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Written Statement—Defendant sought impleadment of Managing Director of plaintiff company, as Plaintiff contending that he was a necessary party as the entire case was based on an oral agreement between the said Managing Director and the defendant and for a direction to him to file affidavit in support of averments in the plaint—Application for extension of time in filing written statement also filed—Contending that written statement, if filed prior to such impleadment, would disclose the defence of the defendant—Plaintiff likely to modify case set up in suit—Single Judge dismissed both the applications (for impleadment and enlargement of time)—Held—Impleadment of Respondent was not necessary—Company being legal entity can file suit in its own name—If during the trail the plaintiff did not examine the Managing Director, consequences would follow—No ground for application for extension of time or application for condonation of delay also made out-Single Judge rightly rejected the application.

Mr. Sandeep Thapar v. *SME Technologies Pvt. Ltd. ... 700*

— Section 96, Order 41 Rule 22 Delhi High Court Act, Section 10—Aggrieved appellants preferred appeal against dismissal of their suit except in respect of preliminary decree qua Ex. DA and PW1/1, i.e. two family settlements entered into between appellants and Respondent no.1—Appellants originally preferred suit seeking separation of their shares after partition of joint property—Respondents resisted the suit and Respondent no.1 also filed counter claim seeking declaration that he was absolute owner of properties—Besides appeal filed by appellants, Respondent no.1 also filed cross objections in the appeal—Appellants contended Kapurthala was a capationary and Baba Jassa Singh was first Karta and after the successive incumbents to 'Kartaship', burden of managing family fell on shoulders of Maharaja Jagatjit Singh who

became Karta in 1877. After his demise, 'Kartaship' devolved on S. Paramjit Singh and thereafter, on S. Sukhjit Singh—Also when on 19.06.1949 Maharaja Jagatjit Singh breathed his last, succession was: (i) per Mitakshara Survivorship as distinct from Succession; (ii) (alternatively) per Mitakshara Succession, (absolute ownership and not by Primogeniture or Will—Further even if property was not HUF from before, it was, converted to coparcenary by reason of Mitakshara Succession—Moreso, Rulers of Kapurthala were only Jagirdars or Chiefs and not Rulers—As per Respondents, Maharaja Jagatjit Singh was sovereign ruler thus, no incidence of coparcenary or Joint Hindu Family could be applied to properties held by him and Junior (sons) had no right by birth—Also, it was neither Mitakshara Survivorship nor Mitakshara Succession, but succession by Will, or failing proof that Will, by Primogeniture—Held: Primogeniture is a rule of succession—It is applicable to impartible estates—It was applicable to Rulers and Monarchs—By this rule, the eldest son or the first born son succeeds to the property of the last holder to the exclusion of his younger brothers—According to the ordinary rule of succession, all the sons of the father are entitled to equal shares in his estate—The rule of succession by which the first born son succeeds to the entire estate, to the exclusion of the other sons, is called primogeniture—The princes wielded sovereign powers and, therefore, they (all the Princes but with a rare exception) had applied the Rule of Primogeniture which then had taken the shape as the law promulgated by them as a sovereign Ruler—Primogeniture, as a rule for succession, applied to the Rulers, the Zamindars etc. which was an exception to the general customs of Mitakshara Survivorship and Mitakshara succession—Kapurthala was a sovereign estate and custom Primogeniture was invariably prevalent in Hindu Sovereign

States of across India including Kapurthala.

Tikka Shatrujit Singh & Others v. *Brig. Sukhjit Singh & Another* *704*

— Section 100—Aggrieved appellants preferred appeal against judgment and decree whereby suit of Respondent decreed—Respondent faced departmental enquiry, and charges proved against him in enquiry proceedings—Respondent filed suit seeking declaration alleging violation of principles of natural justice during Enquiry—Suit dismissed but subsequently in appeal decreed—As per appellants, Civil Court cannot reappreciate evidence led before Enquiry Officer and sit in appeal over enquiry proceedings—Held—Enquiry proceedings do not have to strictly abide by strict rules of evidence; enquiry has to be seen to have been held; the question of the adequacy or reliability of the evidence, however, cannot be convassed—The court or the Tribunal has no power to trench on the jurisdiction to appreciate the evidence and to arrive at its own conclusion—Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It is meant to ensure that the delinquent receives fair treatment and not to ensure that the conclusion which the Authority reaches is necessarily correct in the view of the Court or Tribunal—Suit of Respondent correctly dismissed.

Union of India & Another v. *Ramesh Chand* *822*

— Sections 96, 100—Second appeal—Suit for perpetual injunction against the defendant—Demolition notice dated 14.09.1978 is bad in law—Defendants be restrained from demolishing his construction shown in site plan—Construction raised sometime in April 1997—Trial Judge and First Appellant Court dismissed the suit on the ground that under the provisions of Section 225 of Punjab Municipal Act, there is

bar to the jurisdiction of Civil Court—Second appeal—Appellant urged that the impugned judgment has not discussed the evidence of the plaintiff—Held—The first appeal court is bound to consider the evidence adduced before the Trial Judge, both oral and documentary; it must appreciate and draw its own conclusion based on a reasoned finding—In the instant case the impugned judgment has not examined the evidence led by the plaintiff—A party has a right to be heard both on question of facts as also on law before the first Appeal Court who is bound to address itself on all such issues—Since this mandate had not been adhered to, it is a fit case where the matter is to be remanded back to the first Appeal Court to decide the case afresh after discussing the evidence and giving a reasoned order.

Daljit Singh v. *New Delhi Municipal Corporation* *620*

— Section 100—Appeal against the Judgment and decree reversing the finding of the Trial Court which had dismissed the Suit—Respondent/Plaintiff filed a Suit for Possesssion claiming to be the owner of a property—Appellant/Defendant contested the suit contending that he had purchased the property from the Plaintiff at a consideration—After framing the issues, the Trial Court examined oral and documentary evidence and held that Defendant is not the tenant in the suit Property and had in fact purchased the Property—The suit was dismissed—The First Appellate court reversed the finding disbelieving the defence—Held that there is no perversity in the finding of the First appellate court—The Court had after a detailed examination of the documentary and oral evidence had drawn a conclusion that the defence of the Defendant that he had purchased the property vide the Agreement to sell, GPA and Receipt was a sham defence.

Baljit Singh v. *Thakaria* *563*

— Article 15—Reservations for widows/wards of defence personal—Respondent University providing reservation for widows/wards of Defence Personnel—Petitioner son of retired personnel of Indian Air Force—Petitioner applied for admission under category reserved for wards of Defence personal—Achieved rank of 2010 in written examination—Not called for counseling—Respondent University not treating wards of retired and serving Defence personnel in reserved category—Defence Ministry had merely issued recommendations to Central Universities for reservation for Armed Forces under seven heads—Respondent University made reservation only under five heads—Reservations not made for other two categories keeping in mind "hardship" factor—Other Universities also not made reservations—Petitioner fully aware that he was not eligible for reservation—Hence present petition. Held—No cogent reason for providing reservation only for five categories and not all seven—None in Respondent University has applied mind—No justification for making distinction between first five and sixth and seventh categories—Respondent University cannot justify decisions for reasons which did not form the basis thereof—Kendriya Sainik Board recommended reservation in all seven categories including wards of serving and retired personnel—Said Board an expert body in such matters—Supreme Court in *CS Sidhu's* case Expressed regret on shabby treatment of country's army men—Once expert Body recommended reservation for ex-servicemen and serving personnel though lowest in terms of priority—No reason to deprive the wards of ex-servicemen of said benefit—Petitioner approached Court before counseling ended—Estoppel not applicable.

CONTEMPT OF COURTS ACT, 1971—Section 19—Appeal against order in contempt petition—Scope-Suit instituted for restraining Defendants from creating third party interest, altering Suit Property etc.—Order passed on 09.01.2008 restraining Defendants from the same—Local Commissioner Appointed—Defendant filed applications u/S 11 & 12 of Contempt of Courts Act for initiating contempt—Single Judge disposed off said contempt petition on 11.09.2009—Appellants directed to demarcate shops forming Suit Property—Appellant averring that Respondent has clearly violated order of Court. Held—Reliance placed on *Midnapore* case (2006) 5 SCC 399—Appeal u/s 19 of the Act only maintainable against order imposing punishment for contempt—Order dropping contempt proceedings or acquitting contemnor not appealable—However Court may pass orders necessary for preserving directions which contemnor has not followed.

DELHI COOPERATIVE SOCIETIES RULES, 1973—Rule 24(2)—Applicability to persons enrolled as members through auction sale—Petitioners enrolled as members through inviting of bids for flats by Society-defaulters in payment—Request of Society for enrolling petitioners as members—Rejected on the ground of violation of Rule 24(2)—Vacancies could only be filled pursuant to advertisement—Allotment of flats-could only be by draw. Held—Rule 24(2) protects only valid existing members in waiting list in terms of the decision of *Rajib Mukhopadyaya and others v. Registrar Cooperative Societies* WP(C) No. 15741/2006 decided on 17.11.2008—Enrollment through auction illegal—Petitioners—Not existing members-rejection justified.

INDIAN ELECTRICITY ACT, 1910—Section 39—Dishonest abstraction of energy—Petitioners main averment that inspection team failed to point out any dishonest abstraction of energy through deployment of artificial means—FIR registered under Section 39 and 44—Trial Court did not find circumstances justifying framing of charges u/s 44—Proving dishonest intention matter to be examined after evidence led by both parties.

Sh. Kapil Mahajan v. *The State* *592*

— Section 39—Use of artificial means—Burden of proof shifts on consumer to prove no dishonest abstraction of electricity energy.

Sh. Kapil Mahajan v. *The State* *592*

Precedents—Word of caution against citing judgments even when there is only a parapharase which supports the case—Little difference in facts may make a lot of difference in precedential value.

Sh. Kapil Mahajan v. *The State* *592*

INDIAN EVIDENCE ACT, 1872—Section 137—Suit for partition—Lt Col. Gurupuran Singh, father of the plaintiff and defendants no. 1 to 4 died—Plaintiff claimed 1/5th in the estate of Lt. Col. Gurupuran Singh, on the basis of the Will dated 04.03.1992—Defendant no.3 had not specifically denied the execution of the Will dated 04.03.1992—She took the stand that high agricultural land was given to her by the deceased father, vide Will dated 29.01.1982—Defendant no. 4 also admitted the execution of Will dated 04.03.1992—Defendant no.1 denied the execution of both the Wills—Affidavit of PW1 tendered for examination—Witness was to be cross

examined—Controversy arose, as to who is to cross examine the said witness first—Held—The *Hiralal's* case has rightly classified the defendants into three categories—Firstly those who are supporting the case of the plaintiff fully, secondly those who are partially supporting the case of the plaintiff and thirdly those who are not at all supporting the case of the plaintiff. The classification of the defendants in the aforesaid three categories must regulate the cross examination of the plaintiff's witness. Accordingly, so far as the facts of the present case are concerned, the defendants no.3 & 4 are supporting the case of the plaintiff both partially and fully respectively and therefore they must first cross examine the witness of the plaintiff first rather than the defendant no.1 who is contesting the claim of the plaintiff.

Mrs. Sarabjit Singh v. *Mr. Gurinder Singh Sandhu & Bros.* *624*

INDIA PARTNERSHIP ACT, 1932—Section 69 and Code of Civil Procedure, 1908—Section 115, Order 7 Rule 11—Petition against Trial Court dismissing the application of the Petitioner under Order 7 Rule 11—Respondent filed a Suit for Permanent and Mandatory Injunction against the Petitioner and Municipal corporation of Delhi—Respondent had taken the Suit Property on rent from the father of Petitioner—Respondent contended that Petitioner had been threatening to raise construction over the roof of suit property which form part of Respondent's tenancy—Petitioner pleaded that Respondent is an illegal and unauthorized sub tenant in the property and Respondent was never accepted as a tenant—Petitioner also filed Application under Order 7 Rule 11, CPC on the ground that the Respondent firm has not been registered with the Registrar of firms and as such the suit is barred under Section 69 of the Indian Partnership Act which mandates that an unregistered firm cannot file a suit against any third party on

a cause of action arising out of a contract entered into by the partnership firm—Respondent in reply stated that suit filed by it is for injunction, which is not arising out of any contract between the parties and as such, Section 69 (2) of the Act has no application—Held—Petitioner's own case is that Respondent was never accepted as tenant and therefore there is no privity of contract between him and the Respondent—Under these circumstances, when there is no contract between the Petitioner and the Respondent, provisions of Section 69 (1) & (2) of the Act, are not applicable to the facts of the case—Thus, Petition dismissed.

Kewal Kishan v. *M/s. Khurana Kaj House* *543*

INDIAN SUCCESSION ACT, 1925—Section 63, 70—Suit for declaration—Property No. B-4/196, Safdarjung Enclave, New Delhi, was owned by late Smt. Shakuntala Devi Mathur, mother of the parties—She expired on 05th November, 1998, leaving a registered Will dated 17th September, 1981—It is alleged that Testator changed her mind in November, 1997, by writing a letter, addressed to her children, on a non-judicial stamp paper, annexing therewith some pieces of paper written in her own handwriting and containing her real intention—This document constituted a deemed codicil to the Will dated 17th September, 1981—Defendant took the objection that since the alleged deemed codicil has not been attested by any witness, it does not comply with the mandatory requirement of law—Held—The same rule of execution apply to a codicil, which apply to a Will to which the codicil relate and the evidence adduced in proof of execution of codicil must satisfy the same requirements as apply to the proof of execution of a Will—Since none of the documents out of Exs. PW 4/1 to PW4/7 has been executed in the manner, prescribed in Section 63(C) of the Indian Succession Act, they cannot be considered as a

valid Will or codicil to the Will dated 17th September, 1981.

Suresh Chand Mathur v. *Harish Chand Mathur* *632*

— Section 138, 131—Suit for declaration—Property No. B-4/196, Sarfdarjung Enclave, New Delhi, was owned by late Smt. Shakuntala Devi Mathur, mother of the parties—She expired on 05th November, 1998, leaving a registered Will dated 17th September, 1981—It is alleged that restrictions contained in the Will on transfer of share is void and invalid Under Section 138 of the Indian Succession Act—Held—The will executed by the Testator in this case is a conditional bequest—A conditional bequest does not come within the purview of Section 138 of Indian Succession Act, which applies to altogether different situation where there is an absolute bequest of the legatee, but his right to deal with the property as its absolute owner is sought to be curtailed by the Testator—In fact, Section 131 of the Indian Succession Act is the provision which applies to the bequest made by Late Smt. Shakuntala Devi—This Section deals with a defeasance cause of course, the defeasance must be in favour of somebody in existence at the time the bequest is made—The restrictions in Will are valid.

Suresh Chand Mathur v. *Harish Chand Mathur* *632*

LIMITATION ACT, 1963—Article 65—Appellant filed suit seeking possession of property; decreed in his favour—On appeal, findings of Trial Judge reversed—Aggrieved appellant preferred appeal, urging Respondent failed to prove hostile and uninterrupted possession of suit property qua appellant for last 12 years, thus appellant entitled to possession of suit property—Per contra, as per Respondent, his title by adverse possession perfected and suit of appellant hopelessly barred by time—Held—The assertion of title adverse to the true

servant is subject to such rules as may be framed by Govt. from time to time—Held—Higher benchmark has to apply prospectively would mean only previous DPCs cannot be reviewed—Executive has right to revise pending instructions relating to guidelines on issue of benchmark—When a benchmark is enhanced it is bound to have retroactive operation as preceding five years ACRs have to be considered—Retroactivity and restropectivity are different concepts—Tribunal is wrong in directing that notwithstanding benchmark being enhanced and DPC being convened after date when enhanced benchmark was notified, department has to consider entitlement of respondent with reference to lower benchmark—Directions passed to convey below benchmark ACR grading for year 2003-04 till 2007-08 to respondent who would have a right to file a representation which will be considered and disposed of within three weeks—If ACR gradings are enhanced, a review DPC shall be constituted within six weeks thereafter.

Union of India Ors. v. *V Pitchandi* *835*

SERVICE TAX ACT, 1944—Section 83—Suit filed claiming declaratory and injunctive relief as to whether it or the Defendant has to bear service tax liability in respect of the rents paid received by Plaintiff—Central government, with effect from June, 2007, levied service tax on the renting of immoveable property for business purposes—Plaintiff contended that the service tax, levied by the Government is not in the nature of tax on property but a levy on service and to be collected from the beneficiary of the service, i.e. the lessee—Defendant contends that the service tax is a tax on property, thus be borne by the lessor and if the lessor has any grievance in respect of the imposition of the service tax, it is open for the lessor to take up the matter with the

appropriate forum with the Central Government—Held if the overall objective of the levy were to be taken into consideration, it is the service which is taxed and the levy is an indirect one, which necessarily means that the user/lessee has to bear it.

Pearey Lal Bhawan Association v. *M/s. Satya Developers Pvt. Ltd.* *604*

TRANSFER OF PROPERTY ACT, 1882—Section 106—Appellant at the stage of Appeal contended that there are twin requirements to be fulfilled under Section 106, TPA; the notice must give a clear 15 days period to the tenant to vacate the property coupled with the requirement that the tenancy must terminate on the last date of the calendar month—Appellant contended that the second requirement was not fulfilled—Held that the plea of non fulfillment of the requirements of the provisions of Section 106 cannot be taken at the stage of Second Appeal by the tenant.

Baljit Singh v. *Thakaria* *563*

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W.P. (C)

PALLAVI @ PALLAVI CHANDRA .....PETITIONER

VERSUS

CBSE AND ORS. ....RESPONDENTS

(RAJIV SAHAI ENDLAW, J.)

W.P. (C) NO. : 6379/ 2010 DATE OF DECISION: 04.10.2010

Constitution of India, 1950—Article 226—Name change—Petitioner issued certificate for Senior School Certificate Examination by Central Board of Secondary Education (''CBSE'') in 2004—Said certificate in name of ''Pallavi'' and refers to petitioner's father as ''Ramesh Chandra''—Petitioner graduated from School of Open Learning in 2007—Certificate in name of ''Pallavi''—In 2010, Petitioner decided to change her name to ''Pallavi Chandra''—Advertisement inserted in newspaper—Said change effected by publication in weekly Gazette published by Delhi Government—Petitioner applied to CBSE and Delhi University for change in her name in certificate and change in name of petitioner's father from ''Ramesh Chander'' to "Ramesh Chandra"—CBSE refused to effect change, Delhi University did not take any action—Hence present petition. Held—Petitioner contended that Single Judge of this Court in *Dhruva parate's* case had taken different position than previous judgments—Hence notice issued—Counsel for CBSE contended that change of name not permitted after passing school examination—Counsel for Delhi University contended that there was a discrepancy regarding simultaneous attendance in University course and Open School of Learning—Said discrepancy matter of investigation—Perusal of Gazette

Notification—Change in name prospective in nature—Therefore issuance of changed certificate would create anomalous situation—Name appearing on certificate would be different from name appearing on Gazette Notification—Issuance of revised certificates as claimed would rather create a discrepancy and reflect a status which did not exist at the time of issuance thereof—Hence petition dismissed.

A bare perusal of the aforesaid Gazette Notification would show that the petitioner admits therein that till the date of the said Gazette Notification, she was known as Pallavi and it is only after the said date that her name stood changed. It is thus not as if the effect of the said Notification is to treat the changed name of the petitioner as her name since her birth. The Notification is not intended to be retrospective but is only prospective. That being the position, as on the date of the issuance of the certificates by the respondent No.1 CBSE and the respondent no.2 University of Delhi, the name of the petitioner was Pallavi only and which name has been correctly shown and issuance of a changed certificate would rather create an anomalous situation and if such change is allowed the name appearing of the petitioner thereon on the date of issuance thereof would be different from the admitted name of the petitioner then. **(Paras 14)**

As aforesaid, the issuance of revised certificates as claimed would rather create a discrepancy and reflect a status which did not exist at the time of issuance thereof. If anyone were to make a deeper enquiry, they will wonder that if the name was changed only in 2010, how the changed name appears on a certificate issued on a prior date. Rather the procedure of having a Gazette Notification for changed name is intended to obviate the said difficulties and to give sanctity to the change in name. **(Paras 16)**

Important Issue Involved: Therefore issuance of changed certificate would create anomalous situation—Name appearing on certificate would be different from name appearing on Gazette Notification—Issuance of revised certificates as claimed would rather create a discrepancy and reflect a status which did not exist at the time of issuance thereof.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Shri Sandeep Khatri, Advocate.

FOR THE RESPONDENT : Mr. Atul Kumar, Advocate. for R-1 Ms. Manisha & Mr. Amit Bansal, Advocate. for R-2.

CASES REFERRED TO:

1. *Sh. Karan Kapoor* vs. *Central Board of Secondary Education* WP(C) No.5978/2010.
2. *Anika Jain* vs. *University of Delhi* 2009 (107) DRJ 42.
3. *Sajjad Barakat* vs. *Central Board of Secondary Education* WP(C) No.5967/2008.
4. *Dhruva Parate* vs. *Central Board of Secondary Education* WP(C) No.3577/2008.
5. *Ms. Parul Dabas* vs. *Central Board of Secondary Education* WP(C) No.7933/2007.
6. *J.K. Aggarwal* vs. *Haryana Seeds Development Corporation Ltd. & Ors.* 1991 (2) SCC 283].
7. *Indian Aluminium Company* vs. *Kerala State Electricity Board* 1975 (2) SCC 414.

RESULT: Petition dismissed.

RAJIV SAHAI ENDLAW, J.

1. The petitioner took the Senior School Certificate Examination held by the respondent No.1 Central Board of Secondary Education

(CBSE) in the year 2004 and was issued a certificate therefor. In the said certificate the name of the petitioner is given as "Pallavi" and that of her father as "Ramesh Chandra".

2. The petitioner claims to have joined School of Open Learning (respondent no.4) of the respondent No.2 University of Delhi in the year 2004 and graduated in the year 2007. In the certificate issued for the same also the name of the petitioner is given as "Pallavi".

3. The petitioner in the year 2010 decided to change her name from Pallavi to Pallavi Chandra and inserted an advertisement in the newspaper to the said effect and also got the said change effected by publication in the weekly Gazette published by the Delhi Government on 20th August, 2010. The petitioner thereafter applied to the respondent No.1 CBSE and to the respondent No.2 University of Delhi for change of her name as given in the certificate issued by them from "Pallavi" to "Pallavi Chandra" and that of her father in the certificate issued by University from "Ramesh Chander" to "Ramesh Chandra". Upon the refusal of respondent No.1 CBSE and the inaction of respondent No.2 University of Delhi to do so, the present writ petition has been filed claiming the relief of direction to the respondent No.1 CBSE and to the respondent no.2 University of Delhi to so change/correct the name of the petitioner and her father respectively in their records and to issue fresh certificates to the petitioner with the changed/corrected names.

4. A number of such petitions have been coming before this Court. The contention of the counsel for the respondent No.1 CBSE appearing in those petitions had been that the matter is no longer res integra having been decided in the order dated 18th September, 2008 in WP(C) No.7933/2007 titled **Ms. Parul Dabas Vs. Central Board of Secondary Education** and in the order dated 16th April, 2009 in WP(C) No.5967/2008 titled **Sajjad Barakat Vs. Central Board of Secondary Education.** On the basis of the said judgments, I have also dismissed WP(C) No.5978/2010 titled **Sh. Karan Kapoor Vs. Central Board of Secondary Education** on 6th September, 2010.

5. However, on the contention of the counsel for the petitioner that another Single Judge of this Court in judgment dated 23rd March, 2009 in WP(C) No.3577/2008 titled **Dhruva Parate Vs. Central Board of Secondary Education** had taken a different view, notice of this petition

was issued.

6. Though the respondent No.1 CBSE and the respondent No.2 University of Delhi have not filed counter affidavits but the counsels have been heard.

7. The counsel for the respondent No.1 CBSE has contended that **Dhruva Parate** (supra) was a case of correction of name; in that case, the correction had been carried out in the school record even prior to the student leaving the school. It is contended that it was in these circumstances that the respondent No.1 CBSE abiding by the said judgment did not challenge the same. It is argued that the present is not a case of correction of name having been carried out in the school records before the petitioner left the school and thus the judgment in Dhruva Parate does not apply. Else it is contended that the judgments in **Parul Dabas, Sajjad Barakat** (supra) & **Sh. Karan Kapoor** (supra) would apply.

8. The counsel for the respondent No.1 CBSE has also contended that though prior to the amendment of 2007, Rules of CBSE permitted change of name even after passing the school examination, the same is not permitted now. The Rule as it stands now is as under:

"69 Changes in Board's Certificate

69.1 Changes & Correction in Name.

i. No change in name/surname once recorded in the Board's records shall be made. However, correction in the name to the extent of correction in spelling errors, factual typographical errors in candidate's name/surname, father's name/mother's name or Guardian's name to make it consistent with what is given in the school record or list of candidates (LOC) submitted by the school may be made.

Provided further that in no case, correction shall include alteration, addition, deletion to make it different (except as mentioned above) from the LOC or the school records.

ii. Application for correction in name/surname will be considered only within ten years of the date of declaration of result provided the application of the candidate is forwarded with the following documents: (a) Admission

form(s) filled in by the parents at the time of admission.

(b) The School Leaving Certificate of the previous school submitted by the parents of the candidate at the time of admission.

(c) Portion of the page of admission and withdrawal register of the school where the entry has been made in respect of the candidate.

iii. The Board may effect necessary corrections after verification of the original records of the school and on payment of the prescribed fee."

9. The counsel for the respondent No.2 University of Delhi states that she has received instructions to the effect that the petitioner in the year 2004 had joined the course of B.A.(Hon.) Hindi in the respondent No.3 Ram Lal Anand College (Eve) and had taken the first year exam in the year 2005 but had failed in the same. It is stated that the petitioner could not have pursued both B.A. (Hon.) Hindi & Open School of Learning at the same time and the matter will have to be investigated. It is further urged that perhaps it is for this reason only that the change is being sought.

10. The counsel for the petitioner though has not disputed that the petitioner had joined the B.A. (Hon.) Hindi course in respondent No.3 Ram Lal Anand College (Eve) but contends that the petitioner had subsequently migrated to the School of Open learning with the consent of the respondent No.3 College. He however states that the said fact remained to be mentioned in the petition. On being asked about the migration certificate if any issued by the respondent No.3 College permitting the petitioner to migrate to the School of Open Learning, it is stated that no migration certificate was issued but the petitioner was permitted by the respondent No.3 College to appear in the first year exam of the School of Open Learning also while appearing in the first year exam of B.A. (Hon.) Hindi. The counsel for the respondent No.2 University of Delhi states that a student is not permitted to appear in the exam of two different courses in the same year.

11. Be that as it may, the matter has been considered de hors the aforesaid controversy. The counsel for the petitioner has relied on paragraphs 7 to 9 of the judgment in **Dhruva Parate** as under:

"7. The applicability of bye-law 69.1 (ii), in the opinion of the Court, is undoubtedly meant to limit the discretion of the CBSE. The two-year period imposed by it and the restriction of having to change the name before the publication of results are likewise self-imposed. Concededly, the question is not governed by any statute-in that sense, there is no legislative mandate controlling the exercise of this discretion. In this case, though the petitioner's name was different when he appeared in the Class X, the fact remains that it was subsequently changed; the same was also notified in the newspapers and the school records were duly corrected. Such being the case, when the identity of the person, father's name and the school are undisputed and a series of records, also reflect the name change, all that the CBSE is putting forward is a self-imposed limitation or restriction.

8. The interests of efficiency of an organization ordinarily determine the guidelines that have to be administered; yet when they constrain the authorities of the organization, which is meant to sub-serve the general public, from doing justice, in individual cases, the guidelines become self-defeating. In such cases, as in the present one, the end result would mean that the petitioner would be left with two certificates with different names and a whole lifetime spent possibly on explaining the difference – hardly conducive to him, reflecting the inadequacy in the system.

9. It is settled law that an executive agency operating within the field of its discretion, cannot unduly fetter or circumscribe, it [Ref. **Indian Aluminium Company Vs. Kerala State Electricity Board** 1975 (2) SCC 414; **J.K. Aggarwal Vs. Haryana Seeds Development Corporation Ltd. & Ors.** 1991 (2) SCC 283]. The CBSE's decision is precisely one enforcing a condition which fetters and restricts its otherwise wide discretion in the matter. Accepting its plea would mean fostering the injustice, which is unacceptable to the Court."

and which do show that the observations made by this Court were in general notwithstanding the peculiarity of facts of that case as pointed out by the counsel for the respondent No.1 CBSE.

12. However, in view of the differing opinion in Parul Dabas and Sajjad Barakat, I have deemed it appropriate to consider the matter.

13. The counsel for respondent No.1 CBSE has argued that the change of name effected by the petitioner is prospective. I find considerable force in the said contention of the counsel for the respondent No.1 CBSE. The Gazette Notification is as under:

> "I, hitherto known as PALLAVI daughter of Late RAMESH CHANDRA, residing at 504, Laxmi Bai Nagar, New Delhi-110 023, have changed my name and shall hereafter be known as PALLAVI CHANDRA. It is certified that I have complied with other legal requirements in this connection.
>
> PALLAVI
>
> [Signature (in existing old name)]"

14. A bare perusal of the aforesaid Gazette Notification would show that the petitioner admits therein that till the date of the said Gazette Notification, she was known as Pallavi and it is only after the said date that her name stood changed. It is thus not as if the effect of the said Notification is to treat the changed name of the petitioner as her name since her birth. The Notification is not intended to be retrospective but is only prospective. That being the position, as on the date of the issuance of the certificates by the respondent No.1 CBSE and the respondent no.2 University of Delhi, the name of the petitioner was Pallavi only and which name has been correctly shown and issuance of a changed certificate would rather create an anomalous situation and if such change is allowed the name appearing of the petitioner thereon on the date of issuance thereof would be different from the admitted name of the petitioner then.

15. The counsel for the petitioner relies on the judgment **Anika Jain Vs. University of Delhi** 2009 (107) DRJ 42 to contend that the welfare of the student should be the prime concern and cannot be brushed aside. The said observations were made in the context of giving NOC for migration from one College to another. The counsel contends that the petitioner is now proceeding abroad for pursuing further studies and would face insurmountable difficulties in explaining to foreign universities regarding the controversy qua her name. It is stated that had the petitioner continued to do her education within the country the need would not

arise for the same.

16. As aforesaid, the issuance of revised certificates as claimed would rather create a discrepancy and reflect a status which did not exist at the time of issuance thereof. If anyone were to make a deeper enquiry, they will wonder that if the name was changed only in 2010, how the changed name appears on a certificate issued on a prior date. Rather the procedure of having a Gazette Notification for changed name is intended to obviate the said difficulties and to give sanctity to the change in name.

17. The counsel for the petitioner at this stage states that the petitioner has since got her name changed in the Class X certificates of National Open School and contends that the same would pose a difficulty. The said difficulty, if any, is of the petitioner's own creation and cannot entitle the petitioner to a relief as a matter of right; rather it has been enquired from the counsel for the petitioner as to what is the right, if any, of the petitioner to have the name so changed now. No right has been disclosed.

18. The prayer for correction of name of the father of the petitioner is consequential to the prayer for change of name of the petitioner which has been disallowed, and hence does not survive.

19. The petition is therefore dismissed. No order as to costs.

ILR (2011) I DELHI 468
W.P.(C)

PRASHANT RAMESH CHAKKARWAR & ANR. ....PETITIONERS

VERSUS

UNION PUBLIC SERVICE COMMISSION & ANR. ....RESPONDENTS

(PRADEEP NANDRAJOG AND MOOL CHAND GARG, JJ.)

W.P. (C) NO. : 6586/2010, 6590/2010, 6592/2010, 6596/2010, 6601/2010 & 6602/2010 **DATE OF DECISION: 05.10.2010**

Constitution of India, 1950—Article 226—Scope of interference in selections-allegation of irregularity in evaluation of answer sheets leveled by Petitioners who are civil services aspirants who appeared in Civil Service Examinations conducted by Respondent in 2007, 2008 and 2009—Petitioners cleared Preliminary Examination, could not qualify Main Examination—Petitioners filed application Central Administrative Tribunal alleging possibility of irregularities in method of evaluation of answer sheets—Petitioners sought directions to Respondent to produce relevant records—Allegation of irregularities based in light of irregularities found in earlier examinations conducted by Respondent UPSC—Evaluation method and use of "moderation" also questioned—Tribunal held that in absence of any provision for re-examination, candidate has no right/claim for the same—Method adopted by UPSC cannot be faulted as being subjective or unscientific—Tribunal dismissed applications—Hence present petitions. Held—Issue pertaining to legality of "moderation" examined by Gujarat High Court in

Kamlesh Haribhai's **case—After scrutiny said method found to be perfectly legal and valid—Scaling of marks also recommended for achieving common standard of evaluation—Reference made to affidavit filed by Respondent in *Neel Ratan's* case wherein held that wisdom and method of moderation to be left to experts—Decision of Supreme Court in *Subhash Chandra's* case examined—Method of evaluation found to be valid—Decision of Supreme Court in *Sanjay Singh's* case also discussed—Supreme Court examined differences in evaluation methods of UPSC and Respondent UPSC—Held that method of scaling used only for Preliminary Examination—Application of scaling of marks by UPSC held to be arbitrary and illegal—Supreme Court found that moderation is no solution to finding inter se merit across several subjects—In such situations, "scaling" is appropriate method of evaluation—However scaling not to be used in regard to Civil Judge (Junior Division) Examination—Said decision to apply prospectively alone—Therefore moderation and scaling are two separate methods of evaluation—No merit in application of "moderation" in evaluating answer sheets of Civil Services (Main) Examination—UPSC conducting Civil Service Examinations since 1949—Stray incidents of irregularities—Does not vitiate sanctity of the same—Petitioners averred that lower marks may be due to faulty manner of evaluation—Amounts to relying on surmises and conjectures—Further observed that Petitioners had failed to implead successful candidates before Tribunal—Delay in approaching Tribunal most fatal to case of Petitioners.**

A B C D E F G H I

After carefully noting the method of moderation of marks applied by UPSC in evaluating the answer-sheets of the candidates pertaining to Civil Services (Main) Examination, the Court found the said method to be perfectly legal and valid. The relevant discussion contained in the said decision is being reproduced herein below:-

A B C D E F G H I

"We are afraid that it can hardly be contended that where number of candidates appearing at the Civil Services (Main) Examination is increasing every year and was as large as about 10,000 in the main examination with which we are concerned in this ˇpetition, where again each candidate has to appear in eight subjects with as many as 46 optional subjects and having option to answer General Studies and non-language optional subject in any of the regional languages specified in the VIIIth Schedule to the Constitution, the moderation is not necessary. The Commission was perfectly justified in urging that in a competitive examination with 46 different optional subjects it is not only necessary to ensure reasonable degrees of uniformity inter se the examiners but also inter se subjects. It does not require much of imagination that in an examination where there are number of examiners in a subject there is bound to be what is known as "Examination Variability'. This situation, therefore, necessitates the moderation to ensure reasonable degree of uniformity inter se the examiners. Similarly, in order to curtail this Examination Variability arising as a result of number of optional subjects being allowed and they being permitted to be answered in as many as 14 regional languages, the Commission is under an obligation to have the moderation for purposes of achieving uniformity inter se subjects. If there is no moderation in such situations, a candidate may not be able to compete with the other candidates on account of fortuitous circumstance of his Paper-Setter or Examiner being conservative or liberal. The Commission, having regard to the statistical position of each subject finds that the valuation has been strict or liberal by the Head Examiner or Paper-setter and does statistical moderation by linear transformation, wherever necessary….." (Emphasis Supplied) **(Para 14)**

After carefully noting the method of scaling of marks applied by UPPSC in evaluating the answer-sheets of the candidates pertaining to Civil Judge (Junior Division) Examination it was held by Supreme Court that the said method is arbitrary and illegal and that the decision of Supreme Court in **Subhash Chandra Dixit's** case (supra) was incorrect. In said regards, the relevant portion of the discussion contained in the said decision is being reproduced herein under:-

> **"24.** In the Judicial Service Examination, the candidates were required to take the examination in respect of all the five subjects and the candidates did not have any option in regard to the subjects. In such a situation, moderation appears to be an ideal solution. But there are examinations which have a competitive situation where candidates have the option of selecting one or few among a variety of heterogeneous subjects and the number of students taking different options also vary and it becomes necessary to prepare a common merit list in respect of such candidates. Let us assume that some candidates take Mathematics as an optional subject and some take English as the optional subject. It is well recognised that marks of 70 out of 100 in Mathematics do not mean the same thing as 70 out of 100 in English. In English 70 out of 100 may indicate an outstanding student whereas in Mathematics, 70 out of 100 may merely indicate an average student. Some optional subjects may be very easy, when compared to others, resulting in wide disparity in the marks secured by equally capable students. In such a situation, candidates who have opted for the easier subjects may steal an advantage over those who opted for difficult subjects. There is another possibility. The paper-setters in regard to some optional subjects may set questions which are comparatively easier to answer when compared to some paper-setters in other subjects who set tougher questions which are difficult to answer. This may happen when for example, in Civil Service Examination, where Physics and

> Chemistry are optional papers, Examiner 'A' sets a paper in Physics appropriate to degree level and Examiner 'B' sets a paper in Chemistry appropriate for matriculate level. In view of these peculiarities, there is a need to bring the assessment or valuation to a common scale so that the inter se merit of candidates who have opted for different subjects, can be ascertained. The moderation procedure referred to in the earlier para will solve only the problem of examiner variability, where the examiners are many, but valuation of answer-scripts is in respect of a single subject. Moderation is no answer where the problem is to find inter se merit across several subjects, that is, where candidates take examination in different subjects. To solve the problem of inter se merit across different subjects, statistical experts have evolved a method known as scaling, that is creation of scaled score. Scaling places the scores from different tests or test forms on to a common scale. There are different methods of statistical scoring. Standard score method, linear standard score method, normalised equipercentile method are some of the recognised methods for scaling.
>
> **25.** A. Edwin Harper Jr. and V. Vidya Sagar Misra in their publication Research on Examinations in India have tried to explain and define scaling. We may usefully borrow the same. A degree "Fahrenheit" is different from a degree "Centigrade". Though both express temperature in degrees, the "degree" is different for the two scales. What is 40 degrees in Centigrade scale is 104 degrees in Fahrenheit scale. Similarly, when marks are assigned to answer-scripts in different papers, say by Examiner 'A' in Geometry and Examiner 'B' in History, the meaning or value of the "marks" is different. Scaling is the process which brings the marks awarded by Examiner 'A' in regard to Geometry scale and the marks awarded by Examiner 'B' in regard to History scale, to a common scale.

Scaling is the exercise of putting the marks which are the results of different scales adopted in different subjects by different examiners onto a common scale so as to permit comparison of inter se merit. By this exercise, the raw marks awarded by the examiner in different subjects are converted to a "score" on a common scale by applying a statistical formula. The "raw marks" when converted to a common scale are known as the "scaled marks". Scaling process, whereby raw marks in different subjects are adjusted to a common scale, is a recognised method of ensuring uniformity inter se among the candidates who have taken examinations in different subjects, as, for example, the Civil Services Examination.

xxx xxx

45. We may now summarise the position regarding scaling thus:

(i) Only certain situations warrant adoption of scaling techniques.

(ii) There are number of methods of statistical scaling, some simple and some complex. Each method or system has its merits and demerits and can be adopted only under certain conditions or making certain assumptions.

(iii) Scaling will be useful and effective only if the distribution of marks in the batch of answer-scripts sent to each examiner is approximately the same as the distribution of marks in the batch of answer-scripts sent to every other examiner.

(iv) In the linear standard method, there is no guarantee that the range of scores at various levels will yield candidates of comparative ability.

(v) Any scaling method should be under continuous review and evaluation and improvement, if it is to be

a reliable tool in the selection process.

(vi) Scaling may, to a limited extent, be successful in eliminating the general variation which exists from examiner to examiner, but not a solution to solve examiner variability arising from the "hawk-dove" effect (strict/liberal valuation).

46. The material placed does not disclose that the Commission or its expert committee have kept these factors in view in determining the system of scaling. We have already demonstrated the anomalies/ absurdities arising from the scaling system used. The Commission will have to identify a suitable system of evaluation, if necessary by appointing another committee of experts. Till such new system is in place, the Commission may follow the moderation system set out in para 23 above with appropriate modifications.

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48. S.C. Dixit1, therefore, upheld scaling on two conclusions, namely, (i) that the scaling formula was adopted by the Commission after an expert study and in such matters, the Court will not interfere unless it is proved to be arbitrary and unreasonable; and (ii) the scaling system adopted by the Commission eliminated the inconsistency arising on account of examiner variability (differences due to evaluation by strict examiners and liberal examiners). As scaling was a recognised method to bring raw marks in different subjects to a common scale and as the Commission submitted that they introduced scaling after a scientific study by experts, this Court apparently did not want to interfere. This Court was also being conscious that any new method, when introduced, required corrections and adjustments from time to time and should not be rejected at the threshold as unworkable. But we have found after an examination of the manner in which

scaling system has been introduced and the effect thereof on the present examination, that the system is not suitable. We have also concluded that there was no proper or adequate study before introduction of scaling and the scaling system which is primarily intended for preparing a common merit list in regard to candidates who take examinations in different optional subjects, has been inappropriately and mechanically applied to a situation where the need is to eliminate examiner variability on account of strict/ liberal valuation. We have found that the scaling system adopted by the Commission leads to irrational results, and does not offer a solution for examiner variability arising from strict/liberal examiners. Therefore, it can be said that neither of the two assumptions made in S.C. Dixit1 can validly continue to apply to the type of examination with which we are concerned. We are therefore of the view that the approval of the scaling system in S.C. Dixit1 is no longer valid.

49. Learned counsel for the Commission contended that scaling has been accepted as a standard method of evaluation in the following decisions and therefore it should be approved:

(i) **Kamlesh Haribhai Goradia v. Union of India**6 upheld by this Court by order dated 11-3-1987 in SLP (C) No. 14000 of 1986.

(ii) **Mahesh Kumar Khandelwal v. State of Rajasthan**7 upheld by this Court by order dated 22-1-1996 in SLPs (C) Nos. 15682-84 of 1994.

(iii) **K. Channegowda v. Karnataka Public Service Commission**8.

All the three cases related to moderation and not scaling. There are, however, passing references to scaling as one of the methods to achieve common

standard of assessment. The fact that scaling is a standard method of assessment, when a common base has to be found for comparative assessment of candidates taking examinations in different optional subjects, is not in dispute. In fact the Commission may continue to adopt the said system of scaling, where a comparative assessment is to be made of candidates having option to take different subjects. The question is whether scaling, in particular, linear standard scaling system as adopted by the Commission, is a suitable process to eliminate "examiner variability" when different examiners assess the answer-scripts relating to the same subject. None of the three decisions is of any assistance to approve the use of method of "scaling" used by the Commission." (Emphasis Supplied)
(Para 24)

With respect to the first submission advanced by the learned counsel, suffice would it be to note the legal position extracted by us in sub-paras III, IV and V of para 26 above. In view of such legal position, we find no merit whatsoever in the submission advanced by the learned counsel that the method of moderation of marks applied by UPSC in evaluating answer sheets of the candidates pertaining to Civil Services (Main) Examination is unreasonable and arbitrary and thus violative of Articles 14 and 16 of Constitution of India.
(Para 28)

With respect to third submission, we note that UPSC has been continuously conducting Civil Services Examination every year starting from 1949 to till date. The petitioners had pointed out ten incidents of detection of irregularities in Civil Services Examination conducted by UPSC over the past "seven decades". A few stray incidents of irregularities detected in the Civil Services Examination conducted in the past seven decades do not vitiate the sanctity of Civil Services Examination. No materials whatsoever has been placed on record by the petitioners in the present case suggesting that there were irregularities in the Civil Services

Examinations conducted by UPSC in the year 2007-2009. **(Para 31)**

The alternative answer to the aforesaid question lies in the decision of Supreme Court in **Sanjay Singh's** case (supra) wherein it was held that where an authority has acted in a bona fide manner in proceeding with the selection of the candidates for a particular post and that the appointments have been made in pursuance of said selection, any jurisdiction fault, if found, in the process of evaluation of the candidates shall require directions to be issued, to be applied in the future. The reason is simple. The affected candidates are not before the Court and in their absence, their appointments cannot be set aside. **(Para 34)**

35. Before concluding, we proceed to note a significant aspect of the present matters. It is most relevant to note that the petitioners in Writ Petitions Nos.6586, 6590, 6592 and 6602 of 2010 approached the Tribunal after a period of more than one year from the date of declaration of results in respect of Civil Services Examinations in question. Till the time the petitioners in question approached the Tribunal, the selections and appointments in pursuance of declaration of results had already been made. The petitioners in question did not implead as respondents the persons who already stood appointed and were likely to be adversely affected by the success of the petitioners before the Tribunal. It does not stand to reason to upset the appointments made much prior to the date of filing of applications by the petitioners in question before the Tribunal. The delay in approaching the Tribunal by the petitioners in question was most fatal to the case set up by them before the Tribunal. **(Para 35)**

Important Issue Involved: UPSC conducting Civil Service Examination since 1949—Stray incidents of irregularities does not vitiate sanctity of the same.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Sh. Sumit Kumar Advocate.

FOR THE RESPONDENT : Ms. Aditi Gupta, Advocate for R-1 Ms. Sugandha, Advocate for Mr. Atul Nanda, Advocate for R-2.

CASES REFERRED TO:

1. *Prashant Ramesh Chakkravar & Anr* vs. *Union Public Service Commission & Anr.* O.A. No.1565/2010.
2. *Sanjay Singh & Anr* vs.*UP Public Services Commission* (2007) 2 Scale 1.
3. *U.P. Public Service Commission* vs. *Subash Chandra Dixit & Ors, Special Leave Petition* (Civil) No.23723/2007.
4. *Neel Ratan* vs. *Union of India & Ors*, Writ Petition (Civil) No.1271/2006.
5. *U.P. Public Service Commission* vs. *Subhash Chandra Dixit* (2003) 12 SCC 701.
6. *Subash Chandra Dixit* vs. *U.P. Public Service Commission* (S.L.P. (civil) 23723/2002.
7. *Kamlesh Haribhai Goradia* vs. *Union of India & Anr* (1987) 1 GLR 157.
8. *Kamlesh Haribhai Goradia* vs. *Union of India* SLP (C) No. 14000 of 1986.

RESULT: Petitions dismissed.

PRADEEP NANDRAJOG, J.

1. Every year, Union Public Service Commission (hereinafter referred to as the "UPSC") conducts Civil Services Examination for the purposes of recruitment to Indian Administrative Service and other allied services. So high are the expectations of some candidates that on not finding success, they resort to litigation as they earnestly believe that by no reasonable process of evaluation, could they achieve such low level of success. We find that virtually every year same ritualistic pleas are urged, notwithstanding that the issue has been debated repeatedly and Courts have held, that though not a perfect situation, in the absence of a better

alternative, the procedures followed by UPSC while evaluating the answer sheets do not warrant judicial interference. We had heard learned counsel for the petitioner and the respondents at length on 28.9.2010. It was the first date when the matter was listed before us. The petitioners were relying upon pleadings of UPSC in earlier litigations and the issues were discussed with reference to the said pleadings.

2. The Civil Services Examination comprises of two successive stages; namely, (i) Civil Services Preliminary Examination (Objective Type) for the selection of candidates for appearing in the main examination, and (ii) Civil Services Main examination (Written and Interview) for the selection of candidates for the various services and posts. The Preliminary Examination consists of two papers of objective type (multiple choice questions) in two subjects, namely, General Studies and one subject to be selected from the list of optional subjects set out in paragraph 2 of the plan of examinations notified by the UPSC and carries 150 and 300 marks respectively. The marks obtained in the preliminary examination are not considered and counted for determining the final order of merit of the successful candidates at the main examination. The candidates who are declared successful in the Preliminary Examination are required to appear at the Main Examination which consists of written examination as well as viva voce test. The written examination consists of nine papers; namely, two papers each for two optional subjects, two papers pertaining to General Studies, one paper pertaining to English, one paper pertaining to Regional Language and one paper pertaining to an essay written by the candidate. The marks pertaining to English and Regional Language are not counted for purposes of ranking in the examination. The papers pertaining to optional subjects and General Studies carry 300 marks whereas the paper pertaining to essay carries 200 marks, thus totaling 2000 marks in all. The viva voce test carries 300 marks. The marks obtained by a candidate in the Main Examination (written as well as viva voce) determine his final ranking. The successful candidates are allotted various services having regard to their ranking in the examination and the preferences expressed by them for various services and posts.

3. The petitioners herein are the civil services aspirants, who appeared in Civil Services Examinations conducted by UPSC in the years 2007, 2008 and 2009. The petitioners successfully cleared the Preliminary Examination in the year they sat, but could not qualify in the Main

Examination. Aggrieved by the marks awarded to them in the Main Examination, the petitioners filed applications under Section 19, Administrative Tribunals Act, 1985 before Principal Bench of Central Administrative Tribunal, New Delhi inter-alia, alleging that the possibility that there were irregularities in the Civil Services Examination conducted by UPSC in the years 2007-2009 cannot be ruled out inasmuch as various irregularities have been detected in the Civil Services Examinations conducted in the past several years and that the process adopted by UPSC for evaluation of answer sheets of the candidates pertaining to Main Examination is arbitrary and illegal. The details of the applications filed by the petitioners are being tabulated herein below:-

S. No	Number of application filed in Tribunal (O.A. No.)	Date of filing of application before Tribunal	Year of challenge of Civil Services Exami-nation	Date of judgment of Tribunal	Number of Writ Petition filed by applicant (W.P. (C) No)
1.	1565/2010	30.04.2010	2008	13.05.2010	6586/2010
2.	3504/2009	05.11.2009	2007	04.12.2009	6590/2010
3.	3507/2009	05.11.2009	2007	04.12.2009	6592/2010
4.	3502/2009	05.11.2009	2007	04.12.2009	6602/2010
5.	2419/2010	27.07.2010	2009	11.08.2010	6601/2010
6.	1252/2009	30.04.2009	2008	21.05.2009	6596/2010

4. For the sake of convenience, O.A. No.1565/2010 titled **'Prashant Ramesh Chakkravar & Anr v Union Public Service Commission & Anr'** shall be treated as the lead matter inasmuch as a perusal of the aforesaid applications reveals that the contents thereof are more or less identical and during arguments said petition was extensively referred to.

5. As already noted herein above, feeling aggrieved by the marks awarded to them by UPSC, petitioners namely, Prashant Ramesh Chakkravar and Pranav Kumar Vatsa, filed O.A. No.1565/2010 before

the Tribunal, inter-alia, seeking following reliefs:-

(i) Direct the respondent to produce all the records relating to the case including attendance sheets/Proforma F containing details of supplements taken, the answer books of the Applicants in all the subject and verify the irregularities committed by the Respondent in the evaluation of the answer books; and

(ii) Direct the respondent to produce attendance sheets/Proforma F (Containing details of supplements used) of all the applicants to verify the number of extra sheet used by them and verify the irregularities committed by the Respondent;

(iii) Direct the respondent to produce raw and moderated marks of applicants and all other candidates in Civil Services (Main) Examination 2008 to verify justness of moderation system;

(iv) To strike down the system of moderation/scaling applied by the UPSC after asking UPSC to explain the system;

(v) Direct the Respondent to bring uniformity on the system of awarding marks in personality test by reducing excessive subjectivity;

(vi) Permit the Applicants to carry out the inspection of the answer books in the answer books in the Court.

(vii) direct the respondent to reexamine and re-evaluate the answer books of the Applicants where the irregularities are found to be existing in the evaluation process of Civil Service (Main) Examination 2008; and

(viii) direct the respondent to declare the Applicants pass in the Civil Service (Main) Examination 2008 if after revaluation and proper valuation they get more marks than the mark achieved by the last candidate in the result who was called for interview and consider them for appointment; and

(viii) To pass such other order/orders as this Hon'ble Tribunal may deem just and proper in the facts and circumstances of the case."

6. To demonstrate that there was a possibility of irregularities in the

Civil Services Examinations conducted by UPSC in the years 2007, 2008 and 2009 following averments were made in the application:-

"4.17 It is respectfully submitted that in recent past, a number of instances have come to light intimating serious irregularities in the conduct of the examinations. Some of them are explained below:

(a) In the 1985 Examinations, when the result was declared, it was found that none from Bhopal Center was selected for interview. The candidates from that Center made representations to the UPSC. When the Press took up the matter, the UPSC conducted inquiries and it was found that the answer-sheets of General Studies-II of all 95/97 candidates of that Center were lost and were untraceable. As such, fresh examination was held for these candidates as a result of which, 25 of them were called for interview. Out of these 25, 22, were finally declared successful. This has been accepted by the Respondent before this Hon.ble Tribunal in O.A. No.816 of 1997.

(b) In 1985, the C.B.I. registered a case under Sections 420, 464, 471 and 120-B of the I.P.C. as also under the Prevention of Corruption Act against one, Ratipal Saroj and four employees of UPSC, Shri Saroj was selected in Civil Service Examinations, 1985 and was declared as No.3 in the merit list. A letter was written by certain candidates of Allahabad Centre to the Prime Minister declaring their suspicion and requested him to look into the matter. The C.B.I. inquiries revealed that Shri Saroj joined the UPSC as Section Officer and then was promoted to the post of Deputy Secretary. He was well known to a number of officers in UPSC to whom he had been supplying various articles from time to time. It was alleged that he replaced his answer sheets with the new ones in the UPSC in collusion with the officers. In this examination he got very good marks and stood third in the examination. A copy of news item reported by the Tribune News Service, downloaded from the Internet and other paper cuttings showing irregularities in the recruitment of the respondent is annexed as **ANNEXURE A-4.**

(c) In 1985, the C.B.I. filed another case under Section 420 and

120-B of the I.P.C. against Sanjay Bhatia and others. The accusation against him was that he produced false Caste certificate showing himself to be a Scheduled Caste and he got himself selected for I.P.S.

(d) In 2001, one Nitin Verma was initially declared to be on 278th rank. However, after re valuation he was declared to be holding 28th rank. Translated copy with original of Daily "Dainik Bhasker" dated 25.7.2002 showing this fact is filed herewith as **ANNEXURE A-5.**

(e) Mr. Brijees Sher Arzoo Roll No.306429 who was reported absent in the paper of Urdu literature I & II as his optional in Civil Services (Main) Examination 2005 contrary to his actual score of 176 out of 300 and 190 out of 300 respectively.

(f) In 2006, the lines of SC and ST candidates for Civil Service Main Exam. 2005 were deliberately exchanged thereby affecting the entire list. True copy of news report to this effect published in "Hindustan" daily dated 8.6.2006 and revised merit list is filed herewith as **ANNEXURE A 6 (COLLY).**

(g) Even in 2006, re-examination of Public Administration paper in Civil (Services Preliminary) Examination, 2006 has been held due to discrepancy in tallying the number of question papers at one of the examination centres. True copy of the news report to this effect containing in "The Hindu" dated 17.5.2006 is filed as **ANNEXURE A-7.**

(h) The news report contained in the Indian Express dated 16.7.2006 shows that even before the declaration of result a candidate namely Sunita Dogra claimed herself to be successful in the UPSC which also show flaw in the system. The same is filed as **ANNEXURE A-8.**

(i) There are general allegations against many officers of the UPSC, that they got the question out in order to get their wards and relatives qualified for the Civil Services examination. There are other allegations causing suspicion on account of the fact that the wards of I.A.S. officers are invariable selected in these examinations. The other allegations are that in Rau's Circle (Rau

Study Circle for 1985 Examination, a guess paper was given to the students with 11 questions out of which 8 questions appeared in the actual question paper. Further, during the investigations by the C.B.I. into the matter of Saroj and Sanjay Bhatia, two other candidates, namely, Mrindula Sinha and Suresh Chandra were also found to be involved. It has also been reported in the Press that with the manipulations of the UPSC officials, answer-sheets had been substituted in some other cases.

(j) The irregularity may also be seen in the case of Chittranjan Kumar wherein, when he requested the Respondent for rechecking the papers of Hindi paper II, the Respondent responded vide letter dated 16.6.2009 that the total number of answer-sheets used by him was 2. When he further applied for details of the number and serial No. of the copies, the Respondent replied vide letter dated 22.7.2009 and thereby stated the number of answer-sheets of Hindi paper II was 3. However, in fact that the candidate had written four answer-sheets in Hindi Paper II. The Respondent further did not mention the map submitted with the paper of History Paper-I. True copy of the letter dated 16.6.2009 alongwith translation and letter dated 22.7.2009 sent by the Respondent is filed herewith as **ANNEXURE A-9 (COLLY).**

4.10. These instances show that the UPSC is not infallible and that the recruitment process of UPSC is not full proof. It is further submitted that where many instances have come to public knowledge, there may be several others which may not come into light due to the closed system of recruitment process and this itself hurts the integrity of the highest agency of recruitment in India…."

7. With respect to the allegations pertaining to method adopted by UPSC for evaluation of answer sheets of candidates pertaining to the Main Examination being arbitrary and illegal, following averments were made in the application:-

"4.12 It is respectfully submitted that the said lower marks of the Petitioners may be due to the manner of evaluation applied by the Respondent for evaluation of Answer-Books of Main's

Examination which includes the scheme of Moderation as disclosed by the Respondent in several cases including the case of **Subash Chandra Dixit Vs. U.P. Public Service Commission** (S.L.P. (civil) 23723/2002) before Hon'ble Supreme Court and before Hon.ble Delhi High Court in case of **Neel Ratan Vs. Union of India and ors** (CWP No.1271 of 2006) true copy of which are filed herewith as **ANNEXURE P-11 (COLLY).**

….

4.14 It is further submitted as per own admission of the respondent in case of **Neel Ratan Vs. union of India** CWP No.1271 of 2006, statistical moderation is done by liner transformation of marks…..

It is respectfully submitted though the Respondent has not clarified anywhere what is liner transformation and how it is different from linear scaling, the Applicant has tried to find out the materials on the concerned issue and have been able to find out at least two reports which suggest that the said linear transformation of marks is same as liner scaling, except the name……

True copy of the report to the qualifications and curriculum authority "Statistical moderation of teachers assessment" commissioned by the qualifications and curriculum authority, United Kingdom prepared by "John Wilmut and Jennifer Tuson" is filed herewith as **ANNEXURE P-12 (colly).**

…..

4.22 It is further submitted that in the case of Subash Chandra Dixit Vs. U.P. Public Service Commission (S.L.P. (civil) 23723/ 2002) the Respondent Commission had stated that they follow equi-percentile method of scaling and not linear scaling. However, the Respondent Commission has in the case of Neel Ratan has stated in their Additional Affidavit dated 10.3.2006 that they do stastical moderation by Linear transformation in subjective papers of Civil Services Examination. Meanwhile, as the above reports show, the Linear Transformation is the Linear Scaling only, and therefore, the Respondent Commission is applying the same method of Linear Scaling in the present case which it has been

found to be improper by Hon'ble Supreme Court in **Sanjay Singh & Anr Vs. UPSC** (2007) 2 Scale 1)….." (Emphasis Supplied)

8. The relevant portion of the counter affidavit filed by UPSC before Supreme Court in Special Leave Petition (Civil) No.23723/2007 titled **'U.P. Public Service Commission Vs. Subash Chandra Dixit & Ors",** which affidavit was relied upon by the petitioner(s) to show that the method adopted by the UPPSC for evaluation of answer sheets of the candidates pertaining to Main Examination is faulty, reads as under:-

"3. This respondent further craves leave to submit that the scaling system being followed by Uttar Pradesh PSC is different from that of the UPSC. The Uttar Pradesh PSC is following a linear method (also known as standard deviation method) for its examination which involve descriptive as well as objective type of papers. As against this the UPSC follows two different and distinct procedures for the objective and descriptive papers. As regards examinations involving optional objective papers the UPSC scaling procedure is based on Normalized Equi-Percentile (NEP) method. Descriptive (Conventional) type question papers are manually evaluated. These are subjected to moderation and not scaling. The scaling is done only in the Civil Services (Preliminary) Examination where the candidates have the choice to opt for any one paper out of 23 optional papers. No scaling is done for the compulsory papers in any of the examinations conducted by the UPSC.

….

MODERATION

16. Moderation is applied by UPSC to achieve uniformity in standards of evaluation of descriptive answer books where a number of examiners are involved. The problem of uniformity of standards becomes more complex when viewed against the background that candidates in Civil Services (Main) Examination have the option of answering the papers, besides English, in any one of the eighteen languages specified in the Eighth Schedule of the Constitution.

17. As far as conventional/descriptive type of examinations are concerned, the question papers are set up by experts duly approved by the Commission for each subject. The paper setter acts as the Head Examiner.

18. When conventional papers are set, the answers have to be of descriptive type by the very nature of questions, and such answers are evaluated by a number of examiners, depending upon the number of candidates. These examiners are called Additional Examiners and work under the Head Examiner for each subject.

19. The Commission have devised a procedure of moderation to ensure equitable treatment to all candidates and to judge them on merit by reducing the "Examination variability" to the extent possible.

20. The experts who set the question papers for each subject, act as Head-Examiner for the evaluation of the answer-books of that subject/paper. Whenever the number of candidates is very large in a particular subject, the Commission appoints Additional Examiners from amongst subject experts. Each Additional Examiner evaluates approximately 250 to 300 answer books. To achieve uniformity in valuation, where more than one examiner are involved, the UPSC arrange for a meeting of the Head Examiner with his additional examiners for each subject soon after the examination is over. At this stage, they thoroughly discuss the question paper and the appropriate answers. They also carry out a sample valuation of answer books and this is reviewed by the Head Examiner and variations in marking, if any, are further discussed. After the discussion is over and the standard of evaluation of Answer Scripts has been decided upon, the examiners disperse and complete the valuation of answer books according to a given time schedule.

21. This exercise alone is not enough to bring about uniformity of assessment since, in the process of valuation, the examiners tend to deviate from the standards laid down by Head Examiner and expected to be followed. The UPSC therefore, apply further checks to ensure uniformity in evaluation of answer scripts.

22. After all the answer scripts duly evaluated are received back in the office of the UPSC from each Additional Examiner, they are kept separately each Additional Examiner-wise. To ensure that Additional Examiners have not deviated from the uniform standards of evaluation and followed the agreed norms the Head Examiner conducts sample survey of the 20 answer books (ten highest scoring answer books and ten selected random in respect of each of the additional examiners). Depending on the standards adopted by the additional examiner, the Head Examiner confirms the awards without any change or carries out upward or downward moderation according to the degree of leniency or strictness in marking. The awards given by the Head Examiner of these revalued 20 answer books are accepted as final.

23. As regards the other answer scripts, to achieve maximum measure of uniformity inter se the examiners, the award of marks by the additional Examiners are moderated as considered appropriate by the Head Examiner. To achieve the uniformity in the standards of evaluation, this exercise is done in regard to each subject in the Main Written Examination. If in the opinion of the Head Examiner, there has been totally erratic marking by an additional examiner, for which the Head Examiner considers that it is not feasible to have statistical moderation, the scripts already evaluated by the additional examiner are revalued by the Head Examiner or by any other additional examiner whose norms of marking are similar to that of the Head Examiner and other additional examiners.

24. It may be relevant to mention here that the answer scripts are given dummy roll numbers to ensure anonymity.

25. In a competitive written examination with 51 different optional subjects as in the C.S. (Main) Examinations, it is not enough only to ensure reasonable degree of uniformity between the examiners in individual subjects but also inter se subjects. If a paper setter in a particular subject is very strict or lenient in either setting the question paper or in awarding marks to candidates, then the candidates offering that subject may lose or gain, as compared to others offering different optional subjects,

not on merit but because the paper setter/examiner has been strict or lenient. It, therefore, becomes necessary to moderate the marks scored by the candidates with a view to bringing about the uniform standards between all the subjects also. The Commission, therefore, considers the statistical position of all the optional subjects to see whether the evaluation in any subject have been too strict or too lenient and accordingly does statistical moderation where it is considered necessary….."

9. The relevant portion of the additional affidavit filed by UPSC before this Court in Writ Petition (Civil) No.1271/2006 titled **"Neel Ratan Vs Union of India & Ors",** which affidavit was relied upon by the petitioner(s) to show that the method adopted by UPSC for evaluation of answer sheets of the candidates pertaining to Main Examinations is faulty, reads as under:-

"12. That in a competitive written examination with 51 different optional subjects as in the C.S. (Main) Examinations, it is necessary not only to ensure reasonable degree of uniformity between the examiners in individual subjects but also inter se subjects. If a paper setter in a particular subject is very strict or lenient in either setting the question paper or in awarding marks to candidates, then the candidates offering that subject may lose or gain, as compared to others offering different optional subjects, not on merit but because the paper setter/examiner has been strict or lenient. It, therefore, becomes necessary to moderate the marks scored by the candidates with a view to bringing about the uniform standards of evaluation in all optional subjects as well. The Commission, therefore, considers the statistical position of each subject to find out if the valuation has been strict or liberal by the Head Examiner/Paper Setter and does statistical moderation by linear moderation wherever considered necessary. (Emphasis Supplied)

10. After holding that in absence of any provision for re-evaluation of an answer-sheet in the relevant rules, no candidate at an examination has got any right whatsoever to claim or ask for re-evaluation of his answer-sheet and that the applications raising similar issues as involved in the present case have been dismissed by the Tribunal on earlier occasions on the ground that the method of moderation applied by the Tribunal

cannot be faulted as being subjective or unscientific, vide impugned judgment(s) passed on different dates noted by us in the table extracted above, the learned Tribunal dismissed the aforesaid applications filed by the petitioners.

11. Aggrieved by the dismissal of the aforesaid applications by the Tribunal, the petitioners have filed the above-captioned petitions under Articles 226 and 227 of Constitution of India.

12. During the hearing, following 4 submissions were advanced by the learned counsel for the petitioner(s):-

A That the learned Tribunal failed to appreciate that the method of moderation of marks applied by UPSC in evaluating answer sheets of the candidates pertaining to Civil Services (Main) Examination is unreasonable and arbitrary and thus violative of Articles 14 and 16 of Constitution of India.

B That the learned Tribunal failed to appreciate that the method of scaling of marks applied by UPSC in evaluating answer sheets of the candidates pertaining to Civil Services (Main) Examination was held to be arbitrary and illegal by Supreme Court in the decision reported as **Sanjay Singh & Anr Vs.UP Public Services Commission** (2007) 2 Scale 1. To bring home the point that scaling was being applied by UPSC in evaluating answer sheets of the candidates pertaining to Main Examination particular emphasis was laid down by the counsel on the averment contained in the additional affidavit filed by UPSC in this Court in Writ Petition (Civil) No.1271/2006 titled **'Neel Ratan Vs Union of India & Ors.** that 'the Commission, therefore, considers the statistical position of each subject to find out if the valuation has been strict or liberal by the Head Examiner/Paper Setter and does statistical moderation by linear moderation wherever considered necessary'. It was argued by the counsel that the aforesaid averment when read in conjunction with the report titled "Statistical moderation of teachers assessment" commissioned by the qualifications and curriculum authority, United Kingdom and prepared by John Wilmut and Jennifer Tuson (which report was filed and particularly relied by the petitioners before the learned Tribunal), bring out that statistical moderation of marks by linear transformation is nothing but linear scaling of marks.

C That the learned Tribunal failed to appreciate that overwhelming material was produced by the petitioners strongly suggesting that there may have been manifold irregularities in the Civil Services Examination conducted by UPSC in the years 2007-2009. Counsel argued that faced with such a situation, it was incumbent upon the Tribunal to direct UPSC to produce the answer-sheets of the petitioners pertaining to Main Examination and redress the doubts raised by the petitioners regarding the sanctity of the said examination(s). In said regards, particular emphasis was laid down by the counsel on the averments extracted by us in para 6 above.

D That the petitions raising similar issues as involved in the present petitions have been admitted for hearing by a co-ordinate Bench of this Court. It was argued by the learned counsel that judicial proprietary and discipline demand that this Court should not proceed to adjudicate upon the present petitions till the pronouncement of decision in such other petitions.

12. Whether the petitioners are right in contending that the method of moderation of marks applied by UPSC in evaluating answer sheets of the candidates pertaining to Civil Services (Main) Examination is arbitrary and illegal and that the method of scaling of marks applied by UPSC was held to be arbitrary and illegal by Supreme Court in **Sanjay Singh's** case (supra)?

13. The issue pertaining to legality of method of moderation of marks in evaluating answer sheets pertaining to Civil Services (Main) Examination was examined by Gujarat High Court in the decision reported as **Kamlesh Haribhai Goradia Vs Union of India & Anr** (1987) 1 GLR 157. In the said case, the marks of the petitioner therein were substantially reduced in several subjects in Civil Services (Main) Examination due to method of moderation of marks applied by UPSC. The method of moderation of marks applied in evaluation of Civil Services (Main) Examination was explained by UPSC in the following terms:-

> "As a constitutional functionary, the Commission is aware of its responsibilities and have devised its own procedure regarding the conduct of examination and finalisation of marks/results to ensure that in a competitive examination no injustice is done to a candidate or a group of candidates due to the subjectivity involved in the

examination of answer books. It is submitted that the process of moderation is an integral part of the finalisation of marks/results of an examination when a large number of examiners are involved to bring about uniformity of assessment inter se the examiners. It is in the context that the phrase "marks finally awarded to each candidate" occurring in Rule 15 reproduced above is to be read. The U.P.S.C. follows a well established procedure of moderation which has stood the test of time. The system of moderation can be shown to be in vogue since 1949 in the case of I.A.S. etc. examination and also for the Civil Services ˇExamination which is a successor to the I.AS. etc. examination) held since 1979. The system of moderation forms part of the internal functioning of the Commission which is treated as 'secret' and it would not be in public interest to disclose the details of the same.

In this connection it is submitted that the 'Committee on Recruitment Policy and Selection Method' set up under the Chairmanship of Dr. D.S. Kothari, an emineat educationist, on whose recommendations the present scheme of Civil Services Examination was based, had observed, "We have elsewhere pointed out that an examination, however carefully organised, suffers inevitably from what is termed 'examination variability'. The marks may be arkedly different-specially when the answer books, because of their large number, are distributed amongst several examiners". It was to overcome this subjectivity in the valuation and to ensure that the candidates do not suffer or gain due to the strictness or liberality of the examiners in evaluation of scripts, that the system of 'Moderation' has been evolved by the Commission. The system has been studied and found by the learned Single Judge to be 'beneficial to the candidates and will remove some arbitrariness, if there is any, of different examiners....

(c) The number of candidates taking the Civil Services (Main) Examination is around 10,000 and as each candidate is required to take 8 papers, the number of scripts for valuation is around 80,000. There are subjects where a very few candidates, sometimes, even one, take the examination while there are subjects which are offered by more than 4,000/- candidates. While for

the subjects where the number is around 300, the paper-setter himself values all the answer scripts; in the subjects which the number is more than this, it become necessary to appoint additional examiners in addition to the paper setter who acts as a Head Examiner for valuation of answer books within the schedule time. The subjectivity involved in valuation of conventional papers has been established by research and therefore it becomes necessary to take steps to ensure uniformity inter se the examiners where more than one examiner is involved in valuation of ˇthe particular paper/subject. Further, in a competitive situation where a common merit list is to be prepared and the candidates have the option of selection of subjects from a variety of heterogeneous subjects and particularly so when the number of candidates widely varies it also becomes necessary to ensure reasonable degree of uniformity inter se the subjects as well. The problem of uniformity of standards becomes more complex when viewed in the background that the candidates have, in addition, the option of answering the papers in any one of the sixteen specified languages.

In some of the examinations conducted by the Commission, the number of candidates appearing is so large that the Commission have to appoint even up to one hundred examiners in a subject and therefore, it becomes incumbent on the part of the Commission to devise a system of moderation to ensure that the candidates do not suffer because of the subjectivity of the examiners concerned. The Commission have devised the moderation procedure detailed below with due regard to constraints of time and other relevant factors to ensure equitable treatment to all candidates and to judge them on merits by reducing the "examination variability" to the extent possible.

(d) The paper-setter of the subject normally acts as the Head Examiner for the subject and is selected from amongst senior academicians or scholars or senior civil servants (in case of General Studies papers only) by the Commission. In the case of subjects involving a large number of candidates, normally more than 350, the Commission appoint additional examiners to value the answer books. Each of them is allotted about 250-300 answer books for valuation. The Head Examiner values the answer books

in English medium and such other language medium/ media in which he has proficiency. So far as the remaining answer books are concerned, to the extent feasible, for their valuation, the Commission appoint bilingual examiners, i.e. those who are proficient in English and one or more of the Indian languages.

(e) To achieve uniformity in valuation, where more than one examiner is involved, the Commission arrange for a meeting of the Head Examiner with his additional examiners soon after the examination is over. At this stage, they discuss thoroughly the question paper, the possible answers and the weightage to be given to various aspects of the answers. They also carry out a sample valuation in the light of their discussion. The sample valuation of scripts is reviewed by the Head Examiner and variations in marking, if any are further discussed. After the discussion is over and the standard has been decided upon, the examiners disperse and complete the valuation of answer books according to a given schedule. The additional examiners are requested to adopt the same standard of marking in the case of answer books written in an Indian language as they adopt in the case of valuation of answer books in the English medium.

(f) Experience of the Commission over the years has shown that the above exercise is not enough to bring about uniformity of assessment inter se the examiners since in the process of valuation, the examiners tend to deviate from the standard expected to be followed. The Commission, therefore, apply further checks.

(g) After the valuation is completed by the additional examiner, the Head Examiner conducts a random sample survey of answer books to verify, if the norms of procedure evolved in the meetings of examiners have actually been followed by the additional examiners The process of random sampling consists of scrutiny of some top level answer books and some answer books selected at random from the batches of answer books valued by the additional examiners. The top level answer books of each additional examiner are revalued by the Head Examiner who carries out such corrections or alterations in the awards as he in his judgment, considers best, to achieve uniformity. The marks in language

medium answer books are checked by the Head Examiner through interpreters wherever necessary. As an aid to his work and to help in forming his judgment about the standard of marking of each examiner, the Commission prepare certain statistics like distribution of candidates in various marks ranges, the average percentage of marks, the highest and lowest awards etc. in respect of the valuation of each examiner.

(h) It may be relevant to mentioned that the Head Examiner for each paper is not aware of the identity of any of the candidates whose scripts he values, as they bear fictitious roll numbers.

(i) Depending upon the standard adopted by the additional examiner, the Head Examiner may confirm the awards without any change if the examiner has followed the instructions correctly and the standard decided upon, or suggest upward or downward moderation, the quantum of moderation varying according to the degree of liberality or strictness in marking. In the case of the top level answer books revalued by the Head Examiner, his awards are accepted as final. As regards the other answer books below the top level, to achieve maximum measure of uniformity inter se the examiners, the awards are moderated as per the recommendations made by the Head Examiner and as accepted by the Commission. If in the opinion of the Head Examiner there has been erratic marking by an additional examiner, for which it is not feasible to have statistical moderation, the scripts of the additional examiner are revalued by the Head Examiner or by another additional examiner whose norms of marking are similar to that of the Head Examiner.

14. After carefully noting the method of moderation of marks applied by UPSC in evaluating the answer-sheets of the candidates pertaining to Civil Services (Main) Examination, the Court found the said method to be perfectly legal and valid. The relevant discussion contained in the said decision is being reproduced herein below:-

> "We are afraid that it can hardly be contended that where number of candidates appearing at the Civil Services (Main) Examination is increasing every year and was as large as about 10,000 in the main examination with which we are concerned in this petition,

> where again each candidate has to appear in eight subjects with as many as 46 optional subjects and having option to answer General Studies and non-language optional subject in any of the regional languages specified in the VIIIth Schedule to the Constitution, the moderation is not necessary. The Commission was perfectly justified in urging that in a competitive examination with 46 different optional subjects it is not only necessary to ensure reasonable degrees of uniformity inter se the examiners but also inter se subjects. It does not require much of imagination that in an examination where there are number of examiners in a subject there is bound to be what is known as "Examination Variability'. This situation, therefore, necessitates the moderation to ensure reasonable degree of uniformity inter se the examiners. Similarly, in order to curtail this Examination Variability arising as a result of number of optional subjects being allowed and they being permitted to be answered in as many as 14 regional languages, the Commission is under an obligation to have the moderation for purposes of achieving uniformity inter se subjects. If there is no moderation in such situations, a candidate may not be able to compete with the other candidates on account of fortuitous circumstance of his Paper-Setter or Examiner being conservative or liberal. The Commission, having regard to the statistical position of each subject finds that the valuation has been strict or liberal by the Head Examiner or Paper-setter and does statistical moderation by linear transformation, wherever necessary….." (Emphasis Supplied)

15. Relevant would it be to note that while discussing the merits/ de-merits of method of moderation of marks it was observed by the Court that method of scaling of marks is also a suitable method for achieving a common standard of assessment of marks and that UPSC should consider applying the said method in evaluating answer-sheets of candidates of Civil Services Examination in future.

16. In the year 2006, legality of method of moderation of marks applied by UPSC in evaluation of answer sheets of candidates of Civil Services (Main) Examination was challenged in this Court by way of filing a writ petition bearing No.1271/2006 titled **'Neel Ratan v Union of India & Ors'** under Articles 226 and 227 of Constitution of India.(At

this juncture, it may be remembered that the affidavit of UPSC filed in this Court, on which great reliance was placed by the petitioners in the present case and relevant extract whereof has been noted in para 9 above, was filed in the said case.) Vide judgment dated 16.03.2006 a learned Single Judge of this Court dismissed the aforesaid petition in the following terms:-

> "7. The wisdom and method of Moderation must be left to the experts concerned. So far as this Petition is concerned, I do not find any scope to conclude that the marks obtained by the Petitioner were deliberately downgraded in order to favour some third parties; or to displace him from the order of merit…."

17. Aggrieved by the judgment dated 16.03.2006 passed by a learned Single Judge of this Court in W.P. (Civil) No.1271/2006, a Letters Patent Appeal was filed before a Division Bench of this Court, which appeal was dismissed vide order dated 21.04.2006.

18. In the decision reported as **U.P. Public Service Commission Vs. Subhash Chandra Dixit** (2003) 12 SCC 701 Uttar Pradesh Public Service Commission (herein after referred to as "UPPSC") conducted various competitive examinations and applied a system of scaling of marks awarded by the examiners who evaluated the answer sheets in the said examinations. Some of the candidates, who could not secure selection in the said examinations assailed the examination system adopted by UPPSC mainly on the ground that the introduction of method of scaling of marks was arbitrary and illegal by filing writ petitions under Articles 226 and 227 of Constitution of India before Allahabad High Court, which petitions were allowed. Aggrieved by the aforesaid judgment of the Allahabad High Court, UPPSC filed a Petition for Special Leave under Article 136 of Constitution of India before Supreme Court.

19. While dealing with the legality of the method of scaling of marks applied by UPPSC in the evaluation of answer sheets of the candidates in examinations in question, the Supreme Court touched upon the method of moderation of marks applied by UPSC for achieving common standards of assessment in evaluation of answer sheets of candidates in Civil Services (Main) Examination. In said regards, the relevant portion of the said judgment reads as under:-

> "28. U.P.PSC in its special leave petition as well as the rejoinder-affidavit filed before us has stated in detail as to how the scaling system was applied and the circumstances which necessitated the adoption of such a formula. At the outset, we must say that the scaling system, which was adopted by U.P. PSC was not similar to the scaling system adopted by the Union Public Service Commission. The system adopted by UPSC was challenged by certain candidates in a writ petition before the High Court of Gujarat. The Division Bench of the Gujarat High Court considered the question in detail in Kamlesh Haribhai Goradia v. Union of India5 and held that the process of moderation was necessary to find out the merit of the candidates inter se and the marks cannot be awarded till such uniformity is achieved in the matter of assessment of the performance of the candidates at the examination. It, therefore, cannot be said that there is any deviation so that the Commission would not have any authority or power ˇto moderate the valuation of the performance of the candidates at the written examination." (Emphasis Supplied)

20. After carefully noting the method of scaling of marks applied by UPPSC in evaluating the answer-sheets of the candidates pertaining to examinations in question, the Court found the said method to be perfectly legal and valid. The relevant discussion contained in the said decision is being reproduced herein below:-

> "31. There is a vast percentage difference in awarding of marks between each set of examiners and this was sought to be minimized by applying the scaling formula. If scaling method had not been used, only those candidates whose answer-sheets were examined by liberal examiners alone would get selected and the candidates whose answer-sheets were examined by strict examiners would be completely excluded, though the standard of their answers may be to some extent similar. The scaling system was adopted with a view to eliminate the inconsistency in the marking standards of the examiners. The counsel for the respondents could not demonstrate that the adoption of scaling system has in any way caused injustice to any meritorious candidate. If any candidate had secured higher marks in the written examination, even by applying the scaling formula, he

would still be benefited.

32. The Division Bench of the High Court observed that the process of scaling was done examiner wise only and the scaling formula did not take into consideration the average of mean of all the candidates in one particular paper but took the mean of only that group of candidates which has been examined by one single examiner. The counsel for U.P. PSC submitted that the observation made by the High Court is incorrect. The scaling formula was adopted to remove the disparity in the evaluation of 14 examiners who participated in the evaluation of answer-sheets and the details have also been furnished as to how the scaling formula was adopted and applied. Therefore, we do not think that the observation of the Division Bench that the Commission did not take care of varying standards which may have been applied by different examiners but has sought to reduce the variation of the marks awarded by the same examiner to different candidates whose answer-sheets had been examined, is correct. The Division Bench was of the view that as a result of scaling, the marks of the candidates who had secured zero marks were enchanced to 18 and this was illegal and thus affected the selection process. This finding is to be understood to mean as to how the scaling system was applied. 18 marks were given notionally to a candidate who secured zero marks so as to indicate the variation in marks secured by the candidates and to fix the mean marks.

33. In that view of the matter, we do not think that the application of scaling formula to the examinations in question was either arbitrary or illegal. The selection of the candidates was done in a better way. Moreover, this formula was adopted by U.P. PSC after an expert study and in such matters, the court cannot sit in judgment and interfere with the same unless it is proved that it was an arbitrary and unreasonable exercise of power and the selection itself was done contrary to the Rules. Ultimately, the agency conducting the examination has to consider as to which method should be preferred and adopted having regard to the myriad situations that may arise before them."

21. In the decision reported as **Sanjay Singh Vs U.P. Public Service Commission** (2007) 3 SCC 720 petitions under Article 32 of

Constitution of India were filed before Supreme Court by the unsuccessful candidates who appeared in the examinations conducted by Uttar Pradesh Public Service Commission (herein after referred to as the "UPPSC") in the year 2003 for recruitment to the posts of Civil Judge (Junior Division). The said examination comprised of two successive stages; namely, Preliminary Examination and Main Examination. The preliminary examination was 'objective type' consisting of two papers; namely, General Knowledge and Law. The Main Examination was descriptive (conventional) type and consisted of five papers. The answer sheets relating to each subject were distributed to several examiners for evaluation, as it was not possible to get the large number of answer sheets by a single examiner. The marks assigned by the examiners were subjected to "statistical scaling" and the results of the Examination were based on such scaled marks. On behalf of the petitioners, amongst others grounds, it was contended that conversion of their raw marks into scaled marks is illegal as the same was done by applying an arbitrary, irrational and inappropriate scaling formula. It was further submitted that the method of scaling of marks applied by UPPSC has resulted in meritorious candidates being ignored, and less meritorious candidates being awarded higher marks and selected, thereby violating the fundamental rights of the meritorious candidates. On behalf of UPPSC, it was contended that the "statistical scaling" method adopted in regard to Civil Judge (Junior Division) Examination is legal, scientific and sound and is based on experts' opinion as also the experience gained in conducting several examinations.

22. While dealing with the legality of the method of scaling of marks applied by UPPSC in the evaluation of answer sheets of the candidates in Civil Judge (Junior Division) Examination, a three-Judge Bench of the Supreme Court touched upon the method of moderation of marks used in similar types of examinations for achieving common standards of assessment in evaluation of answer sheets of candidates in said examinations. In said regards, the relevant portion of the said judgment reads as under:-

> "23. When a large number of candidates appear for an examination, it is necessary to have uniformity and consistency in valuation of the answer-scripts. Where the number of candidates taking the examination are limited and only one examiner (preferably the paper-setter himself) evaluates the

answer-scripts, it is to be assumed that there will be uniformity in the valuation. But where a large number of candidates take the examination, it will not be possible to get all the answer-scripts evaluated by the same examiner. It, therefore, becomes necessary to distribute the answer-scripts among several examiners for valuation with the paper-setter (or other senior person) acting as the Head Examiner. When more than one examiners evaluate the answer-scripts relating to a subject, the subjectivity of the respective examiner will creep into the marks awarded by him to the answer-scripts allotted to him for valuation. Each examiner will apply his own yardstick to assess the answer-scripts. Inevitably therefore, even when experienced examiners receive equal batches of answer-scripts, there is difference in average marks and the range of marks awarded, thereby affecting the merit of individual candidates. This apart, there is "hawk-dove" effect. Some examiners are liberal in valuation and tend to award more marks. Some examiners are strict and tend to give less marks. Some may be moderate and balanced in awarding marks. Even among those who are liberal or those who are strict, there may be variance in the degree of strictness or liberality. This means that if the same answer-script is given to different examiners, there is all likelihood of different marks being assigned. If a very well-written answer-script goes to a strict examiner and a mediocre answer-script goes to a liberal examiner, the mediocre answer-script may be awarded more marks than the excellent answer-script. In other words, there is "reduced valuation" by a strict examiner and "enhanced valuation" by a liberal examiner. This is known as "examiner variability" or "hawk-dove effect". Therefore, there is a need to evolve a procedure to ensure uniformity inter se the examiners so that the effect of "examiner subjectivity" or "examiner variability" is minimized. The procedure adopted to reduce examiner ˇsubjectivity or variability is known as moderation. The classic method of moderation is as follows:

(i) The paper-setter of the subject normally acts as the Head Examiner for the subject. He is selected from amongst senior academicians/scholars/senior civil servants/judges. Where the case is of a large number of candidates, more than one examiner is

appointed and each of them is allotted around 300 answer-scripts for valuation.

(ii) To achieve uniformity in valuation, where more than one examiner is involved, a meeting of the Head Examiner with all the examiners is held soon after the examination. They discuss thoroughly the question paper, the possible answers and the weightage to be given to various aspects of the answers. They also carry out a sample valuation in the light of their discussions. The sample valuation of scripts by each of them is reviewed by the Head Examiner and variations in assigning marks are further discussed. After such discussions, a consensus is arrived at in regard to the norms of valuation to be adopted. On that basis, the examiners are required to complete the valuation of answer-scripts. But this by itself, does not bring about uniformity of assessment inter se the examiners. In spite of the norms agreed, many examiners tend to deviate from the expected or agreed norms, as their caution is overtaken by their propensity for strictness or liberality or erraticism or carelessness during the course of valuation. Therefore, certain further corrective steps become necessary.

(iii) After the valuation is completed by the examiners, the Head Examiner conducts a random sample survey of the corrected answer-scripts to verify whether the norms evolved in the meetings of examiner have actually been followed by the examiners. The process of random sampling usually consists of scrutiny of some top level answer-scripts and some answer books selected at random from the batches of answer-scripts valued by each examiner. The top level answer books of each examiner are revalued by the Head Examiner who carries out such ˇcorrections or alterations in the award of marks as he, in his judgment, considers best, to achieve uniformity. (For this purpose, if necessary certain statistics like distribution of candidates in various marks ranges, the average percentage of marks, the highest and lowest award of marks, etc. may also be prepared in respect of the valuation of each examiner.)

