 2004 SC 4116.

RESULT: Allowed.

RAJIV SAHAI ENDLAW, J.

1. The petitioner impugns the order dated 22nd March, 2011 of the Central Administrative Tribunal (CAT) dismissing O.A. No.3582/2010 preferred by the petitioner.

2. Notice of the petition was issued and vide detailed order dated 26th August, 2011 the respondent directed to file an affidavit furnishing the information mentioned therein. Affidavit has so been filed and to which response has been filed by the petitioner.

3. The petitioner working as a Junior Telecom Officer (Assistant Manager) in the respondent Bharat Sanchar Nigam Limited (BSNL) appeared in the Limited Departmental Competitive Examination-2007 held for promotion to the grade of Sub-Divisional Engineer (Telecom). As per the scheme of the said examination, all candidates securing 50% marks in each of the two papers were to be declared successful and eligible for promotion. In the result declared, the petitioner was shown to have secured 49% marks in the first paper and 58% marks in the second paper; he was accordingly not declared successful.

4. The case of the petitioner is that the Question No.2 in the first paper in which he was awarded 49% marks, was as under:

''Which of the following is valid GSM downlink frequency band?

(a) 890-915 MHz (b) 1710-1785 MHz

(c) 935-960 MHz (d) 1900-1975 MHz''

5. It is undisputed that the petitioner exercised the option (c) i.e. ''935-960 MHz''. The said answer of the petitioner was marked wrong and no marks awarded therefor. The petitioner contends that his answer was correct and if marks are awarded therefor, he would have 50% marks in the first paper also, making him successful in the examination.

6. The petitioner in this regard relied on the answer key for the aforesaid first paper in which the correct answer was shown as ''(b) 935-960 MHz''. The contention of the petitioner is that the correct

answer is ''935-960 MHz but in the answer key the said correct answer has been erroneously given against option (b).

7. The representation of the petitioner having not met with any success, ultimately the O.A. No.3582/2010 under Section 19 of the Administrative Tribunals Act, 1985 was preferred.

8. The Tribunal, in the impugned order has noticed that Rule 15 contained in Appendix 37 (Rules Relating to Departmental Examinations) specifically prohibits re-evaluation of answer sheet and relying on **H.P. Public Service Commission Vs. Mukesh Thakur** (2010) 6 SCC 759 (laying down that in the absence of any provision of statute or statutory rules/regulations, the Court should not generally direct re-evaluation) held that no re-evaluation can be directed and dismissed the application.

9. It is the contention of the petitioner that the present is not a case of re-evaluation but of re-computation and of correction of a mistake. On the said contention of the petitioner, vide order dated 26th August, 2011 (supra) the respondents were directed to file an affidavit as to whether the answer of ''935-960 MHz'' given by the petitioner was correct or not.

10. The respondents in the affidavit filed have failed to controvert that the answer given by the petitioner is correct. It is however stated that total 8594 candidates had appeared in the examination and of which 1867 were declared successful on 8th July, 2008; that all answer sheets were examined in an impartial manner; that the paper setter besides the question paper had also provided an answer key; that the answer sheets were evaluated by fairly high level officers of the department who are experts in the subject; that the answer sheets were distributed to a number of evaluators all of whom were to, besides being guided by the answer key, also use their own wisdom; that the examiner is the final authority in the matter of evaluation; that the result has attained finality; that the next examination is scheduled to be held in December, 2011/ January, 2012. It is however admitted by the respondents that some of the other examiners/evaluators had marked the answer (c) ''935-960 MHz'' to be correct and awarded marks therefor. It is however pleaded that if the matter is to be reopened, it needs to be reopened qua all the candidates who had appeared in the examination and which is not possible as the answer sheets have since been weeded out.

11. The counsel for the respondents has also placed reliance on **Pramod Kumar Srivastava Vs. Bihar Public Service Commission** AIR 2004 SC 4116 and on **Secretary, All India Pre-Medical/Pre-Dental Examination, C.B.S.E. Vs. Khushboo Shrivastava** 2011 (9) SCALE 63 both deprecating the practice of directing re-evaluation in the absence of any provision therefor.

12. Per contra, the counsel for the petitioner refers to **Guru Nanak Dev University Vs. Saumil Garg** (2005) 13 SCC 749 and to **Manish Ujwal Vs. Maharishi Dayanand Saraswati University** (2005) 13 SCC 744 where in the face of defects in the answer key it was held that merit should not be a causality.

13. It is also the contention of the counsel for the petitioner and not controverted by the respondents that vacancies in the post to which the petitioner would become entitled to be promoted if declared successful, exist.

14. The petitioner has also placed before this Court independent material to show that the answer given by him of ''935-960 MHz'' is the correct answer.

15. The judgments relied upon by the Tribunal as also by the counsel for the respondents before us are relating to questions requiring essay type answers and do not relate to answers to multiple choice questions, as the subject question in the present case was. While in the evaluation of an essay type answer, subjective assessment of the examiner/evaluator assumes importance and is prohibited under the Rules, it cannot be said to be so in case of answers to multiple choice questions. In multiple choice questions, generally, there is only one correct answer and evaluation of such answers requires the examiner/evaluator to only evaluate whether the correct choice has been exercised by the examinee and if so to award marks therefor; there is no scope of controversy or possibility of different examiners awarding different marks for the correct choice exercised. In multiple choice questions, the examiner/evaluator strictly speaking is left with no role whatsoever and in fact most of the examinations with multiple choice questions have now substituted the examiners/evaluators with an Optical Mark Reader (OMR). Thus, the Rule prohibiting re-evaluation framed with respect to the essay type answers cannot be said to be applicable to the answer to multiple choice

questions.

16. From the record before this Court, it is amply established that the correct answer to the question aforesaid was ''935-960 MHz'' as answered by the petitioner and which was placed in the question paper as option (c) but in the answer key was erroneously shown as option (b). Once, it is established that the answer is correct, the error in not giving the marks for the same, is but an error akin to a mistake / re-totaling which under the Rules (supra) of the examination also is permitted. We are therefore of the opinion that the Tribunal erred in applying the prohibition under the Rule as to re-evaluation to such a mistake also.

17. We may notice that the Supreme Court recently in **CBSE Vs. Aditya Bandopadhyay** (2011) 8 SCC 497 has held the examinees to be entitled to inspection of their answer sheets under the Right to Information Act, 2005. Such right to inspection has to be given a meaning and cannot be made to be an empty exercise. Right to inspection carries with it a right to seek judicial review of error/mistake as has occurred in the present case and is intended to eliminate arbitrariness and injustice.

18. In the present case we find injustice to have been meted out to the petitioner. Instead of being declared successful, owing to the mistake/error of the respondents themselves, he 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 the answer of the petitioner but to only correct the obvious mistake. We therefore are of the opinion that the power of judicial review cannot be denied in such cases.

19. As far as the contention of the counsel for the respondents of the petitioner alone being not entitled to the benefit of the error/mistake in the answer key and it being not possible to re-evaluate of answer sheets of others is concerned, we have before this Court the case of the petitioner only who has been agitating the same since the declaration of the result. No other candidate is stated to be so pursuing the matter. Moreover, the answer sheets having been reported to have been weeded out, the possibility of grant of relief to petitioner opening flood gates of litigation by others also does not arise.

20. We accordingly allow this petition and set aside the order of Tribunal. The application under Section 19 of the Administrative Tribunals

Act preferred by the petitioner is allowed. The marks secured by the petitioner in the first paper are enhanced from 49% to 50%. Axiomatically, the petitioner is declared successful in the examination and declared eligible for promotion in pursuance thereto. The respondents are directed to within six weeks hereof so promote the petitioner with effect from the date when others similarly situated as him were promoted and to within eight weeks hereof also pay all consequential benefits to the petitioner.

21. Though the petitioner has suffered owing to the mistake of the respondents and the cussedness of the respondents in, inspite of representations of the petitioner, not correcting the same but we refrain from imposing any costs on the respondents.

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MAT APP.

SATINDER SINGH **....PETITIONER**

VERSUS

BHUPINDER KAUR **....RESPONDENT**

(KAILASH GAMBHIR, J.)

MAT APP. NO. : 20/2011 & CM NO. : 5645/2011 **DATE OF DECISION: 02.11.2011**

Hindu Marriage Act, 1955—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.

It is quite pertinent to note that section 13(2)(iii) talks about section 18 under the HAMA and section 125 Cr.PC, which are both the provisions for grant of maintenance available to the wife only unlike section 24 or 25 of the HMA wherein any party can approach the court for the grant of maintenance. It is thus manifest that the order of maintenance passed in the favour of the wife in her petition under section 18 HAMA or section 125 Cr.PC would make her available the right to file for divorce under section 13(2)(iii). If the contention of the counsel for the appellant is accepted and the order in the section is meant to be only a final order then the purpose of the said provision would be negated as the wife who seeks a decree of divorce under the said section would have to wait till a final order under section 18 or section 125, as the case may be, which would certainly mean insisting on an invariably long waiting period, which is certainly not the object of the said section. The only desideratum is that the parties have ceased to live together for one year or more and to save the wife from vagrancy she has a order or decree of maintenance in her favour. The judgments relied

upon the counsel for the appellant would not be applicable to the facts of the case at hand as they sought to carve a different legal proposition altogether. **(Para 10)**

Important Issue Involved: The intention of the legislature is to give a right to the wife to invoke the provision of Section 13(2) (iii) of Hindu Marriage Act, 1955 in a case where even an interim order has been passed in suit under Section 18 of the Hindu Adoption and Maintenance Act, 1956 or in a proceedings under Section 125 of Code of Criminal Procedure, 1973.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Hari Shankar, Advocate.

FOR THE RESPONDENT : Mr. Shailender Dahiya, Advocate.

CASES REFERRED TO:

1. *Amarjeet Singh* vs. *Devi Ratan,* AIR 2010 SC 3676.
2. *Kalabharati Advertising* vs. *Hemant Vimalnath,* AIR 2010 SC 3745.
3. *Prem Chandra Agarwal* vs. *U.P.* , JT 2009(8) SC 118.
4. *Gita Massant* vs. *Narain Dass,* 27 (1985) DLT 374.
5. *Snehlata Seth* vs. *V.Kewal Krishan Seth,* 27(1985) DLT 449.

RESULT: Dismissed.

KAILASH GAMBHIR, J.

1. By this appeal filed under Section 28 of the Hindu Marriage Act, 1955 read with section 151 CPC, the Appellant seeks to challenge the Order dated 16.8.2010 passed by the learned trial court whereby a decree of divorce under Section 13(2)(iii) of the Hindu Marriage Act was passed in favour of the respondent.

2. Brief sequence of events that has led to the filing of the present appeal is that the respondent filed a petition for divorce under section

13(2)(iii) of the Hindu Marriage Act and the appellant filed an application under Order VII rule 11 for rejection of the plaint which was dismissed vide order dated 13.11.2009. A revision was filed against the said order which was dismissed by this court vide order dated 17.12.2010. Thereafter the petition for divorce was decided and the respondent was granted divorce vide order dated 16.8.2010 and feeling aggrieved by the same, the appellant has preferred the present appeal.

3. Assailing the said judgment and decree, learned counsel representing the appellant submits that the order passed under Section 125 Cr.PC was an interim order and based on the interim order the learned matrimonial court could not have exercised jurisdiction to grant a decree of divorce in terms of section 13(2) (iii) of the Hindu Marriage Act. Counsel also submits that any interim order passed in any proceedings will always remain an interim order which would ultimately be subject to passing of a final order and the final order can always vary and in a given case may be against the party in whose favour an interim order has been passed. Counsel thus submits that jurisdiction under Section 13(2) (iii) of the Hindu Marriage Act may be exercised by the matrimonial court only when a final order was passed under Section 125 Cr.PC and, therefore, the expression 'order' referred to under section 13(2) (iii) of the Hindu Marriage Act must be read as a final order and not as an interim order. Counsel also submits that the respondent has also misled the matrimonial Court by not disclosing the fact that she got remarried and due to such suppression of a material fact on the part of the respondent she was not entitled to the grant of decree under section 13(2) (iii) of the Hindu Marriage Act. Counsel also submits that the learned matrimonial court has also not appreciated that the earlier divorce petition filed by the respondent under section 13(1) (ia) of the HM Act was dismissed and the said finding being against the respondent and in favour of the appellant, the learned trial court ought not to have passed a decree in favour of the respondent under section 13(2) (iii) of the Hindu Marriage Act. In support of his arguments, counsel for the appellant has placed reliance on the following judgments :

1. **Gita Massant vs. Narain Dass,** 27 (1985) DLT 374
2. **Snehlata Seth vs. V.Kewal Krishan Seth,** 27(1985) DLT 449.

3. **Prem Chandra Agarwal vs. U.P. ,** JT 2009(8) SC 118

4. **Amarjeet Singh vs. Devi Ratan,** AIR 2010 SC 3676

5. **Kalabharati Advertising vs. Hemant Vimalnath,** AIR 2010 SC 3745

4. Opposing the present appeal, counsel for the respondent submits that the appeal filed by the appellant is a gross abuse of process of law and the appellant has suppressed from this court that he had filed an application under Order VII Rule 11 CPC before the matrimonial Court to seek rejection of the said petition filed by the respondent under section 13(2) (iii) of the HM Act and that the said application of the appellant was dismissed by the trial court. Counsel further submits that against the said order the appellant had also filed a revision petition before this Court which was also dismissed vide order dated 17.12.2010. Counsel thus submits that because of suppression of these vital facts, the appellant is not entitled to the grant of any relief by this Court in the present appeal. Counsel further submits that in the order passed by the Hon'ble High Court in the said revision petition, the finding has already been given by this Court that the interim order passed under section 125 Cr.PC would give jurisdiction to the matrimonial court to pass a decree under section 13(2) (iii) of the HM Act and the said finding not being challenged by the appellant, the same attained finality and in view of this also the appellant now cannot agitate the same grievance again before this Court. Counsel also submits that so far as the remarriage of the respondent is concerned, same has taken place after the passing of the decree of divorce in favour of the respondent.

5. I have heard counsel for the parties at considerable length and gone through the records.

6. The Law Commission in its 59th report recommended adding section 13(2)(iii) to the Act wherein it provided an additional ground of divorce to the wife. The intent of introducing the said section was to give the wife the right to seek divorce if she has been neglected or not maintained by her husband after an order of maintenance has been passed in her favour. There was discussion with regard to the said provision being made available to the husband equally but it was concluded that such right would ultimately lead to the husband misusing the provision, who in the bid to get rid of his wife would abandon her and compel the

wife to move the court for the grant of maintenance and thereafter himself fully submit to the order of payment of maintenance knowing that he would be entitled to get a decree of divorce after the said period of one year has elapsed. Therefore the said provision was brought on the statute book to enable only the wife to seek a decree of divorce if after passing of the order of maintenance there has been no cohabitation for one year which would mean that the husband has ceased to value the society of the wife and their need for each others company has prima facie come to an end. Earlier it was suggested that the period under the section be of three years but later on it was reduced to one year as being appropriate. Thereafter Section 13(2)(iii) of the Hindu Marriage Act in its present form was introduced in the Act through the Marriage Laws (Amendment) Act, 1976 (Act 68 of 1976). Hence by virtue of the said provision, an additional ground of divorce has been made available to the wife to seek dissolution of her marriage by a decree of divorce on the ground that a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife either in a suit filed by the wife under Section 18 of the Hindu Adoptions and Maintenance Act or in the proceedings under Section 125 of the Code of Criminal Procedure and since the date of passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards. For better appreciation, Section 13(2) (iii) is reproduced as under:

> **''Section 13(2):** A wife may also present a petition for dissolution of her marriage by a decree of divorce on the ground,
>
> (iii) that in suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 , (78 of 1956 .) or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974 .) (or under the corresponding section 488 of the Code of Criminal Procedure, 1898), (5 of 1898 .) a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards;''

7. It would be evident from a plain reading of the above provision that for a wife to claim divorce under the said provision she is required to satisfy the following conditions:

(a) A decree or order has been passed in her favour and against the husband awarding maintenance to her either in a suit filed by her under Section 18 of the Hindu Adoptions and Maintenance Act or in the proceedings under Section 125 of the Code of Criminal Procedure; and

(b) That the wife has been living apart since passing of such a decree or order; and

(c) There has been no resumption of cohabitation between the parties for a period of one year or upwards.

Hence, in a petition filed by the wife under the said section if she is able to satisfy the aforesaid three conditions, then she would be entitled to a decree of divorce. In the facts of the case at hand, the contention raised by the counsel for the appellant is that the order which gives a right to the wife to seek divorce under the said section is a final order and not an interim order. The appellant had urged this ground for filing an application under order 7 rule 11 for rejection of the petition for divorce filed by the wife on the basis of the interim order dated 2.3.2005 under section 125 CrPC where the court while dismissing the said application vide order dated 13.11.2009 held that the word 'order' would include an interim order as well and the appellant herein had then challenged the order before this court in the revision petition which was also dismissed by this court vide order dated 17.12.2010 with the following observations:

> ''As per this Section, wife is entitled to file a petition for dissolution of marriage by a decree of divorce on the basis of proceedings under Section 125 Cr.P.C. wherein a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife. The word ''order'' appearing in this Section includes the interim order as well as the final order and does not speak only of the final order passed on a petition under Section 125 Cr.P.C. for seeking dissolution of marriage by a decree of divorce under the above provisions of law''

Admittedly, the above said order of this court was not challenged by the appellant and thus attained finality laying the controversy to rest to whether

the order under the said section would mean an interim order as well and the ground cannot be allowed to be reagitated by the appellant herein.

8. Even otherwise, a bare look at the section13(2)(iii) would manifest the intention of the legislature as two separate expressions have been used in the said Section i.e. 'decree' or 'order', which would necessarily mean either an interim or a final order. The intention of the legislature is to give a right to the wife to invoke the said provision in a case where even an interim order has been passed in either of the said proceedings, which is also clear from the language used in the said section beginning with the words *''in a suit under Section 18 of the Hindu Adoption and Maintenance Act, 1956 (78 of 1956), or in a proceeding under Section 125 of the Code of Criminal Procedure,* wherein the words *'in a suit or in a proceeding'* would clearly mean that the order passed during the pendency of the proceedings either under Section 18 or under Section 125 of the Code of Criminal Procedure. There is thus no room to interpret the said provision in a manner suggested by the counsel for the petitioner which otherwise would defeat the very purpose and object of the said section.

9. The essence of the said provision is that there should be no resumption of cohabitation between the parties for a period of one year or upwards from the date of the passing of such an order, so this one year gap has to be reckoned from the date of the passing of an order under Section 125 of the Code of Criminal Procedure or under Section 18 of the Hindu Adoptions and Maintenance Act and not necessarily a final order or decree. The section does not talk about the payment or non payment of the maintenance amount but of the non resumption of cohabitation of the parties. Clearly, in the facts of the present case the appellant had admitted that there was no resumption of cohabitation for a period of more than one year after the order dated 02.03.2005 under Section 125 Cr.P.C. was passed by the court of the learned Metropolitan Magistrate.

10. It is quite pertinent to note that section 13(2)(iii) talks about section 18 under the HAMA and section 125 Cr.PC, which are both the provisions for grant of maintenance available to the wife only unlike section 24 or 25 of the HMA wherein any party can approach the court for the grant of maintenance. It is thus manifest that the order of maintenance passed in the favour of the wife in her petition under section

18 HAMA or section 125 Cr.PC would make her available the right to file for divorce under section 13(2)(iii). If the contention of the counsel for the appellant is accepted and the order in the section is meant to be only a final order then the purpose of the said provision would be negated as the wife who seeks a decree of divorce under the said section would have to wait till a final order under section 18 or section 125, as the case may be, which would certainly mean insisting on an invariably long waiting period, which is certainly not the object of the said section. The only desideratum is that the parties have ceased to live together for one year or more and to save the wife from vagrancy she has a order or decree of maintenance in her favour. The judgments relied upon the counsel for the appellant would not be applicable to the facts of the case at hand as they sought to carve a different legal proposition altogether.

11. In the light of the above discussion, this court does not find any merit in the present appeal and the same is hereby dismissed.

ILR (2012) I DELHI 355
INCOME TAX APPEAL

THE COMMISSIONER OF INCOME TAX-X ....APPELLANT

VERSUS

SATISH KUMAR AGARWAL ....RESPONDENT

(SANJIV KHANNA AND R.V. EASWAR, JJ.)