(iv) After ascertaining or assessing the standards adopted by each examiner, the Head Examiner may confirm the award of

marks without any change if the examiner has followed the agreed norms, or suggests upward or downward moderation, the quantum of moderation varying according to the degree of liberality or strictness in marking. In regard to the top level answer books revalued by the Head Examiner, his award of marks is accepted as final. As regards the other answer books below the top level, to achieve maximum measure of uniformity inter se the examiners, the awards are moderated as per the recommendations made by the Head Examiner.

(v) If in the opinion of the Head Examiner there has been erratic or careless marking by any examiner, for which it is not feasible to have any standard moderation, the answer-scripts valued by such examiner are revalued either by the Head Examiner or any other examiner who is found to have followed the agreed norms.

(vi) Where the number of candidates is very large and the examiners are numerous, it may be difficult for one Head Examiner to assess the work of all the examiners. In such a situation, one more level of examiners is introduced. For every ten or twenty examiners, there will be a Head Examiner who checks the random samples as above. The work of the Head Examiners, in turn, is checked by a Chief Examiner to ensure proper results.

The above procedure of "moderation" would bring in considerable uniformity and consistency. It should be noted that absolute uniformity or consistency in valuation is impossible to achieve where there are ˇseveral examiners and the effort is only to achieve maximum uniformity. (Emphasis Supplied)

23. The differences between the methods applied by UPPSC and UPSC in evaluating answer-sheets of candidates pertaining to Civil Judge (Junior Division) Examination and Civil Services (Main) Examination was pointed out by Supreme Court in following terms:-

"26. The Union Public Service Commission ("UPSC", for short) conducts the largest number of examinations providing choice of subjects. When assessing inter se merit, it takes recourse to scaling only in Civil Service Preliminary Examination where candidates have the choice to opt for any one paper out of 23 optional papers and where the question papers are of objective

type and the answer-scripts are evaluated by computerised scanners. In regard to compulsory papers which are of descriptive (conventional) type, valuation is done manually and scaling is not resorted to. Like UPSC, most examining authorities appear to take the view that moderation is the appropriate method to bring about uniformity in valuation where several examiners manually evaluate answer-scripts of descriptive/ conventional type question papers in regard to same subject; and that scaling should be resorted to only where a common merit list has to be prepared in regard to candidates who have taken examination in different subjects, in pursuance of an option given to them."

24. After carefully noting the method of scaling of marks applied by UPPSC in evaluating the answer-sheets of the candidates pertaining to Civil Judge (Junior Division) Examination it was held by Supreme Court that the said method is arbitrary and illegal and that the decision of Supreme Court in **Subhash Chandra Dixit's** case (supra) was incorrect. In said regards, the relevant portion of the ˇdiscussion contained in the said decision is being reproduced herein under:-

"24. In the Judicial Service Examination, the candidates were required to take the examination in respect of all the five subjects and the candidates did not have any option in regard to the subjects. In such a situation, moderation appears to be an ideal solution. But there are examinations which have a competitive situation where candidates have the option of selecting one or few among a variety of heterogeneous subjects and the number of students taking different options also vary and it becomes necessary to prepare a common merit list in respect of such candidates. Let us assume that some candidates take Mathematics as an optional subject and some take English as the optional subject. It is well recognised that marks of 70 out of 100 in Mathematics do not mean the same thing as 70 out of 100 in English. In English 70 out of 100 may indicate an outstanding student whereas in Mathematics, 70 out of 100 may merely indicate an average student. Some optional subjects may be very easy, when compared to others, resulting in wide disparity in the marks secured by equally capable students. In such a situation, candidates who have opted for the easier subjects may steal an

advantage over those who opted for difficult subjects. There is another possibility. The paper-setters in regard to some optional subjects may set questions which are comparatively easier to answer when compared to some paper-setters in other subjects who set tougher questions which are difficult to answer. This may happen when for example, in Civil Service Examination, where Physics and Chemistry are optional papers, Examiner 'A' sets a paper in Physics appropriate to degree level and Examiner 'B' sets a paper in Chemistry appropriate for matriculate level. In view of these peculiarities, there is a need to bring the assessment or valuation to a common scale so that the inter se merit of candidates who have opted for different subjects, can be ascertained. The moderation procedure referred to in the earlier para will solve only the problem of examiner variability, where the examiners are many, but valuation of answer-scripts ˇis in respect of a single subject. Moderation is no answer where the problem is to find inter se merit across several subjects, that is, where candidates take examination in different subjects. To solve the problem of inter se merit across different subjects, statistical experts have evolved a method known as scaling, that is creation of scaled score. Scaling places the scores from different tests or test forms on to a common scale. There are different methods of statistical scoring. Standard score method, linear standard score method, normalised equipercentile method are some of the recognised methods for scaling.

25. A. Edwin Harper Jr. and V. Vidya Sagar Misra in their publication Research on Examinations in India have tried to explain and define scaling. We may usefully borrow the same. A degree "Fahrenheit" is different from a degree "Centigrade". Though both express temperature in degrees, the "degree" is different for the two scales. What is 40 degrees in Centigrade scale is 104 degrees in Fahrenheit scale. Similarly, when marks are assigned to answer-scripts in different papers, say by Examiner 'A' in Geometry and Examiner 'B' in History, the meaning or value of the "marks" is different. Scaling is the process which brings the marks awarded by Examiner 'A' in regard to Geometry scale and the marks awarded by Examiner 'B' in regard to History scale, to a common scale. Scaling is the exercise of putting the

marks which are the results of different scales adopted in different subjects by different examiners onto a common scale so as to permit comparison of inter se merit. By this exercise, the raw marks awarded by the examiner in different subjects are converted to a "score" on a common scale by applying a statistical formula. The "raw marks" when converted to a common scale are known as the "scaled marks". Scaling process, whereby raw marks in different subjects are adjusted to a common scale, is a recognised method of ensuring uniformity inter se among the candidates who have taken examinations in different subjects, as, for example, the Civil Services Examination.

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45. We may now summarise the position regarding scaling thus:

(i) Only certain situations warrant adoption of scaling techniques.

(ii) There are number of methods of statistical scaling, some simple and some complex. Each method or system has its merits and demerits and can be adopted only under certain conditions or making certain assumptions.

(iii) Scaling will be useful and effective only if the distribution of marks in the batch of answer-scripts sent to each examiner is approximately the same as the distribution of marks in the batch of answer-scripts sent to every other examiner.

(iv) In the linear standard method, there is no guarantee that the range of scores at various levels will yield candidates of comparative ability.

(v) Any scaling method should be under continuous review and evaluation and improvement, if it is to be a reliable tool in the selection process.

(vi) Scaling may, to a limited extent, be successful in eliminating the general variation which exists from examiner to examiner, but not a solution to solve examiner variability arising from the "hawk-dove" effect (strict/liberal valuation).

46. The material placed does not disclose that the Commission

or its expert committee have kept these factors in view in determining the system of scaling. We have already demonstrated the anomalies/absurdities arising from the scaling system used. The Commission will have to identify a suitable system of evaluation, if necessary by appointing another committee of experts. Till such new system is in place, the Commission may follow the moderation system set out in para 23 above with appropriate modifications.

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48. S.C. Dixit1, therefore, upheld scaling on two conclusions, namely, (i) that the scaling formula was adopted by the Commission after an expert study and in such matters, the Court will not interfere unless it is proved to be arbitrary and unreasonable; and (ii) the scaling system adopted by the Commission eliminated the inconsistency arising on account of examiner variability (differences due to evaluation by strict examiners and liberal examiners). As scaling was a recognised method to bring raw marks in different subjects to a common scale and as the Commission submitted that they introduced scaling after a scientific study by experts, this Court apparently did not want to interfere. This Court was also being conscious that any new method, when introduced, required corrections and adjustments from time to time and should not be rejected at the threshold as unworkable. But we have found after an examination of the manner in which scaling system has been introduced and the effect thereof on the present examination, that the system is not suitable. We have also concluded that there was no proper or adequate study before introduction of scaling and the scaling system which is primarily intended for preparing a common merit list in regard to candidates who take examinations in different optional subjects, has been inappropriately and mechanically applied to a situation where the need is to eliminate examiner variability on account of strict/liberal valuation. We have found that the scaling system adopted by the Commission leads to irrational results, and does not offer a solution for examiner variability arising from strict/liberal examiners. Therefore, it can be said that neither of the two assumptions made in S.C. Dixit1 can

validly continue to apply to the type of examination with which we are concerned. We are therefore of the view that the approval of the scaling system in S.C. Dixit[1] is no longer valid.

49. Learned counsel for the Commission contended that scaling has been accepted as a standard method of evaluation in the following decisions and therefore it should be approved:

(i) **Kamlesh Haribhai Goradia v. Union of India6** upheld by this Court by order dated 11-3-1987 in SLP (C) No. 14000 of 1986.

(ii) **Mahesh Kumar Khandelwal v. State of Rajasthan7** upheld by this Court by order dated 22-1-1996 in SLPs (C) Nos. 15682-84 of 1994.

(iii) **K. Channegowda v. Karnataka Public Service Commission8**.

All the three cases related to moderation and not scaling. There are, however, passing references to scaling as one of the methods to achieve common standard of assessment. The fact that scaling is a standard method of assessment, when a common base has to be found for comparative assessment of candidates taking examinations in different optional subjects, is not in dispute. In fact the Commission may continue to adopt the said system of scaling, where a comparative assessment is to be made of candidates having option to take different subjects. The question is whether scaling, in particular, linear standard scaling system as adopted by the Commission, is a suitable process to eliminate "examiner variability" when different examiners assess the answer-scripts relating to the same subject. None of the three decisions is of any assistance to approve the use of method of "scaling" used by the Commission." (Emphasis Supplied)

25. After dealing with the method of scaling of marks applied by UPPSC in evaluating answer-sheets of the candidates pertaining to Civil Judge (Junior Division) Examination, Supreme Court observed as under:-

"52. The petitioners have requested that their petitions should be treated as being in public interest and the entire selection process

in regard to Civil Judge (Junior Division) Examination, 2003 should be set aside. We are unable to accept the said contention. What has been made out is certain inherent defects of a particular scaling system when applied to the selection process of the Civil Judges (Junior Division) where the problem is one of examiner variability (strict/liberal examiners). Neither mala fides nor any other irregularities in the process of selection are made out. The Commission has acted bona fide in proceeding with the selection and neither the High Court nor the State Government had any grievance in regard to selections. In fact, the scaling system applied had the seal of approval of this Court in regard to the previous selection in S.C. Dixit1. The selected candidates have also been appointed and functioning as Judicial Officers. Further as noticed above, the scaling system adopted by the Commission has led to irrational and arbitrary results only in cases falling at the ends of the spectrum, and by and large did not affect the major portion of the selection. We, therefore, direct that our decision holding that the scaling system adopted by the Commission is unsuited in regard to Civil Judge (Junior Division) Examination and directing moderation, will be prospective in its application and will not affect the selections and appointments already made in pursuance of the 2003 examination." (Emphasis Supplied)

26. From a cumulative reading of the aforesaid decisions, the factual/ legal position which emerges can be summarized as under:-

I Moderation and scaling of marks are two different techniques used by examining authorities for achieving common standard of assessment of marks.

II UPSC does not apply the method of scaling of marks in evaluating the answer-sheets of the candidates pertaining to Civil Services (Main) Examination and confines the application of the said method in evaluation of answer-sheets of the candidates pertaining to Civil Services (Preliminary) Examination.

III The method of moderation of marks propounded by Supreme Court in **Sanjay Singh's** case (supra) is similar to the ˇone applied by UPSC in evaluating the answer-sheets of the candidates pertaining to

Civil Services (Main) Examination.

IV The method of moderation of marks applied by UPSC in evaluating the answer-sheets of the candidates pertaining to Civil Services (Main) Examination has been approved by a learned Single Judge and a Division Bench of this Court.

V The method of moderation of marks applied by UPSC in evaluating the answer-sheets of the candidates pertaining to Civil Services (Main) Examination has been approved by a Division Bench of Gujarat High Court in **Kamlesh Haribhai's** case (supra), which decision has been impliedly approved by Supreme Court in **Subhash Chandra's** case (supra) and that the said aspect of Subhash Chandra's case has not been overruled in **Sanjay Singh's** case (supra).

VI The application of method of scaling of marks was held to be arbitrary and illegal by Supreme Court in **Sanjay Singh's** case only in respect of Civil Judge (Junior Division) Examination conducted by UPPSC. No opinion was expressed by Supreme Court regarding the legality of method of scaling of marks applied by UPSC in evaluating answer-sheets of the candidates pertaining to Civil Services (Preliminary) Examination.

27. In the backdrop of the aforesaid factual/legal position, we proceed to deal with the submissions advanced by the learned counsel for the petitioner(s).

28. With respect to the first submission advanced by the learned counsel, suffice would it be to note the legal position extracted by us in sub-paras III, IV and V of para 26 above. In view of such legal position, we find no merit whatsoever in the submission advanced by the learned counsel that the method of moderation of marks applied by UPSC in evaluating answer sheets of the candidates pertaining to Civil Services (Main) Examination is unreasonable and arbitrary and thus violative of Articles 14 and 16 of Constitution of India.

29. With respect to the second submission advanced by the learned counsel, we note that UPSC had stated on oath before Supreme Court in **Sanjay Singh's** case (supra) that it is not applying the method of scaling of marks in evaluating answer sheets of the candidates pertaining to Civil Services (Main) Examination. (See para 3 of the counter affidavit filed by UPSC in the said matter). A perusal of the report relied upon by

the petitioners merely brings out that linear scaling of marks is one of the methods of statistical moderation and is not the same as linear scaling as alleged by the petitioners. It may be highlighted that no argument can be advanced that scaling, ipso facto, results in imperfection. Scaling as a concept has various hues for example, linear scaling and equi-percentile scaling. Each has its own indices and formula. In a given situation, the desired result may fail but only at the extremities of the spectrum (as was discovered by Supreme Court in **Sanjay Singh's** case (supra). Thus, without showing to the court the scaling formula applied and indices used by teachers in UK to achieve common standards of assessment of marks, the deficiency found in applying scaling in UK cannot be a ground to question moderation, applying linear scaling by UPSC.

30. The matter can also be looked at from another angle. In Kamlesh Haribhai's case, Gujarat High Court noted with approval that while applying method of moderation of marks in evaluating the answer sheets of the candidates pertaining to Civil Services (Main) Examination, 'the Head Examiner does statistical moderation of marks by linear transformation, wherever considered necessary'. As already noted hereinabove, the decision of Gujarat High Court in **Kamlesh Haribhai's** case (supra) has been impliedly approved by Supreme Court in **Subhash Chandra's** case (supra) and that the said aspect of Subhash Chandra's case has not been overruled in **Sanjay Singh's** case (supra).

31. With respect to third submission, we note that UPSC has been continuously conducting Civil Services Examination every year starting from 1949 to till date. The petitioners had pointed out ten incidents of detection of irregularities in Civil Services Examination conducted by UPSC over the past "seven decades". A few stray incidents of irregularities detected in the Civil Services Examination conducted in the past seven decades do not vitiate the sanctity of Civil Services Examination. No materials whatsoever has been placed on record by the petitioners in the present case suggesting that there were irregularities in the Civil Services Examinations conducted by UPSC in the year 2007-2009.

32. In this regards, it is also significant to note that the petitioners averred in the applications filed by them before the Tribunal that *'lower marks of the Petitioners may be due to the manner of evaluation applied by the Respondent for evaluation of Answer-Books of Main's*

Examination'. The aforesaid averment contained in the applications in question brings out the allegations made by the petitioners against UPSC in respect of manner of conduct of Civil Services Examination and method of evaluation of answer-sheets of the candidates are based on surmises and conjectures and that the petitioners were throwing darts in dark with a hope that one of the darts would hit the bull's eye.

33. In dealing with fourth submission advanced by the learned counsel, we find that no question of law which arises for consideration has been set out in any petition which is pending and without recording any reasons, notice simpliciter has been issued. Since we heard arguments at length at the admission stage itself and find that the issues raised are squarely covered, we see no reason why instant petitions should not be disposed of.

34. The alternative answer to the aforesaid question lies in the decision of Supreme Court in **Sanjay Singh's** case (supra) wherein it was held that where an authority has acted in a bona fide manner in proceeding with the selection of the candidates for a particular post and that the appointments have been made in pursuance of said selection, any jurisdiction fault, if found, in the process of evaluation of the candidates shall require directions to be issued, to be applied in the future. The reason is simple. The affected candidates are not before the Court and in their absence, their appointments cannot be set aside.

35. Before concluding, we proceed to note a significant aspect of the present matters. It is most relevant to note that the petitioners in Writ Petitions Nos.6586, 6590, 6592 and 6602 of 2010 approached the Tribunal after a period of more than one year from the date of declaration of results in respect of Civil Services Examinations in question. Till the time the petitioners in question approached the Tribunal, the selections and appointments in pursuance of declaration of results had already been made. The petitioners in question did not implead as respondents the persons who already stood appointed and were likely to be adversely affected by the success of the petitioners before the Tribunal. It does not stand to reason to upset the appointments made much prior to the date of filing of applications by the petitioners in question before the Tribunal. The delay in approaching the Tribunal by the petitioners in question was most fatal to the case set up by them before the Tribunal.

36. In view of above discussion, we find no merit in the above captioned petitions. The same are hereby dismissed.

37. No costs.

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W.P. (C)

INSPIRATION **....PETITIONER**

VERSUS

THE NATIONAL TRUST & ANR. **....RESPONDENTS**

(DR. S. MURALIDHAR, J.)

W.P. (C) NO. : 13450/2009 **DATE OF DECISION: 06.10.2010**

The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (Trust Act)—Section 4(4) and 4(5)—Object of Trust Act—Petitioner Society was sanctioned grant of Rs. 27,89,342/—Disbursement of money was to be in installments—After sanction, President of the Petitioner Society joined the Board of Respondent Trust—Respondent Trust sought refund of grant—Alleged violation of Section 4(4) and 4(5)—Member of Board—Not to have financial interest or beneficiary of Respondent Trust Held—Object of Section 4(4) and 4(5)—To ensure that there is no conflict of interest and position is not used to gain favours—Would be attracted only upon becoming member and not retrospectively—Would not affect grants sanctioned prior to becoming a member.

The object of the above provisions is to ensure that there is no conflict of interest in a member of the Board functioning

as such and the relationship such member may have with the National Trust independent of that. The second object is that no member of the Board should be able to use that position to gain any favours, after becoming such member. In the context of the present case, a member of the organisation of such member should not be given any new grants or renewal of grants already made. Obviously the bar under Sections 4(4) and 4(5) would be attracted only upon a person becoming a member. It cannot apply retrospectively to affect grants already made to an organisation to its representative becoming a member of the Board.**(Para 29)**

Important Issue Involved: The bar u/s 4(4) and 4(5) would be attracted only upon a person becoming a member of Board. It cannot apply retrospectively to affect disbursement of grants already made to an organization to its representative becoming a member of the Board.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS **:** Mr. Colin Gansalves, Senior, Adv. with Mr. Divya Jyoti Jaipuriar, Advocate.

FOR THE RESPONDENT **:** None.

RESULT: Petition allowed with cost of Rs. 10,000/- to be paid to Petitioner by Respondent No. 1 and 2.

S. MURALIDHAR, J.

1. The Petitioner, which is a society registered under the Societies Registration Act, 1860 is aggrieved by a letter dated 18th July 2006 written to it by the National Trust, Respondent No.1, asking it to refund "the entire amount grant-in-aid of Rs. 27,89,342/- at the earliest." The Petitioner is also aggrieved by the implied debarment of the Petitioner from applying for any further grants to the National Trust as evident from a notice dated 3rd September 2008 placed on the website of the National Trust. Certain other consequential reliefs are also prayed for.

2. The Petitioner's organisation is represented by its President Smt. Saswati Singh and has its office at Tilak Nagar at New Delhi. It was granted registration as a society on 22nd June 1996. The Petitioner is running a day care centre in Tilak Nagar having about 75 to 80 students mostly from the lower income-group strata. It also runs a home in Dehradun for about 25 students. The Petitioner states that one of its main tasks is to work for intellectually challenged special children, and to develop awareness about the causes and interventions required for intellectually challenged children and adults. The Petitioner's special schools deal with the training and rehabilitation for students from ages 2 to 35. The Petitioner also provides a range of therapies including alternative therapies. The focus is on self-help skills, vocational training and parents' training. The Petitioner's group home in Dehradun caters to autistic young adults with severe challenges, where the students are trained along with parents. The students from regular schools and colleges are encouraged to volunteer and interact with the students of the Petitioner's school and day care home, which according to the Petitioner, helps in their personality development and self-confidence.

3. The Petitioner states that its Director Smt. Saswati Singh, is highly qualified and has considerable experience in providing for the care and rehabilitation of special children who are intellectually challenged. It is stated that she has received a large number of awards both at the national and international level. She received the National Trust Annual Award 2007 the best individual parent of a person with disability.

4. Respondent No.1 is the National Trust. It is a statutory body established by the Ministry of Social Justice and Empowerment ('MSJE'), Government of India under the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 ('National Trust Act'). The MSJE, Government of India has been impleaded as Respondent No.2 to the present petition. For the period of 2001-05 the National Trust made a total grant of Rs. 9,28,800/- to the Petitioner. This helped support the school and day care centre run by the Petitioner. It is stated that the money was received by an office order No. 104 dated 19th December 2001. It is stated that this money was used for payment to 6 therapists, 1 medical doctor, 10 assistant teachers, 1 sweeper, 1 chowkidar and for purchase of occupational therapy equipments, educational toys etc.

5. On 3rd April 2002, in continuation of the order dated 19th December 2001, the National Trust sanctioned an additional sum of Rs. 3,51,200/- to the Petitioner towards recurring cost for the expenditure of additional staff. Out of this, Rs. 1,75,600/- was released as a first instalment 2002-03. By an office order dated 30th October 2002, the MSJE sanctioned to the National Trust a sum of Rs. 6,10,400/- in favour of the Petitioner which included Rs. 2,40,000/- towards non-recurring grant and Rs. 3,70,400/- towards the 2nd instalment of the recurring grant.

6. In continuation of the sanction order dated 19th December 2001, the National Trust sanctioned a grant of Rs. 7,10,142/- to the Petitioner towards recurring expenditure for day care centre. Consequently, a sum of Rs. 3,54,942/- was released to the Petitioner by the National Trust by an order dated 23rd June 2003.

7. It is reiterated by the Petitioner that the above monies were released pursuant to the Petitioner being given a grant by the National Trust in 2001 and pursuant to the contract entered into that year between National Trust and the Petitioner. The contract was for three years i.e. 2001-04. The period was extended to 2005. It is stated that the total grant received by the Petitioner from the National Trust pursuant to the above contract was Rs. 27,89,342/- and has been utilized for the purposes of the day care centre and for the payment of staff in the two centres run by the Petitioner.

8. It is stated that the National Trust was desirous of inducting into its Board, persons who were representative of the mental disabilities sector. It is stated that Smt. Saswati Singh had at that stage specifically enquired from the then Chairperson of the National Trust whether there would be any adverse implications for the grants made to the Petitioner if she was a member of the Board. According to the Petitioner, the Chairperson of the National Trust assured her that the already sanctioned grants would not be affected.

9. The National Trust approached the then Additional Solicitor General of India ('ASG') for his opinion. The specific queries posed to the learned ASG were as under:

"Issue 1:4

Section 4(5) of the Act appears to disqualify those organizations

from receiving aid whose members are on the Board of the Querist. Some Board members of the Queriest belong to registered organizations that receive grants-in-aid from the Trust. In some instances such members came on the board after a grant to their organization had already been approved by the Board. While one installment of the grant has already been disbursed, the other installment is yet to be given to the registered organisation.

(5) In view of these facts, the following have arisen:

(i) Whether in view of Section 4(5) of the Act the registered organizations whose representatives are on the Board of the Trust are eligible to apply for grants-in-aid under Section 11(1)(c) of the Act.

(ii) Would the National Trust be justified in:

(a) Disbursing the remaining installments which were part of the amount sanctioned at the time when they were not on the Board of the National Trust?

(b) Renewing such grants for subsequent years."

10. By a letter dated 28th August 2003 the learned ASG gave the following opinion:

"6. A perusal of Section 4(5) clearly shows that a Board member is not entitled to receive any grant in aid. This is a salutary provision as it militates against any possible conflict of interest. The bar under this provision is absolute and not in the nature of a bar which would permit the Board to approve funds after an interested member excuses himself from any proceeding where a discussion about the grant to his organization takes place.

7. However, in case a grant has already been approved, but not fully disbursed, there is no occasion not to give the rest of the amount. In such a case there can be no possible conflict of interest. A purposive construction of the Act shows that it does not bar the mere disbursement of money already due…the possibility of favouritism in the decision making…Since the member did not participate in the decision making process, there can be no objection to releasing money to the organisation.

8. Section 11(1)(c) deals with the grant in aid. There is no concept of renewal of a grant under the Act. Therefore, each application for grant has to be a fresh application. Consequently, if an organisation is barred from receiving a fresh grant, it is also barred from an alleged renewal of the grant.

9. Therefore, I answer the queries posed above as under:

Query 1: No, registered organizations whose representatives are on the Board of the Trust are not eligible to apply for grants-in-aid under Section 11(1)(c) of the Act.

Query 2(a) : The National Trust may disburse any remaining amount.

Query 2(b) : No "renewal" of a grant can be made in case a member of the organization is also a member of the Board."

11. The above opinion was categorical that mere disbursements of moneys already granted to an organisation would not be constituted as a bar to an individual representing such grantee organisation from coming on to the Board of the National Trust. It is stated that on the basis of the above opinion of the learned ASG, Smt. Saswati Singh and one Dr. Dholakia stood for election and joined the Board of the National Trust.

12. A notification dated 9th December 2003 was issued by the MSJE under Section 3(4) of the National Trust Act whereby the Petitioner and certain others were appointed as Members of the Board of the National Trust.

13. On 21st October 2005 the Director General of Audit wrote to the Chairperson of the National Trust enclosing the statement of fact regarding irregular release of grants under the ERI scheme and asking for confirmation and comments. This issue was discussed at the 20th Meeting of the Board of the National Trust on 7th September 2005. It was again discussed on the meeting of the Board held on 20th December 2005. The deliberations of the said meeting as recorded in the minutes reads as under:

"Agenda Item No.7: CAG Audit for the year 2004-05 Irregular release of grants under ERI scheme At the outset JS&CEO pointed out that the letter of the Addl. Solicitor General is very

clearly worded on this issue & there is no need for second opinion in the matter. Mrs. Saswati Singh pointed out if she had prior knowledge of this, she would not have joined the Board and it will be very difficult for the parent's organisation to refund the money at this juncture. Shri P.K. Ray, JS, Ministry of Labour pointed out that since it will be difficult for organizations to refund the money, a request may be made to the CAG. It was unanimously decided that a request may be made to the CAG for waiving this amount in view of the peculiar circumstances in this case. Thereafter the Board will be approached again depending upon the reply received from them. It was pointed out by the Chairperson that in future Board member will not be the beneficiaries of any schemes. There was one vote of dissent by Shri Udai Singh, who pointed out that the views of the Addl. Solicitor General are very clear in the matter that every year it should be treated as a new grant."

14. It is stated by the Petitioner that despite the opinion of the learned ASG the National Trust sent the impugned letter dated 18th July 2006 to the Petitioner seeking refund of Rs. 27,89,342/-. It is further stated that the amount disbursed to the Petitioner after Smt. Saswati Singh joined the Board of the National Trust was Rs. 8,28,000/- whereas the National Trust was asking the Petitioner to refund the entire amount of Rs. 27,89,342/-.

15. It may be mentioned here that the Petitioner's term on the Board of National Trust has since come to an end. Further, it is stated that the Petitioner was adversely affected by the impugned letter dated 18th July 2006. Subsequently, on 3rd September 2008 a notice was placed on the website of the National Trust where application for release of grant were invited from all NGOs except a few which included the Petitioner. According to the Petitioner, the effecting of the debarment of the Petitioner from receiving any grant from the MSJE, Government of India, has been adverse. The Petitioner states that all the special educators except two were discontinued because salaries could not be paid. The occupational therapy equipments got worn out and had to be discarded and could not be replaced because there were no funds. The number of students dwindled from 100 in 2001 to about 75 as on the date of filing of the writ petition i.e. 18th November 2009.

16. While directing notice to issue to the Respondents on 26th November 2009, this Court restrained the Respondents from taking any coercive steps for recovery of the aforementioned sum of Rs.27,89,342/- from the Petitioner.

17. The reply filed by Respondent No.1 National Trust, inter alia, acknowledged that opinion had been given by the learned ASG on 29th August 2003 that "there would be no conflict of interest as envisaged in Section 4(4) & (5) of the NT Act if the sanctions were made prior to the members coming on the Board and the disbursements were made thereout during the tenure of the members in an on-going project. He advised against giving fresh sanctions to the members. organizations during the period they were members on the Board or any renewal of the grants."

18. Also annexed to the counter affidavit of the National Trust as Annexure R-7 are its comments on the draft paragraph in the report of the Director General of Audit titled "release of grant-in-aid in violation of an act of Parliament" in respect of the National Trust. The relevant extract of the said comment reads as under:

"Under the provisions of Section 3(4)(b) of the Act ibid, Dr. H.T. Dholakia and Smt. Saswati Singh, who are associated with the NGOs namely Association for the Welfare of the Persons with Mental Handicap in Maharashtra (AWMH), Mumbai, and INSPIRATION, Delhi, respectively, were appointed as Members of the Board of the National Trust, both w.e.f. 09.12.2003. While Dr. Dholakia ceased to be the Member of the Board of the Trust beyond 03.11.2005. Smt. Singh is still continuing as the Member of the Board.

The total amount of grants released by the Trust to these NGOs during the tenure of their functionaries as Members of its Board is Rs. 13,23,132/- only and not Rs. 40.23 lakh as stated in the draft audit paragraph.

The NGOs, with which these Members are associated with, had been in receipt of grants from the Trust since 2002-03 and 2001-02 respectively and during their tenure as Members of the Board, their NGOs received grants of Rs. 4,94,332/- and Rs.

8,28,800/- respectively.

The fact cannot be ignored that these two Members are not the direct beneficiaries of the grants released by the Trust. The amounts have been released to the NGOs of these Members for utilization for the benefits of the persons affected by Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities. The persons with these disabilities are the real beneficiaries of the grants and neither the Members of the Board of the Trust nor the functionaries of the concerned NGOs. A such the grants released to these NGOs may not be treated as grants released in violation of Section 4(5) of the Act. Meantime the said scheme (ERI) has been discontinued with effect from 1.4.2005.

Further, as earlier stated that under Section 3(4)(b) of the Act persons associated with the NGOs are to be appointed as Members of the Board of the Trust. Appointment of the eminent persons associated with NGOs should not debar their NGOs to receive grant from the Trust for utilization for the benefits of the target group of persons with disabilities. If such a ban is imposed and release of grants to such NGOs is discontinued during the tenure of the functionaries of the NGOs as Members of the Board of the Trust, the NGOs will not be in a position to render services to the target group thereby the real beneficiaries i.e. the person with disabilities will be deprived of the benefits of the Schemes of the Trust. Hence, release of grants under the Scheme of the National Trust to the NGOs during the tenure of their functionaries as Members of the Board of the Trust may not be treated as violation of Section 4(5) of the National Trust Act."

19. As regards the allegation that the National Trust had released Rs. 8.49 lakhs to the two NGOs including the Petitioner herein, even after the registration of the said NGOs with the Trust had expired, the comments of the MSJE are as under:

"The NGOs are registered with the Trust initially for a period of five years followed by renewal from time to time on receipt of application from the NGOs for such renewal. The initial validity period of registration of the above said NGOs expired on the 11th /12th March, 2005. Their request for renewal of their registration being under process in the Trust, the amount of

AWMH, Mumbai, and the Inspiration, Delhi respectively in June, 2005. Since, the process of renewal of registration of these NGOs with the Trust in continuation of the initial registration period was in progress, such release of grants to these NGOs by the Trust for continuous implementation of its Scheme may be treated as for the benefits of the target group of persons with disabilities and this aspect may not be objectionable."

20. By a subsequent affidavit filed on 25th February 2010, the National Trust has clarified as under:

"(b) The said sanctioned amount was released in installments from time to time partly before and partly after the above said members joined the Board of the Trust. All release Orders carried the words 'sanction order' in a routine fashion were in fact 'release orders' and were in continuation of earlier 'sanction order' or as "installments of recurring expenses". As such, it may be taken that the said release order cannot be construed as sanction orders."

21. It appears that on 9th September 2008 the National Trust wrote to the MSJE confirming that the entire funds released to the Petitioner "has been utilized for the benefit of persons with disabilities which included small sum of Rs. 88,200/- (@Rs. 4200/- per month) paid to Smt. Saswati Singh, Board Member as honorarium for providing her services as a trained teacher (Therapist)". It was further observed as under:

"(ii) Had the services of therapist been outsourced, it would have been much more expensive than acquiring the services of above Board Member by paying the nominal honorarium.

(iii) Out of the above honorarium, Rs. 21,000/- was paid during the intervening period (August, 2003-December, 2003) when the office bearers were elected as Board Member but the Notification in this regard was issued. The total payment of Rs. 6.23 lakhs to both the NGOs including this small portion of honorarium made during this intervening period is, however terms as unethical by the Audit, though strictly it is not in violation of the provisions of the National Trust Act."

22. The recommendation was that a sum of Rs. 67,200/- i.e. (Rs. 88,200-21,000/-) paid to Smt. Saswati Singh as honorarium, may at the most be considered as recoverable.

23. The MSJE has filed an affidavit dated 26th March 2010. This affidavit confirms that that National Trust had advised the MSJE that there was no possibility of recovering the amount already released to the Petitioner. However, it was confirmed that "There is no report of misuse of funds by NGOs on the basis of which recovery of the grants-in-aid in question could have been made."

24. While stating that action taken note ('ATN') incorporating the comments by the MSJE was under finalisation, the stand of the MSJE is that the present petition is premature.

25. The MSJE's comments on the draft audit paragraph are more or less similar to that of the National Trust. The relevant portions of the said note are as under:

> "The fact cannot be ignored that these two Members are not the direct beneficiaries of the grants released by the Trust. The amounts have been released to the NGOs of these Members for utilization for the benefits of the persons affected by Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities. The persons with these disabilities are real beneficiaries The fact cannot be ignored that these two Members are not the direct beneficiaries of the grants released by the Trust. The amounts have been released to the NGOs of these Members for utilization for the benefits of the persons affected by Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities. The persons with these disabilities are the real beneficiaries of the grants and neither the Members of the Board of the Trust nor the functionaries of the concerned NGOs. A such the grants released to these NGOs may not be treated as grants released in violation of Section 4(5) of the Act. Meantime the said scheme (ERI) has been discontinued with effect from 1.4.2005.
>
> Further, as earlier stated that under Section 3(4)(b) of the Act persons associated with the NGOs are to be appointed as Members of the Board of the Trust. Appointment of the eminent

> persons associated with NGOs should not debar their NGOs to receive grant from the Trust for utilization for the benefits of the target group of persons with disabilities. If such a ban is imposed and release of grants to such NGOs is discontinued during the tenure of the functionaries of the NGOs as Members of the Board of the Trust, the NGOs will not be in a position to render services to the target group thereby the real beneficiaries i.e. the person with disabilities will be deprived of the benefits of the Schemes of the Trust. Hence, release of grants under the Scheme of the National Trust to the NGOs during the tenure of their functionaries as Members of the Board of the Trust may not be treated as violation of Section 4(5) of the National Trust Act."

26. The response as regards the release of Rs. 8.49 lakhs is identical to the comments offered by the National Trust.

27. Importantly, by a letter dated 28th November 2008 addressed by the MSJE to the Director General of Audit, it was pointed out that "As such, there is no evidence of any special effort put in or unusual interest shown in the process of getting the ERI projects of the said two NGOs approved or extended." It was also observed as under:

> "(vi) There is no report that NGOs had misutilized the funds, on the basis of which, recovery of the grants-in-aid in question could have been made. In this regard, copies of the relevant utilisation certification and audited statement of accounts in respect of the released grants-in-aid in question together with the list of beneficiaries concerned are enclosed for ready reference."

28. This Court first examines the purport of Sections 4(4) and 4(5) of the Trust Act which read as under:

> "4(4) Before appointing any person as the Chairperson or a Member, the Central Government shall satisfy itself and that the person does not and will not, have any such financial or other interest as is likely to affect prejudicially his function as such member.
>
> 4(5) No member of the Board shall be beneficiary of the Trust during the period such member holds office."

29. The object of the above provisions is to ensure that there is no

conflict of interest in a member of the Board functioning as such and the relationship such member may have with the National Trust independent of that. The second object is that no member of the Board should be able to use that position to gain any favours, after becoming such member. In the context of the present case, a member of the organisation of such member should not be given any new grants or renewal of grants already made. Obviously the bar under Sections 4(4) and 4(5) would be attracted only upon a person becoming a member. It cannot apply retrospectively to affect grants already made to an organisation to its representative becoming a member of the Board.

30. Turning to the facts on hand, the above narration shows that both the National Trust as well as the MSJE acknowledged that there has been absolutely no misutilisation of the funds released to the Petitioner. The second fact that emerges is that although the orders are termed 'sanction orders' they were in fact orders for release and disbursement of the money that had already been granted to the Petitioner earlier to the induction of Smt. Saswati Singh on the Board of the National Trust. The opinion of the learned ASG obtained earlier to the induction of Smt. Singh on the Board of the National Trust, and which was acted upon by the National Trust made it clear that Section 4(5) of the National Trust Act would not come in the way of the release of monies pursuant to a grant already made to an organisation, even after a representative of that organisation is inducted in the Board of the National Trust. It was only after being supported by legal opinion that the induction of Smt. Singh in the Board of the National Trust took place. She cannot therefore be visited with adverse consequences for no fault of hers. The narration of facts also shows that there has been no single instance of Smt. Saswati Singh trying to misuse her position as Member of the Board of the National Trust to get any new grants released in favour of the Petitioner. The monies released to the Petitioner were consequent to the grant already made to the Petitioner, i.e., prior to Smt. Saswati Singh becoming a member of the Board.

31. In the above circumstances, this Court is of the view that that National Trust was not justified in seeking to recover from the Petitioner the entire sum of Rs. 27,89,342/- being the total money released to the Petitioner as a result of grant made to it by the National Trust. Once it was clear that the entire monies were utilised for the purposes for which

they were released there was no justification in seeking refund. This Court is of the view that there is no violation of Section 4(5) of the National Trust Act. The release of the monies to the Petitioner, pursuant to a grant already made in 2001, was not in violation of any provision of the National Trust Act.

32. Consequently, the demand raised by the letter dated 18th July 2006 by the National Trust is hereby quashed.

33. The debarment of the Petitioner from being eligible for any grant of the National Trust was a result of the erroneous stand of the Respondents that the release of the monies to the Petitioner, after Smt. Saswati Singh was inducted into the Board of the National Trust, was contrary to the provisions of the National Trust Act. This Court has held that this stand of the Respondents was not sustainable in law. Consequently, the decision of Respondent No.1, the National Trust, to debar the Petitioner from receiving further grants, as evidenced by its notification dated 3rd September 2008, has also to be held to be unsustainable in law. The debarment of the Petitioner from receiving grants shall be lifted forthwith by Respondent No.1 the National Trust.

34. The writ petition is allowed in the above terms with costs of Rs. 10,000/- which will be paid in equal halves by Respondent Nos.1 and 2 respectively to the Petitioner within a period of four weeks from today.

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W.P.

SH. RAHUL KATHURIA ....PETITIONER

VERSUS

THE REGISTRAR, COOPERATIVE SOCIETIES & ANR. ....RESPONDENTS

(SANJAY KISHAN KAUL & VALMIKI, J. MEHTA, JJ.)

WP(C) NO. : 15741/2006, CM NO. :2298/2010 & WP(C) NO. : 17218/2006 CM NO. :2550/2010

DATE OF DECISIONL: 06.10.2010

Delhi Cooperative Societies Rules, 1973—Rule 24(2)—Applicability to persons enrolled as members through auction sale—Petitioners enrolled as members through inviting of bids for flats by Society-defaulters in payment—Request of Society for enrolling petitioners as members—Rejected on the ground of violation of Rule 24(2)—Vacancies could only be filled pursuant to advertisement—Allotment of flats-could only be by draw. Held—Rule 24(2) protects only valid existing members in waiting list in terms of the decision of *Rajib Mukhopadyaya and others v. Registrar Cooperative Societies* WP(C) No. 15741/2006 decided on 17.11.2008—Enrollment through auction illegal—Petitioners—Not existing members-rejection justified.

No doubt, the aforesaid order dated 16.12.2008 does show the stand of the RCS that the objections stated in the letter dated 21.9.2006 do not stand, however, it is quite clear that the counsel who appeared for the RCS made a statement without knowing the correct facts. Surely, a wrong statement cannot change the factual position in a case and the factual position is that petitioners were sought to be made members

in violation of Rule 24(2) i.e. through auction of the flats and which is illegal and impermissible. There cannot be estoppel against RCS against the admitted factual position and the settled legal position referred to in the said order dated 16.12.2008 itself by reference to the case of **Rajib Mukhopadhyaya.** Since the petitioners are not enrolled on the basis of the procedure under Rule 24(2), hence their claim of membership (assuming them to be members) clearly violates Rule 24(2). The impugned letters of the RCS dated 21.9.2006 are thus valid. Though, the learned counsel for the petitioner has sought to urge that the letter of the RCS dated 21.9.2006 does not state the reason why Rule 24(2) was violated, however, the petitioners who would otherwise know of all the facts in that they themselves were parties to the auction proceedings of the sale of the flats, and thus they cannot claim ignorance of facts and the consequence thereof how the provision of Rule 24(2) of the said Rule was violated. In fact, the rationale for refusing auction sale of the flats is given in the counter-affidavit which has been filed by the respondent no.1 in this court. The relevant para II of the counter-affidavit of the respondent no.1 reads as under:-

> "The society has not followed the Rules 24(2) in letter as well as spirit. The Practice/Method of allotting flats and enrolment of members by the tender system is not in confirming with DCS Act/Rules. The Tender System is not applicable in such matter because it should be ensured that the benefits of cheap land and subsidized housing is given only to genuine members."

On factual aspects, the reason for refusing the enrolment of the petitioners is given in the following paragraph 2 of the preliminary submission of the counter-affidavit and the same reads as under:-

> "2. The Bannu Biradari Cooperative Group Housing Society is registered at S.No. 27 in the department of the answering respondent. As per letter dated

21.4.2006 from the President of Society General Body of the Society on 29.01.2006 resolved to fill up the two vacancies of the membership of the society by advertising the same in two leading newspapers and inviting the applications/offers for the membership of the society and allotment of flats to the members to be enrolled. The offers were opened in public and applicants, who fulfilled all the requirements of the membership of the society and those who offered the highest bids after were taken out. Subsequently, the managing committee of the society resolved to enrol the names of Shri Sandeep Kumar Verma and Shri Rahul Kathuria but approval for filling up two vacancies was considered and rejected by answering respondent as the society did not fulfil the requirements of Section 24(2) of DCS Rules 1973, vide letter no. 4211 dt. 21.09.2006, copy of the same is **Annexure R1** herein. Shri Sandeep Kumar Verma is one of the applicants whose case was recommended by the society however, the case was rejected by the answering respondent."

We therefore reject the argument of the petitioners that the RCS was not justified in issuing the letter dated 21.9.2006 and the order dated 16.12.2008 binds the RCS.**(Para 11)**

We now turn to the aspect whether the petitioners can claim membership although they are defaulters in payment of the balance amount of 85%. Two clauses of the terms of auction pursuant to which the petitioners sought to become members of the respondent No. 2 are relevant. The said clauses are clauses 8 & 10 which read as under:

"8. The highest offer who fulfil all the terms and conditions shall only be considered for membership and instalment of the flats of the society.

9. xxx xxx xxx

10. The earnest money of first and second highest offerers for each flat shall be retained and earnest

money ˇof the rest offers will be refunded. The first highest offerer shall be given time to make payment of offered and the second highest offerer be kept in reserve."

Therefore, in terms of the above clauses only when the person who gives the highest offer fulfils all the terms and conditions of the auction would such person be entitled to be a member and the person who makes the highest offer must make the balance payment within the time fixed by the society. The admitted facts here are that the petitioners did not deposit the amount within the time granted by the respondent no.2 society of 30 days intimated vide letter dated 11.4.2006. Not only that, the balance was not paid even thereafter by the petitioners within the extension of one month as prayed by the petitioners vide their letter dated 3.5.2006 and granted by the respondent no.2 society vide its letter dated 8.5.2006. Clearly, the petitioners did not comply with the requirement of making the deposit of the balance amount in the time granted. Once they did not pay the requisite amount to the society, the society can justifiably take a stand that the petitioners were not „existing members. of the society because 'existing members' mean those members who have cleared all their dues and the society has accepted them as members, and have issued the membership /share certificate to such persons and confirmed by a resolution of the managing committee/General Body of the Society. The only way not for the petitioners was to be 'existing members' as per the judgment in **Rajib Mukhopadhyaya's** case (supra). However, the petitioners do not fall in the category of those persons ˇwho have been protected by the aforesaid decision in **Rajib Mukhopadhyaya** (supra) inasmuch as the petitioners were not existing members of the respondent no.2 society as on 2.7.2007. The existing members are those existing members who are awaiting allotment meaning thereby they have otherwise become valid members of the respondent no.2 society but could not be allotted flats because flats were not

Ahmad, J.)

available for one reason or the other. Such members who are awaiting allotment are in fact members in the waiting list and such members who are protected by the judgment of the Division Bench in Rajib Mukhopadhyaya's case on 2.7.2007. We have already reproduced the operative portion of the said judgment in the case of Rajib Mukhopadhyaya. The Division Bench only intended to protect these existing and enrolled members of a Cooperative Society who were awaiting allotment.

We, therefore, hold that the petitioners clearly do not fall within the category of persons who were exempted from the application of Rule 24 (2) by the judgment in case of **Rajib Mukhopadhyaya's** case (supra). **(Para 12)**

In view of the above, the following conclusion emerge on the record :-

(i)The provision of Rule 24 (2) is constitutionally valid and was upheld in the Rajib Mukhopadhyaya's case. Only those persons were given protection, in spite of falling in the net of the Rule 24(2), were those who were existing members of the Cooperative Society who were awaiting the allotment i.e. those who are already valid existing members of a Cooperative Society on 2.7.2007 being in the waiting list, but, for one reason or the other were not allotted flats.

(ii) The petitioners are not those persons who were "existing members" on the waiting list of the respondent no. 2 who were/are awaiting allotment after being enrolled as members, but, came through the route of auction sale proceedings which is illegal and impermissible in terms of the Delhi Cooperative Societies Act, 1972 and Delhi Cooperative Societies Act, 2003.

(iii)The respondent no.1/RCS has rightly rejected the permission sought by the respondent no.2 society for enrolling the petitioners as members by its letter

dated 21.9.2006 clearly specifying the violation of Rule 24(2) and which violation is that enrolment of petitioners as members without the due procedure of advertisement in newspapers and in terms of applicable rules. **(Para 13)**

Important Issue Involved: The category of persons exempted from application of Rule 24(2) in terms of the decision in *Rajib Mukhopadhyaya's* case (Supra) are only those who were already existing members of cooperative society being in the waiting list but for one reason or the other were not allotted flats. Members enrolled through auction violating Rule 24(2) were not 'existing members' and were not exempted from application of Rule 24(2).

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. D.K. Rustagi, Advocate with Mr. B.S. Bagga, Advocate.

FOR THE RESPONDENTS : Ms. Sujata Kashyap, Advocate for the respondent No. 1. Mr. Ashok K. Chhabra, Advocate for the respondents No. 2.

CASE REFERRED TO:

1. *Rajib Mukhopadhyaya & Ors.* vs. *Registrar Cooperative Societies.* W.P.(C) No.1403-14.

RESULT: Writ Petition dismissed.

VALMIKI J. MEHTA, J.

1. The issues in both the petitions are same and the facts more or less similar, they are therefore being disposed of by this common judgment. The challenge in both these petitions is to the letter of the Registrar of Cooperative Societies (RCS) dated 21.9.2006 which reads as under:

" Most Urgent
Out today

OFFICE OF THE REGISTRAR COOPERATIVE SOCIETIES
GOVERNMENT OF NCT OF DELHI
OLD COURT'S BUILDING PARLIAMENT STREET: NEW DELHI
No.F.47/27/GH/Coop./NW4211 Date 21/9/06

To

The President/Secretary
Bannu Biradari CGHS,
Bannu Enclave, Road No.-42,
Pitam Pura, Delhi-34.

Sub: **Regarding approval of members against two vacancies in the society.**

Sir,

With reference to you letter dated 21.4.2006 for approval of filing of two vacancies in the society. In this connection it is stated that this request has been considered and rejected as the society did not fulfill the requirement of section 24(2) of DCS Rule, 1973.

Yours faithfully

(GURKIRPAL SINGH)
ASSTT. REGISTRAR (NW)"

2. Rule 24 (2) of the Delhi Cooperative Societies Rules, 1973 (hereinafter referred to as the 'said Rules') reads as under:

> **"24(2)** In case of vacancy in a housing society including group housing society the same shall be filled by the committee by notifying it in leading daily newspaper of Delhi in Hindi and English. In case the number of applications are more than the notified vacancies the membership shall be finalized through draw of lot in the presence of authorized representative of the Registrar."

3. By the impugned letter, the request of respondent No.2 society for enrolling of the petitioners as members was rejected on the ground of violation of Rule 24(2) because the petitioners were enrolled as members

through inviting of bids for the flats by the respondent No.2 society when as per Rule 24(2) in case of vacancy arising in a cooperative society, then, such vacancies have to be filled pursuant to advertisement in the newspaper and transfer of the flat is at the rates fixed by the Delhi Co-op. Societies Act, 1972 and the said Rules, and not at market rates. In case, the number of applications are more than number of flats, then, the flats have to be allotted by draw of lots, but, ˇit is not permissible for a society to sell the flats at market value including through auction of flats on bids being invited for the same. The cost to be recovered after allotment of plots by draw of lots is in terms of Rule 36 A which reads as under:

> **"36A. Penalty for Belated Payment or Equalisation Charges for New Membership on Enrolment at the Advanced Stage of Construction, and Payment of Interest to a Member who has Resigned his Membership in a Group Housing Co-operative Society**
>
> 1. In case of default in payment of demand in cooperative group housing society by the members, equalisation charges on enrolment as a member against vacancy and payment of interest on resignation by member, the maximum rate of interest charges shall be as under, which shall be approved by a resolution of the general body of the society:
>
> (a) For default of payment of instalment upto six months-@ 12% per annum.
>
> (b) For default of payment of instalment upto one year-@ 15% per annum.
>
> (c) For default of payment of instalment for more than one year-@18% per annum.
>
> (d) Equalisation charges/interest to be charged from the member enrolled at the advance stage of construction-@24% per annum.
>
> (e) Interest to be paid by a group housing society to a resigned/ expelled member on the amount deposited after deducting the administrative expenditure incurred by the society-@ 7% per annum.

2. The Registrar shall be competent to review the above rates periodically."

4. No doubt the letter of the respondent No.1 is quite cryptic, however, it is obvious that the respondent No.2 society which would have forwarded the names of the petitioners for memberships in the society would have stated that the flats have been auctioned and it is for this reason that the RCS refused permission for enrolment of the petitioners as members of the respondent No.2 cooperative society. This aspect is not disputed that the respondent No.2 society conducted auction of the flats in which two flats were put to auction, namely flat No.92 on the second floor and flat No.211 on the first floor. The reserve price was fixed at Rs.22 lakhs each. Advertisement was published in the newspaper calling for the bids on 25.3.2006 and the offer alongwith the earnest money of 15% was to be deposited in the office of the respondent No.2 society by 7.4.2006. With respect to flat No.92, Sh. Rahul Kumar, the petitioner in W.P.(C) No.15741/06 offered a consideration of Rs.23,26,000/- and for flat No.211 offer was made of Rs.26,11,111/- by Sh. Sandeep Verma who is the petitioner in W.P.(C) No.17218/06. The two petitioners were declared as the highest bidders entitled to flats, subject to inter-alia, payment of the balance of 85% of the offered price.

5. There are disputes between the respondent No.2 society and the petitioners as the respondent No.2 society has taken up a stand that after the petitioners were successful, they failed to deposit the requisite amount within a period of 30 days as fixed by the society vide its letter dated 11.4.2006. The petitioners thereafter asked for extension of time by letter dated 3.5.2006 and extension was granted for payment upto 8.6.2006 and still the petitioners did not deposit the amount. It is averred that since the allotment in favour of the ˇpetitioners was provisional subject to deposit of the balance amount in time, and since the petitioners failed to deposit the balance in time, the allotment stood cancelled.

6. Before us, the learned counsel for the petitioners argued that the petitioners became valid members of the respondent No.2 society inasmuch as not only were they successful in auction and their bids were accepted by the respondent No.2 society, the petitioners had further filled the enrolment forms and filed affidavits as per rules. It is contended that the balance payment was not to be made to the respondent No.2 society till approval was received from RCS for enrolling the petitioners as members

of the society.

7. In view of the aforesaid, the arguments before us are raised under two heads. The first head of arguments is of the petitioners of being valid and existing members of the respondent No.2 society on account of the society having accepted the bids and it was therefore bound to necessarily enrol the petitioners as members although they have defaulted in payment of the balance amount within the time as fixed by the society. The second head of argument is of the respondents, the RCS and the society, that assuming that there are no disputes between the respondent No.2 society and the petitioners and the petitioners had paid all the dues in time, yet, since there was admitted violation of Rule 24(2), the petitioners could not be enrolled as members of the respondent No.2 society.

8. We may note at this stage that various connected writ petitions were disposed of by a Division Bench of this Court on 2.7.2007. A reference to this judgment dated 2.7.2007 is necessary because both the petitioners and the respondents can succeed in their respective stands only if the petitioners fall in the category of persons who are exempted from application of Rule 24 (2) by virtue of this judgment. The lead case was W.P.(C) No.1403-14 titled as **Rajib Mukhopadhyaya & Ors. Vs. Registrar Cooperative Societies.** It has been held in this judgment that the though provision of Rule 24(2) of the said Rules was constitutionally valid, however, the operation of Rule was to be prospective in the sense that the requirement to call for advertisement in the newspaper was only to be after the allotment is made to the existing members of the society. The Division Bench has made it clear that if the society has existing members who have not got allotment of a plot/flat, then, such members shall be first allotted the plot/flat/premises before resort to Rule 24(2) of the said Rules. The Division Bench has further categorically stated that it is only when such existing members awaiting allotment have been given the allotment, would Rule 24(2) come into operation/being. The relevant paragraphs of the judgment are para 12 to 14 which reads as under:

> "12. Consequently, we uphold the constitutional validity of Rule 24(2) of the DCS Rules subject to the above interpretation of the law submitted by the learned Additional Solicitor General, which we accept and declare. The bye laws of the Society shall be fully

followed in entertaining the claims of memberships set up by those applying through the medium of Rule 24(2) ˇof the DCS Rules. Thus, if the society has any existing requirements in its bye laws about the characteristics required to be possessed by an intending member, only such persons possessing the requirements as stipulated in the existing bye laws and regulations of the Society are entitled to apply pursuant to Rule 24(2) of the DCS Rules. We also make it clear that if the Society has any existing members who have still not got the allotment of a plot/ flat, such members, in accordance with the bye laws, shall be first allotted the vacant plot/flat/premises before resort to Rule 24(2) of the DCS Rules. It is only when all such existing members awaiting allotment have been allotted the premises/plot/flats, shall the operation of Rule 24(2) of the DCS Rules come into being.

13. Consequently, while dispelling the challenge to the constitutional validity of Rule 24(2) of the DCS Rules, we nevertheless uphold the societies right to restrict its membership in accordance with the bye-laws, regulations and the rules of the society prospective candidates and further make it clear that any prospective entrant to a society, pursuant to the mandate of Rule 24(2) of the DCS Rules shall only be eligible to be allotted a plot after the requirement of the existing members are fulfilled.

14. The operation of Rule 24(2) of the DCS Rules requiring a draw of lots in the presence of the Registrar of the Cooperative Societies shall only apply to new prospective entrants who apply pursuant to the notification issued under Rule 24(2) of the DCS Rules. In order to further streamline the process of allotment and to expedite such process of allotment of residential accommodation in the city which is already very scarce, we make it clear that the Registrar, Cooperative Societies, if called upon by the Society in writing to conduct the draw of lots, shall do so not later than six weeks from the date of the receipt of the written intimation from the Society."

9. The present petitions which were tagged along with connected writ petitions with the lead case of **Rajib Mukhopadhyaya** (supra) were delinked vide the order of this court dated 31.10.2008. The Division Bench which passed the judgment in the connected writ petitions on

2.7.2007 passed the following order on 31.10.2008 on a review petition filed by the petitioners herein, and which order reads as under:-

"The learned counsel for the review petitioner has sought the following prayer:

"In view of the above, it is mot respectfully prayed that this Hon'ble Court may kindly be pleased to recall/modify the judgment dated 02.07.2007 to the extent of consideration by peculiar issues raised in the present writ petition involving the interpretation of the word 'draw of lots' to include "the tender bid or not," in order to meet the ends of justice."

The above prayer cannot form the subject matter of the review petition.

The learned counsel for the review petitioner has submitted that the Writ Petition (C) No. 15741/2006 may be detached from the case titled as **Rajib Mukhopadhyaya & ors. V. registrar Cooperative Societies,** decided on 2nd July 2007 and his pleas may be heard separately. Accordingly, the review petition is dismissed as withdrawn with the aforesaid liberty. List the writ petition before the learned Single Judge as per roster for hearing on 17th November, 2008.

Interim orders passed in the review petition stand vacated. However, it will be open to the petitioner to seek interim orders from the learned Single Judge."

10. Thereafter, another Division Bench of this court on 16.12.2008 passed the following order and which is relied upon by the learned counsel for the petitioner to urge that the RCS/Respondent no.1 has accepted the stand of the petitioners that the objection raised in the letter dated 21.9.2006 do not stand.

"Ms. Sujata Kashyap, learned counsel appearing for the RCS clarifies that subsequent to the decision in W.P.(C) 1403-14/ 2006 titled **Rajiv Mukhopadhyaya & Ors Vs. Registrar, Cooperative Societies,** objections raised in the letter dated 21.9.2006 (annexure –P5) do not stand. She, inter alia, submits that it is still to be scrutinized whether there are any Members

on the waiting list of the Society. We do not have advantage of representation from Society today.

Renotify on 17th February, 2009.

CM No. 10189/2008

Interim order passed on 25.7.2008 shall continue till the next date of hearing."

11. No doubt, the aforesaid order dated 16.12.2008 does show the stand of the RCS that the objections stated in the letter dated 21.9.2006 do not stand, however, it is quite clear that the counsel who appeared for the RCS made a statement without knowing the correct facts. Surely, a wrong statement cannot change the factual position in a case and the factual position is that petitioners were sought to be made members in violation of Rule 24(2) i.e. through auction of the flats and which is illegal and impermissible. There cannot be estoppel against RCS against the admitted factual position and the settled legal position referred to in the said order dated 16.12.2008 itself by reference to the case of **Rajib Mukhopadhyaya.** Since the petitioners are not enrolled on the basis of the procedure under Rule 24(2), hence ˇtheir claim of membership (assuming them to be members) clearly violates Rule 24(2). The impugned letters of the RCS dated 21.9.2006 are thus valid. Though, the learned counsel for the petitioner has sought to urge that the letter of the RCS dated 21.9.2006 does not state the reason why Rule 24(2) was violated, however, the petitioners who would otherwise know of all the facts in that they themselves were parties to the auction proceedings of the sale of the flats, and thus they cannot claim ignorance of facts and the consequence thereof how the provision of Rule 24(2) of the said Rule was violated. In fact, the rationale for refusing auction sale of the flats is given in the counter-affidavit which has been filed by the respondent no.1 in this court. The relevant para II of the counter-affidavit of the respondent no.1 reads as under:-

> "The society has not followed the Rules 24(2) in letter as well as spirit. The Practice/Method of allotting flats and enrolment of members by the tender system is not in confirming with DCS Act/Rules. The Tender System is not applicable in such matter because it should be ensured that the benefits of cheap land and subsidized housing is given only to genuine members."

On factual aspects, the reason for refusing the enrolment of the petitioners is given in the following paragraph 2 of the preliminary submission of the counter-affidavit and the same reads as under:-

> "2. The Bannu Biradari Cooperative Group Housing Society is registered at S.No. 27 in the department of the answering respondent. As per letter dated 21.4.2006 from the President of Society General Body of the Society on 29.01.2006 resolved to fill up ˇthe two vacancies of the membership of the society by advertising the same in two leading newspapers and inviting the applications/offers for the membership of the society and allotment of flats to the members to be enrolled. The offers were opened in public and applicants, who fulfilled all the requirements of the membership of the society and those who offered the highest bids after were taken out. Subsequently, the managing committee of the society resolved to enrol the names of Shri Sandeep Kumar Verma and Shri Rahul Kathuria but approval for filling up two vacancies was considered and rejected by answering respondent as the society did not fulfil the requirements of Section 24(2) of DCS Rules 1973, vide letter no. 4211 dt. 21.09.2006, copy of the same is **Annexure R1** herein. Shri Sandeep Kumar Verma is one of the applicants whose case was recommended by the society however, the case was rejected by the answering respondent."

We therefore reject the argument of the petitioners that the RCS was not justified in issuing the letter dated 21.9.2006 and the order dated 16.12.2008 binds the RCS.

12. We now turn to the aspect whether the petitioners can claim membership although they are defaulters in payment of the balance amount of 85%. Two clauses of the terms of auction pursuant to which the petitioners sought to become members of the respondent No. 2 are relevant. The said clauses are clauses 8 & 10 which read as under:

> "8. The highest offer who fulfil all the terms and conditions shall only be considered for membership and instalment of the flats of the society.
>
> 9. xxx xxx xxx

10. The earnest money of first and second highest offerers for each flat shall be retained and earnest money ˇof the rest offers will be refunded. The first highest offerer shall be given time to make payment of offered and the second highest offerer be kept in reserve."

Therefore, in terms of the above clauses only when the person who gives the highest offer fulfils all the terms and conditions of the auction would such person be entitled to be a member and the person who makes the highest offer must make the balance payment within the time fixed by the society. The admitted facts here are that the petitioners did not deposit the amount within the time granted by the respondent no.2 society of 30 days intimated vide letter dated 11.4.2006. Not only that, the balance was not paid even thereafter by the petitioners within the extension of one month as prayed by the petitioners vide their letter dated 3.5.2006 and granted by the respondent no.2 society vide its letter dated 8.5.2006. Clearly, the petitioners did not comply with the requirement of making the deposit of the balance amount in the time granted. Once they did not pay the requisite amount to the society, the society can justifiably take a stand that the petitioners were not "existing members" of the society because 'existing members' mean those members who have cleared all their dues and the society has accepted them as members, and have issued the membership /share certificate to such persons and confirmed by a resolution of the managing committee/General Body of the Society. The only way not for the petitioners was to be "existing members" as per the judgment in **Rajib Mukhopadhyaya's** case (supra). However, the petitioners do not fall in the category of those persons ˇwho have been protected by the aforesaid decision in **Rajib Mukhopadhyaya** (supra) inasmuch as the petitioners were not existing members of the respondent no.2 society as on 2.7.2007. The existing members are those existing members who are awaiting allotment meaning thereby they have otherwise become valid members of the respondent no.2 society but could not be allotted flats because flats were not available for one reason or the other. Such members who are awaiting allotment are in fact members in the waiting list and such members who are protected by the judgment of the Division Bench in Rajib Mukhopadhyaya's case on 2.7.2007. We have already reproduced the operative portion of the said judgment in the case of Rajib Mukhopadhyaya. The Division Bench only intended to protect these existing and enrolled members of

a Cooperative Society who were awaiting allotment.

We, therefore, hold that the petitioners clearly do not fall within the category of persons who were exempted from the application of Rule 24 (2) by the judgment in case of **Rajib Mukhopadhyaya's** case (supra).

13. In view of the above, the following conclusion emerge on the record :-

(i) The provision of Rule 24 (2) is constitutionally valid and was upheld in the Rajib Mukhopadhyaya's case. Only those persons were given protection, in spite of falling in the net ˇof the Rule 24(2), were those who were existing members of the Cooperative Society who were awaiting the allotment i.e. those who are already valid existing members of a Cooperative Society on 2.7.2007 being in the waiting list, but, for one reason or the other were not allotted flats.

(ii) The petitioners are not those persons who were "existing members" on the waiting list of the respondent no. 2 who were/are awaiting allotment after being enrolled as members, but, came through the route of auction sale proceedings which is illegal and impermissible in terms of the Delhi Cooperative Societies Act, 1972 and Delhi Cooperative Societies Act, 2003.

(iii) The respondent no.1/RCS has rightly rejected the permission sought by the respondent no.2 society for enrolling the petitioners as members by its letter dated 21.9.2006 clearly specifying the violation of Rule 24(2) and which violation is that enrolment of petitioners as members without the due procedure of advertisement in newspapers and in terms of applicable rules.

14. In view of the above, we find that the writ petitions are liable to be dismissed inasmuch as the RCS/Respondent no.1 was justified in rejecting the application of the memberships of petitioners as forwarded by the respondent no.2 society to it on account of violation of Rule 24(2). The letter dated 21.9.2006 of the respondent ˇno.1 refusing enrolment of the petitioners as members on account of violation of the provision of Rule 24(2) is thus upheld. The petitioners are also not

"existing members" in terms of the judgment in Rajib Mukhopadhyaya's case and hence cannot fall in the exception carved out of Rule 24(2). The petitions are therefore dismissed, leaving the parties to bear their own costs.

ILR (2011) I DELHI 543
CRP

KEWAL KISHAN ....PETITIONER

VERSUS

M/S. KHURANA KAJ HOUSE ....RESPONDENT

(V.B. GUPTA, J.)

CRP NO. : 150/2010 & CM NO. : 14598/2010 (STAY) **DATE OF DECISION: 06.10.2010**

India Partnership Act, 1932—Section 69 and Code of Civil Procedure, 1908—Section 115, Order 7 Rule 11—Petition against Trial Court dismissing the application of the Petitioner under Order 7 Rule 11—Respondent filed a Suit for Permanent and Mandatory Injunction against the Petitioner and Municipal corporation of Delhi—Respondent had taken the Suit Property on rent from the father of Petitioner—Respondent contended that Petitioner had been threatening to raise construction over the roof of suit property which form part of Respondent's tenancy—Petitioner pleaded that Respondent is an illegal and unauthorized sub tenant in the property and Respondent was never accepted as a tenant—Petitioner also filed Application under Order 7 Rule 11, CPC on the ground that the Respondent firm has not been registered with the Registrar of firms and as such the suit is barred under

Section 69 of the Indian Partnership Act which mandates that an unregistered firm cannot file a suit against any third party on a cause of action arising out of a contract entered into by the partnership firm—Respondent in reply stated that suit filed by it is for injunction, which is not arising out of any contract between the parties and as such, Section 69 (2) of the Act has no application—Held—Petitioner's own case is that Respondent was never accepted as tenant and therefore there is no privity of contract between him and the Respondent—Under these circumstances, when there is no contract between the Petitioner and the Respondent, provisions of Section 69 (1) & (2) of the Act, are not applicable to the facts of the case—Thus, Petition dismissed.

Respondent has filed the suit for injunction against petitioner on the allegations that he (petitioner) is threatening to raise construction over the roof which forms part of his tenancy. **(Para 9)**

On the other hand, as per written statement filed by petitioner its stand is that respondent is an illegal and unauthorized sub-tenant in the suit property. Petitioner never accepted respondent's firm as its tenant. **(Para 10)**

Thus, as per petitioner's own case there is no privity of contract between him and the respondent's firm. Moreover, petitioner never took any specific plea in the written statement that suit is barred under Section 69 of the Act **(Para 11)**

Since, petitioner never accepted respondent's firm as its tenant and as such, there is no contract between petitioner and respondent's firm. Under these circumstances, provisions of Section 69 (1) and (2) of the Act, are not applicable to the facts of the present case. **(Para 14)**

Important Issue Involved: If there is no privity of contract between the parties, provisions of Section 69 (1) & (2) of the Indian Partnership Act do not apply.

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Sanjay Goswani, Advocate.

FOR THE RESPONDENT : Nemo.

CASES REFERRED TO:

1. *Sopan Sukhdeo Sable and others* vs. *Assistant Charity Commissioner and others,* (2004) 3 Supreme Court Cases 137.
2. *Saleem Bhai and Others* vs. *State of Maharashtra and others,* AIR 2003 Supreme Court 759.
3. *Haldiram Bhujjiawala & Another* vs. *Anand Kumar/ Deepak Kumar and ˇanother,* JT 2000 (2) SC 596.
4. *M/s Raptakos Brett & Co. Ltd.* vs. *Ganesh Property,* AIR 1998, Supreme Court 3085.

RESULT: Petition dismissed.

V.B.Gupta, J.

1. Present revision petition under Section 115 of the Code of Civil Procedure 1908 (for short as 'Code') has been filed by petitioner against order dated 12th May, 2010, passed by Senior Civil Judge, New Delhi, vide which application of petitioner under Order 7 rule 11 of the Code was dismissed.

2. Brief facts of this case are that, respondent (plaintiff in the trial court) is a partnership firm with Mr. Ravinder Pal Singh and Mr. Paramjeet Singh as its partner. Respondent's firm had taken the suit property on rent from the father of petitioner in 1976-1977. Petitioner has been threatening to raise construction over the roof of the suit property which form part of respondent's tenancy. Accordingly, respondent filed a suit for permanent and mandatory injunction against petitioner and Municipal Corporation of Delhi.

3. Petitioner in its written statement took the plea that respondent is an illegal and unauthorized sub-tenant in the suit shop and he never accepted respondent's firm as its tenant.

4. After filing of the written statement, later on petitioner filed an application under Order 7 rule 11 of the Code, stating that as apparent from the plaint, respondent's firm has not been registered with the Registrar of Firms and as such suit filed by it is barred under Section 69 of The Indian Partnership Act (for short as "Act") and petition is liable to be dismissed.

5. In reply, it is stated by respondent that, suit filed by them is for injunction, which is not arising out of any contract between the parties and as such Section 69 (2) of the Act has no application.

6. It is contended by learned counsel for petitioner that Section 69 of the Act, clearly mandates that an unregistered partnership firm cannot file a suit against any third party on a cause of action arising out of a contract entered into by the partnership firm. Since, entire basis of the suit is that the contractual tenancy of respondent as regard the suit shop also included the roof rights, as such present suit is not maintainable in the absence of necessary registration of the respondent's firm under the Act.

7. Other contention is that, inspite of filing of the written statement and not taking any specific defence with regard to the registration of the respondent's firm under the Act, application under Order 7 rule 11 of the Code is maintainable. In support, learned counsel has relied upon the following judgments:-

(i) **Saleem Bhai and Others Vs. State of Maharashtra and others,** AIR 2003 Supreme Court 759;

(ii) **Sopan Sukhdeo Sable and others Vs. Assistant Charity Commissioner and others,** (2004) 3 Supreme Court Cases 137 and

(iii) **M/s Raptakos Brett & Co. Ltd. Vs. Ganesh Property,** AIR 1998, Supreme Court 3085.

8. Section 69 (1) and (2) of the Act, relevant for deciding the present controversy read as under;

"69. Effect of non-registration-

(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) xxxxx xxxxx xxxxx"

9. Respondent has filed the suit for injunction against petitioner on the allegations that he (petitioner) is threatening to raise construction over the roof which forms part of his tenancy.

10. On the other hand, as per written statement filed by petitioner its stand is that respondent is an illegal and unauthorized sub-tenant in the suit property. Petitioner never accepted respondent's firm as its tenant.

11. Thus, as per petitioner's own case there is no privity of contract between him and the respondent's firm. Moreover, petitioner never took any specific plea in the written statement that suit is barred under Section 69 of the Act.

12. Since, the suit of respondent is not for enforcement of any right arising from any contract, the trial court rightly relied upon **Haldiram Bhujjiawala & Another Vs. Anand Kumar/Deepak Kumar and ˇanother,** JT 2000 (2) SC 596, in which it was observed;

"The above Report and provisions of the English Acts, in our view, make it clear that the purpose behind Section 69 (2) was to impose a disability on the unregistered firm or its partners to enforce rights arising out of the contracts entered into by the plaintiff firm with third party-defendant in the course of the firm's business transactions."

13. The words used by Supreme Court in **Halidram Bhujjiawala** (Supra) are that "in the course of firm's business transactions".

14. Since, petitioner never accepted respondent's firm as its tenant and as such, there is no contract between petitioner and respondent's firm. Under these circumstances, provisions of Section 69 (1) and (2) of the Act, are not applicable to the facts of the present case.

15. Various judgments cited as above by learned counsel for petitioner are not applicable to the facts of the present case.

16. It is well settled that those litigants who are in the habit of challenging each and every order of the trial court, even if the same is based on sound reasoning, simply waste the time of the courts by filing frivolous petitions. No mercy should be shown to such type of litigants. Since, there is no infirmity, illegality or error in the impugned order passed by the trial court, present petition being ˇfrivolous one and which has been filed just to delay the proceedings pending before the trial court, is hereby dismissed with costs of Rs.20,000/- (Rupees Twenty Thousand Only).

17. Petitioner is directed to deposit the costs by way of cross cheque with Registrar General of this court, within four weeks from today.

CM No. 14598/2010 (stay)

18. Dismissed.

19. List for compliance on 8th November, 2010.

ILR (2011) I DELHI 549
RSA

ALL INDIA MOTOR UNION CONGRESS ....APPELLANT

VERSUS

BHAI TRILOCHAN SINGH & ORS. ....RESPONDENTS

(INDERMEET KAUR, J.)

RSA NO. : 33/1996 DATE OF DECISION: 06.10.2010

Code of Civil Procedure, 1908—Section 100 & 11—Plaintiff/respondent filed a suit for recovery of Rs. 7243.55 as arrears of rent against nine defendants—Trial Judge passed a decree of Rs. 7243.55 against defendant no. 7 only—A new tenancy was created in favour of defendant no.7 in August, 1964—The first appellate court modified the judgment—The tenancy of defendant no. 7 was created with effect from 1.9.1963 liability of defendants no. 1 to 7 is joint and several—Second Appeal—Appellant contended that finding in suit no. 159/1980 had become final and binding and could not have been reopened by first appellate court while deciding the same issue between the same parties in the appeal arising of suit no. 467/1979—Held—By applying the ratio of the judgment in *Premier Tyres Limited* (supra) it is clear that judgment rendered in suit No. 159/1980 had attained finality as no appeal had been filed against it—The findings of said judgment could not have been reversed by first appellate court in its impugned judgment while considering and adjudicating upon the same issues which already stood finally decided vide the judgment rendered in this suit No. 159/1980—The findings in suit No. 159/1980 had attained a finality and were binding; they could not be re-agitated—The impugned

judgment set aside—Appeal allowed.

By applying the ratio of the judgment in **Premier Tyres Limited** (surpa) it is clear that the judgment rendered in suit No.159/1980 had attained a finality as no appeal had been filed against it. The findings of the said judgment could not have been reversed by the first appellate court in its impugned judgment while considering and adjudicating upon the same issues which already stood finally decided vide the judgment rendered in this suit i.e. in suit No.159/1980. The findings in suit No.159/1980 had attained a finality and were binding; they could not be re-agitated. As such the modification in the impugned judgment holding that defendants no.1 to 6 are also liable along with defendant no.7 is set aside; defendant no.7 had become a tenant of Manjit Sabharwal after she had become the owner of the property. **(Para 13)**

Important Issue Involved: If no appeal is preferred against an order passed in a connected case then it becomes final and this finality can be taken away only in accordance with law.

[Vi Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. Atul Bandhu, Advocate.

FOR THE RESPONDENTS : None.

CASE REFERRED TO:

1. *Premier Tyres Limited* vs. *Kerala State Road Transport Corporation* Supreme Court reported in AIR 1993 SC 1202.

RESULT: Appeal allowed.

INDERMEET KAUR, J. (Oral)

1. This appeal is directed against the impugned judgment and decree dated 17.10.1995 which had with a modification endorsed the finding of

the Trial Judge dated 15.12.1982. Vide judgment and decree dated 15.12.1982 the suit of the plaintiff had been decreed for Rs.7,243.55/- against defendant no.7 alone; against the other defendants the suit had been dismissed. The impugned judgment had modified the decree; the suit of the plaintiff had been decreed for a sum of Rs.7,243.55 against the defendants no. 1 to 7.

2. Plaintiff Bhai Trilochan Singh had filed a suit for recovery of Rs.7243.55 as arrears of rent against nine defendants. Contention was that the plaintiff is the owner/landlord of the premises bearing No.16A/ 1, Delhi Ajmeri Gate Scheme, Asaf Ali Road, New Delhi. Harbhajan Singh the father of defendant no.1 and the husband of ˇdefendant no.2 had taken a portion of the first floor of the said premises (1300 sq.feet) in terms of a registered lease deed at a monthly rental of Rs.410/- which was later on increased to Rs.450/- per month. This lease deed had been entered into between Bhai Sunder Dass and Harbhajan Singh. By a registered will dated 11.1.1962 Bhai Sunder Dass had bequeathed the suit property to Smt.Manjit Sabharwal. Vide registered sale deed dated 28.3.1972 Smt.Manjit Shbarwal sold this property to the plaintiff i.e. Bhai Trilochan Singh. Plaintiff is thus entitled to arrears of rent from the defendants.

3. A common written statement was filed by defendants no.1 to 6. Contention was that the defendant no.7 is a tenant of the suit premises and defendants no.1 to 6 have nothing to do with the same.

4. A separate written statement was filed by defendants no.7 to 9. In their written statement contention was that the premises had been taken for the purpose of defendant no.7 who was in occupation thereof as a tenant.

5. Trial Judge had framed five issues. They inter alia read as follows:

1. Whether plaintiff is owner-landlord of the premises in suit? OPP

2. Whether Shri Harbhajan Singh had taken the premises on rent at the rate of Rs.410/- p.m. and had executed the lease deed dated 16.6.54 in favour of Bhai Sunder Dass? OPP

3. Whether the defendant no.7 was the tenant in the premises since the inception of the tenancy or a new tenancy was created

by Smt. Manjit Sabharwal in favour of defendant no.7 in August, 1964, w.e.f. 1.9.63? OPD

4. Whether the defendant no.8 and 9 have been unnecessarily impleaded? OPD

5. To what amount is the plaintiff entitled and from which of the defendant? OPP

6. Trial Judge held that vide registered sale deed Ex.P-3 plaintiff had become the owner of the suit property. Harbhajan Singh had taken the premises on lease at a initial rental of Rs.410/- per month. A new tenancy had been created in favour of defendant no.7 in August, 1964. Decree of Rs.7,243.55/- had been passed in favour of the plaintiff and against the defendant no.7 alone.

7. The impugned judgment had endorsed the finding of the Trial Judge. It was only modified to the effect that the tenancy of defendant no.7 was created with effect from 1.9.1963; further the liability of the defendants no.1 to 7 is joint and several; they were all liable to pay the aforesaid amount of Rs.7,243.55/- to the plaintiff.

8. This is a second appeal. After its admission, the following substantial questions of law were formulated on 2.5.1996:

1. Whether the first appeal, allowed by the impugned judgment and decree, was barred by res judicata because the judgment and decree in connected suit No.159/1980 inter se the same parties was not challenged in appeal and had become final?

2. What is the effect of the first Appellate Court not taking into consideration the evidence on record e.g. Ext.DW1/A and statement of DW-1 in the present case?

9. Learned counsel for the appellant has submitted that in view of the judgment of the Supreme Court reported in AIR 1993 SC 1202 **Premier Tyres Limited vs. Kerala State Road Transport Corporation** in a case where two connected suits had been decided, and an appeal had been filed against the findings in one suit only and no appeal has been filed in the second case, the effect of non filing of appeal would be that such a decree has become final and such a finality can be taken away only in accordance with law. By applying the ratio of the aforestated

proposition it is clear that in this case as well although the appeal had been filed in suit No.467/1979, yet no appeal had been filed against the findings given in suit No.159/1980; result being that the findings of suit ˇNo.159/1980 had become final and binding and could not have been reopened by the first appellate court while deciding the same issue between the same parties in the appeal arising out of suit No.467/1979.

10. The perusal of record shows that two suits i.e. suit Nos.159/1980 and 467/1979 had been filed by the plaintiff Bhai Trilochan Singh against the same defendants. Suit No.159/1980 was a suit for recovery of Rs.15,750/- as arrears of rent; suit No.467/1979 was also a suit for recovery of arrears of rent of Rs.7243.55/-. They related to the same parties; issues involved were common; the only difference was that the rates of rent for different periods of time had been claimed vide the aforestated suits. It is also not in dispute that the two suits had been clubbed together and common evidence had been led. However, judgments were delivered separately in the two suits although on the same date. Both the judgments i.e. in suit Nos.159/1980 and 467/1979 were delivered on 15.12.1982. Admittedly, no appeal has been filed against the judgment and decree passed in suit No.159/1980. The findings in suit No.467/1979 alone have been assailed.

11. While disposing of suit No.159/1980 the court had held that Harbhajan Singh had taken the premises on rent from Bhai Sunder Dass; Manjit Sabharwal after inheriting the property by Will through her father-in-law Bhai Sunder Dass had accepted defendant no.7 in the property as a tenant and accepted the payment of rents in the year 1964; finding was to the effect that the suit premises in the beginning was taken by Harbhajan Singh but later on defendant no.7 was accepted as a tenant by the landlords; further that defendants no.1 to 6, defendants no.8 and 9 ˇhad been mis-joined. Suit of the plaintiff had been decreed against defendant no.7 alone for a sum of Rs.15,750/- i.e. arrears of rent for a period with effect from 1.8.1973 to 30.6.1976.

12. The judgment impugned herein has modified the findings given by the trial judge in suit No.467/1979. Defendants no.1 to 6 had also been held liable along with defendant no.7 for payment of arrears of rent; further that a new tenancy had not been created in favour of defendant no.7.

13. By applying the ratio of the judgment in **Premier Tyres Limited** (surpa) it is clear that the judgment rendered in suit No.159/1980 had attained a finality as no appeal had been filed against it. The findings of the said judgment could not have been reversed by the first appellate court in its impugned judgment while considering and adjudicating upon the same issues which already stood finally decided vide the judgment rendered in this suit i.e. in suit No.159/1980. The findings in suit No.159/1980 had attained a finality and were binding; they could not be re-agitated. As such the modification in the impugned judgment holding that defendants no.1 to 6 are also liable along with defendant no.7 is set aside; defendant no.7 had become a tenant of Manjit Sabharwal after she had become the owner of the property.

14. In the judgment of **Premier Tyres Limited** (surpa) in a similar scenario where the question for consideration was the effect of non-filing of an appeal in a connected suit which had been tried together; the Supreme Court had returned a finding as follows:

> 5. …. ….. it appears that where an appeal arising out of connected suits is dismissed on merits the other cannot be heard, and has to be dismissed. The question is what happens where no appeal is filed, as in this case from the decree in connected suit. Effect of non filing of appeal against a judgment or decree is that it become final. This finality can be taken away only in accordance with law. Same consequences ˇfollows when a judgment or decree in a connected suit is not appealed from.
>
> 5. …. ….. …..
>
> 6. Thus the finality of finding recorded in the connected suit, due to non filing appeal, precluded the Court from proceeding with appeal in other suit. In any view of the matter the order of the High Court is not liable to interference.

15. This has answered the first substantial question of law. The second substantial question of law has not been pressed before this court.

16. Appeal is allowed and disposed of in the above terms.

ILR (2011) I DELHI 555
W.P.

UNION OF INDIA ....PETITIONER

VERSUS

R.S. KHAN ...RESPONDENT

(DR. S. MURALIDHAR, J.)

W.P. (C) NO. : 9355/2009 & CM NO. : 7144/2009 **DATE OF DECISION: 07.10.2010**

Right to Information Act, 2005 (RTI Act)—Section 8(i)(e), 8(i)(g) and 8(i)(j)—Notings and files during disciplinary proceedings—Central information Commission (CIC) allowed the appeal of Respondent directing the Central Public Information Officer (CPIO) to provide to Respondent information sought in respect of his disciplinary proceedings—CPIO had rejected the request—Contended that information attracted Section 8(i)(e), 8(i)(g) and 8(i)(j) of RTI Act. HELD—File notings, unless specifically excluded, included u/s 2(f)—File notings about performance or conduct of an officer are not given pursuant to 'fiduciary relationship' and do not attract Section 8 (i)(e), 8(i)(g) and 8(i)(j)- at best can only be denied to third party.

Unless file notings are specifically excluded from the definition of Section 2(f), there is no warrant for proposition that the word 'information' under Section 2(f) does not include file notings. **(Para 9)**

The next submission to be dealt with is that information contained in the files in the form of file notings made by the different officials dealing with the files during the course of disciplinary proceedings against the Petitioner were available to the Union of India in a 'fiduciary relationship' within the

meaning of Section 8(1)(e) of the RTI Act. This Court concurs with the view expressed by the CIC that in the context of a government servant performing official functions and making notes on a file about the performance or conduct of another officer, such noting cannot be said to be given to the government pursuant to a 'fiduciary relationship' with the government within the meaning of Section 8(1)(e) of the RTI Act, 2005. Section 8(1)(e) is, at best, a ground to deny information to a third party on the ground that the information sought concerns a government servant, which information is available with the government pursuant to a fiduciary relationship, that such person, has with the government, as an employee. **(Para 10)**

In light of the above developments, this Court finds no merits in any of the apprehensions expressed by the CPIO in the order rejecting the Respondent's application with reference to either Section 8(1)(g) of the RTI Act 2005.The disclosure of information sought by the Petitioner can hardly endanger the life or physical safety of any person. There must be some basis to invoke these provisions. It cannot be a mere apprehension. **(Para 16)**

As regards Section 8(1)(j), there is no question that notings made in the files by government servants in discharge of their official functions is definitely a public activity and concerns the larger public interest. In the present case, Section 8(1)(j) was wrongly invoked by the CPIO and by the Appellate Authority to deny information to the Respondent. **(Para 17)**

Important Issue Involved: The expression 'fiduciary relationship' u/s 8(1)(e) could not apply to relationship between government and its own employees. File notings made during disciplinary proceedings was a public activity and can at best only be denied to a third party.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Ms. Maneesha Dhir with Ms. Preeti Dalal, Advocate.

FOR THE RESPONDENT : Mr. Nandan K. Jha, Advocate.

CASES REFERRED TO:

1. *Khanapuram Gandaiah* vs. *Administrative Officer* (2010) 2 SCC 1.
2. *Union of India* vs. *Central Information Commission* 2009 (165) DLT 559.
3. *Sethi Auto Service Station* vs. *Delhi Development Authority* 2009 (1) SCC 180.
4. *Dev Dutt* vs. *Union of India* (2008) 8 SCC 725.
5. *Union of India* vs. *L.K. Puri* 151 DLT 2008.
6. *State of Bihar* vs. *Kripalu Shankar* (1987) 3 SCC 34.

RESULT: Writ petition dismissed with costs of Rs. 5,000/-.

S. MURALIDHAR, J.

1. This petition is directed against the order dated 8th May 2009 of the Central Information Commission ('CIC') allowing the appeal of the Respondent and directing the Central Public Information Officer ('CPIO') in the office of the Controller General of Defence Accounts ('CGDA') to provide to the Respondent within 10 working days the information sought by her.