INCOME TAX APPEAL NO. : 349/2011 **DATE OF DECISION: 08.11.2011**

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 matter poses little difficulty. In this case the assessee claimed deduction under Section 80HHC, inter alia, on the footing that the loss suffered by him in the export of trading goods need not be adjusted against the export incentives to the extent of 90% thereof. The question whether the loss has to be so adjusted has been settled in favour of the revenue by the judgment of the Supreme Court in the case of **IPCA Laboratory Ltd.**(supra). This judgment was rendered on 11th March, 2004. This was the law of the land and the ratio thereof ought to have been applied by the Assessing Officer while completing the assessment on 31st March, 2004. He, however, omitted to do so. Non-consideration of the judgment of the Supreme Court and non-application of

the ratio of the said judgment to the facts of the present case, with reference to the claim of the assessee under Section 80HHC, is a glaring, patent and obvious mistake of law which can be rectified by resort to section 154 of the Act. It is also to be noted that there is no dispute regarding the facts and no further investigation was required to gather any more facts. On the admitted facts, the applicability of the judgment of the Supreme Court (supra) was not capable of generating any elaborate or long-drawn process of argument. In fact, no such plea appears to have been taken by the assessee. The omission to apply the judgment of the Supreme Court was a glaring and obvious mistake of law. In the circumstances, the case is covered by the ratio of the ruling of the Supreme Court in **M.K.Venkatachalam, Income Tax Officer and Anr. Vs. Bombay Dyeing and Manufacturing Co. Ltd.** (1958) 34 ITR 143 where it was observed that a glaring and obvious mistake by law can be corrected under Section 154. In **Assistant Commissioner of Income-Tax v. Saurashtra Kutch Stock Exchange Ltd.,** (2008) 305 ITR 227 (SC) the Supreme Court held that where, after the Tribunal rendered its decision on appeal, a miscellaneous application was filed by the assessee under Section 254 (2) of the Income Tax Act stating that the order of the Tribunal required to be rectified on the ground that a judgment of the jurisdictional High Court was not brought to the notice of the Tribunal, there was a mistake apparent from the record which required rectification. In that case the Tribunal decided the appeal on 27.10.2000. A judgment of the Gujarat High Court in **Hiralal Bhagwati v. CIT** (2000) 246 ITR 188, which was the judgment of the jurisdictional High Court, was rendered a few months prior to the order of the Tribunal. However, the judgment was not brought to the attention of the Tribunal. An application under Section 254 (2) of the Income Tax Act was filed before the Tribunal requesting the Tribunal to rectify its order so as to bring it in conformity with the law laid down by the jurisdictional High Court. The Tribunal accepted the application which action was upheld by the Gujarat High Court in the judgment

reported as **CIT (Asst.) v. Saurashtra Kutch Stock Exchange Ltd.** (2003) 262 ITR 146. On appeal by the Revenue, the judgment of the Gujarat High Court (supra) was upheld by the Supreme Court holding that no error was committed by the Tribunal in rectifying the mistake. Though the facts of the case before the Supreme Court (supra) show that the rectification was made by the Tribunal on the basis of the judgment of the jurisdictional High Court, the ratio would apply to the present case with stronger force because in the present case the rectification has been done on the basis of a judgment of the Supreme Court which is binding under Article 141 of the Constitution of India. In our considered view, the judgment of the Supreme Court in **Saurashtra Kutch Stock Exchange Ltd.** (supra) applies a fortiori to the present case. **(Para 8)**

Important Issue Involved: Non consideration of the judgment of the Supreme Court and non application of the ratio of the said judgment to the facts of a case, with reference to the claim of the an assessee under Section 80HHC, is a glaring, patent and obvious mistake of law which can be rectified by resort to Section 154 of the Indian Income-Tax Act, 1961.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANT : Ms. Rashmi Chopra, Advocate.

FOR THE RESPONDENT : Ms. Bhakti Pasrija, Advocate.

CASES REFERRED TO:

1. *Shahbad Co-operative Sugar Mills Ltd.* vs. *Deputy Commissioner of Income-Tax,* (2011) 336 ITR 222 (P&H).
2. *Commissioner of Income-Tax and Another* vs. *Bindal Industries Ltd.,* (2010) 328 ITR 160 (All).
3. *Assistant Commissioner of Income-Tax* vs. *Saurashtra Kutch Stock Exchange Ltd.,* (2008) 305 ITR 227 (SC).

4. *IPCA Laboratory Ltd.* vs. *Deputy Commissioner of Income Tax* (2004) 266 ITR 520 (SC).

5. *CIT (Asst.)* vs. *Saurashtra Kutch Stock Exchange Ltd.* (2003) 262 ITR 146.

6. *Hiralal Bhagwati* vs. *CIT* (2000) 246 ITR 188.

7. *M.K.Venkatachalam, Income Tax Officer and Anr.* vs. *Bombay Dyeing and Manufacturing Co. Ltd.* (1958) 34 ITR 143.

RESULT: Allowed.

R.V. EASWAR, J.:

1. This is an appeal filed by the Revenue under Section 260A of the Income Tax Act (for short 'the Act') against the order dated 28th May, 2010 passed by the Income Tax Appellate Tribunal (for short ''Tribunal''), Delhi Bench ''G'' in IT Appeal No.1429/Del/2008 for the assessment year 2002-2003.

2. The respondent/assessee is an individual. He is engaged in the business of export and was accordingly entitled to the deduction under Section 80HHC of the Act. We are concerned with the assessment year 2002-2003. The assessee filed a return of income on 31st October, 2002 claiming deduction under the aforesaid section. An assessment was framed by the Assessing Officer by order dated 31st March, 2004 passed under Section 143(3) of the Act. In this order the Assessing Officer computed and allowed Rs.2,24,38,491/- as deduction under Section 80HHC.

3. After the completion of the assessment, a notice under Section 154 of the Act was issued by the Assessing Officer proposing to rectify the assessment order on the ground that the deduction allowed in the assessment order was incorrect to the extent of Rs.1,36,92,769/-. One of the grounds on which the Assessing Officer issued the notice under Section 154 of the Act was that the loss suffered by the assessee from the export of trading goods, amounting to Rs.68,37,193/- ought to have been adjusted against 90% of the export incentives under the proviso to Section 80HHC(3) and the omission to do so in the assessment order passed on 31st March, 2004 was a mistake apparent from the record which needed rectification.

4. The assessee objected to the notice under Section 154 of the Act on the ground that the issue proposed to be rectified was debatable and was not amenable to the jurisdiction conferred under Section 154 of the Act. The assessee also drew the attention of the Assessing Officer to several authorities on the point, which were in his favour. These contentions were however rejected by the Assessing Officer who passed the order under Section 154 of the Act on 1st July, 2005 reducing the deduction under Section 80HHC as per the working given in the said order. In short, the loss suffered in the export of trading goods was adjusted against the export incentives and deduction under Section 80HHC was reduced accordingly.

5. The assessee preferred an appeal before the CIT(Appeals) against the order passed by the Assessing Officer under Section 154 of the Act. The CIT(Appeals) agreed with the Assessing Officer and held that the provisions of Section 80HHC authorized the adjustment made by the Assessing Officer in the order passed by him under Section 154 of the Act and that in any case the issue was settled in favour of the Revenue by the judgment of the Supreme Court in the case of **IPCA Laboratory Ltd. vs. Deputy Commissioner of Income Tax** (2004) 266 ITR 520 (SC). He also referred to the amendment made to the aforesaid Section by the Taxation Laws Amendment Act, 2005 with retrospective effect from 1st April, 1998. He, thus, dismissed the assessee's appeal.

6. The assessee filed an appeal before the Tribunal against the order of the CIT(Appeals) and contended that the issue sought to be rectified by the Assessing Officer in the order passed under Section 154 of the Act was a debatable issue and hence cannot be rectified as a mistake apparent from the record. It was also submitted that the Assessing Officer had framed the assessment after due consideration of all the relevant aspects of Section 80HHC and, therefore, cannot resort to rectification proceedings under Section 154 of the Act. These contentions were accepted by the Tribunal which held by order dated 28th May, 2010 that the rectification order passed by the Assessing Officer under Section 154 of the Act was not valid, that it amounted to review by the Assessing Officer of his own assessment order and that there was no glaring, patent or obvious mistake apparent from the record. The Tribunal also observed that merely because there was a possible loss of revenue, the provisions of Section 154 of the Act cannot be invoked. In this view

of the matter, the Tribunal accepted the assessee's appeal and quashed the order passed by the Assessing Officer under Section 154 of the Act. In the view which the Tribunal took, it did not consider it necessary to examine the merits of the assessee's contentions.

7. The Revenue has filed the appeal against the aforesaid order passed by the Tribunal. The following substantial question of law is framed after hearing counsel for both the sides:-

> ''Whether on the facts and in the circumstances of the case, and having regard to the nature of the issue sought to be rectified, the Tribunal was right in law in quashing the order passed by the Assessing Officer under Section 154 of the Income Tax Act, 1961?

8. The matter poses little difficulty. In this case the assessee claimed deduction under Section 80HHC, inter alia, on the footing that the loss suffered by him in the export of trading goods need not be adjusted against the export incentives to the extent of 90% thereof. The question whether the loss has to be so adjusted has been settled in favour of the revenue by the judgment of the Supreme Court in the case of **IPCA Laboratory Ltd.**(supra). This judgment was rendered on 11th March, 2004. This was the law of the land and the ratio thereof ought to have been applied by the Assessing Officer while completing the assessment on 31st March, 2004. He, however, omitted to do so. Non-consideration of the judgment of the Supreme Court and non-application of the ratio of the said judgment to the facts of the present case, with reference to the claim of the assessee under Section 80HHC, is a glaring, patent and obvious mistake of law which can be rectified by resort to section 154 of the Act. It is also to be noted that there is no dispute regarding the facts and no further investigation was required to gather any more facts. On the admitted facts, the applicability of the judgment of the Supreme Court (supra) was not capable of generating any elaborate or long-drawn process of argument. In fact, no such plea appears to have been taken by the assessee. The omission to apply the judgment of the Supreme Court was a glaring and obvious mistake of law. In the circumstances, the case is covered by the ratio of the ruling of the Supreme Court in **M.K.Venkatachalam, Income Tax Officer and Anr. Vs. Bombay Dyeing and Manufacturing Co. Ltd.** (1958) 34 ITR 143 where it was

observed that a glaring and obvious mistake by law can be corrected under Section 154. In **Assistant Commissioner of Income-Tax v. Saurashtra Kutch Stock Exchange Ltd.,** (2008) 305 ITR 227 (SC) the Supreme Court held that where, after the Tribunal rendered its decision on appeal, a miscellaneous application was filed by the assessee under Section 254 (2) of the Income Tax Act stating that the order of the Tribunal required to be rectified on the ground that a judgment of the jurisdictional High Court was not brought to the notice of the Tribunal, there was a mistake apparent from the record which required rectification. In that case the Tribunal decided the appeal on 27.10.2000. A judgment of the Gujarat High Court in **Hiralal Bhagwati v. CIT** (2000) 246 ITR 188, which was the judgment of the jurisdictional High Court, was rendered a few months prior to the order of the Tribunal. However, the judgment was not brought to the attention of the Tribunal. An application under Section 254 (2) of the Income Tax Act was filed before the Tribunal requesting the Tribunal to rectify its order so as to bring it in conformity with the law laid down by the jurisdictional High Court. The Tribunal accepted the application which action was upheld by the Gujarat High Court in the judgment reported as **CIT (Asst.) v. Saurashtra Kutch Stock Exchange Ltd.** (2003) 262 ITR 146. On appeal by the Revenue, the judgment of the Gujarat High Court (supra) was upheld by the Supreme Court holding that no error was committed by the Tribunal in rectifying the mistake. Though the facts of the case before the Supreme Court (supra) show that the rectification was made by the Tribunal on the basis of the judgment of the jurisdictional High Court, the ratio would apply to the present case with stronger force because in the present case the rectification has been done on the basis of a judgment of the Supreme Court which is binding under Article 141 of the Constitution of India. In our considered view, the judgment of the Supreme Court in **Saurashtra Kutch Stock Exchange Ltd.** (supra) applies a fortiori to the present case.

9. The learned standing counsel for the Income Tax Department cited the judgment of the Allahabad High Court in **Commissioner of Income-Tax and Another v. Bindal Industries Ltd.,** (2010) 328 ITR 160 (All) and the judgment of the Punjab and Haryana High Court in **Shahbad Co-operative Sugar Mills Ltd. v. Deputy Commissioner of Income-Tax,** (2011) 336 ITR 222 (P&H). The Allahabad High Court (supra) held that the law declared by the Supreme Court is binding on

every court and authority and any decision taken earlier which is contrary to the law declared by the Supreme Court can be rectified under Section 154 of the Act. The Punjab and Haryana High Court (supra) also took the same view. These two judgments support the rectification order passed in the present case by the Assessing Officer.

10. We are, accordingly, unable to agree with the view taken by the Tribunal that there was no mistake apparent from the record requiring rectification. We, therefore, reverse the decision of the Tribunal and answer the substantial question of law in the negative and in favour of the Revenue and against the assessee.

11. The appeal of the revenue is allowed with no order as to costs.

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THE COMMISSIONER OF INCOME TAX DELHI-IV, NEW DELHI **....APPELLANT**

VERSUS

EON TECHNOLOGY P. LIMITED **....RESPONDENT**

(SANJIV KHANNA AND R.V. EASWAR, JJ.)

INCOME TAX APPEAL NO. : 1167/2011 **DATE OF DECISION: 08.11.2011**

The Income Tax Act, 1961—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.

Important Issue Involved: The test which is to be applied to determine "business connection" is to examine the activities in India and whether the said activities have contributed to the business income earned by the non resident, which has accrued, arisen or received outside India. The business connection must be real and intimate from which the income had arisen directly or indirectly. The question of business connection, therefore, has to be decided on facts found by Assessing Officer (or in the appellate proceedings).

[Ar Bh]

APPEARANCES:

FOR THE APPELLANT : Mr. Sanjeev Sabharwal, Advocate.

FOR THE RESPONDENT : Mr. Sail Aggarwal and Mr. Prakash Chand, Advocates.

CASES REFERRED TO:

1. *GE India Techonology Centre (P) Ltd.* vs. *CIT* (2010) 327 ITR 456.
2. *Commissioner of Income Tax, New Delhi* vs. *Eli Lilly and Company (India) Private Ltd.,* (2009) 15 SCC 1.
3. *Ishikawajma-Harima Heavy Industries ltd.* vs. *Director of income Tax,* Mumbai (2007) 3 SCC 481].
4. *Transmission Corporation of Andhra Pradesh* vs. *CIT,* (1999) 239 ITR 587 (SC).
5. *C.I.T.* vs. *Toshoku Limited,* (1980) 125 ITR 525 (SC).
6. *Carborandum & Co.* vs. *CIT* (1977) 2 SCC 862.
7. *CIT* vs. *R.D. Aggarwal and Company* (1965) 56 ITR 20 (SC).

RESULT: Dismissed.

SANJIV KHANNA, J.

1. Revenue in the present appeal under Section 260A of the Income Tax Act, 1961, (Act, for short) has raised the following substantial question of law:-

> ''Whether Income Tax Appellate Tribunal has erred in upholding the order of the CIT(A) deleting the addition of Rs.33,36,068/- made by the Assessing Officer under section 40(a)(i) of the Income Tax Act, 1961?''

2. The respondent assessee EON Technology Pvt. Ltd. is a private limited company engaged in business of development and export of software. During the relevant assessment year 2007-08, the assessee had paid commission of Rs.33,36,068/- to its parent/holding company EON Technologies, U.K., (ETUK, for short) on the sales and amounts realized on export contracts procured by ETUK for the respondent assessee. There is no dispute about the nature and on what account commission has been paid. The quantum etc. and the fact that ETUK was entitled to said payment is not doubted or disputed.

3. The contention and question raised by the Revenue is that the commission income of Rs.33,36,068/- earned by ETUK had accrued in India or was deemed to accrued in India and, therefore, the respondent assessee was liable to deduct tax at source and as there was failure, the said expenditure should be disallowed under Section 40(a)(ia) of the Act. The relevant portion of the assessment order reads:-

> ''There are express provisions of the IT Act that provide for taxation of any part of income that accrues or arises or deemed to accrue or arise in India. When one states 'accrual of income' it is basically an absolute concept when both the situs and receipt of such income is within the territories of the country. However, if such conditions are not met fully and completely, then the deeming concept comes into play. As per previous judicial pronouncement, it has been clearly established that income can be said to be received when it reaches the assessee but it can be said to have ''accrued'' or ''arisen'' immediately when the right to receive the said income becomes vested in the assessee. By performing the functions as envisaged in the agreement, the ETUK has earned the right to receive the income, thereby attracting the provisions of section 5 of the Act. It has further been stated vide various judicial pronouncement including in the case of **CIT Vs. Punjab Tractors Cooperative Multipurpose Society Ltd** that in the case of rendering of services, income would accrue at the time of such rendering of services. As per the agreement of ETUK is the sole selling and marketing agent for the assessee, which means ETUK is rendering the service of selling which has enabled him to earn the right to receive the income from ET India, i.e. the assessee. Since such receipts situs/origin in India, this portion of income becomes liable to be taxed in India. It shall not out of place to mention that the place of accrual of income is the place where right to receive that income arises with the corresponding liability of the prayer to make the payment of the same there. The assessee's statement that since no operation/ business are carried out in the taxable territories of India then the income accruing abroad through on any business connection in India cannot be deemed to accrue or arising in India, does not hold any water as the source of such income arising to ETUK is its business connection with the assessee company in India i.e.

the source is situate wholly and completely within territories of India.

Another contention of the assessee regarding that that this commission payment is remitted directly to ETUK and is therefore not received in India is also not tenable since receipt and right to receive are two distinct concepts both of which cannot be used interchangeably. Here the ETUK may not have received the amount in India but due to its business connection in India, ETUK has earned the right to receive this income ''deemed to accrue" and thereby becoming liable to be taxed in India of the portion that accrues or arises in India.''

(emphasis supplied)

4. The reasoning of the Assessing Officer is confusing, laconic and not clear. In the first paragraph of the assessment order quoted above it has been held that the right to receive income by ETUK had situs or origin in India. It is stated that the place of accrual of income was in India as payment was made from India and, therefore, it is deemed to be received in India. In the first paragraph towards the end, the Assessing Officer has held that that the source of income by way of commission earned by ETUK has business connection with the respondent-assessee in India i.e. the source was situated wholly and completely within the territory of India. The second paragraph refers to business connection and principle of deemed accrual.

5. Thus, on one hand, it was held that the commission income paid to ETUK had accrued or arisen in India and the said ETUK had right to receive income in India, since the situs/origin is in India but it is also averred that ETUK had business connection with the respondent assessee in India.

6. Concept of deemed accrual of income is different from income accruing, arising or received in India. When income accrues, arises or is received in India by a non resident, it is taxable in India. Income which is deemed to accrue or arise in India under the Act is taxable in India even though such income has not actually accrued, arisen or received in India.

7. To appreciate the legal position, Section 5(2) of the Act is reproduced below:-

''Section 5 (2): Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which —

(a) Is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) Accrues or arises or is deemed to accrue or arise to him in India during such year.

Explanation 1 : Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2 : For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India."

8. It is apparent from the Section 5(2) of the Act that total income of previous year of a person, who is a non-resident, is chargeable to tax in India if it is received or is deemed to be received in India or accrues or arises or is deemed to accrue or arise to him in India. Explanation 1 to the said section stipulates that income accruing or arising outside India shall not be deemed to be received in India within the meaning of the said section by reason of the fact that it is taken into account in the balance sheet prepared in India. Explanation 1 is a complete answer to the observations of the Assessing Officer that commission income had accrued, arisen or was received by ETUK in India because it was recorded in the books of respondent assessee in India or was paid by the respondent assessee situated in India. This aspect has been also examined below while dealing with the question of deemed accrual.