2. On 5th December 2008, the Petitioner applied to the CPIO in the CGDA seeking information in respect of 8 matters arising from the disciplinary proceedings conducted against her for a major penalty, which had recently been concluded. The Respondent had been awarded the penalty of 'censure' in those disciplinary proceedings. By an order dated 7th January 2009, the CGDA rejected the request stating that the information cannot be provided as it attracted Sections 8(i)(e), 8(i)(g) ˇand 8(i)(j) of the Right to Information Act, 2005 ('RTI' Act, 2005). Inter alia, it was observed as under:

"Notings in case of a disciplinary proceeding contain the views

and opinions of the various authorities which are fiduciary in nature and the views and opinions, if made open, might antagonize the charged officer. It may also lead to the danger of the lift of the officials who have made those remarks. Further the disciplinary proceedings are conducted in an objective and fair manner with the involvement of lot of agencies which include CGDA, Ministry of Defence (Finance), and DoPT. Further disclosing entire set of notings which includes the personal information/opinion of the officials at various stages does not have any relationship with any public activity or interest."

3. The Appellate Authority concurred with the view of the CPIO and dismissed the Respondent's appeal on 4th March 2009. Thereafter, the Respondent preferred an appeal to the CIC.

4. The CIC observed that the expression "fiduciary relationship" in Section 8(1)(e) of the RTI Act, 2005 could not apply to the relationship between a government and its own employees. It did not cover notings in a public document. Likewise, the reference to Section 8(1)(g) of the RTI Act was also held to be misplaced. It was held that notings made on files as part of discharge of official functions was a public activity. The CIC disagreed with the view expressed by the CPIO and the Appellate Authority that the conduct of disciplinary proceedings against the Petitioner that the notings and the files during the disciplinary proceedings did not have any relationship with public activity or public interest.

5. Ms. Maneesha Dhir, learned counsel for the Petitioner reiterated the submissions made before the CIC and supported the order of the CPIO and the Appellate Authority. She again referred to Section 8(1)(e), 8(1)(g) and 8(1)(j) of the RTI Act, 2005 and submitted that the information sought was covered under each of these provisions and was therefore exempt from disclosure. It was submitted that notings on files do not fall within the definition of information under Section 2(f) RTI Act, 2005. Reliance is placed on the decisions of the Supreme Court in **State of Bihar v. Kripalu Shankar** (1987) 3 SCC 34, **Sethi Auto Service Station v. Delhi Development Authority** 2009 (1) SCC 180, **Khanapuram Gandaiah v. Administrative Officer** (2010) 2 SCC 1 and **Union of India v. Central Information Commission** 2009 (165) DLT 559.

6. As regards the first point urged, this Court is unable to accept the submission made on behalf of the Union of India that file notings, which are in the form of the views and comments expressed by the various officials dealing with the files, are not included within the definition of "information" under Section 2(f) of the RTI Act, 2005. Section 2(f) reads as under:

> "(f) "information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force;"

7. It is clear that legislative intent is to give a wide interpretation to the term 'information' under Section 2(f) of the RTI Act, 2005. This is evident from the inclusion of "records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders" within the broad definition of "information".

8. The submission made by learned counsel for the Petitioner also stands contradicted by an office memorandum dated 28th June 2009 issued by the Department of Personnel & Training ('DoPT') to the following effect:

> **"OFFICE MEMORANDUM**
>
> Subject : Disclosure of 'file noting' under the Right to Information Act, 2005.
>
> ***
>
> The undersigned is directed to say that various Ministries/ Departments etc. have been seeking clarification about disclosure of file noting under the Right to Information Act, 2005. It is hereby clarified that file noting can be disclosed except file noting containing information exempt from disclosure under section 8 of the Act.
>
> 2. It may be brought to the notice of all concerned."

9. Unless file notings are specifically excluded from the definition

of Section 2(f), there is no warrant for proposition that the word 'information' under Section 2(f) does not include file notings.

10. The next submission to be dealt with is that information contained in the files in the form of file notings made by the different officials dealing with the files during the course of disciplinary proceedings against the Petitioner were available to the Union of India in a 'fiduciary relationship' within the meaning of Section 8(1)(e) of the RTI Act. This Court concurs with the view expressed by the CIC that in the context of a government servant performing official functions and making notes on a file about the performance or conduct of another officer, such noting cannot be said to be given to the government pursuant to a 'fiduciary relationship' with the government within the meaning of Section 8(1)(e) of the RTI Act, 2005. Section 8(1)(e) is, at best, a ground to deny information to a third party on the ground that the information sought concerns a government servant, which information is available with the government pursuant to a fiduciary relationship, that such person, has with the government, as an employee.

11. To illustrate, it will be no ground for the Union of India to deny to an employee, against whom the disciplinary proceedings are held, to withhold the information available in the Government files about such employee on the ground that such information has been given to it by some other government official who made the noting in a fiduciary relationship. This can be a ground only to deny disclosure to a third party who may be seeking information about the Petitioner in relation to the disciplinary proceedings held against her. The Union of India, can possibly argue that in view of the fiduciary relationship between the ˇPetitioner and the Union of India it is not obligatory for the Union of India to disclose the information about her to a third party. This again is not a blanket immunity against disclosure. In terms of Section 8(1)(e) RTI Act, the Union of India will have to demonstrate that there is no larger public interest which warrants disclosure of such information. The need for the official facing disciplinary inquiry to have to be provided with all the material against such official has been explained in the judgment of the Division Bench of this Court in **Union of India v. L.K. Puri** 151 DLT 2008, as under:

> "The principle of law, on the conjoint reading of the two

judgments, as aforesaid, would be that in case there is such material, whether in the form of comments/findings/ advise of UPSC/CVC or other material on which the disciplinary authority acts upon, it is necessary to supply the same to the charge sheeted officer before relying thereupon any imposing the punishment, major or minor, in as much as **cardinal principle of law is that one cannot cat on material which is neither supplied nor shown to the delinquent official.** Otherwise, such advice of UPSC can be furnished to the Government servant along with the copy of the penalty order as well as per Rule 32 of the CCS(CCA) Rules."

12. In **Dev Dutt v. Union of India** (2008) 8 SCC 725, the Supreme Court mandated communication of not only all entries in ACR but even whether the entry of a grade in an ACR, in comparison to the previous years' entry resulted in the lowering of the grade. A reference may be made to paras 39 and 45 of the said judgment which read as under:

"39. In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the Annual Confidential Report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no Rule/G.O. requiring communication of the entry, or even if there is a Rule/G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion requires such communication. Article 14 will override all rules or government orders."

.....

45. In our opinion, non-communication of entries in the Annual Confidential Report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above).

Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution."

13. The decision in **State of Bihar v. Kripalu Shankar** was rendered at a time when no RTI Act existed. The understanding of `privileged. information in 1987 will have to give way to the legislative intent manifest in the RTI Act, enacted eighteen years later. The decision in **Sethi Auto Services** was again not in the context of the RTI Act. It concerned the termination of a petrol pump dealership. In **Khanapuram Gandaiah,** the Petitioner was seeking to know from a Judicial Officer as to why he decided an appeal "dishonestly". The said decision is plainly distinguishable on facts.

14. In the considered view of this Court, the Union of India cannot rely upon Section 8(1)(e) of the RTI Act, 2005 to deny information to the Petitioner in the present case.

15. It may be further added that the Respondent has already retired on 31st October 2009. Further, even the censure awarded to the Petitioner has been quashed by this Court by an order dated 9th August 2010 in Writ Petition (Civil) No. 12462 of 2009. The Respondent has also placed on record a copy of the order passed by the CGDA treating the suspension period as duty period, and directing the release of full pay and allowances to the Respondent for the said period.

16. In light of the above developments, this Court finds no merits in any of the apprehensions expressed by the CPIO in the order rejecting the Respondent's application with reference to either Section 8(1)(g) of the RTI Act 2005.The disclosure of information sought by the Petitioner can hardly endanger the life or physical safety of any person. There must be some basis to invoke these provisions. It cannot be a mere apprehension.

17. As regards Section 8(1)(j), there is no question that notings made in the files by government servants in discharge of their official functions is definitely a public activity and concerns the larger public interest. In the present case, Section 8(1)(j) was wrongly invoked by the CPIO and by the Appellate Authority to deny information to the Respondent.

18. This Court finds that no error has been committed by the CIC in passing the impugned order. Consequently, the writ petition is dismissed with costs of Rs. 5,000/-, which will be paid by the Petitioner to the

Respondent, within a period of four weeks. Interim order dated 27th May 2009 stands vacated. Application also stands dismissed.

ILR (2011) I DELHI 563
RSA

BALJIT SINGH ....APPELLANT

VERSUS

THAKARIA ....RESPONDENT

(INDERMEET KAUR, J.)

RSA NO. : 32/2000 DATE OF DECISION: 08.10.2010

(A) Code of Civil Procedure, 1908—Section 100—Appeal against the Judgment and decree reversing the finding of the Trial Court which had dismissed the Suit—Respondent/Plaintiff filed a Suit for Possesssion claiming to be the owner of a property—Appellant/ Defendant contested the suit contending that he had purchased the property from the Plaintiff at a consideration—After framing the issues, the Trial Court examined oral and documentary evidence and held that Defendant is not the tenant in the suit Property and had in fact purchased the Property—The suit was dismissed—The First Appellate court reversed the finding disbelieving the defence—Held that there is no perversity in the finding of the First appellate court—The Court had after a detailed examination of the documentary and oral evidence had drawn a conclusion that the defence of the Defendant that he had purchased the property vide the Agreement to sell, GPA and Receipt was a sham defence.

There is no perversity in this finding. The impugned judgment after a detailed examination of the documentary and oral evidence had drawn a conclusion that the defence of the defendant that he had purchased this suit property vide the aforenoted documents i.e. the agreement to sell, GPA, and receipt was a sham defence; the contention of the plaintiff that the defendant was a tenant in the suit premises had been upheld. It is not the case of the appellant that the evidence had been ignored by the Courts below; the argument that the evidence has been mis-appreciated is an argument worthy of little merit as the second Appellate Court is not a third fact finding court; it cannot allow a party to re-agitate and reopen questions of fact which have been adequately dealt with by the Courts below. This answers the first and the second substantial question of law framed by this Court. **(Para 7)**

(B) Transfer of Property Act, 1882—Section 106—Appellant at the stage of Appeal contended that there are twin requirements to be fulfilled under Section 106, TPA; the notice must give a clear 15 days period to the tenant to vacate the property coupled with the requirement that the tenancy must terminate on the last date of the calendar month—Appellant contended that the second requirement was not fulfilled—Held that the plea of non fulfillment of the requirements of the provisions of Section 106 cannot be taken at the stage of Second Appeal by the tenant.

Important Issue Involved: The plea of non fulfillment of the requirements of the provisions of Section 106 of the Transfer of Property Act, 1882 cannot be taken at the stage of Second Appeal by a tenant.

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. Sunil Chauhan, Advocate.

FOR THE RESPONDENT : Mr. Sanjay Sehgal, Advocate.

CASES REFERRED TO:

1. *Dipak Kumar Ghosh* vs. *Mrs.Mira Sen*, AIR 1987 SC 759.
2. *Bondill Satyanaray Ana Singh* vs. *Rajagopalaswamy Vari Derasthaaam Madhavaripalem*, (1983) 1 Andh LT 344.
3. *Calcutta Credit Corporation Ltd. and Anr.*, vs. *Happy Homes (P) Ltd.* MANU/SC/0343/1967 : [1968]2SCR20.

RESULT: Appeal dismissed.

INDERMEET KAUR, J. (Oral)

1. This appeal has impugned the judgment and decree dated 05.02.2000 which had reversed the finding of the Trial Judge dated 14.05.1999. The Trial Judge vide its judgment and decree dated 14.05.1999 had dismissed the suit of the plaintiff. The impugned judgment had reversed this finding thereby decreeing the suit of the plaintiff.

2. Briefly stated the factual matrix of the case is as follows:-

i. Plaintiff, Thakaria, had filed a suit for possession. He claimed himself to be owner of the suit property i.e. property bearing house no. 585 situated at village Bakhtawarpur, Garhi. He had inherited it from his deceased father, Mr. Niadar Singh.

ii. After his father's death, he along with his two brothers had become 1/3rd (each) owners of the suit property; the suit ˇproperty is depicted in red colour in the site plan; this was the 1/3rd share of the plaintiff.

iii. This property had been let out to the defendant who was his nephew at a monthly rental of Rs. 500/- for a period of 11 months. Defendant failed to vacate the suit property. Legal notice dated 05.10.1988 was served upon the defendant but to no avail. Suit was filed.

iv. Defendant contested the suit. His contention was that he had purchased this property from the plaintiff on 06.02.1985 for a consideration Rs. 19500/-; plaintiff had executed a general power of attorney, agreement to sell and a receipt which were duly

registered documents. Defendant claimed ownership of the suit property. He denied that he was a tenant of the plaintiff.

v. Trial Judge framed four issues which inter alia read as follows:-

i. Whether the defendant purchased the suit property by way of power of attorney, agreement to sell and registered receipt from the plaintiff as alleged in P.O. No. 1? OPD

ii. Whether the defendant is tenant in the suit property? OPP

iii. Whether the plaintiff is entitled to the relief of possession as claimed? OPP

iv. Relief.

vi. Trial Judge examined the oral and the documentary evidence. Three witnesses have been examined on behalf of the plaintiff and one witness had come into the witness box on behalf of the defendant. It was held that the defendant is not a tenant in the suit property. He had purchased this suit property in terms of an agreement to sell, general power of attorney and a receipt. Suit of the plaintiff was dismissed.

vii. This finding of the Trial Judge was revered by the First Appellate Court. The impugned judgment had disbelieved the defence of the defendant that he had purchased this suit property from the plaintiff vide an agreement to sell, general power of attorney; all these documents have been marked as Mark A, A1 and A2. The thumb marks on the said documents purported to be of the plaintiff were disbelieved; claim of the defendant that he had title to the suit property was disbelieved. Defendant was held to be a tenant and his tenancy was validly terminated by a legal notice Ex.PW-3/2. Suit of the plaintiff was decreed.

3. This is a second appeal on 10.05.2000; the appeal had been admitted and the following substantial questions of law were formulated which inter alia reads as follows:-

1. Whether the first appellate court, on the basis of presumption and assumption could decide issue no. 2 by holding that the appellant is the tenant of the respondent?

2. Whether the first appellant court was justified in law by holding that the appellant is the tenant of the respondent without looking into the evidence led by the parties and could have reversed the judgment and decree of the trial court had not relied upon the testimony of the respondent's witness.

3. Whether the courts below erred in ignoring the invalidity of the notice for termination of tenancy served by the respondent on the appellant. No doubt it is new plea being taken by the appellant for the first time in the second appeal but the same is a legal one and mere reading of the notice can determine the same.

4. On behalf of the appellant, it has been urged that in para one of the replication, the plaintiff had admitted that the defendant might have got his thumb impression under the impression of alcohol; this admission of the plaintiff cannot be washed way; this had been illegally ignored in the impugned judgment. Attention has been drawn to the testimony of PW3 who was the plaintiff. It is pointed out that his contrary stand in the cross-examination that the documents i.e. GPA, receipt and agreement to sell did not bear his thumb mark and his categorical denial that he had not signed on any blank paper is a conflicting version. It is pointed out that under Section 106 of the Transfer of Property Act (hereinafter referred to as "T.P.Act") there are two twin requirements to be fulfilled; the notice must give a clear 15 days period to the tenant to vacate the property coupled with the second requirement that it must terminate on the last date of the calendar month; Ex.PW-3/2 does not fulfill the second requirement; the tenancy was not terminated on the last date of the calendar month.

5. Arguments have been countered by learned counsel for the respondent. It is pointed out that the plea of the validity of a notice cannot be raised in a second appeal. This notice was never in dispute before the two Courts below. The findings of fact on the documentary evidence also cannot be re-agitated before this Court.

6. Perusal of the record shows that the first limb of the arguments addressed by the learned counsel for the appellant has been dealt with in deep detail in the impugned judgment. The impugned judgment had

discarded the power of attorney, agreement to sell and receipt i.e. the purported documents of sale which had been set up by the defendant and purported to have been thumb marked by the plaintiff. In this context this finding in the impugned judgment reads as follows:

> "4. By the very nature of the defence, the defendant has admitted the ownership of the plaintiff. Similarly the possession of the defendant over the suit property is also admitted. The plaintiff alleges that the defendant came into the possession of the suit property under a contract of tenancy. On the other hand, the defendant claims that he came into possession of the suit property under an agreement to sell and on payment of the consideration money. According to the plaintiff the tenancy was oral. Accordingly no document of tenancy could be produced. On the other hand the defendant relied upon the documents. In view of the pleadings the parties, the onus of proof in this case is very heavy on the defendant. The ownership of the plaintiff is admitted. Therefore unless the defendant establishes his title to continue in possession, he is liable to be evicted. In case defendant's right is not established then he is either a tenant or an unauthorized occupant.

5. The documents produced by the defendant are agreement to sell mark A-1, receipt mark A-2 and a General Power of Attorney mark A. All these three documents are purported to have been thumb marked by the plaintiff. The plaintiff is an illiterate person. The thumb marks, as per signatures appearing on the document, were taken in presence of one Khacheru and one Chhotu Singh. The receipt also carries the signatures (initials) of one Mr.M.N.Sharma, advocate. None of the three persons has been produced in the witness box by the defendant. The thumb impressions on the document mark A-1 are dim. The thumb impression on mark A-2 is ink smudged. The thumb impression on mark-A is partly clear and partly smudged. The defendant, however, has made no efforts to get the thumb impressions examined by an expert. The thumb impressions are not like signatures which one can admit or deny on a visual inspection. The plaintiff categorically denies that he ever agreed to sell the suit property to the defendant or that he received the alleged consideration money for the suit property. In his replication while denying the alleged transaction the plaintiff says that he is an alcohol addict and

that the plaintiff might have got his thumb impression under the influence of alcohol. This plea of the plaintiff cannot be taken as an admission of the thumb impression on the document. The entire plea of the plaintiff in this respect has to be read. The plaintiff says:-

> "That para Ist of P.O. is wrong and denied. It is emphatically denied that premises in dispute was sold, alienated or transferred to the Defendant. As far as the plaintiff remember he had not signed any document pertaining to the sale of premises in question. The plaintiff is addict of alcohol and defendant might have got his thumb impression under the influence of alcohol and which is wrong and illegal under the eyes of law."

6. The possibility of his thumb impression being taken under influence of alcohol is pleaded only as a possible defence in the event of the thumb impression being proved.

7. The learned trial court has taken this averment of plaintiff in the replication quoted above into consideration and has also given emphasis to the fact that the receipt mark A-2 is a registered document. The argument given by the learned trial court is that the documents could not have been registered without the presence of the plaintiff. If such argument is accepted, then no registered document should require any proof. The requirement of Evidence Act however is quite different. Even a registered document is required to be proved by proving the executing of the document. In the present case none of the three documents relied upon by the defendant is proved. Even the defendant does not state on oath that the thumb impressions were obtained by him or were obtained in his presence. In my opinion, no credit can be given to any of the three documents. I have no option but to hold that the defendant has failed to establish any right over the suit property by virtue of agreement to sell or on receipt of payment of the consideration amount.

8. In view of this situation, the defendant is either a tenant or an unauthorized occupant. The court cannot make out a third case. Therefore the only possible case is that the defendant is a tenant. The tenancy of the defendant has been terminated by a notice of termination of tenancy. No argument is advanced in

appeal against the service and validity of the notice. The tenancy of the defendant having been terminated by the notice. The defendant is liable to be evicted.

9. There is no other defence raised in the written statement. Hence the appellant/plaintiff is entitled to a decree for possession."

7. There is no perversity in this finding. The impugned judgment after a detailed examination of the documentary and oral evidence had drawn a conclusion that the defence of the defendant that he had purchased this suit property vide the aforenoted documents i.e. the agreement to sell, GPA, and receipt was a sham defence; the contention of the plaintiff that the defendant was a tenant in the suit premises had been upheld. It is not the case of the appellant that the evidence had been ignored by the Courts below; the argument that the evidence has been mis-appreciated is an argument worthy of little merit as the second Appellate Court is not a third fact finding court; it cannot allow a party to re-agitate and reopen questions of fact which have been adequately dealt with by the Courts below. This answers the first and the second substantial question of law framed by this Court.

8. Qua the third substantial question of law, it is relevant to state that the legal notice sent by the plaintiff Ex.PW-3/2 is dated 5.10.1988. Reply to the said notice had been filed by the defendant/appellant Ex.DW-1/B. It is nowhere the contention of the defendant that this notice was not a valid notice; that it did not fulfill the requirements of Section 106 of the TP Act. This plea cannot be taken at this stage i.e. before the Second Appellate Court. In (1983) 1 Andh LT 344 **Bondill Satyanaray Ana Singh Vs. Rajagopalaswamy Vari Derasthaaam Madhavaripalem,** it was held that it would not be permissible for a tenant to contend for the first time at the stage of second appeal that the notice period does not synchronize with the end of the month of tenancy; in this case it was held that such a plea not having been advanced by the defendant in the two Courts below it could not be said that the notice was not in accordance with Section 106 of the T.P. Act. In AIR 1987 SC 759 **Dipak Kumar Ghosh Vs. Mrs.Mira Sen,** the Supreme Court in the context of this particular situation had held as follows:

> "Even assuming that it is a notice under Section 106 of the Transfer of Property Act and, accordingly, the instant notice to

quit is bad, yet the respondent having accepted the notice to quit, it will not be open to the appellant to contend that it is invalid and cannot be relied upon by the respondent as a ground for eviction. A notice to quit even if it is defective can be accepted by the landlord, and after such acceptance the tenant will be estopped from challenging the validity of the notice given by him. Indeed, the question came up for consideration before this Court in the **Calcutta Credit Corporation Ltd. and Anr., v. Happy Homes** (P) Ltd. MANU/SC/0343/1967 : [1968]2SCR20. It has been held by this Court that a notice which does not comply with the requirements of Section 106 of the Transfer of Property Act in that it does not expire with the end of the month of the tenancy, or the end of the year of the tenancy, as the case may be or of which the duration is shorter than the duration contemplated by Section 106, may still be accepted by the party served with the notice and if that party accepts and acts upon it, the party serving the notice will be estopped from denying its validity."

9. Even otherwise on the perusal of the Ex.PW-3/2, it is clear that the twin requirements of Section 106 of the T.P. Act stand met with. This notice is dated 5.10.1988; it clearly stipulates that the tenancy of the defendant is terminated asking him to vacate the suit property within 15 days from the receipt of this notice. The first requirement of a 15 day clear notice is fulfilled; the second requirement that this tenancy will terminate on the last day of the calendar month is also clear from a reading of this document. It states that the rent of Rs.500/- has not been paid after February 1988 and from February to September 1988; it comes to Rs.4000/-. It is implicit from the a reading of the language of this notice that the tenancy had stood terminated on the last day of the month as rent had not been paid from February 1988 onwards; thereafter demand of Rs.4000/- was raised for the months of February 1988 to September 1988.

10. The Supreme Court in **Dipak Kumar Ghosh** (supra) held that a notice under Section 106 of the T.P.Act must be construed liberally and not with a view to find faults in it but with a view to its validity. There is no particular form of notice. Its plain reading must bring out the intention on the part of the lessor to terminate the lease; no hard or fast

rule or technical formula can be laid down about the language of a notice under Section 106. The precise words are immaterial provided the notice terminates the tenancy; it must express a clear and unequivocal intention to terminate the tenancy.

11. At this juncture i.e. at the stage of second appeal, when till date the notice has not been disputed and in fact has been accepted by sending the reply Ex.DW-1/B to the same, the appellant is now precluded from challenging its validity.

12. Appeal has no merit; it is dismissed.

ILR (2011) I DELHI 572
WP (C)

SH. SUKHANSHU SINGH ....PETITIONER

VERSUS

DELHI TECHNOLOGICAL UNIVERSITY & ORS. ....RESPONDENTS

(RAJIV SAHAI ENDLAW, J.)

WP (C) NO. : 5682/2010 DATE OF DECISION: 08.10.2010

Constitution of India, 1950—Article 15—Reservations for widows/wards of defence personal—Respondent University providing reservation for widows/wards of Defence Personnel—Petitioner son of retired personnel of Indian Air Force—Petitioner applied for admission under category reserved for wards of Defence personal—Achieved rank of 2010 in written examination—Not called for counseling—Respondent University not treating wards of retired and serving Defence personnel in reserved category—Defence Ministry had merely issued recommendations to Central

Universities for reservation for Armed Forces under seven heads—Respondent University made reservation only under five heads—Reservations not made for other two categories keeping in mind "hardship" factor—Other Universities also not made reservations—Petitioner fully aware that he was not eligible for reservation—Hence present petition. Held—No cogent reason for providing reservation only for five categories and not all seven—None in Respondent University has applied mind—No justification for making distinction between first five and sixth and seventh categories—Respondent University cannot justify decisions for reasons which did not form the basis thereof—Kendriya Sainik Board recommended reservation in all seven categories including wards of serving and retired personnel—Said Board an expert body in such matters—Supreme Court in *CS Sidhu's* case Expressed regret on shabby treatment of country's army men—Once expert Body recommended reservation for ex-servicemen and serving personnel though lowest in terms of priority—No reason to deprive the wards of ex-servicemen of said benefit—Petitioner approached Court before counseling ended—Estoppel not applicable.

I have enquired from the counsel for the respondent No.1 University as to why the respondent No.1 University while opting to follow the recommendation of the Kendriya Sainik Board has chosen to dissect the said recommendation and to provide reservation for five categories only of the seven categories recommended. Reason therefor is not evident from the documents filed by the respondent No.1 University. On the contrary, in the counter affidavit dated 23rd August, 2010 of the respondent No.1 University it is stated:

> "In case priority VI (wards of ex-servicemen) and VII (wards of serving personnel) have to be included under CW category for admission in the current admission session the necessary approval from the competent authority may be sought."

From the aforesaid, it appears that none in the respondent no.1 University has applied mind to the aforesaid aspect. **(Para 8)**

Insofar as the respondent No.1 University in its affidavit has sought to justify the reservation for five categories only, in the absence of any decision of the Academic Council or other appropriate authority of the respondent No.1 University for making out such distinction between the first five and the sixth and seventh categories, no justification thereof is permissible as laid down by the Supreme Court in **Mohinder Singh Gil Vs. Chief Election Commissioner** (1978) 1 SCC 405. The respondent cannot seek to justify a decision for reasons which did not form the basis thereof.**(Para 11)**

Else also, I am unable to hold that there is any rationale for the respondent No.1 University to make such distinction. The Kendriya Sainik Board, constituted with the specific object of looking into the said matter in its wisdom has deemed it appropriate to provide for reservation for all the seven categories i.e. for wards of children of serving and retired personnel also. The said Board is an expert body to go into the said question and is deemed to have considered all the factors in making the seven categories aforesaid and in giving priority thereto. The respondent No.1 University cannot be said to be best equipped to distinguish between the first five and the remaining two categories. The classification made by the respondent No.1 University is not shown to have any nexus to the object of reservation. The Supreme Court also, recently in **Union of India Vs. C.S. Sidhu** (2010) 4 SCC 563 has commented with regret on the shabby manner in which the army men in our country are being treated. It was commented that they bravely defend the country even at the cost of their lives and deserve a better and humane treatment. The same in my view applies to the present case also. Once the Body constituted to look into the welfare measures relating to personnel of the

Defence forces has in its wisdom chosen to recommend reservation for ex-servicemen and serving personnel also, though lowest in terms of priority, I see no reason to deprive the wards of ex-servicemen from the said benefit. Once the respondent No.1 University has accepted the recommendation of reservation for Defence Category, it cannot be permitted to twist it to its own liking and is bound to provide reservation for all seven categories in terms of priority. **(Para 12)**

Relief—Academic session already begun—But Petitioner approached Court before end of counseling—Inspite of best efforts, case could not be heard earlier—Hence relief of admission granted in view of peculiar facts and circumstances of case—Remedy must follow the right.

Important Issue Involved: Kendriya Sainik Board recommended reservation in all seven categories including wards of serving and retired personnel—Said Board an expert body in such matters—Once expert Body recommended reservation for ex-servicemen and serving personnel though lowest in terms of priority—No reason to deprive the wards of ex-servicemen of said benefit.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Dr. Vijendra Mahndiyan, Advocate.

FOR THE RESPONDENTS : Ms. Zubeda Begum, Advocate for R-1 & R-2. Mr. Sachin Dutta & Ms. Gayatri Verma, Advocates for R-3/ UOI.

CASES REFERRED TO:

1. *Union of India* vs. *C.S. Sidhu* (2010) 4 SCC 563.
2. *Dr. Manish Patnecha* vs. *Chairperson, Counselling Committee, AIIMS* LPA No.622/2009.

3. *Madan Lal* vs. *State of Jammu and Kashmir* (1995) 3 SCC 486.
4. *Islamic Academy of Education* vs. *State of Karnataka CW(P)* No.350/1993.
5. *Dileep Damodaran* vs. *Secretary to Govt. Education Department*, AIR 1991 Andhra Pradesh 194.
6. *Mohinder Singh Gil* vs. *Chief Election Commissioner* (1978) 1 SCC 405.

RESULT: Petition allowed.

RAJIV SAHAI ENDLAW, J.

1. The petitioner by this writ petition impugns the action of the respondent No.1 in, while providing for reservation for admissions for widows/wards of Defence personnel, not including therein the widows/ wards of ex-servicemen and serving personnel.

2. The petitioner claims to be the son of a retired personnel of Indian Air Force who retired in 1994 after serving for 15 years. The petitioner applied for admission to B.Tech programme 2010-11 under the category reserved for Wards of Defence personnel. The petitioner, in the written examination achieved the rank of 2010. The counselling for admission was scheduled from 20th July, 2010 to 31st August, 2010. The petitioner was however not called for counselling. The petitioner on enquiry learnt that the respondent No.1 was not treating the wards of retired and serving Defence personnel in the reserved category and accordingly filed the instant petition.

3. This petition came up before this Court first on 20th August, 2010. The contention of the counsel for the petitioner inter alia was that other Institutions providing reservation for widows/wards of Defence personnel were including not only:

(i) Widows/wards of Defence personnel killed in action.

(ii) Wards of serving personnel and ex-servicemen disabled in action.

(iii) Widows/Wards of Defence personnel who died in peace time with death attributable to military service.

(iv) Wards of Defence personnel disabled in peace time with disability attributable to military service.

(v) Wards of ex-servicemen and serving personnel who are in receipt of Gallantry Awards.

as the respondent no.1 also is, but also

(vi) Wards of ex-servicemen.

(vii) Wards of serving personnel.

which the respondent No.1 was not including under the said category.

4. Notice of the petition was issued and this Court being of the view that the Union of India should also be impleaded as a party, impleaded UOI through the Ministry of Defence as a respondent to the petition.

5. The counsel for the Defence Ministry of the Government of India on 9th September, 2010 informed that the Defence Ministry had from time to time issued merely recommendations to the Central Universities for reservation for Armed Forces and the said recommendations are vis-à-vis all the seven categories aforesaid i.e. they include the wards of ex-servicemen and wards of serving personnel also who as aforesaid have been excluded by the respondent No.1. An affidavit of Lieutenant Colonel A.N. Sen on behalf of Kendriya Sainik Board, Ministry of Defence has also been filed stating that the Kendriya Sainik Board functions under the Department of Welfare of Ex-servicemen, Ministry of Defence and is responsible for formulation of policies for welfare of ex-servicemen and widows; similarly there are Rajya & Zila Sainik Boards at the State & District level respectively which function under their respective Government/Union Territory administration; the Kendriya Sainik Board with the assistance of Rajya Sainik Board implements most of the welfare/ policy recommendations. It is further stated that a High Level Committee constituted by the Ministry of Defence had in the year 1995 recommended a provision for reservation for the wards of ex-servicemen and widows in professional and other Institutions within the States and Union Territories within which they may lie; that the said recommendations are not binding on the State Government and the State Governments are free to choose or desist from implementing them. The recommendation made in the year 2000 by the then Defence Minister to the Ministry of Human Resource

Development was for reservation for all the seven categories aforesaid, with the first category i.e. widows/wards of Defence Personnel killed in action having highest priority and the seventh category i.e. wards of serving personnel having lowest priority. With respect to the prospectus of the respondent No.1 University providing for reservation for the first five categories only and not for the remaining two categories, it is stated that the matter needs to be resolved by the State Government in consultation with the respondent No.1 University.

6. The respondent No.1 University in its counter affidavit has stated that the erstwhile Delhi College of Engineering affiliated to the Delhi University has now been upgraded to the respondent No.1 University; that the Delhi College of Engineering was following all the norms, procedures, eligibility for reservation, Rules prescribed by the Delhi University; that the respondent No.1 University is governed by its Act, Statutes and Ordinances approved by the competent bodies of the University and the Academic Council of the respondent No.1 University exercises general supervision over the academic policies. It is further stated that the decision to lay down reservation for five categories only under the Defence category and not forthe remaining two categories has been taken keeping in mind the "hardship" factor. It is yet further pleaded that all the Central Universities/Institutions have not included the wards of ex-servicemen in the Defence category. It is yet further pleaded that the petitioner applied for admission with the full knowledge that he was not eligible for reservation and is now estopped from challenging the same. Reference in this regard is made to **Madan Lal Vs. State of Jammu and Kashmir** (1995) 3 SCC 486.

7. The respondent No.1 University has filed an additional affidavit in which it is stated that it has laid down five categories only under the Defence category "to maintain high academic standard like the IITs. The University of Delhi in its technical courses is also following only five categories." It is further stated that non inclusion of the sixth and seventh category aforesaid is for the reason of maintaining high standards and that if the sixth and seventh category aforesaid is also included, merit in the respondent No.1 University may suffer.

8. I have enquired from the counsel for the respondent No.1 University as to why the respondent No.1 University while opting to

follow the recommendation of the Kendriya Sainik Board has chosen to dissect the said recommendation and to provide reservation for five categories only of the seven categories recommended. Reason therefor is not evident from the documents filed by the respondent No.1 University. On the contrary, in the counter affidavit dated 23rd August, 2010 of the respondent No.1 University it is stated:

> "In case priority VI (wards of ex-servicemen) and VII (wards of serving personnel) have to be included under CW category for admission in the current admission session the necessary approval from the competent authority may be sought."

From the aforesaid, it appears that none in the respondent no.1 University has applied mind to the aforesaid aspect.

9. Insofar as the argument of the counsel for the respondent No.1 University that the other Central Institutions like the IITs providing reservation for five categories only instead of all the seven categories under the Defence Category reservation is concerned, no document in that regard has been placed before this Court. Similarly, though it is pleaded that the same is the position with respect to the technical courses in the Delhi University, again no document has been placed.

10. On the contrary, the counsel for the petitioner has contended that the respondent No.1 University is a State University and thus cannot follow the central Universities, the provisions for reservation wherein are different. He also states that the other State University namely the Guru Gobind Singh Indraprastha University is providing for reservation for all the seven categories. He has also placed before this Court the order dated 10th February, 2004 of the Department of Training & Technical Education of the Government of Delhi issued in pursuance to the judgment dated 14th August, 2003 of the Supreme Court in CW(P) No.350/1993 titled **Islamic Academy of Education Vs. State of Karnataka** laying down policy guidelines on admissions and reservation of seats covering the AICTE approved courses/Institutions affiliated to the GGSIP University. In the said order, while providing for reservation for Defence category, reservation is for all the seven categories. Though the counsel for the petitioner has also referred to **Dileep Damodaran Vs. Secretary to Govt. Education Department,** AIR 1991 Andhra Pradesh 194 but the same was in relation to the Andhra Pradesh Educational Institutions

(Regulation of Admission and Prohibition of Capitation Fees) Act, 1983 and is not found apposite to the controversy over here.

11. Insofar as the respondent No.1 University in its affidavit has sought to justify the reservation for five categories only, in the absence of any decision of the Academic Council or other appropriate authority of the respondent No.1 University for making out such distinction between the first five and the sixth and seventh categories, no justification thereof is permissible as laid down by the Supreme Court in **Mohinder Singh Gil Vs. Chief Election Commissioner** (1978) 1 SCC 405. The respondent cannot seek to justify a decision for reasons which did not form the basis thereof.

12. Else also, I am unable to hold that there is any rationale for the respondent No.1 University to make such distinction. The Kendriya Sainik Board, constituted with the specific object of looking into the said matter in its wisdom has deemed it appropriate to provide for reservation for all the seven categories i.e. for wards of children of serving and retired personnel also. The said Board is an expert body to go into the said question and is deemed to have considered all the factors in making the seven categories aforesaid and in giving priority thereto. The respondent No.1 University cannot be said to be best equipped to distinguish between the first five and the remaining two categories. The classification made by the respondent No.1 University is not shown to have any nexus to the object of reservation. The Supreme Court also, recently in **Union of India Vs. C.S. Sidhu** (2010) 4 SCC 563 has commented with regret on the shabby manner in which the army men in our country are being treated. It was commented that they bravely defend the country even at the cost of their lives and deserve a better and humane treatment. The same in my view applies to the present case also. Once the Body constituted to look into the welfare measures relating to personnel of the Defence forces has in its wisdom chosen to recommend reservation for ex-servicemen and serving personnel also, though lowest in terms of priority, I see no reason to deprive the wards of ex-servicemen from the said benefit. Once the respondent No.1 University has accepted the recommendation of reservation for Defence Category, it cannot be permitted to twist it to its own liking and is bound to provide reservation for all seven categories in terms of priority.

13. The petitioner has approached this Court even before the counselling ended and this cannot be said to be estopped. The petitioner has also demonstrated that those with lower rank than him have been admitted and thus the question of his admission interfering with merit does not arise.

14. The next question which arises is of the relief to be granted. The counsel for the respondent No.1 University has argued that the session has begun. Though the Courts would ordinarily not interfere after the session has begun and I have also been following the said principle with respect to the petitions preferred thereafter but the petitioner in the present case approached this Court well before the last date of counselling. Inspite of best efforts of this Court, the case could not be decided earlier. In my view the petitioner having been found entitled ought not to be deprived of the relief. The Division Bench of this Court also in judgment dated 10th December, 2009 in LPA No.622/2009 titled **Dr. Manish Patnecha Vs. Chairperson, Counselling Committee, AIIMS** has held that remedy must follow the right.

15. I, therefore direct the respondent No.1 University to admit the petitioner to a seat under the Defence category within one week of today. I refrain from imposing any costs on the respondent No.1 University.

ILR (2011) I DELHI 582
CONT. APP. (C)

RAJ SINGH GEHLOT ....APPELLANT

VERSUS

PARDIAM EXPORTS PVT. LTD. ....RESPONDENT

(VIKRAMAJIT SEN & MUKTA GUPTA, JJ.)

CONT. APP.(C) NO. : 5/2010 & CM NO. : 14846/2010 **DATE OF DECISION: 08.10.2010**

(A) Contempt of Courts Act, 1971—Section 19—Appeal against order in contempt petition—Scope-Suit instituted for restraining Defendants from creating third party interest, altering Suit Property etc.—Order passed on 09.01.2008 restraining Defendants from the same—Local Commissioner Appointed—Defendant filed applications u/S 11 & 12 of Contempt of Courts Act for initiating contempt—Single Judge disposed off said contempt petition on 11.09.2009—Appellants directed to demarcate shops forming Suit Property—Appellant averring that Respondent has clearly violated order of Court. Held—Reliance placed on *Midnapore* case (2006) 5 SCC 399—Appeal u/s 19 of the Act only maintainable against order imposing punishment for contempt—Order dropping contempt proceedings or acquitting contemnor not appealable—However Court may pass orders necessary for preserving directions which contemnor has not followed.

With regard to Point (iii), learned counsel for the Respondent, has placed reliance on paragraph 21, but in our view mistakenly. What the Hon'ble Supreme Court was at pains to clarify was that if orders are passed which are totally outside the scope of proceedings for contempt and which amounted to adjudication of rights and liabilities not in issue in contempt

proceedings, corrective action by the Appellate Court would be called for. Contempt proceedings would invariably culminate in imposition or refusal to award punishment and not in ancillary adjudications. **(Para 7)**

Impugned Order does not record finding of contempt committed by Appellant—Interim orders not violated—However despite Court not holding Appellant guilty of contempt nor punished Appellant—Instant appeal maintainable—Single judge passed orders extraneous to alleged violation of Court Orders—To this extent, appeal available.

This above extracted passage has also been extracted in **Parents Association of Students vs. M.A. Khan,** (2009) 2 SCC 641 and has been applied. The Court, on being prima facie satisfied of the commission of contempt of Court, had issued notice to the alleged contemnor. However, in the very same order interim orders relating to the operation of a Government order had also been passed. Their Lordships opined in paragraph 19 that if the concerned party "cannot be punished for commission of contempt of the High Court, an interim order should not have been passed". We must, however, clarify that the Court is empowered and competent to pass orders which are necessary for preserving the directions which the contemnor has either failed to follow, overreach or contumaciously violated. In **Mohammad Idris Vs. Rustam Jehangir Bapuji,** AIR 1984 SC 1826 the Court found the commission of "a clear breach of the undertaking given by the petitioners and we are of the opinion that the Single Judge was quite right in giving appropriate directions to close the breach". The Division Bench of the Calcutta High Court has made similar observations in **Sujit Pal Vs. Prabir Kumar Sun,** AIR 1986 Calcutta 220. It is important to underscore that in both these cases the commission of contempt of Court had been concluded upon and hence the directions, apart from punishing for contempt, were with the view to implementing orders that had been violated by the

contemnor. This distinction must be kept in mind so far as the present case is concerned. On a careful reading of the impugned Order, we have failed to find any opinion that the Appellant was guilty of contempt of Court. The interim Orders that had been passed had not been found to have been violated, inter alia, because the flooring had been laid such that it conformed to the other flooring in the area. **(Para 9)**

On the first date of hearing, an objection had been raised as to the maintainability of the Appeal before us. In view of the discussion above, especially of **Midnapore**, it seems to us that the Appeal is maintainable despite the fact that the Appellant has neither been found guilty of commission of contempt of Court nor has been punished for it. The grievance of the Appellant is that the learned Single Judge has transgressed its jurisdiction by passing orders extraneous to the alleged violation of Court Orders. To this extent, an Appeal is facially available, since the impugned Order has civil obligations also. **(Para 11)**

(B) Code of Civil Procedure, 1908—Order XXXIX—Temporary Injunctions—Single Judge fully empowered to pass whatever orders considered expedient—Directions to erect partition were to be passed *de hors* disposal of Contempt Petition—Such directions could be severed from Impugned Order—Appropriate course to remand case back to Single Judge who had passed Impugned Order.

The learned Single Judge was avowedly in control of the pending suit at the time when the impugned Order came to be passed. The Court was, therefore, fully empowered to pass whatever orders it considered expedient and just so far as the equities or legalities demanded. If the directions vis-à-vis erection of glass door partition relating to Shop Nos.42 and 43 were to have been passed de hors the disposal of the Contempt Petition, they would certainly not be devoid of

jurisdiction. It seems to us that in the interest of justice these directions could be severed from the impugned Order. This is not a case where there was no material before the learned Single Judge to have come to conclusion which stands challenged before us. A neat technicality, however, arises, namely, whether the learned Single Judge intended to charter this course. Without setting aside the impugned directions, which have been impugned before us on technicalities, we think it proper to remand the case to the learned Single Judge who had passed the impugned Order. **(Para 12)**

Important Issue Involved: Appeal u/s 19 of the Act only maintainable against order imposing punishment for contempt—Order dropping contempt proceedings or acquitting contemnor not appealable. Court in contempt jurisdiction may pass orders necessary for preserving directions which contemnor has not followed, if order does not record finding of contempt committed by Appellant and still passes orders or directions which have civil consequences—Appeal maintainable to this extent as the order would be extraneous to alleged violation of Court Orders.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. P.K. Aggarwal, Mr. Rajbir Kapoor and Ms. Mercy Hussain, Advocates.

FOR THE RESPONDENT : Mrs. Pratibha M. Singh and Ms. Surbhi Mehta, Advocates.

CASES REFERRED TO:

1. *Parents Association of Students* vs. *M.A. Khan,* (2009) 2 SCC 641.
2. *Midnapore Peoples. Coop. Bank Ltd.* vs. *Chunilal Nanda,* (2006) 5 SCC 399.
3. *V.M. Manohar Prasad* vs. *N. Ratnam Raju,* (2004) 13 SCC 610.
4. *Vidya Charan Shukla* vs. *Tamil Nadu Olympic Association,* AIR 1991 Madras 323.
5. *Sujit Pal* vs. *Prabir Kumar Sun,* AIR 1986 Calcutta 220.
6. *Mohammad Idris* vs. *Rustam Jehangir Bapuji,* AIR 1984 SC 1826.

RESULT: Appeal allowed, case remanded.

VIKRAMAJIT SEN, J.

1. This Appeal assails the Order dated 11.9.2009 of the learned Single Judge passed on the Defendant's application under Sections 11 and 12 of the Contempt of Courts Act, 1971 read with Order XXXIX Rules 1 and 2A of the Code of Civil Procedure, 1908 (CPC for short). The learned Single Judge, after discussing threadbare the rival stands and submissions, had, *inter alia*, held as follows:-

> 7. In view of the report filed by the Local Commissioner on 4th August, 2009, it is apparent that marble flooring has been laid on the area specified for the shops allotted to the petitioner which is identified in colour with that of the surrounding lobby. It is also clear that the shops in question were not demarcated by the glass doors. The Local Commissioner on 1st August, 2009 was directed to demarcate the shops allotted to the petitioner which was done by him temporarily by bricks and wires. Since the respondents admitted that the shops are demarcated in the layout plan and the partition would be put later, it is directed that the respondents demarcate the shops G-42 and G-43 allotted to the petitioner and enclose it with glass door partition. The contempt petition is hereby disposed of.

2. The first Order passed in the proceedings of the Suit before the learned Single Judge was on 9.1.2008. It restrained the Defendants as also its employees, officers, assigns, etc. from creating any third party interest, encumbering or parting with the possession or changing the Layout Plan of the Shops bearing No. G-48 and G-49 (new No.G-42 and

G-43) in Ambi Mall at Plot No.2, Vasant Kunj, New Delhi till the next date of hearing. This Order has not been recalled.

3. There appears to be a typographical error in the impugned Order inasmuch as the learned Single Judge has alluded to an Order dated 28.5.2009 which, in fact, refers to the response of the Defendant/Appellant to the Contempt Petition wherein he has admitted that the shops in question can be clearly demarcated and that the partition walls can be put up without any difficulty. A Local Commissioner was appointed on two occasions and his Reports have been perused by us. Learned Counsel for the Respondent insists that there has been a violation of the Order of the Court justifying the filing of the subject application for initiation of contempt of Court proceedings. Since no cross-appeal/Objections have been preferred, it is patent that the Respondent has no grievance in respect of the absence of any punishment being imposed on the Appellant by the learned Single Judge.

4. Learned counsel for the Adversaries before us have relied on **Midnapore Peoples. Coop. Bank Ltd. –vs- Chunilal Nanda,** (2006) 5 SCC 399 and hence it is necessary to analyze this precedent in some detail. Three questions were formulated by their Lordships for consideration:-

> (i) Where the High Court, in a contempt proceedings, renders a decision on the merits of a dispute between the parties, either by an interlocutory order of final judgment, whether it is appealable under Section 19 of the Contempt of Courts Act, 1971? If not, what is the remedy of the person aggrieved?
>
> (ii) Where such a decision on merits is rendered by an interlocutory order of a learned Single Judge, whether an intra-court appeal is available under clause 15 of the Letters Patent?
>
> (iii) In a contempt proceeding initiated by a delinquent employee (against the enquiry officer as also the Chairman and Secretary in charge of the employer Bank), complaining of disobedience of an order directing completion of the enquiry in a time-bound schedule, whether the court can direct (a) that the employer shall reinstate the employee forthwith; (b) that the employee shall not be prevented from discharging his duties in any manner; (c) that the employee shall be paid all arrears of salary; (d) that the enquiry officer shall cease to be the enquiry officer and the employer shall appoint a fresh enquiry officer; and (e) that the suspension shall be deemed to have been revoked?

5. Several decisions were thereafter perused and distilled by their Lordships in carving out the following conclusion in the context of the first point:-

> 11. The position emerging from these decisions, in regard to appeals against orders in contempt proceedings may be summarized thus:
>
> I. An appeal under Section 19 is maintainable only against an order or decision of the High Court passed in exercise of its jurisdiction to punish for contempt, that is, an order imposing punishment for contempt.
>
> II. Neither an order declining to initiate proceedings for contempt, nor an order initiating proceedings for contempt nor an order dropping the proceedings for contempt nor an order acquitting or exonerating the contemnor, is appealable under Section 19 of the CC Act. In special circumstances, they may be open to challenge under Article 136 of the Constitution.
>
> III. In a proceeding for contempt, the High Court can decide whether any contempt of court has been committed, and if so, what should be the punishment and matters incidental thereto. In such a proceeding, it is not appropriate to adjudicate or decide any issue relating to the merits of the dispute between the parties.
>
> IV. Any direction issued or decision made by the High Court on the merits of a dispute between the parties, will not be in the exercise of "jurisdiction to punish for contempt" and, therefore, not appealable under Section 19 of the CC Act. The only exception is where such direction or decision is incidental to or inextricably connected with the order punishing for contempt, in which event the appeal under Section 19 of the Act, can also encompass the incidental or inextricably connected directions.

> V. If the High Court, for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved is not without remedy. Such an order is open to challenge in an intra-court appeal (if the order was of a learned Single Judge and there is a provision for an intra-court appeal), or by seeking special leave to appeal under Article 136 of the Constitution of India (in other cases).

6. On Point (ii), it has been opined that an Appeal would be maintainable not only against a Final Judgment but also in respect of "interlocutory judgment" which finally decides several rights and obligations.

7. With regard to Point (iii), learned counsel for the Respondent, has placed reliance on paragraph 21, but in our view mistakenly. What the Hon.ble Supreme Court was at pains to clarify was that if orders are passed which are totally outside the scope of proceedings for contempt and which amounted to adjudication of rights and liabilities not in issue in contempt proceedings, corrective action by the Appellate Court would be called for. Contempt proceedings would invariably culminate in imposition or refusal to award punishment and not in ancillary adjudications.

8. The contention is that the learned Single Judge erred in directing the Defendant to enclose Shops G-42 and G-43 with glass partition as appears to have been done in all other shops. In this regard, reliance has been placed on the observations made in **V.M. Manohar Prasad –vs- N. Ratnam Raju,** (2004) 13 SCC 610 to the effect that "in contempt proceedings no further directions could be issued by the court. In case it is found that there is violation of the order passed by the court the court may punish the contemnor otherwise notice of contempt is to be discharged. An order passed in the contempt petition, could not be a supplemental order to the main order granting relief". It was in this context also that reference was made to the celebrated decision in **Midnapore** in which their Lordships, in the 5th sub paragraph of paragraph 11, opined that – "If the High Court, for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without

remedy. Such an order is open to challenge in an intra-court appeal. …."

9. This above extracted passage has also been extracted in **Parents Association of Students –vs- M.A. Khan,** (2009) 2 SCC 641 and has been applied. The Court, on being prima facie satisfied of the commission of contempt of Court, had issued notice to the alleged contemnor. However, in the very same order interim orders relating to the operation of a Government order had also been passed. Their Lordships opined in paragraph 19 that if the concerned party "cannot be punished for commission of contempt of the High Court, an interim order should not have been passed". We must, however, clarify that the Court is empowered and competent to pass orders which are necessary for preserving the directions which the contemnor has either failed to follow, overreach or contumaciously violated. In **Mohammad Idris –vs- Rustam Jehangir Bapuji,** AIR 1984 SC 1826 the Court found the commission of "a clear breach of the undertaking given by the petitioners and we are of the opinion that the Single Judge was quite right in giving appropriate directions to close the breach". The Division Bench of the Calcutta High Court has made similar observations in **Sujit Pal –vs- Prabir Kumar Sun,** AIR 1986 Calcutta 220. It is important to underscore that in both these cases the commission of contempt of Court had been concluded upon and hence the directions, apart from punishing for contempt, were with the view to implementing orders that had been violated by the contemnor. This distinction must be kept in mind so far as the present case is concerned. On a careful reading of the impugned Order, we have failed to find any opinion that the Appellant was guilty of contempt of Court. The interim Orders that had been passed had not been found to have been violated, inter alia, because the flooring had been laid such that it conformed to the other flooring in the area.

10. We have also analysed the legal position so far as Order XXXIX Rule 2A of the CPC is concerned. In **Vidya Charan Shukla –vs- Tamil Nadu Olympic Association,** AIR 1991 Madras 323 one of the questions that had been argued before the Full Bench concerned the legal propriety of passing interim mandatory injunction for restoring status quo ante. **Sujit Pal** was favourably viewed. The Full Bench rejected the argument that it would be inappropriate to issue a mandatory injunction. Instead, they were of the opinion that "any restriction upon the jurisdiction of the Court in this regard will render the constitutional protections under Articles

215 and 225 of the Constitution afore quoted and afore discussed ineffective and unenforceable. …. The object of such an order being to safeguard the rights of a party against a threatened invasion by the other party, if in disobedience of the order of injunction, such rights are invaded during the pendency of the suit, the inherent power under Section 151 of the Code can be invoked and a mandatory injunction can be granted. The Courts have also to take notice of the larger and higher interests of the administration of justice which is a public interest and this should receive the first priority in considering whether the Court's special or inherent power should be exercised or not".

11. On the first date of hearing, an objection had been raised as to the maintainability of the Appeal before us. In view of the discussion above, especially of **Midnapore**, it seems to us that the Appeal is maintainable despite the fact that the Appellant has neither been found guilty of commission of contempt of Court nor has been punished for it. The grievance of the Appellant is that the learned Single Judge has transgressed its jurisdiction by passing orders extraneous to the alleged violation of Court Orders. To this extent, an Appeal is facially available, since the impugned Order has civil obligations also.

12. The learned Single Judge was avowedly in control of the pending suit at the time when the impugned Order came to be passed. The Court was, therefore, fully empowered to pass whatever orders it considered expedient and just so far as the equities or legalities demanded. If the directions vis-à-vis erection of glass door partition relating to Shop Nos.42 and 43 were to have been passed de hors the disposal of the Contempt Petition, they would certainly not be devoid of jurisdiction. It seems to us that in the interest of justice these directions could be severed from the impugned Order. This is not a case where there was no material before the learned Single Judge to have come to conclusion which stands challenged before us. A neat technicality, however, arises, namely, whether the learned Single Judge intended to charter this course. Without setting aside the impugned directions, which have been impugned before us on technicalities, we think it proper to remand the case to the learned Single Judge who had passed the impugned Order.

13. In these circumstances, parties shall appear before our esteemed learned Brother, Justice Manmohan Singh on 29.10.2010.

14. Appeal is disposed of in these terms. Pending application is also disposed of.

ILR (2011) I DELHI 592
CRL.M.C.

SH. KAPIL MAHAJAN ....PETITIONER

VERSUS

THE STATE ....RESPONDENT

(KAILASH GAMBHIR, J.)

CRL.M.C. NO. : 1499/2009, DATE OF DECISION: 08.10.2010
CRL.M.C. NO. : 1500/2009 &
CRL.M.C. NO. : 1501/2009

(A) Code of Criminal Procedure, 1973—Section 173—Framing of charges-extent of examination of material/ evidence by court—Premises of Petitioners inspected by Joint Inspecting Team—Petitioners accused of Fraudulent Abstraction of Energy—Theft bills raised against them—Petitioners failed to deposit theft bills—Separate FIR registered—Report filed by police u/s 173 Code of Criminal Procedure, 1973—Magistrate directed framing of charges under first part of Section 39, Indian Electricity Act, 1910—Petitioners filed revision petition—Revision petition dismissed—Truth, veracity and effect of prosecution evidence not to be examined meticulously at time of framing of charge—Sifting of evidence permissible to find out whether prima facie made out or not.

It is a settled legal position that the truth, veracity and effect of the evidence which the prosecutor proposes to adduce

are not to be examined meticulously at the stage of framing of charge. The sifting of evidence at the stage of framing of charges is permissible only for a limited purpose, to find out as to whether a prima facie view of the case is made out against the accused persons or not. It is also equally true that the court is not expected to frame the charges mechanically but has to exercise its judicial mind after giving careful consideration to the case set up by the prosecution. **(Para 12)**

(B) Indian Electricity Act, 1910—Section 39—Dishonest abstraction of energy—Petitioners main averment that inspection team failed to point out any dishonest abstraction of energy through deployment of artificial means—FIR registered under Section 39 and 44—Trial Court did not find circumstances justifying framing of charges u/s 44—Proving dishonest intention matter to be examined after evidence led by both parties.

The FIR in the present case against the petitioners was registered under Section 39/44 I.E. Act/379 IPC but the Ld. Magistrate, after careful consideration of the material on record did not find circumstances justifying framing of charge against the petitioner u/s 44 of the Indian Electricity Act. **(Para 16)**

(C) Indian Electricity Act, 1910—Section 39—Use of artificial means—Burden of proof shifts on consumer to prove no dishonest abstraction of electricity energy.

The legal position is well settled that in the case of deployment of artificial means, the burden of proof shifts on the consumer to prove that through such deployment of artificial means there was no dishonest abstraction of electricity energy. **(Para 16)**

(D) Precedents—Word of caution against citing judgments even when there is only a parapharase which supports the case—Little difference in facts may make a lot of difference in precedential value.

Hence, in the final analysis, the facts of this case are unique to its own and hence cannot be equated with that of another case. **(Para 19)**

(E) Code of Criminal Procedure, 1973—Section 482—Quashing petition—*Bhajan Lal's* case has settled law on when criminal proceedings can be quashed—At stage of framing of issue—Roving inquiry not permissible—Trial Court to confine itself to material produced by investigating agency—Truthfulness and sufficiency of the same to only be considered during course of trial—No merit in instant petitions—Hence dismissed.

At that point, the trial court has to confine itself to the material produced on record by the investigating agency and it is only in a case where after taking into consideration the entire material placed on record by the prosecution, the trial court comes to the conclusion that no offence can be made out against the accused. The truthfulness and the sufficiency of the material thus produced on record can be tested by the trial court only during the course of trial and not at the stage of framing of the charges. **(Para 20)**

Important Issue Involved: Truth, veracity and effect of prosecution evidence not to be examined meticulously at time of framing of charge—Sifting of evidence permissible to find out whether prima facie view made out or not.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. S.K. Pruthi, Advocate.

FOR THE RESPONDENT : Mr. Sunil Fernandes, Advocate for BSES.

CASES REFERRED TO:

1. *Sarva Shramik Sanghatana (KV)* vs. *State of Maharashtra* (2008) 1 SCC 494.
2. *J.K Steelomelt (P) Ltd.* vs. *BSES* MANU/DE/7684/2007.
3. *Col. R.K Nayar (retd)* vs. *BSES* MANU/DE/7685/2007.
4. *Swaran Dhawan* vs. *State (NCT of Delhi)* 99 (2002) DLT 416.
5. *Devi Charan Gupta* vs. *State* 80(1999) DLT 801.
6. *Ramesh Chandra & Ors.* vs. *State Of Delhi* 68(1997) DLT 257.
7. *State of Haryana* vs. *Bhajan Lal* 1992 Supp (1) SCC 335.
8. *Jagarnath Singh* vs. *H. Krishna Murthy* AIR 1967 SCC 947.

RESULT: Petitions dismissed.

KAILASH GAMBHIR, J.

1. This common order shall dispose of three separate petitions bearing number Crl. M.C. No. 1499/2009, 1500/2009 and 1501/2009.

2. By these petitions filed under Article 226/227 of the Constitution of India read with Section 482 Cr.P.C., 3rd these three petitions assail a common order dated March, 2008 passed by the Court of Metropolitan Magistrate, Delhi and the order dated 9.2.2008 passed in revision by the Court of the learned Additional Sessions Judge.

3. The bone of controversy in all these three petitions is a joint inspection report dated 22.10.1997. The premises of the petitioners were inspected by the joint inspecting team and all the three petitioners were found indulging in Fraudulent Abstraction of Energy (FAE) and theft bills against all the petitioners were raised by the respondent. Since the petitioners failed to deposit the theft bills, a separate FIR against all the petitioners was registered, based on the complaint filed by the respondent, and after investigation the police filed a report under Section 173 Cr.P.C. Vide order dated 3rd March, 2008 the learned Magistrate directed framing of charges against the petitioners under first part of Section 39 of the

Indian Electricity Act, 1910. So far charge under Section 44 and Section 39 Part II of the Indian Electricity Act are concerned, the learned Magistrate found that no charge is made out against the petitioners. Feeling aggrieved with the said orders of the learned Magistrate, the petitioners preferred revision petitions u/s 397 Cr.P.C. and vide common order dated 9.2.2009 the same were dismissed. Feeling aggrieved with the same, the petitioners have filed the present petitions.

4. Mr. S.K. Purthi, counsel for the petitioners vehemently contended that in the joint inspection report, nowhere the joint inspection team has pointed out that there was any dishonest abstraction of the electricity energy through the deployment of any artificial means by these petitioners and in the absence of the same no charge under Section 39 Part I of the Indian Electricity Act, 1910 could be framed against the petitioners. Counsel further submitted that merely because the connected load was found to be more than the sanctioned load or that shunt capacitor was not installed, it would not lead to an inference that the petitioners were abstracting the electricity energy in a fraudulent manner. The contention of the counsel for the petitioners was that if the connected load is found more than the sanctioned load then the respondent can always charge the misuse charges, but the same cannot be held to be a theft of energy.

5. Drawing attention of this Court to the joint inspection report, counsel pointed out that so far K No. 131015/IP of registered consumer M/s Elite Sheltter Inds. is concerned, the inspection team gave the following findings:

> "The load report was prepared vide performa No. 16964 dated 22.10.97 and load found connected 72.634 KW on I.P. and 2.670 KW on IL meters. The M.T.D. report prepared vide performa No. 256/38306 dtd. 22.10.97. DESU's yellow paper seal No. 0021232 pasted on M.S. box was found tempered. The existing meters LS/Line against above K.Nos. were removed by zone as per the directions of SDM and XEN(D)NGL."

Mr. Pruthi stated that hence so far as the first connection is concerned, the only discrepancy found by the joint inspection team was that DESU's yellow paper seal No. 0021232 pasted on M.S. box was found tampered. Mr. Pruthi further stated that the same was only a paper seal and its tampering could not lead to commission of an ˇoffence

envisaged under Section 39 of the Indian Electricity Act.

6. So far the connection bearing K.No. O/O 7841851/IP with respect to registered consumer Shri Hari Ram is concerned, the team found as follows:

> "The load report was prepared vide Performa No. 16965 dt. 22.10.97 and load found connected 86.250 KW on I.P. and 9.140 KW on I.L. meters. The detailed M.T.D. report prepared vide Performa No. 256/38.307 dt. 22.10.97. The consumer has indulged in F.A.E. as the half seals of the meter 4D-30950, found fictitious. There is a cavity on L.H.S. in the above meter between load half seal service. Accordingly the existing meter and service line removed by the Zonal staff as per the directions of SDM/XEN(D)NGL."

The counsel submitted that the case of F.A.E. was made out against the petitioner in the above inspection report only on the ground that half seals of the meter 4D30950 were found fictitious and also because a cavity was found on L.H.S. (left half seal) in the meter between load half seal service. The contention of counsel for the petitioner was that even if half seal of the meter was found fictitious then the same by itself would not result in ascertaining illegal extraction of the energy from the said meter.

7. And as regards K. No. O/O – 1201133/IP registered consumer No. Shri Joginder Singh, the team made the following observations:

> "The consumer has indulged in F.A.E. as the consumer tempered the DESU's yellow paper seal No. 0033255 found pasted on M.S. Box. The half seal of the I.L. meter L.H.S. found missing scratches also found on reading digits/dial plate."

As regards the third connection, counsel stated that again the joint inspection team found the tampering in the yellow paper seal besides some scratches that were found on reading digits. The contention of counsel for the petitioner was that if the said report of the joint inspection team is taken as correct and as a gospel truth even then no case is made out against the petitioner under Section 39 of the Indian Electricity Act.

8. Based on the said report counsel submitted that in none of the

three cases, the joint inspection team pointed out any fraudulent abstraction of energy on the part of the petitioners by adopting any artificial means and, therefore, the case of the petitioners is squarely covered by the judgment of the Supreme Court in **Jagarnath Singh vs. H. Krishna Murthy** AIR 1967 SCC 947. The petitioner also placed reliance on the judgment of this Court in **Swaran Dhawan Vs. State (NCT of Delhi)** 99 (2002) DLT 416.

9. Mr. Sunil Fernandes, counsel for the respondent very fairly admitted to the contention of counsel for the petitioner that mere tampering of the seals would not make out the case of FAE to invoke Section 39 of the Indian Electricity Act. Counsel, however, submitted that as per the joint inspection report, it is not merely the tampering of the seals but there is more tangible evidence found by the team which shows that the petitioner was indulging in FAE. Mr. Fernandes further submitted that so far the first meter is concerned, no doubt the allegation against the petitioner is that a yellow paper seal was found tampered but so far the second and third meters are concerned, certainly there is enough evidence to show that the petitioner was found indulging in FAE as cavity on the left hand seal was found fictitious in the meter and through the said cavity the petitioner was in a position to stop the running of the disc. As regards the third meter, the counsel submitted that half seal (LHS) of the industrial load meter was found missing and scratches were also found on the dial plate and reading digits, which again establishes that the petitioner was indulging in FAE. Counsel further submitted that even the rivets were found tampered and it can be inferred from it that the petitioner was indulging in FAE. Counsel further submitted that the raiding team on inspection found that the seals of poly phase metres were found to be fictitious and did not tally with the authenticated sample monogram. It was also found by the Joint Raiding Team that MT Cone was found missing, shunt capacitor was found missing, cavity was observed at the left side of the meter and the meter disc stopped running on a load of 100W as well as on consumer load coupled with the fact that the connecting load was found to be on a much higher side than the sanctioned load. Counsel further submitted that all the three meters were inter connected and any tampering in one meter would effect all of the three meters. Counsel further submitted that these are the findings of the facts which can only be gone into during the course of the trial.

10. Supporting the order passed by both the courts below the counsel for the respondent further submitted that after careful consideration of the material placed on record by the prosecution, the learned trial court framed charges against the petitioners under Section 39 Part I of the Indian Electricity Act, 1910. Counsel further submitted that a bare perusal of the Joint Inspection Report, Inspection Report, Load Report, etc. and the statements given by the prosecution under Section 161 Cr.P.C. would show that the petitioners have committed an offence under the first Part of Section 39 of the Indian Electricity Act. Mr. Fernandes invited attention of this Court to para 7 of the impugned order passed by the learned Additional Session Judge wherein the learned Judge has referred to the order dated 3rd March, 2008 passed by the learned Magistrate highlighting various tangible acts committed by the petitioner, which includes that the meter cover was found missing, rivets were found tampered, one cavity was found on LHS between load seal and rivets, disc of the meter was found stopped on a load of 100 watt as well as consumption load. Counsel further submitted that the Revisional Court also upheld the order of the Ld. Magistrate framing charges against the petitioner under Part I of Section 39 of the Indian Electricity Act and therefore the concurrent view of both the courts below does not call for interference by this court while exercising jurisdiction under Article 227 of the Constitution of India.

11. I have heard learned counsel for the parties at considerable length and gone through the records.

12. It is a settled legal position that the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be examined meticulously at the stage of framing of charge. The sifting of evidence at the stage of framing of charges is permissible only for a limited purpose, to find out as to whether a prima facie view of the case is made out against the accused persons or not. It is also equally true that the court is not expected to frame the charges mechanically but has to exercise its judicial mind after giving careful consideration to the case set up by the prosecution.

13. Before adverting to the facts of the case at hand, it would be important to reproduce Section 39 of the Indian Electricity Act,1910 :

"39. Theft of energy. -Whoever dishonestly abstracts, consumes or uses any energy shall be punishable with imprisonment for a term, which may extend to three years, or with fine, which shall not be less than one thousand rupees, or with both: and if it is proved that any artificial means not authorised by the licensee exist for the abstraction, consumption or use of energy by the consumer, it shall be presumed, until the contrary is proved, that any abstraction, consumption or use of energy has been dishonestly caused by such consumer."

(emphasis supplied)

14. The main plank of argument taken by the counsel for the petitioners was that the inspection team failed to point out that there was any dishonest abstraction of the electricity energy through the deployment of any artificial means and in the absence of the same no charge u/s 39 Part I of the Indian Electricity Act, 1910 can be framed against the petitioners. It was also submitted that merely because the connected load was found to be more than the sanctioned load, that by itself would not lead to an inference that the petitioners were abstracting the electricity in a fraudulent manner and so for the load higher than the sanctioned load is concerned, the respondent can always charge the misuse charges.

15. Counsel for the respondent on the other hand, placed reliance on the observations of the joint inspection team which in their inspection found that the meter cover was found missing, half seals of the meter were found fictitious, disc meter was found stopped, MT Cone cover was found missing, rivets were found tampered, the genuineness of the seals could not be tallied due to the non-availability of sample monogram and no shunt capacitor was found installed on the IP connections. Based on the said joint inspection report, the counsel submitted that Part I of Section 39 of the Electricity Act is clearly attracted against the petitioners and the contentions raised by the counsel for the petitioners can only be examined by the trial court during the course of the trial.

16. The FIR in the present case against the petitioners was registered under Section 39/44 I.E. Act/379 IPC but the Ld. Magistrate, after careful consideration of the material on record did not find circumstances justifying framing of charge against the petitioner u/s 44 of the Indian Electricity Act. The court also found that the case of the prosecution is

well covered within the first part of Section 39 of I.E. Act. So far proving the dishonest intention on the part of the accused persons was concerned, the trial court felt that the same needs to be examined after evidence is led by both the parties. The Revisional Court also examined the contentions raised by the petitioners in detail and taking into consideration the totality of the facts came to the conclusion that there is a prima facie case to proceed against the petitioners based on the joint inspection report submitted by the raiding party. So far the contention of the counsel for the petitioner that the joint inspection team did not find deployment of any artificial means for the illegal abstraction of electricity energy so as to attract Section 39 of the Indian Electricity Act is concerned, the legal position is well settled that in the case of deployment of artificial means, the burden of proof shifts on the consumer to prove that through such deployment of artificial means there was no dishonest abstraction of electricity energy. The Ld. Magistrate was conscious of this fact as he clearly observed that the case is made out against the petitioner under Part I of Section 39 of the Indian Electricity Act and as regards to the question that whether there was a dishonest abstraction or not, the same can only be determined during the course of the trial.

17. A number of judgments were cited by the counsel for the petitioners to accentuate the argument that no case under section 39 of the Electricity Act against the petitioners can be made out. The judgment in **Swaran Dhawan Vs. State** (supra) has been rightly distinguished by the learned trial court, (the case cited by the counsel for the petitioner even before this court), wherein the court found that the disc of the meter was moving in right direction and no other artificial means were found but in the facts of the present case as per the inspection report ,the disc was found stopped on a load of 100 W as well as on the consumer load besides the fact that all the three connections were found interconnected and they were drawing connected load more than the sanctioned load. Counsel for the petitioner also placed reliance on the judgment of this court in the case of **Ramesh Chandra & Ors. vs. State Of Delhi** 68(1997) DLT 257 which also would not be of any help to the petitioner as the facts of the case at hand are different from this case as in Ramesh Chandra's case only half seals of the meters were found tampered whereas in the present case the meter disc was also found stopped alongwith the connected load being more than the sanctioned load. Also, the charge framed in that case was u/s 39/44 of the Electricity

Act, 1910 which requires the discovery of deployment of artificial means whereas in the present case the learned trial court being mindful of this fact has framed the charge only under part I of section 39 of the I.E Act. The judgment of this court in **Devi Charan Gupta vs. State** 80(1999) DLT 801 cited by the petitioner, relied upon the case of **Ramesh Chandra**(supra) and hence would also not aid the petitioner in any way. Yet another judgment cited by the counsel is of the Apex Court in **Jagarnath Singh vs. H.Krishna Murthy**(supra) which case was an appeal against conviction and hence the Hon'ble Supreme Court delved deep into the merits of the case , which is not the situation in the present case where we are at the stage of framing of charge. The counsel for the petitioner vehemently relied on the judgment of this court in the case of **Col. R.K Nayar (retd) vs. BSES** MANU/DE/7685/2007 where the petitioner had challenged the speaking order which made a case of DAE against the petitioner. The judgment would not be applicable to the present case as there the petitioner himself had written a letter to the DVB complaining about the tampering of the meter, a fact which the DVB did not deny and hence the petitioner could not have been nailed down for the tampering. Also, the fact that the inspection report was not properly made, the court was of the view that it was a sham as there were no signatures of the officials or of the petitioner on the report. Hence, the view of the court in that case cannot be squarely pasted in the present case. The judgment of this court cited by the petitioner in **J.K Steelomelt (P) Ltd. Vs. BSES** MANU/DE/7684/2007 is on the same lines and is hence not applicable to the facts of the present case as well.

18. At this juncture, this court would like to sound a word of caution with regard to the practice that has evolved, that of citing judgments even when there is only a paraphrase that supports a case. This court acknowledges the theory of precedents but is mindful of the admonition of Lord Denning which has become locus classicus :

> "Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all

decisive."

The Apex Court has also time and again reminded that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. It would be pertinent to refer here to the judgment of the Apex Court in **Sarva Shramik Sanghatana (KV) vs. State of Maharashtra** (2008) 1 SCC 494 where it cited the following passage from **Quinn v. Leathem** with approval:

> "… Now, before discussing **Allen v. Flood** and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but [are] governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

19. Hence, in the final analysis, the facts of this case are unique to its own and hence cannot be equated with that of another case.

20. The Apex court in the case of **State of Haryana vs. Bhajan Lal** 1992 Supp (1) SCC 335 settled the law as to when criminal proceedings can be quashed by the High Court under Section 482 CrPC. At the stage of framing of the charges roving and fishing inquiry is impermissible and a mini trial cannot be conducted at such a stage. At that point, the trial court has to confine itself to the material produced on record by the investigating agency and it is only in a case where after taking into consideration the entire material placed on record by the prosecution, the trial court comes to the conclusion that no offence can be made out against the accused. The truthfulness and the sufficiency of the material thus produced on record can be tested by the trial court only during the course of trial and not at the stage of framing of the charges. This court, therefore, does not find merit in the submission of the counsel for the

petitioner that even after prima facie taking into consideration the report of the joint inspection team, no offence under part 1 of Section 39 of the Indian Electricity Act can be made out against the petitioner.

21. In view of the aforesaid, I do not find any merit in the present petitions and this court is hesitant to give any view on the merits of the case as such a view would prejudice the case of either of the parties. However, taking into consideration the concurrent view of both the courts below and the prima facie material placed on record by the prosecution, I am of the considered view that there is no illegality or infirmity in the orders passed by both the courts below. The present petitions do not merit any intervention by this court while exercising jurisdiction under Article 227 of the Constitution of India.

22. Keeping in view the totality of these facts, this court does not find the present cases to be fit cases for quashing the charges at this stage.

23. Hence, in the light of the above discussion, the present petitions are dismissed.

ILR (2011) I DELHI 604
CS (OS)

PEAREY LAL BHAWAN ASSOCIATION ....PLAINTIFF

VERSUS

M/S. SATYA DEVELOPERS PVT. LTD. ....DEFENDANTS

(S. RAVINDRA BHAT, J.)

CS (OS) NO. : 1016/2008 DATE OF DECISION: 20.10.2010
I.A. NO. :6532/2008
CS (OS) NO. : 1018/2008 & 6537/2008

Service Tax Act, 1944—Section 83—Suit filed claiming declaratory and injunctive relief as to whether it or

the Defendant has to bear service tax liability in respect of the rents paid received by Plaintiff—Central government, with effect from June, 2007, levied service tax on the renting of immoveable property for business purposes—Plaintiff contended that the service tax, levied by the Government is not in the nature of tax on property but a levy on service and to be collected from the beneficiary of the service, i.e. the lessee—Defendant contends that the service tax is a tax on property, thus be borne by the lessor and if the lessor has any grievance in respect of the imposition of the service tax, it is open for the lessor to take up the matter with the appropriate forum with the Central Government—Held if the overall objective of the levy were to be taken into consideration, it is the service which is taxed and the levy is an indirect one, which necessarily means that the user/lessee has to bear it.

The controversy requiring decision by the Court is narrow and limited. It is whether the burden of service tax, levied on the service or facility of leasing (of the suit premises) should be borne by the lessor (i.e. the service provider) or the lessee (i.e. the defendant, user). There is no dispute that the parties did not visualize that this kind of a levy would be made in respect of lease, or rental of commercial properties; it is also undisputed that the levy was made effective in 2007, after the parties had entered into the agreement. The defendant denies liability to pay, submitting that the conditions in the contract clearly stipulate that all taxes, etc. are to be borne by the plaintiff landlord. It relies on principles of interpretation of contract, to submit that when parties visualize situations and provision for them, it is not open to either of them to roam outside the express terms, and try to discover obligations when none exist. **(Para 12)**

The Supreme Court, in **All India Federation of Tax Practitioners v. Union of India,** (2007) 7 SCC 527, speaking about the nature of service tax liability, held that:

"4. Service tax is an indirect tax levied on certain services provided by certain categories of person including companies, associations, firms, body of individuals, etc., Service sector contributes about 64% to GDP. "Services" constitute a heterogeneous spectrum of economic activities. Today services cover wide range of activities such as management, banking insurance, hospitality, consultancy, communication, administration, entertainment, research and development activities forming part of retailing sector. Service sector is today occupying the centre stage of the Indian economy. It has become an Industry by itself. In the contemporary world, development of service sector has become synonymous with the advancement of the economy. Economics hold the view that there is no distinction between the consumption of goods and consumption of services as both satisfy the human needs.

In late seventies, Government of India initiated an exercise to explore alternative revenue sources due to resource constraints. The primary sources of revenue are direct and indirect taxes. Central excise duty is a tax on the goods produced in India whereas customs duty is the tax on imports. The word "goods" has to be understood in contradistinction to the word "services". Customs and excise duty constitute two major sources of indirect taxes in India. Both are consumption specific in the sense that they do not constitute a charge on the business but on the client…"

Similarly, in **All India Taxpayers Welfare Association v. Union of India & Ors.,** (2006) (4) STR 18) it was held that:

"9. The provider of service is an assessee under s.65 of the Finance Act, 1994 and he has to collect service tax from the users of service as contemplated under ss. 12A and 12B of the central Excise Act. In this

context, it is necessary to refer that s. 12A of the Central Excise Act contemplates that notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold. Sec. 12B of the Central Excise Act contemplates that every person who has paid the duty of excise on any goods under this Act, shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods. Thus, the provider of service only being an assessee according to s. 65 of finance Act is to collect service-tax from the users of service as contemplated under ss. all bills the details including service tax which is payable by the users".

It would also be necessary to notice here that Sections 12-A of the Central Excise Act, which are also made applicable by virtue of Section 83 of the Service Tax Act, prescribe that the provider of goods (in this case, service) has the obligation to indicate the quantum of tax, on the goods or services, sold or offered, for sale. The said provisions are as follows:

"12A. PRICE OF GOODS TO INDICATE THE AMOUNT OF DUTY PAID THEREON.

Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold…." **(Para 13)**

It is true, that the contracts entered into between the parties

in this case, spoke of the plaintiff lessor's liability to pay municipal, local and other taxes, in at least two places. The Court, however, is not unmindful of the circumstance that service tax is a species of levy which the parties clearly did not envision, while entering into their arrangement. It is not denied that leasing, and renting premises was included as a "service" and made exigible to service tax, by an amendment; the rate of tax to be collected, is not denied. If the overall objective of the levy – as explained by the Supreme Court, were to be taken into consideration, it is the service which is taxed, and the levy is an indirect one, which necessarily means that the user has to bear it. The rationale why this logic has to be accepted is that the ultimate consumer has contact with the user; it is from them that the levy would eventually be realized, by including the amount of tax in the cost of the service (or goods). **(Para 14)**

It would be noteworthy to recollect Section 64-A of the Sale of Goods Act, 1930, which visualizes and provides for situations where levies of tax are imposed after the contract (for sale of goods) is entered into. The provision prescribes that:

"64-A. In contracts of sale, amount of increased or decreased taxes to be added or deducted. - (1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid where tax was chargeable at that time,

(a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may

add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and

(b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.

(2) The provisions of sub-section (1) apply to the following taxes, namely;

(a) any duty of customs or excise on goods;

(b) any tax on the sale or purchase of goods."

The above provision also clearly says that unless a different intention appears from the terms of the contract, in case of the imposition or increase in the tax after the making of a contract, the party shall be entitled to be paid such tax or such increase. Although there is no explicit provision to that effect, enabling lessors such as the plaintiff, to the service tax component, this Court is of the view that there is sufficient internal indication in the Act, through Section 83 read with Section 12-A and Section 12-B suggesting that the levy is an indirect tax, which can be collected from the user (in this case, the lessee). This issue, is therefore, answered in the plaintiff's favour, and against the defendant. **(Para 15)**

Important Issue Involved: In case of service Tax, it is the service which is to be taxed and the user of the service has to bear it.

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Simran Mehta, Advocate.

FOR THE RESPONDENT : Mr. Sachin Puri and Ms. Jyoti Ojha, Advocates.

CASES REFERRED TO:

1. *All India Federation of Tax Practitioners* vs. *Union of India,* (2007) 7 SCC 527.
2. *Thermal Contractors Association* vs. *Dir. Rajya Vidyut Utpadan Nigam Ltd.,* (2006) (4) STR 18.
3. *All India Taxpayers Welfare Association* vs. *Union of India & Ors.,* (2006) (4) STR 18.
4. *All India Tax Payers Welfare Assn.* vs. *Union of India* 2006 (4) S.T.R. 14.
5. *Vindhyachal Distilleries* vs. *State of M.P.* 2006 (3) STR, 723 (M.P.).
6. *Tamil Nadu Kalyana Mandapam Assn.* vs. *Union of India* reported in 2006 (3) S.T.R. 260 (S.C.).
7. *Thermal Contractors Assn.* vs. *Dir. Rajya Vidyut Utpadan Nigam Ltd.,* reported in 2006 (4) S.T.R.
8. *State of Gujarat (Commissioner of Sales Tax, Ahmedabad)* vs. *Variety Body Builders,* AIR 1976 SC 2108.
9. *Modi Co.* vs. *Union of India,* AIR 1969 SC 9.

RESULT: Suit Decreed.

S.RAVINDRA BHAT, J.

1. These two suits involve determination of common questions of fact and law; they were accordingly heard together. The plaintiff claims declaratory and injunctive relief as to whether it or the defendant has to bear service tax liability in respect of the rents paid (by the defendant) and received (by the plaintiff). In addition, money decrees for specified amounts, is claimed.

2. The Plaintiff Society is owner of the building Pearey Lal Bhawan located at 2, Bahadur Shah Zafar Marg, (hereafter called "the suit

premises") and the principal lessee of the land. The Plaintiff had entered into a registered Lease Deed on 09.10.2006 "first lease" with the Defendant, (hereafter "Satya Developers") in respect of an area measuring 2818 sq. ft. on the ground floor of the premises Pearey at Lal Bhawan. On 16th October, 2006, the parties entered into an Agreement for Maintenance of Common Services and Facilities in respect of the leased premises.

3. It is the common case of the parties that with effect from 1st June, 2007 the Central Government, by amending Chapter V of the Finance Act, 1994, levied service tax on the renting of immoveable property for business purposes. The plaintiff contends that the said levy tax is in the nature of an indirect tax, which has to be deposited by the service provider, after collecting the same from the user of the service. It is de-facto and de-jure a tax on the service and not a tax on the service provider. It contends that the burden of service tax has to be borne by the user of the service provider. The plaintiff relies on the Madras High Court judgment in **All India Tax Payers Welfare Assn. v. Union of India** reported in, 2006 (4) S.T.R. 14; **Vindhyachal Distilleries v. State of M.P.** a Madhya Pradesh High Court decision, reported in 2006 (3) STR, 723 (M.P.), **Tamil Nadu Kalyana Mandapam Assn. v. Union of India** reported in 2006 (3) S.T.R. 260 (S.C.), a decision of the Supreme Court, and **Thermal Contractors Assn. v. Dir. Rajya Vidyut Utpadan Nigam Ltd.,** reported in 2006 (4) S.T.R. (All.) a decision of the Allahabad High Court.

4. The plaintiff submits that service tax, levied by the Central Government, is not in the nature of a tax on property, as under the Constitutional scheme only the State Legislatures have the power to levy tax on property, but a levy on the service, and to be collected from the beneficiary of the service, such as the lessee Defendant, in this case. The suit states that in keeping with this position of law the bills of lease rental and maintenance charges sent to the Defendant from June, 2007, onwards included an amount on account of service tax and cess at the rate of 12.36% on the rent payable.

5. On 11th June, 2007, the Defendant by its letter repudiated the plaintiff's stand, and stated that it (the plaintiff) had to bear the incidence of service tax. The plaintiff denied this position, by its letter dated 26th June, 2007. The parties thereafter exchanged communication, whereby

they maintained their stated positions.

6. The plaintiff submits that the position in law being settled that service tax is a levy on the service, and having regard to the amendment to the Act, whereby leasing or renting properties, is deemed to be a service, the service consumer, who in this case, is the lessee has to bear the tax, as it is an indirect tax. The plaintiff relies on the definition clause, Section 64 (105), which defines "taxable service" as follows:

> "(zzzz) …..to any person, by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce.
>
> Explanation 1.—For the purposes of this sub-clause, "immovable property" includes—
>
> (i) building and part of a building, and the land appurtenant thereto;
>
> (ii) land incidental to the use of such building or part of a building;
>
> (iii) the common or shared areas and facilities relating thereto; and
>
> (iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate, but does not include
>
> (a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;
>
> (b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;
>
> (c) land used for educational, sports, circus, entertainment and parking purposes; and
>
> (d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.
>
> Explanation 2.—For the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business

or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce;…"

It is argued that by virtue of Section 83 of the Service Tax Act, read with Section 12-B of the Central Excise Act, there is a presumption that the levy has been collected from the user. Section 83 of the Service Tax Act reads as follows:

"83. Application of certain provisions of Act 1 of 1944:

The provisions of the following section of the Central Excise Act, 1944 (1 of 1944), as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise:

9C, 9D, 11B, 11BB, 11C,12 12A, 12B. 12C, 12D, 12E, 14, [14AA] *, 15, 33A, 35F, 35-FF to 35-O (both inclusive), 35Q, 36, 36A, 36B, 37A, 37B, 37C, 37D, [38A] * and 40."

Section 12-B of the Central Excise Act reads as follows:

"12B. PRESUMPTION THAT INCIDENCE OF DUTY HAS BEEN PASSED ON TO THE BUYER.

Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.."

7. Satya Developers, the defendant, denies the suit claim, and denies that service tax has to be paid after collecting the same form the user. The defendant denies that the judgments relied on by the plaintiff, apply to the facts of this case. It is contended that the ruling of the High Court of Allahabad in **Thermal Contractors Association v. Dir. Rajya Vidyut Utpadan Nigam Ltd.,** (2006) (4) STR 18 is contrary to the plaintiff's contention, which holds that –

"Therefore even though under the scheme of service tax from the scheme of service tax, the payer of service tax is entitled to realize service tax from its consumers, yet it all depends upon contracts entered into between the parties. It is always open to

the service provider to charge or not to charge the amount of service tax from its customers and to pay it from its own pocket. In the absence of any contract having been filed along with the petition we are not in position to dwelve into and adjudicate upon the issue raised by the learned senior counsel for the petitioner".

8. Satya Developers point out to the relevant clauses of the Lease Deed, particularly Clause 5 reads as under :

"5. That the lessor shall continue to pay all or any taxes, levies or charges imposed by the MCD, DDA, L&DO and or Government, Local Authority etc".