9. Section 9 of the Act postulates and states when income is deemed to arise in India. The Assessing Officer has not mentioned any specific provision of Section 9 but it appears that he had invoked Section 9(1)(i) of the Act which for the sake of convenience is reproduced below:-

''9. Income deemed to accrue or arise in India.—

(1) The following incomes shall be deemed to accrue or arise in Indiaù (i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

Explanation 1.ùFor the purposes of this clause—

(a) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India;

(b) in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export;

(c) in the case of a non-resident, being a person engaged in the business of running a news agency or of publishing newspapers, magazines or journals, no income shall be deemed to accrue or arise in India to him through or from activities which are confined to the collection of news and views in India for transmission out of India;

(d) in the case of a non-resident, being—

(1) an individual who is not a citizen of India; or

(2) a firm which does not have any partner who is a citizen of India or who is resident in India; or

(3) a company which does not have any shareholder who is a citizen of India or who is resident in India, no income shall be deemed to accrue or arise in India to such individual, firm or company through or from operations which are confined to the shooting of any cinematograph film in India;

Explanation 2.—For the removal of doubts, it is hereby declared that 'business connection' shall include any business activity

carried out through a person who, acting on behalf of the non-resident,—

(a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the non-resident; or

(b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or

(c) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident:

Provided that such business connection shall not include any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status is acting in the ordinary course of his business:

Provided further that where such broker, general commission agent or any other agent works mainly or wholly on behalf of a non-resident (hereafter in this proviso referred to as the principal non-resident) or on behalf of such non-resident and other non-residents which are controlled by the principal non-resident or have a controlling interest in the principal non-resident or are subject to the same common control as the principal non-resident, he shall not be deemed to be a broker, general commission agent or an agent of an independent status.''

10. For the said provision to apply, the Assessing Officer was required to examine whether the said commission income is accruing or arising directly or indirectly from any business connection in India. The Assessing Officer has not dealt with or examined the said aspect but has merely recorded that the payment made to ETUK was taxable in India because of its ''business connection''. The Assessing Officer did not elaborate or has not discussed on what basis he had come to the conclusion that ''business connection'' as envisaged under Section 9(1)(i) existed.

On this aspect, we may note that the respondent assessee had submitted that ETUK was a non resident company and did not have any permanent establishment in India. ETUK was not rendering any service or performing any activity in India itself. These facts are not and cannot be disputed. Explanation 2 has not been invoked or relied upon by the Revenue. Factual matrix in respect of Explanation 2 has not been referred to or examined by the Assessing Officer and is not on record.

11. Commissioner of Income Tax (Appeals) relied upon two circulars issued by the Central Board of Direct Taxes being Circular No. 23 dated 23rd July, 1969 and Circular No. 786 dated 7th February, 2000, reported in [2000] 241 ITR 132 (St.). The relevant portion of the said circulars, for the sake of convenience are quoted below:-

Circular No.23 dated 23.07.1969

''Foreign Agents of India Exports-Where a foreign agents of India exporter operates in his own country and his commission is usually remitted directly to m/him and is, therefore, not received by him or on his behalf in India. Such an agent is not liable to income-tax in India on the commission''

Circular No.786 dated 07.02.2000

''As clarified earlier in circular No.23 dated 23-7-1969 (see under section (5) where the non-resident agent operates outside the country, no part of his income arises in India, and since the payment is usually remitted directly abroad, it cannot be held to have been received by or on behalf of agent in India. Such payments were therefore, held to be not taxable in India. This clarification still prevails. In view of the fact that the relevant sections [section 5(2) and section 9] have not undergone and change in this regard. No tax is therefore deductible under section 195 from export commission and other related charges payable to such a non-resident for services rendered outside India.''

12. On the said aspect we may refer to the decision of the Supreme Court in **C.I.T. vs. Toshoku Limited,** (1980) 125 ITR 525 (SC). This case relates to the assessment year 1962-63. The Indian assessee had paid commission to two foreign companies through whom they had procured export orders. Questions arose; what was the effect of the

entries in the books of accounts of the Indian assessee which had resulted in debit and credit entries on account of commission and secondly, whether procurement of export orders by the foreign companies for the Indian company had resulted in a business connection. Two contentions were rejected by the Supreme Court inter-alia recording as under:-

''It cannot be said that the making of the book entries in the books of the statutory agent amounted to receipt by the assessees who were non-residents as the amounts so credited in their favour were not at their disposal or control. It is not possible to hold that the non-resident assessees in this case either received or can be deemed to have received the sums in question when their accounts with the statutory agent were credited, since a credit balance, without more, only represents a debt and a mere book entry in the debtor's own books does not constitute payment which will secure discharge from the debt. They cannot, therefore, be charged to tax on the basis of receipt of income actual or constructive in the taxable territories during the relevant accounting period.

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In the instant case, the non-resident assessees did not carry on any business operations in the taxable territories. They acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to an operation carried out by the assessees in India as contemplated by cl. (a) of the Explanation to s. 9(1)(i) of the Act. The commission amounts which were earned by the non-resident assessees for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India. The High Court was, therefore, right in answering the question against the department.''

13. The aforesaid decision is a complete answer to the contention raised by the Revenue and as mentioned in the assessment order that commission income had accrued and arisen in India when credit entries were made in the books of the respondent assessee in favour of the ETUK and the said income towards commission was received in India.

As noticed above, the stand of the Revenue is contrary to the two circulars issued by the CBDT in which it is clearly held that when a non-resident agent operates outside the country no part of his income arises in India, and since payment is remitted directly abroad, and merely because an entry in the books of accounts is made, it does not mean that the non-resident has received any payment in India. This fact alone does not establish business connection. In Circular No. 786 dated 7th February, 2000, it has been stated that in such cases, the Indian assessee is not liable to deduct TDS under Section 195 of the Act from the commission and other related charges payable to such a non-resident having rendered service outside India.

14. The term ''business connection'' has been interpreted by the Supreme Court to mean something more than mere business and is not equivalent to carrying on business, but a relationship between the business carried on by a non-resident, which yields profits and gains and some activities in India, which contributes directly or indirectly to the earning of those profits or gains. It predicates an element of continuity between the business of the non-resident and the activity in India [**CIT Vs. R.D. Aggarwal and Company** (1965) 56 ITR 20 (SC), **Carborandum & Co. Vs. CIT** (1977) 2 SCC 862 and **Ishikawajma-Harima Heavy Industries ltd. Vs. Director of income Tax, Mumbai** (2007) 3 SCC 481]. The test which is to be applied is to examine the activities in India and whether the said activities have contributed to the business income earned by the non-resident, which has accrued, arisen or received outside India. The business connection must be real and intimate from which the income had arisen directly or indirectly. The question of business connection, therefore, has to be decided on facts found by Assessing Officer (or in the appellate proceedings). In the present case, facts found by the Assessing Officer do not make out a case of business connection as stipulated in Section 9(1) (i) of the Act. There is hardly any factual discussion on the said aspect by the Assessing Officer. He has not made any foundation or basis for holding that there was business connection and, therefore, Section 9(1)(i) of the Act is applicable. Appellate authorities, on the basis of material on record, have rightly held that ''business connection'' is not established.

15. The scope and ambit of Section 195 of the Act has been explained by the Supreme Court in **GE India Techonology Centre (P) Ltd. vs. CIT** (2010) 327 ITR 456. In the said case the expression ''any other sum chargeable under the provisions of the Act'' in Section 195 of the Act was elucidated and explained. It was held that if payment is made in respect of the amount which is not chargeable to tax under the provisions of Act, tax at source (TDS, for short) is not liable to be deducted. Decision of Supreme Court in **Transmission Corporation of Andhra Pradesh vs. CIT,** (1999) 239 ITR 587 (SC), operates and is applicable when the sum or payment is chargeable to tax under the provisions of the Act. In such cases, TDS has to be deducted on the gross amount of payment made and not merely on the taxable income included in the gross amount. The said decision would not apply in case payment is made but the said sum in entirety is not chargeable or exigible to tax under the provisions of the Act. The said distinction has been rightly understood by the first appellate authority and the ITAT and correctly applied by them.

16. It will be appropriate to refer to the following observations of the Supreme Court in the **Commissioner of Income Tax, New Delhi Vs. Eli Lilly and Company (India) Private Ltd.,** (2009) 15 SCC 1, wherein it has been observed :-

> ''**60.** Under the 1961 Act, total income for the previous year is chargeable to tax under Section 4. Section 4(2) inter alia provides that in respect of income chargeable under Section 4(1), income tax shall be deducted at source where it is so deductible under any provision of the 1961 Act. Section 192(1) falls in the machinery provisions. It deals with collection and recovery of tax. That provision is referred to in Section 4(2). Therefore, if a sum that is to be paid to the non-resident is chargeable to tax, tax is required to be deducted. *The sum which is to be paid may be income out of different heads of income* mentioned in Section 14, that is to say, income from *salaries*, income from house property, profits and gains of business, capital gains and income from other sources.
>
> **61.** The scheme of the TDS provisions applies not only to the amount paid, which bears the character of ''income'' such as salaries, dividends, interest on securities, etc. but the said provisions also apply to gross sums, the whole of which may not be income or profits in the hands of the recipient, such as

payment to contractors and sub-contractors.

62. The purpose of TDS provisions in Chapter XVII-B is to see that the sum which is chargeable under Section 4 for levy and collection of income tax, the payer should deduct tax thereon at the rates in force, if the amount is to be paid to a non-resident. The said TDS provisions are meant for tentative deduction of income tax subject to regular assessment. (See Transmission Corpn. of A.P. Ltd. v. CIT, SCC pp. 273-74, para 10 : ITR pp. 594-95.)''

(emphasis supplied)

It was thereafter lucidly clarified:-

''73. On the question as to whether there is any interlinking of the charging provisions and the machinery provisions under the 1961 Act, we may, at the very outset, point out that in **CIT v. B.C. Srinivasa Setty** this Court has held that:

''10. ... the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section.''

We may add that, the 1961 Act is an integrated code and, as stated hereinabove, Section 9(1) integrates the charging section, the computation provisions as well as the machinery provisions. (See Section 9(1)(i) read with Sections 160, 161, 162 and 163.)

74. In the present case, it has been vehemently urged that TDS provisions being machinery provisions are independent of the charging provisions whereas as held by this Court in **B.C. Srinivasa Setty,** the 1961 Act is an integrated code.

75. To answer the contention herein we need to examine briefly the scheme of the 1961 Act. Section 4 is the charging section. Under Section 4(1), total income for the previous year is chargeable to tax. Section 4(2) inter alia provides that in respect of income chargeable under sub-section (1), income tax shall be deducted at source whether it is so deductible under any provision

of the 1961 Act which inter alia brings in the TDS provisions contained in Chapter XVII-B. In fact, if a particular income falls outside Section 4(1) then TDS provisions cannot come in.

76. Under Section 5, all residents and non-residents are chargeable in respect of income which accrues or is deemed to accrue in India or is received in India. Non-residents who are not assessable in respect of income accruing and received abroad are rendered chargeable under Section 5(2)(b) in respect of income deemed by Section 9 to accrue in India.''

(emphasis supplied)

17. After referring to **Eli Lilly** (supra) in **GE India Technology Centre Private Limited** (supra), it has been held:

''17. Section 195 appears in Chapter XVII which deals with collection and recovery. As held in **CIT v. Eli Lilly & Co. (India) (P) Ltd.** the provisions for deduction of TAS which is in Chapter XVII dealing with collection of taxes and the charging provisions of the IT Act form one single integral, inseparable code and, therefore, the provisions relating to TDS applies only to those sums which are ''chargeable to tax'' under the IT Act. It is true that the judgment in Eli Lilly was confined to Section 192 of the IT Act. However, there is some similarity between the two. If one looks at Section 192 one finds that it imposes statutory obligation on the payer to deduct TAS when he pays any income ''chargeable under the head 'Salaries'''. Similarly, Section 195 imposes a statutory obligation on any person responsible for paying to a non-resident any sum ''chargeable under the provisions of the Act'', which expression, as stated above, does not find place in other sections of Chapter XVII. It is in this sense that we hold that the IT Act constitutes one single integral inseparable code. Hence, the provisions relating to TDS applies only to those sums which are chargeable to tax under the IT Act.

18. If the contention of the Department that any person making payment to a non-resident is necessarily required to deduct TAS then the consequence would be that the Department would be entitled to appropriate the monies deposited by the payer even if

the sum paid is not chargeable to tax because there is no provision in the IT Act by which a payer can obtain refund. Section 237 read with Section 199 implies that only the recipient of the sum i.e. the payee could seek a refund. It must therefore follow, if the Department is right, that the law requires tax to be deducted on all payments. The payer, therefore, has to deduct and pay tax, even if the so-called deduction comes out of his own pocket and he has no remedy whatsoever, even where the sum paid by him is not a sum chargeable under the Act. The interpretation of the Department, therefore, not only requires the words ''chargeable under the provisions of the Act'' to be omitted, it also leads to an absurd consequence. The interpretation placed by the Department would result in a situation where even when the income has no territorial nexus with India or is not chargeable in India, the Government would nonetheless collect tax. In our view, Section 195(2) provides a remedy by which a person may seek a determination of the ''appropriate proportion of such sum so chargeable'' where a proportion of the sum so chargeable is liable to tax.''

18. In view of the aforesaid discussions, it has to be held that there is no error in the findings recorded by the Commissioner of Income Tax (Appeals) which have been upheld in the impugned order by the ITAT. We do not find any merit in the present appeal and the same is dismissed. No costs.

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RC REV.

PUNJAB BEARING TRADERS ....PETITIONER

VERSUS

MOHAMMAD JAMEEL KHAN LODHI ....RESPONDENT

(INDERMEET KAUR, J.)

RC. REV. NO. : 32/2010 DATE OF DECISION: 16.11.2011

Delhi Rent Control Act, 1958—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.

Important Issue Involved: Summons sent to a tenant in an eviction petition under Section 14 (1) (e) of Delhi Rent Control Act as per format prescribed in third schedule mentioning on top of summons next date of hearing does not take away the text of what is contained in the body of the summons which clearly informs the tenant that he must on affidavit within 15 days of the receipt of these summons file an application for leave to contest the eviction petition failing which the eviction petition shall stand decreed in favour of the applicant/landlord.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Satinder S. Gulati, Advocate.

FOR THE RESPONDENT : Mr. Rajat Aneja, Advocate with Ms. Shweta Singh and Mr. Vibhav Jairaj, Advocates.

CASES REFERRED TO:

1. *Rani Aloka Dudhoria and Ors.* vs. *Goutam Dudhoria & Ors.* (2009) 13 SCC 569.
2. *Hamza Haji* vs. *State of Kerala and Anr.* (2006) 7 SCC 416.
3. *Ram Chandra Singh* vs. *Savitri Devi & Ors.,* (2003) 8 SCC 319.

RESULT: Disposed of.

INDERMEET KAUR, J. (Oral)

1. The order impugned before this court is the order dated 18.9.2009 wherein the eviction petition filed by the landlord under Section 14(1)(e) of the Delhi Rent Control Act (hereinafter referred to as 'the DRCA) had been decreed; the application for leave to defend filed by the tenant had been dismissed.

2. Record shows that an eviction petition seeking eviction of the tenant under Section 14(1)(e) of the DRCA had been filed. Summons in terms of the impugned order had been served upon the defendant on 18.07.2009. Contention of the petitioner before this court is that a perusal of the summons clearly shows that there was a next date of hearing mentioned therein which was noted as 08.09.2009; the 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 a confusion in his mind which had been deliberately created which in turn amounts to a fraud. Learned counsel for the petitioner has placed reliance upon the judgments of the Apex Court reported in (2003) 8 SCC 319 titled as **Ram Chandra Singh vs. Savitri Devi & Ors.,** (2009) 13 SCC 569 titled as **Rani Aloka Dudhoria and Ors. vs. Goutam Dudhoria & Ors.** as also another judgment of the Apex Court reported in (2006) 7 SCC 416 titled as **Hamza Haji vs. State of Kerala and Anr.** to support his submission that the commission of a fraud on the court and suppression of material facts are core issues which vitiate every solemn act; fraud and justice never dwell together; the summons amounting to a fraud, did not amount to a valid service; impugned order in these circumstances not entertaining the application for leave to defend of the tenant holding that it was filed beyond the period of 15 days which period was counted with effect from 18.07.2009 suffers from a clear infirmity.

3. It is submitted that this summons are even otherwise defective as they were not in prescribed format which has been prescribed in the third Schedule of the DRCA; there is a format which does not mention any next date of hearing; in these summons next date of hearing had been noted as 08.09.2009 which had led to the confusion as the defendant is a lay person. Reliance has also been placed upon the judgment reported in 1996 RLR 71 tiled as **Abdul Salam vs. Hans Raj** to support his submission that summons which are not in prescribed format do not amount to a valid service. Further submission being that even otherwise

the bona fide requirement of the petitioner had not been made out and this is clear from the perusal of the eviction petition.

4. Arguments have been rebutted. It is pointed that the application for leave to defend has not been filed within the stipulated period; the averments made in the eviction petition are deemed to be admitted and the landlord is entitled to a decree forthwith; reliance has been placed upon the judgment of the Apex Court reported in 2010 RLR 15(SC) titled as **Pritpal Sigh Vs. Satpal Singh** to support this submission.

5. Record shows that the impugned order in no manner suffers from any infirmity. The summons sent to the petitioner are in the format which has been prescribed in the third Schedule of the Delhi Rent Control Act. The name, description, place of residence of the tenant had been mentioned in these summons; these summons clear state that an eviction petition under section 14(1)(e) of the DRCA has been filed and the respondent/petitioner is directed to appear before the controller within 15 days of service thereof and to obtain leave of the controller to contest the application for eviction on the aforesaid ground; in default the applicant would be entitled at any time after the expiry of the period of 15 days to obtain an order of eviction. It further states that the leave to appear and contest the application may be obtained on an application to the controller which to has be submitted on an affidavit as referred to in Sub-Section 5 of Section 25B; the date of the summons has been mentioned as 18.07.2009.

6. The summons are in the correct format and in strict compliance of the requirements of the summons. Submission of the petitioner that on the top of the summons the date of 08.09.2009 has been mentioned was in fact a fraud which had been played upon him as this had led to confusion in his mind and he had appeared only on 08.09.2009 is an argument clearly without any merit; the next date of 08.09.2009 written on the top of the summons states that it is the next date of hearing; that does not take away the text of what is contained in the body of the summons which has clearly noted the contents as (supra) informing the tenant that he must on affidavit within 15 days of the receipt of these summons file an application for leave to contest the eviction petition which has been filed under Section 14(1)(e) of the DRCA failing which the eviction petition shall stand decreed in favour of the applicant/landlord. It is also an undisputed fact that alongwith these summons the eviction

petition had also been served upon the petitioner as 11 pages had been served upon the petitioner; this has also been noted by the Trial Court. This summon sent cannot be said to be a fraud which has been committed by the petitioner. The aforenoted judgments relied upon by the petitioner in this context are thus wholly inapplicable; the judgment of **Abdul** (supra) is also not application. This was a case where the court had noted that in the summons where two dates were required to be mentioned only one date was mentioned; further the summons were incomplete as the number of premises in question was not given; further the eviction petition and site plan were also not delivered to the petitioner alongwith the summons; the seal of the court was not clear; facts of the said case are distinct and are not applicable.

7. Petition is without any merit; it is dismissed.

ILR (2012) I DELHI 382
CM (M)

CHITRA **....PETITIONER**

VERSUS

PANKAJ KASHYAP **....RESPONDENT**

(KAILASH GAMBHIR, J.)

CM (M) NO. : 1344/2011 &
CM (M) NO. : 20851/2011 **DATE OF DECISION: 18.11.2011**

Constitution of India, 1950—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.

Important Issue Involved: If a Family Court feels that there is some averment lacking in the application for interim maintenance, then it should give fresh opportunity to the petitioner to file a fresh affidavit disclosing her income and her exact financial status and even the Court has ample powers to take the statements of the parties under Order X CPC and even the parties could have been directed to file affidavit in terms of Form No. 16A Appendix E under Order XXI Rule 41 (2) of the CPC.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Vineet Mehta, Advocate.

FOR THE RESPONDENT : Nemo.

CASE REFERRED TO:

1. *Smt.Satish Bindra* vs. *Surjit Singh Bindra* AIR1977P&H383.

RESULT: Disposed of.

KAILASH GAMBHIR, J.(Oral):

1. By this petition filed under Article 227 of the Constitution of India, the petitioner seeks to challenge the order dated 1.9.2011 passed by the learned Family Court, whereby the application of the petitioner under Section 24 of the Hindu Marriage Act to seek interim maintenance during the pendency of the divorce petition was dismissed.