The defendant also relies on clause II (1), which reads as under :

"II (1) That the Lessor to pay all rates, taxes, ground rent, house-tax charges, fire-fighting tax, easements and outgoing charges imposed or payable to the MCD, L&DO, DDA or Government in respect of the demised premises payable by the Lessor and discharge all its obligations well in time".

It is argued that the parties clearly agreed that all taxes would be borne and paid by the Plaintiff thus the question of Defendant paying any taxes much less service tax does not arise.

9. The defendant contends that service tax, is a tax on property and if the plaintiff has any grievance in respect of the imposition of service tax it is open for the Plaintiff to take up the matter in the appropriate forum with the Central Government. The defendant argues that contractual clauses have to be plainly read by the Court, and no attempt to supply meanings other than the expressions used, and the context visualized, can be resorted to by the Court. Reliance is placed on the judgment of the Supreme Court in **State of Gujarat (Commissioner of Sales Tax, Ahmedabad) v. Variety Body Builders,** AIR 1976 SC 2108 where the Court held that:

"8. It is well settled that when there is a written contract it will be necessary for the court is find out therefrom the intention of the parties executing the particular contract. That intention has to be primarily gathered from the term and conditions which are agreed upon by the parties. We will therefore immediately turn

our attention to the agreement in question.

Modi Co. v. Union of India, AIR 1969 SC 9, another decision of the Supreme Court is also relied on by the defendants, to urge that the Court should only consider the intention of the parties, to be gathered from a reading of the agreement, or contract. The Court had held that:

> "8. In this connection it is well established that in construing such a contract. It is legitimate to take into account the surrounding circumstances for ascertaining the intention of the parties".

10. The parties had indicated that there would be no need to record evidence, and that the factual matrix was borne out by the pleadings and documents on the record. It was submitted that since the suit involved a decision on a pure question of law, the suit may be heard for final disposal. Accordingly counsel were heard on all the questions.

11. The following issues arise for consideration:

(1) On whom does the incidence of taxation fall, in this case, having regard to the materials and documents on the record;

(2) Is the plaintiff entitled to the money decree, as claimed, or any other relief: OPP

(3) Relief.

Issue No. 1

12. The controversy requiring decision by the Court is narrow and limited. It is whether the burden of service tax, levied on the service or facility of leasing (of the suit premises) should be borne by the lessor (i.e. the service provider) or the lessee (i.e. the defendant, user). There is no dispute that the parties did not visualize that this kind of a levy would be made in respect of lease, or rental of commercial properties; it is also undisputed that the levy was made effective in 2007, after the parties had entered into the agreement. The defendant denies liability to pay, submitting that the conditions in the contract clearly stipulate that all taxes, etc. are to be borne by the plaintiff landlord. It relies on principles of interpretation of contract, to submit that when parties visualize situations and provision for them, it is not open to either of them to roam

outside the express terms, and try to discover obligations when none exist.

13. The Supreme Court, in **All India Federation of Tax Practitioners v. Union of India,** (2007) 7 SCC 527, speaking about the nature of service tax liability, held that:

> "4. Service tax is an indirect tax levied on certain services provided by certain categories of person including companies, associations, firms, body of individuals, etc., Service sector contributes about 64% to GDP. "Services" constitute a heterogeneous spectrum of economic activities. Today services cover wide range of activities such as management, banking insurance, hospitality, consultancy, communication, administration, entertainment, research and development activities forming part of retailing sector. Service sector is today occupying the centre stage of the Indian economy. It has become an Industry by itself. In the contemporary world, development of service sector has become synonymous with the advancement of the economy. Economics hold the view that there is no distinction between the consumption of goods and consumption of services as both satisfy the human needs.
>
> In late seventies, Government of India initiated an exercise to explore alternative revenue sources due to resource constraints. The primary sources of revenue are direct and indirect taxes. Central excise duty is a tax on the goods produced in India whereas customs duty is the tax on imports. The word "goods" has to be understood in contradistinction to the word "services". Customs and excise duty constitute two major sources of indirect taxes in India. Both are consumption specific in the sense that they do not constitute a charge on the business but on the client…"

Similarly, in **All India Taxpayers Welfare Association v. Union of India & Ors.,** (2006) (4) STR 18) it was held that:

> "9. The provider of service is an assessee under s.65 of the Finance Act, 1994 and he has to collect service tax from the users of service as contemplated under ss. 12A and 12B of the central Excise Act. In this context, it is necessary to refer that s. 12A of the Central Excise Act contemplates that notwithstanding

anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold. Sec. 12B of the Central Excise Act contemplates that every person who has paid the duty of excise on any goods under this Act, shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods. Thus, the provider of service only being an assessee according to s. 65 of finance Act is to collect service-tax from the users of service as contemplated under ss. all bills the details including service tax which is payable by the users".

It would also be necessary to notice here that Sections 12-A of the Central Excise Act, which are also made applicable by virtue of Section 83 of the Service Tax Act, prescribe that the provider of goods (in this case, service) has the obligation to indicate the quantum of tax, on the goods or services, sold or offered, for sale. The said provisions are as follows:

"12A. PRICE OF GOODS TO INDICATE THE AMOUNT OF DUTY PAID THEREON.

Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold…."

14. It is true, that the contracts entered into between the parties in this case, spoke of the plaintiff lessor's liability to pay municipal, local and other taxes, in at least two places. The Court, however, is not unmindful of the circumstance that service tax is a species of levy which the parties clearly did not envision, while entering into their arrangement. It is not denied that leasing, and renting premises was included as a "service" and made exigible to service tax, by an amendment; the rate of

tax to be collected, is not denied. If the overall objective of the levy – as explained by the Supreme Court, were to be taken into consideration, it is the service which is taxed, and the levy is an indirect one, which necessarily means that the user has to bear it. The rationale why this logic has to be accepted is that the ultimate consumer has contact with the user; it is from them that the levy would eventually be realized, by including the amount of tax in the cost of the service (or goods).

15. It would be noteworthy to recollect Section 64-A of the Sale of Goods Act, 1930, which visualizes and provides for situations where levies of tax are imposed after the contract (for sale of goods) is entered into. The provision prescribes that:

"64-A. In contracts of sale, amount of increased or decreased taxes to be added or deducted. -(1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid where tax was chargeable at that time,

(a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and

(b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.

(2) The provisions of sub-section (1) apply to the following taxes, namely;

(a) any duty of customs or excise on goods;

(b) any tax on the sale or purchase of goods."

The above provision also clearly says that unless a different intention appears from the terms of the contract, in case of the imposition or increase in the tax after the making of a contract, the party shall be entitled to be paid such tax or such increase. Although there is no explicit provision to that effect, enabling lessors such as the plaintiff, to the service tax component, this Court is of the view that there is sufficient internal indication in the Act, through Section 83 read with Section 12-A and Section 12-B suggesting that the levy is an indirect tax, which can be collected from the user (in this case, the lessee). This issue, is therefore, answered in the plaintiff's favour, and against the defendant.

Issue No. 2

16. The plaintiff seeks a decree for declaration in both the suits, and consequential injunction, to the effect that the extent of service tax liability has to be borne by Satya Developers; money decrees are also sought; in Suit No. 1016/2008, a decree for Rs. 3,55, 270/-is claimed; in Suit No. 1018/2008, a decree for Rs. 24,720/-is claimed. The plaintiff has placed on record documents showing that these amounts were paid towards service tax liability for the period 01.06.2007 to 31.03.2008, in respect of the two agreements (i.e. for lease and Maintenance) dated 09.10.2006 ˇand 16.10.2006. The levy had, apparently been held to be Unconstitutional during the pendency of the suit. However, parties had stated that the judgment is now pending consideration in appeal, and the present judgment may determine the liability, which would be subject to the final outcome of the appeal.

17. In view of the findings on issue No. 1, this Court is of the opinion that the plaintiff is entitled the declaration and injunctions claimed against the defendant, to the effect that the latter is liable to pay and refund the service tax liability. The plaintiff is also entitled to the amounts claimed. The second issue is answered accordingly.

Issue No. 3:

18. In view of the findings on Issue Nos. 1 and 2, the suits are entitled to succeed. They are, accordingly decreed in terms of the reliefs sought by the plaintiffs. It is clarified that this is subject to the levy of

service tax being ultimately upheld, finally. In the circumstances, the plaintiff is entitled to costs, in both the suits.

ILR (2011) I DELHI 620
RSA

DALJIT SINGH ....APPELLANT

VERSUS

NEW DELHI MUNICIPAL CORPORATION ....RESPONDENT

(INDERMEET KAUR, J.)

RSA NO. : 67/1991 & CM NO. : 1553/1991 **DATE OF DECISION: 27.10.2010**

Civil Procedure Code, 1908—Sections 96, 100—Second appeal—Suit for perpetual injunction against the defendant—Demolition notice dated 14.09.1978 is bad in law—Defendants be restrained from demolishing his construction shown in site plan—Construction raised sometime in April 1997—Trial Judge and First Appellant Court dismissed the suit on the ground that under the provisions of Section 225 of Punjab Municipal Act, there is bar to the jurisdiction of Civil Court—Second appeal—Appellant urged that the impugned judgment has not discussed the evidence of the plaintiff—Held—The first appeal court is bound to consider the evidence adduced before the Trial Judge, both oral and documentary; it must appreciate and draw its own conclusion based on a reasoned finding—In the instant case the impugned judgment has not examined the evidence led by the plaintiff—A party has a right to be heard both on question of facts as also on law before the first Appeal Court who is bound

to address itself on all such issues—Since this mandate had not been adhered to, it is a fit case where the matter is to be remanded back to the first Appeal Court to decide the case afresh after discussing the evidence and giving a reasoned order.

There is no doubt to the proposition that a litigant has a valuable right of appeal which he can agitate by way of first ˇappeal; the first appeal Court is bound to consider the evidence adduced before the Trial Judge both oral and documentary; it must appreciate and draw its own conclusion based on a reasoned finding. In the instant case as is apparent and evident from the record, the impugned judgment has not examined the evidence led by the plaintiff. A party has a right to be heard both on question of facts as also on law before the first Appeal Court who is bound to address itself on all such issues. Since this mandate had not been adhered to, it is a fit case where the matter is to be remanded back to the first Appeal Court to decide the case afresh after discussing the evidence and giving a reasoned order. **(Para 7)**

Important Issue Involved: First Appellate Court is bound to consider the evidence both oral and documentary, appreciate the same and write own conclusion based on a reasoned finding.

[Vi Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. Rajesh Gupta, Mr. Harpreet Singh & Mr. Sumit R. Sharma, Advocate.

FOR THE RESPONDENT : Mr. Ashutosh Lohia, Advocate.

CASE REFERRED TO:

1. *Rattan Dev* vs. *Pasam Devi* 2002 7 SCC 441.

RESULT: Matter remanded back.

INDERMEET KAUR, J.(Oral)

1. This second appeal has impugned the judgment and decree dated 21.8.1991 which had reversed the finding of the Trial Judge dated 17.5.1983 thereby dismissing the suit of the plaintiff Daljit Singh.

2. Daljit Singh had filed a suit for perpetual injunction against the defendant New Delhi Municipal Committee (NDMC) stating that the impugned demolition notice dated 14.9.1978 served upon him on 03.10.1978 was bad in law and the defendant be restrained from demolishing his construction i.e. as shown in the site plan of flat no.74-G, Sujan Singh Park, New Delhi. Contention of the plaintiff was that he had raised this construction sometimes in April 1977.

3. Trial Judge and the impugned judgment had dismissed the suit of the plaintiff on the ground that under the provisions of Section 225 of Punjab Municipal Act there is a bar to the jurisdiction of the Civil Court; the Civil Court could not have entertained the suit. The suit was accordingly dismissed.

4. This is a second appeal. Substantial question of law had been formulated on 26.10.2010, it inter alia reads as follows:

> "Whether the findings in the impugned judgment dated 28.8.19 qua the notice dated 31.8.1978 and 14.9.1978 is a perverse finding, if so, its effect?"

5. Counsel for the appellant has urged that the impugned judgment has not discussed the evidence of the plaintiff; it is pointed out that three witnesses have been examined on behalf of the plaintiff but there is not whisper of their testimony either oral or documentary proved through them which has been gone into by the first Appellate Court; a valuable right has been lost. Attention has been drawn to the impugned judgment.

6. Perusal of the same shows that this contention of the learned counsel for the appellant is borne out from the record. The impugned judgment has appreciated the testimony of the four witnesses examined on behalf of the defendant as also their documentary evidence but there is no mention, let alone a discussion about the evidence adduced by the plaintiff. Record shows that three witnesses had been examined by the plaintiff. Documents had also been proved. None of the oral or

documentary evidence has been examined by the first appeal Court.

7. There is no doubt to the proposition that a litigant has a valuable right of appeal which he can agitate by way of first appeal; the first appeal Court is bound to consider the evidence adduced before the Trial Judge both oral and documentary; it must appreciate and draw its own conclusion based on a reasoned finding. In the instant case as is apparent and evident from the record, the impugned judgment has not examined the evidence led by the plaintiff. A party has a right to be heard both on question of facts as also on law before the first Appeal Court who is bound to address itself on all such issues. Since this mandate had not been adhered to, it is a fit case where the matter is to be remanded back to the first Appeal Court to decide the case afresh after discussing the evidence and giving a reasoned order.

8. In 2002 7 SCC 441 **Rattan Dev Vs. Pasam Devi** Supreme Court had held that where the First Appeal Court had failed to consider the valuable material on record, it amounted to a failure on its part to discharge its judicial obligation having a substantial impact on the rights of the parties raising a substantial question of law.

9. The matter is accordingly remanded back to the District Judge, Delhi, who will assign it to the concerned first Appeal Court. Parties to appear before Ld. District & Sessions Judge, Tis Hazari Courts, Delhi on 09.11.2010 at 10.00 AM.

10. Records be also sent back.

11. Appeal as also the pending application is disposed of.

ILR (2011) I DELHI 624
CS (OS)

MRS. SARABJIT SINGH .....PLAINTIFF

VERSUS

MR. GURINDER SINGH SANDHU & BROS. .....DEFENDANT

(V.K. SHALI, J.)

CS (OS) NO. : 642/1993 DATE OF DECISION: 09.11.2010

Indian Evidence Act, 1872—Section 137—Suit for partition—Lt Col. Gurupuran Singh, father of the plaintiff and defendants no. 1 to 4 died—Plaintiff claimed 1/5th in the estate of Lt. Col. Gurupuran Singh, on the basis of the Will dated 04.03.1992—Defendant no.3 had not specifically denied the execution of the Will dated 04.03.1992—She took the stand that high agricultural land was given to her by the deceased father, vide Will dated 29.01.1982—Defendant no. 4 also admitted the execution of Will dated 04.03.1992—Defendant no.1 denied the execution of both the Wills—Affidavit of PW1 tendered for examination—Witness was to be cross examined—Controversy arose, as to who is to cross examine the said witness first—Held—The *Hiralal's* case has rightly classified the defendants into three categories—Firstly those who are supporting the case of the plaintiff fully, secondly those who are partially supporting the case of the plaintiff and thirdly those who are not at all supporting the case of the plaintiff. The classification of the defendants in the aforesaid three categories must regulate the cross examination of the plaintiff's witness. Accordingly, so far as the facts of the present case are concerned, the defendants no.3 & 4 are supporting the case of the plaintiff both partially and fully respectively and therefore they must first cross

examine the witness of the plaintiff first rather than the defendant no.1 who is contesting the claim of the plaintiff.

I have gone through the aforesaid three authorities and I find myself to be in agreement with the reasoning given by the Bombay High Court as well as the Gujarat High Court, so far as the order in which the cross examination of the plaintiff's witnesses is to be conducted. The reason for such an order is not far to seek. The **Hiralal's** case has rightly classified the defendants into three categories – firstly those who are supporting the case of the plaintiff fully, secondly those who are partially supporting the case of the plaintiff and thirdly those who are not at all supporting the case of the plaintiff. The classification of the defendants in the aforesaid three categories must regulate the cross examination of the plaintiff's witness. It may be pertinent here to mention that Section 137 of the Evidence Act also lays down that when a witness enters into a witness box, he will be first subjected to examination-in-chief, then cross examination and thereafter re-examination. **(Para 11)**

The Evidence Act clearly lays down that the scope of cross examination is much wider as it permits a party to cross-examine the witness even regarding his character in order to impeach his credibility. Leading questions which are suggestive of answer can also be asked to the witness. Therefore, in such a contingency where the scope of cross examination is much wider and gives better leeway to the defendant, it cannot be permitted by a party who either fully or partially supports the case of the plaintiff to cross examine witness after the contesting party has done. If this is permitted to be done, then it will greatly prejudice the rights of the parties who are contesting the claim of the plaintiff. I therefore find myself in agreement with the judgment of **Hiralal's** case that the party which supports the case of the plaintiff partially or fully must cross examine the witness of the plaintiff first. Accordingly, so far as the facts of the present case are concerned, the defendants No.3 and 4 are

supporting the case of the plaintiff both partially and fully respectively and therefore they must first cross examine the witness of the plaintiff first rather than the defendant No.1 who is contesting the claim of the plaintiff. I accordingly allow the contention of the defendant No.1 directing defendant No.3 and other defendants to cross examine the plaintiff's witness in the first instance before the defendant No.1 undertakes the cross examination. However, expression of any opinion hereinbefore shall not be deemed to be an expression on the merits of the case. **(Para 12)**

Important Issue Involved: The witness of the plaintiff shall be cross examined firstly by the defendant, who supports the plaintiff's case, secondly, who partially supports the case of the plaintiff and thirdly, who does not support the case of the plaintiff.

[Vi Ba]

APPEARANCES:

FOR THE PLAINTIFF : Mr. S.K. Sharma, Advocate.

FOR THE DEFENDANT : Mr. J.K. Seth, Sr. Adv. with Ms. Shalini Kapoor, Advocate for defendant No.1. Mr. I.S. Alag Advocate for defendants No.2, 3 & 5.

CASES REFERRED TO:

1. *M. Hymavathi & Anr.* vs. *M. Koteswararao & Ors.* AIR 2006 AP 395.
2. *Sunil Chhatrapal Kedar* vs. *Y.S. Bagde* 2004 MHLJ 4 620.
3. *Shah Hiralal Himatlal & Ors.* vs. *M.G. Pathak & Ors.* AIR 1964 Gujarat 26.

RESULT: Petition allowed.

V.K. SHALI, J.

1. 17 years have gone by and still the Court is faced with the question as to which of the defendants should cross examine the PW-1, the only witness whose examination-in-chief has been completed. In order to appreciate the point in issue, it is necessary to give brief facts of the case.

2. A suit for partition came to be filed by the plaintiff against her brother (D-1), sisters (D-2 to 4) and husband of defendant No.2 (D-5). The centre of controversy was the properties left by one Lt. Col. Gurpuran Singh, father of the plaintiff and the defendants No.1 to 4. He is stated to have died at Delhi on 13th April, 1992. From the list of properties, Late Lt. Col. Gurpuran Singh seemed to be a man of means as he even owned a Rolls Royce car. The claim of the plaintiff was that she has 1/5th share in the estate of the Late Lt. Col. Gurpuran Singh on the basis of the Will dated 4th March, 1992 purported to have been made by him.

3. The defendant No.3 filed her written statement and had not specifically denied the execution of the Will dated 4th March, 1992 purported to have been made by her father. However, she took the stand that one of the properties, which was huge agricultural land, was given to her by the deceased father vide Will dated 29th January, 1982. Thus, the defendant No.3 had partially supported the case of the plaintiff except that she wanted the agricultural land be taken away from the arena of controversy.

4. The defendant No.4 has also admitted the Will dated 4th March, 1992 as the basis of partition.

5. The defendant No.1 has denied the execution of both the Wills dated 29th January, 1982 in favour of defendant No.3 or the Will dated 4th March, 1992 on the basis of which the plaintiff laid her claim. It may be pertinent here to mention that defendant No.1 is the real brother of the plaintiff. The suit itself was filed in the year 1993 and issues have been framed on 24th July, 2008. Affidavit of PW-1, the sole witness has been tendered in examination and the witness was to be cross examined by the defendants at which stage the controversy arose as to who is to cross examine the said witness first.

6. The case of the defendant No.1 was that the defendant No.3 and other defendants who are supporting the case of the plaintiff either fully

or partially must be directed to cross examine the witness first and thereafter the defendant No.1 will cross examine the said witness. Sh. J.K.Seth, learned senior counsel on behalf of the defendant No.1 had contended that in case the aforesaid order is not followed, it would only give an opportunity to the defendants No.2 to 4 to fill up the lacunae which may be brought about by the cross examination of defendant No.1 and thus would prejudicially affect the case of the defendant No.1 whose interest is totally adverse to that of the plaintiff. The learned senior counsel in support of his contention has relied on judgments titled **Shah Hiralal Himatlal & Ors. Vs. M.G. Pathak & Ors.** AIR 1964 Gujarat 26, **M. Hymavathi & Anr. Vs. M. Koteswararao & Ors.** AIR 2006 AP 395 and **Sunil Chhatrapal Kedar Vs. Y.S. Bagde** 2004 MHLJ 4 620.

7. The aforesaid three authorities which have been cited by the learned senior counsel essentially support the contention that the defendant who is supporting the case of the plaintiff partially or fully must be directed to cross examine the witness of the plaintiff first in comparison to a defendant who is contesting the claim of the plaintiff.

8. Mr. Alag, learned counsel for defendant No.3 has refuted this contention of the learned senior counsel by contending that the defendant No.3 is not supporting the case of the plaintiff either partially or fully which may entail passing of a direction to defendant No.3 to cross examine the plaintiff first in comparison to the defendant No.1. The learned counsel had drawn the attention of the Court to his written statement in order to show that one of the properties in respect of which partition is sought by the plaintiff is an agricultural land situated in Punjab, while as the defendant No.3 is contesting the claim of the plaintiff with regard to this property on the ground that the said property has already been given by the late father of the parties to the defendant No.3 and she has also mutated the same in the Revenue record in her own name. The learned counsel contended that by such an averment, having been made by defendant No.3 in written statement, it could not be said that defendant No.3 is either admitting the claim of the plaintiff based on a Will of 1992 either partially or fully and therefore the order of cross examination must follow the same order in which they are shown as defendants.

9. I have heard Mr. S.K. Sharma, the learned counsel for the plaintiff, Mr. J.K. Seth, learned senior counsel for defendant No.1 as well as the learned counsel, Mr. I.S. Alag on behalf of the defendant No.3.

I have also gone through the record as well as the judgments.

10. None of the parties has cited any judgment of the Apex Court on the point which is raised in the instant case, nor have I been able to lay my hand on any such authority. Under these circumstances, one has to fall back on the judgments which have been cited by the learned counsel for the plaintiff. Out of the three judgments which have been cited by the learned counsel for defendant No.1, the judgment in **Shah Hiralal Himatlal's** case (supra) is passed by the learned Single Judge of the Gujarat High Court way back in 1964 wherein it has been held as under :

> "(4) So far as the defendants go, the question which of the defendants should begin has not been dealt with in Order 18, Civil Procedure Code. But on general principle, if any of the defendants supports the plaintiff in whole or in part, then he should address the Court and lead his evidence first before the other defendants who do not support wholly or in part the plaintiff's case. The order in which defendants lead evidence becomes important only when some of them support the case of the plaintiffs in whole or in part while the others do not. If all the defendants completely oppose the plaintiff's case, then the question of order of leading evidence amongst the defendants is immaterial. It is only when the defendants are divided into two groups, one group consisting of the defendants supporting the plaintiff's case in part and the other group consisting of defendants, who do not support the plaintiff's case in any part that the question of order of leading evidence becomes important. In such cases among defendants the order of leading evidence should be as follows :
>
> (1) Those defendants who fully support the case of the plaintiff.
>
> (2) Those defendants who partly support the case of the plaintiff.
>
> (3) Those defendants who do not support the case of the plaintiff in any part."

A perusal of the aforesaid para of the Judgment would show that the said judgment has categorized the defendants into three essential categories – one who fully support the case of the plaintiff, secondly the defendants who partially support the case of the plaintiff and thirdly those who do not support the case of the plaintiff or any part. It has been held that they will cross examine the witnesses in the same order. The said judgment in the case of **Shah Hiralal Himatlal's** case (supra) has been followed by Andhra Pradesh High Court in **Hymavathi's** case (supra). In 2004, **Sunil Chhatrapal's** case (supra), the issue was examined by the Bombay High Court again where the reference was made to the two judgments of Gujarat and the Andhra Pradesh High Courts and after discussing both these judgments, the learned Single Judge of Bombay High Court has also arrived at the same conclusion that the party who is fully or partially supporting the case of the plaintiff must cross examine the witness of the plaintiff in the first instance as against the party who is contesting the claim of the plaintiff. Reference has also been made to Section 137 of the Evidence Act which lays down that when the witness is examined by way of examination-in-chief, then he will be cross examined by the „adverse. party. It has been concluded by the Bombay High Court that a party who is supporting the case of the plaintiff either fully or partially cannot be said to be an "adverse" party in the same sense in which a party is contesting the claim of the plaintiff. It has been observed that in case this order is not followed for the purpose of cross examination, then any lacunae which is left in the cross examination by the contesting party will be filled up, in the cross examination conducted by the defendants, who are partially or fully supporting the case of the plaintiff. This will be prejudicial to the interest of the contesting party and therefore it has supported the view of Gujarat High Court as well as the Andhra Pradesh High Court.

11. I have gone through the aforesaid three authorities and I find myself to be in agreement with the reasoning given by the Bombay High Court as well as the Gujarat High Court, so far as the order in which the cross examination of the plaintiff's witnesses is to be conducted. The reason for such an order is not far to seek. The **Hiralal's** case has rightly classified the defendants into three categories – firstly those who are supporting the case of the plaintiff fully, secondly those who are partially supporting the case of the plaintiff and thirdly those who are not at all supporting the case of the plaintiff. The classification of ˇthe

defendants in the aforesaid three categories must regulate the cross examination of the plaintiff's witness. It may be pertinent here to mention that Section 137 of the Evidence Act also lays down that when a witness enters into a witness box, he will be first subjected to examination-in-chief, then cross examination and thereafter re-examination.

12. The Evidence Act clearly lays down that the scope of cross examination is much wider as it permits a party to cross-examine the witness even regarding his character in order to impeach his credibility. Leading questions which are suggestive of answer can also be asked to the witness. Therefore, in such a contingency where the scope of cross examination is much wider and gives better leeway to the defendant, it cannot be permitted by a party who either fully or partially supports the case of the plaintiff to cross examine witness after the contesting party has done. If this is permitted to be done, then it will greatly prejudice the rights of the parties who are contesting the claim of the plaintiff. I therefore find myself in agreement with the judgment of **Hiralal's** case that the party which supports the case of the plaintiff partially or fully must cross examine the witness of the plaintiff first. Accordingly, so far as the facts of the present case are concerned, the defendants No.3 and 4 are supporting the case of the plaintiff both partially and fully respectively and therefore they must first cross examine the witness of the plaintiff first rather than the defendant No.1 who is contesting the claim of the plaintiff. I accordingly allow the contention of the defendant No.1 directing defendant No.3 and other defendants to cross examine the plaintiff's witness in the first instance before the defendant No.1 undertakes the cross examination. However, expression of any opinion hereinbefore shall not be deemed to be an expression on the merits of the case.

CS(OS) No.642/1993

List the matter before learned Joint Registrar on 01.12.2010 for fixing up dates of trial.

ILR (2011) I DELHI 632
CS (OS)

SURESH CHAND MATHUR ....PLAINTIFF

VERSUS

HARISH CHAND MATHUR ....DEFENDANT

(V.K. JAIN, J.)

CS (OS) NO. : 1818/2001 DATE OF DECISION: 09.11.2010

(A) Indian Succession Act, 1925—Section 63, 70—Suit for declaration—Property No. B-4/196, Safdarjung Enclave, New Delhi, was owned by late Smt. Shakuntala Devi Mathur, mother of the parties—She expired on 05th November, 1998, leaving a registered Will dated 17th September, 1981—It is alleged that Testator changed her mind in November, 1997, by writing a letter, addressed to her children, on a non-judicial stamp paper, annexing therewith some pieces of paper written in her own handwriting and containing her real intention—This document constituted a deemed codicil to the Will dated 17th September, 1981—Defendant took the objection that since the alleged deemed codicil has not been attested by any witness, it does not comply with the mandatory requirement of law—Held—The same rule of execution apply to a codicil, which apply to a Will to which the codicil relate and the evidence adduced in proof of execution of codicil must satisfy the same requirements as apply to the proof of execution of a Will—Since none of the documents out of Exs. PW 4/1 to PW4/7 has been executed in the manner, prescribed in Section 63(C) of the Indian Succession Act, they cannot be considered as a valid Will or codicil to the Will dated 17th September, 1981.

In **Bhagat Ram And Another vs. Suresh and Ors.:** (2003) 12 SCC 35, Supreme Court observed that since by fiction of law, the codicil, though it may have been ˇexecuted separately and at a place or time different from the Will, forms part of the related Will, it would be anomalous to accept the contention that though a Will is required to be executed and proved as per the rules contained in the Succession Act and the Evidence Act, the document explaining, altering or adding to the Will and forming part of the Will is not required to be executed or proved in the same manner. In this regard, the Court made a reference to Section 70 of the Act which expressly provides that no unprivileged Will or codicil, nor any part thereof, shall be revoked otherwise than by marriage or by another Will or codicil or by some writing, declaring an intention to revoke the same and executed in the manner in which an unprivileged Will is required to be executed. The Court expressly held that the same rule of execution, therefore, apply to a codicil, which apply to a Will to which the codicil relate and the evidence adduced in proof of execution of a codicil must satisfy the same requirements as apply to the proof of execution of a Will. **(Para 11)**

In **Lalitaben Jayantilal Popat Vs. Pragnaben Jamnadas Kataria:** AIR 2009 SC 1389, after referring to provisions of Section 63 of the Indian Succession Act, Supreme Court held that one of the requirements of due execution of a Will is its attestation by two more witnesses which is mandatory. No judgment to the contrary has been brought to my notice by the learned counsel for the plaintiff. Since none of the documents out of Ex.PW-4/1 to PW-4/7 has been executed in the manner, prescribed in Section 63(C) of the Indian Succession Act, they cannot be considered as a valid Will or codicil to the Will dated 17th September, 1981. The issue is decided against the plaintiffs and in favour of defendant No.1. **(Para 12)**

(B) Indian Succession Act, 1925—Section 138, 131—Suit for declaration—Property No. B-4/196, Sarfdarjung Enclave, New Delhi, was owned by late Smt. Shakuntala Devi Mathur, mother of the parties—She expired on 05th November, 1998, leaving a registered Will dated 17th September, 1981—It is alleged that restrictions contained in the Will on transfer of share is void and invalid Under Section 138 of the Indian Succession Act—Held—The will executed by the Testator in this case is a conditional bequest—A conditional bequest does not come within the purview of Section 138 of Indian Succession Act, which applies to altogether different situation where there is an absolute bequest of the legatee, but his right to deal with the property as its absolute owner is sought to be curtailed by the Testator—In fact, Section 131 of the Indian Succession Act is the provision which applies to the bequest made by Late Smt. Shakuntala Devi—This Section deals with a defeasance cause of course, the defeasance must be in favour of somebody in existence at the time the bequest is made—The restrictions in Will are valid.

A conditional bequest does not come within the purview of Section 138 of Indian Succession Act which applies to an altogether different situation where there is an absolute bequest of the legatee, but his right to deal with the property as its absolute owner is sought to be curtailed by the Testator. In fact, Section 131 of Indian Succession Act is the provision which applies to the bequest made by late Smt. Shakuntala Devi. This provision, to the extent it is relevant, reads as under:-

> **"Bequest over, conditional upon happening or not happening of specified uncertain event.** (1) A bequest be made to any person with the condition superadded that, in case a specified uncertain event shall happen, the thing bequeathed shall go to another person, or that in case a specified uncertain event shall not happen, the thing bequeathed shall go over

to another person.

Illustration

(ii) An estate is bequeathed to A with a proviso that if A shall dispute the competency of the testator to make a will, the estate shall go to B. A disputes the competency of the testator to make a will. The estate goes to B."

This section deals with a defeasance clause, whereas Section 138 of the Act deals with a repugnant clause. The distinction behind a repugnant provision and a defeasance provision is that where the intention of the Testator is to maintain an absolute estate conferred on the legatee, but he simply adds some restriction, in derogation of incidents of such absolute ownership, such restrictive clause would be repugnant to the absolute grant and, therefore void, but, where the grant of an absolute estate is expressly or impliedly made subject to defeasance o the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over is taken to be valid and operative. Section 138 thus provides for divestment of the estate which has already vested, but is subject to divested by some act or event at an after period. Of course, the defeasance must be in favour of somebody in existence at the time the bequest is made. **(Para 16)**

Important Issue Involved: (A) The same rule of Execution apply to codicil as to a Will.

(B) Conditional bequest is recognized by law.

[Vi Ba]

CASES REFERRED TO:

1. *Lalitaben Jayantilal Popat* vs. *Pragnaben Jamnadas Kataria:* AIR 2009 SC 1389.
2. *Bhagat Ram And Another* vs. *Suresh and Ors.:* (2003) 12 SCC 35.
3. *Smt. Rajrani Sehgal* vs. *Dr. Parshottam Lal and others* AIR 1992, Delhi, 134.
4. *K. Babu Rao* vs. *Datta Rao:* AIR 1992 Kant 290.
5. *Enasu* vs. *Antony* AIR 1969 Ker 207.
6. *Ramchandra* vs. *Anasuyabai:* AIR 1969 Mysore 69.
7. *Pyare LAl* vs. *Rameshwar Das:* AIR 1963 SC 1706 (1706).
8. *Ajit Chandra* vs. *Akhil Chandra,* AIR 1960 Cal 551.
9. *Surinder Kumar and Ors* vs. *Gyan Chand and Ors.:* AIR 1957 SC 875, 1958.
10. *Shyama Charan* vs. *Sarup Chandra:* 14 IC 708.
11. *Administrator-General* vs. *Hughes:* 21 IC 183.

RESULT: Suit Dismissed.

V.K. JAIN, J.

1. This is a suit for declaration. The plaintiffs and defendants are brothers. Property No. B-4/196, Safdarjung Enclave, New Delhi was owned by late Smt. Shakuntala Devi Mathur, mother of the parties. She expired on 05th November, 1998, leaving a Will dated 17th September, 1981, which was registered on the same date. The property was bequeathed by the Testator in the following terms:-

"(1) On the ground floor of the house situated at B-4/196, Safdarjung Enclave, New Delhi, I am in occupation of a drawing room measuring 13'-10½" into 11'-10" and one dining room measuring 13'-10½" into 10'-0", one toilet measuring 8'-C" into 4'-8", one kitchen measuring 8'-C" into 7'-0". The same is bequeathed to my son Shri Harish Chand Mathur. In addition to the above one bedroom measuring 13'-10½" into 11'-10" with attached toilet measuring 6'-5" into 6'-4½" presently under the tenancy of one Shri Sohan Minz is also bequeathed to the said Shri Harish Chand Mathur. The entire open space including Canopy, verandah, etc. on the front side and half portion of the

open space on the back side to the property is bequeathed to the said Shri Harish Chand Mathur. The entire portion thus bequeathed to said Shri Harish Chand Mathur has been marked as Red in the appended plain.

(3) The remaining portion of the ground floor, consisting of one bed, measuring 13'-10½" into 10'-0" and one kitchen (Box) measuring 8'-0" into 5'-0", which is presently part of the tenanted portion with said Shri Sohan Minz including half portion of the open space on the back side of the property is ˘bequeathed to my son Shri Ishwar Chand Mathur.

(4) That under the municipal laws, the Ist and second Floor of the house can be further constructed, which I have not been able to carry out for want of funds. My sons Shri Suresh Chand Mathur, Shri Mahesh Chand Mathur and Shri Naresh Chand Mathur are settled in life and are in a position to construct the property for themselves, and with that view in mind, I further bequeath:

(a) The portion on the first floor above the dining and drawing room including toilets and kitchen, presently under my possession, to Shri Mahesh Chand Mathur for the purpose of constructing thereon suitable property according to the municipal law.

(b) Similarly, Shri Suresh Chand Mathur is bequeathed the portion on the first floor above the two bed rooms attached bath room and kitchen, presently under the tenancy of Shri Sohan Minz for the purpose of constructing property according to municipal laws.

(c) Similarly, Shri Naresh Chand Mathur is bequeathed space on the second floor for construction of house according to the municipal laws over all constructions on first floor. Provided that in the event the construction on the first floor is not carried out by the legatees over their respective portions within 10 years after my death, the portion thus bequeathed, shall revert to my son Shri Naresh Chand Mathur, who shall thereafter have a complete right over the same as full owner. In that event rights of Naresh Chand regarding second floor will revert to Shri Harish Chand Mathur. Provided, further, that in case of Shri Naresh

Chand Mathur who has been bequeathed the second floor does not carry out the constructions within ten years of constructions on first floor or within ten years of his entitlement to first floor as aforesaid, his entitlement will revert back to Shri Harish Chand. Shri Harish Chand Mathur shall have the right of extending the aforesaid period of ten years by consenting in writing to that effect. In case of pre-death of Shri Harish Chand, his heirs, will step in his place. It may be added here that Shri Mahesh Chand, Shri Suresh Chand Mathur and Shri Naresh Chand Mathur shall have complete right of construction over the space bequeathed to them. They shall, however, have no right to transfer the portion, thus bequeathed to them without first carrying out the constructions according to the municipal laws. They shall have free right of access and passage to the first or the second floor, as the case may be from the front side of the house, where the staircase is situated. They shall have no other right to the assets and property left by me after death.

2. It has been alleged in the plaint that late Smt. Shakuntala Devi Mathur changed her mind in November, 1997, by wring a letter, addressed to her children, on a non-judicial stamp paper, annexing therewith some pieces of paper written in her own handwriting and containing her ˘real intention in the matter. In one of the annexures to the aforesaid letter, she recorded that her house B-4/196 will go to her five sons and her daughter shall have no rights therein. This document, according to the plaintiffs, constituted a deemed codicil to the Will dated 17th September, 1981. The plaintiffs have sought a declaration that the restriction, contained in the Will dated 17th September, 1981 on transfer of the shares of the plaintiffs in the aforesaid property is void and invalid under Section 138 of Indian Succession Act and that the letter dated 06th November, 1996 reflects the real and last intention/desire of the Testatrix and amounts to a deemed codicil. They have also sought declaration that the defendants have no specific share in the property in terms of the Will, read with the deemed codicil.

3. The suit has been contested by defendant No.1, who has taken a preliminary objection that the suit for declaration simplicitor is not maintainable as the plaintiff has not claimed any consequential relief. He has taken another preliminary objection that the suit is not properly

valued for the purpose of Court Fee and jurisdiction as the market value of the suit property is Rs 82,54,232/- and ˇ3/5th share in this property should be valued at Rs 49,32,540/-, whereas the suit has been valued only at Rs 21 lacs. He has also taken another preliminary objection that since the alleged deemed codicil has not been attested by any witness, it does not comply with the mandatory requirement of law and, therefore, the plaint does not disclose any valid cause of action.

4. On merits, it has been alleged that the document dated 06th November, 1996 and its annexures are forged and fabricated documents. It has been claimed that the documents relied upon by the plaintiff are inconsistent with each other and the annexures of the document dated 06th November, 1996 do not bear any date. It has also been alleged that the deceased had bequeathed clearly demarcated and specified areas and rights to her sons.

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

(i) Whether the suit is not maintainable? OPD

(ii) Whether the suit has not been properly valued for purposes Court fee and pecuniary jurisdiction? OPD

(iii) Whether late Smt. Shakuntala Devi had executed documents marked annexures 3 to 9 to the plaint? OPP

(iv) In case Issue No.3 is proved in the affirmative, whether the said documents either collectively or independently constitute a deemed codicil, which supersedes or modifies the registered Will of the testatrix dated 17th September, 1981? OPP

(v) Whether the restrictions contained in para 4 of the registered will dated 17th September, 1981 on transfer of the share in the suit property is void and invalid under Section 138 of the Indian Succession Act, 1925? If so, whether the plaintiffs have absolute right to sell their respective portions? OPP

(vi) Relief.

6. Issue No.1

No submissions were made on this issue during the course of the arguments. The issue is decided against defendant No.1.

7. Issue No.2

No submissions were made on this issue during the course of the arguments. The issue is decided against defendant No.1.

8. Issue No.3

The plaintiffs have filed their own affidavit by way of evidence. In their affidavits, the plaintiffs have supported the case setup in the plaint. They have also produced their sister Smt. Shashi Mathur in the witness box as PW-4. Smt. Shashi Mathur has stated that on the 13th day after the death of her mother, the almirah was opened in the presence of all the brothers and sisters, the documents were taken out from it, and were handed over to her after supplying photocopies to all brothers and sisters. She has identified the handwriting of her mother Smt. Shakuntala Devi on the documents Ex.PW-4/1 to PW-4/7. During cross-examination, she stated that her mother had started writing regarding change of circumstances, but she did not change her Will which she had got registered in the office of Sub-Registrar in her presence.

7. Defendant No.1 has filed his own affidavit by way of evidence. No other witness has been produced by him in support of his case.

8. I see no reason to disbelieve the testimony of Smt. Shakuntala Devi as regards the handwriting on the documents Ex.PW-4/1 to PW-4/7. During cross-examination of the witness, no such suggestion was given to her that these documents are not in the handwriting of the deceased. When a witness deposes a particular fact and no suggestion to the contrary is given to him during cross-examination, the person against whom the deposition is made is deemed to have admitted that fact. Since defendant No.1 was disputing the claims of the plaintiff that Ex.PW-4/1 to PW-4/7 are in the handwriting of late Smt. Shakuntala Devi, it was incumbent upon him to dispute the deposition of PW-4 in this regard by suggesting to her that in fact these documents were not in the hand of late Smt. Shakuntala Devi. Even defendant No.1, in his affidavit by way of evidence, did not claim that the documents Ex.PW-4/1 to PW-4/7 were not in the hand of his mother. In his cross-examination, defendant No.1 admitted that besides the Will, 8 FDRs and documents Ex.PW-4/1 to PW-4/7 were recovered from the almirah of

the deceased, after her death. In fact, in the later part of the cross-examination, he specifically admitted that documents Ex.PW-4/1 to PW-4/7 ˇare in the handwriting of his mother. Thus, it is now an admitted fact that documents are in the handwriting of late Smt. Shakuntala Devi. The issue is decided in favour of the plaintiff and against the defendant.

9. Issue No. 4 and 5

These issues are interconnected and can be conveniently decided together.

EX.PW-4/2 is the main document relied upon by the plaintiffs, though certain portions of the property are also referred to in the stamped document Ex.PW-4/1 and the document Ex.PW-4/3. Vide document PW-4/2, the deceased wrote that her house B-4/196 belongs to all her 5 songs Suresh Chand, Naresh Chand, Mahesh Chand, Ishwar Chand and Harish Chand and that her daughters have no right in it. This document, however, does not bear any date and is not signed by any person as an attesting witness. In the absence of any date on this document, it cannot be ascertained whether it was written before or after execution of the Will dated 17th September, 1981. No evidence has been led by the plaintiffs to prove the date on which this document was written by late Smt. Shakuntala Devi. None of the plaintiffs claimed to be present at the time when this document was written by her. PW-4 also did not tell the Court as to on which date, this document was written by her mother. It is true that the document Ex.PW-4/1 which is dated 06th November, 1996 and has been written on stamp paper purchased on the very same day refers to certain documents. But, since the Ex.PW-4/1 does not describe the documents referred in it, it cannot be ascertained whether Ex.PW-4/2 was one of those documents or not. This is more so when Ex.PW-4/2 does not bear any date. The same applies to the document Ex.PW-4/3, which contains a reference to some portion of the suit property. In fact, PW-2 expressly admitted in his cross-examination that he was not aware of the documents Ex.PW-4/1 to PW-4/7 during the lifetime of his mother.

10. What is more important is that none of the documents, out of Ex.PW-4/1 to Ex.PW-4/7, is witnessed by any person. Section 63 of Indian Succession Act, to the extent, it is relevant, reads as under:

> **Execution of unprivileged Wills-** Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged] or a mariner at sea, shall execute his will according to the following rules:--
>
> (c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

Since Smt. Shankuntala Devi Mathur was not a soldier or an airman, employed in an expedition or engaged in actual warfare not was she a mariner at sea, any Will or Codicil by her was required to be executed in terms of Section 63(C) of the Act. As provided in Section 2(b) of the Act "codicil" means an instrument made in relation to a Will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the Will. The Codicil, therefore, is also required to be executed in the same manner in which a Will is to be executed.

11. In **Bhagat Ram And Another vs. Suresh and Ors.:** (2003) 12 SCC 35, Supreme Court observed that since by fiction of law, the codicil, though it may have been executed separately and at a place or time different from the Will, forms part of the related Will, it would be anomalous to accept the contention that though a Will is required to be executed and proved as per the rules contained in the Succession Act and the Evidence Act, the document explaining, altering or adding to the Will and forming part of the Will is not required to be executed or proved in the same manner. In this regard, the Court made a reference to Section 70 of the Act which expressly provides that no unprivileged Will or codicil, nor any part thereof, shall be revoked otherwise than by marriage or by another Will or codicil or by some writing, declaring an intention to revoke the same and executed in the manner in which an unprivileged Will is required to be executed. The Court expressly held that the same rule of execution, therefore, apply to a codicil, which apply to a Will to which the codicil relate and the evidence adduced in proof of execution of a codicil must satisfy the same requirements as apply to the proof of execution of a Will.

12. In **Lalitaben Jayantilal Popat Vs. Pragnaben Jamnadas Kataria:** AIR 2009 SC 1389, after referring to provisions of Section 63 of the Indian Succession Act, Supreme Court held that one of the requirements of due execution of a Will is its attestation by two more witnesses which is mandatory. No judgment to the contrary has been brought to my notice by the learned counsel for the plaintiff. Since none of the documents out of Ex.PW-4/1 to PW-4/7 has been executed in the manner, prescribed in Section 63(C) of the Indian Succession Act, they cannot be considered as a valid Will or codicil to the Will dated 17th September, 1981. The issue is decided against the plaintiffs and in favour of defendant No.1.

13. Issue No. 5

Section 138 of Indian Succession Act reads as under:-

> "Direction that fund be employed in particular manner following absolute bequest of same to or for benefit of any person.- Where a fund is bequeathed absolutely to or for the benefit of any person, but the Will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the Will had contained no such direction."

14. A bare perusal of the above-referred Section would show that it applies to a case, where, on a reading of the Will, the intention of the Testator is found to be to give whole of his estate absolutely to the legatee, but, he has imposed restrictions on the right of the legatee to use and enjoy that property as its absolute owner. In such a case, though the bequest will stand, the subsequent clause in the Will placing restriction on the right of the legatee would be treated as void. In other words, this Section applies to a case where the Testator has devised an absolute estate to the legatee, but, has specifically added a clause, which has the effect of reducing his power to deal with that property as an absolute estate. In such a case, the restriction placed on the right of the legatee needs to be rejected on account of its being repugnant to the absolute bequest of that property to the legatee. To take certain examples where a Will provides that on the death of the Testator, the legatee shall enjoy the property as its absolute owner, but he will not be entitled to alienate it or where he, while bequeathing the property to one of his family members, puts a rider that he will have no right to alienate it for a

particular period or where he stipulates in his Will that the legatee will be able to sell the property bequeathed to him only to a particular person, thereby restricting the right of the legatee as absolute owner of the estate.

15. However, the Will, executed by late Smt. Shakuntala Devi on 17th September, 1981, does not come within the purview of Section 138 of Indian Succession Act, since this is not a case where any legatee has been given absolute right in any part of the property and then the right of that particular legatee with respect to use and enjoyment of that part of the property has been restricted or taken away. In this Will, there is no stipulation that any of the legatees will have no right or will have a limited right with respect to disposal of that property. A perusal of the Will would show that one part of the ground floor has been bequeathed to Shri Harish Chand Mathur, whereas the remaining part of the ground floor has been bequeathed to Ishwar Chand Mathur. The open space on the first floor, above the dining and drawing room, including toilets and kitchen was bequeathed to Shri Mahesh Chand Mathr, who could make construction thereon in accordance with municipal law. Another open space on the first floor, above the two bed rooms, attached bath room and kitchen which were under the tenancy of one Sohan, was bequeathed to Suresh Chand Mathur, for raising construction thereon in accordance with municipal laws. The construction on the first floor by Shri Mahesh Chand Mathur and Shri Suresh Chand Mathur was to be raised within 10 years of the death of the Testator. In the event of Shri Mahesh Chand Mathur and/or Suresh Chand Mathur failing to raise construction on the first floor within the time stipulated in the Will, the portion of the person failing to raise construction on the first floor was to revert to Naresh Chand Mathur, who, then was to have complete right on the same as a full owner. In that event, the rights which Naresh Chand Mathur was given in the event of construction being raised on the first floor within the time stipulated in the Will, were to revert to Shri Harish Chand Mathur. In the event of Shri Naresh Chand Mathur also failing to raise construction on the first floor within 10 years of his becoming entitled to first floor, his entitlement is also to revert back to Shri Harish Chand Mathur. The stipulation for construction to be raised on the first floor, by Shri Mahesh Chand Mathur and Shri Suresh Chand Mathur, within 10 years of the death of the Testator, was not such a condition which could not have been fulfilled and, therefore, cannot be said to be an impossible condition. The conditional bequest of the estate is not unknown to law

and is well-recognized by it.

16. A conditional bequest does not come within the purview of Section 138 of Indian Succession Act which applies to an altogether different situation where there is an absolute bequest of the legatee, but his right to deal with the property as its absolute owner is sought to be curtailed by the Testator. In fact, Section 131 of Indian Succession Act is the provision which applies to the bequest made by late Smt. Shakuntala Devi. This provision, to the extent it is relevant, reads as under:-

> **"Bequest over, conditional upon happening or not happening of specified uncertain event.** (1) A bequest be made to any person with the condition superadded that, in case a specified uncertain event shall happen, the thing bequeathed shall go to another person, or that in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person.
>
> **Illustration**
>
> (ii) An estate is bequeathed to A with a proviso that if A shall dispute the competency of the testator to make a will, the estate shall go to B. A disputes the competency of the testator to make a will. The estate goes to B."

This section deals with a defeasance clause, whereas Section 138 of the Act deals with a repugnant clause. The distinction behind a repugnant provision and a defeasance provision is that where the intention of the Testator is to maintain an absolute estate conferred on the legatee, but he simply adds some restriction, in derogation of incidents of such absolute ownership, such restrictive clause would be repugnant to the absolute grant and, therefore void, but, where the grant of an absolute estate is expressly or impliedly made subject to defeasance o the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over is taken to be valid and operative. Section 138 thus provides for divestment of the estate which has already vested, but is subject to divested by some act or event at an after period. Of course, the defeasance must be in favour of somebody in existence at the time the bequest is made.

17. In **Administrator-General vs. Hughes:** 21 IC 183, the Testator

made a bequest in favour of a Baptist Church with a condition that (1) no ordained Minister or missionary be ever elected as a Deacon of the Church or be allowed to canvass for votes to secure his election. (2) that two cups, one of fermented and the other of unfermented wine should be provided at the communion service; (3) that the said Deacons do not introduce any innovation into the practice of the said Church, but adhere to the old practices. In the event of the non-fulfillment of the conditions there was a gift over in favour of another Church. It was held that there was nothing illegal or impossible in the conditions and on non-fulfilment of those conditions, the gift over came into operation.

In **Shyama Charan vs. Sarup Chandra:** 14 IC 708, the Testator made an absolute estate to a legatee with condition superadded that the legatee shall personally live in the house and that if he does not live personally in the house, his interest shall and the estate will go over to someone else. Holding that there was nothing illegal in the condition, the bequest was upheld by the Court.

In **Enasu vs. Antony** AIR 1969 Ker 207, a clause in the Will provided that if any of the persons who had been enjoined to meet the expenses of the funeral ceremonies of the Testator and his wife and of certain specified charities commits default in meeting such expenses, then such person shall have no right to the property earmarked for such expenses. The condition was held to be a condition subsequent.

18. Since Shri Mahesh Chand Mathur and Shri Suresh Chand Mathur admittedly have failed to raise construction on the first floor within 10 years of the death of the deceased Testator, the portion bequeathed to them on the first floor stands bequeathed to Shri Naresh Chand Mathur, who will have to raise construction on it within 10 years from the date he became entitled to raise construction on the first floor. The rights in the second floor over the construction which Shri Naresh Chand Mathur is required to raise within the time stipulated in the Will will devolve on Harish Chand Mathur. If Shri Naresh Chand Mathur does not raise construction on the first floor within 10 years of becoming entitled to raise such a construction, his rights in respect of the first floor will revert back to Shri Harish Chand Mathur.

19. The learned counsel for the plaintiff has referred to the decision of this Court in **Smt. Rajrani Sehgal Vs. Dr. Parshottam Lal and**

others AIR 1992, Delhi, 134. The will of the Testator in that case, to the extent it is relevant for our purpose, provided as under:-

> "I wish that after my death my son Dr. Parshotam Lal will be entitled to the whole of my properties….
>
> …..I also wish that my son Dr. Parshotam Lal shall not sell or mortgage or transfer or pawn the immoveable properties during his life time.
>
> I also wish that my grandsons or my daughter in law shall not sell, transfer or mortgage the properties to anybody after the, death of Parshotam Lal.
>
> I also further wish that the sons or daughters of my grandsons shall not sell, transfer or mortgage the properties to anybody."

20. It was contended by the appellant before this Court that the Testator had created perpetuity in his family and has tended to limit the absolute enjoyment of the estate for an indefinite period which was prohibited by law since it offended the rule against perpetuity as contemplated by Section 114 of the Act and, therefore, the bequest in favour of the Testator was void and inoperative. On the other hand, it was contended on behalf of the son/respondent before this Court that once the Court was satisfied that the Testator wanted to give his all to the named legatee, then all subsequent restrictions would be void being repugnant to the predominant intention of passing the entire estate to the heir. This Court was of the view that the Testator had expressed an unequivocal desire that his son would be entitled to all his immovable and movable properties and that the restrictions imposed against alienation were to be treated as repugnant to the dominant intention of the Testator and were liable to be ignored. This judgment has absolutely no applicability to the facts of this case before this Court, where there is no restriction on the right of any legatee to deal with the portion bequeathed to him, in any manner he desired.

21. The plaintiff has also referred to **Ramchandra vs. Anasuyabai:** AIR 1969 Mysore 69, **Pyare LAl vs. Rameshwar Das:** AIR 1963 SC 1706 (1706), **K. Babu Rao vs. Datta Rao:** AIR 1992 Kant 290, **Ajit Chandra vs. Akhil Chandra,** AIR 1960 Cal 551, **Surinder Kumar and Ors vs. Gyan Chand and Ors.:** AIR 1957 SC 875, 1958. I have gone

through this judgment. None of them has any applicability to the matters in issue before this Court. The issue is, therefore, decided against the plaintiffs.

22. Issue No.6

In view of my findings on Issue Nos. 1 to 5, the plaintiffs are not entitled to any of the declaration sought by them in the suit.

ORDER

23. The suit is hereby dismissed without any order as to costs. Decree sheet be prepared accordingly.

ILR (2011) I DELHI 648
CS(OS)

M/S. SINEXIMCO PTE. LTD. .....PLAINTIFF

VERSUS

M/S. DINESH INTERNATIONAL PVT. LTD. .....DEFENDANT

(V.K. JAIN, J.)

CS (OS) NO. : 855/2002 & IA NO. : 2394/2009 **DATE OF DECISION: 09.11.2010**

Limitation Act, 1963—Articles 34 & 39—Suit for recovery—The defendant company agreed—Plaintiff shipped 2000 metric tonnes of commodities valued at US$ 1,85,729.25 vide invoice dated 27.06.1997—The plaintiff drew Bill of Exchange for the invoiced amount—Payment was to be made within 90 days of sight—The bill was accepted by the defendant on 29.07.1997—Defendant paid a total sum of US$ 150,820 from time to time—Balance payment was not paid, hence, the Bill of Exchange was returned to the

plaintiff by its bank vide letter dated 10.05.1999—Defendant failed to make the balance payment despite notice of demand—Defendant took the preliminary objection that suit is barred by limitation—On merit, it was alleged that matter was amicably resolved and no payment was due—Counsel for the plaintiff submitted that since the suit is based on a dishonoured foreign bill, hence it will be governed by Article 39—Held—There are two prerequisites before Article 39 can be invoked. A protest should be made and notice should be given when a foreign bill is dishonoured. If either of these two prerequisite conditions is missing, Article 39 would not apply—In the present case, no protest is alleged to have been made by the plaintiff when the Bill of Exchange was dishonoured. Hence, the first prerequisite condition for applicability of Article 39 of Limitation Act does not stand fulfilled—The object of notice is not to demand payment, but to warn the party of liability and in case of a drawer to enable him to protect him, as against the drawee or acceptor, who has dishonoured the installment—Therefore, the second prerequisite condition for invoking Article 39 of Limitation Act also does not exist in this case—Hence, there is no merit in the contention that Article 39 of Limitation Act, would govern the present suit—Suit dismissed being barred by Limitation.

During the course of arguments, the contention of the learned counsel for the plaintiff was that the present suit would be governed by Article 39 of Limitation Act since it is based on a dishonoured foreign bill. Article 39 of Limitation Act provides that in a suit based on a dishonoured foreign bill, where protest has been made and notice given, the period of limitation would be three years from the date when the notice is given. There are two pre-requisites before this Article can be invoked. A protest should be made and notice should be given when a foreign bill is dishonoured. If either of these two pre-requisite conditions is missing, Article 39 would not apply. Section 100 of Negotiable Instruments Act

provides that:

> "When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may, within a reasonable time, cause such dishonour to be noted and certified by a notary public. Such certificate is called a protest."**(Para 20)**

In the present case, no protest is alleged to have been made by the plaintiff when the Bill of Exchange was dishonoured. Hence, the first pre-requisite condition for applicability of Article 39 of Limitation Act does not stand fulfilled. **(Para 22)**

Section 93 of Negotiable Instruments Act provides that when a promissory note, Bill of Exchange or cheque is dishonoured by non-acceptance or non-payment, the holder thereof, or some party thereto who remains liable thereon, must give notice that the instrument has been so dishonoured to all other parties whom the holder seeks to make severally liable thereon, and to some one of several parties whom he seeks to make jointly liable thereon.

Nothing in this section renders it necessary to give notice to the maker of the dishonoured promissory note, or the drawee or acceptor of the dishonoured bill of exchange or cheque. **(Para 23)**

The object of a notice of dishonour which is to be given to the endorser is to indicate to the party notified that ˇthe contract arising on the instrument has been broken by the principal debtor and the former being a surety will now be liable for the payment. Thus, the object is not to demand payment, but to warn the party of liability and in case of drawer to enable him to protect him as against drawee or acceptor who has dishonoured the instrument. The notice under Section 93 is to be given by the holder or by or on behalf of endorser, who, at the time of giving the notice, is himself liable on the Bill of Exchange.

This Section has no applicability to the facts of the present case and in any case no notice, as envisaged in this Section has been given. Therefore, the second pre-requisite condition for invoking Article 39 of Limitation Act also does not exist in this case. Hence, there is no merit in the contention that Article 39 of Limitation Act would govern the present suit. **(Para 24)**

Important Issue Involved: There are two prerequisites for invoking Article 39 of limitation Act i.e. protest should be made and notice should be given when a foreign bill is dishonoured.

[Vi Ba]

APPEARANCES:

FOR THE PLAINTIFF : Mr. A.K. Singla, Sr. Adv. with Mr. J.K. Sharma, Advocate.

FOR THE DEFENDANT : None.

CASES REFERRED TO:

1. *P. Mohan* vs. *Basavaraju* AIR 2003, Karnataka, 213.
2. *Amirajan Saheb* vs. *Sayed Khadar,* AIR 1978 Madras 385.
3. *Ghasi Patra* vs. *Brahma Thati:* AIR 1962, Orissa 35.
4. *Nath Sah* vs. *Lal Durga Sah,* AIR 1936 Allahabad, 160
5. *Ganpat Tukaram* vs. *Sopana Tukaram,* AIR 1928 Bombay 35.
6. *Bishun Chand* vs. *Audh Bihari Lal,* AIR 1917 Pat 533.

RESULT : Suit dismissed.

V.K. JAIN, J.

1. This is a suit for recovery of Rs. 84,15,000/-. It has been alleged in the complaint that the plaintiff is a company incorporated in Singapore and Sh. D.D. Gupta, who is its Managing Director and Principal Officer, is competent to institute this suit and sign and verify the pleadings on

behalf of the plaintiff company. It has been further alleged that vide Sales Contract No. 3371 dated 29th April 1997, the defendant company agreed to purchase Australian Tyson Chick Peas from the plaintiff company on the terms and conditions detailed in the contract. Pursuant thereto the plaintiff company shipped 2000 MT of commodities valued at US$1,85,729.25, vide invoice dated 27th June 1997. As per the terms of the sale contract, the plaintiff drew Bill of Exchange for the invoiced amount. The Bill of Exchange envisaged payment by the defendant to Standard Chartered Bank, Singapore or any banker or trust nominated by it, within 90 days of sight. Bank of Punjab Ltd. Connaught Circus Branch, accordingly presented the Bill of Exchange for acceptance and payment by the defendant. The Bill was accepted by the defendant on 29th July 1997. The defendant paid a total sum of US$ 150,820 from time to time. The last payment of US$ 10970 was paid by the defendant company on 4th February 1999. It has been further alleged that as per the terms of Bill of Exchange, the unpaid amount was payable by the defendant on or before 5th May 1999. Since the balance payment was not paid, the Bank of Punjab, vide its letter dated 21st April 1999 returned the Bill of Exchange which was returned to the plaintiff by its banker Standard Chartered Bank, Singapore vide its letter dated 10th May 1999. The defendant company failed to make payment of the balance amount despite notice of demand. The plaintiff has accordingly claimed the principal amount of US$ 84790.25 along with interest amounting to US$ 84790 for the period 29th October 1997 to 4th May 1997 at the rate of 18% per annum and bank charges amounting to US$ 305. The plaintiff has also claimed pendente lite and future interest at the rate of 24% per annum.

2. The defendant filed the written statement contesting the suit and took preliminary objection that the suit was barred by limitation since it pertains to the transaction of the year 1997. On merits, it was alleged that the defendant company imported Australian Tyson Chick Peas from the plaintiff company on a number of occasions in the year 1997 and the total quantity imported by it was about 9487.650 MT. The quantity was, however, found short by 209.534 MT. Moreover, the quality of the commodity was not as per specifications. The disputes which arose between the parties in this regard were amicably resolved and no payment according to the defendant is due from it to the plaintiff. As regards consignment subject matter of the present suit, it is alleged in the written statement that the invoice of the plaintiff company stipulated delivery

against acceptance though all other consignments were on the basis of documents against collection. This, according to the defendant, was done as the plaintiff had accepted the fact that the loss had occurred to the defendant due to bad quality and short quantity. Consequently, it agreed to make this concession. It has been further alleged that on arrival of the goods at the ports, the commodity was found to be only 472 MT as against the agreed quantity of 525 MT and on the matter being taken up by the defendant company with the plaintiff company, a letter was being sent to it by the plaintiff company agreeing to waive the interest and to receive part payments against the bill pertaining to that consignment.

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

1. Whether the claim of the plaintiff is barred by the time? OPD

2. Whether the disputes between the parties stand settled as alleged by the defendants? OPD

3. Whether the plaintiff is entitled to recover the suit amount? OPP

4. Whether the plaintiff is entitled to interest? If so, at what rate, for which period and on what amount? OPP.

5. Relief?

ISSUE NO. 2

4. The onus of proving this issue was on the defendant. No evidence has been produced by the defendant to prove that the disputes between the parties were settled and no amount remained due from the defendant company to the plaintiff company. The issue is, therefore, decided against the defendant and in favour of the plaintiff.

ISSUE No. 3

5. The plaintiff examined one witness Mr D.D. Gupta as PW-1. No witness was examined in the defence and the evidence of the defendant was closed vide order dated August 28, 2008. In his affidavit Mr D.D. Gupta stated that the defendant purchased commodity from the plaintiff as stated in the invoice Ex. P-1, valued at US$ 185729.25. The ˇinvoice was accompanied by Bill of Exchange Ex.P-2. The invoice as well as the Bill of Exchange were sent by the plaintiff for collection through its

banker Standard Chartered Bank, Singapore. The Bill of Exchange, for payment on behalf of the defendant, was handled by Bank of Punjab Limited. The endorsement made on behalf of the defendant company, accepting to pay by due date, appears at Mark 'B' on the Bill of Exchange Ex. P-2.

6. According to PW-1 the banker of the defendant company returned the Bill of Exchange unpaid, to the value of US$ 84729.25. The letter of the banker in this regard is Ex. P-3 whereas Return Memo of plaintiff's bank dated 10th May 1999 is Ex. P-4. During cross-examination, PW-1 Mr D.D. Gupta denied the suggestion of the defendant that the commodity supplied by the plaintiff company to the defendant company was not of agreed quality.

7. Though the defendant filed the affidavit of one Mr Daya Kishan Goel by way of evidence, that cannot be read in evidence since Mr Daya Kishan Goel was not produced for cross-examination.

8. The un-rebutted testimony of PW-1 thus proves that a sum of US$ 84909.25 remained payable by the defendant company to the plaintiff company. Even otherwise it is an admitted case in the pleadings that the defendant had agreed to purchase 525 MT of Australian Tyson Chick Peas from the plaintiff company. There is no dispute with respect to rate of the goods imported by the defendant company from the plaintiff company. Though the case of the defendant in the written statement is that instead of 525 MT, the quantity of the commodity, found on arrival of the goods at the port, was only 472 MT, no evidence has been led by the defendant to prove that the quantity of the goods, when delivered to it was only 472 MT. Thus, it has failed to discharge the onus placed upon it in this regard.

9. The defendant has also alleged in the written statement as that the Chick Peas received by it were not of agreed quality. No evidence has, however, been led to prove this averment and thus, this allegation also does not stand substantiated. This is not the case of the defendant that it had made any payment over and above the payments acknowledged in the plaint. Therefore, the plaintiff company is entitled to an amount equivalent to US$ 84909.25 from the defendant company. The issue is decided accordingly.

ISSUE No. 4

10. The plaintiff has claimed interest at the rate of 18% per annum. Admittedly, there is no agreement between the parties for payment of interest. No custom or usage of trade for payment of interest has been pleaded by the plaintiff company.

11. Section 80 of Negotiable Instruments Act however is relevant in this regard and reads as under:-

> **Interest when no rate specified.**-When no rate of interest is specified in the instrument, interest on the amount due thereon shall, [notwithstanding any agreement relating to interest between any parties to the instrument], be calculated at the rate of [eighteen per centum] per annum, from the date at which the same ought to have been paid by the party charged, until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs.
>
> Explanation- When the party charged is the endorser of an instrument dishonoured by non-payment, he his liable to pay interest only form the time that he receives notice of the dishonour.

12. In **Nath Sah vs. Lal Durga Sah,** AIR 1936 Allahabad, 160, a Division Bench of Allahabad High Court held that where no rate of interest is specified in a written instrument, then, notwithstanding any contract to the contrary, the interest is to be calculated at the rate of 6% per annum and the date from which such interest should be calculated should be the date on which the Principal amount ought to have been paid. In that case the suit was based on a promissory note which contained no mention of any liability to pay interest and the defendant had denied his liability to pay any interest.

In **Ghasi Patra vs. Brahma Thati:** AIR 1962, Orissa 35, the pronote payable on demand did not provide for payment of interest. It was contended before the High Court that under Section 80 of Negotiable Instruments Act , interest could have been allowed only from the date of demand and not for any earlier period and since no demand was proved in the case, no interest should have been allowed from the date of the execution of the pronote till the date of the suit. It was held that the plaintiff was entitled to interest under Section 80 of Negotiable

Instruments Act from the date of execution of the pronote. In taking this view, the High Court followed the decision of Bombay High Court in **Ganpat Tukaram v. Sopana Tukaram,** AIR 1928 Bombay 35, where it was held that where a promissory note is payable on demand, but is silent as to interest, the interest can be awarded under Section 80 of Negotiable Instruments Act at 6% per annum from the date of the promissory note. A Division Bench of Patna High Court in **Bishun Chand v. Audh Bihari Lal,** AIR 1917 Pat 533 also took the view that if the handnote is payable on demand but does not provide for the payment of interest, it carries interest at the rate of 6% per annum from the date of execution of the hand note until the realisation of the debt.

In **P. Mohan vs. Basavaraju** AIR 2003, Karnataka, 213, the suit was based on cheques which when presented were dishonoured. There was an agreement between the parties not to pay interest. It was held by Karnataka High Court that in view of the provisions of Section 80 of Negotiable Instruments Act, the defendant/appellant would be entitled to pay interest and that agreement between the parties not to pay interest would be valid only until the cheques were dishonoured.

13. In the case before this Court, there is no agreement between the parties that no interest will be paid by the defendant to the plaintiff. I find no justification for restricting the scope of Section 80 of Negotiable Instruments Act to only those cases, where the instrument provides for payment of interest, but the rate of interest is not specified and thereby allows unjust enrichment to a person who has defaulted in honouring his contractual obligation with respect to repayment of Principal sum. In my view, the provisions of Section 80 of Negotiable Instruments Act would equally apply to those cases where no term regarding payment of interest is contained in the instrument. Since the aforesaid provision, as amended, carries interest at the rate of 18% per annum, consequently, the plaintiff is entitled to interest at the rate of 18% per annum under Section 80 of Negotiable Instruments Act and the interest would be payable from the date on which the principal amount ought to have been paid by the defendant to the plaintiff.

14. Issue No.1

The case of the plaintiff, as set out in the plaint, is that the sale contract between the parties envisaged payment made by the defendant

within 90 days from sight. In para 3 of the plaint, the plaintiff claimed as under:

> "As per terms of sale contract, the plaintiff drew Bill of Exchange of invoiced value, envisaging payment by defendant 90 days from sight to the order of Standard Chartered Bank, Singapore or any banker or Trust Company nominated by them."

15. In para 12 of the plaint, the plaintiff has pleaded as under:

> "The cause of action for suit claim accrued to plaintiff……..on payment under Bill of Exchange becoming due for payment on 29.10.1997."

16. Ex.P-2 is the Bill of Exchange drawn by the plaintiff upon the defendant on 23rd July, 1997 and accepted by the defendant on 29th July, 1997. A perusal of the endorsement made by the defendant at mark "B" on this document would show that the defendant accepted to pay by due date. The Bill of Exchange expressly stipulated payment in 90 days from sight. Thus, there can be no doubt that the agreement between the parties envisaged payment by the defendant within 90 days from sight. Since the defendant accepted the Bill of Exchange on 29th July, ˇ1997 and the acceptance was for payment on due date, the amount under the Bill of Exchange became payable by the defendant to the plaintiff on 27th October, 1997.

17. Ex.P-5 is the legal notice sent by the plaintiff to the defendant. Para 2 of the notice, to the extent it is relevant, reads as under:

> "Amount under Bill of Exchange payable D/A 90 days from sight was due for payment on 29th October, 1997."

A perusal of the plaint would show that the plaintiff has claimed interest on the unpaid principal amount, at the rate of 18% per annum, from 29th October, 1997. In view of the pleading of the plaintiff and the legal notice sent by it to the defendant, it is not open to the plaintiff to say that the amount under the Bill of Exchange did not become due on 29th October, 1997.

18. Article 34 of Limitation Act provides that the period of limitation on a Bill of Exchange payable at a fixed time after sight or after demand is three years from the date when the fixed time expired. Since the time

fixed for payment, by the defendant, to the plaintiff, expired on 29th October, 1997, the period of limitation prescribed under Article 34 of Limitation Act expired on 27th October, 2000. ˇIt has come in the evidence of the plaintiff and is otherwise an admitted case that the defendant made part payments to the plaintiff from time to time. The last part payment was made on 04th February, 1999. Section 19 of Limitation Act provides that where payment on account of debt or of interest is made before the expiration of the prescribed period, by the person liable to pay the debt or by his agent duly authorized in his behalf, a fresh period of limitation can be computed from the time when the payment was made. Since the last payment was made by defendant No.1 on 04th February, 1999, the period of limitation needs to be computed afresh from that date and computed accordingly which expired on 04th February, 2002. This suit, however, has been filed on 22nd April, 2002 and, therefore, is patently barred by limitation.

19. It has been alleged in the plaint that as per the terms of Bill of Exchange, the unpaid amounts was payable by the defendant by or before 05th May, 1999. I, however, fail to appreciate how the unpaid amount under the Bill of Exchange came to be payable on or before 05th May, 1999. A bare perusal of the Bill of Exchange is sufficient to show that the payment under this instrument became due on 29th ˇOctober, 1997. Part payments made by the defendant from time to time did not have the effect of altering the date on which the amount payable under the Bill of Exchange became due to the plaintiff. Irrespective of part payments made by the defendant from time to time and accepted by the plaintiff, the due date under the Bill of Exchange dated 23rd July, 1997 remained 27th October, 1997 when 90 days expired from the date the Bill of Exchange was accepted by the plaintiff. This is not the case of the plaintiff, anywhere in the plaint, that the parties had entered a subsequent agreement to alter the due date under the Bill of Exchange Ex.P-2 from 27th October, 1997 to 05th May, 1999 or any other date. The fact that in the legal notice sent by it to the defendant, the plaintiff expressly claimed that the amount under the Bill of Exchange, was payable on 90 days from the sight and was due for payment on 29th October, 1997, leaves no scope for any such plea by the plaintiff. The claim of interest by the plaintiff with effect from 29th October, 1997 is yet another indicator that the payment under the Bill of Exchange, even according to

the plaintiff, became due on 29th October, 1997. Since payment under the Bill of Exchange had become due on 27th October, 1997 or at best ˇon 29th October, 1997, the Court, while computing afresh period of limitation in view of the provisions of Section 19 of Limitation Act, cannot add 90 days to the date from which the period of limitation is to be made afresh. The amount under the Bill of Exchange was already due when the part payments were made by the defendant to the plaintiff from time to time. The last payment having been made on 04th February, 1997, the fresh period of limitation computed under Section 19 of Limitation Act expired on 04th February, 2002.

20. During the course of arguments, the contention of the learned counsel for the plaintiff was that the present suit would be governed by Article 39 of Limitation Act since it is based on a dishonoured foreign bill. Article 39 of Limitation Act provides that in a suit based on a dishonoured foreign bill, where protest has been made and notice given, the period of limitation would be three years from the date when the notice is given. There are two pre-requisites before this Article can be invoked. A protest should be made and notice should be given when a foreign bill is dishonoured. If either of these two pre-requisite conditions is missing, Article 39 would not apply. Section 100 of Negotiable Instruments Act provides that:

> "When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may, within a reasonable time, cause such dishonour to be noted and certified by a notary public. Such certificate is called a protest."

21. Thus, the protest must contain (a) either the instrument itself, or a literal transcript of the instrument and of everything written or printed thereupon; (b) the name of the person for whom and against whom the instrument has been protested; (c) a statement that payment or acceptance, or better security, as the case may be, has been demanded of such person by the notary public; the terms of his answer, if any, or a statement that he gave no answer, or that he could not be found; (d) when the note or bill has been dishonored, the place and time of dishonor, and, when better security has been refused, the place and time of refusal; (e) the subscription of the notary public making the protest; (f) in the event of an acceptance for honour or of a payment for honour, the name of the person by whom, of the person whom, and the manner in which,

such acceptance or payment was offered and effected.

22. In the present case, no protest is alleged to have been made by the plaintiff when the Bill of Exchange was dishonoured. Hence, the first pre-requisite condition for applicability of Article 39 of Limitation Act does not stand fulfilled.

23. Section 93 of Negotiable Instruments Act provides that when a promissory note, Bill of Exchange or cheque is dishonoured by non-acceptance or non-payment, the holder thereof, or some party thereto who remains liable thereon, must give notice that the instrument has been so dishonoured to all other parties whom the holder seeks to make severally liable thereon, and to some one of several parties whom he seeks to make jointly liable thereon.

Nothing in this section renders it necessary to give notice to the maker of the dishonoured promissory note, or the drawee or acceptor of the dishonoured bill of exchange or cheque.

24. The object of a notice of dishonour which is to be given to the endorser is to indicate to the party notified that the contract arising on the instrument has been broken by the principal debtor and the former being a surety will now be liable for the payment. Thus, the object is not to demand payment, but to warn the party of liability and in case of drawer to enable him to protect him as against drawee or acceptor who has dishonoured the instrument. The notice under Section 93 is to be given by the holder or by or on behalf of endorser, who, at the time of giving the notice, is himself liable on the Bill of Exchange.

This Section has no applicability to the facts of the present case and in any case no notice, as envisaged in this Section has been given. Therefore, the second pre-requisite condition for invoking Article 39 of Limitation Act also does not exist in this case. Hence, there is no merit in the contention that Article 39 of Limitation Act would govern the present suit.

25. After the judgment was reserved, the learned counsel for the plaintiff has filed a copy of the decision of Madras High Court in **Amirajan Saheb vs. Sayed Khadar,** AIR 1978 Madras 385. In the case before Madras High Court, a promissory note was executed on 06th April, 1966 and it represented part of consideration detained by the defendant in

respect of a land purchased by him from the plaintiff. On the same date, there was an agreement between the parties which provided that if any litigation started within five years of the transaction, the expenses towards the same had to be met out of the amount of that pronote and the plaintiff would be entitled only to balance, if any, after meeting the litigation expenses. It was further stipulated in the agreement that if no litigation commenced, disputing the title of the property within five years, the plaintiff would be entitled to entire promissory note amount. This agreement was executed since the parties contemplated that there would be litigation regarding the title of the property, as Wakf Board was rightly to claim the same to be it property. The defendant made a payment of Rs 50/- after execution of the document. Later, the plaintiff filed a suit on the promissory note, claiming the entire amount, less the same of Rs 50 received by him. The suit was dismissed by the lower Appellate Court as premature finding that the Wakf Board had in fact filed a suit, claiming title to the property sold by the plaintiff to the defendant. The lower Court was of the view that because of the agreement between the parties, the time for payment of amount under the promissory note had been postponed and, therefore, even though as an ordinary promissory note, it would get time barred within a few days after the date on which the suit was filed, it would not be so time barred, inasmuch as time for payment got postponed by a collateral agreement. Upholding the order of the lower Court, it was held that right to sue had not accrued when the suit was filed and, therefore, the suit was premature. In the case before this Court, there is no agreement between the parties, postponing the due date under the Bill of Exchange accepted by the defendant on 29th July, 1997. No such agreement has either been pleaded or proved. Part payment by the defendant from time to time did not amount to an agreement between the parties to postpone the due date of payment under the Bill of Exchange. As noted earlier, the plaintiff itself has claimed, in the legal notice sent by it to the defendant, that the amount under the Bill of Exchange due on 29th October, 1997 and it has also claimed interest from that date. This was nowhere the case of the plaintiff in the notice that the due date for payment under the Bill of Exchange was postponed to a later date by a subsequent agreement between the parties. No such case has been made out even in the plaint. Therefore, reliance on this judgment is wholly misplaced. The issue is decided against the plaintiff and in favour of the defendant.

26. Issues No.3 and 5

In view of my finding on the issues, the suit is liable to be dismissed being barred by limitation.

ORDER

The suit is hereby dismissed. The parties to bear their own costs.

Decree sheet be prepared accordingly.

ILR (2011) I DELHI 662
RFA

STERLING HOLIDAY RESORTS (INDIA) LTD. ....APPELLANT

VERSUS

MANOHAR NIRODY ....RESPONDENT

(KAILASH GAMBHIR, J.)

RFA NO. : 863/2005 AND C.M. NO. : 13841/2010 **DATE OF DECISION: 10.11.2010**

Proving a document—Opportunities to cross-examine not availed—Suit for recovery of money-decreed in favour of respondent-instant appeal filed contention—Letter dated 07.06.2000—Crucial for calculating limitation not proved sufficient opportunity not given-to cross examine respondent. Held—Order sheets shows-opportunities for cross examination were not utilized by appellant no steps taken to cross examine appellant—In his own statement did not take stand to contradict the letter or prove it was forged—Where party fails to avail right of cross examination despite sufficient opportunity-testimony of witness remains Unrebutted—testimony has to be given due

credence—In the absence of specific plea in the written statement to dispute the letter, plea of forgery cannot be taken.

Also a perusal of the order sheet dated 21.7.04 where it is clearly observed by the learned trial court that PW 1 is present for cross examination and opportunities for cross examination have not been utilized by the defendant, hence the cross examination is accordingly closed. Therefore, it is clear that the appellant did not choose to cross-examine PW1 who proved the case of the respondent. The plea of the appellant that sufficient opportunity was not granted to the appellant to cross-examine the said witness is totally untenable as evidently no steps were taken by the appellant to seek such an opportunity to cross examine the said witness. Neither did the appellant in its own evidence take any stand to contradict the said letter dated 7th June, 2000 nor did the appellant anywhere take a stand that the letter was a forged document. It is a settled legal proposition that the where the party fails to avail the right of cross examination of a witness despite there being sufficient opportunity and the testimony of such a witness remains unrebutted and unimpeached then in such circumstances such a testimony has to be given due credence. Once the appellant itself has chosen not to dispute the correctness of the said document by taking any specific plea in the written statement and has also not chosen to cross-examine the witness of the respondent besides not even taking any such stand in his own deposition, then, now he cannot be heard to say that the said document was a forged document or the same was not proved in accordance with the law. **(Para 12)**

Important Issue Involved: Where a party fails to avail right of cross examination despite sufficient opportunity and testimony of witness remains unrebutted, the testimony has to be given due credence and it cannot be said that the documents were not proved in accordance with law.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Ankit Gupta, Advocate.

FOR THE RESPONDENT : Ms. Nikita Sharma and Mr. Asit Kumar, Advocates.

RESULT: Appeal dismissed.

KAILASH GAMBHIR, J. Oral:

1. By this appeal filed under Section 96 read with Order 41 Rule 2 and Section 151 of the Code of Civil Procedure, 1908, the appellant seeks to set aside the judgment and decree dated 1.9.2005 passed by the Court of the learned ADJ, Delhi whereby the suit was decreed in favour of the respondent and against the appellant.

2. The background of facts necessary to decide the present appeal is that the respondent was employed in the appellant company as General Manager Operation (North) since 15.10.94. The respondent while in service opted for the scheme of "own your car scheme" offered by the appellant company under which the appellant deducted an amount of Rs.1000/- every month from the salary of the respondent and after adjusting the entire price of the car failed to transfer the registration in the name of the respondent. Thereafter, the appellant stopped paying the salary to the respondent since January, 1998 and the respondent resigned on 10.8.98 and the car was also repossessed by the finance company. Feeling aggrieved with the actions of the appellant company the respondent filed a recovery suit which vide judgment and decree dated 1.9.2005 was decreed in favour of the respondent for a sum of Rs. 4,94,888/- alongwith interest at 12% p.a from the date of filing of the suit till its realization. Feeling aggrieved with the abovesaid judgment, the appellant has preferred the present appeal.

3. Counsel for the appellant has mainly raised two contentions in support of his appeal. The first argument is that the acknowledgment letter dated 7.6.2000 alleged to have been issued by the appellant company was not proved by the respondent in accordance with law. The second argument of the counsel for the appellant is that the appellant was not given sufficient opportunity to cross examine the respondent.

4. Assailing the impugned order, counsel for the appellant submits that the respondent failed to prove the letter dated 7th June, 2000 through which the respondent has claimed acknowledgment of the said dues. The contention of counsel for the appellant is that the second page of the said letter is a photocopy and, therefore, clearly signatures of Mr. Steve Borgia on the second page are not original. Counsel thus states that mere exhibition of the said document cannot be taken to imply that the respondent has proved the said document. Counsel also submits that the appellant has raised objections to all the documents, which were exhibited by the respondent in his evidence filed by him by way of affidavit including the said letter dated 7th June, 2000. Counsel also submits that sufficient opportunity was not granted to the appellant to cross-examine the respondent who entered the witness box as PW-1. Counsel also submits that nowhere the respondent has taken a stand as to the whereabouts of the original of the second page of the letter. Counsel for the appellant further submits that the said letter dated 7th June, 2000 was forged by the respondent so as to claim the benefit of the limitation period.

5. Counsel for the appellant also submits that the suit filed by the respondent was clearly barred by limitation as the 3rd same was filed by the respondent on July, 2003 while limitation came to an end somewhere in the year 2001. Counsel also submits that even based on the said acknowledgment letter dated 7th June, 2000, the limitation came to an end on 6th 3rd June, 2003 while the suit was filed by the respondent on July, 2003.

6. Counsel for the respondent on the other hand refutes the submissions of the counsel for the appellant and submits that the suit was instituted by the respondent on 31st May, 2003 and therefore the same was clearly within the limitation period. Counsel for the respondent further placed reliance on paras No. 12 and 13 of the impugned judgment whereby the Trial Court has dealt with the said issue of limitation and decided the same in favour of the respondent.

7. I have heard learned counsel for the parties.

8. On perusal of the trial court record it is quite evident that the suit was filed by the respondent on 31st May, 2003 and on the assignment

of the same, it was taken by the concerned Court on 3rd July, 2003. If the period of limitation is taken from the date of the said acknowledgment letter dated 7th June, 2000 then clearly the suit filed by the respondent is within the prescribed period of limitation.

9. Now to examine the contention of the counsel for the appellant that the letter dated 7.6.2000 was forged, on perusal of para No. 28 of the plaint it is quite evident that the respondent/plaintiff pleaded limitation period based on the said acknowledgement letter dated 7th June, 2000 and in reply to the said para the appellant/defendant has not taken a stand that 7th the said letter dated June, 2000 was forged by the respondent/ plaintiff. Copy of the said letter was placed on record by the respondent/ plaintiff and, therefore, the appellant could have taken a clear stand that the said letter filed by the respondent was a forged document. No such plea was raised by the appellant before the learned Trial Court also. Hence, so far the question as to whether the said letter dated 7th June, 2000 was properly proved by the respondent on record or not or whether the said letter is a forged document or not, this Court does not find any perversity or illegality in the findings arrived at by the learned Trial Court. In paras 12 and 13 of the impugned judgment, the learned Trial Court came to the conclusion that no evidence was led by the appellant/defendant to prove that the said document i.e. letter dated 7th June, 2000 was a forged one. The learned Trial Court also observed that the entire evidence led by the appellant appears to be hearsay evidence. It would be useful to reproduce the said paras of the impugned judgment here:

> "12. Although the defendant has stated that the document is forged but in the entire evidence led by the defendant not even a single statement has been made by the witness how he can say that the document is forged one and the defendant has not led even single evidence to prove that document Ex.PW 1/19 is forged document or the manner in which the defendant can say that document is forged one. The entire evidence led by the DW1 appears to be hear say evidence.
>
> 13. Onus to prove this issue was on the plaintiff. The plaintiff has proved this issue by placing on record and proving the letter dated 7.6.2000 of the defendant company wherein the defendant admitted liability of making payment as per Section 18 of the

Limitation Act. Cause of action for filing present suit arose on 10.08.98 when the plaintiff left the services of the defendant and hence letter dated 7.6.00 is within three years limitation period and has further extended limitation for filing suit for recovery up till 6.6.03, suit is filed on 3.6.03. Therefore I am of the opinion that onus has been rightly discharged by the plaintiff. The suit of the plaintiff is within period of limitation. This issue is decided in favour of the plaintiff and against the defendant."

10. Although in the impugned judgment reproduced above, there is a wrong observation made by the Trial Court that the suit was filed by the respondent on 3rd June, 2003, which in fact should have been 31st May, 2003, but except the said mistake this Court does not find any illegality in the said findings arrived at by the learned Trial Court on issue No. 1.