2. Arguing for the petitioner, learned counsel Mr. Vineet Mehta submits that the learned Family Court has dismissed the said application of the petitioner only on the ground that the petitioner in her application has nowhere stated that she is not earning anything or the income earned by her is not sufficient for her to support herself. Counsel submits that the learned family court also observed in the impugned order that the petitioner was even silent about whether she is getting any income out of any job or any profession and she was also silent about the expenses which she has to bear for her sustenance. The contention raised by the counsel for the petitioner is that in para 5 of the application under Section 24 of the Hindu Marriage Act, the petitioner clearly disclosed that the respondent husband has neglected and refused to maintain her and malafidely never provided any kind of maintenance allowance to her. Counsel further submits that in the divorce petition under section 13(1)(ia), the petitioner in para 36 has clearly disclosed that she is financially dependent on her parents after she was ousted from her matrimonial home. The submission of the counsel for the petitioner is that merely because the petitioner in her application did not specifically plead that she was not having any independent income for her sustenance, it should not have deprived the petitioner for the grant of maintenance amount as the total reading of the averments made by her in the divorce petition as well as in her Section 24 application it was manifest that the petitioner has

stated that she is financially dependent on her parents which would clearly mean that the petitioner has no independent source of income. Counsel also submits that in the absence of any specific averments made by the petitioner in her application, the learned Family Court could have given a fresh opportunity to the petitioner to file a better affidavit or could have taken statement of the parties under Order X of CPC so as to know the correct financial status of the parties, instead of dismissing the application of the petitioner by adopting such a hyper technical approach.

3. I have heard learned counsel for the petitioner at considerable length and gone through the impugned order passed by the learned Family Court.

4. In the present case, the petitioner had filed a divorce petition under Section 13(1) (ia) of the Hindu Marriage Act to seek dissolution of her marriage with the respondent. Simultaneously, the petitioner had also filed an application under section 24 of the HMA seeking Rs.75,000/-towards interim maintenance and Rs.22,000/-as litigation expenses. In para 36 of the divorce petition, the petitioner has clearly averred that for her sustenance she was dependent upon her parents after she was ousted from her matrimonial house and in para 5 of the application under section 24 , the petitioner had clearly averred that her husband has neglected and refused to maintain the petitioner and in fact had deliberately and malafidely never provided any maintenance allowance to her. She has also stated that the income of the respondent is Rs. 1.5 per month and that she is also entitled to maintain the same standard of living as maintained by the respondent and the respondent is legally, socially and morally bound to maintain the petitioner and the respondent has no other liability except to maintain the petitioner. In reply to the said application the respondent has taken a stand that the petitioner is B.A and is earning an income to the tune of Rs.35,000/-per month and is thus not entitled to the grant of interim maintenance.

5. The learned trial court has dismissed the application of the petitioner merely on the ground that the petitioner has nowhere stated in the application that the she is unable to maintain herself and is thus not entitled to maintenance. No doubt the petitioner ought to have made a specific averment in the application to plead that she has no independent source of income in terms of the requirement of Section 24 of the Hindu Marriage Act, but nevertheless a mere omission on the part of the petitioner

cannot deny her the said relief of interim maintenance. The language of Section 24 of the Hindu Marriage Act is quite clear as it envisages that where in any proceeding under this Act, it appears to the court that either the wife or the husband has no independent source of income sufficient for her or his support, the court may pass order granting interim maintenance to the applicant spouse. Although, the said provision uses the word may which does not bind the court to grant maintenance to the applicant but through judicial pronouncements the courts have set a judicial trend regarding the manner in which Section 24 applications are decided, the factors to be taken into account in granting maintenance, the quantum, the date of grant of maintenance, etc. which have attained a crystalised legal position.

6. Section 24 is a discretionary relief to be given by the court. This discretion has to be exercised on sound judicial principles and reasoning and not in an arbitrary manner. It is a common tendency for the parties to hide their actual income to escape the liability of paying maintenance amount to the totally dependent spouse and it is then the court has to satisfy itself and call for proof in case of rival claims of the parties. The learned Family Court in the present case has adopted a hyper technical approach by dismissing the petition on the ground that the petitioner had not stated that she did not have any independent source of income whereas in the reply the respondent has claimed that the petitioner has a monthly income sufficient to support herself. The learned court should have dug a little deeper in calling for the rejoinder of the petitioner or affidavit or further proof required to be adduced so as to able to decide the application on merits rather than dismissing it on procedural niceties. Here it would be relevant to the judgment of eth Punjab & Haryana High court in the case of **Smt.Satish Bindra vs. Surjit Singh Bindra** AIR1977P&H383 wherein the court held as under:

> ‘‘3. Mr. Gurbachan Singh, who appears for the petitioners, has laid particular emphasis on the fact that a copy of an agreement executed earlier between the parties was on the record of the case before the trial Court in which the husband had agreed to pay to the petitioner Rs. 700 per mensem on account of maintenance. The factum of the copy of the agreement being on the record of the trial Court is denied by the learned counsel for the husband. Be that as it may, it is clear that the trial Court has not passed any order in accordance with law on the application

of the petitioner. If the averments of the petitioner contained in her affidavit were not considered enough, she should have been afforded an opportunity to give supplementary affidavit or affidavits on any point required by the Court or if the Court so required even to lead evidence in the course of a summary inquiry, at the end of which proper order should have been passed. Since the order is not supported by any reason and does not discuss the pros and cons of the rival versions of the parties relating to the quantum of income of the husband, I have to set aside the order of the trial Court.''

In the present case as well, the order is not supported by any reasons and the application has been dismissed in an obscure manner. Even if the learned Family Court had felt that the there was some averment lacking in the application, then it should have given fresh opportunity to the petitioner to file a fresh affidavit disclosing her income and her exact financial status and even the court has ample powers to take the statements of the parties under Order X of the CPC and even the parties could have been directed to file affidavit in terms of Form No.16-A Appendix E under Order XXI Rule 41(2) of the CPC. No such recourse was adopted by the Family Court and instead has dismissed the application of the petitioner denying her the right of interim maintenance and also forcing her to approach this court to file present petition.

7. The power of the High Court under Article 227 of the Constitution of India is to keep the inferior courts and tribunals into their bounds and see that they have exercised their duty in a legal manner. The High court can interfere in the orders of erroneous assumption, errors apparent on the face of record, arbitrary or capricious exercise of discretion, a patent error in procedure or arriving at a finding based on no material. The court finds the present case fir to exercise its jurisdiction under Article 227 and if not exercised it would lead to a grave miscarriage of justice. This court is constrained to observe that the approach adopted by the learned Family Court is totally insensitive which is not expected of a court discharging the functions of a family court, where more humane and sensitive approach is required. The injudicious approach of the learned Family Court is not appreciated.

8. In the light of the foregoing, this Court is of the view that the facts of the case do not necessitate directing notice upon the respondent.

The matter is accordingly remanded to the learned Family Court for fresh decision on the application of the petitioner. The petitioner is directed to file a better affidavit disclosing her correct financial status in the said affidavit. The learned Family Court shall decide the said application of the petitioner on its merits.

9. With the aforesaid directions, the petition stands disposed of.

ILR (2012) I DELHI 388
CRL. A.

AMIT KUMAR **....APPELLANT**

VERSUS

STATE (GOVT. OF NCT OF DELHI) **....RESPONDENT**

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

CRL. A. NO. : 953/2011, CRL. M. (BAIL) NO. : 1347/2011 **DATE OF DECISION: 22.11.2011**

Indian Penal Code, 1860—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.

Section-300, IPC in its opening part says that culpable homicide would be murder save the exceptions. Exception 4 to Section 300 of the IPC reads as under:

> "Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

If the prosecution can successfully establish that the accused inflicts an injury with the intention of causing it and such injury would result ordinarily in the course of nature in death or inflicts injury with the intention of causing death or inflicts an injury knowing that such injury would cause death, he would be punishable with imprisonment for culpable homicide. **(Para 10)**

Important Issue Involved: To prove conviction under Section 302 IPC a calculated or a pre-mediated intent on part of appellant to kill deceased to be proved.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. S.K. Balain, Advocate.

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

RESULT: Appeal allowed accordingly.

S.RAVINDRA BHAT (OPEN COURT)

1. In this appeal, the judgment and order of the learned Additional Sessions Judge dated 29.04.2011 in S.C. No.117/2008 has been challenged. The appellant was convicted for having committed the offence punishable under Section-302, IPC and was sentenced to undergo life imprisonment.

2. The prosecution's case is that an intimation was received by the police in Police Station Uttam Nagar that a fire incident had occurred during the night intervening 31.10.2007 and 01.11.2007 around 12:30 AM in house no.17/A Som Bazar, Vikas Nagar. After recording the DD Ex.PW-13/B-1, the police reached the spot. According to the prosecution, the injured Rampal had been taken to the Deen Dayal Upadhyaya Hospital by his wife Radha. After inspecting the spot, ASI Mamur Khan went to the hospital and recorded the statement of Rampal -Ex.PW15/B. The injured stated that at around 12:30 AM, his neighbour, the appellant Amit was quarreling with his family members under the influence of liquor. His wife Sonia and mother were raising an alarm since the appellant threatened to set himself on fire. Sonia cried out for help; the injured Rampal went to the appellant's house and saw that he had a plastic bottle containing petrol. Rampal tried to snatch the bottle from the appellant; the latter, however, caught hold of him and in this struggle, petrol spilled over Rampal and bottle fell. Some petrol also spilled on the floor. The appellant pushed Rampal and bolted the door, lit a match-stick and threw it on Rampal and ran away. Rampal sustained fire injuries. Rampal succumbed to his injuries on 03.11.2007. The investigation was later carried on by Inspector Rakesh Tyagi. After the conclusion of the investigation, the appellant was charged with committing the offence of murder. He pleaded not guilty and claimed trial.

3. The prosecution examined 18 witnesses and also relied upon material documents such as postmortem report and dying declaration made by Rampal -Ex.PW-15/B and on consideration of all these, the Trial Court convicted the appellant.

4. Learned counsel for the appellant urged that the findings of the Trial Court cannot be sustained because of fatal discrepancies between the statements of PW-2 Radha, the deceased's wife, on the one hand and

the so called dying declaration Ex.PW-15/B. It was submitted that PW-2 clearly was not an eye witness and joined in the proceedings after the burning incident took place. Counsel urged that even PW-1, brother of the deceased mentioned having gone to the gali and seeing his brother on fire. If the dying declaration were kept aside, the evidence of these two eye witnesses could not have been the basis for a charge let alone conviction under Section-302, IPC. It was next urged that the MLC in this case nowhere reflected that the injured Rampal had mentioned the name of the assailant when he was taken to the hospital at about 01:30 AM. Furthermore, having regard to his condition, particularly, the nature of the burn injuries, it was highly improbable that he in fact stated as alleged and agreed to affix his thumb impression. Counsel also relied upon the statement of PW-2 who deposed that her husband was asked by the police to sign his statement. He, however, wanted to verify the contents but the police officials nevertheless put his thumb impression. Having regard to these circumstances and fact that the prosecution witness herself mentioned that thumb impression was taken forcibly, it could not be said that the dying declaration was voluntary. Furthermore, no Doctor's fitness certificate was mentioned or proved.

5. It was urged alternatively that even if the Court were to believe that in fact dying declaration had been made under the circumstances alleged by the prosecution, at the highest, this was a case for conviction under Section-304 Part-II, IPC and not for a conviction under Section-302, IPC. Counsel here emphasizes that the prosecution did not allege or establish any motive on the appellant's part; on the contrary, its case was that the appellant was trying to commit suicide by pouring petrol and setting himself on fire. The deceased Rampal on hearing the commotion tried to save the appellant who was in a drunken condition. In the struggle, the appellant allegedly set fire the petrol which caused burn injuries to the deceased. All these facts taken together did not establish any intention to kill nor even existence of intention to cause bodily injury that would have normally resulted in death. Having regard to the mental condition of the appellant, the only inference that could have been drawn on the basis of these proved facts, was that he had knowledge that his action might result in injuries which would lead to Rampal's death.

6. Learned APP, on the other hand, argued that the appellant was aware of the dangers associated with pouring petrol. The fact that he was attempting to commit suicide but instead of that event, someone was

doused with kerosene and ultimately received serious injuries did not in any manner diminishes criminal responsibility. He had a clear intention to do an act which would certainly result in death and, therefore, the benefit of Explanation-IV to Section-300 could not have been availed.

7. In this case, the account even was recorded through the statement of the deceased Rampal. That statement had been produced as Ex.PW-15/B. That statement has been testified by PW-1, who deposed that his brother spoke to the police about the surrounding circumstances which led to the injuries. PW-2 also corroborated the fact that her husband's statement was recorded. She too deposed that in her presence Rampal had told the police that he was burnt by appellant after the latter poured petrol on him. The initial Investigation Officer PW-15 SI Mamur Khan deposed that on receiving the DD-Ex.PW-13A, he reached the spot. He came to know that PW-2 and PW-1 had taken Rampal to the hospital; he inspected the crime scene, seized a match box containing 2/3 sticks, a plastic bottle smelling of petrol and kept it in a sealed parcel which was marked as Ex.PW-11/A. When he was at the spot, he received information through DD-5A from the hospital regarding the admission of Rampal. After reaching hospital, PW-15 claims to have made an application to the Doctor seeking to record his statement; that application was produced as Ex.PW-15/A. The concerned Doctor PW-6 Dr. Rajeev Tyagi had examined the patient and he recorded that the patient Rampal was in a fit condition to make a statement. The Doctor's endorsement was proved as Ex.PW-6/B. It was under these circumstances that PW-15 recorded the statement of the deceased.

8. At this stage, it would be necessary to notice some of the findings recorded by the impugned judgment which after discussing the relevant case laws concerning the admissibility of dying declarations during the course of the criminal trial held as follows:

> ''33. In the light of above discussion and observation on Section 32 (1) Indian Evidence Act, the statement Ex. PW15/B of deceased Rampal dt. 01.11.07 falls under the category of dying declaration. The statement was made by deceased Rampal in the circumstances where he never foresee his death. The statement was recorded after the doctors declared him fit to make the statement and it suffers from no infirmity or exaggeration of the incident which took place with him. Hence the statement Ex.

PW15/B i.e. dying declaration of deceased Rampal is admissible as it passes the test that it was made in fit state of mind, voluntarily and on the basis of personal knowledge. PW2 Radha w/o Rampal (deceased) further corroborated the fact that statement of deceased Rampal was recorded by police in her presence. Her deceased husband stated to the police that he was burnt by accused Amit Kumar after accused poured petrol at him and burnt him with a lit match stick. Her truthfulness further comes out when she objected on taking of thumb impression of the deceased because she had apprehension whether the police recorded true facts or not. Further record reflects that police recorded correct version. She also explained why she resisted the police officials from taking the thumb impression because she wanted the accused to be arrested first. PW2 Radha successfully passed the test of cross examination and explained how she reached at the house of accused. She further explained that they had no visiting terms relations with the accused and about 20-25 days prior to the incident, some incident took place between deceased Rampal and accused. After going through the testimony of PW2 Radha and dying declaration of deceased Rampal Ex. PW15/B it is further proved that accused had the intention to kill deceased due to which he had poured petrol on the deceased and lit him on fire with a match stick, though the deceased had gone to make him understand not to burn himself and tried to help him.

34. PW1 Mansa Ram brother of deceased further corroborated the facts regarding the incident as to how it was started and he also reached there. He did not support the police version being eye witness of the incident. However he corroborated the fact that his brother deceased Rampal told him that accused Amit Kumar had poured petrol on him and then lit him with a match stick. Another witness examined by prosecution PW5 Babu Ram turned out to be hostile but his hostility is not effecting the prosecution case at all. However he corroborated the fact regarding the incident that deceased Rampal was seen by him coming out in burnt condition from the house of accused Amit Kumar.

35. The wife of accused namely Sonia who appeared as DW1

in this case also corroborated that on 31.10.07 after midnight accused consumed huge quantity of liquor and gave beatings to his brother in law Sumit and in the afternoon she gave birth to a male child. She raised alarm and deceased came to rescue the accused and to help them. She admitted that deceased was trying to make accused understand not to burn himself and tried to snatch the bottle of petrol which was with the accused. This version of DW1 Sonia, wife of accused, further corroborates the prosecution case in respect of incident. The dying declaration given by deceased Ex. PW15/B stands corroborated by the versions given by PW1 Mansa Ram and PW2 Smt. Radha. The same also stands corroborated by the statement of DW1 Sonia, wife of accused.''

The cause of death in this case can be ascertained through the postmortem report Ex.PW-13/A; according to it and according to PW-13 Dr. Arvind Thergaonkar, the cause of death was shock following 65% ante mortem flame burns.

9. It is evident from the above discussion that the incident unfolded itself very rapidly; the appellant was apparently drunk and was threatening to kill himself. Though the medical examination report Ex.PW-3/A i.e. the MLC of the appellant does not throw much light since the examination took place around 07:25 PM on 01.11.2007, the combined testimonies of PW-1 and 2 and even DW-1 would show that the appellant's violent conduct left DW-1 crying for help. The deceased Rampal who was the appellant's neighbour reached there and tried to wrest the petrol bottle from him. The appellant apparently resisted and in the process poured the petrol over the deceased; some quantity of the petrol also got spilled on the floor. The appellant then lit the petrol with the match stick. This resulted in serious injuries to Rampal who was immediately rushed to the hospital. His statement was recorded; he later succumbed to the injuries on 03.11.2007.

10. Section-300, IPC in its opening part says that culpable homicide would be murder save the exceptions. Exception 4 to Section 300 of the IPC reads as under:

> "Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue

advantage or acted in a cruel or unusual manner."

If the prosecution can successfully establish that the accused inflicts an injury with the intention of causing it and such injury would result ordinarily in the course of nature in death or inflicts injury with the intention of causing death or inflicts an injury knowing that such injury would cause death, he would be punishable with imprisonment for culpable homicide.

11. In this context, it would be useful to extract the following observations of the Supreme Court in **Jagrup Singh v State of Haryana** 1981(3) SCC 616:

> ''In the present case, there is no doubt that there was a sudden quarrel and the appellant assaulted the deceased with the blunt side of the gandhala on the head in the heat of the moment. What actually was the immediate cause for the assault by the appellant on the deceased at the marriage ceremony of Tej Kaur is not clear. The genesis of the quarrel resulting in the head injury to the deceased is not known. The prosecution came with a positive case that the appellant, together with his three brothers, who had not been invited to the marriage of Tej Kaur by Mst. Dalip Kaur at the instigation of deceased Chanan Singh, came armed with different weapons to teach the deceased a lesson. But the prosecution has failed to examine Mst. Dalip Kaur and the defence version is that the appellant and his brothers had been invited to the marriage of Tej Kaur by Mst. Dalip Kaur. In view of these infirmities in the prosecution case, the High Court was constrained to observe:
>
> > ''In the absence of any specific and positive evidence whether oral or documentary, it is not possible to arrive at any positive conclusion that this circumstance furnished any motive for the accused to attack Chanan Singh (deceased) and three other prosecution witnesses. After a careful perusal of the entire prosecution evidence, it appears more probable that the accused had also joined in the marriage as the collaterals, but something happened on the spur of the moment which resulted in the infliction of injury by Jagrup Singh on the person of Chanan Singh which resulted into his death. In the first information

> > report, it had not been disclosed, as was subsequently made out at the trial, that the accused had come from the house of Jarmail Singh, accused, armed with weapons.
> >
> > (emphasis supplied)''
>
> In our judgment, the High Court having held that it was more probable that the appellant Jagrup Singh had also attended the marriage as the collateral, but something happened on the spur of the moment which resulted in the infliction of the injury by Jagrup Singh on the person of the deceased Chanan Singh which resulted in his death, manifestly erred in applying Clause Thirdly of s. 300 of the Code. On the finding that the appellant when he struck the deceased with the blunt side of the gandhala in the heat of the moment, without pre-meditation and in a sudden fight, the case was covered by Exception 4 to s.
>
> 300. It is not suggested that the appellant had taken undue advantage of the situation or had acted in a cruel or unusual manner. Thus, all the requirements of Exception 4 are clearly met. That being so, the conviction of the appellant Jagrup Singh, under s. 302 of the Code cannot be sustained. The result, therefore, is that the conviction of the appellant under s. 302 is altered to one under s. 304, Part II of the Indian Penal Code. For the altered conviction, the appellant is sentenced to suffer rigorous imprisonment for a period of seven years.

Similarly, in **Thangaiya Vs. State of T.N** (2005) 9 SCC 650 it was held that:

> ''Thus, according to the rule laid down in Virsa Singh case even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be Crl.A @ S.L.P.(Crl.)No.8847 of 2009 .... (contd.) murder. Illustration (c) appended to Section 300 clearly brings out this point. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses.

It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons —being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other that it may not be convenient to give a separate treatment to the matters involved in the second and third stages".

12. Here, in this case, the quarrel was on between the appellant and other members of his family; he threatened to set himself ablaze. His wife raised an alarm; the deceased rushed to his house, and tried to stop him from committing suicide. The appellant was apparently drunk; he had a bottle of petrol, the contents of which fell on to the deceased, as well as on the floor. The ensuing event led to the fire, and serious burn injuries, which ultimately claimed Rampal's life. These proven facts do not point to a calculated or pre-meditated intent on the part of the appellant to kill the deceased; clearly this is not a case for conviction under Section 302. The appellant, however, can be said to have possessed knowledge that his act would result in such injuries on the deceased, which in the normal course of nature would have resulted in his death, and consequently was guilty of the offence punishable under Section 304, Part II, IPC.

13. In view of the above discussion, the Appeal is entitled to succeed in part. The appellant's conviction under Section 302, IPC is altered to Section 304 Part II, IPC. His sentence is therefore modified; instead of life imprisonment, he shall serve rigorous imprisonment for seven years. The Appeal is allowed in these terms.

ILR (2012) I DELHI 398
W.P. (C.)

JAMIA MILLIA ISLAMIA ....PETITIONER

VERSUS

SH. IKRAMUDDIN ....RESPONDENT

(VIPIN SANGHI, J.)

W.P. (C.) NO. : 5677/2011 DATE OF DECISION: 22.11.2011

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.

Important Issue Involved: The expression "personal information" used in Section 8 (1) (j) of the Right to Information Act, 2005 does not relate to information pertaining to the public authority to whom the query for disclosure of information is directed. The expression "personal information" used in Section 8 (1) (j) means information personal to any other "person" that the public authority may hold.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. M. Atyab Siddiqui, Advocate.

FOR THE RESPONDENT : Mr. Zafar Sadique, Advocate.

RESULT: Dismissed.

VIPIN SANGHI, J.

1. The petitioner, Jamia Millia Islamia, a statutory public central institution regulated by Jamia Millia Islamia Act, 1988, assails the order dated 21.06.2011 passed by the Central Information Commission (in short referred to as ''CIC'') in the respondent's appeal No.CIC/SG/A/2010/001106, whereby the CIC has allowed the appeal preferred by the respondent and directed the Public Information Officer (PIO) of the petitioner to provide the complete information available as on record in relation to query No.1 of the respondent.

2. The respondent had sought information vide query No.1 as follows: ''Copies of Agreement/settlement between Jamia and Abdul Sattar S/o Abdul Latif & mania and Kammu Chaudhary in Ghaffar Manzil land''. Two other queries were also raised, however, I am not concerned with them in this petition as the impugned order directs disclosure of information raised in query No.1 only, as aforesaid.

3. The PIO vide reply dated 18.03.2010 rejected the application of the respondent under the Right to Information Act, 2005 (the Act for short) by stating that the information sought had no relationship to any public activity or interest and, as such, the same could not be disclosed under Section 8(1)(j) of the Act. The first appellate authority also affirmed the order of the PIO on the same grounds. The CIC, as aforesaid, has allowed the appeal insofar as query No.1 is concerned.

4. Before the CIC, the submission of the petitioner was, and even before me is, that the disclosure of the title documents of the petitioner/public authority/institution is exempted under Section 8(1)(j) of the Act. It was argued that the information sought by the respondent was an invasion of the privacy of the institution and had no relationship with any public activity or interest. It was argued that in case the title documents of the petitioner fall in wrong hands, it could be highly prejudicial to the cause of the petitioner-Institution, as there was a possibility that the said title documents may be misused.

5. On the other hand, the argument of the respondent herein was that since the petitioner is a University, it had no right to withhold the information about it.

6. The CIC held that to qualify for the exemption contained in Section 8(1)(j) of the Act, the information sought must satisfy the

following criteria:-

- ''The information sought must be personal in nature. Words in a law should normally be given the meanings given in common language. In common language, we would ascribe the adjective 'personal' to an attribute which applies to an individual and not to an Institution or a Corporate. From this, it flows that 'personal' cannot be related to Institutions, Organisations or Corporates. Hence, Section 8(1)(j) of the RTI Act cannot be applied when the information concerns Institutions, Organisations or Corporates.

- The phrase 'disclosure of which has no relationship to any public activity or interest' means that the information must have been given in the course of a public activity. Various public authorities while performing their functions routinely ask for 'personal' information from citizens, and this is clearly a public activity. Public activities would typically include situations wherein a person applies for a job, or gives information about himself to a public authority as an employee, or asks for a permission, license or authorization, or provides information in discharge of a statutory obligation.

- The disclosure of the information would lead to unwarranted invasion of the privacy of the individual. The State has no right to invade the privacy of an individual. There are some extraordinary situations where the State may be allowed to invade the privacy of a citizen. In those circumstances special provisions of the law apply usually with certain safeguards. Therefore where the State routinely obtains information from citizens, this information is in relationship to a public activity and will not be an intrusion on privacy.''

7. The CIC held that for exemption under Section 8(1)(j) of the Act to apply, the information sought must be personal in nature, that it must pertain to an individual and not an Institution/Organization/Corporate. It was further held that whether the information sought had a relationship with any public activity or interest is not a consideration, while interpreting

Section 8(1)(j) of the Act. Consequently, the defence of the petitioner herein was rejected and the appeal was allowed.

8. The submission of Mr. Siddiqui, learned counsel for the petitioner, is that the petitioner – a statutory body, is a juristic entity. It is a ''person'' in law. He relies on the meaning of the expression ''person'' as defined in the *Black's Law Dictionary* which, *inter alia*, means *"an entity (such as a corporation) that is recognized by law as having the rights and duties of a human being"*.

9. He submits that Article 14 of the Constitution of India also uses the expression ''person'' and reads:

> **''14. Equality before law.-** The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.''

He submits that the fundamental right guaranteed by Article 14 of the Constitution of India is available not only to an individual, that is a living person, but also to a juristic person. He also relies on Section 3(42) of the General Clauses Act which defines a person to *"include any company or association or body of individuals, whether incorporated or not"*.

10. He submits that the expression ''personal information'' used in Section 8(1)(j) of the Act means the information in relation to any ''person'', whether an individual or a juristic entity. He submits that the CIC is wrong in its conclusion that ''personal information'' can only relate to an individual. He further submits that Clause (j) of Section 8(1) of the Act uses both expressions ''personal information'' and ''individual''. He submits that this itself shows that the expression ''personal information'' has a wider connotation than information relating to an ''individual''.

11. Mr. Siddiqui further submits that Section 8, which provides the exemptions from disclosure of information, begins with a non obstante clause by stating *"Notwithstanding anything contained in this Act....."*. Therefore, the exemptions contained in Section 8(1) of the Act override the right granted to a querist to seek information under Section 3 of the Act.

12. He submits that the disclosure of the information as allowed by the CIC can lead to serious consequences, inasmuch as, armed with the said information, the querist or any other person in whose hands the said information may fall, may misuse the same by resorting to forgery and fabrication.

13. On the other hand, the submission of learned counsel for the respondent is that the petitioner University, a statutory Corporation, is a public authority within the meaning of Section 2(h) of the Act. He submits that the CIC has only directed the disclosure of the copies of the Agreement/settlement arrived at between the petitioner and one Abdul Sattar in relation to Gaffar Manzil land. He submits that the petitioner being a public authority, every citizen is entitled to seek information in relation to its public activities and conduct. It is argued by the learned counsel for the respondent that under the Act, the rule is in favour of disclosure of information. He submits that even in relation to an individual, there is no absolute bar against disclosure of his personal information. The disclosure of personal information in relation to an individual could be withheld by the public authority only where the disclosure of the information is either not in relation to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual. However, even in such cases, the Central Public Information Officer (CPIO) or the State Public Information Officer (SPIO) or the appellate authority, on being satisfied, in larger public interest would disclose even such personal information.

14. I have given my due consideration to the issue raised. The preamble of the Act provides an aid to interpret clause (j) of Section 8(1) of the Act. The preamble of the Act, inter alia, states:

> ''An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, ...
>
> And Whereas democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

> And Whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;
>
> And Whereas it is necessary to harmonise these conflicting interest while preserving the paramountancy of the democratic ideal;''

15. The thrust of the legislation is to secure access of information under the control of public authorities in order to promote transparency and accountability in the working of every public authority. The access to information is considered vital to the functioning of a democracy, as it creates an informed citizenry. Transparency of information is considered vital to contain corruption and to hold Government and its instrumentalities accountable to the governed citizens of this country. No doubt, a ''person'' as legally defined includes a juristic person and, therefore, the petitioner is also a ''person'' in law. This is amply clear from the definition of the expression ''person'' contained in Section 3(42) of the General Clauses Act. That is how the expression is also understood in Article 14 of the Constitution of India.

16. However, in my view the expression ''personal information'' used in Section 8(1)(j) of the Act, does not relate to information pertaining to the public authority to whom the query for disclosure of information is directed.

17. No public authority can claim that any information held by it is ''personal''. There is nothing ''personal'' about any information, or thing held by a public authority in relation to itself. The expression ''personal information'' used in Section 8(1)(j) means information personal to any other ''person'', that the public authority may hold. That other ''person'' may or may not be a juristic person, and may or may not be an individual. For instance, a public authority may, in connection with its functioning require any other person – whether a juristic person or an individual, to provide information which may be personal to that person. It is that information, pertaining to that other person, which the public authority may refuse to disclose, if it satisfies the conditions set out in clause (j) of Section 8(1) of the Act, i.e., if such information has no relationship to any public activity or interest vis-a-vis the public authority, or which

would cause unwarranted invasion of the privacy of the individual, under clause (j) of Section 8(1) of the Act. The use of the words ''invasion of the privacy of **the** individual'' instead of ''an individual'' shows that the legislative intent was to connect the expression ''personal information'' with ''individual''. In the scheme of things as they exist, in my view, the expression ''individual'' has to be and understood as ''person'', i.e., the juristic person as well as an individual.

18. The whole purpose of the Act is to bring about as much transparency, as possible, in relation to the activities and affairs of public authorities, that is, bodies or institutions of self governance established or constituted: by or under the Constitution; by any other law made by Parliament; by any other law may by State legislature; any body owned or controlled or substantially financed directly or indirectly by the funds provided by the appropriate Government; any non-government organization substantially financed directly or indirectly by the funds provided by the appropriate Government; or any authority or body or institution constituted by a notification issued or by order made by the appropriate Government.

19. If the interpretation as suggested by the petitioner were to be adopted, it would completely destroy the very purpose of this Act, as every public authority would claim information relating to it and relating to its affairs as ''personal information'' and deny its disclosure. If the disclosure of the said information has no relationship to any public activity or interest.

20. Alternatively, even if, for the sake of argument it were to be accepted that a public authority may hold ''personal information'' in relation to itself, it cannot be said that the information that the petitioner has been called upon to disclose has no relationship to any public activity or interest.

21. The information directed to be disclosed by the CIC in its impugned order is the copies of the Agreement/settlement arrived at between the petitioner and one Abdul Sattar pertaining to Gaffar Manzil land. The petitioner University is a statutory body and a public authority. The act of entering into an agreement with any other person/entity by a public authority would be a public activity, and as it would involve giving or taking of consideration, which would entail involvement of public funds, the agreement would also involve public interest. Every citizen is entitled to know on what terms the Agreement/settlement has been reached

by the petitioner public authority with any other entity or individual. The petitioner cannot be permitted to keep the said information under wraps.

22. In the light of the aforesaid discussion, I do not find any merit in this petition and dismiss the same as such.

ILR (2012) I DELHI 406
CRL. A.

STATE **....APPELLANT**

VERSUS

RAM PALAT **....RESPONDENT**

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

CRL. A. NO. : 1082/2011 **DATE OF DECISION: 29.11.2011**

Indian Penal Code, 1860—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.

In this case, the star prosecution witnesses i.e. PW-2 and PW-9 have entirely turned hostile. Both of them have corroborated each other as to the nature of injuries and as to how it took place i.e. the deceased slipped and fell down the stairs and sustained fatal injuries. This was despite prosecution seeking and being permitted to cross-examine them. Therefore, one line of prosecution witnesses have favoured the story which can be a plausible explanation for the death of the deceased i.e. it was not homicidal but accidental. As against this, PW-10 has deposed that he took up the injured along with PW-2 (her brother) to the hospital where she mentioned that she was beaten by Ram Palat. This was sought to be corroborated by an external circumstance, i.e., the MLC (Ex.PW-19/A) which recorded the alleged history of assault by the husband. Now a close look at Ex.PW-19/A would reveal that the deceased was unfit to make a statement. This, in turn, would mean that recording or making endorsement on the MLC was in fact on account of the statement of PW-10. **(Para 8)**

Having at one stage noticed that there are two plausible views, this Court cannot help wondering if how mere recording of statement by PW-10 which gets reflected in an endorsement would elevate the nature of his testimony (if it is weighed and balanced with the other evidence which has appeared on the record.) So far, therefore, what emerges is that there is conflicting evidence about the nature of injuries

sustained by the deceased. One set of witnesses -the deceased's close relatives state that the injuries were caused accidentally, whereas PW-10, a police officer stated that they were the result of homicidal attack. **(Para 9)**

Important Issue Involved: 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.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Ms. Richa Kapoor, APP.

FOR THE RESPONDENT : Mr. Aparbal Singh, Advocate.

CASES REFERRED TO:

RESULT: Appeal dismissed.

S. RAVINDRA BHAT (OPEN COURT)

1. The State appeals by leave, against the judgment and order of the learned Addl. Sessions Judge dated 05.11.2009, whereby the respondent (hereinafter referred to variously as the accused or Ram Palat), was acquitted of the charges of having committed the offence punishable under Section302 IPC.

2. The prosecution's allegations briefly were that Ram Palat was a driver of the phat-phat sewa and was earning a meager livelihood from that. His wife Urmila (deceased) used to urge him to take proper employment so that they could better their lives; Ram Palat, however, was allegedly unwilling to do so. This was the cause of frequent marital discord and quarrels between the couple. The prosecution further alleged that on 15.09.2008 at around 2:00 PM Urmila asked Ram Palat whether she could take up an employment; he allegedly lost control, lifted a club and started assaulting her on her head. She sustained serious injuries and started bleeding. Her daughter (PW-9) raised an alarm and informed Urmila's brother Sanjay Kumar (PW-2) on the telephone about the incident. The latter informed the PCR van which resulted in Urmila being taken to GTB hospital. The prosecution further alleged that Urmila had told Sanjay

(PW-2), in the course of their journey to the hospital, about the incident and clearly implicated Ram Palat. This, according to the prosecution was also recorded in the MLC (Ex.PW-19/A) which mentioned ''alleged history of assault by husband''. The MLC was prepared at 3:20 PM on the day of incident i.e. 15.09.2008. Urmila apparently did not regain consciousness and subsequently died at 6:00 pm on the same day.

3. The police, on the basis of information and statements recorded registered an FIR, conducted investigation and arrested the accused Ram Palat. He was charged for having committed the offence of murder.He entered the plea of not guilty and claimed trial. During the course of proceedings before the Trial Court, the prosecution relied upon the testimonies of 20 witnesses besides other documentary evidence including the MLC, post mortem report, disclosure statements and recovery memos etc. After considering all these, the Trial Court held that the prosecution was unable to bring home Ram Palat's guilt and accordingly acquitted him.

4. It is urged by learned Addl. Public Prosecutor for the State that though PW-2 and PW-9 did not support the prosecution's version during the trial and instead chose to depose that Urmila slipped and fell down the stairs and thereby sustained the injuries, the Trial Court did not attach much importance to certain very significant circumstances. Elaborating on this submission, Ms. Richa Kapur, learned APP urged that the testimony of PW-10, if read along with MLC (Ex.PW-19/A), categorically pointed to homicidal death on account of beatings by the husband. This was narrated within a short span to PW-2 who deposed about the same. Learned counsel also relied upon, what she termed as a very strong circumstance, i.e. that there was no reason for the relatives of Urmila to have informed the police and seek their assistance to take her to the hospital. This would have happened only if the injuries were sustained on account of an attack as it did in this case.

5. Learned counsel also submitted that the opinion of the doctor who conducted the postmortem (PW-6), as stated in the report (Ex.PW-6/A) found not less than 6 serious injuries; the doctor also stated that the death could have been caused as a result of injuries sustained on account of club blows. She subsequently pointed out the deposition of PW-6, who stated that some injuries such as fracture on the parietal region were the result of the deceased being clubbed by the accused. Learned counsel

submitted that even though close relatives of Urmila as well as accused did not support the prosecution's story, the circumstances were sufficient enough to record a conviction, which the Trial Court failed to do. Counsel urged that the impugned judgment, therefore, has to be set aside, as it has led to manifest failure of justice.

6. The respondent/accused's case which found favour with the Trial Court was the conflicting evidence which emerged from the record. PW-2 and PW-9, who were the star prosecution witnesses, did not support its case. On the other hand, the prosecution's heavy or total reliance upon the testimony of PW-10 to explain the injuries, could not be upheld, once its own case was undermined by other witnesses.

7. The parameters which apply to the High Court when it appreciates the evidence with a view to consider whether the findings of acquittal by the Trial Court are to be upset, are well settled. It is only where the reasoning in the impugned judgment discloses compelling or substantial reasons that the High Court interferes as a duty or right to entirely re-appreciate the evidence. Again, however, the High Court's re-appreciation of evidence cannot result in upsetting an acquittal merely because another view is possible to convict the accused, so long as the view favoured by the Trial Court, is reasonable or plausible. Mere existence of another view on re-appreciation of evidence would not entitle the High Court to record the conviction after reversal of the acquittal.

8. In this case, the star prosecution witnesses i.e. PW-2 and PW-9 have entirely turned hostile. Both of them have corroborated each other as to the nature of injuries and as to how it took place i.e. the deceased slipped and fell down the stairs and sustained fatal injuries. This was despite prosecution seeking and being permitted to cross-examine them. Therefore, one line of prosecution witnesses have favoured the story which can be a plausible explanation for the death of the deceased i.e. it was not homicidal but accidental. As against this, PW-10 has deposed that he took up the injured along with PW-2 (her brother) to the hospital where she mentioned that she was beaten by Ram Palat. This was sought to be corroborated by an external circumstance, i.e., the MLC (Ex.PW-19/A) which recorded the alleged history of assault by the husband. Now a close look at Ex.PW-19/A would reveal that the deceased was unfit to make a statement. This, in turn, would mean that recording or making endorsement on the MLC was in fact on account of the statement of PW-10.

9. Having at one stage noticed that there are two plausible views, this Court cannot help wondering if how mere recording of statement by PW-10 which gets reflected in an endorsement would elevate the nature of his testimony (if it is weighed and balanced with the other evidence which has appeared on the record.) So far, therefore, what emerges is that there is conflicting evidence about the nature of injuries sustained by the deceased. One set of witnesses -the deceased's close relatives state that the injuries were caused accidentally, whereas PW-10, a police officer stated that they were the result of homicidal attack.

10. In these circumstances, the Trial Court would have been justified to acquit the respondent Ram Palat. So far as the submission with regard to the medical evidence is concerned, we notice that PW-6, the postmortem doctor deposed in the cross-examination as follows:

> ''Injuries referred to above can result on account of fall from stairs, but underline fractures can be a result of blunt force impact to the head. Lacerated wounds referred above can be caused by a club. Bruise referred above cannot be a result of grappling. The wounds referred above were not the result from fall from the stairs''.

11. Undoubtedly, before this part of the evidence, the doctor did list out the nature of injuries which were 11 serious wounds. However, in the end, she deposed that the injuries could have been the result of a fall from the stairs and the fracture could be the result of blunt force impact on the head and she did state that lacerated wounds could be caused by a club. At best, this testimony, in the opinion of this Court, is suggestive but nowhere conclusive; by itself it could not have implicated respondent Ram Palat.

12. Having regard to all these circumstances and on careful scrutiny of the Trial Court records as well as the findings of the Trial Court, we are of the opinion that the impugned judgment does not call for any interference having regard to a fair application of standards which the High Court as an Appellate Court has to follow while re-appreciating the evidence and returning its own finding.

13. For the foregoing reasons, the appeal is devoid of merit and is dismissed.

ILR (2012) I DELHI 412
WP (CRL.)

RIPUN BORA **....PETITIONER**

VERSUS

STATE (THROUGH CBI) **....RESPONDENT**

(G.S. SISTANI, J.)