11. The other issue raised by the counsel for the appellant is that sufficient opportunity was not given to cross examine the respondent, PW 1. The learned trial court has clearly observed in para 16 of the impugned judgment as under:

"16. The plaintiff has given the detailed facts in the evidence, despite giving opportunity to the defendant for cross examination on this account plaintiff witness was not cross examined and hence the opportunity was closed. Therefore the testimony of the plaintiff is uncontroverted and unchallenged."

12. Also a perusal of the order sheet dated 21.7.04 where it is clearly observed by the learned trial court that PW 1 is present for cross examination and opportunities for cross examination have not been utilized by the defendant, hence the cross examination is accordingly closed. Therefore, it is clear that the appellant did not choose to cross-examine PW1 who proved the case of the respondent. The plea of the appellant that sufficient opportunity was not granted to the appellant to cross-examine the said witness is totally untenable as evidently no steps were taken by the appellant to seek such an opportunity to cross examine the said witness. Neither did the appellant in its own evidence take any stand to contradict the said letter dated 7th June, 2000 nor did the appellant anywhere take a stand that the letter was a forged document. It is a

settled legal proposition that the where the party fails to avail the right of cross examination of a witness despite there being sufficient opportunity and the testimony of such a witness remains unrebutted and unimpeached then in such circumstances such a testimony has to be given due credence. Once the appellant itself has chosen not to dispute the correctness of the said document by taking any specific plea in the written statement and has also not chosen to cross-examine the witness of the respondent besides not even taking any such stand in his own deposition, then, now he cannot be heard to say that the said document was a forged document or the same was not proved in accordance with the law.

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

ILR (2011) I DELHI 668
IA

MRIGENDRA PRITAM VIKRAMSINGH ....PLAINTIFFS
STEINER & ORS.

VERSUS

JASWINDER SINGH & ORS. ....DEFENDANTS.

(V.K. SHALI, J.)

IA NOS. : 7093-94/2009 & 10546/2009 IN CS(OS) NO. : 980/2009

DATE OF DECISION: 12.11.2010

Code of Civil Procedure, 1908—Order VII Rule 11—Grounds for rejection of plaint—Plaintiff four daughters of one Late Rajender Vikram Singh—Defendant no.1 to 5 successors of Late Jaswant Singh brother of Late Rajender Vikram Singh—Suit filed for the partition of two properties, stating first property was purchased

by Late Rajender Vikram Singh and second was joint property with brother Late Jaswant Singh—Defendant no.1 contested the suit inter-alia on the ground that the said properties were bequeathed to him by a Will by Late Rajender Vikram Singh—Defendant no.1 filed application under Order VII Rule 11 inter alia on the ground that the suit was bad for mis-joinder of parties; documents not filed by the plaintiff despite an order under Order VII Rule 4 CPC; suit barred by limitation, there is a defective verification of plaint, filing of affidavit which is neither signed nor attested; thus cannot be taken cognizance of; and Power of Attorney on the basis of suit filed not attested—Held, defendant must adduce evidence to show how mis-joinder of parties has caused serious prejudice or will prevent Court from giving complete relief—Hence cannot constitute ground for summary rejection of plaint—Non filing of documents cannot be ground for summary rejection of plaint—Plaintiff does so at his own peril—Defendants failed to show how suit barred by limitation—Cause of action in present case is continuing one and within period of limitation—Omission to verify or defective verification can be regularized at later stage—Lack of authority, defective verification or even absence of affidavit are irregularities which can be cured during trial—Law of procedure not to be used to deny relief on technical grounds—Therefore, application under Order VII Rule 11 CPC completely misplaced and dismissed.

A perusal of the aforesaid four clauses show that so far as the first ground for rejection of the plaint is concerned, that is based on the cause of action. This is not the case of the defendant that the plaint does not disclose any cause of action. On the contrary, the grounds which are urged are misjoinder of parties or non filing of the documents despite time having been given by the Court etc. These are no grounds for rejection of plaint summarily under O 7 R 11

CPC. There can be at best an issue framed with regard to mis-joinder of parties whereupon parties will be given an opportunity to produce the evidence and decide the said issue. The defendant will have to adduce evidence to show that on account of mis-joinder of parties he has been seriously prejudiced or in the absence of joining of a necessary or a proper party, the Court has not been or will not be able to give the complete relief to the plaintiff, therefore, this cannot be a ground for summoning for rejection of the plaint. **(Para 22)**

Similarly, if the plaintiff has not filed the document despite the time having been given, it will at best make the Court draw an adverse inference against him but can hardly be a ground for rejection of the plaint at this stage. The basic dictum is that one who asserts must prove. Further, when it comes to proof of documents best evidence has to be produced and in the case of documentary evidence. The document itself is the best evidence unless a party is permitted to produce secondary evidence. If the plaintiff does not do so he does so at its own peril. **(Para 23)**

Omission to verify or defective verification can be regularized at a later stage and if it is a mere irregularity within Section 99 as a defect in verification it has been held in catena of authorities to be curable defect and not a fatal one. Reliance in this regard can be placed on the following authorities **AIR 2001 Rajasthan 211** and **AIR 2002 Allahabad 363.(Para 28)**

Further merely by stating that the statement made in this paragraph are true on the basis of information received or belief to be true is sufficient compliance and is not necessary in the verification clause to disclose the grounds or the source of information with regard to the averments which are based on the information received. Reliance in this regard is placed on **AIR 1995 Rajasthan 50.** Similarly, so far as the contention of the learned counsel for the plaintiff with regard to the maintainability of the plaint itself on

account of lack of power of attorney is concerned, the said power of attorney is not attached as Annexure–I to the suit this is at best an irregularity which can be cured at any stage of the trial. The plaintiff has chosen to file an affidavit adopting supporting all the acts which have been done by her mother during the hearing of the case. Having chosen to file the said affidavit the Court feels that there was sufficient authority with the mother of the plaintiff of Baljeet Dhillion to file the present suit against the defendant. Therefore, lack of authority, defective verification or even the absence of the affidavit are at alleged irregularities which can be cured during the trial. **(Para 29)**

Moreover, it is settled that the law of procedure is not to be used in order to oust a person on a technical ground from getting a rights of a party on merits adjudicated by the competent court. In other words, the technicality of law should not deter the Court from passing the orders on merits of the case or proceedings towards the resolution of the matter on merits rather than get bogged down by the technicalities. This principle of law is laid down by the Apex Court five decades back in the case titled **Sangram Singh Vs. Election Tribunal** AIR 1955 SC 425 wherein it was observed as under:

> "A code of procedure is procedure, something designed to facilitate justice and further its ends: not a Penal enactment for punishment and penalties; not a thing designed to rip people up. Too technical construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it."
>
> **(Para 30)**

Important Issue Involved: No grounds made out for summary rejection of plaint—Defendant must adduce evidence to show how mis-joinder of parties has caused serious prejudice or will prevent Court from giving complete relief—Hence cannot constitute ground for summary rejection of plaint—Non filing of documents cannot be ground for summary rejection of plaint—Plaintiff does so at its own peril—Defendants failed to show how suit barred by limitation—Cause of action in present case is continuing one and within period of limitation—Omission to verity of defective verification can be regularized at later stage.

[Sa Gh]

APPEARANCES:

FOR THE PLAINTIFFS : Mr. A.K. Vali & R.K. Srivastava, Advocates.

FOR THE DEFENDANTS : Mr. A.K. Khosla, Advocate.

CASES REFERRED TO:

1. *S. P. Chengalvaraya vs. Jagannath* AIR 1994 SC 853 and AIR 1992 Delhi 197.
2. *Sangram Singh Vs. Election Tribunal* AIR 1955 SC 425.

RESULT: Interlocutory Applications disposed off.

V.K. SHALI, J.

IA Nos. 7093-94/2009 & 10546/2009

1. This order shall dispose of three applications bearing IA Nos. 10546/2009 under Order VII Rule 11 (a) CPC filed by the defendant no. 1, IA No. 7093/2009 under Order XXXVIII Rule 5 CPC and IA bearing no. 7094/2009 under Order XL Rule 1 CPC filed by the plaintiffs.

2. Briefly stated the facts of the case are that the plaintiffs are four daughters of Late Shri Rajendra Vikram Singh. The suit was filed for partition of two properties bearing no. B-10, West End, New Delhi and a commercial property bearing no. 510, Suryakiran Building, 19, Kasturba Gandhi Marg, New Delhi marked in green in Schedule-I. The Surya

Kiran Property was purchased from the defendant no. 6. So far as the property in West End is concerned, it was alleged that it was a joint property of their deceased father Rajendra Vikram Singh and his brother Jaswant Singh (since deceased). The defendant no. 1 Jaswinder Singh is the son of Late Shri Jaswant Singh. The defendant no. 2/Ms. Surinder Kaur is the widow of Jaswant Singh. The defendant nos. 3 and 4 and 5 Jasdeep Kaur, Harpreet Kaur and Hardeep Kaur are the daughters of Late Shri Jaswant Singh. The defendant no. 6 is stated to be Ansal Properties from whom the commercial property bearing no. 510, Suryakiran Building, 19, Kasturba Gandhi Marg, New Delhi was purchased. The defendant no. 7 is the tenant in respect of rear half portion of the West End property while as the defendant no. 8 is the tenant in respect of the commercial property bearing no. 510, Suryakiran Building, 19, Kasturba Gandhi Marg, New Delhi.

3. It was the case of the plaintiffs that their father was the joint owner of West End property and two separate buildings were constructed on the said plot. The front portion of the building belonged to Late Shri Jaswant Singh, predecessor-in-interest of defendant nos. 1 to 5 while as the rear portion of the building facing towards the South End side owned by Rajendra Vikram Singh father of the plaintiffs, which is presently under the occupation of a tenant paying rent to the defendant no.1. Similarly, the property Surya Kiran Building is also under tenancy. Though the names of the tenants are given but it is stated that as of date they are not the tenants.

4. It is not in dispute that the father of the plaintiffs who had settled in USA died on **02.01.2001** in India. It is alleged that their father had made an unregistered WILL dated **05.12.2000** and bequeathed all the immovable properties to the plaintiffs and in any case even if the WILL is not taken into consideration the property passed by operation of law and succession as envisaged under Section 8 of the Hindu Succession Act according to which the plaintiffs get the share in the said property. The plaintiff has also stated in the plaint that earlier they had filed a suit bearing no. CS (OS)1207/2001 claiming half ownership of the West End property which was rejected on the ground that the requisite court fees was not paid, and accordingly, the present suit has been filed by the plaintiffs.

5. So far as the defendant no. 1 to 5 are concerned, they have contested the claim of the plaintiffs for partition of the suit property. The defendant no. 1 has taken the plea that so far as the deceased father of the plaintiffs is concerned as his daughters were settled permanently in USA, he had bequeathed the aforesaid immovable properties vide WILL dated 05.12.2000 in favour of the defendant no. 1, who happen to be the nephew (brother's son) out of natural love and affection. It is alleged by him that the property situated in West End accordingly was got mutated by him in his own name on the basis of the WILL and it has been let out by him to the tenant from whom an amount of Rs.6/7 lakhs or so is being realized per month.

6. So far as the commercial property bearing no. 510, Suryakiran Building, 19, Kasturba Gandhi Marg, New Delhi is concerned, it is stated by the defendant no. 1 that this property was also bequeathed by Rajendra Vikram Singh in favour of the defendant no. 1 on the basis of the WILL dated 05.12.2000. Further he had applied to the defendant no. 6 for mutation of the property in his favour which was done by them by making an endorsement on the agreement to sell and thereafter he has got the said agreement to sell further endorsed in favour of his wife and daughters. It is the case of the defendants that no document of title in respect of the commercial property was executed by the defendant no. 6. There was only a letter of allotment/agreement to sell executed in respect of the said property which was got endorsed in pursuance to the WILL purported to have been made by Rajendra Vikram Singh deceased firstly in favour of the defendant no. 1 and thereafter in favour of the daughters of the defendant no.1 and thus they are the owners of the property.

7. The defendant no. 1 has filed an application under Order VII Rule 11(a) CPC for rejection of the plaint on the number of grounds which are as under:

(i) It is alleged by the defendant no. 1 that the plaintiffs had earlier filed their case on the basis of the WILL dated **05.12.2000** which was dismissed, and therefore, the said WILL cannot be the basis of filing of the present suit.

(ii) That the suit has been signed, verified and instituted by one Ms. Baljit Dhillion, mother of the plaintiffs, in her

capacity of being the Power of Attorney holder when no such documentary authorization has been placed on record despite a mention in the plaint that it is attached as annexure A in para I of the plaint. A subsidiary argument which was raised is that even if it is assumed that the plaint has been duly signed, verified and instituted by a competent person the verification of the suit cannot be countenanced as it has been stated that averments made in paras 1 to 41 of the plaint are .true and correct to my knowledge, that means they are true and correct to the knowledge of Baljeet Dhillion. It is also alleged that the affidavit in support of the plaint is neither signed nor attested, and therefore, no cognizance of the said affidavit can be taken.

(iii) The third objection which is taken for the rejection of the plaint is that under Order VII Rule 14 CPC an application seeking exemption from filing the original documents was sought which was granted but no original documents have been filed till date. It is alleged that although the plaintiffs are purported to be relying on such an oral documents but no such documents have been filed by them despite the fact that after the order dated 25.05.2009 the plaintiffs application bearing no. 7095/2009 under Order VII Rule 14 CPC was allowed and four weeks' time was given to file the original documents.

(iv) Fourth ground for rejection of the plaint is the suit is bad for mis-joinder of the defendant nos. 2 to 7 and as their impleadment is designed to embarrass the Court with unnecessary and vexatious litigation which has no bearing to the relief claimed by them.

(v) It is alleged that the plaint propounds the WILL. It is alleged that the defendant no. 2 is the defendant no.1's mother and the defendant nos. 3 to 5 are the sisters of the defendant no. 1, all of whom have never raised a claim with regards to the property and this is in the knowledge of the plaintiffs, and therefore, this is a case of misjoinder of parties.

(vi) So far as the commercial property bearing no. 510,

Suryakiran Building, 19, Kasturba Gandhi Marg, New Delhi is concerned, it is alleged that although the suit property was agreed to be sold by defendant No.6 to Late Shri Rajendra Vikram Singh, however, on account of the demise of Rajendra Vikram Singh the said agreement to sell was endorsed in favour of the two daughters Ms. Geetanjalei Singh and Ms. Aishwarya Singh on 03.01.2008 in their favour, and therefore, there was no cause of action for the plaintiffs to file the present suit and the name of the defendant no. 6 be struck off from the array of defendants. Similarly, a prayer with regard to the defendant nos. 7 and 8 for deleting them from the array of defendants has been made.

(vii) It is alleged that the plaintiffs have approached this Court with unclean hands and material facts with regard to the previous litigation or the litigation between Late Shri Rajendra Vikram Singh and his wife Baljeet Dhillion has not been revealed in the plaint.

(viii) It is also alleged that the instant suit is barred by provision of 23 Rule 1 CPC in as much as the earlier civil suit bearing No. CS(OS) 1207/2001 was on the same cause of action, as the instant case. The said suit was dismissed vide order dated 12.02.2007 because of non-payment of requisite court fees, and therefore, the present suit is not maintainable. A rejection of the suit is also sought on the ground of limitation and on the ground of under valuation of the suit property in respect of which she has sought the declaration of ownership.

(ix) It is alleged that the plaintiffs have valued the suit property in West End at the rate of 4/5 lacs per sq. yard while as the actual market value is much higher than that, and therefore, the present suit is liable to be rejected. It is on these grounds the defendant no. 1 has sought rejection of the plaint.

8. The plaintiffs have filed the reply to the application and contested the claim of the defendant no.1 for rejection of the plaint. The dismissal of the suit filed by the plaintiff on the basis of the will does not preclude

the filing of the suit on the basis of intestate succession. Therefore there is no application of the principle of res-judicata or the rejection of plaint under Order VII Rule 11. So far as the rejection of the plaint as not having been validly signed, verified or instituted by Baljeet Dhillion, the mother of the plaintiffs is concerned, an application duly supported by an affidavit of one of the plaintiff's has been filed during the hearing of the arguments contending that assuming that there is deficiency with regard to the authority of Baljeet Dhillion, the mother of the plaintiffs in instituting the suit still the acts of Baljeet Dhillion are being ratified and owned by the plaintiffs. The rejection of the suit of the plaintiffs filed in 2001 on account of lack of payment of court fees does not preclude the filing of a fresh suit provided the cause of action was itself within limitation. So far as the question of limitation is concerned that the question of limitation is a mixed question of law and fact, it can be adjudicated only after the parties are permitted to adduce evidence when an issue in this regard is framed.

9. The other objections with regard to the non-joinder of necessary parties or the defect in verification clause, alleged concealment of facts etc. the learned counsel for the defendant has contended that this is only at best an irregularity or a fact to be established by evidence. It is further stated that the irregularity can be rectified during the course of trial and the plaint cannot be rejected under Order VII Rule 11(a) CPC for the same.

10. The remaining two applications have been filed by the plaintiffs. An application bearing no. 7093/2009 is an application under Order XXXVIII Rule 5 CPC read with section 151 CPC for attachment before the judgment of the portion of the property bearing no. B-10 West End, New Delhi belonging to the defendant No.1 which is marked in Green, Schedule-D to the plaint so that a decree in respect of the mesne profits which may be passed against the defendant No.1 is executed. The plaintiffs have claimed apart from partition, a sum of Rs.2,10,06,720/- as the mesne profits for the two properties which would have accrued to the plaintiffs. It is stated by the plaintiffs in the plaint and this factum is not disputed by the defendant no. 1 either that South End portion of the B-110 West End, New Delhi has been let out by the defendant no. 1 to a party from whom he is realizing the hefty amount of Rs.6,00,000/- or so per month by way of rentals.

11. This application for attachment before judgment has been resisted by the defendant no. 1 on the ground that the plaintiffs are not entitled to any mesne profit on account of the fact that the deceased father of the plaintiffs had bequeathed his portion of the property in West End in favour of the defendant no. 1 by virtue of a WILL and hence the defendant no. 1 was lawfully entitled to the entire property to West End including the realization of rent.

12. With regard to the second IA bearing no. 7094/2009 the plaintiffs have prayed for an appointment of a receiver in respect of the West End property especially the portion which is under the occupation of a tenant as well as the commercial property bearing no. 510, Suryakiran Building, 19, Kasturba Gandhi Marg, New Delhi for efficient management, protection, preservation, improvement and collection of rents and profits from the said property. It was alleged in the application by the plaintiffs that even in the earlier suit bearing no. CS(OS) 1207/2001 the plaintiffs had filed an IA bearing no. 5699/2001 for deposit of rent of the suit premises tenancies in this Court apart from restraint order whereupon the High Court on 06.06.2001 had restrained the defendants which included the defendant no. 1 also, from transferring, alienating or parting with possession of any of the properties mentioned in para 2 of the said plaint. Further the tenants who were defendant No.2 and 3, in the said case in respect of these properties were directed to deposit the rent in Court. It is contended that the same order deserves to be passed in the present application also in as much as the defendant no. 1 is trying to fritter away the properties and the rentals which are being realized. It is in this context a prayer for appointment of a receiver is made who will not only maintain, preserve the suit properties but also collect the rent and deposit the same in Court.

13. The defendant no. 1 has filed the reply to the said application and the stand which has been taken by him for resisting the attachment before judgment has been taken in reply to the present application also. It has been further stated that so far as the commercial property bearing no. 510, Suryakiran Building, 19, Kasturba Gandhi Marg, New Delhi is concerned, there was an agreement to sell in favour of Late Shri Rajendra Vikram Singh executed by the defendant no. 6. The said agreement is endorsed in favour of the defendant no. 1 on the basis of the WILL and thereafter the defendant no. 1 has further got the endorsement of the

agreement to sell recorded in favour of his two daughters, and therefore, if at all any rent is being realized by them in pursuance to the said endorsement, they being not parties to the suit the receiver in respect of the said property cannot and may not be appointed.

14. It may be pertinent here to refer to the written statement which has been filed by the defendant no. 6/Ansal Properties which has sold the said commercial property vide an agreement to sell in favour of the father of the plaintiffs deceased Rajendra Vikram Singh. The defendant no. 6 has taken the stand that on account of demise of Rajendra Vikram Singh, he being the owner of the said property was well within his right to bequeath the said property in favour of the defendant no. 1. It is also stated by them that on the basis of the WILL dated 05.12.2001 having been produced by the defendant no. 1, they endorsed the agreement to sell in favour of the defendant no. 1 as there was no requirement of law to ask the defendant no. 1 either to file no objection certificate of the legal heirs of Rajendra Vikram Singh or to obtain the probate. It has tried to justify the endorsement by contending that the property is self-acquired property by the deceased Rajendra Vikram Singh and he was well within his right to alienate the property in favour of the defendant no. 1.

15. I have heard the learned counsel for the parties and perused the record.

16. Mr. Khosla, the learned counsel for the defendant no. 1 has very vehemently and strenuously contended that the suit as framed is liable to be rejected under Order VII Rule 11(a) CPC on account of various contentions and the grounds which has been detailed hereinabove. It was contended by him that the suit has not been validly signed, verified and instituted by a duly authorized person as the document of authorization which is stated to be attached with the plaint as annexure 'A-1' is not attached with the plaint.

17. The suit is purported to have been filed by the plaintiffs through their mother Baljeet Dhillion whose power of attorney is not on record and the affidavit of one of the plaintiff's which has been filed during the course of submissions cannot be taken cognizance so as to regularize the irregularity in filing of the suit and this must result in rejection of plaint. Another subsidiary argument to this plea was that the suit is not properly verified as it has been stated that the contents of paras 1 to 41 are true

to her knowledge. It is stated that when the suit is being filed through the power of attorney how it could be said that the contents of the various paras were true to her knowledge.

18. The learned counsel for the defendant has also raised the objection regarding misjoinder of parties on the ground that neither the defendant No.6, who had sold the flat to the deceased nor the tenants in the two properties are neither necessary nor proper parties and therefore the suit is liable to be rejected. It is also contended that despite the time having been given, the plaintiff has not filed the original documents and therefore the plaint be rejected. It is alleged that the suit is liable to be rejected on the ground of concealment of facts.

19. The suit is being barred by limitation and the rejection of the previous suit is canvassed as a ground for rejection under Order VII Rule 11 (d) CPC. The learned counsel has placed reliance on the judgment of the Apex Court in case title **T. Arivandandam Vs. T. V. Satyapal & Anr.** AIR 1977 SC 2421 to contend that a false and vexatious claim must be rejected. The learned counsel has referred to the para 5 of the said judgment in order to support his point regarding rejection of the plaint. The said para reads as under:

> "5. that if on a meaningful -- not formal -- reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order VII Rule 11, C.P.C. taking care to see that the ground mentioned therein is fulfilled. And, if clear drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X, C.P.C. An activist Judge is the answer to irresponsible law suits. The trial Courts would insist imperatively on examining the party at the first hearing so that bogus litigation cam be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Ch. XI) and must be triggered against them.

20. I have carefully considered the submissions made by the learned counsel for the defendant for rejection of the plaint, however, I find myself unable to agree with any of the submissions made by the learned counsel with regard to the rejection of the plaint under Order VII Rule 11(a) CPC and with any of the points which are urged by him in the

instant case. Although there is no dispute about the proposition of law which has been laid down by the Apex Court in **Arivandandam's** case (Supra) however the facts of the present case do not merit rejection of plaint as prayed for on the basis of the observation passed in the said judgment.

21. The Order VII Rule 11(a) Reads as under:

> "Order VII Rule 11 Rejection of plaint The plaint shall be rejected in the following cases:—
>
> (a) where it does not disclose a cause of action;
>
> (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
>
> (c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;"
>
> (d) where the suit appears from the statement in the plaint to be barred by any law.

22. A perusal of the aforesaid four clauses show that so far as the first ground for rejection of the plaint is concerned, that is based on the cause of action. This is not the case of the defendant that the plaint does not disclose any cause of action. On the contrary, the grounds which are urged are misjoinder of parties or non filing of the documents despite time having been given by the Court etc. These are no grounds for rejection of plaint summarily under O 7 R 11 CPC. There can be at best an issue framed with regard to mis-joinder of parties whereupon parties will be given an opportunity to produce the evidence and decide the said issue. The defendant will have to adduce evidence to show that on account of mis-joinder of parties he has been seriously prejudiced or in the absence of joining of a necessary or a proper party, the Court has not been or will not be able to give the complete relief to the plaintiff, therefore, this cannot be a ground for summoning for rejection of the plaint.

23. Similarly, if the plaintiff has not filed the document despite the

time having been given, it will at best make the Court draw an adverse inference against him but can hardly be a ground for rejection of the plaint at this stage. The basic dictum is that one who asserts must prove. Further, when it comes to proof of documents best evidence has to be produced and in the case of documentary evidence. The document itself is the best evidence unless a party is permitted to produce secondary evidence. If the plaintiff does not do so he does so at its own peril.

24. The clause (b) and (c) as envisaged under Order VII CPC are the grounds where either the suit has been undervalued or even if properly valued but deficient court fees has been paid which is not the case of the defendant.

25. Although the defendant no. 1 has taken the plea that the suit is barred by limitation but he has failed to show as to how the suit is barred by limitation. On the contrary the ground for rejection of the plaint which has been taken by the defendant no.1 is that the plaintiff had earlier filed a suit bearing no. CS (OS) 1207/2001 basing his claim on the WILL purported to have been made by their father and sought possession of the West End property which was rejected on account of the deficient court fees. If a suit is rejected on account of lack of payment of proper court fees or for that matter deficient court fees, the aggrieved party can always pay the deficient court fees and revive the suit or even file a fresh suit as the case may be provided it is within limitation. In the instant case also the plaintiffs have filed the present suit after paying the deficient court fees. In addition even if a party has failed to show its claim on property on the basis of an alleged Will still it is open to the party to contend that the property passes on to it by ordinary law of succession.

26. The present suit is filed for partition in respect of which the defendants have denied the claim of the plaintiffs and the cause of action is a continuing one and therefore it clearly shows that it is within the period of limitation.

27. The learned counsel for the plaintiffs has put too much reliance on the lack of authority of Baljeet Dhillion the mother of the plaintiff to file the present suit by contending that the requisite power of attorney is not on record. He has also tried to assail the verification clause of the suit by contending that the source of verification is not given and the present plaintiffs who have filed the present suit has simply stated that

the averments made in para 1 to 41 are true and correct to her knowledge but wherefrom this knowledge drive has not been given.

28. Omission to verify or defective verification can be regularized at a later stage and if it is a mere irregularity within Section 99 as a defect in verification it has been held in catena of authorities to be curable defect and not a fatal one. Reliance in this regard can be placed on the following authorities **AIR 2001 Rajasthan 211** and **AIR 2002 Allahabad 363.**

29. Further merely by stating that the statement made in this paragraph are true on the basis of information received or belief to be true is sufficient compliance and is not necessary in the verification clause to disclose the grounds or the source of information with regard to the averments which are based on the information received. Reliance in this regard is placed on **AIR 1995 Rajasthan 50.** Similarly, so far as the contention of the learned counsel for the plaintiff with regard to the maintainability of the plaint itself on account of lack of power of attorney is concerned, the said power of attorney is not attached as Annexure–I to the suit this is at best an irregularity which can be cured at any stage of the trial. The plaintiff has chosen to file an affidavit adopting supporting all the acts which have been done by her mother during the hearing of the case. Having chosen to file the said affidavit the Court feels that there was sufficient authority with the mother of the plaintiff of Baljeet Dhillion to file the present suit against the defendant. Therefore, lack of authority, defective verification or even the absence of the affidavit are at alleged irregularities which can be cured during the trial.

30. Moreover, it is settled that the law of procedure is not to be used in order to oust a person on a technical ground from getting a rights of a party on merits adjudicated by the competent court. In other words, the technicality of law should not deter the Court from passing the orders on merits of the case or proceedings towards the resolution of the matter on merits rather than get bogged down by the technicalities. This principle of law is laid down by the Apex Court five decades back in the case titled **Sangram Singh Vs. Election Tribunal** AIR 1955 SC 425 wherein it was observed as under:

> "A code of procedure is procedure, something designed to facilitate justice and further its ends: not a Penal enactment for punishment and penalties; not a thing designed to rip people up. Too technical construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it..

31. The learned counsel for the defendant no. 1 had also taken the point of rejection of the plaint on the ground of concealment of fact and placed reliance on case titled **S. P. Chengalvaraya Vs. Jagannath** AIR 1994 SC 853 and **AIR 1992 Delhi 197.** Similarly, the learned counsel for the plaintiff had also canvassed the point of rejection of the plaint on the ground of deficient payment of court fees by urging that land rate in Connaught Place is around 43,000/- per sq. meter and in West End Rs.7,00,000/- per sq. meter to urge that the plaintiff has to pay court fees after calculating the market value of both these properties by reference to the aforesaid land rates. No doubt, in **Chengalvaraya's** case (supra) the Court has said that concealment of material facts or fraud would vitiate the entire proceedings void ab initio but the observations of the Supreme Court were passed in the fact situation which is not available in the instant case. Similarly in the Delhi High Court Judgment it was observed that concealment of material facts would disentitle a party from claiming discretionary relief of injunction. What is presently being decided is not the injunction application, and therefore, the Delhi High Court Judgment does not apply. Moreover, in the instant case the parties are yet to adduce evidence and the facts as placed clearly shows that the effort of the defendant is to somehow or the other keep the plaintiffs away from the properties left by their father who are the prima facie rightful successor of the properties left behind by their deceased father and the objection regarding payment of court fees on the basis of the market value at this stage is only being raised by the defendant as a ploy to keep the plaintiffs out of the adjudication of their rights qua the properties. The question of payment of court fees is again a question of procedure which in the light of the observations of the Supreme Court in **Sangram's Singh** case (supra). In the light of peculiar facts of this property where the plaintiffs are residing abroad are being sought to be deprived of their being rightful successor of the property left behind by their father, I am not inclined to accept the plea of the defendant, however, the defendant shall be free to adduce evidence in this regard on merits in respect of which an issue can be framed.

32. I, accordingly, for the abovementioned reasons feel that the application of the defendant under Order VII Rule 11 CPC for rejection of the plaint is totally misconceived and vexatious in nature as there does not seem to be even a single ground available in law which would merit the rejection of the plaint under Order VII Rule 11 CPC, and therefore, the same deserves to be dismissed.

33. The second application which has been filed by the plaintiff bearing no. 7093/2009 under Order XXXVIII Rule 5 CPC is with regard to the attachment of the suit property till the disposal of the suit so far as the West End property is concerned. This is on account of the fact that in the present suit the plaintiffs have claimed mesne profit to the tune of Rs.2,10,06,720/- which in the event of the being decreed in his favour may not be realized by him, and therefore, necessary orders have been prayed.

34. I do not agree with the contention of the learned counsel for the plaintiffs that the suit property which is situated in West End the portion which is under occupation of the plaintiffs and the other portion which is purportedly claimed by the plaintiff to be his share which is under the tenancy deserves to be attached in as much as order dated 25.05.2009 the plaintiff's interest has already been secured and there is a restraint against the parties from creating any third party interest with regard to the title or the possession of the portion of the suit property. Because of this order it will not be open to the defendant no. 1 to transact any portion of the property which should be sufficient enough to secure the interest of the plaintiffs in the event of his succeeding in getting a decree for the mesne profits passed by the Court, therefore, the application of the plaintiffs under Order XXXVIII Rule 5 CPC is disallowed.

35. This leaves the Court with only one of the application bearing no. 7094/2009 under Order XL Rule 1 CPC for appointment of the receiver in respect of part of the property situated towards South End more particularly shown in the map in Green colour portion which is under the occupation of a tenant as well as the commercial property bearing no. 510, Surya Kiran Building, 19, Kasturba Gandhi Marg, New Delhi is sought to be governed by an appointment of a receiver. The Court is of the view that there is prima facie a case in favour of the plaintiffs for appointment of a receiver in respect of both these properties.

36. So far as the commercial property bearing no. 510, Surya Kiran Building, 19, Kasturba Gandhi Marg, New Delhi is concerned, it is not disputed that the same was agreed to be purchased by Late Shri Rajendra Vikram Singh under an agreement to sell from the defendant no. 6 namely the Ansal Properties and the possession of the said property has been handed over to the perspective purchaser namely Late Shri Rajendra Vikram Singh but before his title in respect of the said property could be perfected, he expired. The defendant no. 1 had set up a WILL contending that by virtue of the said WILL the said commercial flat was bequeathed to him. The minimum which was expected by the builder/seller the defendant no. 6 was that it ought to have directed the defendant no. 1 to obtain a no objection certificate from the legal heirs of the deceased owner which has been done. It is also admitted case that WILL dated 5.12.2000 which has been made the basis for ownership by the defendant no. 1 is not a registered document with the Sub Registrar. Nor the same has been probated and yet the natural legal heirs of the deceased Rajendra Vikram Singh have been divested of the said suit property, therefore, it raises a reasonable doubt regarding the genuineness of the WILL and it could not be considered as the basis for mutation or endorsement of the agreement to sell in favour of the deceased in respect of the commercial property in favour of the defendant no. 1. Much less the defendant no. 1 could get the same endorsed in favour of his daughters so as to overreach the Court orders and to present as if the Court is powerless to balance the equity in respect of the suit property. Admittedly, the said property is let out to a private party from whom the rent is being realized which is stated to be to the tune of Rs.6,00,000/- per month or so. The plaintiffs have filed the present suit not only for partition but also for realization of mesne profits part of which pertains to this commercial property and in case a receiver is not appointed or a direction is not issued to the Receiver to take the constructive possession of both the properties the defendant no 1 and his daughters are only going to fritter away the property but also making unjust enrichment by realizing the rent or using the same to their own benefit and to the detriment of the plaintiff. Further, the trial as the common knowledge goes, is likely to take considerable time. This will cause serious prejudice to the interest of the plaintiffs in as much as by the time the trial concludes the of the defendant no. 1 and his daughters would have realized substantial amount of money from the said property as rental to their advantage. The defendant

no. 1 and his daughters have already realized the amount for which they have not been accounted, and therefore, keeping in view the principle of equity, fair play and justice apart from the property being frittered away, I consider it just and proper to appoint an officer of this court as the Receiver of the aforesaid two properties for the purpose of efficient management, protection, preservation, maintenance, upkeep of the suit properties and also the realization of the rent from the said tenants. There was a direction passed by this Court on the application in the previous suit also that the rent be deposited by the tenants in Court, but the said suit was rejected and therefore, the said direction no more survives. The tenant of the two properties are directed to deposit their respective rent with the learned Registrar General, High Court of Delhi on or before 7th of each calendar month or alternately on the present order being served on the occupants/tenants of both these properties, they shall draw the rent in the name of Registrar General of this Court and deposit with him or hand over to the receiver who shall deposit the same with the Registrar General, Delhi High Court.

37. I, accordingly, appoint an officer of the Court with impeccable record be appointed as the receiver who will manage, supervise and take instructive charge of the properties. I accordingly, appoint **Ms. Priya Kumar, Advocate,** Mobile No. **9811355512** of this Court as the Receiver in respect of both the properties bearing no. B-10, West End, New Delhi and a commercial property bearing no. 510, Surya kiran Building, 19, Kasturba Gandhi Marg, New Delhi properties to carry out the aforesaid directions. The amount after leaving the amount of rent for one month shall be kept in a form of FDR initially for a period of one year which is to be renewed on expiry till order to the contrary are passed. So far as the rent of initial one month is concerned that should be utilized for meeting the house tax liabilities or for carrying out necessary repairs or maintenance of the properties which can be drawn on application being made to the Registrar General of the Court. The learned receiver shall also be given a copy of the order and will visit both the premises and apprise the respective tenants about the order that henceforth they will have to comply with the direction of the Court regarding the deposit of their rentals in the name of Registrar General, Delhi High Court. The Receiver shall, for all practical purposes deal with the existing tenants as well as with the supervision, maintenance of the properties so that both the properties are kept in a proper habitable and usable condition so that

its value does not get depleted. The learned Receiver shall also maintain account of the expenses incurred by her in any maintenance and repair of the properties which may be brought to her notice by the respective tenants or which she may feel necessary for the proper maintenance of the properties. The tenants of both the properties shall give access to the learned Receiver with due intimation in advance after sunrise or before sunset to the properties in case she wants to inspect and necessary intimation regarding the inspection of the properties shall be given to the learned counsel for the parties. The learned Receiver shall be paid an amount of Rs.10,000/- per month apart from expenses as her fee for undertaking the entire exercise by the plaintiff which shall be recovered by them on quarterly basis from the Registry of this Court from the amount deposited by the learned Receiver. The learned Receiver shall further be entitled to take all such actions as may be considered by her to be reasonable, prudent and necessary for discharge of her duties enjoined under Order XL CPC. In the event their being any clarification needed by her she shall be fee free to file such applications may be permissible in law.

38. For the reasons mentioned above, the IA bearing no. 10546/2009 under Order VII Rule 11 (a) CPC and IA bearing no. 7093/2009 under Order XXXVIII Rule 5 CPC are disallowed. However, the IA bearing no. 7094/2009 under Order XL Rule 1 CPC is allowed. The expression of any opinion hereinabove shall not be treated as an expression on the merits of the case.

39. List on 23.2.2011 for the disposal of all the pending IAs.

ILR (2011) I DELHI 689
RSA

1. SMT. SUBHADRA ....APPELLANTS
2. SMT. CHANDERWATI

VERSUS

DELHI DEVELOPMENT AUTHORITY ....RESPONDENT

(INDERMEET KAUR, J.)

RSA NO. : 28/2001 AND DATE OF DECISION: 11.11.2010
C.M. NO. : 73/2001 (FOR STAY)

Punjab Land Revenue Act, 1887—Delhi High Court Act, 1966—Disputed Boundaries—Report of Patwari—Mandatory Procedure—Not followed—Evidentiary value—Appellant's suit for permanent injunction-dismissed—Trial Court and First Appellate Court ignored the report of Patwari-mandatory procedure—Three permanent points to be located before demarcation-not followed—Held—Trial Court and First Appellate Court rightly rejected the report—Punjab Land Revenue Act, 1887 and Part C of the Delhi High Courts Act, 1966—should be followed in suits involving disputed boundaries.

The Punjab Land Revenue Act, 1887 extends to the Union Territory of Delhi. Chapter VII deals with surveys and boundaries. Under Section 100, the Financial Commissioner has powers to make rules as to matters in which the boundaries of all or any estates in any local area are to be demarcated. Part C of the Delhi High Court Act 1966 relate to the instructions to Civil Courts. The procedure has been entailed for "Hadd Shikni" cases/boundary disputes under the aforenoted instructions which are binding instructions. As per these instructions the Field Kanungo should with his scale read on the map, the position and distance of those

points from a line of square, and then with a chain and cross staff mark out the position and distance of those points. If there is no map on the square system available, he should then find three points on different sides of the place in dispute as near to it as he can, and if possible, not more than 200 kadams, apart which are shown in the map and which the parties admit to have been undisturbed. Further, these instructions should be followed by the Revenue Officers of Field Kanungos whenever they are appointed by a Civil Court as a Commissioner in suits involving disputed boundaries. This is a mandate. **(Para 17)**

These instructions/guidelines had not been adhered to as is evident from the demarcation report. The Tehsildar had admitted that there is construction and houses have been raised in land in dispute; it is not possible to identify pucca/ permanent points as a result of which the paimaish/ measurement could not be taken. Only on approximations, the demarcation report had drawn a conclusion that the suit land falls in Khasra No.48/7. This was not the answer which was required to be given to the Court. A positive finding had to be returned in the absence of which both the Courts below had rightly ignored the demarcation report.

(Para 18)

Important Issue Involved: Punjab Land Revenue Act, 1887 and Part C of the Delhi High Courts Act 1966 should be followed by the Revenue Officers of field Kanungos wherever they are appointed by a Civil Court as Commissioner in suits involving disputed boundaries.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Vipin K. Singh, Advocate.

FOR THE RESPONDENT : Mr. Bhupesh Narula, Advocate.

RESULT: Appeal dismissed.

INDERMEET KAUR, J.

1. This second appeal has impugned the judgment and decree dated 10.1.2001 which had endorsed the finding of the Trial Court dated 2.5.2000 whereby the suit of the plaintiffs i.e. Smt. Subhdara & another was dismissed.

2. There were two plaintiffs who had filed the present suit which was a suit for permanent injunction. The plaintiffs were stated to be in possession of two residential houses bearing no. 20-H and 20-I in Khasra No.48/7, 4 bighas 4 biswas in Village Humayunpur of which a portion of land i.e.75 sq. feet stood in the name of each plaintiff. It was stated that the plaintiffs were paying house tax and water tax in respect of the suit property. The property had been described as being bounded on the northern side by property bearing no.B-4/182 and B-4/206, Safdarjung Enclave; on the west there was a land measuring 12 feet; on the east there was a pucca road. The contention of the plaintiffs was that on 10.3.1987 a demolition notice under Section 30(1) read with Section 31(1) of the Delhi Development Act, 1957 (hereinafter referred to as the Act) was served upon the plaintiffs restraining them from raising any construction in the land. On 8.9.1987 the officials of the DDA visited the site and threatened them with demolition. A decree for permanent injunction was accordingly prayed for by filing the present suit.

3. The defendant/DDA had contested the suit; it was submitted that the land belongs to the department; suit was not maintainable. It was denied that the suit land forms a part of the Khasra no.48/7, Village Humayunpur; contention was that the plaintiffs have illegally and unauthorizedly encroached upon the land of the defendant which land falls in Khasra no.48/5; they had illegally raised construction therein; Khasra no.48/5 had been acquired by the government vide Award no.1170 and has been placed at the disposal of the DDA under Section 22(1) of the said Act vide notification dated 3.11.1961.

4. Trial Judge had framed four issues. On 15.02.1989 the Patwari had been appointed as a local commissioner to demarcate the suit property. His report had been filed on 27.9.1989. No objections had been filed to the said report.

5. The plaintiffs in support of their case examined three witnesses of whom the Patwari Sunil Kumar was examined as PW-3. The

department had also examined two witnesses of whom the Patwari Gulfam Ahmed was examined as DW-1.

6. Trial Jude returned a finding that the plaintiffs are not the owners in possession of the residential houses bearing no. 20-H and 20-I falling in Khasra No.48/7, Village Humayunpur; they had failed to establish that the suit land falls in aforenoted khasra. The demarcation report dated 27.9.1989 of the Patwari holding that two house fall in Khasra No.48/7 was ignored; it was held that the demarcation report had clearly stated that no permanent point could be found in the absence of which this was a violation of the Punjab High Court Rules and the said Rules not having been adhered to, this demarcation report could not be relied upon in evidence.

7. The relevant extract of the finding of the Trial judge qua this observation was recorded as follows:

> "As per demarcation report dt. 27.9.89, it has been mentioned that houses of both the plaintiffs falls in Kh. No.48/7 and vacant land infront of the house does not fall in Kh. No.48/7. Counsel for pltf. during the course of arguments has submitted that as per aks sajra placed on record Ex.PW-3/1, under no circumstances vacant land in front of house can fall in Kh. No.48/5 because Kh. No.48/5 is in the Northern side of Kh. No.48/7 whereas vacant land is shown in the Eastern side of the suit property by Naib Tehsildar in the site plan prepared with the demarcation report. Copy of jamabandi has been placed on record and according to the same, land of Khasra No.48/7 is total measuring 34 bigha 3 biswas out of which 20 bigha is banjar and 14 bigha 3 biswa is gair mumkin. It is land Shamlat Thok of village Humayunpur and has been entered in the name of different persons. But still the question is same whether the suit land falls in Khasra No.48/7 or 48/5. In demarcation report, it has been mentioned that no permanent point was found on the site. According to Punjab High Court Rules regarding dispute of Boundaries, demarcation is required to be carried out at least from 3 permanent points and demarcation is a material piece of evidence only. Demarcation report has neither been exhibited nor proved by examining the persons who conducted the demarcation. Moreover, at the same time, plaintiffs cannot deny some part of demarcation

and can relied upon on other part of the demarcation. The demarcation report cannot be relied upon partly in favour of plaintiffs and partly against them. SLO for DDA submitted that at least vacant land which falls in Kh. No.48/5 be protected. But in my opinion as demarcation has not been carried out according to the rules as provided and it has not been proved in any manner, hence, cannot be relied upon to decide the question whether the suit land falls in Kh. No.48/7 or 48/5."

Suit of the plaintiff was dismissed.

8. The Appellate Court endorsed this finding. The first Appellate Court had also ignored the report of the Tehsildar. The finding on this issue inter alia reads as follows:

"The record of the learned trial Court would reveal that the court had directed the Nayab Tehsildar to carry out the demarcation in order to determine whether the suit property fell in khasra no.48/7 or in khasra no.48/5. The record of the learned trial Court contains one report of the Nayab Tehsildar, Attar Singh dated 13.9.89 submitting that the entire area is heavily built up and thus, it was only after inquiries that it was determined that four walls on khasra no.29 were very old and were taken as a measuring point after determining the measurements of khasra no.29 and finding the same correct. However, further demarcation was not conducted on that date on account of heavily built up properties in khasra no.30. After further directions were given for use of bamboos etc. Shri Attar Singh carried out the demarcation on 27.9.89 once again observing that the areas was heavily built up and khasra no.29 with its four boundaries were found to be correct as per the field book measurement and from there the various measurements were commenced. The learned trial Court, however, did not look into this report on the ground that they were not proved by Shri Attar Singh. Moreover, the learned trial Court observed that the measurements were not taken from three permanent points as required under the Punjab High Court Rules and therefore, did not find it appropriate to rely on the demarcation report. According to the learned counsel for the appellants since the demarcation report had been sought for by the court it had become part of the court records. It was also

submitted that since no objections had been filed therefore, the learned trial Court could not have rejected this report.

8. No doubt neither side had filed any objections to the Nayab Tehsildar's demarcation report. Moreover, when an area is heavily built up it is quite possible that permanent points as required for demarcation may not be easily traceable. However, even if the demarcation report is taken as an acceptable report it is difficult to see how the plaintiffs would be helped in their case. Admittedly the khasra no.48/5 is acquired land. Equally the khasra no.48/7 is private land. The demarcation report only says that the two houses fell in khasra no.48/7 whereas the area in front of these houses which was open land did not fall in 48/7. Having measured up to the houses it is not known why the Patwari failed to ascertain as to in which khasra the open vacant land fell. It was submitted that since 48/5 was towards the North of 48/7 as per Aks Shajra the vacant land could not be considered to be in that khasra number and thus, the learned counsel for the plaintiffs/appellants have submitted that the vacant land lying to the east of the constructed portion was clearly not part of the acquired land. Reliance has been placed on Ext.PW3/1 which is one Aks Shajra brought on record by the Patwari, PW3 examined by the plaintiffs. But it may be noticed that in this Aks Shajra whereas there are clear lines demarcating various khasras, only dotted lines seem to be delineate khasra no.48/5 and 48/7 which itself leaves the demarcation uncertain. 48/7 is rather extensive, as also 48/5 unless these two khasras were clearly demarcated by straight line. In the absence of such division no conclusion can be reached that 48/5 was only towards the North of 48/7 and not towards the East of 48/7 as certain portions have been separated only by dotted line towards the East also.

9. The plaintiffs in the plaint have set out confusing claims in that whereas they claim that in khasra no.48/7 the land belonging to Shri Nathu Ram, Har Narain owned 4 bighas and 4 biswas. They also claimed that there remained only 1500 sq. yard after disposing 2 bighas and 4 biswas by the forefathers but the extent of land belonging to Nathu Ram & Har Narain etc. is not clear at all. Moreover, the plaintiffs claim in the plaint that each had

75 ft. of built up area. No extent of vacant land adjacent to the built up area is mentioned. The Patwari's report is also silent about the extent of the built up area and the extent of the vacant land except to say that 70 ft. shown in black colours in his site plan did not fall in 48/7.

10. No doubt the Patwari, PW3, Shri Sunil Kumar deposed that khasra no.48/7 was in the ownership of Har Narain but it is claimed that khasra no.48/7 measures only 2 bighas and plaintiff Subhadra was in possession to the extent of 3 biswas and Smt. Chandra Wati to the extent of 2 biswas. But these measurements were never mentioned in the plaint. Moreover, extract of which has been placed on record as Ext.PW1/2 is nowhere mentioned that Smt. Subhadra is in possession to the extent of 3 biswas and Chandra Wati to the extent of 2 biswas. Besides when the plaintiffs themselves claim equal extent of 75 ft. of built up area the testimony of PW3 Sunil Kumar that one plaintiff has 3 biswas and the other 2 biswas creates only contradiction in the case of the plaintiffs.

11. As regards the testimony of DW1 Gulfam Ahmad Patwari, he no doubt had stated that at the time of the filing of the written statement the DDA had believed that the subject matter in dispute fell in khasra no.48/5 and claimed that after demarcation the disputed land was taken by Nayab Tehsildar and Kanungo, it came to their knowledge that it fell in khasra no.48/7 which was not acquired by Government. It is clear that the Patwari's report restricts only the built up portion of the disputed property as falling in khasra no.48/7 excluding the vacant portion. Thus, DW1 has himself gone beyond the Patwari's report. 12. In these circumstances, neither can the plaintiffs/appellants seek any help from the Patwari's report nor from the oral testimonies of the witnesses to prove that the suit premises fell in khasra no.48/7. The only admitted fact is that khasra no.48/7 is not acquired and khasra no.48/5 is. But in the light of the contradiction pointed out hereinabove it is clear that the learned trial Court was justified in coming to the conclusion that there was no conclusive evidence to decide whether the suit land fell in khasra no.48/7 or 48/5. Even if the issue no.2 was decided against the DDA it is not as

if the plaintiffs/appellants would be entitled to a decree in as much as they had to prove that the entire suit property comprising of built up and vacant land fell in khasra no.48/7 which belonged to the plaintiffs or their families as ancestral property. They have failed to discharge this onus. It is for the plaintiffs to prove their case as to their entitlement for an injunction and they have to stand on their own legs irrespective of how successful the defendants are in proving their defence."

9. This is a second appeal. After its admission on 5.12.2003 the following substantial question of law were formulated which inter alia read as follows:

> "Whether in view of the statement of DW-1, Gulfam Ahmed, Patwari, New Lease Section, DDA, who deposes to the effect that the house in question falls in Khasra NO.48/7, it would be proper for the courts below to have disregarded his evidence?"

10. On behalf of the appellant, it has been vehemently argued that the impugned judgment had illegally ignored the report of the Patwari. It is pointed out that the Patwari had been appointed under the orders of the Court. Admittedly no objection had been filed by either side to his report. In these circumstances, there was a patent illegality on the part of the two Courts below in ignoring this report. Once this report is read in evidence, it categorically establishes that the suit land falls in Khasra No.48/7; the land which has been acquired by government vide Award no.1170 is the land falling in Khasra No.48/5; the plaintiffs in these circumstances are lawfully entitled to a decree of permanent injunction.

11. Arguments have been countered by the department. It is submitted that the Courts below had returned positive findings and given cogent reasons for ignoring the report of the Patwari which was wholly for the reason that Patwari had failed to follow the mandatory procedure which is ordained under the Delhi High Court Rules which specifically postulate that for disputes relating to boundary, three permanent (pucca) points have to be located by the Tehsildar before the demarcation is effected. In the absence of this procedure having been followed by Patwari this report could not be looked into; it was not authentic.

12. No other argument has been urged before this Court.

13. Perusal of the record shows that on 22.2.1989 a local commissioner had been appointed to set at rest the controversy raised between the parties as to whether the suit land falls in Khasra No.48/5 or 48/7. The extract of the order dated 22.2.1989 reads as follows:-

> "The controversy between the parties is regarding the Kh. No. in which the property in question is situated. The case of the pltffs. are that the property in question is situated in Kh. No.48/7 which has not been acquired whereas the case of the deft. is that the suit property is situated in Kh. No.48/5 which is acquired. It is not disputed that Kh. No.48/7 has not been acquired. In order to resolved the controversy between the parties Naib Tehsildar Mehrauli is appointed as the Local Commissioner, he will inspect the suit property and find as to whether the same falls within Kh. No.48/7 or falls within Kh. No.48/5. He will also find out as whether the suit land has been acquired or not. He will inspect the suit property after given notice to both the parties. His fee for that purpose is fixed Rs.500/- which will be shared equally by both the parties. The fees of the L.C. to be deposited within 10 days thereafter the notice will be sent to the L.C. Case adjourned for the report of L.C. for 5.4.89."

14. On 15.9.1989 the Court had reiterated that no separate notice would be given to the parties; local commissioner would inspect the suit property on 27.9.1989 at 1.00 P.M. Report dated 27.9.1989 is on record. This is the report of Attar Singh, Naib Tehsildar, Mehrauli. As per this report the disputed land falls in Khasra No.48/7 in village Humayunpur. It further states that as per the directions of the Court the identification of the suit land as to whether it fell in Khasra No.48/5 or Khasra No.45/7 had to be determined and this was possible only after "nishandehi"/identification of the permanent points; it stated that "nisandehi"/identification of the permanent points was not feasible as there were houses located in the suit land; measurement in Khasra Nos.29 and 30 was taken with approximation whereupon the aforenoted conclusion had been arrived at; site plan was also prepared at the spot. The rough site plan appended along with the report had depicted the houses of the two plaintiffs in red colour with a road on the east and the west side and a gali on the north. No further details or measurement had been depicted in this site plan. What was the built up area had not been explained and

informed by the Patwari in his report except to show that the black portion in the rough site plan prepared by him did not fall in Khasra No.48/7. Aksjira report had proved through the version of PW-3 Sunil Kumar, the Patwari at the relevant time and is Ex.PW-3/1. Ex.PW-3/1 shows that there are dotted lines which had demarcated Khasra Nos.48/5 and 48/7; dotted lines are not deciphered anywhere else in Ex.PW-3/1; it was obviously for the reason that the demarcation of Khasra Nos.48/5 and 48/7 was uncertain. It was primarily for this reason that the local commissioner had been appointed to ascertain and identify as to whether the suit land falls in Khasra No.48/5 or 48/7. PW-3 who was the witness of the plaintiffs had stated that Subhadra i.e. the plaintiff no.1 is in possession of 3 biswas of land; plaintiff no.2 Chander Devi is in possession of land measuring 2 biswas of land; no such measurement has been detailed or mentioned in the plaint. Plaintiffs themselves appear to be confused.

15. DW-1 Gulfam Ahmed, Patwari (at the relevant time) had on the basis of the demarcation report dated 27.9.89 deposed that the subject matter of the suit property (as per the report) falls in Khasra No.48/7 and Khasra No.48/7 is not acquired by the government. The acquired khasra is Khasra No.48/5. There is no dispute to this factual averment of DW-1.

16. However, the question which has to be answered is as to whether the suit land falls in Khasra No.48/7 or 48/5. Both the Courts below had given concurrent findings of fact that the demarcation report not having followed the procedure relating to enquiries to be made by Revenue Officers in boundary disputes, the said demarcation report could not be relied upon. The demarcation report had clearly stated that since there were houses in the vicinity no pucca/permanent points could be established for the purpose of 'paimaish'/measurement.

17. The Punjab Land Revenue Act, 1887 extends to the Union Territory of Delhi. Chapter VII deals with surveys and boundaries. Under Section 100, the Financial Commissioner has powers to make rules as to matters in which the boundaries of all or any estates in any local area are to be demarcated. Part C of the Delhi High Court Act 1966 relate to the instructions to Civil Courts. The procedure has been entailed for "Hadd Shikni" cases/boundary disputes under the aforenoted instructions which are binding instructions. As per these instructions the Field Kanungo

should with his scale read on the map, the position and distance of those points from a line of square, and then with a chain and cross staff mark out the position and distance of those points. If there is no map on the square system available, he should then find three points on different sides of the place in dispute as near to it as he can, and if possible, not more than 200 kadams, apart which are shown in the map and which the parties admit to have been undisturbed. Further, these instructions should be followed by the Revenue Officers of Field Kanungos whenever they are appointed by a Civil Court as a Commissioner in suits involving disputed boundaries. This is a mandate.

18. These instructions/guidelines had not been adhered to as is evident from the demarcation report. The Tehsildar had admitted that there is construction and houses have been raised in land in dispute; it is not possible to identify pucca/permanent points as a result of which the paimaish/measurement could not be taken. Only on approximations, the demarcation report had drawn a conclusion that the suit land falls in Khasra No.48/7. This was not the answer which was required to be given to the Court. A positive finding had to be returned in the absence of which both the Courts below had rightly ignored the demarcation report.

19. The plaintiffs had alleged that the suit land falls in Khasra No.48/7; the onus was upon him to prove it. They had failed to discharge this onus. This Court is not a third fact finding Court.

20. The question of law as formulated on 5.12.2003 was to the effect that the statement of DW-1 that the houses in dispute fall in Khasra No.48/7 could not have been ignored. Testimony of DW-1 was based on the demarcation report. That report itself has been ignored for the reasons aforenoted. It could not have been read in evidence. In this view of the matter, the testimony of DW-1 based on demarcation report is of no relevance. It is not as if DW-1, the Patwari had made an independent factual enquiry himself and had drawn the said conclusion. Both the Courts below had appreciated the fact that the demarcation report not having adhered to the procedure and the requirements which have been set out under the Punjab Land Revenue Act, 1887 applicable to the Union Territory of Delhi as also the Delhi High Court Act 1966 and Rules framed thereunder, this report was only a piece of paper; it had based its conclusion on approximations alone; paimaish/measurements

could not be taken by the local commissioner. This report was thus rightly ignored. Substantial question of law is answered accordingly.

21. There is no merit in the appeal. The appeal as also the pending application is dismissed.

ILR (2011) I DELHI 700
FAO

MR. SANDEEP THAPAR ....APPELLANT

VERSUS

SME TECHNOLOGIES PVT. LTD. ....RESPONDENT

(VIKRAMAJIT SEN & MUKTA GUPTA, JJ.)

FAO NO. : 607/2010 DATE OF DECISION: 12.11.2010

Code of Civil Procedure, 1908—Order VIII Rule r/w Section 151—Extension of time for filing Written Statement—Defendant sought impleadment of Managing Director of plaintiff company, as Plaintiff contending that he was a necessary party as the entire case was based on an oral agreement between the said Managing Director and the defendant and for a direction to him to file affidavit in support of averments in the plaint—Application for extension of time in filing written statement also filed—Contending that written statement, if filed prior to such impleadment, would disclose the defence of the defendant—Plaintiff likely to modify case set up in suit—Single Judge dismissed both the applications (for impleadment and enlargement of time)—Held—Impleadment of Respondent was not necessary—Company being legal entity can file suit in its own name—If during the trail the plaintiff did not examine

the Managing Director, consequences would follow— No ground for application for extension of time or application for condonation of delay also made out- Single Judge rightly rejected the application.

We do not find any infirmity in the Impugned Order. The learned Single Judge has rightly held that it is not necessary to implead Shri Sharad Maheshwari as a Plaintiff, as the company being a legal entity is entitled to file a Suit in its own name through an authorized representative. Moreover, it is for the Respondent/Plaintiff to prove its case during the trial and if it does not implead or does not examine Shri Sharad Maheshwari the consequence thereof will flow.

(Para 3)

This Application of the Appellant was not accompanied by the Written Statement. Order VIII Rule 1 CPC is a clear mandate to the Court to permit filing of the Written Statement within 30 days from the date of service of summons and the Court has power to permit a period of further 60 days from the date of service of summons to the Defendant to file Written Statement for reasons to be recorded in writing. This being the position the learned Single Judge rightly dismissed the Application as neither the ground for extension of time to file the Written Statement was made out nor an Application for condonation of delay nor the Written Statement was filed. The learned Single Judge rightly struck off the defence of the Appellant and we are not inclined to interfere with this order.

(Para 6)

Important Issue Involved: When a company files a suit, the defendant cannot compel the impleadment of the Managing Director as a plaintiff on the ground that agreement was with him and that he was a necessary party. However, during trial, if the plaintiff company fails to produce such Managing Director as a witness, the court would be at liberty to draw inferences.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. S.S. Ray, Advocate.

FOR THE RESPONDENT : None.

RESULT: Appeal and application dismissed.

MUKTA GUPTA, J. CM No.18613/2010 (Delay)

For the reasons stated in the Application, the same is allowed. Application stands disposed of accordingly.

FAO (OS) 607/2010 & CM No.18612/2010 (Stay)

1. The Appellant/Defendant in the Suit sought impleadment of Shri Sharad Maheshwari, Managing Director of the Respondent Company as a Plaintiff and a direction to file an Affidavit supporting the averments in the plaint besides being examined by the Court in IA No.11803/2008 under Order I Rule 10 and Order X Rule 2 read with Section 151 CPC. The Appellant contends that since Mr. Sharad Maheshwari was dealing with the Appellant for and on behalf of the Respondent/Plaintiff Company being its Managing Director, he was a necessary party to the Suit. Learned counsel contends that the entire Suit is based on the oral agreement between the Appellant and Mr. Maheshwari and thus he is a necessary party to the adjudication of the Suit.

2. The learned Single Judge dismissed this Application of the Appellant for the reason, the Respondent being a company is persona in law and is entitled to sue in its own name through an authorized representative. In so far as the examination of Shri Sharad Maheshwari under Order X Rule 2 CPC is concerned, it was observed if need be the same will be recorded at the relevant stage.

3. We do not find any infirmity in the Impugned Order. The learned Single Judge has rightly held that it is not necessary to implead Shri Sharad Maheshwari as a Plaintiff, as the company being a legal entity is entitled to file a Suit in its own name through an authorized representative. Moreover, it is for the Respondent/Plaintiff to prove its case during the trial and if it does not implead or does not examine Shri Sharad Maheshwari the consequence thereof will flow.

4. The Appellant filed yet another Application being IA No.13902/

2008 under Order VIII Rule 1 read with Section 151 CPC for extension of time to file the Written Statement till the disposal of Application IA No.11803/2008. As per the Appellant since Mr. Sharad Maheshwari had not filed his Affidavit despite the entire Suit being based on an oral agreement alleged to have been entered into between the Appellant and Shri Sharad Maheshwari, in case the Appellant was to file his Written Statement that would disclose his defence and the Respondent is thus likely to change/modify the case set up in the Suit.

5. In our view, the learned Single Judge rightly dismissed this Application on the ground that even if Shri Sharad Maheshwari was impleaded as a party and would have filed his Affidavit, the averments in the plaint could not have been changed. The same would not have changed the character of the plaint, pleadings contained therein and the relief sought by the Plaintiff. Thus, in no manner can the pendency of the abovementioned Application be considered as a good or sufficient cause for not filing the Written Statement within the period prescribed.

6. This Application of the Appellant was not accompanied by the Written Statement. Order VIII Rule 1 CPC is a clear mandate to the Court to permit filing of the Written Statement within 30 days from the date of service of summons and the Court has power to permit a period of further 60 days from the date of service of summons to the Defendant to file Written Statement for reasons to be recorded in writing. This being the position the learned Single Judge rightly dismissed the Application as neither the ground for extension of time to file the Written Statement was made out nor an Application for condonation of delay nor the Written Statement was filed. The learned Single Judge rightly struck off the defence of the Appellant and we are not inclined to interfere with this order.

7. The Appeal and all Applications are accordingly dismissed.

ILR (2011) I DELHI 704
RFA

TIKKA SHATRUJIT SINGH & OTHERS .... APPELLANTS

VERSUS

BRIG. SUKHJIT SINGH & ANOTHER ....RESPONDENT

(A.K. SIKRI & MANMOHAN SINGH, JJ.)

RFA (OS) NO. : 23/2004 & DATE OF DECISION: 19.11.2010
CM NO. : 13060/2004 AND
CM NO. : 4530/2008

Code of Civil Procedure, 1908—Section 96, Order 41 Rule 22 Delhi High Court Act, Section 10—Aggrieved appellants preferred appeal against dismissal of their suit except in respect of preliminary decree qua Ex. DA and PW1/1, i.e. two family settlements entered into between appellants and Respondent no.1—Appellants originally preferred suit seeking separation of their shares after partition of joint property—Respondents resisted the suit and Respondent no.1 also filed counter claim seeking declaration that he was absolute owner of properties—Besides appeal filed by appellants, Respondent no.1 also filed cross objections in the appeal—Appellants contended Kapurthala was a capationary and Baba Jassa Singh was first Karta and after the successive incumbents to 'Kartaship', burden of managing family fell on shoulders of Maharaja Jagatjit Singh who became Karta in 1877. After his demise, 'Kartaship' devolved on S. Paramjit Singh and thereafter, on S. Sukhjit Singh—Also when on 19.06.1949 Maharaja Jagatjit Singh breathed his last, succession was: (i) per Mitakshara Survivorship as distinct from Succession; (ii) (alternatively) per Mitakshara Succession, (absolute ownership and not by Primogeniture or Will—Further even if property

was not HUF from before, it was, converted to coparcenary by reason of Mitakshara Succession—Moreso, Rulers of Kapurthala were only Jagirdars or Chiefs and not Rulers—As per Respondents, Maharaja Jagatjit Singh was sovereign ruler thus, no incidence of coparcenary or Joint Hindu Family could be applied to properties held by him and Junior (sons) had no right by birth—Also, it was neither Mitakshara Survivorship nor Mitakshara Succession, but succession by Will, or failing proof that Will, by Primogeniture—Held: Primogeniture is a rule of succession—It is applicable to impartible estates—It was applicable to Rulers and Monarchs—By this rule, the eldest son or the first born son succeeds to the property of the last holder to the exclusion of his younger brothers—According to the ordinary rule of succession, all the sons of the father are entitled to equal shares in his estate—The rule of succession by which the first born son succeeds to the entire estate, to the exclusion of the other sons, is called primogeniture—The princes wielded sovereign powers and, therefore, they (all the Princes but with a rare exception) had applied the Rule of Primogeniture which then had taken the shape as the law promulgated by them as a sovereign Ruler—Primogeniture, as a rule for succession, applied to the Rulers, the Zamindars etc. which was an exception to the general customs of Mitakshara Survivorship and Mitakshara succession—Kapurthala was a sovereign estate and custom Primogeniture was invariably prevalent in Hindu Sovereign States of across India including Kapurthala.

It is evident that 'sovereigns' what has passed as law into the law of the land, is that primogeniture and not Mitakshara, applies. Presumption makes the fundamental basis for Evaluation of Evidence. The weighment thereof has to take place in that light. **(Para 39)**

The law which applied to the former Rulers was different

than that applied to the non-sovereign States. The distinction in application was again explained by the Supreme Court in **Nabha** case **Pratap Singh vs Sarojini Devi** 1994-Supp(1) SCC 735,.49 para 65 in the following words:

> "Though impartibility and primogeniture, in relation to zamindari estates or other impartible estates are to be established by custom, in the case of a sovereign Ruler, they are presumed to exist." **(Para 49)**

Important Issue Involved : Primogeniture is a rule of succession by which the first born son succeeds to the entire estate to the exclusion of the other sons—Primogeniture, as a rule for succession, applied to the Rulers, the Zamindars etc. which was an exception to the general customs of Mitakshara Survivorship and Mitakshara succession.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANTS : Mr. Rajiv Sawhney, Sr. Advocate with Mr. V.K. Tandon, Advocate.

FOR THE RESPONDENTS : Dr. Arun Mohan, Sr. Advocate with Ms. Vaishaliee Mehra for Respondent No.1.

CASES REFERRED TO:

1. *Pratap Singh* vs. *Sarojini Devi* 1994-Supp(1) SCC 735,.49 para 65.
2. *H.H.Maharaja Pratap Singh* vs. *H.H.Maharani Sarojini Devi*, 1994 Supp -1 SCC 734 = JT 1993 (Supp) SC 244.
3. *State of Punjab* vs. *Brig Sukhjit Singh* 1993-3 SCC 459 [Kapurthala].
4. *R.K.Rajindra Singh* vs. *State of Himachal Pradesh* (1990) 4 SCC 320 [Bushahr].
5. *Vishnu Pratap Singh* vs. *State of Madhya Pradesh* AIR

1990 SC 522.

6. *Thakore Vinayasinhji AIR* Vs. *Kumar Shri Natwar Sinjhi-* 1988 SC 247.

7. *Jaikrishan Nagwani & Others* Vs. *Brotomarics Enterprises Pvt. & Others* 1987 Suppp. SCC 72.

8. *Moon Devi* Vs. *Radha Devi;* AIR 1972 SC 1471.

9. *D.S. Meramwala Bhayala v. Ba Shri Amarba Jethsurbhai* ILR (1968) 9 Gujarat 966.

10. *Raj Kumar Narsingh Pratap Singh Deo* vs. *State of Orissa,* AIR 1964 SC 1793,99.

11. *Prabir Kumar Bhanja Deo* vs. *State of Orrisa* ILR 1969 (Orissa/Calcutta series 794).

12. *K.K.Y. Varu & Ors. v. S.K.Y. Varu & Ors* reported as (1969) 3 SCC 281.

13. *Darbar Shri Vira Vala Surag Vala Vadia* vs. *State of Saurashtra;* (AIR 1967 SC 346 [Vadia].

14. *V T S T Thevar* vs. *V T S S Pandia Thevar* AIR 1965 SC 1730.

15. *D.S. Meramwala Bhayala* Vs. *Ba Shri Amarba Jethsurbhai* (1968) Gujarat Law Reporter Vol. 9 page 609.

16. *Mohan Lal* vs. *Sawai Man Singh.* AIR 1962 SC 73,.5 = 1962-1 SCR 702).

17. *Jai Kaur* vs. *Sher Singh,* AIR 1960 SC 1118.

18. *Salig Ram* vs. *Maya Devi,* AIR 1955 SC 266,.68 Col 2.

19. *Kochunni* vs. *Kuttanunni,* AIR 1948 PC 47 50.

20. *Raja Chattar Singh* vs. *Diwan Roshan Singh:* AIR 1946 Nagpur 277.

21. *Mohd. Yusuf* vs. *Mohd. Abdullah* AIR 1944 Lahore 117.

22. *Mt. Charjo & Another* Vs. *Dina Nath & others,* AIR 1937 Lahore 196.

23. *Shiba Prasad* vs. *Prayag Kumari:* AIR 1932 PC 216.

24. *Martand Rao* vs. *Malhar Rao,* AIR 1928 PC 10.

25. *Ram Saran* Vs. *Gappu Ram,* AIR 1916 Lahore 277.

26. *Kunhanbi* vs. *Kalanthar,* XXVII [1914] Madras Law Journal 163,.63.

27. *Baboo Gunesh Dutt Singh* vs. *Maharaja Moheshur Singh,* Vol. VI [1854-7] Moore's Indian Appeals 164).

RESULT: Appeal dismissed and cross objections disposed of.

MANMOHAN SINGH, J.

1. The present Regular First Appeal has been filed by the four appellants namely Tikka Shatrujit Singh, Maharaj Kumar Amanjit Singh (Deceased), Smt. Gita Devi and Maharajkumari Preeti Devi against the two respondents namely Brig. Sukhjit Singh and Maharaj Kumari Gayatri Devi under Section 96 of the Code of Civil Procedure read with Section 10 of the Delhi High Court Act against the judgment and decree passed by the learned Single Judge on 03.09.2004 in Suit No. 1052/1977 whereby the suit of the appellants was dismissed except in respect of the preliminary decree qua exhibit DA and PW-1/1. The appeal was admitted and the status quo order was maintained during the pendency of the present appeal.

2. The respondent no.1 and appellant No.3 are husband and wife and are parents of appellant Nos.1, 2 (sons) and appellant No.4 and respondent No.2 (daughters). The appellant No.2 died intestate and his estate is inherited by his mother appellant No.3 during the pendency of the suit.

3. Originally the Suit was filed by the appellants seeking separation of the shares of the Plaintiffs after the partition of the joint properties. In para 8 of the Plaint, the details of the co-parcenary properties have been given which are as under:

> "(1) double-storey residential house bearing municipal No.90-A, Greater Kailash-I, New Delhi; (2) Commercial Flat No. 101 on the first floor of the building known as Surya Kiran situated at Kasturbal Gandhi Marg, New Delhi; (3) a residential house known as Villa Bouna Vista and Cottage Villa Chalet, servant quarters, garages, etc. located in Village Chuharwal, Distt. Kapurthala; (4) a residential palace in Mussoorie known as "Chateau. St. Helens, Mussoorie; (5) all movables including furniture, carpets, etc.

lying in Villa Kapurthala, Chateau St. Helens , Mussoorie and in property in Greater Kailash; (6) all jewellery and valuables lying in the safes of Chateau, Mussoorie; (7) jewellery lying in locked brief case kept in locker no. 325, Gindlays Bank, „H. Block, Connaught Place, New Delhi; (8) jewellery lying in Societies General, Bouleward Haussmann, Paris, France; and (9) shares in joint stock companies, share certificates of which are lying in safe custody with the First National City Bank, Fort, Bombay. It is also pleaded that if there are some (sic) properties which are co-parcenary properties, of which the plaintiffs for the present have no knowledge, if are found, they be also partitioned."

4. Matrix facts stated inter alia in the plaint by the appellant reads as under:

a) That the plaintiffs and defendants formed Hindu Undivided Family and all of them have been joint in estate and worship upto August 1976 and were joint in mess. Defendant No.1 had deserted the family since August 1976 and has been residing at Gymkhana Club, New Delhi;

b) That the details of co-parcenary properties have been enumerated in para 8 of the plaint and it is prayed that if any other co-parcenary properties, of which the plaintiffs for the present have no knowledge, if are found, they be also partitioned;

c) That on or about January 13, 1977, the defendant No.1 had filed a suit in this Court against plaintiff No.3, praying for a declaration that the two properties namely, Villa at Kapurthala and the Chateau, Mussorie with all the movables lying therein are his personal and exclusive properties and the property at Greater Kailash, B 90-A is also owned exclusively by him, acquired from his personal funds and the jewelries lying in different places in the properties, enumerated in the plaint is owned by him;

d) That the defendant No.1, karta of the Hindu Undivided Family (for short the "HUF") has set up wrongful claims to the co-parcenary properties and has thus committed a gross misconduct resulting into the plaintiffs' seeking the relief of partition of the joint family/co-parcenary properties. The grandfather of the

defendant No.1 had succeeded to the Gaddi of Kapurthala as a male heir, constituting a valuable property right carrying privileges, title and monetary benefits and all the properties of the Gaddi including the income attached to the Gaddi were ancestral properties in his hands and the property acquired by grandfather wit the aid of any impartible estate became ancestral properties, governed by law of inheritance, applicable to the Mitakshara School and the great grandfather of the plaintiffs 1 & 2 had built Chateau St. Helens at Mussorie with the aid of ancestral funds and the properties acquired with the aid of any impartible estate by the great grandfather or the grandfather of plaintiffs 1 & 2 became HUF properties and the defendant No.1 and his father had not acquired any property with the aid of any privy purse and even if they did so, the same also at any rate became HUF co-parcenary properties as any property acquired wit the aid of impartible estate would become joint property with all the incidents of co-parcenary attached to it and all the jewelleries as well as the pieces of art, etc. are ancestral properties;

e) That some of the properties have been acquired by defendant No.1 from the compensation received by defendant No.1 in respect of the zamindari rights which were ancestral properties and also from the sale proceeds of the palace at Kapurthala."

5. The respondent no.1 (defendant no. 1 in the suit) filed his written statement and counter claim has inter alia taken the following defence:

(a) That the appellant No.3 had no locus standi to represent appellant Nos. 1,2 & 4 but that objection no longer survives inasmuch as the minors had become majors and had elected to pursue the suit and even a statement was made by defendant No.1 stating that respondent No.1 did not dispute the right of the appellant No.3 to act as next friend of the minor plaintiffs I the present suit;

(b) that no partition could be claimed in respect of impartible estate and that the suit is also not maintainable because the properties in dispute had developed on defendant No.1 by virtue of two Wills dated January 16, 1949 and July 10, 1955 by his late grandfather and father respectively

and defendant No.1 is absolute and exclusive owner of the said properties which have been assessed for taxation purposes as his individual properties and the Wills, propounded by the father as well as the Grandfather of defendant No.1 have been duly probated not only in India but also in England and France and thus cannot be challenged;

(c) that the plaintiff No.3 has taken a plea in his written statement in response to the Suit No.35/77, filed by the defendant No.1, stating that the alienation of the Gaddi and the properties comprising the Kapurthala state was also not permissible by the family custom and the plaintiff No.3 in the said written statement admitted that the Gaddi of Kapurthala and all the properties of the Maharaja for the time being used to devolve on his eldest son according to the rule of primogeniture survivorship;

(d) that in the State of Punjab there existed no right of partition in respect of joint family estates during the life time of the father and the suit has been filed by plaintiff No.3 at the instigation of some other person, namely, Shri Anup Singh when in fact plaintiff No.3 has no right in the properties;

(e) that the defendant No.1 being the only son of Maharaja Paramjit singh of Kapurthala was recognized by the Government of India as a "Ruler" and he was the recipient of a privy purse of Rs. 2,70,000/- per annum till the enactment of the Constitution (Twenty Sixth) Amendment Act, 1971;

(f) that like the other ruling families of Punjab, succession in the Kapurthala family has always been according to the rule of primogeniture and the laws governing impartible esatates and the properties of the Ruler of Kapurthala have always devolved in accordance with the rule of primogeniture as an impartible estate and the holder of the same holds such properties absolutely;

(g) that on May 5, 1948 the rulers of various states including of Kapruthala had entered into a Covenant with the concurrence of the Government of India for the integration

of their territories into one union by the name of Patiala and East Punjab States Union which also provided that the ruler of each Covenant State shall be entitled to full ownership, use and enjoyment of all the private properties, belonging to him on the date of his making over the administration of that State to the Raj Pramukh and the said Covenant also provided that the privy purse which was to be given under the said Gaddi became impartible and the law of primogeniture applied to it and was accepted by the Government of India.

(h) that Maharaja Jagatjit Singh during his life time had gifted jewellery, valuables and money to defendant No.1 from time to time and the jewelleries/valuables came to defendant No.1 vide the Wills of his grandfather and father are his exclusive properties and in law the property devolved by principle of primogeniture vests in the holder thereof absolutely and exclusively;

(i) that in view of his being employed on active duty with the army involving great risk to his life, the respondent No.1 had included the name of appellant No.3, his wife as the mere namelender, while acquiring several movable and immovable properties although entire consideration for the same were paid by defendant No.1 with his own money and properties, mentioned in Anex.4 of the written statement and he had been also giving money from time to time to his wife for maintenance and she had purchased various properties from the said funds and in fact has no right or title to the said properties;

(j) that the defendant No.1 has filed a Suit No. 35/77 against the plaintiff No.3, his wife, restraining her from entering the Villa, Kapurthala, the Chateau, Mussorie and from removing the valuables lying in property in Greater Kailash;

(k) that the plaintiff No.3 had caused a cloud on the title of defendant No.1 in respect of his exclusive properties and the properties acquired jointly in the name of plaintiff No.3 exclusively belong to defendant No.1 as plaintiff No.3 had no source of her for acquiring any properties

and that the Villa properties stand in the name of plaintiffs 1 & 2 although the entire consideration of the said property was paid by him;

(l) that in respect of the impartible estate, a member of the family can only claim the right of survivorship and the impartible estate is not a co-parcenary property and thus, the suit for partition is not at all maintainable;

(m) that out of the compensation received by defendant No.1 in 1975 for the U.P. Zamindari from the Government of U.P., he had made over some specific assets to the family and declared the said assets as joint family assets and effected partial partition in March 1976 purely with a view to make suitable provision for the members of his family and also for obtaining the tax reliefs;

(n) that the plot of land in respect of House No. B-90A, Greater Kailash-I, New Delhi was purchased and constructed by him from his own personal funds and the same is his self-acquired property and he had voluntarily arranged for the plaintiff No.3 to have one seventh share in the said house and commercial Flat No.101, Surya Kiran, was purchased by him form his own funds and the same is his exclusive and absolute property although he had joined the name of plaintiff No.3, his wife as co-vendee in the sale deed of the said flat and that the entire consideration for the purchase of residential house known as Villa Bouna Vistra and Cottage, Villa Chalet came from his own sources and he is the exclusive owner of the same;

(o) that all the movables lying in Chateau St. Helens at Mussorie absolutely vest in him on the basis of the said Will and the jewelery/valuables are part of his impartible estate and he is the exclusive owner of the shares although name of plaintiff No.3 has been included as joint owner of the shares as mere namelender and he had acquired those shares with his own money and that he is also the sole beneficiary of the life insurance policies and;

(p) that all the properties of late Maharaja of Kapurthala

including the Gaddi have always devolved on the eldest son under the rule of primogeniture as an impartible estate and thus they are not liable to be partitioned and moreover, he had acquired those properties under the Wills and thus, is absolute owner of the said properties and as he acquired those properties in 1955 on the death of his father, i.e., prior to the enactment of Hindus Succession Act, 1956, so he continues to be the owner of the said property exclusively and those properties have never become joint Hindu family properties or co-parcenary properties.

There was also the counter-claim of respondent No.1 alongwith written statement for declaration that he is the absolute owner of the properties. There is also Suit No.35 of 1977 for injunction, damages, etc.

6. The issues were framed on 07.03.1980 but some issues were modified and the modified issues framed on 11.03.1980 are as follows:

1. Whether the properties in the suit are co-parcenary properties? OPP

2 If Issue No.1 is proved, whether the properties are not liable to partitioned? OPD

3 Is the present suit not in the interest of plaintiffs 1 and 2? OPD

4 What are the rights of plaintiffs 3 and 4 and defendant No.2 in the property in dispute in case they are found to be co-parcenary properties and partible ? OPP

5 Did Maharaja Jagatjit Singh make a declaration dated 11.8.1948 declaring Mussoorie Chateau and other associated properties to be his self-acquired properties. If so, to what extent ? OPP

6 Did Maharaja Jagatjit Singh execute a Will dated 16.1.1949 ? If so, to what effect ? OPD

7 If Issue No.1 is proved in favour of the plaintiff, whether Maharaja Jagatjit Singh bequeath the property by Will dated 16.1.1949 ? OPD

8 Did Maharaja Paramjit Singh execute a Will dated 10.7.1955 ? If so, to what effect ? OPD

9 If Issue No.1 is proved in favour of the plaintiff, whether Maharaja Paramjit Singh could bequeath the property by means of a Will dated 10.7.1955 ? OPD

10 What is the nature of the property held by defendant No.1? OPD

11 Relief.

7. There were also subsequent statements by the Learned Counsel for the parties which were recorded on 9th September 2001 curtailing the issues to some extent:-

"Statement of Mr. Madan Bhatia, Counsel for plaintiffs, and Mr. Arun Mohan, Counsel for defendant No.1 without oath, and of plaintiff No.3 and defendant No.1 on oath:

We agree that the properties B-90-A, Greater Kailash, flat No.101, Surya Kiran, New Delhi, and the shares of Continental Devices India Ltd., standing in the joint names of plaintiff No.3 and defendant No.1, were acquired from the sale proceeds of the Jagatjit Palace and Elysee Palace, Kapurthala. It is also agreed that Rs.1,20,000/- in respect of the Villa at Kapurthala was paid to the heirs of Maharani Brinda Devi out of the sale proceeds of the Jagatjit Palace and Elysee Palace. This joint statement is given by the counsel for the parties without prejudice to their contentions as to the character of the Jagatjit Palace and Elysee Palace in the hands of defendant No.1. There were four Life Insurance policies mentioned in clause 4(a) of Memorandum dated 11.3.1975. Two of these policies were to mature in the year 1979, and the other two were encashed (premature) in the year 1980, and the money was placed into the Hindu Undivided Family bank account with the Punjab & Sind Bank, Janpath, New Delhi by defendant No.1.

Parties are agreed that the above matter can be decided on the question of principle as to the character of the property in the hands of defendant No.1, and the custom prohibiting a son from claiming partition in the lifetime of the father. How-ever, defendant No.1 does not press the plea that the present suit is not for the benefit of the minors. Other pleas remain."

In view of the statement made, issue No.3 was decided in favour of the appellants/plaintiffs in the suit.

8. Issue nos. 1,2 and 10 being inter connected and were decided together.

9. After recording the evidence of the parties, the suit of the plaintiff was decreed vide judgment and decree dated 06.04.1992. The findings of the learned judge in its judgment are:

a. The Will of the grandfather did not exist.

b. The Will of the father was invalid.

c. Custom of impartibility governed by the rule of primogeniture as recognized by Hindu Law did not exist in the family of Kapurthala.

d. Succession of sovereign rulers from the time of Randhir Singh was because of the recognition granted by the British as paramount power.

e. After the merger of the states Maharaja Jagatjit Singh became an ordinary citizen subject to all the laws of the land.

f. When he died his properties developed upon his son Maharaja Paramjit Singh in accordance with the personal law of the family of Kapurthala which was the Mitakshara Hindu Law.

g. As a sovereign ruler Maharaja Jagatjit Singh held all properties as his private personal properties by virtue of his princely power inasmuch as sovereign rulers owned all properties without any distinction between public or private properties in exercise of their sovereign power.

h. Sovereign rulers were not subject to Hindu Law or any custom. They were above law.

i. Properties in the hands of sovereign ruler were not joint Hindu family properties as sovereign rulers were above law were not governed by Hindu Law. No member of the family could afford to challenge his authority or was in a position to claim protection.

10. Later on the said judgment was reviewed by the same learned

Single Judge on 28.04.1995 pursuant to the review applications being R.A. No. 09/1992, 03/1993 in Suit No. 1052/1997 and 35/1977 filed by the respondent no.1. In the review applications, it was contended by the respondent no.1 that the important point about the presumption in favour of the existence of a custom of primogeniture in the family has not at all adjudicated by the learned Single Judge who had in his order dated 28.04.1994 held that it was a crucial point raised by respondent no.1 (defendant no.1 in the suit). The learned Single Judge after referring various decisions, pleading and material, allowed the review applications in respect of issue nos. 1, 2, 4, 5, 10 and 11. The review as regards issue nos. 6 to 9 was rejected and the issues were decided against the respondent no.1. The matter was put by the learned Judge for hearing of the Suit.

11. The matter was subsequently heard by another Hon.ble Judge. By the impugned judgment dated 03.09.2004, the learned Single Judge dismissed the Suit of the appellants except in respect of exhibit DA and PW-1/1, the preliminary decree was passed. Exhibit DA and PW-1/1 are two family settlements entered into between the appellants and respondent no.1 in which he admitted that he is the Karta of the Joint Hindu Family and appellant nos. 1 and 2 continued co-parcenary. The two documents are by way of partition of the UP Zamindari Bonds which were given to the family on abolition of Oudh Zamindari i.e. one of the properties declared by Maharaja Jagatjit Singh as one of the private properties on the merger of the state.

12. The learned Single Judge in his judgment has not dealt with the effect of the two Wills as it was felt by the learned Single Judge that they were in any event not covered by the surviving issues and it was sovereign state.

13. The present appeal has been filed against the judgment and decree dated 03.09.2004. The respondent no.1 filed the cross-objection in the appeal under Order 41 Rule 22 of the Code of Civil Procedure thereby praying that the findings given by the learned Single Judge in its judgment and decree dated 06.04.1992 which were not reviewed in its order dated 28.04.1995 with regard to the Wills be set aside and it be held that the two Wills marked X-8 and Ex.D-11 are the last valid wills of the two Maharajas. The said cross-objections were numbered as CM No. 11751/2005.

14. By the impugned judgment and decree the learned Single Judge, after discussion on issue nos. 1,2,4,5, 10 and 11 had given the following answers:-

1. Whether the properties in the suit are co-parcenary properties? OPP

   Held: No

2 If Issue No.1 is proved, whether the properties are not liable to partitioned? OPD

4 What are the rights of plaintiffs 3 and 4 and defendant No.2 in the property in dispute in case they are found to be co-parcenary properties and partible ? OPP

Held: Answers to issue No.2 and 4 are not required in view of answer to issue No.1.