WP (CRL.) NO. : 882/2009 **DATE OF DECISION: 07.12.2011**

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.

It has been vehemently argued by the counsel for petitioner that the trap had been conducted without the authority of any CBI Director and thus, the trap is illegal. It has been further argued that the complainant Sh. AB Gupta has himself acted as an entrapper or the investigating officer and himself organized the entire trap which is in violation of law. The counsel has placed reliance upon Annexure 6-A of the CBI Manual to aver that a PE/RC can be registered against present and former Ministers of Central/State governments only by a CBI Director and only a CBI director has the power to take decision as regards the verification of source information/complaint against such Ministers. However, in the present case the CBI Director was kept in dark and the trap laid down against the petitioner was not under the authority of any CBI Director. I find force in the argument advanced by the counsel for petitioner. Para 8.5 of the CBI Manual deals with the complaints for which no verification is required but para 8.6 of the Manual deals with complaints where verification should be taken up. Furthermore, para 8.8 of the CBI Manual categorically states that a complaint received against a Minister or former Minister of Union Government must be put up to the Director, CBI for appropriate orders. However, in the present case, there was no authorization by the CBI Director to lay a trap against the petitioner no was any verification conducted. Infact, a perusal of the complaint makes it evident that while 7 copies of the complaint were forwarded to different officials of the CBI; no copy was forwarded to the Director who is the official empowered to deal with complaint against Ministers. The relevant paras are reproduced as under:

> **''Complaints in which Verification should be taken up**
>
> 8.6 The following categories of complaints may be considered fit for verification:

> i. Complaints pertaining to the subject-matters which fall within the purview of CBI either received from official channels or from well-established and recognized public organizations or from individuals who are known and who can be traced and examined.
>
> ii. Complaints containing specific and definite allegations involving corruption or serious misconduct against public servants etc., falling within the ambit of CBI, which can be verified.
>
> 8.7 If any complaint against a Minister or former Minister of the Union Government, or the Union Territory is received in any Branch, it should be put up to the Director, CBI, for appropriate orders. The relevant file of the Branch should remain in the personal custody of SP concerned. In case the complaints are received against members of lower judiciary these may be forwarded to the Registrar of the High Court concerned and the complaints received against members of higher judiciary may be forwarded to Registrar General of Supreme Court through the Joint Director (Policy).''

(Para 39)

Important Issue Involved: 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.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Madan Bhatia, Sr. Advocate with Mr. Nageshwar Pandey, Mr. Anup Sinha and Mr. A.K. Pandey, Advocate.

FOR THE RESPONDENT : Mr. P.K. Sharma, Advocate.

CASES REFERRED TO:

1. *Lalita Kumari* vs. *Government of Uttar Pradesh* reported at (2008)14 SCC 337.
2. *Paramjit Singh* vs. *State of Punjab* reported at (2007)13 SCC 530.
3. *Inder Mohan Goswami* vs. *State of Uttaranchal* reported at (2007)12 SCC 1.
4. *TT Anthony* vs. *State of Kerala* reported at (2001)6 SCC 181.
5. *Vineet Narain* vs. *UOI* reported in (1998) 1 SCC 226.
6. *State of Bihar* vs. *Rajendra Agrawalla* reported at (1996)8 SCC 89.
7. *State of Haryana* vs. *Bhajan Lal* reported at AIR 1992 SC 604.
8. *AC Sharma* vs. *Delhi Administration* reported at 1973 (1) SCC 726.
9. *P. Sirajuddin* vs. *State of Madras* reported at AIR 1971 SC 520.
10. *Niranjan Singh* vs. *State of UP* reported at 1956 SCR 734.

RESULT: Petition allowed.

G.S. SISTANI, J. (ORAL)

1. The present writ petition has been preferred by the petitioner seeking quashing of the RCAI 2008 A004 dated 02.06.2009 under sections 9 and 12 of the Prevention of Corruption Act (hereinafter to referred, as 'PC Act') and all subsequent proceedings emanating therefrom against the petitioner.

2. The facts leading to the filing of present writ petition are that proceedings have been initiated against the petitioner upon registration of RCAI 2008 A004 under sections 9 and 12 of the Prevention of Corruption Act. The said RC was registered upon a written complaint by one Sh. A.B. Gupta, DSP CBI alleging that the petitioner had approached the

complainant AB Gupta, through one Mr. Mukul Pathak and offered him illegal gratification for clearing his name from the murder case RC 5(S)/ 2005-Kol dated 06.06.2005 of one Danial Topno which was being investigated by the complainant. The name of the petitioner emerged as a suspect in the said murder case only upon the statement dated 29.05.2007 of one Sh. Kamal Nath under section 164 Cr.P.C. After investigation of the case RCAI 2008 A004, charge-sheet was filed by the CBI on 31.07.2008 and the learned CBI Special Judge took cognizance of the said case against the petitioner vide order dated 07.08.2008 under section 12 of the PC Act and 120-B of the IPC.

3. As per the chargesheet filed on 31.07.2008 before the CBI Special Judge, during April/ May 2008, petitioner Shri Ripun Bora alongwith one Mukul Pathak and one Ramesh Kumar Maheshwari entered into a criminal conspiracy in order to offer bribe to complainant Shri A B. Gupta for getting the name of the petitioner cleared from the murder case. In pursuance of the said criminal conspiracy, Shri Mukul Pathak on behalf on the petitioner, contacted Shri A.B. Gupta over telephone and fixed a meeting with Shri AB Gupta at Delhi on 16.05.2008 when Shri AB Gupta was on official tour to Delhi.

4. It is further alleged in the chargesheet that on 16.05.2008 the petitioner and Sh. Mukul Pathak met Shri AB Gupta in room No.103 in Hotel Jukaso Inn, while one Shri Ramesh Kumar Maheshwari waited in the reception of the hotel. In the said meeting the petitioner offered an amount of Rs.15 lakhs as bribe to Shri AB Gupta for clearing the name of the petitioner from the said murder case. The bribe amount was enhanced to Rs.17 lakhs at the instance of Shri Mukul Pathak in the said meeting. Petitioner Shri Ripun Bora, in the said meeting, told Shri AB Gupta that the first installment of Rs.10 lakhs would be delivered in a week's time and the remaining Rs.7 lakhs would be delivered after the filing of chargesheet in the murder case thereby clearing the name of petitioner.

5. Thereafter Shri Mukul Pathak, on behalf of Shri Ripun Bora, pursued the matter with Shri AB Gupta over telephone and eventually fixed the date of 02.06.2008 for a meeting at Delhi, where the first installment of Rs.10 lakhs was decided to be delivered. Since, Shri AB Gupta was not willing to accept the bribe; he lodged a complaint on 02.06.2008 to the Joint Director, AC (HQ), CBI, New Delhi. Accordingly,

the instant case was registered against the petitioner Sri Ripun Bora and Mukul Pathak u/s 120-B IPC read with Section 9 and 12 of PC Act, 1988.The FIR was entrusted to sh. Surrender Malik, Inspector, CBI, ACU I, New Delhi who laid a trap against the petitioner and Shri. Mukul Pathak on 02.06.2008 in presence of two independent witnesses and also constituted a team of CBI Officials. After completion of the pre-trap formalities, the team, along, with the independent witnesses, proceeded towards Hotel Jukaso Inn, Sunder Nagar, New Delhi and two rooms Room Nos. 213 and 215 were booked in the name of two fictitious persons, Rakesh Agarwal and Sunder Lal respectively. An audio-videocum-transmitter was discreetly installed in the room no. 213 and a Sony handicam with receiver was installed in room no. 215. A separate audio transmitter was also kept in the pocket of the complainant.

6. As per the chargesheet, petitioner and Sh. Mukul Pathak arrived at Hotel Jukaso Inn and asked the receptionist to book a room. On refusal by the receptionist, they informed the receptionist that they already have a guest in room no. 213 on which they were informed that the said guest has booked two rooms which raised suspicion in the mind of the petitioner and he left the Hotel. Thereafter, the petitioner called the complainant to inform that he visited the hotel but on knowing that two rooms have been booked and that some crime branch officials are present, he left the Hotel. The said information was denied by the complainant and subsequently, asked the complainant to fix a meeting the next day. On the next day, i.e., on 03.06.2008, the petitioner called up the complainant to inform that he would reach the Hotel by 12 noon. However, on visiting the Hotel the petitioner again got suspicious and left the Hotel. He called up the complainant to inform that he has been immediately summoned to Assam Bhawan by the Chief Minister for some talks and asked the complainant to make some other programme. However, the complainant assured the petitioner that he is alone in the room and that the money can be delivered to him in the hotel room only and not otherwise. Accordingly, the petitioner arrived at Hotel Jukaso Inn and met the complainant in the restaurant at the ground floor of the Hotel where the petitioner repeatedly requested the complainant to accept the money kept in the car or to accept the money from the driver who would deliver it in room no. 213 but the complainant refused to accept the money from the driver and returned back to room no. 213. Thereafter, the petitioner after taking the orange colour bag from the car went to room no. 213 and rushed away

immediately after throwing the orange colour bag in the room. On this, the complainant gave the pre-decided signal ''Apni More Prabhur Nishana'' and the trap team caught the petitioner outside room no. 213 and hence the chargesheet was filed charging the petitioner under section 120-B IPC read with section 12 of the PC Act.

7. At the outset, it is contended by the counsel for petitioner that the entire case had been concocted and engineered illegally and is in utter violation of the mandatory provisions of the Code of Criminal Procedure and also against the provisions of Section 12 of the PC Act on account of utterly mala fide motives inspired by the political rivals of the petitioner who wanted to finish his political career and to use the complainant occupying the position of a DSP/CBI as an instrument for designing a nefarious strategy to implicate the petitioner in a case of bribery.

8. Alleging malafide against the CBI, the Counsel for the petitioner submits that registering of the instant case is in complete violation of the CBI manual and the procedure established by law. It is further stated by the counsel that the procedure of investigation mentioned in the CBI Criminal Manual on conducting verification / preliminary enquiry before registering a Regular Case has not been followed. Neither any verification was conducted as envisaged in Chapter 8 of the CBI Criminal Manual nor any preliminary inquiry as contemplated in Chapter 9 of the Criminal Manual was conducted before registering the RC against the petitioner on 02.06.2008. Reliance is placed upon the case of **P.Sirajuddin v. State of Madras** reported at AIR 1971 SC 520 and more particularly at para 17 which reads as under:

> ''17.....Before a public servant, whatever be his status is publicly charged with acts of dishonesty which amount to serious misdemeanor or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person, especially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general. If the Government had set up a Vigilance and Anti-Corruption Department as was done in the State of Madras and the said department was entrusted with enquiries of this

kind, no exception can be taken to an enquiry by officers of this department but any such enquiry must proceed in a fair and reasonable manner. The enquiring officer must not act under any preconceived idea of guilt of the person whose conduct was being enquired into or pursue the enquiry in such a manner as to lead to an inference that he was bent upon securing the conviction of the said person by adopting measures which are of doubtful validity or sanction. The means adopted no less than the end to be achieved must be impeccable....."

9. A further reliance has been placed upon the case of **State of Haryana v. Bhajan Lal** reported at AIR 1992 SC 604 wherein the Supreme Court has given its approval to the aforesaid law laid in the case of P. Sirajuddin (supra). Reliance has been placed upon **Vineet Narain v. UOI** reported in (1998) 1 SCC 226 to aver that the non-compliance with the mandate of law is violative of Article 21 of the Constitution.

10. It is next submitted by counsel for the petitioner that the RC registered on 02.06.2008 pertaining to the incident of 16.05.2008 does not disclose any cognizable offence, which is a condition precedent for the registration of the FIR as contemplated under section 154 Cr.P.C. He also alleges that unexplained delay has been caused in lodging the criminal complaint on 02.06.2008. The case of the petitioner is that the complainant, A.B. Gupta, DSP/CBI who lodged the FIR by misusing his official position in the CBI not only violated the mandatory provisions of Section 154 of Cr.P.C. which makes it incumbent that before any FIR is lodged some cognizable offence must have been committed and that in the absence of commission of any offence no FIR could be lodged or registered but further violated the mandatory law declared by the Hon.ble Supreme Court in **P. Sirajuddin** (supra).

11. It is also alleged by the counsel for petitioner that the CBI was under statutory obligation to register a separate FIR for the incident occurred on 03.06.2008 and thus the entire investigation conducted after the incident of the 03.06.2008 is illegal and unconstitutional.

12. That it is the case of the petitioner that CBI officer by misusing his authority had lodged an FIR and had got it registered through a Superintendent of Police of CBI in utter violation of the mandatory provisions of Section 154 Cr.P.C. The entire proceedings which were

initiated against the petitioner on the basis of a wholly illegal FIR contrary to the mandatory procedure of the provisions of the Code of Criminal Procedure are therefore wholly illegal, non-est and barred by law.

13. It has been vehemently argued by the counsel for petitioner that the complainant Sh. A.B. Gupta had himself instigated/ abetted the accused person for making the payments & committing the offence. The complainant himself booked the rooms in the hotel and also arranged the independent witness. While conducting the trap he played the role of an investigator/ entrapper and has himself organized and executed the trap. The raid conducted, is without any authority of CBI Director and has thus disregarded the procedure mentioned in the CBI Crime Manual casting a shadow of doubt on the entire investigation procedure.

14. Questioning the applicability of section 12 of PC Act, it was argued that the facts contained in the FIR as well as the charge sheet makes it clear that Section 12 has no application at all and the petitioner has not committed any offence under Section 12 of the PC Act. Substantiating the aforesaid contention, it was further argued that Section 12 of the PC Act applies when a person abets or instigates a public servant to accept the bribe in terms of Section 7 of the PC Act. It has no application at all when the public servant himself instigates and abets a person to instigate and abet him to accept the bribe or to incite him to give him the bribe. It is the contention of the petitioner that as per the facts stated in the FIR and the charge sheet it was the CBI Officer who was instigating and abetting the petitioner to instigate and abet him to receive the bribe and was inciting him to give him the bribe which he had no intention to receive but his whole purpose was to implicate the petitioner in a criminal offence of bribe.

15. The counsel for petitioner has vehemently argued that the utter malafides of the case against the petitioner are further eloquently manifested by the fact that while the FIR was registered under Sections 9 & 12 of the PC Act when by no stretch of imagination either of the two sections were applicable at all but when the charge sheet was filed, Section 9 was dropped deliberately because that would have required sanction under the provisions of the PC Act and only Section 12 was retained which had no applicability on the facts stated in the charge sheet and the allegations made against the petitioner when Section 12 itself also have no applicability at all on the basis of the allegations made against the petitioner either in

the FIR or in subsequent facts and events alleged in the charge sheet.

16. It was next averred that it is significant that nowhere is there even a remotest whisper that the petitioner in fact offered any money or bribe to Sh. AB Gupta. The only allegation against the petitioner is that the petitioner threw an orange colour bag from outside the room which was allegedly occupied by Sh. AB Gupta and rushed away. There is no evidence whatsoever of any bribe having passed on from the hands of the petitioner to complainant Sh. AB Gupta at all.

17. That it is the case of the petitioner that sequence of alleged events and facts contained in the subsequent chargesheet narrated and reproduced at the instance of the complainant, Sh. A.B. Gupta on their very fact show not only the utter falsehood, malafide nature and oblique & extraneous motivation but also the execution of a well planned nefarious design to implicate the petitioner in a false case of bribery and it has been further submitted that the facts on the face of it establish that the petitioner has been falsely implicated in the present case at the behest of political rivals so as to ruin his political career.

18. Lastly, it is contended that continuation of the aforesaid proceedings against the petitioner amount to gross violation of the fundamental rights of the petitioner under Article 21 of the Constitution of India and the said proceedings are therefore liable to be quashed by this Hon.ble Court in the exercise of its extra ordinary jurisdiction. The case of the petitioner is completely covered by the law declared by the Hon.ble Supreme Court in the **State of Haryana Vs. Bhajan Lal** reported in AIR 1992 SC 604.

CBI SUBMISSIONS

19. Refuting the contention of the counsel for the petitioner for violation of the provisions of the CBI Manual, the counsel for respondent CBI argued that the exercise of verification of the complaint and conducting preliminary inquiry is normally made in the cases where the allegation are made against a public servant, who has committed an offence while discharging his public duty. The complaint in the instant case was made against a suspect in a murder case and not against any public servant who has committed an offence while discharging his official duty. The petitioner who was a suspect in the murder case was offering bribe to the complainant (Investigating Officer) to exercise his influence in

protecting him in the murder case. The petitioner herein is not being prosecuted in his capacity as a former public servant or the former minister of a State Government. He is a suspect in a murder case and thus the privileges available to a public servant cannot be made available to the petitioner in this case. It was further argued that the case of **P.Sirajuddin** (supra) is not applicable in this case, as it pertains to a situation where there is a complaint against a public servant discharging his public duty.

20. It is further contended that the verification / preliminary inquiry is not possible in the case of Traps, as the whole objective will get frustrated, if the factum of the case is disclosed to the accused in advance. It has been quite unambiguously provided in para 10.16 of the CBI Crime Manual that in trap case, the FIR should be registered as soon as a bona fide complaint / information is received. Reliance has been placed upon para 9.1, 9.2, 10.1 and 10.16 of the CBI Criminal Manual to aver that no preliminary enquiry or verification was required in the present case.

21. It is next argued that the preliminary enquiry is an open enquiry, registration of which would lead to altering the offender, who is offering or demanding the bribe. If preliminary enquiries are registered in trap cases, no corrupt person, be it the public servant committing the offence of Section 7 or 13 of the PC Act or any other person abetting the said offence, would get apprehended. That is why in the para 10.16 of the CBI Manual, it is provided that in trap cases, FIR should be registered as soon as a bona fide complaint / information is received. The instant case is a trap case, wherein the petitioner has abetted the offence of Section 7 of the PC Act, 1988. Therefore, since the complaint of Shri AB Gupta disclosed commission of a cognizable offence, the FIR was registered and the trap was laid.

22. It is next contended by counsel for respondent CBI that assuming, though not admitting that there is an irregularity in investigation, the same cannot result in vitiating the entire proceedings. The only provision which deals with the proceedings being vitiated due to certain irregularities is Section 461 of the Cr.P.C. The Cr.P.C. has laid down the omissions and irregularities which either vitiate the proceedings or not, but does not anywhere specifically state that a mistake committed by a police officer during the course of investigation be said to be an illegality or irregularity,

which makes it clear that the legislature did not contemplate any irregularity in investigation as of sufficient importance to vitiate or otherwise form any infirmity in the inquiry or trial. It was also averred that even violation of the provision of the Code would not amount to any illegality. Reliance has been placed upon **Paramjit Singh v. State of Punjab** reported at (2007)13 SCC 530 and **Niranjan Singh v. State of UP** reported at 1956 SCR 734

23. It is further averred that Chapter 35 of the code of Criminal Procedure would show that section 460 and 461 deal with such proceedings which are vitiated by irregularities in proceedings and those proceedings which are not vitiated due to irregularity. It is contended that the case of the petitioner is not covered by Chapter 35. Reliance has been placed upon **AC Sharma v. Delhi Administration** reported at 1973 (1) SCC 726 and **State of Bihar v. Rajendra Agrawalla** reported at (1996)8 SCC 89.

24. It is next submitted that a bare reading of the complaint filed by the complainant on 02.06.2008 makes out a case for commission of an offence under Section 12 of PC Act, 1988. The complaint discloses that the incident occurred in the 2nd week of April, 2008 and then on 16.05.2008. In both the incidents the accused is making an offer of huge sum of money to the complainant to clear his name in the murder case being investigated by the complainant Sh. AB Gupta. The complainant, on the offer being made to him, decided to report the matter to CBI and thus made a criminal complaint to Joint Director (ACU) CBI New Delhi. Had the complainant chosen to accept the money an offence under section 7 of PC Act would have been made out but since the complainant was firm and did not accede to the illegal offers made by accused person no offence under Section 7 was committed. The PC Act however, deals with people who abet the commission of an offence under section 7 PC Act by way of prosecution under section 12 of the Act, whether or not the offence under section 7 PC Act is committed.

25. As regards the contention of counsel for the petitioner that a separate FIR should have been registered for the incident that occurred on 03.06.2008, the counsel for respondent contends that the incident of 16.05.2008 is the offence in itself and the incident of 03.06.2008 is a part of the same transaction. The counsel has placed reliance on **TT Antony vs. State of Kerala** reported at 2001 (6) SCC 181 and more particularly

at paragraph 20 to substantiate the aforesaid contention which reads as under:

> ''20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 CrPC only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 CrPC. Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 CrPC."