5 Did Maharaja Jagatjit Singh make a declaration dated 11.8.1948 declaring Mussoorie Chateau and other associated properties to be his self-acquired properties? If so, to what effect? OPD

Held: Yes, but the Mussorie estate was personal and private property of Jagatjit Singh. The property covered by the declaration dated 11th August, 1948 is governed by primogeniture.

10 What is the nature of the property held by defendant No.1? OPD

Held: The suit properties except properties covered by Ex. DA dated 11th March, 1975 and Ex. PW1/1 dated 26th March, 1976 are not joint family properties and are exclusively owned by Defendant No.1 by inheriting them according to the custom of primogeniture.

11 Relief.

Held: The surviving Plaintiffs are not entitled to any relief except of reasonable maintenance in accordance with the custom of primogeniture and a preliminary decree qua Ex. DA & PW 1/1 entitling each of the sons and the wife of defendant No.1 to receive their 1/4th share each of Ex. DA & PW1/1.

15. The above said answers to the issues are on the basis of findings arrived by the learned Single Judge while dismissing the suit in the impugned judgment in para 85, 88, 95, 96, 97, 104 to 106, 112, 113, 121, 133, the same reads as under :

"85. In my view these are sufficient pleadings so as to permit the defendant No.1 to urge and prove the custom of primogeniture. While proving the custom of primogeniture, the defendant No.1 cannot be precluded from referring to a custom in the Kapurthala family. The above extracted pleading of the defendant No.1 in my view, is sufficient to enable the defendant No.1 to aver and prove custom.

88. After considering the position of law laid down by the Hon.ble Supreme Court in **Jaikrishan Nagwani & Others Vs. Brotomarics Enterprises Pvt. & Others** 1987 Suppp. SCC 72 to the effect that the decision on an issue at an interlocutory stage is not binding at the final hearing stage and since the order of Justice Talwar dated 9th March, 1981 is indisputably of an interlocutory nature, I hold that the defendants are not precluded from proving and urging the rule/custom of primogeniture and the order of 9th March, 1981 does not come in the way of the defendant No.1.

95. The above documents in addition to the oral evidence adduced on behalf of the defendant successfully establish the sovereign character of the erstwhile Kapurthala State. Consequently, the plaintiff's plea that the rulers of Kapurthala were merely Jagirdars or Chiefs and not Rajas is wholly without substance and even though the plaintiffs though required to, had not substantiated this plea, the defendant No.1 by his evidence has established conclusively that Kapurthala was a sovereign State. The above documents and testimony on behalf of defendant No.1 clearly prove that the custom of primogeniture was invariably prevalent in Hindu Sovereign States all across India and certainly in Punjab. This is also proved by the Administrative Reports which indicated that bearing a few exceptions, in cases of Hindu Rulers, the custom of primogeniture invariably prevailed.

96. While it is not conclusive of the legal position, it is significant

that the plaintiff had herself pleaded in the written statement in Suit No. 35/77 filed by the defendant No.1 against her for alienation of "Gaddi" and properties, that the partition of Kapurthala estate was not permissible according to the family custom. Similarly in Ex. D-6 the plaintiff No.3 herself had described that the defendant No.1 was the exclusive owner of the estate of Kapurthala and held it as his exclusive personal property. The plaintiff's further plea was that the customary rule of primogeniture in respect of properties of sovereign rulers and in respect of succession the "Gaddi" of Kapurthala were imposed by the British paramountcy and could not be equated with the family custom recognizable in law. The plaintiff pleaded that a custom must not only be ancient and invariably followed but must evolve through a conscious and voluntary acceptance by the family over generations. The succession of Randhir Singh after the annulment of the Will of his father, Sardar Nihal Singh was only through the British intervention and not on account of any custom. In any event the rule of primogeniture even if prevalent came to an end upon the independence of India on 15th August, 1947. It was also pleaded that no reference can be made to the other rulers of India and Punjab. It was further pleaded that the Order dated 11th August, 1948 (Exhibit D-1) of Maharaja Jagatjit Singh brought an end to the custom of primogeniture even if it existed. I am of the view qua the Kapurthala ruling family the custom of primogeniture Kapurthala State can not obviously be prior to the founding of the erstwhile Kapurthala State. The defendant no.1 by the tracing out the history of Kapurthala at least since Bhag Singh's reign has demonstrated that the custom of primogeniture was prevalent and followed in Kapurthala. Similarly the declaration of 11th August, 1948 only was in relation to the Mussorie Estate and could at best be required to be confirmed to the property enumerated therein even if the plaintiff's plea about the Mussorie property is accepted and could not bring to an end the custom of primogeniture qua the rest of the properties.

97. The plaintiffs have not led any evidence to substantiate their plea of the imposition of primogeniture by the British. The rule of primogeniture was clearly a customary one and not based on

my statutory provisions or any Act or order passed by the British in the exercise of their paramountcy. The plaintiffs have largely relied upon Ex. PW1/51 which is the book 'Rajas of Punjab'. Even otherwise any statement in a book is not conclusive of this issue. In fact it is the defendant No.1, who has successfully demonstrated and proved the widespread prevalence of the custom of primogeniture in the Kapurthala family. He has further proved that Kapurthala was a sovereign state leading to a presumption of primogeniture not rebutted by the plaintiffs. In any event the plaintiff has not discharged the burden of proving that the properties were coparcenary and that Kapurthala State was different from the other 510 Hindu rulers of that time. From Bhag Singh's time the succession via Fatesh Singh has been to the eldest son notwithstanding the dispute raised by Amar Singh qua the succession of Nihal Singh. Nihal Singh attempted to make a will by dividing the property into 3 portions for inheritance by his 3 sons Randhir, BIkram and Suchet. The will of Nihal Singh was annulled again leading to succession of the eldest son Randhir Singh. Randhir Singh was also succeeded by his eldest son Kharak Singh and consequently the averred leanings of his younger brother Harnam Singh towards christianity and the date of such leaning is of no avail as the eldest son Kharak Singh without any dispute did succeed Randhir Singh. Kharak Singh was succeeded by Jagajit Singh the only son. Jagajit Singh was succeeded by the eldest son Paramjit to the exclusion of the other two sons Ajit and Karamjit without any dispute and eventually the defendant No.1 succeeded Paramjit Singh. Thus it would be seen that barring the dispute raised by Amar Singh and the making of the will by Nihal Singh which was annulled by the British, succession had always been by the eldest son to the exclusion of the other sons and such successions have been accepted by the other siblings. The test of antiquity not being satisfied by the custom pleaded by the defendant No.1 cannot extend to having the custom existing beyond the reign of the Kapurthala State. Since I have held the Kapurthala state to be a sovereign state the tests of customs qua zamindari which is subject to the law of the land cannot be applied. As per the position of law laid down in 1994 Supp. 1 SCC 734 para 65,

Pratap Singh Vs. Sarojini Devi for a sovereign state primogeniture was presumed to apply, whereas for Zaminidari they were to be established by custom. Thus even by the presumption which flowed from the finding of the existence of a sovereign state in Kapurthala, primogeniture existed by virtue of such presumption. The version of the history of Kapurthala state given in the book Rajas of Punjab by Lepal H. Griffin (Ex. PW 1/51), cannot be given more primacy then the Administration Reports which have been termed to be a valuable piece of evidence in para 8 of the judgment of the Hon.ble Supreme court in Jagat Singh vs. State of Gurajat and ors. reported as 1968 (1) SCWR 347. Assuming the two versions i.e. that as per Ex. PW 1/51 the book on Rajas of Punjab and the Administration Report, differ this court has no option but to accept the statements made in the Administration Report Ex. X-22 to X-27 and not the version given in Ex.PW 1/51 which no doubt at page 550 supports the statement of the plaintiff that it was the Governor General who on a visit to Kapurthala created Nihal Singh as a Raja. From Ex. X-22 for the year 1867-68 which described Ranbir Singh as a Raja governed by primogeniture upto Ex. X-27 for the year 1917-18 which described Jagajit Singh as Maharaja. It is clear that Kapurthala was a sovereign state governed by primogeniture. The custom of primogeniture had been followed even prior to Nihal Singh in the case of his father Fatesh Singh. I am also satisfied that the evidence and texts produced by the defendant No.1 showed that the custom of primogeniture in general had an origin as ancient as the founding of the Kapurthala State and was not imposed by the British as contended though not proved by the plaintiffs. At best Ex.PW 1/51 demonstrates that Nihal singh was conferred the title of Raja by the Governor General. In my view this also does not detract from the plea of the plaintiff that Nihal Singh's predecessors were Rajas and succession had even then been according to primogeniture. Even if it assumed that the British titled Nihal Singh as a Raja does not prove that Nihal Singh was not already a Raja tracing his descent from his ancestors who were also rulers according to the custom of primogeniture.

104. Having examined the factual matrix and having come to the conclusion that the family custom of primogeniture stood

established in the family of Defendant No.1 Sukhjit Singh, it would be necessary to examine the legal principles enshrined in judicial pronouncements including those of the Supreme Court. This would be necessary because the dispute between the parties is to be determined in the light of the post merger position in law, particularly, in view of the enactment of the Hindu Succession Act, 1956.

105. Impartibility is an attribute attaching to property which derogates against the normal rule of devolution by survivorship amongst coparceners in the case of joint family property. A partition cannot be claimed in respect of such property. Impartibility is maintained by following rules such as primogeniture or ultimogeniture. Impartibility and, consequently, the precise rule that is followed primogeniture, ultimogeniture, or the like are essentially matters of custom. In **Shiba Prasad vs. Prayag Kumari:** AIR 1932 PC 216 which is the leading case on impartibility, the Privy Council held that [p.222]:-

"Impartibility is essentially a creature of custom."

And, if a confirmation was at all required, the Supreme Court, in **K.K.Y. Varu & Ors. v. S.K.Y. Varu & Ors** reported as (1969) 3 SCC 281, clearly held that [p.296]:-

"The law regarding the nature and incidents of impartible estate is now well settled. Impartibility is essentially a creature of custom."

106. Impartibility of an estate, if not established by custom, can only be claimed on the basis of some specific statutory provision. In the present case, it has been contended on behalf of the defendant No.1 that the suit properties were impartible (a) because of custom as prevailing in the ruling family of the erstwhile princely state of Kapurthala and, (b) because of Article XIV of the instrument of accession dated 20th August, 1948 read with the provisions of Section 5 (ii) of the Hindu Succession Act, 1956. On the other hand, the plaintiffs contend that no such customs of impartibility/primogeniture existed and, in any event, Section 4 of Section 5(ii) of the said were not applicable.

112. Clearly, for an estate to be covered under Section 5(ii) of the Hindu Succession Act, 1956, it is essential that the covenant or agreement or statute must by its terms and by its own force declare that the estate would descend to a single heir. In the present case, Article XIV of the Instrument of Accession merely kept "alive" the custom (without indicating what that custom was) and that too only with regard to succession to the "gaddi" of the State. This article by its terms or by its own force does not declare that any estate would descend to a single heir. Consequently, a custom sanctioning the rule of primogeniture entailing impartibility of the suit properties, would not be saved by the provisions of section 5(ii) of the said Act.

113. As a result, by virtue of section 4 of the said Act, to operate the custom relating to impartible estates and primogeniture would cease to operate and would stand abrogated. However, such custom would not cease ipso facto upon the coming into operation of the said Act in 1956, but whenever succession opened out for the first time after the commencement of the act in 1956. This is clarified by the Supreme Court in the case of **Revathinnal Balagopal Varma** (supra) as under [para 19]:-

"In other words, while the Act may have immediate impact on some matters such as, for e.g. that covered by Section 14 of the Act, its impact in matters of succession is different. There the Act only provides that, in the case of any person dying after the commencement of the Act, succession to him will be governed not by customary law but only by the provisions of the Act."

The aforesaid position of law laid down by the Hon.ble Supreme Court has a material bearing on the decision of the present suit.

121. Clearly, then, the factum of recognition of Defendant no.1 as the successor to the "gaddi" of the erstwhile state of Kapurthala has no effect whatsoever on the manner and mode of succession to the private and personal properties of late Maharaja Paramjit Singh, which must depend upon the personal the personal law of succession (in this case, Hindu law).

133. In view of my findings that the Mussorie estate is private and personal and not HUF co parcenary property, such property

also passed from Jagatjit Singh, defendant No.1 to Paramjit Singh and from Paramjit Singh to Sukhjit Singh in accordance with proved custom of primogeniture and is not accordingly liable to be partitioned.

Mr. Arun Mohan, learned Senior counsel, for defendant No.1 had stated that under law defendant No.1 is/was liable to provide reasonable maintenance in accordance with primogeniture to his wife and sons."

16. The finding in respect of granting partly relief in favour of appellant by passing the preliminary decree qua exhibit D-1 and PW-1/1 have been arrived in the impugned judgment on the basis of finding arrived in paras 103 & 130 which reads as under:

"103. In this respect the defendant No.1 in his evidence deposed that some of the capital was placed in the hands of children to case the impact of the estate duty upon the possible demise of defendant No.1. He had also clarified that no other property except those mentioned in Ex. PW1/1 & Ex. DA would constitute HUF properties. The remaining properties referred to in clause 9 have been explained on the basis that it was to ensure the survival of HUF qua such properties and its continuance as a stepping stone for further throwing in or accretion of the other assets. Significantly the defendant has deposed that even after the partitions effected by Deeds Ex.PW1/1 & PW1/2 tax returns were filed by defendant No.1 both as an individual and as a Karta of the joint Hindu Family. In my view, the above factors of individual and Joint Family returns after the two partitions by virtue of Ex PW1/1 and Ex PW1/2 and indeed the assessment of the Defendant No.1 as an individual under the Wealth Tax and Income Tax proceedings establish that the property was not coparcenary as claimed by the plaintiffs demonstrate that the HUF was created for a limited extent and for a specific purpose of tax management and would only operate qua these 2 Exhibits and the other properties not covered by the two deeds continued to remain impartible. Thus the defendant No.1 is bound by the two deeds Ex.PW1/1 & Ex. PW1/2 (Ex.DA) and cannot wriggle out of the effect of such declaration. Furthermore the plaintiff No.3 was unable to sustain her plea that she had contributed

certain properties to the coparcenary claimed by her as she was not able to establish any source of independent funds and had only been able to prove her ownership of one half of the property at 30 Sunder Nagar and certain TISCO shares.

130. Therefore, since the defendant No.1 had voluntarily made a declaration by virtue of Ex. PW 1/1 dated 26th March, 1976 and Ex. DA dated 11th March, 1975 to the effect that properties enumerated in the said declaration were joint Hindu family property, the defendant No.1 cannot avoid the effect of such declaration and is bound by it. Therefore, the plaintiffs are entitled to a preliminary decree of partition in respect of the properties enumerated in Ex. PW.PW1/1 and Ex. D.A."

17. The crux of main case of the Respondent No. 1 is as under:

i. Kapurthala was a Princely State. The Ruler was a sovereign. His Constitutional position was the same as that of the other 510 Hindu Rulers of that era.

ii. There was never any joint Hindu family/coparcenery. Further, there was never any partition.

iii. For succession, the rule of Primogeniture prevailed in the family, by virtue whereof, the eldest son succeeded to the entire property and others were granted only maintenance.

iv. For a sovereign Ruler, this is what the law also presumes. There is no Mitakshara Survivorship and no Mitakshara Succession.

v. Maharaja Jagatjit Singh ascended the Gaddi of Kapurthala in 1877, and ruled the 630 square miles of this Princely State as its Sovereign Ruler.

vi. In 1948, he ceded the State, and retained for himself some immovable and movable properties.

vii. The lapse of paramountcy [15.08.1947], Merger of the State [20.08.1948], or the ushering in of the Constitution [26.01.1950], did not create any coparcenary.

viii. On 19.06.1949 Maharaja Jagatjit Singh died leaving him surviving three sons and two widows. By reason of will X-8 otherwise by means of Primogeniture and thereby

everything was succeeded to by Maharaja Paramjit Singh. Maintenance allowances were given to the youngers, and continued to be given until 1972.

ix. Maharaja Paramjit Singh died on 19.07.1955, whereupon Respodennt No.1 succeeded to the property again by Will Ex. D-11 and /or otherwise by means of Primogeniture in any case whereof the respondent no. 1 became the absolute owner of the properties.

18. Undisputedly, in between 15th August, 1947 and 20th August, 1948 the Kapurthala state was merged in the PAPSU by virtue of a covenant signed by the emperors of different states. In that respect Maharaja Jagatjit Singh was sovereign ruler. The question which requires consideration before this court is as to what was the nature of the properties held by Maharaja Jagatjit Singh during his lifetime. It cannot be denied that after Maharaja Jagatjit Singh became an ordinary citizen of this country he became subject to the laws of this country and the question that remains to be determined is as to whether on his demise on 19.06.1949 his succession was to be governed by which law.

19. In the present case we have to decide as to whether the properties in question are co-parcenary properties or not. It is also necessary to decide whether the Rule of Primogeniture governed Hindu Rulers and applied to the Kapurthala.

HISTORY OF KAPURTHALA

20. The former Princely State of Kapurthala lay in the Jullundur Doab tract of the Punjab, bounded in the North by the River Beas and in the South, by the River Sutluj. The area of Kapurthala State was 630 sq. miles. A Taluqdari (Zamindari) of 730 sq miles, an area in Oudh (U.P.) was also owned by the Rulers of Kapurthala.

21. The Genealogical Table of the Kapurthala family in the usual form is on the Court record as Ex.D-2.

22. We may add here that the historical facts, there is really no dispute by the parties though the appellants maintain that it was always a joint Hindu family and the karta was designated as a Ruler.

23. Baba Jassa Singh Sahib (1718-1772-1783) The real founder of

the Kapurthala Dynasty is said to be Baba Jassa Singh Sahib. As a young man, Jassa Singh Sahib lived for several years in Delhi with his mother under the care of Mata Sundari, the widow of Guru Govind Singh the Tenth Sikh Guru. On Jassa Singh's departure from Delhi, to return to the Punjab. By 1761, Baba Jassa Singh was undoubtedly the chief leader among the Sikhs in North of the Sutluj. In 1764, Baba Jassa Singh led the Sikh Army during the sack of Sirhind. Baba Jassa Singh contributed his entire share of Rs.9,00,000/- from the sack of Sirhind for the rebuilding of the Golden Temple at Amritsar.

24. In 1780 he conquered Kapurthala and made it his headquarters. Baba Jassa Singh died in 1783. He had neither a son nor a nephew, and Sardar Bhag Singh, a second cousin then in his thirty-sixth year, succeeded to the estate. There was a daughter married to Sardar Mohr Singh of Fatehabad, but a daughter and a daughter's son were not reckoned among the legal heirs.

Sardar Bhag Singh (1747-1783-1801)

24.1 Sardar Bhag Singh who succeeded as the Chief of Kapurthala, consolidated his position in various expeditions in and around the Doab. In 1796, Sardar Bhag Singh joined the Kanheyas, then led by Sadda Kour, one of the remarkable women in Punjab history and the mother-in-law of Maharaja Ranjit Singh, in their attack upon Sardar Jassa Singh Ramgharia, the old enemy of his house, who had entrenched himself at Miani, but did not succeed in defeating him. Sardar Bhag Singh died in 1801. He left behind one son Sardar Fateh Singh.

Sardar Fateh Singh (1784-1801-1836)

24.2 Sardar Fateh Singh succeeded as the Third Ruler of Kapurthala. His first act was to form an alliance, with Ranjit Singh, who had just gained possession of Amritsar. The young Chiefs exchanged turbans, and swore on the Granth Sahib to remain friends for ever.

Sardar Fateh Singh died in October 1837. He left behind the following:

Name		Relation
i Rani Sada Kaur	-	Widow (first)
ii Rani Rattan Kaur	-	Widow (second)

iii	Nihal Singh	-	Elder son
iv	Amar Singh	-	Younger son

All the properties of the late Chief devolved upon and were taken exclusive ownership and control of, by Sardar Nihal Singh, the late Chief's elder son. As per the case of respondent no.1 as per PW/1/51 and documents exhibited as D-61 to 64 the succession therefore was as follows:

i Sardar Nihal Singh	All the properties of the Chief as also the Chiefship yielding about Rs. 12,00,000/- annually.
ii Rani Sada Kaur	Maintenance
iii Rani Rattan Kaur	Maintenance
iv Kr Amar Singh	Maintenance,

Raja Nihal Singh (1816-1836-1852)

24.3 In 1836, Raja Nihal Singh succeeded as the Fourth Ruler of Kapurthala. In 1845 during the first Anglo-Sikh War, Sardar Nihal Singh's troops sided with the Sikh Armies and fought against the British at Aliwal and Budowal. As a result, after the defeat of the Sikh Armies in 1846, Sardar Nihal Singh lost his Cis-Sutluj territories as escheat to the victorious British Government. The Jalandhar Doab Territories however, continued in clear sovereignty with Sardar Nihal Singh. This severe loss ensured that in the second Anglo-Sikh War of 1849-1850, the Kapurthala troops took the field in support of the British. Raja Nihal Singh remained aloof from politics and administered his territories well. Raja Nihal Singh died in 1852. He left behind the following persons:

Name		Relation
i Rani Pratap Kaur	-	Widow (first)
ii Rani Mai Hiran	-	Widow (second)
iii Randhir Singh	-	First son
iv Bikrama Singh	-	Second son
v Suchet Singh	-	Third son

vi Bibi Kaur	-	Daughter

All the properties of the Ruler, were taken exclusive ownership and control of by Raja Randhir Singh, to the exclusion of his younger brothers and the surviving wives. Consequently, the succession in the Kapurthala family was as follows:-

(i) Raja Randhir Singh	The rulership, the entire State, yielding something in excess of Rs.6,00,000 per annum as revenue. Raja Randhir Singh also succeeded exclusively to all the personal properties of the late Ruler.
(ii) Rani Sada Kaur	Nothing
(iii) Rani Mai Hiran	Nothing
(iv) Kr Bikrama Singh	Rs.60,000/- per annum, awarded as a final settlement by the Secretary of State for India in adjudication on the Will of the late Raja Nihal Singh.
(v) Kr Suchet Singh	As above
(vi) Daughter	Was married to the Sardar of Nikandpur.

Raja Randhir Singh (1831-1852-1870)

24.4 In 1852, Raja Randhir Singh succeeded his father as the Fifth Ruler of Kapurthala. In 1857 Raja Randhir Singh rendered distinguished personal service, both in the Punjab and in Oudh, at the head of his troops. Raja Randhir Singh died in 1870. He left behind the following persons:

	Relation	Name
i Elder son	-	Kharak Singh (born 1849)
ii Second son	-	Harnam Singh (born 1851)
iii Daughter	-	(born 1851)

The entire State of Kapurthala and all the properties of the late Ruler were taken exclusive ownership and control of by Raja Kharrak Singh. The succession was as under :

i Raja Kharak Singh	The entire Raj yielding an annual revenue of about Rs.7 lakhs and all the personal properties of the late Ruler, including the Taluqdari in Oudh yielding Rs.12,00,000 per annum as income.
ii Kr Harnam Singh	Maintenance allowance.

Raja Kharak Singh (1849-1870-1877)

24.5 Raja Kharak Singh (the Sixth Ruler)'s reign was uneventful. A male child (Maharaja Jagatjit Singh) was born on 24.11.1872.Raja Kharrak Singh died in 1877. He left behind the following persons:

Name		Relation
i Rani Anand Kaur	-	Widow (died 1897)
ii Jagatjit Singh	-	Son (born 1872)
iii Harnam Singh	-	younger brother

He left behind the following properties :

a	Immovable property in Kapurthala and Oudh, such as the Jalao Khana Palace and the Elysee Palace in Kapurthala.
b	The Oudh Taluqdari.
c	Movable property and valuables.

The resultant succession was:

i Maharaja Jagatjit Singh	The entire State of Kapurthala then yielding an annual revenue of about Rs.14 lakhs plus all properties of the Ruler, including personal effects as also the Taluqdari of Oudh which yielded an additional revenue of Rupees 12 lakhs
ii Rani Anand Kaur	Nothing, except Maintenance.
iii Kr Harnam Singh	Maintenance allowance of Rs.36,000/- eventually or approximately only 1/70th

of the patrimony.

Maharaja Jagatjit Singh (1872-1877-1949)

24.6 Despite the two grand-uncles and the two uncles, the five-year-old Jagatjit Singh succeeded as the Seventh Ruler of Kapurthala. He assumed full ruling powers on 24.11.1890.

The builder of modern day Kapurthala, who ruled the State for almost six decades. As a progressive secular Ruler, he built for his Muslim population, which comprised the majority of the State's population prior to 1948, the finest place of worship in the State – a Mosque built on the pattern of the Koutoubia Mosque in Marrakesh, Morocco. During the reign of Maharaja Jagatjit Singh, some of the most well-known architectural structures were erected in and outside the State. These comprised:

a	Prominent buildings existing in 1872
i	Jalao Khana or Old Palace.
ii	Panj Mandir
iii	Randhir College
b	Buildings built or purchased after 1872
i	Elysee Palace
ii	Villa Palace
iii	Chateau Mussoorie (St Helens Cottage already existed when the property was bought by Maharaja Jagatjit Singh in 1885. Source of this information is from the National Archives of India Foreign and Political Department, Intl October 1885, Proceedings 107-109, Part B, and the attested copy of the Sale Deed submitted to Court by respondent no.-1)
iv	Jagatjit Palace Kapurthala
v	State Gurudwara and Mai Maharani Mandir
vi	State Gurudwara Shri Ber Sahib at Sultanpur Lodi

As per the case of respondent No.1 Maharaja Jagatjit Singh also gifted from time to time – as a maintenance grant – to his younger sons, State Officials and others, lands, cash awards or properties by means of

'Hiba Namas' or gift deeds, or 'Sanad Sultani's also known as Royal gifts or Orders.

In the 1920s, Maharaja Jagatjit Singh thrice represented India at the League of Nations at Geneva.

15.08.1947 – 20.08.1948

24.7 On 14/15.08.1947 the British paramountcy lapsed. One year later, on 5.05.1948, the Merger Agreement was signed by Maharaja Jagatjit Singh for ceding/merging Kapurthala State into the Union of PEPSU. The Merger Agreement, also known as the Covenant, is Ex.D-23. The Ruler's sovereignty came to an end.On 19.06.1949, Maharaja Jagatjit Singh died. He left behind the following among others:

Name	Relation
i Maharani Lachhmi (Bushair)	Senior Widow
ii Maharani Prem Kaur	Second Widow
iii Tikka Paramjit Singh	Eldest son (born 1892)
iv M K Karamjit Singh	Second son (born 1896)
v M K Ajit Singh	Third son (born 1910)

24.8 As per case of the respondent no. 1 at this point of time (19.06.1949, in fact 20.08.1948 onwards), Maharaja Jagatjit Singh was no longer the owner of the State of Kapurthala. He was the owner of only what he had retained for himself at the time of the Merger on 20.08.1948. These came to be called "Private Properties".

24.9 The question is of the character of the holding prior, and subsequent, to 19.06.1949: (1) whether as joint Hindu family (coparcenary) or absolute; and (2) the mode of succession Mitakshara Survivorship/ Succession, or Will/Primogeniture. The respondent no.1 submits that on account of the Will of Maharaja Jagatjit Singh (X-8), and alternatively, the Rule of Primogeniture, Maharaja Paramjit Singh succeeded exclusively. Position with regard to the matter of fact succession was:

Maharaja Paramjit Singh (eldest son)	The Palaces, the Oudh Taluqdari and all personal cash balances, jewellery, valuables and other properties of the late Ruler. Worth almost Rs.70 lakhs.
Maharani Lachhmi @ Bushair (widow)	
Maharani Prem Kaur (widow)	
M.K. Rani Mahijit (widowed daughter-in-law)	No interest in land or properties or other assets at all.
M. K. Karamjit Singh (younger son)	Only maintenance allowances of varying amounts, all totalling approximately Rs.1,08,000/- per annum or 1/60th of the patrimony.
M. K. Ajit Singh (youngest son)	
R. K. Arun Singh (grandson)	
R. K. Martand Singh (grandson)	
Sukhjit Singh (grandson)	Nothing

Maharaja Paramjit Singh (1892-1949-1955)

24.10 On 19.06.1949, Maharaja Paramjit Singh took over as the Eighth Ruler of Kapurthala. Six years later, on 19.07.1955, Maharaja Paramjit Singh passed away.

He left behind the following persons:

Name	Relation
i Rajmata Lachhmi (Bushair)	… widow) Dowager step mother
ii Rajmata Prem Kaur	… (widow) Dowager step mother
iii Maharani Brinda	… First wife (widow)
iv Maharani Stella	… Third wife (widow)
v Tikka Sukhjit Singh	… Son (born 1934)
vi M K Indira Devi	… Daughter
vii M K Sushila Devi	… Daughter
viii M K Ourmila	… Daughter

ix M K Asha Kaur … Daughter

Brigadier Sukhjit Singh/respondent No.1 (1934-1955-???)

24.11 On 19.06.1955, 21-year-old 2nd Lt. Sukhjit Singh succeeded as the Ninth Ruler of Kapurthala. Sukhjit Singh continued with the Indian army, and fought the 1965 and 1971 wars with Pakistan on the battlefront which earned him the combat award of a Maha Vir Chakra (MVC). As per the case of the respondent no.1, he in order to pay the Estate Duty, had sold Jagatjit Palace and Elysee Palace and with the balance sale proceeds property B-90A GK-1 and a commercial flat were purchased.

25. An order was issued by the President on 6.09.1970 "De-recognising" respondent no.1 as the Ruler of Kapurthala. The Parliament enacted the Constitution (26th Amendment) Act 1971. Articles 291 and 362 were repealed; a new Article 363A was added, and the definition of a 'Ruler' in Clause (22) of Article 366 was reworded. It came into effect on 29.12.1971. Thereafter, the Rulers of Indian States (Abolition of Privileges) Act [54 of 1972] was also passed.

26. Before dealing with the rival submissions of the parties, we have to see as to what is the meaning of rule of primogeniture and under which circumstances the rules of primogeniture applies and is different with law of succession and its presumption.

Primogeniture

'Primogeniture' is a rule of succession. It is applicable to impartible estates. It was applicable to Rulers and Monarchs. By this rule, the eldest son or the first born son succeeds to the property of the last holder to the exclusion of his younger brothers. According to the ordinary rule of succession, all the sons of the father are entitled to equal shares in his estate. The rule of succession by which the first born son succeeds to the entire estate, to the exclusion of the other sons, is called Primogeniture. It denotes a rule of succession by which the eldest among the heirs, male or female, succeeds to the estate to the exclusion of other heirs. This is simple primogeniture in contradistinction to lineal male primogeniture. Lineal Male Primogeniture means a continual descent to the eldest male member of the eldest branch. If a person died, leaving him surviving a grandson by a predeceased eldest son and a younger son, the latter would succeed if simple Primogeniture prevailed but the former would

succeed, if succession was governed by the rule of Lineal Male Primogeniture.

27. The argument of the Appellants are that there was a distinction between public and private property of a sovereign Ruler and that the private property was held as a karta of a coparcenary.

28. The Supreme Court in Civil Appeal No.534 of 1983, **Revathinnal Balagopala Varma Vs. His Highness Shri Padmanabhadasa Varma (Since deceased) and others, and Civil Appeal** No.535 of 1983. **Indira Bayi and Others Vs. His Highness Sri Padamanabhadasa Varma (since deceased),** decided on November 28, 1991. It is held by the Apex Court that one incidence of the property held by a sovereign was that there was really no distinction between the public or State properties on the one hand and private properties of the sovereign on the other; and the other incidence was that no one could be a co owner with the sovereign in the properties held by him. The Supreme Court also emphasized that when they are speaking of the property of an absolute sovereign there is no pretence of drawing a distinction, the whole of it belong to him as sovereign and he may dispose of it for public or private purpose in whatever manner he may think. The Apex Court in fact approved a decision of the Gujarat High Court in **D.S. Meramwala Bhayala Vs. Ba Shri Amarba Jethsurbhai** (1968) Gujarat Law Reporter Vol. 9 page 609. It is useful to quote some relevant portion of the said judgment which have ample bearing on the point arising in this case :

> "There is, therefore, no doubt that the Khari-Bagasara Estate was a sovereign Estate and the Chief of the Khari-Bagasara Estate for the time being was a sovereign ruler within his own territories subject to the paramountcy of the British Crown prior to 15th August, 1947 and completely independent after that date. If the Khari-Bagasara Estate was a sovereign Estate, it is difficult to see how the ordinary incidents of ancestral co-parcenary property could be applied to that Estate. The characteristic feature of the ancestral coparcenary property is that members of the family acquire an interest in the property by birth or adoption and by virtue of such interest they can claim four rights : (1) the right of partition; (2) the right to restrain alienation by the head of the family except for necessity; (3) the right of maintenance;

and (4) the right of survivorship. It is obvious from the nature of a sovereign Estate that there can be no interest by birth or adoption in such Estate and There rights which are the necessary consequence of community of interest cannot exist. The Chief of a sovereign Estate would hold the Estate by virtue of municipal power and not by virtue of municipal law. He would not be subject to municipal law; he would in fact be the fountain head of municipal law. The municipal law cannot determine or control the scope and extent of his interest in the estate or impose any limitations on his powers in relation to the Estate. As a sovereign ruler he would be the full and complete owner of the Estate entitled to do what he likes with the Estate. During his lifetime no one else can claim on interest in the Estate. Such an interest would be inconsistent with his sovereignty. To grant that the sons acquire an interest by birth or adoption in the Estate which is a consequence arising under the municipal law would be to make the Chief who is the sovereign to make the Chief who is the sovereign ruler of the Estate subject to the municipal law. Besides, if the sons acquire an interest in the Estate by birth or adoption, they would be entitled to claim the rights enumerated above but these rights cannot exist in a sovereign estate. None of these rights can be enforced against the Chief by a remedy in the municipal courts. The Chief being the sovereign ruler, there can be no legal sanction for enforcement of these rights. The remedy for enforcement of these rights would not be a remedy at law but resort would have to be taken to force for the Chief as the sovereign ruler would not be subject to municipal law and his actions would not be controlled by the municipal courts. Now it is impossible to conceive of a legal right which has no legal remedy. If a claim is not legally enforceable, it would not constitute a legal right and, therefore, by the very nature of a sovereign estate, the sons cannot have these rights and if these rights cannot exist, in the sons, it must follow as a necessary corollary that the sons do not acquire an interest in the Estate by birth or adoption…… ……..Now it was not disputed on behalf of Meramvala that if prior to merger the Estate did not partake of the character of ancestral coparcenary property, the properties left with Bhayawala under the merger agreement would

not be ancestral coparcenary properties; if Meramvala did not have any interest in the Estate prior to merger, he would have no interest in the properties which remained with Bhayavala under the merger agreement. It was not the case of Meramvala and it could not be the case since the merger agreement would be an act of State that as a result of the merger agreement any interest was acquired by him in the properties held by Bhayavala. Bhayavala was, therefore, the full owner of the properties held by him and was competent to dispose of the same by will…… ……The argument of Mr. I.M. Nanavati, however, was that the effect of applicability of the rule of primogeniture by the parmount power was that the rights of coparceners under the ordinary Hindu law were eclipsed : these rights were not destroyed but they remained dormant and on the lapse of paramountcy, the shadow of the eclipse being removed, the rights sprang into full force and effect. This argument is wholly unsustainable on principle……..

From this judgment, it is clear that the characteristics of ancestral coparcenary property: (1) the right of partition; (2) the right to restrain alienations by the head of the family except for necessity; (3) the right of maintenance and (4) the right of survivorship, are not applicable to the properties owned by the sovereign ruler and that the son does not acquire any interest in such properties either by birth or adoption and even after the state of the sovereign ruler has merged with India, the character of his properties does not change. In the case of Revathinnnal Balagopala Varma the Supreme Court referred to all the earlier decisions which have been referred and concluded that there is no distinction between the private and public properties owned by the sovereign ruler and the incidents of ancestral or coparcenary properties are not at all applicable to such properties held by the sovereign ruler. It is also held in this judgment that the mode of succession does not make any difference. As soon as one sovereign ruler succeeds another, all the incidents of sovereignty are then possessed by the successor sovereign ruler. In the said case also, the sovereign before surrendering his sovereignty entered into a covenant gave an option to the sovereign ruler to furnish a list of such properties which he wanted to retain as personal properties.

29. The distinction between ‘public’ and ‘private’ property, reference

was also made by respondent No.1 to the judgments in 1994 Supp. 1 SCC 735 Nabha case and the other judgments referred to therein. See **Advocate General of Bombay vs. Amerchund (1830) Vol 1 Knapp's** PC 329 (=12 ER 340,.45), **Vishnu Pratap Singh vs State of M.P.** 1990 (Supp) SCC 43, White Paper on Indian States (para 157), Meramwala case Vol.9 (1968) G.L.R. Gujarat 609 and Travancore case 1993 Sup-1 SCC 233 wherein the argument was rejected by the court particularly in Nabha case, where it has been ruled that it shall continue as law under Article 372 of the Constitution of India.

30. The custom of Primogeniture for Zamindars evolved as an exception to the general customs of Mitakshara survivorship and Mitakshara succession. However, the Zamindars did not have any sovereign power i.e., power to lay down the law. The Princes wielded sovereign powers and, therefore, they (all the Princes but with a rare exception) had applied the Rule of Primogeniture which then had taken the shape as the law promulgated by them as a sovereign Ruler.

31. The Rulers of Kapurthala (1782 to 20.08.1948) were sovereign Rulers is a part of Constitutional and legal history of India. Before the learned Trial Judge, the Appellants argued that the Kapurthala family were only Zamindars and not Sovereign Rulers, but the learned Single Judge found them to be Sovereign Rulers. The finding of the Trial Judge that they were Sovereign Rulers has not been seriously assailed in appeal. In fact, in the arguments before the Division Bench, this contention was given up by the learned counsel for the appellants.

32. Undisputedly, Maharaja Paramjit Singh was recognised by the Government of Dominion of India as the Ruler of Kapurthala, and thereafter, on Maharaja Paramjit Singh's death (19.07.1955), the Government of India recognised respondent no.1 as the Ruler under the Constitution of India by Notification' respondent no.1 continued to be so recognised till (along with 500 + other Rulers) he was de-recognised by the 26th Constitutional Amendment in 1971-72.

33. Being a sovereign ruler, no incidence of coparcenary or Joint Hindu family could be applied to the properties held by him and the junior (sons), had no right by birth. The judgment of Bhagwati, J. in **Meramwala's** case, Vol.9 (1968) I.L.R. Gujarat 966 = Vol.9 (1968) Gujarat Law Reporter 609 and the judgment of a Division Bench of the

Kerala High Court in Travancore case 1983 Kerala Law Times 408. In **Thakore Vinay Singh's** [Mohanpur] case, 1988 Sup SCC 133 = AIR 1988 SC 247 the Supreme Court held that there was no coparcenary, and in **Vishnu Pratap Singh vs State of Madhya Pradesh** 1990 Sup SCC 43 wherein it was held that the Ruler was the absolute owner of all properties. The Supreme Court judgment 1993 Sup-1 SCC 233 in appeal from the Kerala High Court, and in the Nabha case 1994 Supp-1 SCC 734 = JT 1993 (Supp) SC 288 are conclusive on this aspect.

34. Going back into Indian History, long before the British Rule, the best example of authority on the rule of Primogeniture, which the respondent No.1 cites before this Court, is none other than the decision that Lord Ram would succeed to the kingdom of Ayodhya after the demise of Raja Dashrath in total exclusion of his younger brothers Bharat, Lakshman and Shatrughan. Lord Rama was the eldest son or as the legalistic term goes, the first born. Since this was a Ruling Family; they were ruling the Kingdom of Ayodhya; there was no coparcenery, there was no partition and there was no suit.

35. It appears from the material produced by the appellants on record that "Maintenance Grants" were being given by the Ruler to his younger brothers. Similarly, an "Allowance" was given to the elder son and to the younger sons. If the quantum of the allowance is to be examined, the elder son was the recipient of a larger amount than the younger sons, or even his uncles (Ruler's brothers). This again indicates Primogeniture: See **Chattar Singh vs. Roshan Singh;** AIR 1946 Nagpur 277.

36. Some of the Princely States, prior to their merger into the Dominion of India, had enacted formal legislation in the name of the Ruler. These „Succession Acts., specifically stated that the Rule of Succession applicable to their respective families, would be the Rule of Primogeniture.

37. The following is the list of some of the cases came to the Court after 1950, matters relating to Primogeniture in the Princely States:

(i) **Darbar Shri Vira Vala Surag Vala Vadia vs. State of Saurashtra;** (AIR 1967 SC 346 [Vadia]

1 .. .. there was in Kathiawad a State of the name of

Vadia, succession to the Rulership of which was by primogeniture.

(ii) In **Prabir Kumar Bhanja Deo vs. State of Orissa** (ILR 1969 (Orissa/Cuttack Series) 794,' the question before the DB was relating to Keonjhar a Princely State in Orissa. After stating the genealogical table and noting that Primogeniture prevailed, and also noting that "Pachchis Sawal" was a document of high authority relating to customs prevailing in these States and had stood the field for over 150 years, returned a finding It will thus be apparent from the aforesaid two questions and answers that in Keonjhar State, where succession was governed by the custom of lineal primogeniture, the junior members of the Raj family were not entitled to any interest in the Rajgi (the Raj State). They had only a right of maintenance. … …

(iii) **M.K. Ravinderbir Singh vs M.K. Gajbir Singh** CO 61/ 1960 Punjab & Haryana High Court. This judgment, though based on a compromise, is relevant as an instance of the custom of Primogeniture being followed after the commencement of the Constitution in respect of the property left behind with the Ruler at the time of merger in 1948.

(iv) This question has been dealt by the Supreme Court judgment in the Privy Purses case, where Mitter J was pleased to observe: [1971 SC page 530,.96 = 1971-1 SCC 85,.219] It would appear that invariably the rule of lineal male Primogeniture coupled with the custom of adopting a son prevailed in the case of Hindu Rulers who composed of the bulk of the body.

(v) **Thakore Vinayasinhji AIR Vs. Kumar Shri Natwar Sinjhi**-1988 SC 247 It is not disputed that the Raj Estate, of which the deceased appellant was the Ruler, is impartible and that the rule of primogeniture, which is one of the essential characteristics of an impartible estate, is also applicable.

(vi) **R.K.Rajindra Singh vs State of Himachal Pradesh** (1990) 4 SCC 320 [Bushahr]

3 .. The plaintiff's father Raja Padam Singh having died in April 1947, his elder son Tikka Vir Bhadra Singh born to his first wife Shanta Devi succeeded to the Gaddi under the rule of primogeniture ....

(vii) **State of Punjab vs Brig Sukhjit Singh** 1993-3 SCC 459 [Kapurthala]

11(2).. .. It's ownership and possession in the hands of each succeeding heir apparent by primogeniture was demised perpetually ...

11(3) .. property settled on a title holder for keeping the family name alive perpetually and vesting it in each succeeding heir apparent by the rule of primogeniture.

(viii) In **H.H. Maharaja Pratap Singh vs H.H.Maharani Sarojini Devi,** 1994 Supp -1 SCC 734 = JT 1993 (Supp) SC 244 the Supreme Court says: [Nabha]

Though impartibility and primogeniture, in relation to zamindari estates or other impartible estates are to be established by custom, in the case of a sovereign Ruler, they are presumed to exist.

observed that Ruler in question was governed by customary law.

38. It further appears from the work entitled Annals and Antiquities of Rajasthan, (Oxford University Press, 1920. Reported in 1978 by M N Publishers, New Delhi – 110048) Colonel James Todd, a former Political Agent to the Western Rajputana States, says:

... The law of Primogeniture prevails in all Rajpoot sovereignties; the rare instances in which it has been set aside, are only exceptions to the rule.

39. **Presumption, and how it operates**

It is evident that 'sovereigns' what has passed as law into the law of the land, is that primogeniture and not Mitakshara, applies. Presumption makes the fundamental basis for Evaluation of Evidence. The weighment

thereof has to take place in that light.

(i) In **Baboo Gunesh Dutt Singh vs Maharaja Moheshur Singh,** Vol. VI [1854-7] Moore's Indian Appeals 164) the Privy Council had held:

> We apprehend that the principle upon which we are about to pro-ceed in this case admits of no doubt or question whatever. By the general law prevailing in this district, and indeed generally under the Hindu Law, estates are divisible amongst the sons, when there are more than one son; they do not descend to the eldest son, what are divisible amongst all. With respect to a Raj as a Principality, the general rule is otherwise and must be so. It is a Sovereignty, a Principality, a subordinate Sovereignty and Principality no doubt, which, in its very nature excludes the idea of division in the sense in which that term is used in the present case.
>
> ....

(ii) In the Ramnad case,(ILR Vol XXIV [1901] Madras 613,. 35 a Division Bench of the Madras High Court relied upon the character of the estate as a Raj or Principality as one of the factors for coming to the conclusion that the estate was impartible, and went on further to hold that once the estate was held to be impartible, primogeniture applied as a consequence.

(iii) The Privy Council judgment in **Martand Rao vs Malhar Rao,** AIR 1928 PC 10 in so far as 'sovereignty' or 'principality' is concerned, far from sounding a discordant note, reiterates the presumption of impartibility. Their Lordships were unable to accept that the Amgaon Estate was in the nature of a Raj, and therefore impartible. They, after holding that Amgaon estate was not 'sovereign', ruled:

> ... are such that they could not possibly be classed as appertaining to the category of sovereign or semi-sovereign chiefs whose possessions were necessarily impartible.

(iv) And, in **Kochunni vs Kuttanunni,** AIR 1948 PC 47,. 50

(after holding the State in dispute to be sovereign), on the question of presumption, laid down:

> ... there could, therefore, be no question of his proving, as the High Court has required him to do, that the properties in his possession were impartible.

40. In **Salig Ram vs Maya Devi,** AIR 1955 SC 266,.68 Col 2; and in **Jai Kaur vs Sher Singh,** AIR 1960 SC 1118,'21 the Supreme Court held Rattigan's work to be a book of unquestioned authority. The Rule of Primogeniture only prevails in families of ruling chiefs or Jagirdars whose ancestors were ruling chiefs.

(i) In **Mohd. Yusuf vs. Mohd. Abdullah** AIR 1944 Lahore 117 a Bench of the Lahore High Court had held that, the onus shifts on to that party who challenges recitals in the manual of customary law, to establish that what has been recited in the manual, is incorrect.

41. As discussed above, Primogeniture, as a rule for succession, applied to the Rulers, the Zamindars etc. While examining, we have to first ask ourselves the question: Whether we are dealing with a sovereign or a non-sovereign estate?

42. The contention of the appellants is that no proper plea has been raised with regard to any such custom applicable to Maharaja Jagatjit Singh or the ruling family of Kapurthala. According to him Mitakshara Hindu Law was applicable and it does not matter if Maharaja Paramjit Singh was recognized as a ruler by the President of India. In view of the terms of covenant, Maharaja Jagatjit Singh was not subject to the Mitakshara Hindu Law at the time of his death as Maharaja Paramjit Singh inherited the estate of Maharaja Jagatjit Singh when the said estate became ancestral in his hand. The family of Kapurthala was always governed by Mitakshara School of Hindu Law All sikhs Fall within the definition of Hindu therefore, are govenred by the said law. According to the appellants there was a time when the ancestors of the Kapurthala family were not the rulers in any form and as such were governed by the Mitakshara law. The existence of a custom is a pure question of fact which is to be decided on the basis of evidence proved on record and not on the basis of presumption, it has to be determined pertaining to such a custom of the ruling family of Kapurthala ruler referring to other

states and reference of text and decisions. In the present case as per the case of appellants, no custom prevailing for the family of Kapurthala. The rule of primogeniture and impericable estate and the Gaddi of Kapurthala was imposed on the family by the British in the exercise of their political power and it cannot be equated with the family custom as recognised by a Hindu Law.

43. As regard the Mitakhshara joint Hindu family is concerned, it is averred by the appellants that it is a creature of law and arose out of a relationship known as spinda relationship which is confined to birth, marriage or adoption and comprising of a body consisting of persons, male or female. The coparcenary is also a creature of law and cannot be created by an act of the parties. The moment two coparceners come into existence in a jonit Hindu family, a coparcenors in the Joint Hindu family at any point of time, the joint property would belong to coparcenry and would be known as co-parcenary property.

44. It is submitted by the appellant that Maharaja Paramjit Singh inherited the property of Jagatjit Singh on his death on 19th June, 1949 and the said property was obviously ancestral in the hands of Paramajit Singh and similarly respondent No.1 inherited the property of Paramajit Singh on his death on 19th July, 1955 and such property was ancestral in the hands of respondent No.1. While some of the suit properties remained in the same form in which they were inherited by defendant No.1, the other suit properties were acquired form the nucleus of those properties/funds, which were inherited by defendant No.1. The suit property does not comprise of any self-acquired property by respondent No.1.

45. It is also the case of the appellants that on 20th February, 1950 on the marriage of respondent No.1 with the appellant No.3, a joint Hindu family comprising of respondent No.1 and the original appellant No.3 came into existence by operation of law and respondent No.1 was the karta of the said properties. On the birth of appellant No.1 on 27th December, 1961 a coparcenary consisting of respondent No.1 and the appellant No.1 came into existence by operation of law with respondent no.1 as the karta of that coparcenary. Consequently, all the suit properties became co parcenary properties by operation of law and appellant No.1 required interest in those properties by birth upon his conception. Same

was the case upon the birth of original plaintiff No.2 born on 10th May, 1966 who got added to the above co-parcenary. On 28th May, 1990 Survajit Singh, son of appellant No.1 also became a member of the said co-parcenary upon his birth.

46. The Hindu customs recognised by the Courts are - (1) local, (2) class, and (3) family customs. The 500 and odd Hindu Rulers would certainly form a 'class.' (See **Mohan Lal vs Sawai Man Singh.** AIR 1962 SC 73,.5 = 1962-1 SCR 702)

(i) In **Shimbhu Nath vs. Gayan Chand,** ILR XVI [1894] Allahabad 379 a Bench of the Allahabad High Court held that where a custom alleged to be followed by any particular class of people is in dispute, judicial decisions in which such custom has been recognised as the custom of the class in question are good evidence of the existence of such custom.

(ii) In **Mohesh Chunder Dhal vs. Satrughan Dhal,** Vol. 29 [1902] Indian Appeals 62 the Privy Council held:

"To prove custom of lineal primogeniture as the rule of succession:-

The High Court relied on the oral evidence, which was very fully discussed in the Court of first instance. There was abundant evidence to show that it was well understood in the family, and in families belonging to the same group, that no descendant of a younger branch could take until all the elder branches were exhausted. But there again no witness was able to point to an actual instance in which, in cases of collateral relationship, the rule had either been followed or departed from. The evidence, of course, would have been much stronger if the witnesses had been able to cite instances confirming their view. But still the evidence is not to be disregarded. The High Court relied principally on certain decrees relating to disputes in families, belonging to the same group, in which it was decided that the rule of succession was lineal primogeniture. These decrees do not, of course, bind the parties to the present suit, but they go a long way to shew the prevalence of the custom among families having a common origin, and settled in the same part of the country. Lastly, the

High Court relied on the precedence conferred or marked by the titles of honour given to the sons of the reigning Raja in order of seniority, a precedence which would naturally be attached to the lines of descent traced from them."

(iii) In **Kunhanbi vs Kalanthar,** XXVII [1914] Madras Law Journal 163,.63 a bench of the Madras High Court held:

"When the fact of the existence of a custom amongst a particular class of people has been repeatedly proved in the courts, the courts have power to take judicial notice of it."

(iv) In the **Pittapur** case AIR 1918 PC 81 the Privy Council was concerned with custom governing a non-sovereign Zamindari. The Judicial Committee relied upon judgments relating to other Zamindaris and held:

"When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of a the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end truly a matter of process and pleading. Analogy may be found in instances in the law Merchant or in certain customs in copyhold tenure. In the matter in hand their Lordships do not doubt that the right of sons to maintenance in an impartible Zamindari has been so often recognised that it would not be necessary to prove the custom in each case."

47. There were, in the pre-1950 era, thousands of Zamindaris in India. The basic difference is that they did not enjoy sovereign ruling powers and were merely land owners with the right to collect land revenue. Many of these impartible estates the succession to which was also governed by Primogeniture.

48. The holder of such impartible estates (non-sovereign ones) may not always be an absolute owner and it could well be a family property, yet the one who succeeded to the impartible estate by Primogeniture had the right to transfer inter vivos or by a Will. See **V T S T Thevar vs. V T S S Pandia Thevar** AIR 1965 SC 1730.

(i) In the Travancore case [**Revathinnal Balagopala Varma vs. His Highness Shri Padmanabha Dasa Bala Rama Varma**],

1993 Sup-1 SCC 233 a three-Judge Bench of the Supreme Court observed:

… … It is suggested that the observations in that case run counter to the catena of decisions in the case of impartible estates relied on by Sri Nambiar but this is not correct. If the estate dealt with in that case had been an ordinary impartible estate, the decision should perhaps been quite different. But once the distinction is borne in mind that the estate was a sovereign estate and its chief a sovereign ruler, the real import of the decision becomes clear. It establishes beyond doubt that the acquisitions by a sovereign ruler cannot be claimed to be joint family property.

(ii) In **D.S. Meramwala Bhayala v. Ba Shri Amarba Jethsurbhai** ILR (1968) 9 Gujarat 966 it was held: (paras are excerpted) Against a judgment of the then Supreme Court of Bombay an appeal was taken up before the Privy Council and the judgment of the Privy Council was reported in **Elphinstone vs. Bedreechund** 12 E R 340 = 4 MIA Supp 50. ….....

This being the law with regard to the powers of a sovereign and the legal status of the properties held by him there can be no manner of doubt that till the sovereignty of the Maharaja of Travancore had ceased he was entitled to treat and use the properties under his sovereignty in any manner he liked and his will in this regard was supreme. …

If someone asserts that to a particular property held by a sovereign the legal incidents of sovereignty do not apply, it will have to be pleaded and established by him that the said property was held by the sovereign not as a sovereign but in some other capacity. In the instant case apart from asserting that the properties in suit belonged to a joint family and respondent 1 even though a sovereign ruler, held them as the head of the family to which the property belonged, the appellant has neither specifically pleaded nor produced any convincing evidence in support of such an assertion. It has been urged on behalf of the appellants that only the eldest male offspring of the Attingal Ranis could, by custom, be the

ruler and all the heirs of the Ranis who constituted joint Hindu family would be entitled to a share in the properties of the Ranis and the properties in suit were held by respondent 1 as head of the tarwad even though impartible in his hands. This plea has been repelled by the trial court as well as by the High Court and nothing convincing has been brought to our notice on the basis of which the presumption canvassed on behalf of the appellant could be drawn and the findings of the courts below reversed. …

The properties in suit having passed on from one sovereign to the other came to be ultimately held by respondent 1 in that capacity. Neither any principle nor authority nor even any grant etc. has been brought to our notice on the basis of which it could be held that in the properties of the State held by a sovereign an interest was created or came into being in favour of the family to which the sovereign belonged.

49. The law which applied to the former Rulers was different than that applied to the non-sovereign States. The distinction in application was again explained by the Supreme Court in **Nabha** case **Pratap Singh vs Sarojini Devi** 1994-Supp(1) SCC 735,.49 para 65 in the following words:

"Though impartibility and primogeniture, in relation to zamindari estates or other impartible estates are to be established by custom, in the case of a sovereign Ruler, they are presumed to exist."

50. A table depicting the difference between the Ruler of an Indian State on the one side and the holder of an impartible Zamindari on the other.

	Ruler of an Indian State		*The holder of a Zamindari*
1.	The Ruler (Sovereign) would be the absolute owner of the State and its properties. None else would have any interest or share in his property.	1.	The holder of a Zamindari, as distinct from the Ruler of an Indian State, may hold it as an impartible estate. If ;it is ancestral, he holds it on behalf of the family, and although there would be no right of partition, his interest will not be

			that of an absolute owner, which a sovereign ruler was. It would have been family property and of the type understood by the series of decisions in that regard.
2.	Primogeniture would be presumed to apply as a Rule for succession.	2.	Primogeniture would not, repeat not, be Presumed to apply, but will have to be proved as a Custom.
3.	He would have been signatory to a Covenant/ agreement ceding his State first (15.8. 1947) to the Dominion of India on three subjects, external affairs, com-munication & defence. And thereafter – by the Covenant or the Merger Agreement ceding the administration of his State to the Union or other Government prior to 26.1.1950. 3 to 5		He would not have been a party to any of the items 3 to 5 in the first column. This establishes the difference in status between a former Ruler on the one side and a Zamindari on the other. This in turn, makes all the difference to the applicable law.
4.	After 26.1.1950, he would be re-cognised as a Ruler of a former Indian State by the President of India under Article 366 of the Constitution.		
5.	He would be receiving an annual privy purse for the amount fixed by the Ministry of States.		
6.	On his death, succession	6.	If the he dies after to his estate

			(properties) would be covered by the first part of the exception under Section 5(ii) and therefore not affected by the 1956 Act. If he dies after 17.6.1956, it would make no difference to the succession which will still be by primogeniture. 17.6.1956, succession to his estate shall not be by primogeniture. It will be as per Section 8 of Hindu Succession Act.
7.	He would be De-recognised as a Ruler by the 26th amendment.	7.	Since he was never recognised as a Ruler, there is no question of 'Derecognition'.

51. Numerous documents were filed in the trial court by the parties. As recorded in the impugned judgment the parties had confined to limited documents only. The documents relied upon by the parties in the trial court and discussed in the impugned judgment which have a bearing on the cardinal issue of primogeniture and its applicability to the State of Kapurthala, the same are referred as under :

I. The appellant mainly relied upon the following Exhibits :

(i) exhibit PW 1/51 is a book entitled as "Rajas of the Punjab" which is relied upon by the appellant inter alia to demonstrate that Harnam Singh one of the Rajas of Kapurthala had converted to Christianity and imposition of primogeniture by the British Paramountcy.

(ii) the appellants have also relied upon the order of 11th August, 1948 passed by Jagatjit Singh which declared that the Mussoorie Estate was his private and personal property and would descend to his heirs as their private and personal property.

(iii) family settlements marked as X-8 and D-11 were also relied

upon by the appellant to submit that in this family settlement reference was to HUF.

II. The respondents have relied upon the following documents :

(a) D-61 is a document dated 14th July, 1837 which shows a jagir of Rs.27,000/- per annum given by Raja Nihal Singh to Kr. Amar Singh, the younger brother by way of maintenance. This demonstrated that Umar Singh who was described as Koer accepted only the maintenance from the Raja and laid no claim to the Gaddi and the property of the State of Kapurthala.

(b) D-62 is a similar document on behalf of Koonwar Amar Singh seeking issue of payment of expenses from his elder brother Sardar Nihal Singh Bahadur. This letter clearly records the allegiance and submission of Amar Singh to Nihal Singh.

(c) D-63 is a letter dated 19th September, 1837 from Maharaja Ranjit Singh to his son directing him to make over the estate of yielding Rs.30000/- per annum to Kr. Amar Singh, his younger brother, for maintenance. This also records that Umar Singh will thereafter have no further concern with Ranjit Singh. This letter also demonstrated the pivotal position of the elder son lending to the exclusion of the other siblings.

(d) Ex. D-64 is a translated letter dated 24th March, 1840 written by the Sher Singh brother of Maharaja Sher Singh to Sardar Nihal Singh of Kapurthala regarding the complaint of Amir Singh is respect of the enjoyment of his jagir. This letter also recorded a final settlement by which Nihal Singh was asked to make over the jagir worth Rs.30,000/- for the subsistence of Koer Amar Singh. This letter also demonstrated the primacy of the elder brother.

(e) D-23 is the merger agreement by which the rulers of Faridkot, Jind, Kapurthala, Malerkotla, Nabha, Patiala, Kalsin and Nalhagarh formed into Patiala and East Punjab States Union.

(f) D-1 is the letter/order dated 11th August, 1948 of Maharaja Jagatjit Singh declaring that the share of Mussoorie estate comprises of the private and personal property of Jagatjit Singh

and devolves on the heirs and successors of Maharaja Jagatjit Singh as their private and personal property.

(g) Ex.D-17 is the Succession Certificate proceedings before the Sub Judge, First Class under the Indian Succession Act dated 4.2.1956 where Major Sardar Kirpal Singh, the Private Secretary to Maharaja Sukhjit Singh deposed that on 10th July, 1955 in Mussoorie, Maharaja Paramjit Singh executed a Will (Ex.PA) in favour of Maharaja Sukhjit Singh, the then Tikka Sukhjit Singh. He deposed to the then soundness of mind of the maker of the Will and attestation of Shri Shanti Sagar. He also deposed that the laws of primogeniture applied to the ruling family of Kapurthala.

(h) Ex.D-13 and D-15 is the application and the evidence of Major Kirpal Singh which record that Maharaja Jagatjit Singh was succeeded by Maharaja Paramjit Singh being his elder son and only son succeeded the father and others were entitled only to allowances. He also deposed that Maharaja Sukhjit Singh was the only heir of Maharaja Paramjit Singh after his death in July, 1955. The application for succession certificate averred that the law of primogeniture applied to the family of Sardar Jagatjit Singh of Kapurthala.

(i) Ex. X-22 to X-27 are the Administrative Reports from 1867-68 to 1917-18 demonstrating that primogeniture invariably prevailed in Kapurthala apart from the other Hindu states of Punjab.

(j) A perusal of the Ex.D-22 (Memo of Indian States) shows that Kapurthala family has been indicated as a family which follows primogeniture in the said Administrative Reports. References are to be found to the name of Sh. Randhir Singh for the year 1667-68, Kharag Singh for the year 1874-75, Jagatjit Singh for the year 1882-83 and for Jagatjit Singh again for 1892-93. These contemporaneous documents clearly indicate that primogeniture was noted as prevalent in the Administrative Reports in respect of Estate of Kapurthala. It is also indicated in the administrative report of the 1910-11 that the male heir of Jagatjit Singh was Paramjit Singh. Similar notation was also made for the year 1917-18.

(k) Ex. D-22 is the Memorandum of Indian States published by the then Government of India and the relevant portion of the said document in relation to Kapurthala reads as follows :

> "4. His Highness has four surviving sons, the Heir Apparent, Tikka Raja Paramjit Singh (born on the 16th May, 1892), Major Maharaj Kumar Amarjit Singh (born 1893), Maharaj Kumar Karamjit Singh (born 1895) and Maharaj Kumar Ajit Singh (born 1907)…."
>
> "He was made a C.I.E. in 1935. His Highness has been permitted to call his heir apparent the "Tikka Raja" instead of "Tikka Sahib. A son and heir was born to the Tikka Raja in October, 1934, and was named Rajkumar Sukhjit Singh."

The defendant No.1's counsel sought to rely upon the said statement to show that the Government of India also officially regarded defendant No.1 as the heir apparent thus demonstrating the existence of primogeniture.

(l) Ex. D-59 is the deed "HIBA NAMA" is a gift registered on 9th February, 1924 by Maharaja Jagatjit Singh to his sons younger to Paramjit Singh, Mahait Kuamr, Major Mahijet Singh, Mahait Kumar Karamjit and Maharaj Kumar Ajit Singh. This gift deed describes Paramjit Singh Vali Ahad, i.e. proclaimed successor.

(m) Ex. D-6 is the writing of plaintiff No.3 which according to the defendant No.1 acknowledged primogeniture and reads as under :

> "Moncisur R. Axleroud
> Director,
> Societe General (Sogegarde)
> 4 Avenue Raymond Poincare, Paris 16
> France
>
> Dear Sir,
>
> I write to inform you that my husband, Maharaja Sukhjit Singh of Kapurthala, will personally bring you this letter by hand.
>
> This is to authorize you, on presentation of this letter,

to hand over to Maharaj Sukhjit Singh of Kapurthala, all his jewellery and valuables, lying with the Societe General (Sogegarde) for safe custody, in our joint names, details of which are attached separate.

All these items in your safe custody in our joint names, are the exclusive and personal property of Maharaja Sukhjit Singh of Kapurthala, having been inherited by him from his later Father, the late Maharaja Paramjit Singh of Kapurthala who died in 1955 and who bequeathed his entire estate in India and abroad by a will dated 10th July, 1955, to Maharaja Sukhjit Singh of Kapurthala. This will was probated in India England and France, entirely in Maharaja Sukhjit Singh's favour. Being a serving officer in the Indian Army, on active services, only as a precaution, has this arrangement for the safe custody of his personal valuables, in his absence, been made by me and my name added jointly to his for the safe custody of his jewellery and valuables, which will continue to remain as always, his exclusive personal property fully taxed in his sole hands.

Yours faithfully,
Sd/-
(GITA DEVI)
Maharani of Kapurthala"

According to the respondent No.1's counsel this letter of the plaintiff No.3 clearly contains the admission of the appellant No.3 that the entire estate of Kapurthala was inherited by the respondent No.1

(n) Ex. D-37 is the certificate given by the Ministry of States, Government of India dated 8th July, 1949 certifying that upon the death of the Maharajas of Kapurthala, Paramjit Singh succeeded to the Gaddi as the son and the heir and assumed full powers as the ruler an was entitled to all funds, shares, government securities and other properties held by various banks and concerns as held by his late father Maharaja Jagajit Singh in the dominion of India.

(o) Exh. D-9 is the succession certificate in favour of Maharaja

Paramjit Singh in respect of the estate of the deceased Maharaja Jagatjit Singh.

(p) Exh. D-14 is the statement of Dewan Pyare Lal, Advocate dated 6.2.1965 which indicated that Maharaja Paramjit Singh inherited the entire estate of Kapurthala upon the death of Maharaja Jagatjit Singh and that in the family of Maharaja Sahi only the eldest son becomes the ruler.

(q) Exh. D-12 is the judgment dated 5th November, 1965 by Senior Sub Judge. The said order records that Paramajit Singh succeeded to the estate of Kapurthala upon the death of Maharaja Jagatjit Singh on 19th June, 1949 on the basis of right of primogeniture and upon the death of Maharaja Paramajit Singh on the basis of succession certificate obtained by Maharaja Sukhjit Singh, issued notice to the general public as per the publication in Tribune. Significantly this was granted after notice to the younger sons of Jagatjit Singh i.e. Karamjit Singh and Ajit Singh. There was no resistance to the application. The succession certificate was granted in favour of defendant No.1 Sukhjit Singh.

(r) Exh. D-16 is the succession certificate under Section 372 of Indian Succession Act granted in favour of defendant No.1, Sukhjit Singh in respect of assets of Maharaja Jagatjit Singh Bahadur who died on 19th June, 1949.

(s) Exh. D-27 is the estate duty assessment order dated 30th August, 1961 which shows that the property owned by Maharaja Paramajit Singh was owned in an individual capacity and the estate duty was charged as an absolute estate passing to absolute successor and not a successor of interest in coparcenary as provided by Section 34 (1)(c) of the Estate Duty Act 1953.

(t)(i) X-22- Table LB-2(vi) for the year 1867-68, relating to Raja Randhir Singh, in which a column exists for showing whether the family follows primogeniture. Kapurthala is shown as so following.

(t)(ii) X-23-Table No.6 for the year 1874-75 relating to Raja Kharak Singh, excerpted only for Kapurthala, with a similar column on primogeniture as given in (i) above, again stating that the

family follows primogeniture.

(t)(iii) X-24-Relating to Maharaja Jagatjit Singh. Item No.5 of the Table for the year 1882-83, excerpted only for Kapurthala as given in (ii) above. The column shows that the family follows primogeniture.

(t)(iv) X-25 – Again relating to Maharaja Jagatjit Singh. Item 5 of the table for the year 1892-93, is similar to (iii) above, with the column once again showing that the family follows primogeniture.

(t)(v) X-26 – This is an extract of Item No.5 for the year 1910-11, pertaining to Maharaja Jagatjit Singh. The column in this extract now reads as 'Name and Age of Male Heir' under which is given the name of 'Paramjit Singh' age 19 years (1910)..

(t)(vi) X-27 – This again, is an extract of Item No.5 for the year 1917-18 pertaining to Maharaja Jagatjit Singh. Once again the column for the year 'Name and Age of Male Heir' shows Paramjit Singh, age 26 years.

(t)(vii) Exh. X-1 is the settlement with Maharani Stella widow of Maharaja Paramjit Singh dated 19th April, 1962 which describes the defendant No.1 as His Highness of Maharaja Sukhjit Singh of Kapurthala. The settlement granted a payment of Rs.64,000/- to Maharani Stella plus other sums of money which led to the abandonment of the suit filed by Maharani Stella in France.

The counsel for the respondent No.1 submitted that if the property was coparcenary as per the appellants contention, then Maharani Stella would have had life interest in the estate on 19th July, 1955 which would have enlarged under Section 14 (1) of the Hindu Succession Act to absolute interest which would then have been 1/3rd of the estate and the fact that she settled only for continued maintenance shows that Kapurthala Estate was not a joint family property.

(u) Ex.D-35 is the letter of M/s Khanna and Annadhanam, Chartered Accountant dated 16th August, 1962 giving the view of Shri Vishwanath Shastri on primogeniture applying to defendant No.2. Of similar effect is Ex. D-34 which is the letter of the said

chartered accountant dated 1st May, 1977 stating that the property had devolved under the Wills and could not be HUF.

(v) PW 1/1 and DA are the family settlements relied upon by the plaintiff showing assets of the HUF properties. The case of the learned counsel for the respondent is that at best only the specific assets described in the aforesaid documents can be treated as HUF and no other assets can be imbued as HUF.

(w) Ex. D-36 is the letter of plaintiff dated 20th evening stating that she does not have any money.

(x) Ex. D-48 is a civil suit filed by the respondent No.1 seeking restoration of certain jewellery items and restraint order against the defendant No.3, Smt. Geeta Devi. The plaint also seeks a mandatory injunction in respect of the keys of a flat located in the Kapurthala Villa, Mussoorie Chateau and the matrimonial home at Greater Kailash, New Delhi.

(y) Ex. D-26 shows the respondent No.1's shares in the companies.

(z) Ex. D-43 are the tax returns of respondent No.1 in respect of FDRs. Strong reliance has been placed on the contemporaneous documents X 18 to X 21, PW-4/59 to PW-4/62, PW-4/72 to PW-4/78 by the counsel for the defendant No.1 which documents are the wealth tax returns which show that the properties were described as individual properties by defendant No.1 and not as co parcenary properties.

(aa) Ex. D-21 discloses the gazette notification dated 4th August, 1956 which reads as follows :

"Govt. of India
Ministry of Home affairs
New Delhi-2, the 4th August 1956

ORDER

No.F3/19/55-Poll.III In pursuance of Clause (22) of Article 365 of the Constitution of India the President is hereby pleased to recognize His Highness Maharaja Sukhjit Singh as the Ruler of Kapurthala with effect from the 19th

July, 1955 in succession of His late Highness Maharaja Paramajit Singh.

Sd/- V. Viswanathan

Joint Secretary"

(bb) This notification clearly shows that the Govt. of India recognized Sukhjit Singh defendant No.1 as the Ruler of Kapurthala and successor of Late Mahajara Paramajit Singh. Similar is the tenor of letter dated 10th August, 1955 issued by the Joint Secretary, Ministry of Home Affairs to the appellants.

(cc) Ex. X-8 is the Will of Maharaja Jagajit Singh the relevant portion of which reads as follows :

"Tikka Raja paramajit Singh being my eldest son will succeed to all my personal estates. These estates have always devolved on the eldest so according to the rule of primogeniture. He will of course be succeeded by his eldest son. In order to remove all doubt I bequeath the above properties to Tikka Raja paramjit Singh and after him to his eldest son Maharaja Kumar Sukhjit Singh.

(Sd) Jagatjit Singh

Kapurthala

16th January, 1949

MAHARAJA"

52. Now we shall also discuss the documents referred in Paras 47 and 48 as well as other relevant documents produced by the parties in the trial court and rival submissions of the parties.

53. So far it was Reports regarding Punjab States. To show that Primo-geniture applied invariably to the former Rulers (from all over India), apart from what the Supreme Court observed in the Privy Purses case, AIR 1971 SC page 530,.96 = 1971-1 SCC 85,.219 photocopies of the Administration Reports from other parts of the then Indian sub-continent were also submitted. These are:

1. Photocopy of the relevant pages from the Report on the Administration of the Madras Presidency during the year 1880-

81. Cover page plus 3 pages.

2. Photocopy of the relevant pages from the Report on the Administration of the Central Provinces for the year 1892-93. Cover page plus 2 pages.

3. Photocopy of the relevant pages from the Kathiawar Administration Report for 1899-1900. Cover page plus 11 pages.

4. Copy of the relevant portion of the Report on the Administration of the North West Provinces and Oudh for the year 1900-01.

5. Copy of the relevant portion of the Report on the Administration of the Central Provinces for the year 1900-1901.

6. Copy of the relevant portion of the Report on the Administration of the Madras Presidency for the year 1899-1900.

7. Copy of the relevant portion of the Report on the Administration of the Bombay Presidency for the year 1900-1901.

54. The Meramvala Vol.9 (1968) I.L.R. Gujarat 966 = Vol.9 (1968) Gujarat Law Reporter 609 judgment also places reliance on such Reports to hold that primogeniture applied to the Princely State in question before that court. The Administration Reports were prepared till about 1919. Thereafter, the official annual publication was the Memoranda on the Indian States. These Reports are by themselves enough to conclusively prove that Primogeniture prevailed in Kapurthala. Yet, appellants persisted with their contention– Kapurthala was always a joint family with the karta being called the Maharaja.

55. Ex.D-22 is a photocopy of the cover page and pages 221 to 241 of the Memo for the year 1940, of which para 4 at page 231 is excerpted below:

4. His Highness has four surviving sons, the Heir-Apparent, Tikka Raja Paramjit Singh (born on the 16th May 1892), Major Maharaj Kumar Amarjit Singh (born 1893), Maharaj Kumar Karamjit Singh (born 1896), and Maharaj Kumar Ajit Singh (born 1907). The second son, Maharaj Kumar Mahijit Singh (born 1893), died in April 1932. All His Highness's sons received their education in England. Maharaj Kumar Amarjit Singh was made an Honorary

Captain in 1918, and Honorary Major on the 18th January 1930. He served with the Indian Corps in France and Flanders for about a year during the Great War, and in 1928 was selected as British Staff Officer to accompany General Gouraud, Military Governor of Paris, during a three months, tour in India. He was A.D.C. to His Excellency the Commander-in-Chief. He was made a C.I.E. in 1935. His Highness has been permitted to call his heir-apparent the "Tikka Raja" instead of the „Tikka Sahib.. A son and heir was born to the Tikka Raja in October 1934, and was named Rajkumar Sukhjit Singh.

Two Memos of Indian States (1938 and 1940) in original as also the original White Paper on Indian States were filed.

56. All official records noted Tikka Raja Paramjit Singh as the Heir Apparent which shows prevalence of Primogeniture. The entire body of official records, when referring to:

i. Paramjit Singh (born 1892 - died 19.07.1955);

ii. Mahijit Singh (born 1893 - died 1932);

iii . Amarjit Singh (born 1893 - died 1943);

iv . Karamjit Singh (born 1896 - died 1973); or

v. Ajit Singh (born 1910 - died 1982),

has always recorded Paramjit Singh (till 1949) as Tikka Raja and/or Heir Apparent while his younger brothers were not given any such status. Nowhere has he (Paramjit) been referred to without either Tikka Raja or Heir Apparent. Similarly, nowhere has he been referred to as only Waris (Heir) or as a 'Maharajkumar'.

57. After 19.07.1949, Paramjit Singh came to be recorded as Maharaja while his brothers continued as Maharajkumar. None of the other four brothers (only two survived 1949) have been referred to as Heir Apparent or Tikka Raja or other than simply "Maharaj-kumar". So much so that post-19.07.1955 when 2nd Lt. Sukhjit Singh came to be recorded as the "Maharaja of Kapurthala", uncles Karamjit Singh and Ajit Singh continued to be referred to as Maharajkumars.

58. It is held in many decisions that the grant of maintenance shows that the property is not joint property. Reliance is placed on the following passage from **Raja Chattar Singh vs Diwan Roshan Singh:** AIR 1946 Nagpur 277

that the practice of granting allowance for maintenance to junior members of the family indicates the impartible nature of the estate and the existence of a custom of succession by rule of primogeniture.

And also upon Meramwala Vol.9 (1968) I.L.R. Gujarat 966 = Vol.9 (1968) Gujarat Law Reporter 609 case

Since the rule of primogeniture was applied to the estate ... therefore, during his lifetime made a grant called Kapal Giras of village Khari in favour of Valeravala for his maintenance. ... Or else the grant of maintenance in favour of Valeravala would be entirely unnecessary and inexplicable …

The Supreme Court judgments in **Raj Kumar Narsingh Pratap Singh Deo vs. State of Orissa,** AIR 1964 SC 1793,99 **Prabir Kumar Bhanja Deo vs. State of Orissa,** ILR 1969 (Orissa/Cuttack Series) 794,.90 and also in the **Vadia** case, AIR 1967 SC 346 where the terms 'Primogeniture' 'Heir Apparent' and 'Maintenance' with respect to a Princely State of Gujarat are recorded.

59. The evidence on the file re-garding the factum of the payment of maintenance grants, to the junior members of the Ruler's family in Kapurthala State.

a Translation of a letter dated 19th September 1837 from Maharaja Ranjit Singh addressed to S. Nihal Singh asking the Sardar to make over to Kr. Amar Singh a maintenance jagir of Rs.30,000/- per annum Ex.D-63.

b Translation of a letter dated 24th March 1840 from Maharaja Sher Singh of the Punjab to Sardar Nihal Singh about the maintenance Jagir for Kr. Amar Singh Ex.D-64.

c Translation of the "Razeenama" deed between Kr. Amar Singh, younger brother of Raja Nihal Singh dated 4th July 1837, expressing gratitude for a maintenance jagir of

Rs.27,000/- per annum Ex.D-61.

d Translation of a Deed dated 22 Har, 1994 Vikrami, executed by Kr. Amar Singh, accepting his maintenance Ex.D-62.

e Gift Deed [Hiba Nama] is Ex.D-59

Gift Deed

60. Gift Deed [Hiba Nama] is Ex D-59. It is respectfully submitted that it is relevant for two things: (1) Heir Apparent; and (2) Maintenance.

i Waliahad means 'heir apparent'. This description was conclusive of primogeniture.

ii This means maintenance allowances were already being given in cash and as a supplement thereto, these lands were being granted.

iii (line 6) This shows that the three sons (grantees) were younger to the heir apparent and formed a different class.

iv (line 6 end) Which means for the maintenance of the future generations of the three Maharajkumars. This again points towards primogeniture.

v (page 2 line 1) Indicates that a single heir would be other than the three younger sons, who were the beneficiaries under the grant. If primogeniture did not prevail, and the younger sons were to succeed under Mitakshara Law, then the whole purport of this document and this sentence, falls.

If primogeniture had not applied, the Ruler would not have so written. This document is signed by Tikka Raja Paramjit Singh, who is described as: Tikka Raja Heir Apparent, Kapurthala State.

1949 (and 1964) Succession documents

61. The 1949 "matter of fact Succession" on the death of Maharaja Jagatjit Singh. This was based on Will X-8/Primogeniture. The 1950 proceedings and grant of Succession Certificate dated 18.8.1950 Ex.D-9 to only one son, the eldest, also shows Primogeniture. So also the grant of a subsequent Certificate in 1965 Ex.D-16, where it was, also so stated, in the petition and the judgment.

In 1964, Major Kirpal Singh appeared as a witness in the Court of the Senior Sub Judge, Kapurthala in proceedings relating to a supplementary Succession Certificate with regard to the Estate of Maharaja Jagatjit Singh and his statement, in those proceedings, which is given Exhibit D-15. The law of Primogeniture applies to this ruling family. The two younger sons of Maharaja Jagatjit Singh were noticed by the Court in the 1964 proceedings. There was a public notice as well.

62. 1955 Succession documents

Like with 1949, the 1955 "matter of fact Succession" (on the death of Maharaja Paramjit Singh) is a clincher when it comes to deciding (and rejecting) the claim. This was based on Will D-11/Primogeniture. There is also the evidence of Major Kirpal Singh, (since deceased) recorded by the Court at Kapurthala in Succession Certificate proceedings before the Court of Shri Hari Krishan Mehta, SJIC, Kapurthala. This Court file has been summoned from Kapurthala and is on the record of this hon'ble High Court. The statement, Ex.D-17, is as under:

The law of Primogeniture applies to this Ruling Family.

The appellant no.3 was asked following questions in cross-examination :

Qn. May I take it that all these persons succeeded to his estate in equal shares ? (The question refers to the heirs of Maharaja Paramjit Singh who died on 19th July 1955.)

Ans. No. They did not succeed to his estate in equal shares.

Qn. Can you point out any document by which S.Partap Singh and Raja Sir Daljit Singh partitioned out from the Kapurthala family?

Ans. As far as I know, it was their father and their uncle who had been given a certain amount, details of which can be found in the book, Ex.PW1/51, which I have already tendered in Court. I have not seen any other document apart from the book which refers to certain documents.

I cannot refer to any book or document apart from Ex PW1/51 which states about any partition between Raja Randhir Singh, Kr Bikram Singh and Kr Suchet Singh. It would be possible for me to refer to some other documents

which are in the possession of my husband but as I have no access to them, it is not possible for me to do so.

Qn. Can you refer to any document or passage in any book in history on the Kapurthala family in which there may be any mention of any properties of Raja Randhir Singh going over to Harnam Singh ?

Ans. I have no access to any such document.

Qn. Is it your case that there was a family partition in the life time of Maharaja Jagatjit Singh ?

Ans. My case is that there were partitions in the family even before the life time of Maharaja Jagatjit Singh.

Qn. Can you refer to any document which might have recorded any partition in the life time of Maharaja Jagatjit Singh ?

Ans. As I have no access to any documents although they may be in existence, I am unable to refer to these.

Qn. May I take it that there was never any partition between the various persons that you have mentioned in answer to previous question at any time prior to 15 August, 1947 ?

Ans. As I have stated already that they were all living independently with their own properties, jagirs, moneys, jewellery and were all receiving, including the grand children, each allowances from Maharaja Jagatjit Singh before 15th August, 1947.

Qn. May I take it that all the properties that you have enumerated above devolved upon Maharaja Paramjit Singh, Maharajkumar Karamjit Singh and Maharajkumar Ajit Singh, the three surviving sons of Maharaja Jagatjit Singh in equal shares on the death of Maharaja Jagatjit Singh ?

Ans. As the surviving sons of Maharaja Jagatjit Singh had already received during his lifetime the properties, houses, movables, jewelleries and cash, remaining properties were not divided between the three sons alone but between different members of the family also. For instance Maharajkumar Rani Mahijit the widow of Maharajkumar Mahijit Singh, received Wycliffe in Mussoorie and Maharaja

Paramjit Singh also sold some land in Fatehabad and gave her the money. Maharajkumar Karamjit Singh who had also received properties and valuables and moneys during the lifetime of his father claimed and was given Rs 2,25,000/- by Maharaja Paramjit Singh. Sunnyside was given to Maharajkumar Karamjit Singh and St Helens Cottage in Mussoorie was given to him to live for his lifetime. 3, Mansingh Road, New Delhi was sold by Maharaja Paramjit Singh. Villa in Kapurthala was given to Maharani Brinda and the last surviving consort of Maharaja Jagatjit Singh, Rani Bushair was given the Elysee Palace to reside in for her life time.

Qn. May I take it that all these persons succeeded to his estate in equal shares ? (The question refers to the heirs of *Maharaja Paramjit Singh who died on 19th July 1955.)*

Ans. No. They did not succeed to his estate in equal shares.

Qn. Of all the various persons mentioned in the pedigree table filed by you, Exhibit D/3, can you tell us of any document by which partition amongst any of them might have been effected at any time ?

Ans. As members of Hindu Undivided Family they did not claim because they were always given some properties and assets and were treated fairly. I have no access to any documents showing a partition.

Qn. On 4th March 1981, you stated that "The Chiefs and Jagirdars of Punjab were always Joint Hindu Family". Can you refer to any document by which any partition was effected at any time between any Chief or Jagirdar of Punjab ?

Ans. I have no knowledge of any documents.

Qn. Can you refer to any passage in any books which refers to there having been a partition amongst the families of Chiefs and Jagirdars of Punjab at any time ?

Ans. No, I cannot.

Qn. Kindly state the year and the document by which the

property in Mussoorie, known as Wycliffe was given by the late Maharaja Jagatjit Singh to the widow of his second son, Maharajkumar Rani Mahijit Singh ?

Ans. I have no knowledge of any such document nor can I give the year. I am only aware that the family of Maharajkumar Rani Mahijit Singh is living in that house uptil today.

Qn. Please give any reason why no member of the family sought partition against Maharaja Paramjit Singh and instead, put pressure through the Ministry of Home Affairs as has been stated by you ?

Ans. I cannot give the reasons of others action. However, the members of the family had received a very fair and just portion during the life time of Maharaja Jagatjit Singh. At the time of the demise of Maharaja Jagatjit Singh his last surviving consort was very old and it would be unthinkable for her to take any independent action. The only member of the family who was able to voice a protest on behalf of the others was Maharajkumar Karamjit Singh and he did this very strongly and with the approval and backing of the other members of the family managed to claim and get some allowances which they were receiving during the lifetime of Maharaja Jagatjit Singh.

Qn. Can you tell any reason as to why when Maharaja Paramjit Singh according to you was treating nobody nicely, no member of the family claimed a partition of the alleged Joint Hindu Family properties, i.e. the Villa Kapurthala, Jagatjit Palace and Chateau Mussoorie etc.?

Ans. I have already stated that some members of the family received a just portion during the lifetime of Maharaja Jagatjit Singh, father of Maharaja Paramjit Singh. In fact, Maharaja Paramjit Singh did not wish Maharajkumar Rani Anar Devi, his sister-in-law, to have the property known as Wycliffe in Mussoorie. After a brief court action he was compelled to give it to her. He was also compelled to give Maharajkumar Karamjit Singh Rs.2,25,000/- before he agreed to sign the succession certificate. He was also

compelled to allow Maharajkumar Karamjit Singh to have the property rights of St Helens Cottage in Mussoorie. He was also compelled to allow Dowager Maharani Bushair the right of residing in the Elysee Palace in her life time. Some moneys were also given separately to Maharajkumar Rani Anar Devi. Maharajkumar Ajit Singh had been born from a Spanish Rani who had separated from Maharaja Jagatjit Singh many many years ago. He was brought up abroad and hardly resided in India. He did not wish to be embroiled in any unpleasantness and, therefore, after the house at Mussoorie had been secured for her and the Cottage at Mussoorie had been secured for Maharajkumar Karamjit Singh and the house of Elysee Palace at Kapurthala had been secured for the Dowager Maharani Bushair and the maintenance allowances which they used to have during the lifetime of Maharaja Jagatjit Singh had been secured for them through the efforts of Maharajkumar Karamjit Singh, there was nothing more in dispute. As the Head of State recognised Maharaja Paramjit Singh as the next Karta this matter had to be agreed to by the other members of the family and this is what I meant when I said that it was Maharajkumar Karamjit Singh who signed the succession certificate. I have no idea where the succession certificate which I have referred to was signed by Maharajkumar Karamjit Singh.

Qn. I put it to you that the consent to succession certificate that you are referring to was given in case No. 69 instituted on 23rd June, 1950, before Sub-Judge 1st Class with special powers, Kapurthala ?

Ans I have no idea.