26. It is submitted that the complainant being a straight and upright officer of CBI decided to expose the corrupt mind of accused person who has held the position of minister in the State and had thought of purchasing the complainant by offering him lakhs of rupees. The investigating officer/complainant reported the matter to the Anti Corruption Zone and extended complete co-operation in laying the trap and getting the accused person arrested at the spot. It is submitted that no trap is successful without the help and assistance of complainant. He just did his duty, firstly by reporting the matter to CBI and secondly by assisting the investigating team in organizing the trap. The submissions made by petitioners regarding over involvement of complainant in assisting trap team are totally baseless and absurd.

27. Thus, the contention of the counsel for petitioner may be summarized as under:

i. The petitioner has been falsely implicated in the present case.

ii. No FIR could have been registered in the absence of any cognizable offence and since the FIR is illegal, all

subsequent proceedings arising therefrom are also illegal and are liable to be quashed.

iii. No preliminary enquiry has been conducted by the CBI, as per the decision laid down by the Supreme Court of India in the case of **P.Sirajuddin** (supra).

iv. The investigation has been done in violation of the CBI Manual which has the force of law. v. FIR pertains to two separate incidents dated 16.05.2008 and 02.06.2008 and therefore, separate FIRs should have been registered for the two incidents.

vi. No offence has been made out under section 12 of the PC Act.

28. The contentions of the counsel for respondent CBI can be summarized as under:

i. No verification or preliminary enquiry is required in the present case and the provisions of the CBI Manual have been duly followed without any deviations. ii. The investigation has been carried out complying with the provisions of Cr.P.C as well as the CBI Manual and even if there is any irregularity, it does not vitiate the proceedings

iii. **P. Sirajuddin** (supra) is not applicable to the case of the petitioner as the petitioner has not been charged as a public servant in discharge of his official duty but as a suspect in a murder case.

iv. No separate FIR was required to be registered as the both the incidents were in the course of same transaction/ offence.

v. Section 12 of PC Act is clearly made put against the petitioner.

29. It has been vehemently argued by the counsel for petitioner that the proceedings have been initiated in utter violation of the CBI Manual which require that a preliminary investigation must be conducted before registering a regular case against a public servant and a strong reliance has been placed upon **P. Sirajjudin** (Supra). Refuting the aforesaid contention, the counsel for CBI has urged that the petitioner is not entitled to avail the benefits prescribed for public servants as these benefits

can be availed only in discharge of official duty and the offence that the petitioner has been charged with does not come within the purview of his official duties. It is contended that the petitioner though a Minister, has been charged as an accused who tried to bribe the investigating officer, complainant in the present case, to clear his name from the murder case. A strong reliance has been placed by counsel for CBI on paras 9.1, 9.2 , 10.1 and 10.16 of the CBI Manual (Crime) which read as under:

> ''9.1 When, a complaint is received or information is available which may, after verification as enjoined in this Manual, indicate serious misconduct on the part of a public servant but is not adequate to justify registration of a regular case under the provisions of Section 154 Cr.P.C., a Preliminary Enquiry may be registered after obtaining approval of the Competent Authority. Sometimes the High Courts and Supreme Court also entrust matters to Central Bureau of Investigation for enquiry and submission of report. In such situations also which may be rare, a 'Preliminary Enquiry' may be registered after obtaining orders from the Head Office. When the verification of a complaint and source information reveals commission of a *prima facie* cognizable offence, a Regular Case is to be registered as is enjoined by law. A PE may be converted into RC as soon as sufficient material becomes available to show that *prima facie* there has been commission of a cognizable offence. When information available is adequate to indicate commission of cognizable offence or its discreet verification leads to similar conclusion, a Regular Case must be registered instead of a Preliminary Enquiry. It is, therefore, necessary that the SP must carefully analyse material available at the time of evaluating the verification report submitted by Verifying Officer so that registration of PE is not resorted to where a Regular Case can be registered. Where material or information available clearly indicates that it would be a case of misconduct and not criminal misconduct, it would be appropriate that the matter is referred to the department at that stage itself by sending a self-contained note. In such cases, no 'Preliminary Enquiry' should be registered. In cases, involving bank and commercial frauds, a reference may be made to the Advisory Board for Banking, Commercial & Financial Frauds for advice before taking

up a PE in case it is felt necessary to obtain such advice.

9.2 While proposing registration of a Preliminary Enquiry pertaining to the abuse of official position by a public servant in the matter of business/commercial decision, the important difference between a business risk and a *mala fide* conduct should be kept in mind with view to ensure that while corrupt public servants are suitably dealt with the *bona fide* business/ commercial decisions taken by public servants in discharge of their official duties are not taken up for unnecessary probe.''

Further paras 10.1 and 10.16 read as under:

''10.1 On receipt of a complaint or after verification of an information or on completion of a Preliminary Enquiry taken up by CBI if it is revealed that *prima facie* a cognizable offence has been committed and the matter is fit for investigation to be undertaken by Central Bureau of Investigation, a First Information Report should be recorded under Section 154 Criminal Procedure Code and investigation taken up. While considering registration of an FIR, it should be ensured that at least the main offence/ s have been notified under Section 3 of the Delhi Special Police Establishment Act. The registration of First Information Report may also be done on the direction of Constitutional Courts, in which case it is not necessary for the offence to have been notified for investigation by DSPE. The FIRs under investigation with local Police or any other law enforcement authority may also be taken over for further investigation either on the request of the State Government concerned or the Central Government or on the direction of a Constitutional Court. As the resources of CBI are limited, administrative arrangements have been worked out vis-avis local Police as detailed in this Manual and Policy Division instructions as regards registration of cases. The guidelines regarding the type of petty cases, which should normally not be taken up for investigation, are also mentioned in the Manual and instructions of the Policy Division.

10.16 In trap cases under Sections 7 and 13 of the P.C. Act, 1988, the FIR should be registered as soon as a *bona fide* complaint/information is received attracting the provisions of

Sections 7 and 13 of the P.C. Act, 1988. After the trap materializes, investigation should continue under the same case number. If the offence is to be investigated by an officer of a rank, who cannot investigate the case without permission from a Magistrate, as contemplated under Section 17 of the P.C. Act of 1988, it will be necessary for the Investigating Officer to obtain requisite permission, from the Court soon after the case is registered. In case, the trap materializes, it will be necessary for the Investigating Officer, if he is below the rank specified in Section 17 of the P.C. Act of 1988, to report the developments to the Magistrate and obtain further permission for investigation of the offence of obtaining gratification other than legal remuneration punishable under Sections 7 and 13 of the P.C. Act, 1988 and of criminal misconduct punishable under Section 13(1)(d) read with Section 13(2) of the P.C. Act, 1988.''

30. A bare perusal of the above provisions of the CBI Manual makes it clear that a distinction is carved out between a preliminary inquiry and a regular case. A Preliminary enquiry may be converted into a regular case in terms of para 9.1 of the CBI Manual as soon as sufficient material becomes available to prima facie constitute a cognizable offence. A preliminary enquiry is not a mandatory procedural requirement under the CBI Manual and is to be resorted to only when complaint or information so received is not adequate to justify registration of a regular case under the provisions of section 154 Cr.P.C and it only when the verification of the complaint or information reveals commission of a prima facie offence that a Regular Case is registered against the accused person. A reading of clause 10.16 of the CBI Manual further makes it clear that the said clause is not applicable to the present case since it pertains to trap cases under section 7 and 13 of the PC Act while the case against the petitioner has been registered under section 12 of the PC Act. Moreover, the said clause uses the expression ''bona fide complaint/ information'' which further makes it clear that the investigating officer/ police official must do some verification or enquiry so as to come to a conclusion that the complaint or information received merits some credence or is ''bona fide''.

31. Having said that preliminary inquiry is not a mandatory requirement under the CBI Manual (Crime), it is important to also take note of the law laid down by the Apex Court in **P. Sirajuddin v. State**

of Madras reported at AIR 1971 SC 520 which is as under:

> ''17.....Before a public servant, whatever be his status is publicly charged with acts of dishonesty which amount to serious misdemeanor or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person, especially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general. If the Government had set up a Vigilance and Anti-Corruption Department as was done in the State of Madras and the said department was entrusted with enquiries of this kind, no exception can be taken to an enquiry by officers of this department but any such enquiry must proceed in a fair and reasonable manner. The enquiring officer must not act under any preconceived idea of guilt of the person whose conduct was being enquired into or pursue the enquiry in such a manner as to lead to an inference that he was bent upon securing the conviction of the said person by adopting measures which are of doubtful validity or sanction. The means adopted no less than the end to be achieved must be impeccable.''

32. The above view of the Apex Court has further been reiterated in **State of Haryana v. Bhajan Lal** (Supra) wherein the Apex Court has agreed with the above view taken in Sirajuddin's case. The relevant paras are extracted as under:

> ''77. In this connection, it will be appropriate to recall the views expressed by Mitter, J. in **P. Sirajuddin v. State of Madras**18 in the following words: (SCC p. 601, para 17)
>
> > ''Before a public servant, whatever be his status is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person specially one who like the appellant occupied the top position in a department, even if baseless,

> > would do incalculable harm not only to the officer in particular but to the department he belonged to, in general .... The means adopted no less than the end to be achieved must be impeccable.''
>
> 78. Mudholkar, J. in a separate judgment in **State of Uttar Pradesh v. Bhagwant Kishore Joshi**19 at p. 86 while agreeing with the conclusion of Subba Rao, J. (as he then was) has expressed his opinion stating: (SCR pp. 86-87) ''In the absence of any prohibition in the Code, express or implied, I am of opinion that it is open to a police officer to make preliminary enquiries before registering an offence and making a full scale investigation into it.''
>
> 79. We are in agreement with the views, expressed by Mitter, J. and Mudholkar, J. in the above two decisions.''

33. P. Sirajuddin (supra) as well as **State of Haryana v. Bhajan Lal** (supra) pertains to preliminary inquiries/ verification only as regards the matters where the accused is a public servant. However, it is apposite to take note of the case of **Lalita Kumari v. Government of Uttar Pradesh** reported at (2008)14 SCC 337 wherein the Apex Court was posed with the question, as is also involved in the present case, as to whether upon receipt of information by an officer in charge of the police station disclosing cognizable offence, it is imperative for him/her to register a case under section 154 of the Code of Criminal Procedure, 1973 or a discretion lies with him/her to make some sort of preliminary enquiry before registering the same. In view of conflicting decisions of the Apex Court on the aforesaid issue, the Division Bench of B.N. Agrawal and G.S. Singhvi, JJ. referred the matter to a larger Bench. The said question is thus pending before the larger bench in the Apex Court and it would not be appropriate to make any observations as regards the said issue in the present case.

34. It is pertinent to state that the petitioner, by way of the present petition under Articles 226& 227 of the Constitution read with section 482 Cr.P.C, has approached this Hon.ble Court seeking the quashing of the RC AI 2008 A004 initiated against him as well as the proceedings that emanated therefrom. Before, adverting to the facts of the case in the light of the law laid by the Apex Court, I find it necessary to reiterate the law as regards the power of this Hon'ble Court to quash a FIR/complaint. The Apex Court, in the case of **State of Haryana v. Bhajan Lal and**

Others reported at AIR 1992 SC 604, realizing that it may not be possible to lay down any precise, clearly defined and sufficiently channelized and inflexible guidelines or rigid formulae to give an exhaustive list of myriad kinds of cases wherein such power should be exercised, has elaborately, though not exhaustively, dealt with the circumstances under which the court can exercise power under section 482 to quash FIR either to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Furthermore, in **Inder Mohan Goswami v. State of Uttaranchal** reported at (2007)12 SCC 1, the Apex has elaborately discussed the law evolved by judicial precedents as regards quashing of FIR/complaint/proceedings. The relevant extract of the judgment is as under:

''Scope and ambit of courts' powers under Section 482 Cr.P.C

23. This Court in a number of cases has laid down the scope and ambit of courts' powers under Section 482 CrPC. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under Section 482 Cr.P.C can be exercised:

(i) to give effect to an order under the Code;

(ii) to prevent abuse of the process of court, and

(iii) to otherwise secure the ends of justice.

24. Inherent powers under Section 482 Cr.P.C though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the statute.

Discussion of decided cases

25. Reference to the following cases would reveal that the courts have consistently taken the view that they must use this extraordinary power to prevent injustice and secure the ends of justice. The English courts have also used inherent power to

achieve the same objective. It is generally agreed that the Crown Court has inherent power to protect its process from abuse. In **Connelly v. DPP**[1] Lord Devlin stated that where particular criminal proceedings constitute an abuse of process, the court is empowered to refuse to allow the indictment to proceed to trial. Lord Salmon in **DPP v. Humphrys**[2] stressed the importance of the inherent power when he observed that it is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. He further mentioned that the court's power to prevent such abuse is of great constitutional importance and should be jealously preserved.

26. In **R.P. Kapur v. State of Punjab**[1] this Court summarised some categories of cases where inherent power can and should be exercised to quash the proceedings: 1 AIR 1960 SC 866: (1960)3 SCR 388

(i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings;

(ii) where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

27. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court should normally refrain from giving a *prima facie* decision in a case where all the facts are incomplete and hazy, more so, when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of such magnitude that they cannot be seen in their true perspective without sufficient

1. AIR 1960 SC 866 : (1960) 3 SCR 388

material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage.

28. This Court in **State of Karnataka v. L. Muniswamy**[2] observed that the wholesome power under Section 482 CrPC entitles the High Court to quash a proceeding when it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The High Courts have been invested with inherent powers, both in civil and criminal matters, to achieve a salutary public purpose. A court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. The Court observed in this case that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the legislature. This case 2 (1977)2 SCC 699: 1977 SCC (Cri) 404 has been followed in a large number of subsequent cases of this Court and other courts.

29. In **Chandrapal Singh v. Maharaj Singh**[3] in a landlord and tenant matter where criminal proceedings had been initiated, this Court observed in para 1 at SCC p. 467 as under:

> ''A frustrated landlord after having met his waterloo in the hierarchy of civil courts, has further enmeshed the tenant in a frivolous criminal prosecution which prima facie appears to be an abuse of the process of law. The facts when stated are so telling that the further discussion may appear to be superfluous.''

30. The Court noticed that the tendency of perjury is very much on the increase. Unless the courts come down heavily upon such persons, the whole judicial process would come to ridicule. The Court also observed that chagrined and frustrated litigants should not be permitted to give vent to their frustration by cheaply invoking jurisdiction of the criminal court.

2. (1977) 2 SCC 699 : 1977 SCC (Cri) 404

3. (1982) 1 SCC 466 : 1982 SCC (Cri) 249

31. This Court in **Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre**[4] observed in para 7 as under: (SCC p. 695)

> ''7. The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilized for any oblique purpose and where in the opinion of the court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.''

32. In **State of Haryana v. Bhajan Lal**[5] this Court in the backdrop of interpretation of various relevant provisions of CrPC under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 of the Constitution of India or the inherent powers under Section 482 CrPC gave the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of the court or otherwise to secure the ends of justice. Thus, this Court made it clear that it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list to myriad kinds of cases wherein such power should be exercised: (SCC pp. 378-79, para 102)

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute

4. (1988) 1 SCC 692 : 1988 SCC (Cri) 234

5. 1992 suppl (1) SCC 335 : 1992 SCC (Cri) 426

any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.''

33. This Court in **Janata Dal v. H.S. Chowdhary**[6] observed thus: (SCC p. 355, para 132)

6. (1992) 4 SCC 305 : 1993 SCC (Cri) 36

''132. The criminal courts are clothed with inherent power to make such orders as may be necessary for the ends of justice. Such power though unrestricted and undefined should not be capriciously or arbitrarily exercised, but should be exercised in appropriate cases, *ex debito justitiae* to do real and substantial justice for the administration of which alone the courts exist. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plentitude of the power requires great caution in its exercise. Courts must be careful to see that its decision in exercise of this power is based on sound principles.''

34. In **G. Sagar Suri v. State of U.P**[7] this Court observed that it is the duty and obligation of the criminal court to exercise a great deal of caution in issuing the process, particularly when matters are essentially of civil nature.

35. This Court in **Roy V.D. v. State of Kerala**[8]observed thus: (SCC p. 597, para 18)

''18. It is well settled that the power under Section 482 CrPC has to be exercised by the High Court, inter alia, to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Where criminal proceedings are initiated based on illicit material collected on search and arrest which are per se illegal and vitiate not only a conviction and sentence based on such material but also the trial itself, the proceedings cannot be allowed to go on as it cannot but amount to abuse of the process of the court; in such a case not quashing the proceedings would perpetuate abuse of the process of the court resulting in great hardship and injustice to the accused. In our opinion, exercise of power under Section 482 CrPC to quash proceedings in a case like the one on hand, would indeed secure the ends of justice.''

36. This Court in **Zandu Pharmaceutical Works Ltd. v. Mohd.**

7. (2000) 2 SCC 636 : 2000 SCC (Cri) 513

8. (2000) 8 SCC 590 : 2001 SCC (Cri) 42

Sharaful Haque[9] observed thus: (SCC p. 128, para 8)

> ''8. ... It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.''

37. In **Indian Oil Corpn. v. NEPC India Ltd.**[10] this Court again cautioned about a growing tendency in business circles to convert purely civil disputes into criminal cases. The Court noticed the prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. The Court further observed that: (SCC p. 749, para 13)

> ''13. ... Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged.

35. Thus, it is trite law that the courts can quash the FIR/complaint as well as the proceedings so to prevent the abuse of the process of the law and to secure the ends of justice. Furthermore, if the allegations as set out in the FIR/complaint, even if taken to be uncontroverted and true, are so absurd and improbable so as to shock the conscience of the court, the Court is justified in quashing such proceedings so as to prevent the accused from great hardship and injustice. Adverting to the facts of the present case, a perusal of the contents of the chargesheet filed by the CBI itself shows the absurdity in the allegation so leveled against the petitioner and the manner in which the trap proceedings were executed by the respondent CBI. It has been fairly conceded by the CBI in the

9. (2005) 1 SCC 122 : 2005 SCC (Cri) 283

10. (2006) 6 SCC 736 : (2006) SCC (Cri) 188

chargesheet that when the petitioner reached Hotel Jukaso Inn in the evening of 02.06.2008, the receptionist told the petitioner that the complainant has booked two rooms in the hotel which made the petitioner suspicious and he left the Hotel. The petitioner then called the complainant telling him about his suspicion since two rooms were booked by the complainant and that crime branch officials were present in the Hotel. It is highly unlikely that despite there being a suspicion, the petitioner would again call the complainant and would ask him to fix a meeting on the very next day for the same purpose of tendering the bribe money. However, even on the next day when the petitioner visited the Hotel, he got suspicious after getting to know from his sources that two persons are present in room no. 213 and also that some police personnel are present in room no. 215 who have been staying there since the previous day. It is beyond any imagination that despite such a strong suspicion even on the second visit to the Hotel, the petitioner, who is a Minister in the Assam Government, would again call up the complainant and ask him to fix another time for the meeting to hand over the bribe money at the same Hotel. A further perusal of the chargesheet makes it evident that the complainant was repeatedly instigating the petitioner to hand him over the bribe money assuring that there are no police officials in the Hotel and that the complainant would take bribe money only from the petitioner and only in room no. 213. It is further hard to believe that when the complainant refused to accept the bribe money through the driver of the petitioner, the petitioner himself proceeded to the room to hand over the bribe money running the risk of being caught despite being suspicious of the circumstances. It is pertinent to state here that the petitioner is not a common man or a layman to have ignored the suspicions but was the then Minster of Education in the Government of Assam who was fully aware of the consequences of being trapped red handed while handing over the bribe money. All these circumstances raise a cloud of suspicion on the prosecution story.

36. I further find that it is extremely unusual that though the murder case is registered in Kolkata, the complainant is also a CBI Officer is posted in Kolkata; the complaint was lodged by the complainant only in Delhi. No cogent and plausible explanation has been rendered as to why an officer posted at Kolkata would travel all the way to Delhi at state expenses to lodge a complaint more so when in the complaint itself, it has been alleged that the petitioner expressed his inability to visit Delhi

due to the nature of his work and would like to meet the complainant in Kolkata or Guwahati and it was the complainant only who expressed his inability to meet in Kolkata or Guwahati and said that he could meet the petitioner only in Delhi. In the said circumstances, it would have been most unnatural not to lay a trap in Kolkata or Guwahati but to lay a trap in Delhi. The enthusiasm of the complainant to shift the entire matter to Delhi in unexplainable as the same would mean that the complainant would have to take leave from his office in order to travel to Delhi at State expenses so as to lay trap against the petitioner, who is stationed in Kolkata. It is further strange that a hotel in one of the most posh colonies, i.e., Sunder Nagar is selected to lay down the trap where two rooms are booked. All the above circumstances certainly show that the entire trap proceedings were being stage managed and the complainant was more enthusiastic than the petitioner.