63. <u>Appellants oral evidence</u>

The Appellant's case, both in their pleadings and evidence, is that the Kapurthala family was always a coparcenary. Baba Jassa Singh was the first Karta and after the successive incumbents to the 'kartaship', the burden of managing the family had fallen on the shoulders of Maharaja Jagatjit Singh who became the karta in 1877. After his decease, the

'kartaship' devolved on S.Paramjit Singh and thereafter, on S.Sukhjit Singh.

The evidence recorded is as under:

Qn May I take it that in 1945 there was no joint Hindu family of which Maharaja Jagatjit Singh may have been a Karta ?

Ans. Maharaja Jagatjit Singh was a Karta of joint Hindu family in 1945. The members of that family comprised of his wives, his sons and children of his sons.

Qn. Please state whether according to you, the receipt of this revenue (the revenue of the State of Kapurthala) was individual property in the hands of Maharaja Jagatjit Singh or ancestral property in the hands of Maharaja Jagatjit Singh ?

Ans. Maharaja Jagatjit Singh was Karta of the family. This revenue was a receipt of the family.

Qn. Please state whether according to you the receipt of the income from the Avadh Jagir by Maharaja Jagatjit Singh was his personal property or as Karta of any joint family ?

Ans. According to me, Maharaja Jagatjit Singh was Karta of the family. The revenue from the Avadh Jagir was received by him as Karta of the family.

Qn. Can you state if the word 'Karta of the family' was used in any document or book with reference to anybody in the Kapurthala family during the period 1783 to 1955 ?

Ans. I have not read any book in the colloquial language and most of the books that I have read with regard to our family history have been written in English. The head of the family has been referred to as the Chief or Sardar which I expect is equivalent to Karta in Hindu Law.

Qn. Can you state about any document or any book or any Government communique in which the Kapurthala family or members thereof was at any time, i.e. between 1783 to 1955, referred to as, "Joint Hindu Family", or "Hindu

Undivided Family" ?

Ans. There may be some reference to this family in the book Ex. PW1/51. On the other hand Baba Jassa Singh left no son so a member of his family S. Bhag Singh succeeded as Karta. He having only one son, S.Fateh Singh received the title of Karta from his father, but I cannot refer to any other book or document.

Unable to state when and how the coparcenary was formed ?

Qn. When was the joint family, of which you are seeking partition, formed ?

Ans. In my opinion we were always a joint family.

Qn. Can you tell me the year ?

Ans. If my personal experience is being asked, I say, from the date of my marriage.

Qn. May I take it that there was no joint family in Kapurthala State prior to your marriage ?

Ans. There was always a joint family in Kapurthala State prior to my marriage. According to me Maharaja Jagatjit Singh was head of the joint family. I am seeking partition of the same family. Raja Kharak Singh was father of Maharaja Jagatjit Singh. According to me Raja Kharak Singh was also head of Joint Hindu family. Before that Raja Randhir Singh was head of the family. Before Raja Randhir Singh, Raja Nihal Singh was head of the family.

Qn. On 3rd March, 1981 in your statement, you had stated that on 20th July, 1955, defendant No 1 was Karta of the family of which the other members on that day were the two sisters of defendant No 1 and Maharani Brinda Devi and Maharani Stella. Please state that this joint status had existed for how many years without any interruption to that date ?

Ans. I had stated that the founder of this family was Sadhu Singh. He was not a Chief; he was not a Ruler neither was he a conqueror. He was a simple man who founded four villages in the vicinity of Lahore. He was a Majha

Sikh and he had four sons. He was Karta of his family. I had mentioned in great detail the persons who became Karta after him. I may add that Baba Jassa Singh who for his personal integrity became not only Chief of the Ahluwalia "Misal" acknowledged leader of the other Sikh "Misals", neither was he a King or a Chief. He was, in fact, a Jagirdar and until Kapurthala was taken by Baba Jassa Singh, it was a Jagirdari of Rai Ibrahim. Sardar Bhag Singh was the next Karta and Sardar Fateh Singh followed him but Sardar Fateh Singh was, in fact, a Jagirdar of the Court of Lahore and his very existence depending upon the favour of the Court of Lahore. The next Karta Raja Nihal Singh lost a great many of the estate some of which were restored by the British. In fact, it was the British who gave the title of Raja to our family who were Jagirdars. The title of Maharaja was bestowed by the British on Maharaja Jagatjit Singh, great grandfather of our sons and Maharaja Jagatjit Singh was Karta of this family and he made a declaration in which he had listed his private properties. These properties were acquired with the help of inherited ancestral properties and by his declaration itself he made it quite clear that these properties descend to Maharaja Paramjit Singh as Karta and not as his exclusive individual properties. Maharaja Paramjit Singh by his Will also made it quite clear that he did not intend Maharaja Sukhjit Singh to hold these properties as his personal exclusive properties but these properties were to go to him as Karta for the benefit of himself and the other members of his family.

Qn. Can you give any reason why after the death of Raja Nihal Singh, Raja Randhir Singh became the Ruler and not Bikram Singh and Suchet Singh ?

Ans. The reason that I can give is that Raja Randhir Singh was the eldest son of Raja Nihal Singh. It is correct that Raja Randhir Singh had two sons, Raja Kharak Singh and Raja Harnam Singh. Raja Kharak Singh became the ruler as he was the eldest son.

64. <u>Respondent's oral evidence</u>

The Chief Secretary of Kapurthala State (at the time of merger in 1948), Mohan Lal Puri, appeared as DW-4.

Qn. Can you state if the succession amongst the Ruling Family of Kapurthala is governed by any custom, if so, what is that custom ?

Ans. The ruling family of Kapurthala was governed by the custom of the rule of Primogeniture. The elder son succeeded to the throne and the properties of the Ruler.

65. Dewan Pyare Lal, Advocate (who had been the counsel of one of the sons of Maharaja Jagatjit Singh in the succession case and also otherwise, familiar with the Ruler's family), appeared as DW-2 and said:

Qn. Kindly state if you know as to whether the succession amongst the Ruling Family of Kapurthala has been and is governed by the rule of Primogeniture or not ?

Ans. The rule of Primogeniture governs the devolution of succession in the Royal Family of Kapurthala.

66. Respondent No.1 had come in the witness box as DW-6 and stated:

The Rulers of Kapurthala have always been governed by the law of Primogeniture. The nature of the properties held by the Rulers of Kapurthala from time to time has always been absolute individual impartible estate. Among the Rulers of Kapurthala before 1975, there was never any Hindu Undivided Family or any partition.

Late Maharaja Jagatjit Singh was my grandfather. He was the Ruler of Kapurthala for over six decades until his demise in 1949.

67. That Maharaja Jagatjit Singh was a sovereign ruler and his sovereignty extended over 630 square miles of territory known as the Princely State of Kapurthala, cannot be a matter of dispute. In fact, both the appellants and respondents are ad idem on it. This Sovereignty continued to be wielded by Maharaja Jagatjit Singh till 20.08.1948. Maharaja Jagatjit Singh was an absolute monarch. He was the supreme legislature,

the supreme judiciary and the supreme head of the executive.

Being a sovereign ruler, no incidence of coparcenary or Joint Hindu family could be applied to properties held by him and the juniors (sons), had no right by birth. See the judgment of **Bhagwati J in Meramwala's** case, Vol.9 (1968) I.L.R. Gujarat 966 = Vol.9 (1968) Gujarat Law Reporter 609 and the judgment of a Division Bench of the Kerala High Court in Travancore case. 1983 KLT 408 In **Thakore Vinay Singh's** [Mohanpur] case, AIR 1988 SC 247 the Supreme Court held that there was no coparcenary, and in **Vishnu Pratap Singh vs State of Madhya Pradesh** AIR 1990 SC 522 they were pleased to hold that the Ruler was the absolute owner of all properties. The Supreme Court judgment in appeal from the Kerala High Court, and in the Nabha case 1994 Supp-1 SCC 734 = 1993 Sup-1 SCR 607 are conclusive.

68. The series of judgments culminating with the Nabha case, where the Supreme Court said:

> "Though impartibility and primogeniture, in relation to *Zamindari* estates or other impartible estates are to be established by custom, in the case of a sovereign Ruler, they are presumed to exist squarely applies. The plaintiffs say nothing why this dictum – a statement of general law – by the Supreme Court, is not applicable here. Incidentally, Nabha was also one of the eight Rulers who were signatory to the Covenant Ex.D-23 by which their sovereignty was ceded and PEPSU inaugurated."

69. Maharaja Jagatjit Singh being a Sovereign Ruler, a Presumption (of impartibility-Primogeniture) could be raised. If Kapurthala was a mere Zamindari – then no "Presumption" will be available and it will be for the respondent to prove by evidence that the custom of impartiblity-primogeniture existed. In other words, it was for the appellants to show that Kapurthala is an exception and this burden is a very heavy one. Where once the sovereign status could not be disputed, firstly, the appellants had to prove an exception to the general rule – of Primogeniture. Secondly, even if there was no such presumption, there was overwhelming documentary evidence that Primogeniture prevailed in Kapurthala.

70. No such suit for declaration or partition was filed. Appellants have not pointed out any suit for partition in the post-merger and pre-

17.06.1956 period. There is no reported judgment either. The consistent view is that it can be said with certainty that this rule (Primogeniture) continued even after 1947-48. Under Article 372, the law of succession relating to Primogeniture continues until it is repealed.

71. There are two periods: (1) pre-merger; and (2) post-merger, i.e., post-20.08.1948. No one can dispute the proposition that Maharaja Jagatjit Singh was enjoying sovereign powers and if he wanted to, he could convert the State and its properties into HUF properties. He did not do so. All he did was execute: (1) Ex.D-1; and (2) Will X-8.

72. The appellants say Ex.D-1 converted the Mussoorie property to HUF by applying a hitherto unheard of interpretation to the words „heirs and successors. whereby they argue that this Declaration converts the property to HUF. It does not help the case of the appellants because that (clause of the Covenant) would have been needed to be called in to aid should the Government of India wielding after 20.08.1948 sovereign legislative powers sought to pass a law which altered the customary law of succession.

73. The argument of the appellants that there was a distinction between public and private property of a sovereign Ruler and that for the private property was held as a karta of a coparcenary, is again untenable. A similar argument was rejected by the Court in the Nabha case, where the Supreme Court formulated the Question as:

> The allied question is whether the Rule of Primogeniture applies only to the Rulership (Gaddi) and not to the other property ?
>
> And, after relying upon a series of judgments and the White Paper on Indian States, laid down:
>
> This being the position, the distinction drawn between public and private property seems to be not correct.
>
> In view whereof, this argument of the appellants have no force.

74. At this time [20.08.1948] there was a segregation of properties. Certain properties were retained by Maharaja Jagatjit Singh which were termed (at this juncture), as private properties. A list thereof was prepared by him and submitted to the then Ministry of States.

75. Whether Primogeniture was stamped out (extinguished) by Maharaja Jagatjit Singh on 11.08.1948 by Order Ex.D-1, I submit upon here, but the fact remains and the mention is made here only to complete the narration, because that Order is nine days before the cesser of sovereignty and the Appellants argument have the following :-

> Even if Primogeniture had not been stamped out on 11.08.1948, by Ex.D-1, it ceased to apply on 20.08.1948.

Maharaja Jagatjit Singh, ceased to be a sovereign, when he ceded his State to PEPSU on 20.08.1948. The appellants, relying upon the maxim Cessat Ratio Cessat Lex, say that even if primogeniture applied, and also applied to private property, once the need thereof, came to an end, primogeniture in any case came to an end. In other words, according to them, all the Hindu Rulers (including Maharaja Jagatjit Singh) ceased to be governed by primogeniture, when they ceased to be Sovereigns in 1948-49 [20.08.1948 in this case].

76. The appellants state that till that date the members of the joint family could not have gone to Court, but henceforth every member became entitled to seek partition. In Meramwala's case, the Division Bench speaking through Bhagwati J, (as his Lordship then was) had rejected a similar argument. In that case Bhayawala had died on 17.09.1953, long after the merger (or cesser of sovereignty) and yet, Primogeniture was found to have applied. The plaintiffs. argument regarding 'applicability', 'survival (or dormancy) and resumption. of the personal law by which the ancestors of the Rulers were governed prior to their wielding of sovereignty, is wrong on principle and unsupported by precedent. The proceedings of the legislature in relation to Section 5 of the Hindu Succession Act, also indicate that primogeniture applied to the Rulers, who, after 1948-49, were 'Ruling over no territories' but only holding properties and some privileges.

(i) In **Rajkumar Narsingh Pratap Singh Deo vs. State of Orissa,** AIR 1964 SC 1793 Gajendragadkar CJ speaking for the Court observed:

> .. .. as we have just indicated the customary law, which required the Ruler to provide maintenance for his junior brother, can be said to have been continued by clause 4(b) of the Order of 1948 and Article 372 of the Constitution .. ..
>
> It is plain that though the customary law requiring provision to be made for the maintenance of the appellant is in force.

The Supreme Court was referring to the years 1950-51, and if they found that the customary law in question – maintenance to the youngers where Primogeniture prevails – had continued past the merger agreement into the post-Constitution era (thereby implying that the rights of the junior members \ brothers did not spring back by reason of the merger). In Privy Purses case, at page 596, where it was said that the President had to recognise a Ruler by applying the customary law.

(ii) In **Prabir Kumar Bhanja Deo vs. State of Orrisa** ILR 1969 (Orissa/Calcutta series 794) the question before the DB was relating to Keonjhar a Princely State in Orissa. After stating the genealogical table and noting that Primogeniture prevailed, and also noting that "Pachchis Sawal" was a document of high authority relating to customs prevailing in these States and had stood the field for long years, returned a finding:

> It will thus be apparent from the aforesaid two questions and answers that in Keonjhar State, where succession was governed by the custom of lineal primogeniture, the junior members of the Raj family were not entitled to any interest in the Rajgi (the Raj State). They had only a right of maintenance. … …

The turn of events in 1947-48 did not put an end to this rule. On the contrary, it continued as law under Article 372 of the Constitution of India.

77. Even after the integration of States in 1948-49, the Government of India, in several matters pertaining to succession in the erstwhile Princely States, recognised the existence of this rule. The Hindu Succession Act, 1956 specially provided Section 5(ii) so as to continue this rule.

78. After 15.08.1947, S. Jagatjit Singh's grand-uncle Raja Sir Maharaj Singh son of Raja Harnam Singh (Born 1878 -died 1959, and great-great-great-grandson of Sardar Bhag Singh, the second Ruler of Kapurthala) – or failing him the other senior direct lineal male descendants of Sardar

Bhag Singh did not come forward with a claim to become the karta (and be called Maharaja of Kapurthala) in the lifetime of Maharaja Jagatjit Singh itself, being the senior-most male.

Whether any act of Maharaja Jagatjit Singh or any other event converted the property into joint Hindu family property?

79. The Appellants case that at a Darbar on some day after 20.08.1949 and before 19.06.1949, Maharaja Jagatjit Singh declared that he was no longer the absolute owner and he threw everything into the HUF hotch-pot – the Larger HUF or the Medium HUF is a separate issue – (as many people did with part of their property in the post-constitutional era to reduce the incidence of taxation), in which event, consequent to such declaration, all the family members would have acquired vested interest and then on his decease (19.06.1949), there would be survivorship (cesser of interest). The subsequent events speak for themselves. Therefore, the extinguishment of Primogeniture, revival of rights and other theories of the appellants are liable to be rejected.

80. Inasmuch as there being no dispute about the concepts of Mitakshara succession and joint property per the law as it stood in the pre-17.06.1956 era, and the plaintiff's-appellants. case being that it was always a joint family where the karta was designated as the Ruler – partition/s being a separate issue – it is also necessary to classify the 'family' by its size (number of members).

> "It is also to be noted that none of the collaterals came forward with a claim to become the karta (and be called Maharaja of Kapurthala) on the ground of being the senior-most male in the lifetime of Maharaja Jagatjit Singh itself. Similarly, none of the other males or even the widows brought any suit for partition. The fact that all this did not occur, by itself proves there was no HUF."

81. We now come to 19.06.1949 when Maharaja Jagatjit Singh [1872-1877-1949] breathed his last. He left behind two widows, three sons, and one widow of pre-deceased son.

82. Appellants case as noted earlier, is that on 19.06.1949, the succession was:

i per Mitakshara Survivorship as distinct from Succession;

ii (alternatively) per Mitakshara Succession, (absolute ownership)

and not by Primogeniture or Will. It is also their case that if the property was not HUF from before, it was, in any case, converted to coparcenary as of this day, i.e., by reason of Mitakshara Succession.

83. The Respondent's case is that it was neither Mitakshara Survivorship nor Mitakshara Succession, but succession by Will X-8, or failing proof of that Will, by Primogeniture. It is also the Rspdt's case that as a matter of fact, the eldest son Maharaja Paramjit Singh received everything, and no share of property was received by the collaterals (or even the younger sons of Maharaja Jagatjit Singh, except that they and the widows did receive maintenance), which matter of fact succession:

(1) proves Will X-8/Primogeniture, and (2) disproves Mitakshara Survivorship and/or Mitakshara Succession.

84. To test the Appellants. contention, let us first assume that Maharaja Jagatjit Singh was the karta of an HUF (coparcenary) – large (Great) or Medium.

If the appellants contentions of the HUF from before, or revival of rights on 15.08.1947/20.08.1948, were to be accepted, then the larger HUF (coparcenary) would comprise all the descendants of Sardar Bhag Singh, the second Ruler of Kapurthala – the (supposed) Great Kapurthala Coparcenary.

In such an event, the male members of the family would have had vested interest from prior to Maharaja Jagatjit Singh's death, and each one would have also been free from before, to sue for partition.

85. If the appellants, (alternative) contention of the HUF in any case being created on or after 20.08.1948 and being in existence on 19.06.1949 were to be accepted, the 'Medium' HUF (smaller) would comprise Maharaja Jagatjit Singh's branch, i.e., his wives, three sons, widowed daughter-in-law, and all the grandchildren. Each one would have been free from before, to sue for partition.

Hindu Mitakshara Survivorship postulates a pre-existing coparcenary where all the members have a vested right in the property from prior to

Maharaja Jagatjit Singh death (19.06.1949). The Survivorship principle of the pre-17.06.1956 era proceeds on the basis that on death, the existence of the deceased gets subsumed but the coparcenary continues to exist.

86. If Mitakshara Intestate Succession:

The next contention of the appellants– of the 1949 succession being Mitakshara intestate, i.e., no Will or Primogeniture.

> Mitakshara intestate succession on 19.06.1949 would mean inheritance (or receipt) of property by the three sons as joint-tenants, and per stirpes and not per capita. All grandsons would also get interest from that point of time (19.06.1949) itself. In common parlance, it is referred to as „ancestral property., i.e., property which by reason of inheritance stood converted to HUF. The widows (after 1937) would have got life interest. This was the law prior to 17.06.1956.

s To test this contention of the appellants, we proceed on the basis that Maharaja Jagatjit Singh was not the karta of an HUF (coparcenary) – large or small – and an absolute owner, but we assume that he was not governed by the rule of Primogeniture, but by Mitakshara (as Hindu commoners of north India were prior to 17.06.1956). In that event, and assuming he died intestate, as per the customary law (Shastric Hindu law) then prevailing, the following:

i Tikka Raja Paramjit Singh - Eldest son

ii M.K. Karamjit Singh - Second son

iii M.K. Ajit Singh - Third son

The three grandsons – Tikka Raja Sukhjit Singh, R.K. Arun Singh and R.K. Martand Singh – would have got vested interest on this day (19.06.1949) itself.

88. The two widows (Maharani Bushair and Maharani Prem Kaur) and the widowed daughter-in-law (M.K. Rani Mahijit Singh) would have got life interest under the 1937 Act. The granddaughters (Indira and Asha Kaur) would have become 'members' with a right to maintenance and marriage expenses, which 'membership' would have ceased on their marriage. Therefore (in such event), by operation of law, all of them

(that is, all the three sons along with their wives and sons) would become part of the Kapurthala joint family on 19.06.1949 itself, and unless a partition takes place at which they get equal shares, their rights are not lost.

89. The fact that the two younger sons did not claim as coparceners, and instead received only maintenance, shows, and shows conclusively, that it was the Will X-8, and the rule of Primogeniture, that prevailed. There is no evidence on record or proof by the appellants to show Mitakshara Survivorship/ Succession. On the contrary, the evidence produced and proved by the respondent No.1 establishes :

(1) absence of Mitakshara Survivorship or Mitakshara Succession; and

(2) succession by Will/Primogeniture.

90. Further, if 'Mitakshara inheritance' had taken place in 1949, there could have been no Succession on 19.07.1955, but only 'Survivorship', at which, not Sukhjit Singh, respondent No.1 but his uncle M.K. Karamjit Singh, would have become the karta. This did not happen. See Chapter 11 infra. Furthermore, as per the law, all the widows would have got limited or life interest (under the 1937 Act), and since all six survived 17.06.1956, their interests would have stood enlarged on 17.06.1956 by virtue of Section 14(1) of the Hindu Succession Act. And, since it is admitted to have not occurred – the evidence on record also shows that it did not occur – it stands proved that the succession in 1949 was by Will/Primogeniture, and not by Mitakshara. 91. The matter of fact succession – by the eldest son (Paramjit Singh) alone, with only 'maintenance' to the brothers (younger sons) – or the events that transpired subsequently (19.07.1955, 17.06.1956) more than establish that on 19.06.1949 there was: (1) no HUF; (2) no survivorship; (3) no Mitakshara intestate succession; but Will X-8 or Primogeniture.

92. The documents as referred earlier and the evidence adduced on behalf of the respondent No.1 clearly establish the sovereign character of the erstwhile Kapurthala State. Consequently, the appellants plea that the rulers of Kapurthala were only Jagirdars or Chiefs and not rulers is wholly without cogent evidence and the appellants are failed to substantiate their plea raised, on the other hand the evidence produced has proved that the Kapurthala was a sovereign State and the custom of primogeniture

was invariably prevalent in Hindu Sovereign State all across India including Kapurthala.

93. After having gone through the impugned judgment, we are of the considered view that the learned Single Judge has dealt with each and every piece of evidence produced by the parties and has rightly come to the conclusion that the respondent No.1 has been able to establish his pleas raised in the written statement and we agree with the finding of the learned Single Judge that there is cogent evidence on record to come to the conclusion that rule of primogeniture prevailed.

94. Hence, there is no scope of interference in the impugned judgment and decree passed by the learned Single Judge on 03.09.2004. The appeal is, therefore, devoid of any merit and the same is dismissed with costs.

95. Now, we shall deal with the cross-objections filed by respondent no.1 pertaining to its contentions on issue nos. 6 to 9.

96. The finding on issue no.6 arrived by P.K. Bahri, J. in judgment dated 06.04.1992 which reads as under :

> "Mere fact that mark X8 is the certified copy of the purported Will of Maharaja Jagatjit Singh does not mean that the onus to prove that Maharaja Jagatjit Singh actually had executed a valid Will stood discharged on the part of defendant No.1. the execution of the Will has to be proved in terms of Section 63 of the Indian Succession Act. No evidence has been led to prove that Maharaja Jagatjit Singh who was about 76 years of age at the time of his death in 1949 had the testamentary capacity to execute a Will. No evidence has been led to show that the original Will of which mark X8 is the copy actually had signatures of Maharaja Jagatjit Singh and also the signatures of the two attesting witnesses. In **Moon Devi Vs. Radha Devi;** AIR 1972 SC 1471, it has been laid down that it is not merely the genuineness of signatures on which the proof of the execution of the Will under Section 38 of the Indian Succession Act depends, it has to be proved that the Will was attested in accordance with clause (e) of that Section.
>
> It may be also highlighted that letters Exs. PW 1/18, PW 1/19, PW 1/64 and PW 1/65 would indicate that defendant No.1 was very keen and rather coerced his father to execute a Will in his

favour cancelling the previous Will made in favour of Maharani Stella. Such pressure and coercion would not have been necessary if Maharaja jagatjit Singh had made a Will of which mark X8 is the copy because defendant No.1 would have inherited all the properties bequathed to Maharaja Paramajit singh on the basis of the said Will and in fact, Maharaja Paramajit Singh could not have been entitled to make any Will in respect of those properties at all.

It is also admitted case of the parties that Maharaja Paramjit Singh was making allowances to his collaterals which he had stopped and defendant No.1 in the letter referred to above while referring to the contents of the Will of Maharaja Jagatjit Singh was also accusing his father of acting dirty towards the family and not following the contents of the Will of Maharaja Jagatjit Singh. The document Ex.DW6/XN is a letter written by late Prime Minister Pt. Jawaharlal Nehru to his father objecting to his father cutting down the allowances being given to the other members of the family. So, it is evident that allowances were being paid by Maharaja Paramjit Singh to other family members and it is not shown by defendant No.1 why such allowances were being paid and what were the conditions and the rule which the allowances were being paid to which the indication is given in the letter Ex. DW6/XN. The statements of two witnesses Pyare Lal and Des Raj, Advocates, do not prove that the Will which was allegedly filed in the court proceedings at Kapurthala bore the signatures of Maharaja Jagatjit Singh and they also did not say that they were in a position to identity the signatures of Maharaja Jagatjit Singh and of the attesting witnesses. The testimony of Des Raj, Advocate, shows that a certificate was issued by the Govt. of India in davour of Maharaja Paramjit Singh which was filed in the petition for grant of succession certificate with regard to certain assets left by Maharaja Jagatjit Singh and he could not deny whether the succession certificate had been granted on the basis of certificate issued by the Govt. of India. It is quite evident that the succession that the succession certificate was not granted on the basis of the alleged Will of Maharaja Jagatjit Singh. So, examined from every point of view, it is clear that defendant No.1 has miserably failed to prove that

Maharaja Jagatjit Singh had executed a valid last Will of which mark X8 is the copy.

In view of the above discussion, I hold that defendant No.1 has failed to prove that any Will dated January 16, 1949, of which Mark X8 is the certified copy was executed by Maharaja Jagatjit Singh. So, Issue No.6 is decided against defendant No.1."

Issue Nos.7 to 9 were to arise only if the findings were to be given in issue Nos.6 to 8 in favour of defendant No.1.

97. While determining the issue No.8, the following are main finding in the judgment:

"As far as factum of obtaining a succession certificate is concerned, it is obvious that the proceedings for grant of succession certificate being not proceedings in probate jurisdiction do not determine any title in rem. The succession certificate only entitles a person to collect the money left by the deceased.

In **Ram Saran Vs Gappu Ram,** AIR 1916 Lahore 277, it was laid down that grant of succession certificate does not establish title of the grantee as the heir of the deceased, it only furnishes him with an authority to collect the debts and allows the debtors to make payments to him without incurring any risk. A similar proposition was reiterated by the Lahore High Court in **Mt. Charjo & another Vs Dina Nath & others,** AIR 1937 Lahore 196.

At the time the aforesaid certificate was obtained, defendant No.1 was unmarried. As far as testimony of attesting witness Maj. Kirpal Singh, who has since deceased, recorded in the same is not admissible in evidence inasmuch as the same does not comply with the strict provision of Section 33 of the Indian Evidence Act. So, it cannot be used for proving the aforesaid Will.

Defendant No.1 has not in his elaborate testimony stated as to how and in what manner and at what place the Will came to be executed. It is to be remembered that the Will was allegedly made on July 10, 1955 and Maharaja Paramjit Singh died on July 19, 1955. The contents of the letters written by defendant No.1

Exs.PW1/18, PW1/19, PW1/64 & PW1/65 show amply that defendant No.1's father was not in sound disposing mind during his last days and defendant No.1 was putting up lot of pressure and coercion on his father for revoking his Will which he had earlier made in favour of his wife Maharani Stela. Defendant No.1 in cross-examination was not even admitting the fact that his father had made a Will in favour of Maharani Stela almost bequeathing everything to her but on persistent cross-examination his counsel conceded the fact that for the purposes of this case it be assumed that Maharaja Paramjit Singh had made a Will in favour of his wife.

It has also come out on the record that defendant No.1 had to make a settlement with Maharani Stela and had to part with substantial estate. In case there was a valid Will of his father which is the last Will bequeathing everything in favour of defendant No.1 there could be no occasion for defendant No.1 to have entered into a settlement with Maharani Stela. The contents of the letters written by defendant No.1 mentioned above would clearly indicate that defendant No.1 was accusing his own father of playing dirty with the whole family by trying to leave everything in favour of Maharani Stela and his own efforts to prevail upon his father to revoke the said bequest. There was one schedule of the property attached with the settlement arrived at with Maharani Stela which would have disclosed us how much properly had been given to Maharani Stela on the basis of the settlement but that schedule was not produced.

The two attesting witnesses of the aforesaid Will Maj. Kirpal Singh and Shanti Sagar had died. Major Kirpal Singh was General Attorney and Secretary of defendant No.1. No evidence has been led by defendant No.1 to prove that the aforesaid Will was executed by Maharaja Paramjit Singh in presence of the said two witnesses. Reference was also made by counsel for defendant No.1 to the testimony of Dewan Pyare Lal (DW2) but his statement does not categorically prove the execution of a valid Will by Maharaja Paramjit Singh because he was not present at the time the alleged Will was executed by Maharaja Paramjit Singh.

A half hearted contention was raised that the document being 30 years old a presumption with regard to its due execution arises under Section 90 of the Indian Evidence Act. AT the time the suit was filed the document was not 30 years old. So, no presumption can be drawn regarding its due execution by reference to the provisions of Section 90 of the Indian Evidence Act. I hold that it is not proved that Maharaja Paramjit Singh had executed a valid Will Ex.D11.

Issue No.8 is decided against defendant No.1."

98. In Issue No.6 it was held that the same was not proved that Maharaja Jagatjit Singh has executed any Will dated 16.01.1949 which is exhibited as 'X-8'. In issue No.8 again a finding was given that it is not proved that Maharaja Paramjit Singh had executed a Will dated 10.07.1955 exhibited as 'D-11'.

99. It was specifically mentioned in the order passed in review application on 28.4.1969 that the finding of the court with regard to the issue Nos.6 to 9 did not call for any review. It is a matter of fact that the said order allowing the review petitions was challenged by the appellants before the Division Bench of this Court and the appeal filed by the appellants was dismissed on 09.05.1996. As far as the respondent No.1 is concerned, he did not challenge the said order.

100. Learned counsel for the respondents have made various submissions and also referred decisions in support of cross objections filed by the respondent no.1.

101. Admittedly, P.K. Bahri, J. in his judgment dated 06.04.1992 had decided issue nos. 6 to 9 against the respondents as no review was allowed in respect of these issues by order dated 28.04.1995. The matter was then put up for fresh hearing of issue nos. 1,2,4,5,10 and 11 and ultimately the impugned judgment and decree was passed on 3rd September, 2004 in the main Suit. The same was challenged in the present appeal. The respondent no.1 filed the cross objections in the appeal and challenged the order of review dated 28th April, 1994.

102. Learned Single Judge, admittedly, has not dealt with the finding arrived on issue nos. 6 to 9 while passing the impugned judgment. Learned counsel for the respondent however, during the course of

arguments the learned counsel for the respondent has admitted that the issue on the decision of two Wills marked X-8 and X-11 are merely academic. If relief in favour of respondent no.1 is granted by holding that the rule of primogeniture is applicable in the State of Kapurthala.

103. In view of the above said reasons, we feel it not necessary to deal with and discuss on these issues. The cross objections filed by the resplendent no.1 are, therefore, disposed of accordingly as this court has decided the issue of rule of primogeniture in favour of the respondents.

104. No costs.

ILR (2011) I DELHI 786
RSA

SHRI ASHOK BABU ....APPELLANT

VERSUS

SHRI PURAN MAL ....RESPONDENT

(INDERMEET KAUR, J.)

RSA NO. : 46/2001 DATE OF DECISION: 22.11.2010

Limitation Act, 1963—Article 65—Appellant filed suit seeking possession of property; decreed in his favour—On appeal, findings of Trial Judge reversed—Aggrieved appellant preferred appeal, urging Respondent failed to prove hostile and uninterrupted possession of suit property qua appellant for last 12 years, thus appellant entitled to possession of suit property—Per contra, as per Respondent, his title by adverse possession perfected and suit of appellant hopelessly barred by time—Held—The assertion of title adverse to the true owner must be clear and unequivocal, though not necessarily addressed to the

real owner—It is not always necessary for the person claiming adverse possession to know who the real owner is—It may not be within his knowledge; however what is within his knowledge is that he is occupying land which is of another and upon which he has set up his title adversely—The period of limitation starts running from the date both actual possession and assertion of title are shown to exist—Respondent perfected his title by adverse possession and suit filed more than 12 years being barred by limitation.

What is the adverse possession has been detailed and laid down by the Courts time and again. It has been reiterated in the various judgments cited in the impugned judgment as well. To establish a claim of adverse possession there must be open continuous, uninterrupted, peaceful and hostile possession of the defendant qua the property in dispute and this hostility must be clear and transparent. However, in some cases as in this case, the defendant being unaware of who the true owner was, yet knowing fully well that he is not the owner was not paying any rent to any person. He had set up his claim on a land which belonged to someone else; who that someone was, was not within his knowledge.

(Para 10)

Important Issue Involved: The assertion of title adverse to the true owner must be clear and unequivocal, though not necessarily addressed to the real owner—The period of limitation starts running from the date both actual possession and assertion of title are shown to exist.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. B.B. Gupta and Mr. Mohit R. Nagar and Mr. Harsh Hari Haran, Advocates.

FOR THE RESPONDENT : Ms. Sonia Arora, Advocate.

CASES REFERRED TO:

1. *D.M.H.P. Sales Ltd.* vs. *New Howrah Transport Company & Ors.* 162(2009) DLT 248.
2. *L.N. Aswathama & Anr.* vs. *P. Prakash* (2009) 13 SCC 229.
3. *P.T. Munichikkanna Reddy & Ors.* vs. *Revamma & Ors.* AIR 2007 SC 1753.
4. *Mohan Singh Kohli & Anr.* vs. *Brij Bhushan Anand & Ors.* 2007 (97) DRJ 83.
5. *Anjanappa & Ors.* vs. *Somalingappa & Anr.* (2006) 7 SCC 570 T.
6. *State of Rajasthan* vs. *Harphool Singh* (2000) 5 SCC 652.
7. *Rama Kanta Jain* vs. *M.S.Jain & Ors.* 1999 III AD (Delhi) 32.
8. *Rama Kanta Jain* vs. *M. S. Jain* 1999 III AD (Delhi) 32.
9. *Annasaheb Bapusaheb Patil & Ors.* vs. *Balwant* (1995) 2 SCC 543.

RESULT: Appeal dismissed.

INDERMEET KAUR, J.

1. This appeal has impugned the judgment and decree dated 19.10.2000 which had reserved the finding of the Trial Judge dated 21.9.1999. By judgment and decree dated 21.9.1999 the suit of the plaintiff Ashok Babu seeking possession of one room on the ground floor bearing municipal no.9351, Gali Dorwali, Mohalla Tokriwalan, Pull Mithai, Delhi (hereinafter referred to as the "suit property") had been decreed in his favour. The impugned judgment had set aside this finding; suit of the plaintiff was dismissed.

2. The factul matrix of the case is as follows:

i. Plaintiff Ashok Babu claimed himself to the absolute owner of the property bearing No.9349 to 9352, Gali Dorwali, Mohalla Tokriwalan, Pull Mithai, Delhi. He had purchased it from Smt. Memwati vide sale deed dated 02.02.1982.

ii. The defendant was stated to be in unauthorized possession of one room in ground floor i.e. suit property as described hereinabove for the last eight years. In spite of requests, the defendant failed to deliver the possession of the suit property. Accordingly the suit was filed.

iii. In the written statement, defendant took a preliminary objection that the plaintiff has no locus standi to file the present suit; sale deed was forged and fabricated. Memwati has no title or interest in the suit property. Plaintiff had acquired no title; defendant was in continuous physical and hostile possession of the aforenoted property for the last 31 years. He had become owner by adverse possession.

iv. Trial Judge had framed six issues on 04.8.1993, which read as follows:

i. Whether plaintiff is the owner of the property in suit? OPP

ii. Whether the suit is properly valued for the purpose of court fee and jurisdiction? OPP

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

iv. Whether the defendant has become owner of the property in suit by way of adverse possession? OPD

v. Whether plaintiff is entitled to the relief of possession as prayed for? OPP

vi. Relief.

v. On 24.7.1985, an additional issue was framed, which is as follows "Whether this Court has no pecuniary jurisdiction to try the present suit? OPD

vi. On the basis of the oral and documentary evidence which included five witnesses examined on behalf of the plaintiff and two witnesses examined on behalf of the defendant, suit for possession in favour of the plaintiff was decreed. It was held that plaintiff Ashok Babu had acquired title to the suit property in terms of the sale deed Ex.PW-1/1 dated 5.2.1982 executed in his favour by Memwati.

Contention of the defendant that Memwati had not acquired title of the suit land in terms of the sale deed executed by the erstwhile owner Smt. Nihalo in favour of Memwati was negatived. It was further held that the defendant who had set up the plea of ownership by adverse possession was unsubstantiated; even assuming that the defendant was living in the suit property since 1975, he had not perfected his title in 1982 when the suit was filed; mandatory period of 12 years for an adverse possession was not made out. Suit by the plaintiff for possession was accordingly decreed.

vii. Impugned judgment dated 19.10.2000 had set aside this finding. The first Appellate court had re-appreciated both the oral and documentary evidence. It was held that the defendant was in possession of the suit property since 25.9.1968; he had perfected his title in the intervening period of 12 years i.e. up to 25.9.1980; suit was filed on 31.10.1982 was barred by limitation. Article 65 of the Limitation Act had been adverted to. The relevant extract of the finding in the impugned judgment read as follows:

"It is true that the burden of proving adverse possession lay on the defendant/appellant. It was for him to establish that he had been in open, peaceful, actual, continuous and hostile possession of the property for more than 12 years. He examined himself as DW2 and stated that the room in dispute had been constructed by his father before the partition of the country. He stated that his father shifted to Delhi from Ambala and raised the structure as the land was lying vacant. On cross-examination, he stated as follows:-

"I never claimed that this property belonged to somebody else and that I was in adverse possession of the property. My father also never claimed being in adverse possession of this property. Vol. he himself has constructed the property. I don't know whether my father took this land on lease or purchased the same. I never made any attempt to enquire from the Patwari regarding ownership of the

land.

Q. I put it to you that neither you nor your father ever claimed to be in adverse possession of the property in question which belonged to some third person?

A. This property did not belong to anyone else except my father. Vol.my father as well as I told to everybody regarding this fact.

10. On further cross-examination, DW2 Puran Mal stated that he had said in 1975 for the first time that he was the owner of the property. However, when he was cross-examined again on 10.02.98, he said that he and his father had claimed ownership of the property for about 45 years. Relying on the above statement of DW2, Puran Mal, learned counsel for the plaintiff/respondent had contended that Puran Mal may have been in possession of the property for more than 12 years, but his possession was never adverse to the rightful owner and, therefore, such possession could not ripen into ownership on the expiry of 12 years. Learned counsel has placed reliance on the observations made by the Hon'ble High Court in 1999 III AD (Delhi) 32 **Rama Kanta Jain Vs. M. S. Jain.** The trial court has also quoted extensively from this judgment to arrive at the conclusion that mere length of possession cannot help the defendant in his assertion of adverse title. It was observed in the judgment that a party claiming title of adverse possession, must establish the following facts:-

1. He has been in occupation of the disputed property for more than 12 years without interruption.
2. His possession was to the exclusion of all the persons.
3. The said possession must be open, hostile to the true owner.
4. The possession must be adequate in continuity, in publicity and extent.

11. In Rama Kanta's case, the Hon'ble High Court observed further as follows:- "Adverse possession means a hostile

assertion, i.e., a possession which is expressly or impliedly in denial of the title of the true owner. Under Article 65, burden is on the defendant to prove affirmatively. A person who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In deciding whether the acts alleged by a person constituted adverse possession, regard must be to the animus of the person doing those acts which must be ascertained from the facts and circumstances of each case."

12. The following observations of the Hon'ble High court in Rama Kanta's case were also relied upon by the trial court:-

"The mere fact that the defendants have come forward with a plea of adverse possession, means that they admit the plaintiff to be the true owner. For a plea of ownership on the basis of adverse possession, the first and foremost condition is that the property must belong to someone else other than the person pleading his title on the basis of adverse possession.

13. The trial court presumed that by raising the plea of adverse possession the defendant had impliedly admitted the plaintiff to be the true owner. On this assumption, the trial court held that the pleas of the defendant were contradictory and mutually destructive inasmuch as he could not deny the ownership of the plaintiff after making an implied admission of the same by raising the plea of adverse possession. In my opinion, the approach of the trial court was erroneous and the facts of Rama Kanta's case were not properly appreciated by the trial court. In the case of Rama Kant, the defendant was the elder brother of the plaintiff's husband and his possession was permissive to begin with. In that case, the defendant admitted that the apparent title was in the name of the plaintiff but he contended that the transaction was benami and that he had also contributed towards the purchase of

the property. It was on these facts that the Hon'ble High court observed that the defendant had impliedly admitted the plaintiff to be the true owner. A presumption of admission of ownership can be raised only in those cases where the person claiming adverse possession, enters the property with the permission of the true owner and starts claiming hostile title subsequently. In other cases, the only requirement is that the person claiming adverse possession should know that the property belonged to someone else and not to him. He need not acknowledge any particular person as true owner. If he occupies the property with the knowledge that it does not belong to him and openly remains in continuous possession of the property for more than 12 years, he can validly claim title. In the present case, DW2, Puran Mal stated in the examination-in-chief as well as on cross-examination that the land was lying vacant when his father constructed the room on it. From this statement, it is clear that the construction was raised with the knowledge that the land belonged to someone else. The defendant/appellant has made no attempt whatsoever to trace the title to a lawful origin and, therefore, the element of hostility must have been there from the very beginning.

14. Learned counsel for the plaintiff/respondent has drawn my attention to the language of Article 65 of Limitation Act. He points out that the period of limitation starts running against the true owner only when he comes to know that the possession of the defendant has become adverse to him. Unless such knowledge is there, limitation cannot start running under Article 65 of Limitation Act. This position of law cannot be disputed. In the present case, however, I find that the defendant/appellant had given sufficient notice of his adverse possession to Memwati. As a matter of fact, he filed written statement in suit No.179/72 on 04.11.70 and categorically stated in para No.1 that he was owner of the property by adverse possession. The trial court has held that even if 04-11-70 be taken as the starting point of adverse possession, the

period of 12 years had not yet expired on 29.10.82 when the present suit was filed. In my opinion, the trial court did not properly appreciate the significance of the judgment of Shri O.P.Dwivedi in suit No.179/72. Shri Dwivedi has retuned definite finding that the relationship of landlord and tenant had never existed between Memwati and Puran Mal. From this, it is clear that Puran Mal must have acted in a manner hostile to Memwati from the date she purchased the property from Nihalo. Memwati purchased the property from Nihalo. Memwati purchased the property from Nihalo on 25-09-68 vide Ex-PW-1/2 and, therefore, the adverse possession of Puran Mal can be easily traced to 25-09-68. If we compute limitation from 25-09-68, the period of 12 years expired on 25-09-80. Therefore, when Memwati transferred the property to the plaintiff/ respondent on 02-02-82, her title had already become extinct by reason of adverse possession of the defendant/ appellant and the Sale Deed executed by her conferred no good title on the plaintiff/respondent.

15. In view of the above discussion, I find it difficult to agree with the conclusion of the trial court on the question of adverse possession. I am of the considered opinion that the hostile assertion of title by the appellant started as early as on 25-09-68 and he acquired title by adverse possession before the plaintiff/respondent purchased the property from Memwati. Therefore, a decree of possession could not have been passed in favour of the plaintiff/ respondent. The impugned judgment and decree are, therefore, set aside and the suit of the plaintiff/respondent is hereby dismissed."

3. On behalf of the appellant, it has been urged that this finding in the impugned judgment is perverse. It calls for an interference. It is submitted that to establish the plea of adverse possession, the defendant had to set up that this plea against the true and the original owner; in the written statement defendant has merely stated that he has become the owner by adverse possession but at the same time he has rebutted the claim of the plaintiff; he is not claiming hostile and uninterrupted possession

of the suit property qua the plaintiff; adverse possession necessarily encompasses that there must be an open, peaceful, continuous and uninterrupted possession against the true owner since last 12 years. This onus has not been discharged. Learned counsel for the appellant has placed reliance upon a judgment of the Apex Court reported in (1995) 2 SCC 543 **Annasaheb Bapusaheb Patil & Ors. Vs. Balwant** to support this submission. It is pointed out that the person who bases his title on adverse possession must show by clear and unequivocal evidence that the possession was hostile to the real owner and amounted to a denial of his title to the property claimed. It is pointed out that in the instant case, the defendant till date does not even know who is the real owner; he is contesting the ownership of the plaintiff; neither Nihalo Devi nor Memwati were the owners of the suit property as such they could not pass a better title to the plaintiff than what they themselves had.

4. For the same proposition reliance has also been placed upon AIR 2007 SC 1753 **P.T. Munichikkanna Reddy & Ors. Vs. Revamma & Ors.** It is pointed out that the real owner of the property must be specified in an adverse possession claim which is missing in the instant case. For the same proposition reliance has been placed upon a judgment reported in (2009) 13 SCC 229 **L.N. Aswathama & Anr. Vs. P. Prakash** as also a judgment of the Single Bench of this Court reported in 162(2009) DLT 248 **D.M.H.P. Sales Ltd. Vs. New Howrah Transport Company & Ors.** It is pointed out that the plea of the defendant that the plaintiff is not true owner of the suit property would result in holding that the defendant no.1 has failed to prove perfection of title to the suit property by adverse possession; it is pointed out that in this case also the defendant has set up a plea that the plaintiff is not the true owner of the suit property; claim of adverse therefore cannot hold any water. Reliance has been placed upon 1999 III AD (Delhi) 32 **Rama Kanta Jain Vs. M.S.Jain & Ors.** It is pointed out that the necessary ingredients for adverse possession include the following; uninterrupted occupation for more than 12 years, possession to the exclusion of all other, possession open and hostile to the true owner; the said ingredients have not been met. Reliance has been placed on (2000) 5 SCC 652 **State of Rajasthan Vs. Harphool Singh** to substantiate the same submission. It is pointed out that a finding which is based on legally unacceptable evidence and which is patently contrary to the law is a perverse finding which is liable to be set aside under the provisions of Section 100 of the Code of Civil

Procedure. It is submitted that in (2006) 7 SCC 570 T. **Anjanappa & Ors. Vs. Somalingappa & Anr.** this position has been reiterated.

5. Arguments have been countered by the learned counsel for the respondent. It is pointed out that the defendant has set up his plea of adverse possession in the written statement dated 4.11.1970, which had been filed by him in Suit No.179/72 which was a suit between Memwati and the present defendant, wherein he has stated that he is in possession of the suit property since the year 1950-51; applying the doctrine of relating back it is clear that the defendant has perfected his title by adverse possession. As way back in November 1970 the plaintiff was aware that the defendant is claiming his title by adverse possession. The suit filed on 31.10.1982 is hopelessly barred by time. It is pointed out that there is no relationship of landlord and tenant between the parties. Attention has drawn to the plaint filed in the present suit. It is pointed out that this suit is a suit for possession wherein it has been alleged that the defendant is in unauthorized occupation; arrears of rent have not been claimed for the reason that there was no such relationship between the parties. It is submitted that even as per the case of the plaintiff as is evident in the suit proceedings of Suit No.179/72 Memwati had filed a suit for arrears of rent w.e.f. 01.9.1968 to 31.12.1969 meaning thereby that after 01.9.1968 rent has not been paid. Admittedly after the date not a single paisa had been paid by the defendant and no such amount has also been claimed by the plaintiff. The defendant is in openly hostile and uninterrupted possession since 1.9.1968 and as such the suit filed on 31.10.1982 is barred by time. Learned counsel for the non-applicant has also placed reliance upon the judgment of the Supreme Court in the case of **T. Anjanappa** (supra); it is pointed out that this judgment categorically recites that the evidence of adverse possession must not be necessarily against the real owner; it is not necessary to disclose the name of the real owner. For the same proposition, reliance has also been placed upon a subsequent judgment of a Bench of this Court reported in 2007 (97) DRJ 83 **Mohan Singh Kohli & Anr. Vs. Brij Bhushan Anand & Ors.** wherein it has been held that the observation of adverse title although should be clear and unequivocal, need not necessarily be addressed to the real owner.

6. This is the second Appellate Court. The appeal had been admitted on 10.9.2009 and the following substantial question of law was formulated:

Whether the Appellate Court rightly construed the principles governing the adverse possession while allowing the appeal."

7. Record shows that Memwati had purchased this suit property on 25.9.1968 vide a sale deed from its erstwhile owner Nihalo. On 15.12.1969 she filed a suit i.e. suit bearing No. 179/1972 against Puran Mal. In this suit she had claimed arrears of rent from 1.9.1968 to 31.12.1969. Written statement in this suit was filed on 4.11.1970. In this written statement Puran Mal had categorically set up the plea of adverse possession. The judgment in this case Ex.DW-2/3 was delivered on 31.3.1975. Para 1 of Ex.DW-2/3, recites as follows:

"The suit was filed before the Judge Small Causes Court but the plaint was returned for presentation to proper court because the defendant had taken the plea that he has become owner by adverse possession."

Para 2 of the judgment recites that the defendant had pleaded that he is in continuous and peaceful possession of this property for the last 22 years without any interference whatsoever from either the plaintiff or her predecessor-in-interest; he had not paid rent to the plaintiff or anybody else as he does not recognize his ownership of the said property.

8. Issue no.2 in the said suit i.e. Suit No.179/1972 reads as follows:

"Whether the defendant has become the owner of the premises in dispute as alleged? OPD This judgment had returned a finding that there is no relationship of landlord and tenant between the parties; the question of payment of arrears of rent did not arise.

9. This judgment Ex.DW-2/3 as noted above was rendered on 31.3.1975. It had noted that the defence of the defendant in his written statement which had been filed by him on 04.11.1970 that he was in continuous possession of the suit property since the last 22 years; meaning thereby the defendant had set up a plea of adverse possession from the year 1950. He had also not recognized the plaintiff as the owner.

10. What is the adverse possession has been detailed and laid down by the Courts time and again. It has been reiterated in the various judgments cited in the impugned judgment as well. To establish a claim of adverse possession there must be open continuous, uninterrupted, peaceful and hostile possession of the defendant qua the property in

dispute and this hostility must be clear and transparent. However, in some cases as in this case, the defendant being unaware of who the true owner was, yet knowing fully well that he is not the owner was not paying any rent to any person. He had set up his claim on a land which belonged to someone else; who that someone was, was not within his knowledge.

11. The vehement contention of the learned counsel for the appellant that unless adverse possession is set up against the true owner, the requirement of adverse possession cannot be met is not a correct proposition of law. The Supreme Court in **T. Anjanappa** (supra) had held:

"…… The possession must be open and hostile enough to be capable of being known by the parties interest in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action."

12. In a subsequent judgment of a Bench of this Court in the case of **Mohan Singh Kohli** (supra) while relying upon the proposition laid down in the case of **T. Anjanappa** (supra), the following broad principles of adverse possession culled out. They read as:

"(1) Onus to prove the question of title by adverse possession is on the party who make such a claim.

(2) Mere long possession of the land is not enough. What is important is whether the possessor had the animus possidendi to hold the land adverse to the title of the true owner.

(3) The period of limitation starts running from the date both actual possession and assertion of title are shown to exit.

(4) The assertion of title adverse to the true owner must be clear and unequivocal, though not necessarily addressed to the real owner.

(5) The party claiming adverse possession must prove that his possession is "nec vi, nec clamnec precario."

(6) The party claiming title by adverse possession must make clear averments to that effect and explain as to when he entered

into the possession of the property and when the possession became adverse."

It is clear from the above that the assertion of title adverse to the true owner must be clear and unequivocal although it must not be necessarily addressed to the real owner.

13. This answers this vehement argument of the learned counsel for the appellant. It is not always necessary for the person claiming adverse possession to know who the real owner is. It may not be within his knowledge; however what is within his knowledge is that he is occupying land which is of another and upon which he has set up his title adversely.

14. In the instant case, it is clear from the pleadings in the Suit No.179/1972 (a suit between Memwati and Puram Mal) that the defendant had set up his plea of adverse possession wherein the Court had returned a clear finding that there was no relationship of landlord and tenant between the parties; the defendant Puran Mal was hostile to Memwati from right the date when she had allegedly purchased this property from Nihalo i.e. on 25.9.1968. In his written statement, he had stated that he is occupying this property uninterruptedly for the last 22 years. Be that at it may; the period of limitation of 12 years even if computed from 25.9.1968 which was the date when Memwati had purchased this property from Nihalo and the hostility of Puran Mal was open and clear this period of 12 years expired on 25.9.1980.

15. Memwati had thereafter on 02.02.1980 sold this property to the present plaintiff i.e. Ashok Babu. By this date i.e. by 02.02.1982, the defendant Puran Mal had perfected his title by adverse possession. This has been held in the impugned finding which calls for no interference. The impugned judgment had correctly appreciated the aforenoted dates.

16. It is also relevant to state that the Suit No.179/72 had been filed by Memwati for arrears of rent w.e.f. 01.9.1968 up to 31.12.1969. Her contention was that from 01.9.1968 no rent has been paid by defendant Puran Mal. Rent was thereafter not claimed. The present suit is a suit for possession and based on the plea that the defendant is an unauthorized occupant. No claim of any damages or rent has been made. The hostile attitude of the defendant qua the possession of the suit property was known to Memwati on 01.9.1968 when he stopped paying rent and she

had been constrained to file a suit. Article 65 of the Limitation Act prescribes a period of limitation of 12 years to file a suit where the defendant had set up a plea of adverse possession. This period has to commence from the time when the true owner comes to know that the possession of the defendant had become adverse to him. In this second alternative, it was known to Memwati as early as 01.9.1968 that the defendant has not paid any rent and he is openly hostile and claimed title to the suit property by adverse possession. This period of 12 years if computed from 01.9.1968, title by adverse possession ripens in favour of the defendant on 01.9.1980. Present suit had been filed on 31.10.1982. It was barred by time. The defendant had already perfected his title by adverse possession.

17. Defendant had come into witness box as DW-2. He has stated that the land was lying vacant when his father constructed a room on it. He was fully aware that the land belonged to someone else. He admits no knowledge of the real owner. Hostility was writ large. The High Court in the case of **Ramakant Jain** (supra) had laid down the essentials of adverse possession. Defendant was admittedly in occupation of the suit property for more than 12 years to the exclusion of all others. He was publicly and openly hostile w.e.f. 01.9.1968 when Memwati was constrained to file a suit for recovery of rent. The present suit being barred by limitation was rightly dismissed as landlord-tenant relationship was not established.

18. Suit filed more than 12 years after the defendant perfected his title by adverse possession i.e. on 31.10.1982 being barred by limitation was rightly dismissed. The impugned judgment calls for no interference. There is no merit in the appeal. Dismissed.

ILR (2011) I DELHI 801
CS (OS)

M/S. NATIONAL INSURANCE CO. LTD. & ANR. ....PLAINTIFF

VERSUS

M/S. MUKESH TEMPO SERVICE (CARRIER) ....DEFENDANT

(V.K. JAIN, J.)

CS (OS) NO. : 1468/2001 DATE OF DECISION: 23.11.2010

(A) Carriers Act, 1865—Section 10—Plaintiff No.1 an insurance company—Plaintiff No.2 a company which entered into contract with Defendant—Defendant a company in the transport/carrier field—Plaintiff No. 2 entered into contract with Defendant for delivery of ICs and capacitors—Consignment not delivered to Plaintiff No. 2—Defendant claims that goods were stolen on the way—Hence not liable to pay—Plaintiff No. 2 authorises Plaintiff No. 1 to file instant suit for recovery of value of goods—Hence instant suit—Held—Adequate court fee has been paid—Suit not barred by Section 10 of Carriers Act, 1865—Carrier duly informed of claim of loss of goods—Sufficient notice has been given.

The goods in question were admittedly booked by plaintiff No.2 with the defendant on 1st July 1998. Ex. PW 1/3 is the letter written by plaintiff No.2 to the defendant on 3rd July 1998. Vide this letter a claim was lodged with the defendant for Rs1Lac in respect of loss of 1,40,000 pieces of Ceramic Capacitors. The letter also refers to tempo No. DL-1L-B-0994. It also contains reference to Airway Bill No. 618103565222. Ex. PW 1/4 is the letter dated 3rd July 1998 sent by plaintiff No.2 to the defendant lodging claim for Rs.30Lacs on account of loss of 30,000 pieces of ICs and 11,34,000 pieces of Electrolitic Capacitors. There is reference

to tempo No. DL-1L-B-0994 and Airway Bill No. 6180040284 and 21728833803H in this letter. Ex. P-2 is the letter dated 29th July 1998 written by the defendant to plaintiff No.2. This is an admitted document, the same having been admitted on 16th October 2003. Vide this letter, the defendant acknowledged receipt of the letters in which plaintiff No.2 had claimed Rs. 1Lac and Rs. 30,000/-, respectively for the loss of the goods, which were transported in vehicle No. DL-1L-B-0994. Obviously, the reference is to the letters of plaintiff No.2 Ex. PW1/3 and PW1/4. The notice envisaged in Section 10 of Carriers Act is a notice whereby the carrier is informed of the loss or injury to the goods and the object of the notice is to give an opportunity to the carrier to make amendments for the occurrence of the loss and settle the claim of the consigner or owner of the goods. There is no particular form of notice prescribed in the Act and, therefore, it would be sufficient compliance of the requirement of the Section if the carrier is informed about the loss or injury to the goods. In any case, Ex. PW1/3 and PW1/4 meet the requirement of law in this regard. The issue is decided against the defendant and in favour of the plaintiffs.**(Para 7)**

(B) Carriers Act, 1865—Section 3—Liability of carrier limited to Rs. 100—Said limitation only applicable to goods described in Schedule of the Act—Hence Section 3 not applicable.

A bare perusal of this Section would show that it applies to those goods which are described in the schedule to the Act. I have perused the schedule to Carriers Act, 1865. Neither the Capacitors nor the ICs are included amongst the goods described in the schedule. The learned counsel for the defendant could not point our any entry in the schedule which covers either Capacitors or ICs. Therefore, Section 3 of the Act has no application to the consignments which were booked by plaintiff No.2 with the defendant.**(Para 9)**

(C) Main plea that goods were stolen, hence no negligence

on part of carrier—Reliance placed on ratio in *Patel Roadways* case—Liability of carrier in India is like that of an insurer—It is absolute liability subject to Act of God and special contract between carrier and customer—Not necessary for plaintiff to establish negligence.

The main plea taken by the defendant is that since the goods were stolen while they were being transported in a ˇtempo, there was no negligence on its part and consequently, it is not liable to compensate the plaintiffs for the loss of the goods.

In **Patel Roadways Limited vs. Birla Yamaha Ltd.,** AIR 2000 SC 1461, Supreme Court held that the liability of a carrier in India is like that of an insurer and is an absolute liability subject to an Act of God and a special contract which the carrier may choose to enter with a customer. In this regard, the Court referred to the provisions of Section 9 of the Act, which specifically provides that in case of claim of damage or loss to or deterioration of goods entrusted to a carrier, it is not necessary for the plaintiff to establish negligence. It was further held that even assuming that the general principle in cases of tortuous liability is that of the party who alleges negligence against the other must prove the same, the said principle has no application to cover the case under the Carriers Act. **(Para 10)**

(D) Theft—Does not amount to Act of God—Only exceptions being Act of God, Act of State's enemies or special contract between carrier and customer—Here even alleged theft of goods does not stand established—Hence issue decided against Defendant.

In the case before this Court no special contract between plaintiff No.2 and the defendant has even been alleged. Assuming that the goods entrusted to the defendant for transportation were stolen while being transported to the premises of plaintiff No.2, a loss to the plaintiffs on account

of theft of the goods cannot be considered as an Act of God. In **South Eastern Carriers (P) Ltd. vs Oriental F & G Insurance Co. Ltd.** AIR 2004 Kerala 139, the plaintiffs had chartered a truck for carrier of goods. The truck met with an accident. It was claimed by the carrier that there was no negligence or carelessness on the part of the driver and that the accident had occurred only due to unforeseen and inevitable reasons. Noticing that under Section 8 of Carriers Act the liability of a common carrier is absolute except for Act of God and no evidence had been produced by the carrier to show that the accident had occurred due to Act of God, it was held that the carrier was answerable for the loss of goods even when the loss is not caused by negligence or for want of care on its part. It was held that the only exceptions recognized by the Act are the Act of God and of State's enemies or a special contract that the carrier may choose to enter into with the customer. In **Oriental Insurance Company vs Mukesh & Co.** AIR 2000 MP 35, the goods entrusted to the carrier were gutted by fire during transport. The cause of fire was attributed to sparks emitted at the time of tightening of consignment by nylon ropes at the octroi post. It was held by a Division Bench of High Court that if the fire broke out due to some unknown cause or due to the negligence of coolies, the transporter as the common carrier under Section 8 of the Carrier Act, was liable to pay for the loss of the damage to the consignee. In any case, driver of the vehicle in which the goods booked by plaintiff No.2 were neither being transported nor any other witness has been produced to prove the alleged theft. Hence, even the alleged theft of the goods does not stand established. The issue is decided against the defendant. **(Para 11)**

(E) Subrogation of rights of Plaintiff No. 2—Plaintiff No. 1 granted full power to use all lawful means to recover damages—Plaintiff No.1 authorised to sue in name of Plaintiff No.2—Stamp papers purchased in Delhi—Attested by witness residing in Delhi—Notary also from Delhi—No merit that documents were executed

in Rohtak and attested at New Delhi—Plaintiff No. 2 has not filed any suit for recovery of compensation for loss of good.

These issues are inter-connected and can be conveniently decided together. 'Exhibits PW-1/6 and PW-1/7' are the Letters of Subrogation purporting to be executed by plaintiff No.2, Calcom Electronics Ltd. in favour of plaintiff No.1 National Insurance Company Ltd. Vide these documents, plaintiff No.2, on receipt of Rs.12,50,000/- from plaintiff No.1 in respect of loss/damage to it under Policy No.420602/175152/31.03.98 assigned, transferred and abandoned all its rights, title and interest in respect of the above mentioned policy. It also granted full power to plaintiff No.1 to use all lawful ways and means to recover the damages. Plaintiff No.1 was also authorized to sue in the name of plaintiff No.2 in any action or proceedings that it might bring in its own name or in the name of plaintiff No.2 in relation to the matter assigned, transferred and abandoned under these documents. It also agreed that any money collected from any person shall be the property of plaintiff No.1 and if the same is received by plaintiff No.2, it will be made over to plaintiff No.1. These documents have been proved by PW-1, Shri A.K. Goel, Assistant Manager of plaintiff No.1. The authenticity of these documents which have otherwise been attested by a Notary Public in New Delhi has been assailed by the defendant on the ground that the policy number mentioned in these documents is different from the policy number mentioned in the receipt "Exhibit PW-1/11" and also on the ground that according to PW-1 the Letter of Subrogation was executed in Rohtak, whereas they have been attested at New Delhi. I, however, find no merit in the contention. PW-1 did not have any personal knowledge as to the place where these documents were executed. He stated that he presumed that it must have been executed in the office of the plaintiff-Company in Rohtak, from where the policy had been taken. However, this presumption on the part of PW-1 cannot be preferred to the documents

themselves. Plaintiff No.2 is a Company based in Delhi. The stamp papers on which the documents have been prepared were purchased from a stamp vendor in Delhi, as is evident from the stamp of the stamp vendor on the back side of the documents. The documents have been attested by a witness Mr. A.K. Dixit, who has given his address as B-23, Wazirpur Industrial Area, Delhi. They have been attested by a Notary Public at New Delhi. There is no indication in the documents that they were executed at Rohtak, though they are addressed to Rohtak Branch of National Insurance Company Ltd. Hence, there is no merit in the contention that the documents were executed at Rohtak and attested at New Delhi.

'Exhibits PW-1/8 and PW-1/9' are the other two Letters of Subrogation purporting to be executed by plaintiff No.2 in favour of plaintiff No.1 in respect of Policy No.420602/21/99/96/00020/11-06-96. These documents also have been attested by a Notary Public at New Delhi. They also have been signed by Mr. A.K. Dixit who has signed 'Exhibit PW-1/6 and PW-1/7' as a witness. The stamp paper for these documents have also been purchased from a stamp vendor in Delhi as is evident from the stamp of the stamp vendor on the back side of these documents.

As regards the alleged discrepancy in the policy number, a bare perusal of the receipt 'Exhibit PW-1/11' would show that the number 420602/21/99/0005/98 mentioned in this document is claim number and not the policy number. Therefore, there is no contradiction in the receipt and the Letters of Subrogation as regards the number of the policy to which these documents pertain. **(Para 12)**

The authenticity of the Power of Attorney Ex. PW-1/10 has been disputed by the defendant on the ground that it has been executive at Rohtak, but attested at New Delhi. I, however, find no merit in the objection. The Stamp Paper for this document was purchased from Delhi as is evident from the stamp of the stamp vendor Reeta Kashyap on the back

side of the stamp paper. Plaintiff No. 2 has an office in New Delhi and not in Rohtak. There is a statutory presumption of a valid execution of this document. Therefore, it appears that though at the time this document was typed, the intention could be to get it executed at ˇRohtak, it was in fact executed at New Delhi as is evident from attestation by Notary Public at New Delhi on 06th March, 1999.

Another important aspect in this regard is that plaintiff No. 2 has not come forward to file any suit against the defendant for recovery of compensation for the loss of the goods which it had booked with the defendant. Letters of Subrogation have also been executed by plaintiff No.2 in favour of plaintiff No. 1. The claim of plaintiff No. 2 has been settled by plaintiff No. 1 by paying a sum of Rs 3106425/- to it. Therefore, there can be no genuine dispute with respect to the authenticity of the Power of Attorney Ex. PW-1/10. **(Para 16)**

(F) Notaries Act, 1952—Section 8(1)-(2) Seal of Notary—When seal of notary put on document—Raises presumption that Notary must have satisfied himself in discharge of duties that the person excuting the power of attorney was the proper person.

Since the Power of Attorney Ex. PW-1/10, purporting to be executed by plaintiff No. 2 in favour of plaintiff No. 1 has been attested by a Public Notary, there is a statutory presumption under Section 85 of Evidence Act that the Power of Attorney was executed by the person by whom it purports to have been executed and the person who executed the power of attorney was fully competent in this regard. In **Jugraj Singh and Anr. Vs. Jaswant Singh and Ors.,** AIR 1971 SC 761, the Power of Attorney attested by a Public Notary was disputed on the ground that it did not show on its face that the Notary had satisfied himself about the identity of the executant. Supreme Court held that there was a presumption of regularity of official acts and that the Notary must have satisfied himself in the discharge of his

duties that the person who was executing it was the proper person. In **Rajesh Wadhwa vs. Sushma ˇGovil,** AIR 1989, Delhi 144, it was contended before this Court that till it is proved that the person who signed the said power of attorney was duly appointed attorney, the court cannot draw a presumption under Section 57 and 85 of the Evidence Act. Repelling the contention, it was held by this Court that the very purpose of drawing presumption under Sections 57 and 85 of the Evidence Act would be nullified if proof is to be had from the foreign country whether a particular person who had attested the document as a Notary Public of that country is in fact a duly appointed Notary or not. When a seal of the Notary is put on the document, Section 57 of the Evidence Act comes into play and a presumption can be raised regarding the genuineness of the seal of the said Notary, meaning thereby that the said document is presumed to have been attested by a competent Notary of that country. In **Punjab National Bank vs. Khajan Singh,** AIR 2004 Punjab and Haryana 282, the Power of Attorney in favour of a bank, which had been duly attested, was rejected by the learned District Judge on the ground that the presumption under Section 85 of Evidence Act was available to a particular class of Power of Attorneys described in the section, which was confined to its execution ˇand authenticity alone. The High Court, however, rejected the view taken by the learned District Judge holding that absence of proof of resolution authorizing the executant to execute the Power of Attorney could not be sustained and a presumption in favour of the attorney would arise under Section 85 Act. Hence, in this case also the Court is required to draw the requisite statutory presumption that the power of attorney Ex. PW-1/10 was executed by plaintiff No.2 in favour of plaintiff No.1 and that the person who executed the Power of Attorney on behalf of plaintiff No. 2 was duly authorized in this behalf. **(Para 15)**

(G) Subrogation and Assignment—Subrogation can be enjoyed by insurer as soon as payment is made—

Assignment requires agreement that rights of assured shall be assigned to insurer—Enforcement of rights of subrogation must be in name of assured—Here, Plaintiff No. 2 has also been joined in suit—Letters of Subrogation also stipulate assignment and transfer of actionable rights, title and interest—Legal proposition is settled vide ratio in *Economic Transport Organisation's* case—Insurer cannot maintain complaint in its own name even if such right traced to terms of a letter of subrogation-cum-assignment executed by assured.

The learned counsel has also referred to **Gujarath Andhra Road Carriers Transport Contractors and ors. vs. United India Insurance Company Ltd.** AIR 2006, Andhra ˘Pradesh, 401 where the aforesaid statement in the book by Mac Gillivray Parkington was extracted.

These judgments are of no help to the defendant since the insured has also been joined as plaintiff No.2 in the suit, though the Letters of Subrogation executed by plaintiff No. 2 in favour of plaintiff No. 1 also stipulate assignment and transfer of the actionable rights, title and interest of plaintiff No.2 to plaintiff No.1. However, the legal proposition in this regard has recently been settled as under by a Constitution Bench of Supreme Court in **Economic Transport Organization vs. Charan Spinning Mills Private Limited and Anr.** (2010) 4 SCC 114

> "(a) The insurer, as subrogee, can file a complaint under the Act either in the name of the assured (as his attorney-holder) or in the joint names of the assured and the insurer for recovery of the amount due from the service provider. The insurer may also request the assured to sue the wrong doer (service provider).
>
> (b) Even if the letter of subrogation executed by the assured in favour of the insurer contains in addition to the words of subrogation, any words of assignment, the complaint would be maintainable so long as the complaint is in the name of the assured and insurer figures in the complaint only as an attorney holder or subrogee of the assured.
>
> (c) The insurer cannot in its own name maintain a complaint before a consumer forum under the Act, even if its right is traced to the terms of a Letter of subrogation-cum-assignment executed by the assured.
>
> (d) Oberai is not good law insofar as it construes a Letter of Subrogation-cum-assignment, as a pure and simple assignment. But to the extent it holds that an insurer alone cannot file a complaint under the Act, the decision is correct." **(Para 18)**

Important Issue Involved: Subrogation and Assignment—Subrogation can be enjoyed by insurer as soon as payment is made—Assignment requires agreement that rights of assured shall be assigned to insurer—Enforcement of rights of subrogation must be in name of assured—Here, Plaintiff No. 2 has also been joined in suit—Letters of Subrogation also stipulate assignment and transfer of actionable rights, title and interest—Legal proposition is settled vide ratio in *Economic Transport Organisation's* case—Insurer cannot maintain complaint in its own name even if such right traced to terms of a letter of subrogation-cum-assignment executed by assured.

[Sa Gh]

APPEARANCES:

FOR THE PLAINTIFF : Mr. L.G. Tyagi, Advocate.

FOR THE DEFENDANT : Nr. Ajit Warrier & Mr. Sandeep Grover, Advocates.

CASES REFERRED TO:

1. *Economic Transport Organization* vs. *Charan Spinning Mills Private Limited and Anr.* (2010) 4 SCC 114.
2. *Gujarath Andhra Road Carriers Transport Contractors and*

ors. vs. *United India Insurance Company Ltd.* AIR 2006, Andhra ˇPradesh, 401.

3. *South Eastern Carriers (P) Ltd.* vs. *Oriental F & G Insurance Co. Ltd.* AIR 2004 Kerala 139.

4. *Punjab National Bank* vs. *Khajan Singh,* AIR 2004 Punjab and Haryana 282.

5. *Oberai Forwarding Agency* vs. *New India Assurance Company Limited,* AIR 2000 Supreme Court, 855.

6. *Oriental Insurance Company* vs. *Mukesh & Co.* AIR 2000 MP 35.

7. *Patel Roadways Limited* vs. *Birla Yamaha Ltd.,* AIR 2000 SC 1461.

8. *S.P. Chengalvaraya Naidu (dead) by L.Rs.* vs. *Jagannath (dead) by L.Rs., and others,* AIR 1994 Supreme Court 853.

9. *Rajesh Wadhwa* vs. *Sushma ˇGovil,* AIR 1989, Delhi 144.

10. *Jugraj Singh and Anr.* vs. *Jaswant Singh and Ors.,* AIR 1971 SC 761.

RESULT: Suit decreed in favour of plaintiff.

V.K. JAIN, J.

1. This is a suit for recovery of Rs. 31,06,425/-. Plaintiff No.1 is an Insurance Company registered under Companies Act. The suit has been instituted and the plaint is signed and verified by its Manager Mr D.P. Ghosh, who is alleged to be holding a Power of Attorney from plaintiff No.1 in this regard. Plaintiff No.2 is also a company and it is alleged that it has authorized plaintiff No.1 to file the suit on its behalf. Plaintiff No.2 booked 13 packets containing 30,000 pieces of ICs and 42 packets containing 1134000 capacitors with the defendant for transportation from IGI Airport, New Delhi to the factory premises of plaintiff No.2. The consignment however was not delivered by the defendant to plaintiff No.2. Since the consignment was insured with plaintiff No.1, investigators were appointed to carry out investigation and they reported loss of the consignment. Plaintiff No.1 settled the claim of

plaintiff No.2 on payment of Rs. 31,06,425/-. A Letter of Subrogation was executed by plaintiff No.2 in favour of plaintiff No.1 whereby plaintiff No.1 became entitled to recover the aforesaid amount from the defendant. The plaintiffs have accordingly claimed the amount of Rs. 31,06,425/- from the defendant.

2. The defendant has contested this suit and has taken a preliminary objection that the suit is barred for non-compliance of Section 10 of Carriers Act, 1865. It has also been alleged in the written statement that the subrogation by plaintiff No.2 in favour of plaintiff No.1 is not valid and legally enforceable. It has also been alleged that the suit is not properly valued for the purpose of Court fee and jurisdiction. It has further been alleged that in view of the provisions contained in Section 3 of Carriers Act, the suit against the defendant is not maintainable since value of the goods were not disclosed by plaintiff No.2 to the defendant while booking the goods for transportation. On merits, it has been alleged that when the goods of the plaintiffs were being transported in tempo No. DL-1L-B-0994 on 1st July 1998, some robbers travelling in a car stopped the tempo near Gopinath Bazar, New Delhi, represented themselves to be police officials and took the keys of the vehicle from the driver on the pretext that they wanted to take the tempo to the Police Station. The robbers, however, took the tempo to some unknown place and abandoned it there after taking away all the goods. FIR No. 242/1998 in this regard was lodged at Police Station, Delhi Cantt on 1st July 1998. It has also been claimed that there was no negligence on the part of the defendant and the acts of robbery being beyond its control, it cannot be made liable for the loss.

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

(i) Whether the suit is barred for non-compliance of Section 10 of the Carriers Act, 1865? OPD

(ii) Whether the purported subrogation by the plaintiff No.2 in favour of plaintiff No.1 is a valid and legally enforceable subrogation? OPP

(iii) Whether the suit is correctly valued for the purposes of court fees and jurisdiction? OPP

(iv) Whether the present suit is maintainable against the defendant? OPP

(v) Whether the plaintiff is entitled to any relief? OPP

4. The plaintiffs have examined only one witness Mr A.K. Goel in support of their case. No witness has beenexamined by the defendant.

ISSUE No. 3

5. This is a suit for recovery of money and ad valorem Court fee has been paid by the plaintiffs on the amount claimed by them. The issue is decided against the defendant and in favour of the plaintiff.

ISSUE No. 1

6. Section 10 of Carriers Act, provides that no suit shall be instituted against a common carrier for the loss of, or injury to, goods entrusted to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff.

7. The goods in question were admittedly booked by plaintiff No.2 with the defendant on 1st July 1998. Ex. PW 1/3 is the letter written by plaintiff No.2 to the defendant on 3rd July 1998. Vide this letter a claim was lodged with the defendant for Rs1Lac in respect of loss of 1,40,000 pieces of Ceramic Capacitors. The letter also refers to tempo No. DL-1L-B-0994. It also contains reference to Airway Bill No. 618103565222. Ex. PW 1/4 is the letter dated 3rd July 1998 sent by plaintiff No.2 to the defendant lodging claim for Rs30Lacs on account of loss of 30,000 pieces of ICs and 11,34,000 pieces of Electrolitic Capacitors. There is reference to tempo No. DL-1L-B-0994 and Airway Bill No. 6180040284 and 21728833803H in this letter. Ex. P-2 is the letter dated 29th July 1998 written by the defendant to plaintiff No.2. This is an admitted document, the same having been admitted on 16th October 2003. Vide this letter, the defendant acknowledged receipt of the letters in which plaintiff No.2 had claimed Rs. 1Lac and Rs. 30,000/-, respectively for the loss of the goods, which were transported in vehicle No. DL-1L-B-0994. Obviously, the reference is to the letters of plaintiff No.2 Ex. PW1/3 and PW1/4. The notice envisaged in Section 10 of Carriers Act is a notice whereby the carrier is informed of the loss or injury to the goods and the object of the notice is to give an opportunity to the carrier to make amendments for the occurrence of the loss and settle the claim of

the consigner or owner of the goods. There is no particular form of notice prescribed in the Act and, therefore, it would be sufficient compliance of the requirement of the Section if the carrier is informed about the loss or injury to the goods. In any case, Ex. PW1/3 and PW1/4 meet the requirement of law in this regard. The issue is decided against the defendant and in favour of the plaintiffs.

ISSUE No.4

8. During the course of arguments, it was contended by the learned counsel for the defendant that in view of the provisions contained in Section 3 of the Carriers Act, the liability of the carrier is limited to Rs. 100/- since the value and description of the goods were not disclosed to the defendant, at the time the goods were sent for transportation. Section 3 of the Act provides as under:-

> **Carriers not to be liable for loss of certain goods above one hundred rupees in value unless delivered as such.**- No common carrier shall be liable for the loss of or damage to property delivered to him to be carried exceeding in value one hundred rupees and of the description contained in the Schedule to this Act, unless the person delivering such property to be carried, or some person duly authorized in that behalf, shall have expressly declared to such carrier or his agent the value and description thereof.

9. A bare perusal of this Section would show that it applies to those goods which are described in the schedule to the Act. I have perused the schedule to Carriers Act, 1865. Neither the Capacitors nor the ICs are included amongst the goods described in the schedule. The learned counsel for the defendant could not point our any entry in the schedule which covers either Capacitors or ICs. Therefore, Section 3 of the Act has no application to the consignments which were booked by plaintiff No.2 with the defendant.

10. The main plea taken by the defendant is that since the goods were stolen while they were being transported in a tempo, there was no negligence on its part and consequently, it is not liable to compensate the plaintiffs for the loss of the goods.

In **Patel Roadways Limited vs. Birla Yamaha Ltd.,** AIR 2000

SC 1461, Supreme Court held that the liability of a carrier in India is like that of an insurer and is an absolute liability subject to an Act of God and a special contract which the carrier may choose to enter with a customer. In this regard, the Court referred to the provisions of Section 9 of the Act, which specifically provides that in case of claim of damage or loss to or deterioration of goods entrusted to a carrier, it is not necessary for the plaintiff to establish negligence. It was further held that even assuming that the general principle in cases of tortuous liability is that of the party who alleges negligence against the other must prove the same, the said principle has no application to cover the case under the Carriers Act.

11. In the case before this Court no special contract between plaintiff No.2 and the defendant has even been alleged. Assuming that the goods entrusted to the defendant for transportation were stolen while being transported to the premises of plaintiff No.2, a loss to the plaintiffs on account of theft of the goods cannot be considered as an Act of God. In **South Eastern Carriers (P) Ltd. vs Oriental F & G Insurance Co. Ltd.** AIR 2004 Kerala 139, the plaintiffs had chartered a truck for carrier of goods. The truck met with an accident. It was claimed by the carrier that there was no negligence or carelessness on the part of the driver and that the accident had occurred only due to unforeseen and inevitable reasons. Noticing that under Section 8 of Carriers Act the liability of a common carrier is absolute except for Act of God and no evidence had been produced by the carrier to show that the accident had occurred due to Act of God, it was held that the carrier was answerable for the loss of goods even when the loss is not caused by negligence or for want of care on its part. It was held that the only exceptions recognized by the Act are the Act of God and of State's enemies or a special contract that the carrier may choose to enter into with the customer. In **Oriental Insurance Company vs Mukesh & Co.** AIR 2000 MP 35, the goods entrusted to the carrier were gutted by fire during transport. The cause of fire was attributed to sparks emitted at the time of tightening of consignment by nylon ropes at the octroi post. It was held by a Division Bench of High Court that if the fire broke out due to some unknown cause or due to the negligence of coolies, the transporter as the common carrier under Section 8 of the Carrier Act, was liable to pay for the loss of the damage to the consignee. In any case, driver of the vehicle in which the goods booked by plaintiff No.2 were neither being transported nor any other witness has been produced to prove the alleged theft.

Hence, even the alleged theft of the goods does not stand established. The issue is decided against the defendant.

12. Issues No.2 and 5

These issues are inter-connected and can be conveniently decided together. 'Exhibits PW-1/6 and PW-1/7' are the Letters of Subrogation purporting to be executed by plaintiff No.2, Calcom Electronics Ltd. in favour of plaintiff No.1 National Insurance Company Ltd. Vide these documents, plaintiff No.2, on receipt of Rs.12,50,000/- from plaintiff No.1 in respect of loss/damage to it under Policy No.420602/175152/31.03.98 assigned, transferred and abandoned all its rights, title and interest in respect of the above mentioned policy. It also granted full power to plaintiff No.1 to use all lawful ways and means to recover the damages. Plaintiff No.1 was also authorized to sue in the name of plaintiff No.2 in any action or proceedings that it might bring in its own name or in the name of plaintiff No.2 in relation to the matter assigned, transferred and abandoned under these documents. It also agreed that any money collected from any person shall be the property of plaintiff No.1 and if the same is received by plaintiff No.2, it will be made over to plaintiff No.1. These documents have been proved by PW-1, Shri A.K. Goel, Assistant Manager of plaintiff No.1. The authenticity of these documents which have otherwise been attested by a Notary Public in New Delhi has been assailed by the defendant on the ground that the policy number mentioned in these documents is different from the policy number mentioned in the receipt "Exhibit PW-1/11" and also on the ground that according to PW-1 the Letter of Subrogation was executed in Rohtak, whereas they have been attested at New Delhi. I, however, find no merit in the contention. PW-1 did not have any personal knowledge as to the place where these documents were executed. He stated that he presumed that it must have been executed in the office of the plaintiff-Company in Rohtak, from where the policy had been taken. However, this presumption on the part of PW-1 cannot be preferred to the documents themselves. Plaintiff No.2 is a Company based in Delhi. The stamp papers on which the documents have been prepared were purchased from a stamp vendor in Delhi, as is evident from the stamp of the stamp vendor on the back side of the documents. The documents have been attested by a witness Mr. A.K. Dixit, who has given his address as B-23, Wazirpur Industrial Area, Delhi. They have been attested by a Notary

Public at New Delhi. There is no indication in the documents that they were executed at Rohtak, though they are addressed to Rohtak Branch of National Insurance Company Ltd. Hence, there is no merit in the contention that the documents were executed at Rohtak and attested at New Delhi.

'Exhibits PW-1/8 and PW-1/9' are the other two Letters of Subrogation purporting to be executed by plaintiff No.2 in favour of plaintiff No.1 in respect of Policy No.420602/21/99/96/00020/11-06-96. These documents also have been attested by a Notary Public at New Delhi. They also have been signed by Mr. A.K. Dixit who has signed 'Exhibit PW-1/6 and PW-1/7' as a witness. The stamp paper for these documents have also been purchased from a stamp vendor in Delhi as is evident from the stamp of the stamp vendor on the back side of these documents.

As regards the alleged discrepancy in the policy number, a bare perusal of the receipt 'Exhibit PW-1/11' would show that the number 420602/21/99/0005/98 mentioned in this document is claim number and not the policy number. Therefore, there is no contradiction in the receipt and the Letters of Subrogation as regards the number of the policy to which these documents pertain.

13. In view of the Letters of Subrogation 'Exhibits PW-1/6 to PW-1/9', executed by plaintiff No.2 in favour of plaintiff No.1, it was competent for plaintiff No.1 to file this suit in the joint name of National Insurance Company Ltd. and Calcom Electronics Ltd.

14. 'Exhibit PW-1/10' is the Power of Attorney purporting to be executed by plaintiff No.2, Calcom Electronics Ltd. in favour of plaintiff No.1, National Insurance Company Ltd. Vide this document, plaintiff No.1, was authorized to present any application before any authority or any person concerned for the claim arising under the policy mentioned in the document. Plaintiff No.1 was also authorized to file suit in Court of law against any concerned person for recovery of money for the claim on behalf of plaintiff No.2 and give a valid discharge and an effectual receipt. This document has been attested by a Notary Public at New Delhi on 6th March, 1999.

15. Since the Power of Attorney Ex. PW-1/10, purporting to be executed by plaintiff No. 2 in favour of plaintiff No. 1 has been attested

by a Public Notary, there is a statutory presumption under Section 85 of Evidence Act that the Power of Attorney was executed by the person by whom it purports to have been executed and the person who executed the power of attorney was fully competent in this regard. In **Jugraj Singh and Anr. Vs. Jaswant Singh and Ors.,** AIR 1971 SC 761, the Power of Attorney attested by a Public Notary was disputed on the ground that it did not show on its face that the Notary had satisfied himself about the identity of the executant. Supreme Court held that there was a presumption of regularity of official acts and that the Notary must have satisfied himself in the discharge of his duties that the person who was executing it was the proper person. In **Rajesh Wadhwa vs. Sushma ˇGovil,** AIR 1989, Delhi 144, it was contended before this Court that till it is proved that the person who signed the said power of attorney was duly appointed attorney, the court cannot draw a presumption under Section 57 and 85 of the Evidence Act. Repelling the contention, it was held by this Court that the very purpose of drawing presumption under Sections 57 and 85 of the Evidence Act would be nullified if proof is to be had from the foreign country whether a particular person who had attested the document as a Notary Public of that country is in fact a duly appointed Notary or not. When a seal of the Notary is put on the document, Section 57 of the Evidence Act comes into play and a presumption can be raised regarding the genuineness of the seal of the said Notary, meaning thereby that the said document is presumed to have been attested by a competent Notary of that country. In **Punjab National Bank vs. Khajan Singh,** AIR 2004 Punjab and Haryana 282, the Power of Attorney in favour of a bank, which had been duly attested, was rejected by the learned District Judge on the ground that the presumption under Section 85 of Evidence Act was available to a particular class of Power of Attorneys described in the section, which was confined to its execution and authenticity alone. The High Court, however, rejected the view taken by the learned District Judge holding that absence of proof of resolution authorizing the executant to execute the Power of Attorney could not be sustained and a presumption in favour of the attorney would arise under Section 85 Act. Hence, in this case also the Court is required to draw the requisite statutory presumption that the power of attorney Ex. PW-1/10 was executed by plaintiff No.2 in favour of plaintiff No.1 and that the person who executed the Power of Attorney on behalf of plaintiff No. 2 was duly authorized in this behalf.

16. The authenticity of the Power of Attorney Ex. PW-1/10 has been disputed by the defendant on the ground that it has been executive at Rohtak, but attested at New Delhi. I, however, find no merit in the objection. The Stamp Paper for this document was purchased from Delhi as is evident from the stamp of the stamp vendor Reeta Kashyap on the back side of the stamp paper. Plaintiff No. 2 has an office in New Delhi and not in Rohtak. There is a statutory presumption of a valid execution of this document. Therefore, it appears that though at the time this document was typed, the intention could be to get it executed at Rohtak, it was in fact executed at New Delhi as is evident from attestation by Notary Public at New Delhi on 06th March, 1999.