37. Furthermore, a perusal of the chargesheet also makes it clear that an active role has been played by the complainant himself in organizing the trap against the petitioner. It was the complainant who had booked rooms in Hotel Jukaso Inn and was constantly instigating the petitioner to deliver the bribe money to him in room no. 213 only. Thus, the allegations as leveled are so absurd that no prudent man can come to a logical and just conclusion that there is sufficient ground to proceed against the petitioner.

38. Furthermore, as per the prosecution's own version, the bribe was offered by the petitioner Sh. Ripun Bora on 16.05.2008 whereas the complaint was filed only on 02.06.2008 that is to say after a delay of 18 days and no reason has been given by the prosecution as to why the complainant had remained silent from 16.05.2008 to 02.06.2008 and why the complaint was not filed on the day on which the bribe has alleged to have been offered by the petitioner to the complainant. There is not even an averment on the said issue by the counsel for respondent CBI. Furthermore, no cogent and plausible explanation has been rendered by the counsel for the State for the delay in lodging the FIR especially in the light of the aforestated facts which would show as to how meticulously the alleged trap was laid by booking two rooms in a posh colony of New Delhi, i.e., Sunder Nagar and using electronic equipments like audio-video recorders and Sony handicam so to record the trap proceedings. By the perusal of the transcripts of telephonic conversations between the complainant and the DIG, CBI, placed on record by the counsel for

petitioner, a bleak explanation has come to light that the delay in lodging the complaint was due to the fact that the complainant was disturbed and had sleepless nights. Even in the complaint, the complainant has sated that the he was disturbed and was unable to attend office due to tension. However, the said explanation does not come to the rescue of the respondent CBI in the light of the fact that the complainant was a CBI official and that too of the rank of a Deputy Superintendent of Police and to state that due to tension, being disturbed and having sleepless nights is an explanation far from satisfaction and in fact it is absurd.

39. It has been vehemently argued by the counsel for petitioner that the trap had been conducted without the authority of any CBI Director and thus, the trap is illegal. It has been further argued that the complainant Sh. AB Gupta has himself acted as an entrapper or the investigating officer and himself organized the entire trap which is in violation of law. The counsel has placed reliance upon Annexure 6-A of the CBI Manual to aver that a PE/RC can be registered against present and former Ministers of Central/State governments only by a CBI Director and only a CBI director has the power to take decision as regards the verification of source information/complaint against such Ministers. However, in the present case the CBI Director was kept in dark and the trap laid down against the petitioner was not under the authority of any CBI Director. I find force in the argument advanced by the counsel for petitioner. Para 8.5 of the CBI Manual deals with the complaints for which no verification is required but para 8.6 of the Manual deals with complaints where verification should be taken up. Furthermore, para 8.8 of the CBI Manual categorically states that a complaint received against a Minister or former Minister of Union Government must be put up to the Director, CBI for appropriate orders. However, in the present case, there was no authorization by the CBI Director to lay a trap against the petitioner no was any verification conducted. Infact, a perusal of the complaint makes it evident that while 7 copies of the complaint were forwarded to different officials of the CBI; no copy was forwarded to the Director who is the official empowered to deal with complaint against Ministers. The relevant paras are reproduced as under:

''Complaints in which Verification should be taken up

8.6 The following categories of complaints may be considered fit for verification:

i. Complaints pertaining to the subject-matters which fall within the purview of CBI either received from official channels or from well-established and recognized public organizations or from individuals who are known and who can be traced and examined.

ii. Complaints containing specific and definite allegations involving corruption or serious misconduct against public servants etc., falling within the ambit of CBI, which can be verified.

8.7 If any complaint against a Minister or former Minister of the Union Government, or the Union Territory is received in any Branch, it should be put up to the Director, CBI, for appropriate orders. The relevant file of the Branch should remain in the personal custody of SP concerned. In case the complaints are received against members of lower judiciary these may be forwarded to the Registrar of the High Court concerned and the complaints received against members of higher judiciary may be forwarded to Registrar General of Supreme Court through the Joint Director (Policy).''

40. As regards the contention of the counsel for petitioner that a second FIR should have been registered for the incident that occurred on 03.06.2008, I do not find any force in the aforesaid contention in the light of the law laid by the apex Court in **TT Anthony v. State of Kerala** reported at (2001)6 SCC 181 wherein it has been held that there cannot be a second FIR on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences.

41. Thus, in the light of the observations made above, the chargesheet RC AC 12008 A0004 and the proceedings emanating therefrom are hereby quashed as I am of the view that the proceedings have been initiated against the petitioner in utter abuse of the process of law and the quashing thereof would secure the ends of justice.

42. The writ petition is disposed of accordingly.

ILR (2012) I DELHI 442
CRL. A.

STATE ....APPELLANT

VERSUS

RAM KUMAR & ORS. ....RESPONDENTS

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

CRL. A. NO. : 140/1998 DATE OF DECISION: 15.12.2011

Indian Penal Code, 1860—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.

In **Dasari Siva Prasad Reddy Vs. Public Prosecutor,** AIR 2004 SC 4383, it was held as under:

> "25. A strong suspicion, no doubt, exists against the appellant but such suspicion cannot be the basis of conviction, going by the standard of proof required in a criminal case. The distance between 'may be true' and 'must be true' shall be fully covered by reliable evidence adduced by the prosecution. But, that has not been done in the instant case. If, coupled with the circumstance unfolded by the evidence of PW3, the evidence of PW4 had been believed, it would have gone a long way in substantiating the prosecution case. But, in the instant case, apart from the fact that the appellant was at his house on the morning of 20th April, 1996, there is no other circumstance whatsoever which connects the accused to the crime, though serious suspicion looms large about his involvement. The view taken by the trial Court that the prosecution could not establish the complete chain of circumstances incriminating the accused is a reasonably possible view and the High Court should not have disturbed

> the same. Having regard to the state of available evidence, the benefit of doubt given to the accused by the trial Court warranted no interference by the High Court." **(Para 19)**

Important Issue Involved: Where the evidence is of a 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.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Sanjay Lao, Additional PP.

FOR THE RESPONDENTS : Mr. R.N. Vatsa, Advocate for Respondent No.1. Mr. Puneet Ahluwalia, Advocate for Respondent No.2. Mr. Javed Hashmi, Advocate for respondent No. 3.

CASES REFERRED TO:

1. *Dasari Siva Prasad Reddy* vs. *Public Prosecutor,* AIR 2004 SC 4383.
2. *Ashish Batham* vs. *State of M.P.,* AIR 2002 SC 3206.
3. *Hanumant Govind Nargundkar and Another* vs. *State of Madhya Pradesh,* AIR 1952 SC 343.

RESULT: Appeal dismissed.

G.P. MITTAL, J.

1. This appeal is directed against a judgment dated 19.10.1996 passed by the learned Additional Sessions Judge in case FIR No.139/94

P.S. Malviya Nagar whereby three accused (respondents herein) were acquitted of the charge for the offences punishable under Section 302/ 201/34 Indian Penal Code.

2. In brief, the prosecution case was that accused Ram Kumar was a friend of Jatinder (the deceased) as both of them were studying together in ITI Pusa. Fifteen/twenty days prior to the incident, accused Ram Kumar went to the house of Jatinder and made a grievance to his mother Smt. Vidya Devi(PW2) and father Risal Singh(PW3) that Jatinder was having illicit relations with his wife. The accused (Ram Kumar) threatened that if Jatinder did not desist from continuing with the relations, he would kill him.

3. On 16.03.1994, Jatinder went to the house of his sister Suresh Bala (PW1) and Surender Kaur (PW6) in Shahpur Jat. At about 4:45 pm, accused Ram Kumar went to the house of PWs 1 and 6 where Ram Parkash (PW4) and Ram Kumar (PW8) were also present. Ram Kumar took Jatinder along with him. According to the prosecution version, at about 8:00 PM Pradeep Kumar (PW9) saw all the three accused persons with Jatinder (the deceased). When Pradeep Kumar inquired from Jatinder (the deceased), he informed Pradeep Kumar that they(the accused) were his friends and that they were going to Sector 5, Pushp Vihar where the motorcycle of one of their friends had gone out of order.

4. According to the prosecution, on that very day at about 8:30 pm SI Ramesh Kumar (PW18) along with Constable Dinesh Kumar (PW13) and Constable Darshan was on patrol duty in the area. When he reached near the temple in Sector 5, Pushp Vihar, they noticed some flames in the open space behind MCD Primary School. They also noticed three persons running from there. They chased and apprehended them. On interrogation, their names were disclosed as Ram Kumar, Shahid Khan and Sanjay. They confessed to having committed Jatinder's murder. At the time of their apprehension, accused Ram Kumar was found carrying a dagger (Ex.P1), accused Shahid was having a five litre petrol container (Ex.P6) and accused Sanjay was carrying a purse(Ex.P3) containing a diary and one match box (Ex.P5).

5. PW11 Balbir Singh reached the spot at about 9:00 pm and identified the dead body. He also noticed various articles held by the accused persons. The blood-stained dagger and various other articles

were seized from the accused. Blood-stained earth, earth control, the blood-stained clothes of all the three accused, which they were wearing at that time were seized. The photographs of the scene of occurrence were taken. After completion of investigation, a report under Section 173 of the Code of Criminal Procedure was filed against the accused. Rukka (Ex.PW18/A) was sent to the Police Station at 10:10 pm.

6. In order to establish its case, the prosecution examined 18 witnesses. The learned Trial Court by the impugned order found that the circumstances relied upon by the prosecution were not established and, therefore, giving them the benefit of doubt acquitted them.

7. The prosecution relied on the following circumstances to establish the guilt of the accused persons: -

(i) Threat extended by accused Ram Kumar to Vidya Devi (PW2) and Risal Singh (PW3); the deceased's parents that Jatinder would be killed if he did not desist from continuing the illicit relations with his (Ram Kumar's) wife.

(ii) Taking away of Jatinder by Ram Kumar on 16.03.1994 at 4:45 pm from the house of his sister's(PWs 1 & 6) in presence of their husbands(PWs 4 & 8).

(iii) Pradeep Kumar (PW9) saw the three accused persons with the deceased at 8:00 pm and a conversation took place between him and the deceased wherein he (PW9) was informed that the motorcycle of one of his friends was out of order in Sector 5, Pushp Vihar and they(the deceased and accused) were proceeding there.

(iv)(a) At about 8:30 pm, SI Ramesh Kumar (PW18), Constable Dinesh Kumar(PW13) and PW Darshan while on patrol duty in the area noticed flames in the open ground behind MCD Primary School and found the three accused running from there. They were chased and apprehended.

(b) Accused Ram Kumar was found in possession of a blood-stained dagger (Ex.P1), accused Shahid was carrying a five litre petrol container (Ex.P6) and accused Sanjay was carrying a purse (Ex.P3) containing a diary and a match

box (Ex.P5), which were seized by PW18 at the spot.

(v) Presence of blood-stains of Blood Group ''B'' on accused Shahid Khan and Sanjay's clothes which matched with the blood group of the deceased.

8. We have heard Mr. Sanjay Lao, Additional PP for the State and Mr. R.N. Vatsa, Advocate, Mr. Puneet Ahluwalia, Advocate and Mr. Javed Hashmi, Advocate for respondents No.1, 2 & 3 respectively and perused the record.

9. The circumstance no.(i) relates to the motive for commission of the crime by the accused. The prosecution did not lead any evidence to prove as to why accused Shahid and Sanjay were interested in helping accused Ram Kumar with whose wife the deceased was having illicit relations.

10. PW2 Smt. Vidya Devi, the deceased's mother in her examination-in-chief deposed that she made inquiries from the deceased and the deceased informed her that there was no such relation. In the cross-examination, she deposed that she did not inquire from anyone whether accused Ram Kumar was married or not. Similarly, PW3 Risal Singh (the deceased's father) also deposed that he did not make any inquiry about Ram Kumar's marriage. He deposed that the deceased had informed him that accused Ram Kumar was married.

11. In his statement under Section 313 Cr.P.C., accused Ram Kumar denied that he knew Jatinder or that he was his friend. He denied that he was married and thus stated there was no question of extending any threat to the deceased on account of the alleged illicit relationship between the deceased and his (Ram Kumar's) wife.

12. On the basis of the evidence produced by the prosecution on the point of motive for commission of the offence, the Trial Court held that the motive with regard to the illicit relationship and the threat was not established. The prosecution did not collect any evidence as to when and to whom accused Ram Kumar was married. In view of Ram Kumar's denial that he was ever married, it cannot be said that the prosecution has established the motive for commission of the offence.

13. The circumstance no.(ii) and (iii) stated earlier relate to the last seen evidence. PW1 Suresh Bala and PW6 Surender Kaur are the

deceased's sisters and PW4 Ram Parkash and PW8 Ram Kumar are their husbands. They all deposed that on 16.03.1994 at about 4:45 pm, accused Ram Kumar took Jatinder along with him. All of them testified that they received information about Jatinder's murder and went to the police post. None of those four witnesses or any other person told the Investigating Officer about Ram Kumar's visit till two days after the incident. PW18, SI Ramesh Kumar (Inspector at the time of recording the statement) deposed that on 17.03.1994, none of the relatives informed him that accused Ram Kumar had come to their house on 16.03.1994, in spite of the fact that PW4 and PW8 did meet him on 17.03.1994.

14. If the deceased was murdered in the evening of 16.03.1994 and the deceased's relations had reached the spot by late night, it was very natural for them to have disclosed to the Investigating Officer that accused Ram Kumar who had already been apprehended had taken Jatinder with him from the house of PWs1, 4, 6 and 8. In view of this, the circumstance was rightly disbelieved by the Trial Court.

15. Pradeep Kumar(PW9) deposed that on 16.03.1994 at about 8:00 pm, he was returning from village Khirki to his house in Devli via Pushp Vihar. One Jatinder(who was known to him) met him on the pulia in between Sector 4 and 5, Pushp Vihar. He inquired from him as to how he was present there. He introduced the three accused persons(present in the court) to him. Jatinder informed him that the motorcycle of one of his friends went out of order in Sector 5, Pushp Vihar and they were proceeding there. This was another piece of last seen evidence relied on by the prosecution. In his examination-in-chief, PW9 deposed that at about 11:00 pm when he was going to the house of his uncle, he met Jatinder's father along with 4-5 persons and on inquiry, they informed him that Jatinder had been murdered and they were going to the police post. He deposed that he also accompanied them to the police post. It is very strange that although PW9 saw the deceased with the three accused persons, he did not inform about the same to the deceased's father (PW3). PW9 in his cross-examination tried to hide his relationship with the deceased although PW1, the deceased's sister was quite categorical that Pradeep Kumar (PW9) was their maternal uncle. In these circumstances, the Trial Court was justified in discarding PW9's testimony on the point of last seen evidence.

16. PW18, SI Ramesh Kumar conducted the initial investigation in the case. On 16.03.1994, he was on patrol duty along with Constable Dinesh Kumar (PW13) and Constable Darshan. PW18 stated that at about 8:30 pm, they reached opposite Devi Ka Mandir in Sector 5, Pushp Vihar. They noticed flames in the open space behind MCD Primary School. They found three persons running from there. They got suspicious, chased and apprehended them. He deposed that the trio confessed having committed the deceased's murder and setting him ablaze. He deposed that accused Ram Kumar was holding a blood-stained dagger in his hand, accused Shahid was holding a five litre container of petrol and accused Sanjay had a purse in his hand. They noticed the deceased burning. They extinguished the fire by throwing sand. To the same effect is the testimony of Constable Dinesh Kumar (PW13). They were disbelieved by the Trial Court on the ground that it was highly improbable that when any person is being chased by the police, he would still carry the incriminating article with him. We do agree with the reasoning given by the Trial Court. It defies logic that a police party would chase the fleeing culprits, but they would continue to hold articles like dagger and an empty plastic container which was of little value.

17. On this very point, it would be relevant to refer to Balbir Singh's (PW11) testimony. He was the deceased's maternal uncle. He also claimed to have reached the spot at 9:00 PM by chance and found that a boy had been killed by burning. He deposed that he went to the place where the dead body was lying and he found the dead body to be that of his sister's son Jatinder. He deposed that the police seized a dagger from accused Ram Kumar's hand and a plastic container from accused Shahid's hand and a purse and a match box from accused Sanjay's hand. Again, it is highly improbable that these accused persons would continue to hold these articles in their respective hands even after half an hour of their apprehension. The Trial Court disbelieved the version regarding accused's apprehension on the ground of contradiction in the statements of PW18 and PW13. PW13 deposed that the accused persons were running towards the side of the flats, whereas PW18 deposed that the accused persons were running towards the north side of the temple and the DDA flats were constructed on the west side of the temple. Normally, such contradictions are inconsequential because the Court has to see the main substratum of the prosecution case. It, however, assumes importance in view of the fact that all the friends and the relations of the

deceased have been cited as witnesses of last seen, apprehension and recovery and their testimonies were unbelievable. PW4 and PW8 did not disclose about the deceased being taken away by accused Ram Kumar on that very day in spite of meeting the Investigating Officer; PW9 did not disclose about meeting the accused and the deceased together at 8:00 pm. On the basis of the evidence produced, it can be inferred that the accused persons were not arrested in the manner as alleged by the prosecution.

18. Though the prosecution claims to have found accused Shahid and Sanjay's clothes to be stained with ''B'' Group blood which matched with the deceased's blood, yet in view of the forgoing discussion, we are of the view that the investigation in this case was tainted and the presence of the blood-stains of ''B'' Group on the deceased's clothes simply leads to a suspicion that they might have been responsible for the deceased's murder.

19. In **Dasari Siva Prasad Reddy Vs. Public Prosecutor,** AIR 2004 SC 4383, it was held as under:

> ''25. A strong suspicion, no doubt, exists against the appellant but such suspicion cannot be the basis of conviction, going by the standard of proof required in a criminal case. The distance between 'may be true' and 'must be true' shall be fully covered by reliable evidence adduced by the prosecution. But, that has not been done in the instant case. If, coupled with the circumstance unfolded by the evidence of PW3, the evidence of PW4 had been believed, it would have gone a long way in substantiating the prosecution case. But, in the instant case, apart from the fact that the appellant was at his house on the morning of 20th April, 1996, there is no other circumstance whatsoever which connects the accused to the crime, though serious suspicion looms large about his involvement. The view taken by the trial Court that the prosecution could not establish the complete chain of circumstances incriminating the accused is a reasonably possible view and the High Court should not have disturbed the same. Having regard to the state of available evidence, the benefit of doubt given to the accused by the trial Court warranted no interference by the High Court.''

20. While dealing with a case based on circumstantial evidence, the Supreme Court in **Ashish Batham v. State of M.P.,** AIR 2002 SC 3206 relied on **Hanumant Govind Nargundkar and Another v. State of Madhya Pradesh,** AIR 1952 SC 343 observed that in cases where the evidence is of a 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. Again, the circumstances should be of a conclusive nature and tendency should be such as to exclude every hypothesis but the one proposed to be proved. In other words, 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. In Para 8 of the report, it was observed as under:

> ''8. Realities or Truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away by heinous nature of the crime or the gruesome manner in which it was found to have been committed. Mere suspicion, however, strong or probable it may be is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and grave the charge is greater should be the standard of proof required. Courts dealing with criminal cases at least should constantly remember that there is a long mental distance between 'may be true' and 'must be true' and this basic and golden rule only helps to maintain the vital distinction between 'conjectures' and 'sure conclusions' to be arrived at on the touch stone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record.''

21. It is well-settled that the High Court interferes in an order of acquittal where there are substantial and compelling reasons to do so. When two views are possible, the High Court is slow to interfere in an

order of acquittal. In this case, even if the accused's apprehension in the manner as alleged by the prosecution is believed, there can only be a suspicion that the accused might have been responsible for committing the deceased's murder. But suspicion however strong, cannot take place of proof.

22. We do not find any good reason to interfere in the order of acquittal.

23. The Appeal is accordingly dismissed.