Another important aspect in this regard is that plaintiff No. 2 has not come forward to file any suit against the defendant for recovery of compensation for the loss of the goods which it had booked with the defendant. Letters of Subrogation have also been executed by plaintiff No.2 in favour of plaintiff No. 1. The claim of plaintiff No. 2 has been settled by plaintiff No. 1 by paying a sum of Rs 3106425/- to it. Therefore, there can be no genuine dispute with respect to the authenticity of the Power of Attorney Ex. PW-1/10.

17. The learned counsel for the defendant has referred to the decision of the Supreme Court in **Oberai Forwarding Agency vs. New India Assurance Company Limited,** AIR 2000 Supreme Court, 855 where the Court referred to the following statement in the standard text book on Insurance Law by Mac. Gillivray Parkington (Seventh Edition).

> "1131. Difference between subrogation and assignment permit one party to enjoy the rights of another, but it is well-established that subrogation is not a species of assignment. Rights of subrogation vest by operation of law rather than as the product of express agreement. Whereas rights of subrogation can be enjoyed by the insurer as soon as payment is made, an assignment requires an agreement that the rights of the assured be assigned to the insurer. The insurer cannot require the assured to assign to him his rights against third parties as a condition of payment unless there is a special clause in the policy obliging the assured to do so. This distinction is of some importance, since in certain circumstances an insurer might prefer to take an assignment of an assured's rights rather than rely upon his rights of subrogation.

> If, for example, there was any prospect of the insured being able to recover more than his actual loss from a third party, an insurer, who had taken an assignment of the assured's rights, would be able to recover the extra money for himself whereas an insurer who was confined to rights of subrogation would have to allow the assured to retain the excess.
>
> 1132. Another distinction lies in the procedure of enforcing the rights acquired by virtue of the two doctrines. An insurer exercising rights of subrogation against third parties must do so in the name of the assured. An insurer who has taken a legal assignment of his assured's rights under statute should proceed in his own name.."

18. The learned counsel has also referred to **Gujarath Andhra Road Carriers Transport Contractors and ors. vs. United India Insurance Company Ltd.** AIR 2006, Andhra ˇPradesh, 401 where the aforesaid statement in the book by Mac Gillivray Parkington was extracted.

These judgments are of no help to the defendant since the insured has also been joined as plaintiff No.2 in the suit, though the Letters of Subrogation executed by plaintiff No. 2 in favour of plaintiff No. 1 also stipulate assignment and transfer of the actionable rights, title and interest of plaintiff No.2 to plaintiff No.1. However, the legal proposition in this regard has recently been settled as under by a Constitution Bench of Supreme Court in **Economic Transport Organization vs. Charan Spinning Mills Private Limited and Anr.** (2010) 4 SCC 114

> "(a) The insurer, as subrogee, can file a complaint under the Act either in the name of the assured (as his attorney-holder) or in the joint names of the assured and the insurer for recovery of the amount due from the service provider. The insurer may also request the assured to sue the wrong doer (service provider).
>
> (b) Even if the letter of subrogation executed by the assured in favour of the insurer contains in addition to the words of subrogation, any words of assignment, the complaint would be maintainable so long as the complaint is in the name of ˇ the assured and insurer figures in the complaint only as an attorney holder or subrogee of the assured.

(c) The insurer cannot in its own name maintain a complaint before a consumer forum under the Act, even if its right is traced to the terms of a Letter of subrogation-cum-assignment executed by the assured.

(d) Oberai is not good law insofar as it construes a Letter of Subrogation-cum-assignment, as a pure and simple assignment. But to the extent it holds that an insurer alone cannot file a complaint under the Act, the decision is correct."

19. The learned counsel for the defendant has also referred to the decision of Supreme Court in **S.P. Chengalvaraya Naidu (dead) by L.Rs. vs. Jagannath (dead) by L.Rs., and others,** AIR 1994 Supreme Court 853 where it was held that if the litigants withhold vital documents relevant to the litigation, it amounts to fraud on the Court since one who comes to the Court must come with clean hands. This judgment does not advance the case of the defendant for the simple reason that the plaintiffs have not withheld any vital document from the Court, and no forged document is shown to have been filed by them.

20. Though no officer/official of plaintiff No.2 has been produced in the witness box to prove the value of the goods which were booked by plaintiff No.2 with the defendant, that, to my mind, would not be material in the facts and circumstances of this case. In the written statement, the defendant did not dispute the amount of Rs 3106425/- alleged to have been paid by plaintiff No.1 to Plaintiff No. 2 though there was a specific averment in this regard in para 8 of the plaint. This is not the case of the defendant, anywhere in the written statement, that plaintiff No.1 did not pay any amount to plaintiff No.2 or that it had paid an amount less than Rs 3106425/- to it. This was also not the case of the defendant in the written statement that the value of the goods booked with it was less than Rs 3106425/- and that plaintiff No. 1 had made excess payment to plaintiff No.2. That appears to be the reason why no issue was framed by the Court on this aspect of the matter. The plaintiffs have placed on record the receipt executed by plaintiff No.2 in favour of plaintiff No. 1 while receiving the aforesaid amount. In para 9 of his affidavit, Shri A.K. Goel specifically stated that plaintiff No. 2 has suffered a loss of Rs 3106425/- on account of loss of consignment. During his cross-examination, it was not suggested to him that this loss suffered by plaintiff No.2, on account of loss of the consignment, was less than the

aforesaid amount. Mr. A.K. Goel also stated in para 10 of his affidavit that on claim being preferred with it by plaintiff No.2, it had deputed M/s Investigators Legal Advisors and Surveyors to investigate in the matter and after investigation, the surveyors had confirmed the loss vide report Ex. PW-1/5. This is not the case of the defendant that no surveyor was appointed by plaintiff No.1, to assess the loss sustained by plaintiff No.2. Mr Mukesh Kumar, who came in the witness box as DW-1, also did not claim that the value of the goods lost by the defendant was less that the amount paid by plaintiff No. 1 to plaintiff No.2. In these circumstances, I hold that the plaintiff No. 1is entitled to recover the amount of Rs 3106425/- from the defendant. The issues are decided against the defendant.

ORDER

21. In view of my findings on the issues, a decree of Rs 3106425/- with costs is passed in favour of plaintiff No.1 and against the defendant. Plaintiff No. 1 shall also be entitled to pendente lite and future interest at the rate of 9% per annum. Decree sheet be prepared accordingly.

ILR (2011) I DELHI 822
RSA

UNION OF INDIA & ANOTHER ....APPELLANTS

VERSUS

RAMESH CHAND ....RESPONDENT

(INDERMEET KAUR, J.)

RSA NO. : 49/2002 DATE OF DECISION: 23.11.2010
CM 148/02 & CM 149/02

Code of Civil Procedure, 1908—Section 100—Aggrieved appellants preferred appeal against judgment and decree whereby suit of Respondent decreed—Respondent faced departmental enquiry, and

charges proved against him in enquiry proceedings—Respondent filed suit seeking declaration alleging violation of principles of natural justice during Enquiry—Suit dismissed but subsequently in appeal decreed—As per appellants, Civil Court cannot reappreciate evidence led before Enquiry Officer and sit in appeal over enquiry proceedings—Held—Enquiry proceedings do not have to strictly abide by strict rules of evidence; enquiry has to be seen to have been held; the question of the adequacy or reliability of the evidence, however, cannot be convassed—The court or the Tribunal has no power to trench on the jurisdiction to appreciate the evidence and to arrive at its own conclusion—Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It is meant to ensure that the delinquent receives fair treatment and not to ensure that the conclusion which the Authority reaches is necessarily correct in the view of the Court or Tribunal—Suit of Respondent correctly dismissed.

Impugned judgment has unnecessarily interfered with the said findings; it was arbitrary and unfair. The impugned judgment has travelled much beyond its domain; it was not within the domain of the Appellate Court to re-appreciate and re-examine the testimony of each and every word and sentence spoken by each witness and then come to a conclusion by choosing to pick words and phrases from here and there; testimony of the witnesses has to be read as a whole. **(Para 11)**

Important Issue Involved: The Court or the Tribunal has no power to trench on the jurisdiction to appreciate the evidence and to arrive at its own conclusion—Judicial review is not an appeal from a decision but a review of the manner in which the decision is made—It is meant to ensure that the delinquent receives fair treatment and not to ensure that the conclusion which the Authority reaches is necessarily correct in the view of the Court or Tribunal.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANTs : Mr. Girish Pande & Mr. Ravinder Agarwal, Advocates.

FOR THE RESPONDENT : Mr. G.D. Gupta Senior Advocate with Mr. H.S. Dahiya, Advocate.

CASES REFERRED TO:

1. *Man Singh* vs. *State of Haryana & Ors.* (2008) 12 SCC 331.
2. *Kuldeep Singh* vs. *Commissioner of Police & Ors.* (1999) 2 SCC 10.
3. *Yoginath D. Bagde* vs. *State of Maharashtra & Anr*. AIR 1999 SC 3734.
4. *Govt. & Ors.* vs. *C. Shanmugam* (1998) 2 SCC 394.
5. *Government of Tamil Nadu & Anr.* vs. *A. Rajapandian* AIR 1995 SC 561.

RESULT: Appeal allowed.

INDERMEET KAUR, J. (Oral)

1. This appeal is directed against the impugned judgment and decree dated 15.02.2001 which had set aside the judgment and decree of the Trial Judge dated 20.2.1993. Vide judgment and decree dated 20.2.1993 the suit of the plaintiff Ramesh Chand seeking a declaration was dismissed. The impugned judgment had decreed the suit of the respondent/plaintiff.

2. The facts are as under:

i. Plaintiff was appointed as a security guard in the Central Industrial Security Force, Ministry of Home Affairs (hereinafter referred to as the "CISF"). In October, 1980 he was served with a charge sheet which contained the following charge: "Grave misconduct and gross indiscipline in that no.7637327 SG Ramesh Chand alongwith many other members of the Force wrongfully confined the Commandant CISF Unit MAMG Durgapur in order to wrongfully force the Commandant to withdraw the suspension

orders on three members of the Force belonging to CISF MAMG Durgapur."

ii. Mr. Charanjit Singh was appointed as an Enquiry Officer. Four witnesses were examined on behalf of the prosecution which include the Commandant MAMG Udey Veer, the Assistant Commandant P.K.Lehri, Stenographer T.K.Mondal and SI K.K.Niranjan. The testimony of the aforenoted witnesses was examined by the Trial Judge. It was held that the plaintiff along with other members of the unit had illegally confined the Commandant.

iii. Charges levelled and proved in the enquiry proceedings were endorsed. It was held that there has been no violation of the principles of natural justice; charge sheet has been furnished to the delinquent official who had been granted sufficient opportunity to cross-examine the witnesses of the prosecution.

iv. The impugned judgment had set aside these findings. The relevant extract in the impugned judgment reads as follows:

> "7. I have gone through the material available on record especially the statement of PWs. First of all, in the statement of Sh.Uday Veer Singh, PW1 who was the complainant in this case, has stated before the enquiry officer that on 26/5/1980 he placed three members of CISF Unit under suspension and when on 27/5/80, he went to his office about 10 a.m. and when he was discussing with Sh.N.G.Dutta and P.K.Lahri; about 10 members of the force came to his chamber and forced to withdraw the suspension order, passed by him, against the three members of the force, on the previous day. He has also stated that he did not recognized most of them and he ordered Sh.K.K.Niranjan to make a list of the persons who have participated in wrongful confinement. In his cross-examination his witness was asked whether the appellant was present in his room to which he could not reply with certainty and he answered that most probably appellant had come in the room and he did not remember distinctly whether he was present or not. In another

question in his cross-examination, this witness has stated that he knew the appellant. To my mind, when a person knows the other person, it is not possible that he was not able to recognize the person who had come in his room. Hence, on the basis of this evidence, it is not proper to say that appellant was present at the time of occurrence.

8. PW-2 Sh.P.K.Lahri has stated that on 27/5/80, he alongwith Sh.N.G.Datta Gupta was sitting in the office of Sh.Uday Veer Singh and were discussing when security guard S.K.Bera, S.N.Bhuyan, R.A.Khan, Ramesh Chand alongwith 25 to 30 personnels; S.Krishnan, A.L.Jeorge, C.R.Purohit, S.C.Singh rushed inside the office of Sh.Uday Veer Singh shouting slogans but the statement of this witness cannot be relied upon because of the reason that he was not the witness who have been mentioned in the list of witnesses prepared at the time of framing the charge. Moreover, his statement is not corroborated by Sh.T.K.Mandal, Pw-3 in the enquiry and Sh.K.K.Niranjan PW-4.

9. PW-3 Sh.P.K.Mandal has not mentioned the name of the appellant who had entered into the room of the Commandant at the time of occurrence. He has stated that S.C.Singh, S.D.Pandey, S.Rama Kumar, A.L.Jeorge and R.A.Khan and C.R.Purohit had entered in the chamber. In the cross-examination, this witness has specifically denied that he has not seen the appellant personally. When this witness was further asked in cross-examination whether he has seen this witness doing anything as an active participation in the Gherao? Then he again replied in the negative.

10. Coming to the examination of PW4, S.I., K.K.Niranjan; he has also stated that S.C.Singh, Niranjan Singh, Ramakrishnan, A.N.Malik. C.R.Purohit and A.L.Jeorge had entered in the Commandant's office. This witness has not even stated in his examination in chief that present appellant was present amongst the persons who ˇ have entered the Commandant's office. In his cross-examination he had

said that he had seen the appellant outside the office alongwith other participants of Gherao. He has further stated that appellant was not doing anything and was simply present and was not doing any active part.

11. It has come in the evidence that some list was prepared though it has never been brought on record. PW4 has stated that he has prepared the list of personnels who have participated in the Gherao. He has further stated that he has prepared the list and handed over the same to the Commandant. The said list was never produced in the evidence for the reasons best known to the respondent, the said list could have been the best piece of evidence to show that the appellant was present on the spot and that his name was mentioned in the list. In the absence of producing that list it can be presumed that even the name of the appellant was not mentioned in the said list. In the cross-examination, the witness was asked the question that can you produce any documentary proof regarding general diary, special report, a copy of the list of participants in Gherao; to which his answer was no. However, Ld.Civil Judge has wrongly observed at page 10 of the judgment that "During the course of enquiry, no question was asked by the appellant/plaintiff either from PW1 or PW4 regarding as to why such list was not produced despite the fact that he was given the opportunity to cross-examine the witness". Hence, it cannot be said that no question regarding producing of the list was not asked by the appellant. The PWs could not produce the list despite the fact that they were asked about the same rather PW Niranjan Singh has even mentioned in his examination in chief that he has handed over the said list to the Commandant. It was for the respondent to produce that list to show the presence of the appellant. An adverse inference is drawn against the respondent for non-producing the said list. About the presence of the appellant PW-3 has stated that he did not see these personnels personally, but he came to know from the list submitted to commandant. Considering the statement of this PW, the list becomes all the more important. It is also pertinent to mention here that this witness has not seen the appellant on the spot personally.

12. The enquiry officer has not properly appreciated the evidence, though he has mentioned in his ˇ report that PWs have not seen the appellant in the chamber and PW-1 could not distinctly recognize him as the member of the Gherao, yet enquiry officer has not given any reason of discarding the testimony of the witnesses who have clearly stated that the appellant was not present and has given perverse finding. There is no other circumstantial evidence on record to show the presence of the appellant at the spot. Enquiry officer has wrongly reached to the conclusion that the deposition of PWs and circumstantial evidence on the record proves beyond doubt, that security guard number 7637327, Ramesh Chand took a leading part alongwith other CISF personnels and wrongly confined complainant Uday Veer Singh, I.P.S. Commandant. The enquiry officer, without any evidence on record, had mentioned in its enquiry report that it has been clearly established by the corroborated statement of the PWs that delinquent security guard Ramesh Chand was one of the active participants and took a leading role in the above said Gherao.

13. Now coming to the sub-rule 9 of Rule 34 of Central Industrial Security Force Act, 1968, it says that disciplinary authority shall, if it is not an enquiring authority, referred to above, considered the record of enquiry and record its finding on each charge. In the present case, the disciplinary authority, who was commandant in this case, has passed one line order saying "whereas the charge is proved by the enquiry officer beyond doubt." It is pertinent to mention here that disciplinary authority shall have considered the record and evidence recorded in the inquiry independently and should have recorded its finding whereas from the perusal of the order dated 28/11/81, it is revealed that the

said order was passed mechanically without applying its mind and it is a non-speaking order. Even Hon'ble Karnataka High Court in case, namely, **B.K. Appaiah Vs. Union of India and others,** 1999 LAB. I.C. 2287 has held that Section 34 of the Central Industrial Security Force Act should be strictly complied with. The dismissal of the delinquent officer was quashed in that case.

14. In another recent judgment reported as Joginder Nath Bagdae Vs State of Maharashtra and others, Hon'ble Supreme Court has observed that though the court cannot sit in appeal over the findings recorded by the disciplinary authority or enquiry officer in the departmental enquiry, yet, it does not mean that in no circumstances can the court interfere with the order. It was further observed that court can interfere with the findings recorded if there was no evidence in support of the findings or the findings recorded were such as could not have been reached by an ordinary prudent man or the findings were perverse.

15. Now looking to the case in hand the enquiry officer has recorded its findings which are totally perverse and there is no evidence in support of the findings. No PW has clearly stated that the appellant was present at the time of occurrence or he was participating in the Gherao. Even complainant PW-1 could not identify him as the member of the personnels who had come and Gherao him inside his chamber. Basing on this evidence, the findings against the appellant would not be justified at all. Therefore, the impugned order dated 28/2/1993 is liable to be set aside. I, therefore, set aside the order dated 28/2/93 dismissing the suit of the appellant passed by commandant and the order of the appellate authority dated 21/7/1982. The appellant be treated in service. He shall also be entitled to all the consequential reliefs with cost throughout."

3. This is the second appellate Court. After the appeal was admitted the following substantial question of law was formulated. It reads as follows:

"Whether the Civil Court can sit in review over disciplinary

proceedings and re-appreciate the material on record to come to an independent conclusion." The question of limitation was also left open to be decided along with the appeal.

4. CM No.148/2002 (u/S 5 of Limitation Act)

Before adverting to the merits of the case, it is necessary to deal with the application seeking condonation of delay. The delay is of one or two days as has been specified in the para 4 of the application. The reason stated is because the departmental enquiry records were misplaced and untraceable, the movement of the file could not take place in the department; it took considerable time in tracing out the records. This is the reason given for the delay of one or two days as has been mentioned therein. The application has been supported by the affidavit of Pratap Singh , Assistant Inspector General, CISF.

Reply to the said application has been perused.

The reply is merely on the merits of the controversy between the parties and has not answered the averments and the reasons given for the delay in preferring this appeal belatedly.

Be that at it may, in view of the explanation given by the department and the delay being minimal i.e. one or two days only, in the interest of justice and to advance substantial justice and to rule out technicalities, the delay of two days in filing the appeal is condoned. Application is disposed of.

5. Arguments have been addressed on the merits of the case. On behalf of the appellant, it has been urged that this Court cannot sit in appeal and cannot re-appreciate evidence which has been led before the enquiry officer. This is not within the domain of Civil Court. Counsel for the appellant has placed reliance upon a judgment reported in AIR 1995 SC 561 **Government of Tamil Nadu & Anr. Vs. A. Rajapandian.** to support this submission. It is pointed out that the standard of proof required in a disciplinary proceedings which is not criminal proceedings is only of preponderance of probabilities and not proof beyond doubt. For the same proposition reliance has also been placed upon (1998) 2 SCC 394 Commissioner and Secretary to the **Govt. & Ors. Vs. C.Shanmugam.** It is pointed out that the technical rules of evidence have no application to disciplinary proceedings; judicial review is not an

appeal from a decision of the Tribunal; it is only meant to ensure that the delinquent official has received a fair treatment and not to ensure that the conclusion which the authority has reached is necessarily correct in the view of the Court.

6. Arguments have been countered by the learned counsel for the respondent. It is pointed out that the impugned judgment suffers from no infirmity. Wherever the findings in the enquiry proceedings are perverse the same can be set aside by a Court of competent jurisdiction and this has been held by Supreme Court time and again. Reliance has been placed upon (1999) 2 SCC 10 **Kuldeep Singh Vs. Commissioner of Police & Ors.** to substantiate this submission. For the same proposition reliance has also been placed upon AIR 1999 SC 3734 **Yoginath D. Bagde Vs. State of Maharashtra & Anr.** Reliance has also been placed upon (2008) 12 SCC 331 **Man Singh Vs. State of Haryana & Ors.** It is pointed out that the Supreme Court has time and again reiterated that wherever the State action, whether legislative, quasi-judicial or administrative is arbitrary or unfair, it can become the subject matter of a judicial review as it is opposed to the concept of fairness which in turn is a facet of equality and against the principles enshrined in the Article 14 of the Constitution.

7. Record has been perused.

8. PW-1 is Udey Veer, the complainant. He has deposed about the entire incident; i.e. a gherao as been taken place and he has been wrongly confined by various members of his unit; he has deposed that he was new in the unit at that time; he does not recognize most the miscreants. To a specific question put to him he had stated that he does not remember distinctly whether the delinquent Ramesh Chand was present at the spot or not. PW-2 P.K.Lehri, Assistant Commandant is the person who had also been confined along with PW-1 in the room. His evidence is incriminating; he has categorically stated that at that time on 27.5.1980 between 1030 hours and 1040 hours when he was sitting in the office with the Commandant Udey Veer SG S.K.Bera, SG SN Bhuyam, SG R.A. Khan and SG Ramesh Chand along with 25 to 30 CISF personnel of whom most were wearing CISF uniform had rushed inside the office of PW-1 shouting slogans; the office was jam packed and they were perspiring; he categorically stated in his cross-examination that Ramesh

Chand was present and he had had a good opportunity to see him. PW-3 T.K.Mondal in his cross-examination has stated that he did not see the delinquent person at that time. PW-4 has deposed that various persons were present at the spot but he did not name Ramesh Chand; he has stated that he had prepared the list of persons at the spot on the asking of PW-1; admittedly that list had not been produced. In his cross-examination, he has stated that he had seen the delinquent i.e. Ramesh Chand along with other participants in the gherao; he was in the hall.

9. The vehement contention of the learned counsel for the respondent that this is a case of no evidence and the enquiry officer holding the delinquent guilty is a perverse finding, is misunderstood. The law is well settled. Enquiry proceedings do not have to strictly abide by the strict rules of evidence; enquiry has to be seen to have been held; the question of the adequacy or reliability of the evidence, however, cannot be canvassed. This has been held by Supreme Court in the case of **Government of Tamil Nadu & Anr.** (supra). In **Commissioner and Secretary to the Govt.** (supra) the Supreme Court had posed a question to itself:

> "Whether the Tribunal was right in its conclusion to appreciate the evidence and to reach its own finding that the charge has not been proved?"

The answer was in the negative. The relevant extract of the finding of the Supreme Court in this context reads as follows:

> "The Tribunal is not a court of appeal. The power of judicial review of the High Court under Article 226 of the Constitution of India was taken away by the power under Article 323-A and invested the same in the Tribunal by the Central Administrative Tribunals Act. It is settled law that the Tribunal has only power of judicial review of the administrative action of the appellant on complaints relating to service conditions of employees. It is the exclusive domain of the disciplinary authority to consider the evidence on record and to record findings whether the charge has been proved or not. It is equally settled law that technical rules of evidence have no application for the disciplinary proceedings and the authority is to consider the material on record. In judicial review, it is settled law that the Court or the

Tribunal has no power to trench on the jurisdiction to appreciate the evidence and to arrive at its own conclusion. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It is meant to ensure that the delinquent receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the view of the Court or Tribunal. When the conclusion reached by the authority is based on evidence, Tribunal is devoid of power to re appreciate the evidence and would (sic) come to its own conclusions on the proof of the charge. The only consideration the Court/Tribunal has in its judicial review is to consider whether the conclusion is based on no evidence on record and supports the finding or whether the conclusion is based on evidence."

10. It is in this background that the evidence adduced before the enquiry officer has to be adjudged. There is no doubt that PW-1 has not strictly identified the delinquent at the spot; he being new, he was not sure about his presence at the spot. PW-3 has not named him; PW4 has stated that Ramesh Chand was present in the gherao in the hall. The argument of the appellant that the gherao had taken place in the room and not in the hall, is a mis-appreciated argument; PW-3 in the later part of his version clearly stated that he had seen Ramesh Chand at the time of the gherao. PW-4 had made a list of the persons present in the gherao but this list was not produced. This does not mar the otherwise cogent oral versions of the other PWs including PW-2. PW-2 has stuck to his stand; he was also victim along with PW-1.

11. This is not a case of no evidence. Enquiry officer has adjudged the evidence and arrived at a finding which was well reasoned. Impugned judgment has unnecessarily interfered with the said findings; it was arbitrary and unfair. The impugned judgment has travelled much beyond its domain; it was not within the domain of the Appellate Court to re-appreciate and re-examine the testimony of each and every word and sentence spoken by each witness and then come to a conclusion by choosing to pick words and phrases from here and there; testimony of the witnesses has to be read as a whole. Even if PW-2 was not cited in the original list of witnesses, yet it is not disputed before this Court that he i.e. PW-2 was a victim along with PW-1 and was an eyewitness. His

testimony was not assailed.

12. There is also no violation of the provisions of Section 34(9) of the Central Industrial Security Force Act, 1968 (hereinafter referred to as "the Act"); it reads as follows.

"(9) The disciplinary authority shall, if it is not the Inquiring Authority referred to above, consider the record of the inquiry and record its finding on each charge."

13. The order of the Disciplinary Authority reads as follows:

"No.7637327 Security Guard Ramesh Chand of CISF Unit MAPP, Kalpakkam was charged under Rule 34 of CISF Rules, 1969 for grave misconduct and gross indiscipline in that he alongwith many other members of the Force wrongfully confined the ˇCommandant, CISF Unit, MAMC, Asstt. Commandant, MAMC and Asstt. Commandant, BOGL on 27-5-80 in the office chamber of the Commandant, CISF Unit, MAMC, Durgapur in order to wrongfully force the Commandant to withdraw the suspension orders on three members of the Force belonging to CISF Unit, MAMC, Durgapur.

He acknowledged receipt of the charge memo on 31-10-80 and submitted explanation on 28-11-80 in which he denied the charge. Hence Inspector Charanjit Singh of CISF was appointed as Enquiry Officer on 20th Nov'80 to enquire into the charge framed against SG Ramesh Chand. After careful examination of four prosecution witnesses the Enquiry Officer held Ramesh Chand guilty of the charge and submitted the enquiry proceedings to the undersigned on 24th Sept.'81. Therefore, a show cause notice proposing the punishment of dismissal from service was served to SG Ramesh Chand on 3-10-81 alongwith a copy of the minutes of Enquiry Officer. SG Ramesh Chand submitted further representation on 9-10-81 on the proposed punishment. In the further representation he has not brought out any fresh points for consideration. He stated that he did not take part in the above wrongful confinement and he was the Jeep Driver of Asstt. Commandant. CISF, MAMC, Durgapur, whereas the charge is proved by the Enquiry Officer beyond doubt.

In an uniformed force like CISF the action of the delinquent in joining with other members and wrongfully confining superior officers like Commandant and Asstt. Commandants and wrongfully forcing the Commandant to do a wrong thing like withdrawing suspension orders of some ones under duress is a very serious misdemeanor and such a person can have no place in this organization. I, therefore, considered him not fit to be retained in a disciplined Force like CISF. The proposed punishment is hereby confirmed and No.7637327 Security Guard Ramesh Change is dismissed from service with effect from the date of service of this order."

It is dated 28.11.1981. The Disciplinary Authority had examined the allegations levelled against delinquent official and after going through the record had returned a finding endorsing the order of the Enquiry Officer. There is no perversity and no violation of the aforenoted Rule.

14. This is a fit case where the appeal has to be allowed. The impugned judgment is set aside. Suit of the plaintiff Ramesh Chand is dismissed.

ILR (2011) I DELHI 835
W.P.(C)

UNION OF INDIA ORS. ....PETITIONER

VERSUS

V PITCHANDI ....RESPONDENT

(PRADEEP NANDRAJOG & SIDDHARTH MRIDUL, JJ.)

W.P. (C) NO. : 5562/2010 DATE OF DECISION: 02.12.2010

Service Law—Benchmark prescribed for promotion to post of under Secretary was 'Good' till 01.06.2008 when it was enhanced to 'Very Good'—Respondent denied promotion in view of enhanced benchmark—Administrative Tribunal held that enhanced benchmark would be applicable from date of decision—Decision pertaining to enhanced benchmark cannot be made applicable to ACRs that came into existence prior to said date—Petitioner directed to hold review DPC to reconsider case of respondent for promotion—Order challenges in High Court—Plea taken, Tribunal ignored distinction between interest in promotion and right in promotion—In service jurisprudence, concepts of legitimate expectations and contract have no role—Status of Govt. servant is subject to such rules as may be framed by Govt. from time to time—Held—Higher benchmark has to apply prospectively would mean only previous DPCs cannot be reviewed—Executive has right to revise pending instructions relating to guidelines on issue of benchmark—When a benchmark is enhanced it is bound to have retroactive operation as preceding five years ACRs have to be considered—Retroactivity and restropectivity are different concepts—Tribunal is wrong in directing that notwithstanding benchmark being enhanced and DPC being convened after date when enhanced benchmark was notified, department has to consider entitlement of respondent with reference to lower benchmark—Directions passed to convey below benchmark ACR grading for year 2003-04 till 2007-08 to respondent who would have a right to file a representation which will be considered and disposed of within three weeks—If ACR gradings are enhanced, a review DPC shall be constituted within six weeks thereafter.

Important Issue Involved: Executive has right to revise the pending instructions relating to guidelines on the issue of benchmark. When a benchmark is enhanced it is bound to have a retroactive operation for the simple reason the preceding five years ACRs have to be considered.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Ms. Indira Jaising, ASG with Mr. Satyakam, Ms. Samridhi Sinha and Mr. A.K. Bhardwaj, Advocates.

FOR THE RESPONDENT : Mr. Padma Kumar S., Advocates.

CASES REFERRED TO:

1. *C.K. Sinha* vs. *UOI. W.P.*(C) 6211/2010.
2. *Dev Dutt* vs. *UOI & Ors.* 2008(8) SCC 725.
3. *U.P. Jal Nigam* vs. *Prabhat Chandra Jain* 1996 (2) SCC 363.
4. *Roshan Lal* vs. *UOI* AIR 1967 SC 1889.

RESULT: Disposed of.

PRADEEP NANDRAJOG, J. (Oral)

1. A search on the internet would reveal that two decisions of the Supreme Court have proved to be a lawyers, delight and a Judges, despair. They are the decisions in Adalat Prasad's case pertaining to the power of a Magistrate to recall a summon of appearance and the second is the decision in **Dev Dutt's** case. The two decisions have generated enormous litigation, to the happiness of the lawyers and the despair of the Judges.

2. Instant writ petition concerns the applicability of law declared by the Supreme Court in the decision reported as **Dev Dutt vs. UOI & Ors.** 2008(8) SCC 725.

3. The concept of an ACR grading which was adverse to the employee concerned; adverse being as understood in common parlance was held to be of a kind which requires the same to be communicated to the employee concerned with a right to make a representation and the representation to be decided. This was the law declared by the Supreme Court in the decision reported as 1996 (2) SCC 363 **U.P. Jal Nigam vs. Prabhat Chandra Jain.** What happens if the ACR grading is not adverse as understood in common English language but has an adverse consequence on the promotion of the Government Servant concerned with reference

to the benchmark. For example, if the benchmark is 'Very Good' and an employee is graded 'Good'; notwithstanding the grade 'Good' would not be adverse in English language, but with reference to the benchmark to be achieved, the ACR grading 'Good' would certainly have an adverse impact.

4. In **Dev Dutt's** case (supra), the Supreme Court held that the law declared in **UP Jal Nigam's** case needs to be expanded in harmony with the growth of law where principles of natural justice were expanded. Noting that the concept of natural justice has an expanding content and is not stagnant, the Supreme Court observed in Para 37 of the decision in **Dev Dutt's** case, as under:-

> "37. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the authority concerned, and the authority concerned must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible."

5. Final directions issued by the Supreme Court were as in para 43 and 44. The same reads as under:-

> "43. We are informed that the appellant has already retired from service. However, if his representation for upgradation of the "Good" entry is allowed, he may benefit in his pension and get some arrears. Hence we direct that the "good" entry of 1993-1994 be communicated to the appellant forthwith and he should be permitted to make a representation against the same praying for its upgradation. If the upgradation is allowed, the appellant should be considered forthwith for promotion as Superintending Engineer retrospectively and if he is promoted he will get the

benefit of higher pension and the balance of arrears of pay along with 8% per annum interest.

44. We, therefore, direct that the "good" entry be communicated to the appellant within a period of two months from the date of receipt of the copy of this judgment. On being communicated, the appellant may make the representation, if he so chooses, against the said entry within two months thereafter and the said representation will be decided within two months thereafter. If his entry is upgraded the appellant shall be considered for promotion retrospectively by the Departmental Promotion Committee (DPC) within three months thereafter and if the appellant gets selected for promotion retrospectively, he should be given higher pension with arrears of pay and interest @8% per annum till the date of payment."

6. Reverting to the facts of the instant case, it may be noted that the DPC pertaining to consideration of persons holding post of Senior Field Officer (Telecommunication) to be promoted as Under Secretary considered respondent's ACR gradings for the years 2003-04 till the year 2007-08 i.e. the preceding 5 years. ACR. Promotion order was issued on 23.06.2009. Respondent did not find his name in the promotion list.

7. Indisputably, for the promotion to the post of Under Secretary, benchmark prescribed was 'Good' till 01.06.2008 and only with effect from 02.06.2008 the benchmark was enhanced to 'Very Good'.

8. Marching to the Central Administrative Tribunal with the grievance that he was denied a promotion on unjustifiable grounds, respondent met with success when, vide order dated 12.04.2010, the Tribunal allowed OA No.3763/2009 filed by the respondent. The reasoning of the Tribunal is to be found in para 4 of the impugned order, where after noting the law declared by the Supreme Court in **Dev Dutt's** case (supra) and the fact that till 01.06.2008 benchmark for promotion was 'Good' and only on 02.06.2008 the benchmark was enhanced to 'Very Good', the Tribunal held that in its considered view the same would be applicable from the date the decision was taken i.e. the enhanced benchmark would be applicable from the date of the decision.

9. Of course, the Tribunal is correct that the higher benchmark has to be applied prospectively but this would only mean that based on the office order dated 02.06.2008 previous DPCs cannot be reviewed. However, the problem lies in the next conclusion drawn by the Tribunal where the Tribunal has held that the decision pertaining to the enhanced benchmark cannot be made applicable to ACRs that may have come into existence prior to the said date. The Tribunal has thereafter held that law being that below benchmark entry is required to be conveyed to the employees with a right to file a representation and such ACRs which were not adverse and were upto the benchmark for promotion, will be automatically adverse if the decision taken in 2008 is to relate to the earlier ACRs, and thus this would be impermissible. As a result of so holding in para 4 of the impugned decision, the Tribunal has directed that review DPC be held to reconsider the case of the respondent for promotion in light of the observations made by the Tribunal.

10. It is apparent that the observations of the Tribunal would require that review DPC to consider the record of the respondent with reference to the benchmark 'Good'.

11. It is urged by learned Additional Solicitor General that the Tribunal has ignored the well settled distinction in service jurisprudence between an interest in promotion and the right in promotion. Learned Additional Solicitor General urges that in service jurisprudence concepts of legitimate expectations and contract have no role. Once a Government Servant enters into service the same becomes a matter of status and his status would be subject to such rules which may be framed by the Government from time to time pertaining to the service urges the learned Additional Solicitor General.

12. The submission urged is well merited and for which we may note the decision of the Supreme Court reported as AIR 1967 SC 1889 **Roshan Lal vs. UOI** wherein in para 6 the Supreme Court had observed as under:-

"6. We pass on to consider the next contention of the petitioner that there was a contractual right as regards the condition of service applicable to the petitioner at the time he entered Grade

'D' and the condition of services could not be altered to his disadvantage afterwards by the notification issued by the Railway Board. It was said that the order of the Railway Board dated January 25, 1958, Annexure 'B', laid down that promotion to Grade 'C' from Grade 'D' was to be based on seniority-cum-suitability and this condition of service was contractual and could not be altered thereafter to the prejudice of the petitioner. In our opinion, there is no warrant for this argument. It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of a status than of contract. The hallmark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emolument of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee. It is true that Article 311 imposes constitutional restrictions upon the power of removal granted to the President and the Governor of India under Article 310. But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties society has an interest. In the language of jurisprudence status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned. The matter is clearly stated by Salmond and Williams on Contracts as follows:-

> 'So we may find both contractual and status-obligations produced by the same transaction. The one transaction may result in the creation not only of obligations defined by the parties and so pertaining to the sphere of contract but also and concurrently of obligation defined by the law itself, and so pertaining to the sphere of status. A contract of service between employer and employee, while for the most part pertaining exclusively to the sphere of contract, pertains also to that of status so far as the law itself has seen fit to attach to this relation compulsory incidents, such as liability to pay compensation for accidents. The extent to which the law is content to leave matters within the domain of contract to be determined by the exercise of the autonomous authority of the parties themselves, or thinks fit to bring the matter within the sphere of status by authoritatively determining for itself the contents of the relationship, is a matter depending on considerations of public policy. In such contracts as those of service the tendency in modern times is to withdraw the matter more and more from the domain of contract into that of status.'
>
> (Salmond and Williams on Contracts, 2nd Edition, p.12)"

13. With respect to the distinction between a right to promotion and an interest in promotion we may refer to a decision penned by this Bench being the decision dated 12.11.2010 in W.P.(C) 6211/2010 **C.K. Sinha vs. UOI.** in which decision in para 47 and 48 it was observed as under:-

> "47. Suffice would it be to state that it is within the domain of the executive to prescribe benchmarks. An introduction of a higher benchmark, by amending the existing policy guidelines, would not be a case where the interest in promotion is being affected. Nobody has a vested right to a promotion. The only vested right is to a fair consideration to be promoted. Illustratively, we may note that pertaining to seniority positions, since they affect promotion, issues of seniority have always been interpreted as akin to interest in promotion. Right to earn a promotion with reference to higher or lower benchmark is always treated as akin to abolishing promotional posts or merger of cadres i.e. affecting the right/chance to be promoted.

48. Thus, it cannot be said that the executive had no right to prescribe higher benchmark or that by a sudden lifting of the benchmark for promotion, a vested right of any candidate has been affected."

14. None can deny the right to the executive to revise the pending instructions relating to guidelines on the issue of benchmark. With higher salaries being paid to Government Servants after implementation of the 6th Central Pay Commission, we see no reason to deny the Government the right to enhance the benchmark and require better quality of service from the Government servants.

15. Needless to state when a benchmark is enhanced it is bound to have a retroactive operation for the simple reason the preceding 5 year ACRs have to be considered. Now, retroactivity and retrospectivity are different concepts. Thus, the Tribunal is completely wrong in directing that notwithstanding the benchmark being enhanced and DPC being convened after the date when the enhanced benchmark was notified, the department has to consider the entitlement of the respondent with reference to the lower benchmark.

16. The writ petition is accordingly disposed of modifying the directions issued by the Tribunal and we dispose of the petition by issuing directions in harmony with the one which was issued by the Supreme Court in **Dev Dutt's** case.

17. The writ petition as also OA No.376/2009 stands disposed of with a direction that within two weeks from today below benchmark ACR gradings for the year 2003-04 till 2007-08 shall be conveyed to the respondent who would have a right to file a representation within two weeks thereafter. The representation shall be considered within 3 weeks and disposed of. If ACR gradings are enhanced a review DPC shall be constituted within 6 weeks thereafter and if found fit for promotion consequence shall flow in terms of the directions issued by the Supreme Court as per para 43 of the decision in **Dev Dutt's** case save and except no interest would be paid on arrears to be paid. Needless to state if the representation is rejected no review DPC would be held but in said circumstance the decision taken shall be conveyed to the respondent. Needless to state the representation shall be considered by an authority

as contemplated in paragraph 37 of the decision in **Dev Dutt's** case.

18. No costs.

19. Dasti.

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(Containing cases determined by the High Court of Delhi)

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HIGH COURT OF DELHI: NEW DELHI

NOTIFICATION

Delhi, the 25th January, 2011

No.F. 6/74/2010-Judl./-In exercise of the powers conferred by sub-section (2) of the section 23 of the Family Courts Act, 1984 (66 of 1984) read with the Government of India, Ministry of Home Affairs Notification No. U-11030/4/85-UTI dated the 26th November, 1985, the Lt. Governor of the National Capital Territory of Delhi, after consultation with the High Court of Delhi, hereby makes the following Rules to amend the Delhi Family Courts rules, 1996, namely:-

1. Short title and commencement—(1) These rules may be called the Delhi Family Courts (Amendment) Rules, 2011.

   (2) They shall come into force with immediate effect.

2. Substitution of new rule for rule 7:- In the Delhi Family Courts Rules, 1996, for rule 7, the following rule shall be substituted, namely:-

"7. Administrative Control:- (1) The Judge shall be entitled to leave as admissible to the members of Delhi Higher Judicial Service.

(2) The Judge shall be under the administrative and disciplinary control of the High Court.

(3) Every Principal Counsellor/Counsellor shall be under the administrative and disciplinary control of the principal Judge or Additional Principal Judge/Senior most Judge in case of non-availability of Principal Judge.

(4) Every member of the staff, including officers, appointed to serve in Family Courts shall be under the administrative and disciplinary control of the

Principal Judge or any of the Judges of the Family Courts so nominated for this purpose by the Principal Judge."

HIGH COURT OF DELHI: NEW DELHI

NOTIFICATION

Delhi, the 11th January, 2011

No.F.14(22)/LA-2008/law/17.- The following Act of the Legislative Assembly of the National Capital Territory of Delhi received the assent of the President of India on 17th January, 2011 and is hereby published for general information:-

"THE COURT-FEES (DELHI AMENDMENT) ACT, 2010
(DELHI ACT 10 OF 2011)

(As passed by the Legislative Assembly of the National Capital Territory of Delhi on the 29th November, 2010)

[17th January, 2011]

An Act further to amend the Court-Fees Act, 1870 (7 of 1870) in its application to the National Capital Territory of Delhi.

BE it enacted by the Legislative Assembly of the National Capital Territory of Delhi in the Sixty-first Year of the Republic of India as follows:-

1. Short title, extent and commencement.-(1) This Act may be called the Court-Fees (Delhi Amendment) Act, 2010.

(2) It extends to the whole of the National Capital Territory of Delhi.

(3) It shall come into force on such date as the Lieutenant Governor of the National Capital Territory of Delhi may by notification in the Delhi Gazette appoint.

2. Insertion of new section 16A.- In the Court-Fees Act, 1870 (7 of 1870) in its application to the National Capital Territory of Delhi, after section 16, the following section shall be inserted, namely:-

"16A. Refund of fees on settlement before hearing—Whenever by agreement of parties-

(i) any suit is dismissed as settled out of Court before any

evidence has been recorded on the merits of the claim; or

(ii) any suit is compromised ending in a compromise decree before any evidence has been recorded on the merits of the claim; or

(iii) any appeal is disposed of before the commencement of hearing of such appeal;

half the amount of all fees paid in respect of the claim or claims in the suit or appeal shall be ordered by the Court to be refunded to the parties by whom the same have been respectively paid.

Explanation.- The expression "merits of the claim" refers to matters which arise for determination in the suit not being matters relating to the frame of the suit, misjoinder of parties and cause of action, the jurisdiction of the Court to entertain or try the suit or the fee payable, but includes matters arising on pleas of res judicate, limitation and the like."

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ADMINISTRATIVE TRIBUNAL ACT, 1985—Section 19,20 & 21—Aggrieved petitioners by orders of Administrative Tribunal filed writ petitions—As Per, Petitioners who are husband and wife, they were appointed as Medical Officers on contractual basis by MCD from time to time MCD extended their term of appointment and their remuneration also enhanced—Petitioner no. 1 filed three complaints, levelling sexual harassment allegations against colleague and seniors—Sexual Harassment Committee dismissed those complaints and also recommended strict disciplinary action against both the petitioners—Accordingly, Commissioner MCD vide office letter, took decision not to continue with engagement of petitioners with MCD—Aggrieved by said office order petitioner no. 1 filed writ petition which was dismissed and appeal preferred by her also dismissed—Thereafter petitioner no. 1 filed another writ petition which was also dismissed—On the other hand, petitioner no. 2 after dismissal of application of petitioner no. 1 filed application before Administrative Tribunal which was dismissed and review filed by him also dismissed—Petitioners urged in writ petitions MCD discriminated against petitioners by not extending their term of appointment as term of other Medical Officers who were similarly placed and also who were juniors to petitioners were granted extension of term—Also MCD, did not hold inquiry in terms of Article 311 (2) before issuing office order. Held : In the case of an appointment to a permanent post in a government service on probation or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain, any more than a private servant employed on probation or on an officiating

basis can do, if his service is terminated at any time—Likewise, an appointment to a temporary post in a government service may be substantive or on probation or on an officiating basis—The servant so appointed acquires no right to the post and his service can be terminated at any time except in one case when the appointment to a temporary post is for a definite period—A person appointed on contractual basis does not enjoy the protection of Article 311 (2) as he is not a member of a Civil Service of the Union or a All India Services or a Civil Services of a State or holds a civil post under the Union or a State.

Neena Shad v. *MCD & Ors.* *342*

BORDER SECURITY FORCE ACT, 1968—Section 117(2)—Border Security Force Rules, 1969—Rule 142—Petitioner charged with attempt to commit suicide—Respondents contend petitioner entered plea of guilty before Summary Security Force Court (SSFC) and dismissed him from service—Order challenged in High Court—Plea taken, petitioner had never pleaded guilty to charge—Per contra, plea taken petitioner had prayed for mitigation of punishment—Held—Proceedings of court do not contain signatures of petitioner at any place at all in SSFC which militate against petitioner having so pleaded—Court is required to test legality and validity of findings returned by SSFC based on material before court and conviction of petitioner cannot be premised on any thing which may have come before them subsequently—Record made by hospital authority and police does not support charge for which petitioner was arraigned—Petitioner reinstated with all consequential benefits.

EX-Const. Vijender Singh v. *Union of India and Ors.* *200*

BORDER SECURITY FORCE RULES, 1969—Rule 142—Petitioner charged with attempt to commit suicide—Respondents contend petitioner entered plea of guilty before Summary Security Force Court (SSFC) and dismissed him from service—Order challenged in High Court—Plea taken, petitioner had never pleaded guilty to charge—Per contra, plea taken petitioner had prayed for mitigation of punishment—Held—Proceedings of court do not contain signatures of petitioner at any place at all in SSFC which militate against petitioner having so pleaded—Court is required to test legality and validity of findings returned by SSFC based on material before court and conviction of petitioner cannot be premised on any thing which may have come before them subsequently—Record made by hospital authority and police does not support charge for which petitioner was arraigned—Petitioner reinstated with all consequential benefits.

EX-Const. Vijender Singh v. *Union of India and Ors.* *200*

CARRIERS ACT, 1865—Section 10—Plaintiff No.1 an insurance company—Plaintiff No.2 a company which entered into contract with Defendant—Defendant a company in the transport/carrier field—Plaintiff No. 2 entered into contract with Defendant for delivery of ICs and capacitors—Consignment not delivered to Plaintiff No. 2—Defendant claims that goods were stolen on the way—Hence not liable to pay—Plaintiff No. 2 authorises Plaintiff No. 1 to file instant suit for recovery of value of goods—Hence instant suit—Held—Adequate court fee has been paid—Suit not barred by Section 10 of Carriers Act, 1865—Carrier duly informed of claim of loss of goods—Sufficient notice has been given.

M/s. National Insurance Co. Ltd. & Anr. v. *M/s. Mukesh Tempo Service (Carrier)* *801*

— Section 3—Liability of carrier limited to Rs. 100—Said limitation only applicable to goods described in Schedule of the Act—Hence Section 3 not applicable.

M/s. National Insurance Co. Ltd. & Anr. v. *M/s. Mukesh Tempo Service (Carrier)* *801*

Main plea that goods were stolen, hence no negligence on part of carrier—Reliance placed on ratio in *Patel Roadways* case—Liability of carrier in India is like that of an insurer—It is absolute liability subject to Act of God and special contract between carrier and customer—Not necessary for plaintiff to establish negligence.

M/s. National Insurance Co. Ltd. & Anr. v. *M/s. Mukesh Tempo Service (Carrier)* *801*

Theft—Does not amount to Act of God—Only exceptions being Act of God, Act of State's enemies or special contract between carrier and customer—Here even alleged theft of goods does not stand established—Hence issue decided against Defendant.

M/s. National Insurance Co. Ltd. & Anr. v. *M/s. Mukesh Tempo Service (Carrier)* *801*

Subrogation of rights of Plaintiff No. 2—Plaintiff No. 1 granted full power to use all lawful means to recover damages—Plaintiff No.1 authorised to sue in name of Plaintiff No.2—Stamp papers purchased in Delhi—Attested by witness residing in Delhi—Notary also from Delhi—No merit that documents were executed in Rohtak and attested at New Delhi—Plaintiff No. 2 has not filed any suit for recovery of

compensation for loss of good.

Subrogation and Assignment—Subrogation can be enjoyed by insurer as soon as payment is made—Assignment requires agreement that rights of assured shall be assigned to insurer—Enforcement of rights of subrogation must be in name of assured—Here, Plaintiff No. 2 has also been joined in suit—Letters of Subrogation also stipulate assignment and transfer of actionable rights, title and interest—Legal proposition is settled vide ratio in *Economic Transport Organisation's* case—Insurer cannot maintain complaint in its own name even if such right traced to terms of a letter of subrogation-cum-assignment executed by assured.

CCS PENSION RULES, 1972—Rule 9—CCS (CCA) Rules, 1965—Rule 14—Charge Sheet issued to respondent set aside by Administrative Tribunal on grounds of delay, being mere formality as decision was already taken to punish the respondent and as respondent had already retired, penalty under Rule 9 could not be inflicted—Order challenged in High Court—Held—Starting point while considering delay is not date or period when misdemeanour took place but when department gains knowledge of relevant facts constituting misdemeanour—40% time consumed by respondent and noting steps taken by department in pursuing matter, no delay in issuing charge sheet—Advice of UPSC that considering nature and seriousness of charge it was case of major penalty is prima facie view and not final view which must await evidence being brought on record and findings returned by IO—Under Rule

9, order which can be passed is to recover pecuniary loss caused to government or impose a cut in pension payable of gratuity or both in full or part upon proof of guilt but pertaining to grave misconduct or negligence—With rampant abuse and disabuse of financial power, it cannot be said if proved, such kind of misadventures are not grave misconduct—Order of Tribunal quashed.

— Rule 41—Application of petitioner for grant of compassionate allowance rejected on ground of his dismissal after disciplinary enquiry as petitioner was delinquent of disobedient nature and habitual of being absent—Compassionate allowance admissible only in those cases where delinquent had been honest and dedicated during whole service period—Order challenged in High Court—Held—Conduct of petitioner for purposes of award of compassionate allowance has to be evaluated by authority considering such application taking totality of record into consideration and cannot be premised on isolated instances or specific instances of misconduct for which employee may have been penalized—Commendations, rewards and positive comments in ACR have not been taken into consideration—Respondents erred in passing impugned order and failed to exercise discretion conferred upon them in accordance with law and applicable rules—Petitioner entitled to award of compassionate allowance in terms of applicable rules and guidelines.

CENTRAL CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1957—Rule 15 (1)—Inquiry officer absolved petitioner of charges—Disciplinary authority held that enquiry was not properly conducted and

directed de novo inquiry by new IO—Petitioner absolved of first charge and found guilty of second charge—Disciplinary authority held petitioner guilty of both charges—Notice with copy of report of IO served on petitioner—After considering representation, Disciplinary authority imposed penalty of removal from service—On revision, penalty modified from removal from service to compulsory retirement—Order Challenged in High Court—Plea taken, action of respondents in directing second inquiry is without legal competence and jurisdiction—Disciplinary authority had arrived at a conclusion that petitioner was guilty of both charges—Notice to petitioner after arriving at such conclusion calling upon petitioner to submit representation was meaningless—Held No rule or regulation prescribe second inquiry on identical charges by concerned authority—Disciplinary authority failed to follow a procedure prescribed by law - It was open to disciplinary to record further evidence or call material which had been ignored by IO to be produced after giving full opportunity to petitioner or IO could have been asked to record further evidence—Direction to conduct second enquiry was unwarranted and illegal—Disciplinary authority is required to record its tentative reasons for such disagreement and give opportunity to charged officer to represent before it records its findings—Communication communicating conclusions already drawn by disciplinary authority gives no real opportunity to petitioner to make a representation in respect of either points of disagreement or proposed punishment—Opportunity to represent against points of disagreement has to be meaningful—Impugned order not sustainable—Petitioner directed to be reinstated in service with national seniority but without back wages.

Const. Seth Pal Singh v. *UOI & Ors.* *404*

CCS (TEMPORARY SERVICE) RULES, 1965—Rule 5—Indian

Penal Code, 1860—Section 363/366/376—Respondents appointed on probation against temporary post of Warder Prison in Tihar—Pursuant to registration FIR, respondents sent to judicial custody—Competent Authority terminated services by non stigmatic orders of discharge simpliciter—Representations made to appointing authority to re-induct respondents in service after their acquittal in criminal trial rejected—Representations styled as appeals also rejected—Impugned orders challenged before Administrative Tribunal to set aside order of termination—Plea taken, order terminating services being penal in nature, department was obliged to hold enquiry—Administrative Tribunal allowed application—Order of Tribunal challenged in High Court—Plea taken, applications before Tribunal were time barred—Respondents being accused of serious offences and arrest was motive and not foundation of order terminating their services—Held, Non statutory representation can never extend limitation—Merely by labelling representation as appeal and said work being reflected in order communicating rejection of representation would not make representation appeal—It is substance which matters not label—Representations questioning order terminating services were highly belated and barred by limitation before Tribunal—Employer has legal right to dispense with services of employee without anything more during or at end of prescribed period—Where no findings are arrived at any inquiry or no inquiry is held but employees chooses to discontinue services of employee against whom complaints are received it would be a case of complaints motivating action and would not be bad—Order of Tribunal quashed.

Govt. of NCT of Delhi & Ors. v. *Naresh Kumar* *132*

CENTRAL SALES TAX ACT, 1956—Section 8—Appellant/assessee a Private limited company, traded in electric, electronic and refrigeration items which were notified to be

first point items U/s 5 of the Act—As per, assessee/appellant, it purchased these goods from registered dealers and was not first seller of the goods, therefore had no liability to pay sales tax—Assessee/appellant had put up said claim before Assessing Officer for assessment for year 1996-97—Assessment done both under Delhi Sales Tax Act as well as Central Sales Tax Act and demand of Rs. 3679144 and Rs. 90172 respectively raised under the Acts—Assessee/appellant preferred two rounds of appeal but failed to get full relief—Ultimately, last order of Income Tax Appellant Tribunal resulted in writ petition in which appellant/assessee agitated the plea, registered dealers from whom it purchased goods had paid sales tax—Therefore, not necessary for assessee to charge sales tax on those very items of goods when assessee sold same to consumers—Assessee/appellant failed to produce original books of accounts or invoices before Assessing Officer as same were lost for which FIR was lodged—Percontra, respondent pleaded appellant/assessee not entitled to relief in absence of original invoices. Held : provisions of Delhi Sales Tax Act and rules framed thereunder were mandatory in nature and it was necessary to construe them strictly in order to avoid misuse—Rule 9 requires the dealer to produce a declaration in or ST-3 duly filled in and signed by the dealer selling the goods which has to be produced in original—No doubt when these original forms ST-3 are lost or destroyed because of circumstances beyond the control of the assessee he should not be punished and denied the benefit - To avail the benefit the dealer has to necessarily seek exemption in the manner as provided in the rules - As the appellant failed to file satisfactory proof in the manner provided under the Act and rules, not entitled to the benefit as claimed.

Alpine Agencies Pvt. Ltd. v. *Commissioner of Value Added Tax & Others* *108*

CODE OF CIVIL PROCEDURE, 1908—Order 12 Rule 6—Execution Proceedings Applicability—Respondent filed suit for recovery of possession and arrears of rent—Decree in petition against appellant, judgment debtor—Respondent filed objections—Appellant contended that decree under Order 12 Rule 6 could not have been passed—Issue of ownership pending—Held—Respondent has filed objections to ward off warrants of attachment of property—Objections in the execution proceedings would not in any manner affect the relationship of landlord and tenant—Section 116 of Indian Evidence Act creates an estoppel—Findings concurrent and called for no interference.

Praveen Kumar Wadhwa v. *M/s Endure Capital (P) Ltd.* *421*

— Order IX Rule 13—Industrial Disputes Act, 1947—Section 11—Labour Court by ex parte award directed reinstatement of workman with back wages and dismissed application of petitioner for setting aside exparte award—Orders challenged in HC—Plea taken, counsel without any reason stopped appearing in the case—Held—Ex parte award can be set aside on account of giving valid reasons for non appearance—A client can not be made to suffer for fault of his advocate—This can not be a general rule and facts of each case have to be seen—There is no grave prejudice in setting aside ex parte proceedings as at best on setting aside exparte proceedings case will be decided considering respective merits—Impugned order set aside.

M/s. Genesis Printers v. *Shri Rati Ram Jatav Presiding Officers & Ors.* *279*

— Section 100 & 11—Plaintiff/respondent filed a suit for

recovery of Rs. 7243.55 as arrears of rent against nine defendants—Trial Judge passed a decree of Rs. 7243.55 against defendant no. 7 only—A new tenancy was created in favour of defendant no.7 in August, 1964—The first appellate court modified the judgment—The tenancy of defendant no. 7 was created with effect from 1.9.1963 liability of defendants no. 1 to 7 is joint and several—Second Appeal—Appellant contended that finding in suit no. 159/1980 had become final and binding and could not have been reopened by first appellate court while deciding the same issue between the same parties in the appeal arising of suit no. 467/1979—Held—By applying the ratio of the judgment in *Premier Tyres Limited* (supra) it is clear that judgment rendered in suit No. 159/1980 had attained finality as no appeal had been filed against it—The findings of said judgment could not have been reversed by first appellate court in its impugned judgment while considering and adjudicating upon the same issues which already stood finally decided vide the judgment rendered in this suit No. 159/1980—The findings in suit No. 159/1980 had attained a finality and were binding; they could not be re-agitated—The impugned judgment set aside—Appeal allowed.

All India Motor Union Congress v. *Bhai Trilochan Singh & Ors.* *549*

— Order XXXIX—Temporary Injunctions—Single Judge fully empowered to pass whatever orders considered expedient—Directions to erect partition were to be passed *de hors* disposal of Contempt Petition—Such directions could be severed from Impugned Order—Appropriate course to remand case back to Single Judge who had passed Impugned Order.

Raj Singh Gehlot v. *Pardiam Exports Pvt. Ltd.* *582*

— Order VII Rule 11—Grounds for rejection of plaint—Plaintiff four daughters of one Late Rajender Vikram Singh—Defendant no.1 to 5 successors of Late Jaswant Singh brother of Late Rajender Vikram Singh—Suit filed for the partition of two properties, stating first property was purchased by Late Rajender Vikram Singh and second was joint property with brother Late Jaswant Singh—Defendant no.1 contested the suit inter-alia on the ground that the said properties were bequeathed to him by a Will by Late Rajender Vikram Singh—Defendant no.1 filed application under Order VII Rule 11 inter alia on the ground that the suit was bad for mis-joinder of parties; documents not filed by the plaintiff despite an order under Order VII Rule 4 CPC; suit barred by limitation, there is a defective verification of plaint, filing of affidavit which is neither signed nor attested; thus cannot be taken cognizance of; and Power of Attorney on the basis of suit filed not attested—Held, defendant must adduce evidence to show how mis-joinder of parties has caused serious prejudice or will prevent Court from giving complete relief—Hence cannot constitute ground for summary rejection of plaint—Non filing of documents cannot be ground for summary rejection of plaint—Plaintiff does so at his own peril—Defendants failed to show how suit barred by limitation—Cause of action in present case is continuing one and within period of limitation—Omission to verify or defective verification can be regularized at later stage—Lack of authority, defective verification or even absence of affidavit are irregularities which can be cured during trial—Law of procedure not to be used to deny relief on technical grounds—Therefore, application under Order VII Rule 11 CPC completely misplaced and dismissed.

Mrigendra Pritam Vikramsingh Steiner & Ors. v. *Jaswinder Singh & Ors.* *668*

— Order VIII Rule r/w Section 151—Extension of time for filing Written Statement—Defendant sought impleadment of Managing Director of plaintiff company, as Plaintiff contending that he was a necessary party as the entire case was based on an oral agreement between the said Managing Director and the defendant and for a direction to him to file affidavit in support of averments in the plaint—Application for extension of time in filing written statement also filed—Contending that written statement, if filed prior to such impleadment, would disclose the defence of the defendant—Plaintiff likely to modify case set up in suit—Single Judge dismissed both the applications (for impleadment and enlargement of time)—Held—Impleadment of Respondent was not necessary—Company being legal entity can file suit in its own name—If during the trail the plaintiff did not examine the Managing Director, consequences would follow—No ground for application for extension of time or application for condonation of delay also made out-Single Judge rightly rejected the application.

Mr. Sandeep Thapar v. *SME Technologies Pvt. Ltd. ... 700*

— Section 96, Order 41 Rule 22 Delhi High Court Act, Section 10—Aggrieved appellants preferred appeal against dismissal of their suit except in respect of preliminary decree qua Ex. DA and PW1/1, i.e. two family settlements entered into between appellants and Respondent no.1—Appellants originally preferred suit seeking separation of their shares after partition of joint property—Respondents resisted the suit and Respondent no.1 also filed counter claim seeking declaration that he was absolute owner of properties—Besides appeal filed by appellants, Respondent no.1 also filed cross objections in the appeal—Appellants contended Kapurthala was a

capationary and Baba Jassa Singh was first Karta and after the successive incumbents to ‘Kartaship’, burden of managing family fell on shoulders of Maharaja Jagatjit Singh who became Karta in 1877. After his demise, ‘Kartaship’ devolved on S. Paramjit Singh and thereafter, on S. Sukhjit Singh—Also when on 19.06.1949 Maharaja Jagatjit Singh breathed his last, succession was: (i) per Mitakshara Survivorship as distinct from Succession; (ii) (alternatively) per Mitakshara Succession, (absolute ownership and not by Primogeniture or Will—Further even if property was not HUF from before, it was, converted to coparcenary by reason of Mitakshara Succession—Moreso, Rulers of Kapurthala were only Jagirdars or Chiefs and not Rulers—As per Respondents, Maharaja Jagatjit Singh was sovereign ruler thus, no incidence of coparcenary or Joint Hindu Family could be applied to properties held by him and Junior (sons) had no right by birth—Also, it was neither Mitakshara Survivorship nor Mitakshara Succession, but succession by Will, or failing proof that Will, by Primogeniture—Held: Primogeniture is a rule of succession—It is applicable to impartible estates—It was applicable to Rulers and Monarchs—By this rule, the eldest son or the first born son succeeds to the property of the last holder to the exclusion of his younger brothers—According to the ordinary rule of succession, all the sons of the father are entitled to equal shares in his estate—The rule of succession by which the first born son succeeds to the entire estate, to the exclusion of the other sons, is called primogeniture—The princes wielded sovereign powers and, therefore, they (all the Princes but with a rare exception) had applied the Rule of Primogeniture which then had taken the shape as the law promulgated by them as a sovereign Ruler—Primogeniture, as a rule for succession, applied to the Rulers, the Zamindars etc. which was an exception to the general

customs of Mitakshara Survivorship and Mitakshara succession—Kapurthala was a sovereign estate and custom Primogeniture was invariably prevalent in Hindu Sovereign States of across India including Kapurthala.

Tikka Shatrujit Singh & Others v. *Brig. Sukhjit Singh & Another* *704*

— Section 100—Aggrieved appellants preferred appeal against judgment and decree whereby suit of Respondent decreed—Respondent faced departmental enquiry, and charges proved against him in enquiry proceedings—Respondent filed suit seeking declaration alleging violation of principles of natural justice during Enquiry—Suit dismissed but subsequently in appeal decreed—As per appellants, Civil Court cannot reappreciate evidence led before Enquiry Officer and sit in appeal over enquiry proceedings—Held—Enquiry proceedings do not have to strictly abide by strict rules of evidence; enquiry has to be seen to have been held; the question of the adequacy or reliability of the evidence, however, cannot be convassed—The court or the Tribunal has no power to trench on the jurisdiction to appreciate the evidence and to arrive at its own conclusion—Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It is meant to ensure that the delinquent receives fair treatment and not to ensure that the conclusion which the Authority reaches is necessarily correct in the view of the Court or Tribunal—Suit of Respondent correctly dismissed.

Union of India & Another v. *Ramesh Chand* *822*

— Sections 96, 100—Second appeal—Suit for perpetual injunction against the defendant—Demolition notice dated

14.09.1978 is bad in law—Defendants be restrained from demolishing his construction shown in site plan—Construction raised sometime in April 1997—Trial Judge and First Appellant Court dismissed the suit on the ground that under the provisions of Section 225 of Punjab Municipal Act, there is bar to the jurisdiction of Civil Court—Second appeal—Appellant urged that the impugned judgment has not discussed the evidence of the plaintiff—Held—The first appeal court is bound to consider the evidence adduced before the Trial Judge, both oral and documentary; it must appreciate and draw its own conclusion based on a reasoned finding—In the instant case the impugned judgment has not examined the evidence led by the plaintiff—A party has a right to be heard both on question of facts as also on law before the first Appeal Court who is bound to address itself on all such issues—Since this mandate had not been adhered to, it is a fit case where the matter is to be remanded back to the first Appeal Court to decide the case afresh after discussing the evidence and giving a reasoned order.

Daljit Singh v. *New Delhi Municipal Corporation* *620*

— Section 100—Appeal against the Judgment and decree reversing the finding of the Trial Court which had dismissed the Suit—Respondent/Plaintiff filed a Suit for Possesssion claiming to be the owner of a property—Appellant/Defendant contested the suit contending that he had purchased the property from the Plaintiff at a consideration—After framing the issues, the Trial Court examined oral and documentary evidence and held that Defendant is not the tenant in the suit Property and had in fact purchased the Property—The suit was dismissed—The First Appellate court reversed the finding disbelieving the defence—Held that there is no perversity in the finding of the First appellate court—The Court had after

a detailed examination of the documentary and oral evidence had drawn a conclusion that the defence of the Defendant that he had purchased the property vide the Agreement to sell, GPA and Receipt was a sham defence.

Baljit Singh v. *Thakaria* *563*

— Section 115, Order 7 Rule 11—Petition against Trial Court dismissing the application of the Petitioner under Order 7 Rule 11—Respondent filed a Suit for Permanent and Mandatory Injunction against the Petitioner and Municipal corporation of Delhi—Respondent had taken the Suit Property on rent from the father of Petitioner—Respondent contended that Petitioner had been threatening to raise construction over the roof of suit property which form part of Respondent's tenancy—Petitioner pleaded that Respondent is an illegal and unauthorized sub tenant in the property and Respondent was never accepted as a tenant—Petitioner also filed Application under Order 7 Rule 11, CPC on the ground that the Respondent firm has not been registered with the Registrar of firms and as such the suit is barred under Section 69 of the Indian Partnership Act which mandates that an unregistered firm cannot file a suit against any third party on a cause of action arising out of a contract entered into by the partnership firm—Respondent in reply stated that suit filed by it is for injunction, which is not arising out of any contract between the parties and as such, Section 69 (2) of the Act has no application—Held—Petitioner's own case is that Respondent was never accepted as tenant and therefore there is no privity of contract between him and the Respondent—Under these circumstances, when there is no contract between the Petitioner and the Respondent, provisions of Section 69 (1) & (2) of the Act, are not applicable to the facts of the case—Thus, Petition dismissed.

Kewal Kishan v. *M/s. Khurana Kaj House* *543*

CODE OF CRIMINAL PROCEDURE, 1973—Framing of charge—Indian Penal Code, 1860—Sections 420, 468, 471, 120-B—Accused company falsified accounts to show lesser liability and induced complainant Bank to sanction credit facility—Company did not pay back and cheated bank of more than Rs 6 crores—Trial Court framed charges against petitioner company u/sections 420, 468, 471 read with 120-B IPC—Whether company being a juristic person can have mens rea for the purpose of Section 120 B—Held, Company acts through its Board of Directors—If company can enter into contracts and perform other legal obligations it can also be party to criminal acts—If the company can have a right to do things through its Board of Directors it can have necessary mens rea also through its Board of Directors—Mens rea can be fastened on the company if it is an essential element of crime on the ground that mens rea was present in the officers of the company who were acting as mind of the company—Just because offence u/s 420, 468 and 471 IPC included the punishment of imprisonment does not mean company cannot be prosecuted as court can always resort to punishment of imposition of fine—Petition dismissed.

Morgan Tectronics Ltd. v. *CBI* *29*

— Section 482—Indian Companies Act, 1956—Quashing of criminal complaint filed by the Registrar of Companies u/s 62 r/w section 68 of Companies Act in court of ACMM—Allegation that petitioners were signatories to prospectus containing misstatement of facts—Company had collected Rs 210 lakhs from public issue but had failed to accomplish the promises made in the prospectus—Held, compensation in respect of violation of Section 62 can be claimed by filing appropriate civil suit and no criminal complaint under Section 62 would be maintainable—U/s 68 prior sanction of the

dismissed—Truth, veracity and effect of prosecution evidence not to be examined meticulously at time of framing of charge—Sifting of evidence permissible to find out whether prima facie made out or not.

Sh. Kapil Mahajan v. *The State* *592*

— Section 482—Quashing petition—*Bhajan Lal's* case has settled law on when criminal proceedings can be quashed—At stage of framing of issue—Roving inquiry not permissible—Trial Court to confine itself to material produced by investigating agency—Truthfulness and sufficiency of the same to only be considered during course of trial—No merit in instant petitions—Hence dismissed.

Sh. Kapil Mahajan v. *The State* *592*

CONSTITUTION OF INDIA, 1950—Article 21 and 226—Appellant requested for reimbursement of medical expenses incurred after his retirement, on heart problem—Request declined as there was no such Scheme for retired employees—Writ challenging order of rejection dismissed by Ld. Single Judge—Order assailed in appeal—Held—Though it is constitutional obligation of state to safeguard right to life of every person and such right is right to lead healthy life and not a life of animal existence, but no law mandates that every citizen is entitled to free medical treatment without any limitation on the amount that can be claimed as reimbursement—Formation of a policy is within exclusive domain of executive and Courts should shy away from issuing directions for formation of policy which has financial, economic and other implications, which at best should be left to wisdom of executive.

J.K. Sawhney v. *Punjab National Bank* *79*

— Article 226—Scope of interference—Appellant filed writ petition alleging manipulation in marks awarded in answer sheets—Learned Single Judge dismissed petition—Held that mere overwriting need not mean manipulation or fudging—Hence Present appeal—Held—Revaluation of answer sheet not permissible unless rules of conducting organization allow for the same—Concerned Rules do not permit revaluation. Indian Evidence Act—Section 73: Held not applicable to writ proceedings—Nonetheless answer sheets scrutinized—Change of marks with regard to a particular question is normal and not indicative of malice or manipulation—Appellant failed to name even one officer of Respondent No. 3 who was inimical towards Appellant—Appeal dismissed.

Dr. Rajiva Kumar Tiwari v. *Union of India & Ors.* *161*

— Order passed by Ld. Single Judge in Writ Petition (C) Challenged by appellants as their prayer for issuance of mandamus to respondent to agree to suggestions and amendments proposed by them to draft agreement, dismissed—Respondent urged, petitioner awarded project for development of plot being highest bidder with stipulation that bid amount was to be paid in installments—Appellants did not pay the first installment and only gave a performance guarantee and made payments towards interest and success fee—This resulted in series of breach on part of appellants, hence, termination of contract took place—Appellants filed writ petition in which respondent directed to abide by the contract - Even thereafter appellants did not pay first installment but approached respondent for amendment of tender terms and also sought renegotiation of terms of tender—Thereupon Respondent vide letter informed appellants, rejecting suggestions for amendment and modifications and it also invoked bank guarantee furnished by the appellants—

Aggrieved appellants, then again filed writ petition which was dismissed by the Ld. Single Judge—According to appellants, Writ Court has jurisdiction to address itself even with regard to unfair practice adopted before entering into agreement and also after entering into the agreement—Held : it may, however, be true that where serious disputed questions of fact are raised requiring appreciation of evidence, and, for determination thereof, examination of witnesses would be necessary; it may not be convenient to decide the dispute in a proceeding under Article 226 of the Constitution of India—From the entire gamut of facts which have been brought on record and projected, it is well nigh impossible to say whether the termination of contract and the forfeiture of the earnest money by the respondent is unreasonable or arbitrary and thereby invites the frown of Article 14 of the Constitution of India—It is extremely difficult to state that there are no disputed questions of fact—The petitioner should approach the appropriate legal forum as advised in law.

— Petitioner preferred writ petition impugning condition imposed by respondent NDMC on petitioner to deposit dues of electricity connection earlier installed in property which was purchased by petitioner—As per petitioner, after taking possession of the flat purchased by him, electricity connection was not found existing and electricity meter detached—Petitioner applied to NDMC for electricity connection but NDMC claimed previous dues but petitioner not liable to pay electricity arrears of earlier owner/occupant of flat—Respondent NDMC urged duty of petitioner to ascertain about electricity dues before acquiring property, demand of electricity arrears reasonable and in public interest and necessary to

prevent dishonest consumers transferring property without clearing dues. Held : If any statutory rules govern the condition relating to sanction of a connection or supply of electricity, the distributor can insist upon fulfillment of requirement of such rules and regulations—If the rules are silent, can stipulate such terms and conditions as it deems fit and proper to regulate its transactions and dealings—So long as such rules and regulations or the terms and conditions are not arbitrary and unreasonable, Courts will not interfere with them—The conditions of Supply whereunder such arrears are demanded are statutory—The petitioner is liable to pay the dues of the earlier owner/occupant.

— Article 226 and 227—Code of Civil Procedure, 1908—Order IX Rule 13—Industrial Disputes Act, 1947—Section 11—Labour Court by ex parte award directed reinstatement of workman with back wages and dismissed application of petitioner for setting aside exparte award—Orders challenged in HC—Plea taken, counsel without any reason stopped appearing in the case—Held—Ex parte award can be set aside on account of giving valid reasons for non appearance—A client can not be made to suffer for fault of his advocate—This can not be a general rule and facts of each case have to be seen—There is no grave prejudice in setting aside ex parte proceedings as at best on setting aside exparte proceedings case will be decided considering respective merits—Impugned order set aside.

— Article 12, 226, 227 & 331—Administrative Tribunal Act, 1985 section 19,20 & 21—Aggrieved petitioners by orders of

Administrative Tribunal filed writ petitions—As Per, Petitioners who are husband and wife, they were appointed as Medical Officers on contractual basis by MCD from time to time MCD extended their term of appointment and their remuneration also enhanced—Petitioner no. 1 filed three complaints, levelling sexual harassment allegations against colleague and seniors—Sexual Harassment Committee dismissed those complaints and also recommended strict disciplinary action against both the petitioners—Accordingly, Commissioner MCD vide office letter, took decision not to continue with engagement of petitioners with MCD—Aggrieved by said office order petitioner no. 1 filed writ petition which was dismissed and appeal preferred by her also dismissed—Thereafter petitioner no. 1 filed another writ petition which was also dismissed—On the other hand, petitioner no. 2 after dismissal of application of petitioner no. 1 filed application before Administrative Tribunal which was dismissed and review filed by him also dismissed—Petitioners urged in writ petitions MCD discriminated against petitioners by not extending their term of appointment as term of other Medical Officers who were similarly placed and also who were juniors to petitioners were granted extension of term—Also MCD, did not hold inquiry in terms of Article 311 (2) before issuing office order. Held : In the case of an appointment to a permanent post in a government service on probation or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain, any more than a private servant employed on probation or on an officiating basis can do, if his service is terminated at any time—Likewise, an appointment to a temporary post in a government service may be substantive or on probation or on an officiating basis—The servant so appointed acquires no right to the post and his service can be terminated at any time except in one case when the appointment to a temporary post is for a definite

period—A person appointed on contractual basis does not enjoy the protection of Article 311 (2) as he is not a member of a Civil Service of the Union or a All India Services or a Civil Services of a State or holds a civil post under the Union or a State.

Neena Shad v. *MCD & Ors.* *342*

— Article 309—Indian Foreign Services Branch 'B' (Recruitment, cadre, Seniority and Promotion) Rules, 1964 - Rule 3 and 12—Indian Foreign Service, Branch 'B' (Stenographers Cadre, Principal Private Secretary Posts) Recruitment Rules, 1992—Rule 7—Composition of Foreign Service divided into 'General cadre' and Stenographers cadre—Officers of both cadres were eligible to be promoted to Grade I of General Cadre—Officers in Stenographers cadre in post of Private Secretary had option to choose whether they desired promotion to post of Grade I in General Cadre or to post of Principal Private Secretary Grade of Stenographers Cadra—Petitioners had exercised option for promotion to post in Grade I of General cadre—Option exercised was final and change of option was not permitted—Rules amended by virtue of which officers of Stenographer cadre were not eligible for promotion to Grade—I of General Cadre and could earn promotion only to higher post in stenographer cadre—Petitioners in stenographers cadre working as Private Secretary sought promotion to Grade-I of General Cadre—Representation of petitioners not successful at departmental level—Administrative Tribunal also dismissed their application—Order challenged in High Court—Plea taken, principle of promissory estoppel applied since options were pursuant to statutory provision, exercise of option by petitioners resulted in a contract—Held—A civil servant does not have any vested or statutory right to be promoted—Only

right is to be considered for promotion as per recruitment rules—To apply promissory estoppel it has to be shown that person concerned has altered his position on a representation made by opposite party—No person junior to petitioners has been promoted as Principal Private Secretary in Stenographer Cadre—Promotional avenues not denied to Petitioners—Two avenues of promotion stands restricted to only one - Rule continuing to permit option to petitioners for being considered for promotion to Grade - I of General Cadre in absence of promotional avenue to them in General Cadre rendered meaningless.

Raju Sharma & Ors. v. *Union of India & Anr.* *431*

— Article 16—Public employment—Selection process—Change in process—Respondent issued advertisement dated 12.11.2009 inviting applications for, inter alia post of Deputy Commandment (Law) in the Indian Coast Guard Service—Said advertisement also contained selection procedure—Petitioners applied for said post—Issued call letter for appearance before preliminary and final selection board—Peitioners cleared preliminary and Final selection board (FSB)—Last step required Petitioners to appear before Base Hospital, Delhi Cantt. For medical examination—After leaving premises of selection board—Petitioners telephonically informed to have word with Chief Law Officer, Coast Guard Head Quarters ("CLO")—Prescribed procedure does not mention role of CLO—Petitioners then told to appear before new selection board chaired by CLO—Also told to undertake written test as well as interview on same day—Petitioners did not clear the same—Petitioners made representations in protest—No action taken on said representation—Hence present petitions—Interim application also filed for directions to Respondent to keep one post vacant for each Petitioner—

Admitted position that advertisement did not mention any further testing/interview after clearing FSB—Records produced by Respondent do not support averment that Proficiency Competency Board for those candidates recommended by FSB had due approval—Nothing made on 18.12.2009 proposes for first time a further interview after FSB—No specific decision taken—Proposal for short test and interview made on 21.12.2009—Said proposal not placed before any higher authority and entire decision taken by Deputy Director General himself—Held—Appointing authority has no jurisdiction to change or vary selection, process after its commencement—Supreme Court in NT Devin Katti's case held that selection only to be made in terms of rules applicable at time of commencement of selection process—Respondents had not only notified Petitioners of selection procedure through advertisement dated 12.11.2009—Respondent had also completed the said procedure—Procedure to only consist of two phases and nothing further—Even if Deputy Director General competent to approve "Professional competency and suitability" assessment—Such approval only made on 21.12.2009—Same clearly lacks jurisdiction or authority of law—Petitioners not informed of prescribed syllabi for new test—Not given opportunity to prepare—Professional competency assessed on subjects mentioned in "desirable qualifications" that too without notice—Pleas set up Respondents falsified by records and documents issued to Petitioner as well as records produced before the Court—Nothing on record to even suggest reference to manner in which testing and evaluation of professional competency would be effected—No disclosure on method of testing—Decision to adopt new procedure not made by authority competent to do so—Strong view taken with respect to false and misleading pleas taken by Respondent and attempt to conceal correct record—However since vacant seats

remain—Possible to ensure justice without taking this matter further—Selection process taken by Professional Competency Board set aside—If Petitioners found medically fit, Respondent to complete appointment of Petitioners to post of Deputy Commandant (Law) with consequential benefits from date of recommendation of FSB—Costs of rupees 25,000/- awarded to each petitioner.

Vikas Saksena v. *Union of India and Others*..... *84*

— Article 226—Public Interest Litigation—Petition filed on behalf of Hindustan Kanojia Organisation—Said organization a community of "Dhobis", a scheduled caste—Community's feelings affected by use of "Dhobi Ghat" as name of film—Alleging that the said name is violative of Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 ("1989 Act") Held—Failed to see how naming of movie/film can be offensive to caste in question—Cinema is public medium to communicate to the society—Governed by Cinematograph Act and Rules framed thereunder—Said Act prohibits use and presentation of visual or words contemptuous of racial or religious groups—Use of "Dhobi Ghat" cannot be construed to violate provisions of 1989 Act—Public interest litigation—Reliance on ratio of Ashok Kumar Pandey case—Present litigation initiated marely to satisfy one's own egoism or megalomania—A public cause is required to be espoused in public interest litigation—Present litigation is abuse of the process of the Court—Defeats basic concept of public interest litigation for public good—Petition dismissed with costs of Rs. 25,000/-.

Vinod Kumar Kanojia v. *UOI and Ors.* *151*

— Article 226—Name change—Petitioner issued certificate for Senior School Certificate Examination by Central Board of

Secondary Education (''CBSE'') in 2004—Said certificate in name of ''Pallavi'' and refers to petitioner's father as ''Ramesh Chandra''—Petitioner graduated from School of Open Learning in 2007—Certificate in name of ''Pallavi''—In 2010, Petitioner decided to change her name to ''Pallavi Chandra''—Advertisement inserted in newspaper—Said change effected by publication in weekly Gazette published by Delhi Government—Petitioner applied to CBSE and Delhi University for change in her name in certificate and change in name of petitioner's father from ''Ramesh Chander'' to "Ramesh Chandra"—CBSE refused to effect change, Delhi University did not take any action—Hence present petition. Held—Petitioner contended that Single Judge of this Court in *Dhruva parate's* case had taken different position than previous judgments—Hence notice issued—Counsel for CBSE contended that change of name not permitted after passing school examination—Counsel for Delhi University contended that there was a discrepancy regarding simultaneous attendance in University course and Open School of Learning—Said discrepancy matter of investigation—Perusal of Gazette Notification—Change in name prospective in nature—Therefore issuance of changed certificate would create anomalous situation—Name appearing on certificate would be different from name appearing on Gazette Notification—Issuance of revised certificates as claimed would rather create a discrepancy and reflect a status which did not exist at the time of issuance thereof—Hence petition dismissed.

Pallavi @ Pallavi Chandra v. *CBSE and Ors.* *459*

— Article 226—Scope of interference in selections-allegation of irregularity in evaluation of answer sheets leveled by Petitioners who are civil services aspirants who appeared in Civil Service Examinations conducted by Respondent in 2007, 2008 and

2009—Petitioners cleared Preliminary Examination, could not qualify Main Examination—Petitioners filed application Central Administrative Tribunal alleging possibility of irregularities in method of evaluation of answer sheets—Petitioners sought directions to Respondent to produce relevant records—Allegation of irregularities based in light of irregularities found in earlier examinations conducted by Respondent UPSC—Evaluation method and use of "moderation" also questioned—Tribunal held that in absence of any provision for re-examination, candidate has no right/claim for the same—Method adopted by UPSC cannot be faulted as being subjective or unscientific—Tribunal dismissed applications—Hence present petitions. Held—Issue pertaining to legality of "moderation" examined by Gujarat High Court in *Kamlesh Haribhai's* case—After scrutiny said method found to be perfectly legal and valid—Scaling of marks also recommended for achieving common standard of evaluation—Reference made to affidavit filed by Respondent in *Neel Ratan's* case wherein held that wisdom and method of moderation to be left to experts—Decision of Supreme Court in *Subhash Chandra's* case examined—Method of evaluation found to be valid—Decision of Supreme Court in *Sanjay Singh's* case also discussed—Supreme Court examined differences in evaluation methods of UPSC and Respondent UPSC—Held that method of scaling used only for Preliminary Examination—Application of scaling of marks by UPSC held to be arbitrary and illegal—Supreme Court found that moderation is no solution to finding inter se merit across several subjects—In such situations, "scaling" is appropriate method of evaluation—However scaling not to be used in regard to Civil Judge (Junior Division) Examination—Said decision to apply prospectively alone—Therefore moderation and scaling are two separate methods of evaluation—No merit in application of "moderation" in evaluating answer sheets of Civil Services

(Main) Examination—UPSC conducting Civil Service Examinations since 1949—Stray incidents of irregularities—Does not vitiate sanctity of the same—Petitioners averred that lower marks may be due to faulty manner of evaluation—Amounts to relying on surmises and conjectures—Further observed that Petitioners had failed to implead successful candidates before Tribunal—Delay in approaching Tribunal most fatal to case of Petitioners.

— Article 15—Reservations for widows/wards of defence personal—Respondent University providing reservation for widows/wards of Defence Personnel—Petitioner son of retired personnel of Indian Air Force—Petitioner applied for admission under category reserved for wards of Defence personal—Achieved rank of 2010 in written examination—Not called for counseling—Respondent University not treating wards of retired and serving Defence personnel in reserved category—Defence Ministry had merely issued recommendations to Central Universities for reservation for Armed Forces under seven heads—Respondent University made reservation only under five heads—Reservations not made for other two categories keeping in mind "hardship" factor—Other Universities also not made reservations—Petitioner fully aware that he was not eligible for reservation—Hence present petition. Held—No cogent reason for providing reservation only for five categories and not all seven—None in Respondent University has applied mind—No justification for making distinction between first five and sixth and seventh categories—Respondent University cannot justify decisions for reasons which did not form the basis thereof—Kendriya Sainik Board recommended reservation in all seven categories

including wards of serving and retired personnel—Said Board an expert body in such matters—Supreme Court in *CS Sidhu's* case Expressed regret on shabby treatment of country's army men—Once expert Body recommended reservation for ex-servicemen and serving personnel though lowest in terms of priority—No reason to deprive the wards of ex-servicemen of said benefit—Petitioner approached Court before counseling ended—Estoppel not applicable.

CONTEMPT OF COURTS ACT, 1971—Section 19—Appeal against order in contempt petition—Scope-Suit instituted for restraining Defendants from creating third party interest, altering Suit Property etc.—Order passed on 09.01.2008 restraining Defendants from the same—Local Commissioner Appointed—Defendant filed applications u/S 11 & 12 of Contempt of Courts Act for initiating contempt—Single Judge disposed off said contempt petition on 11.09.2009—Appellants directed to demarcate shops forming Suit Property—Appellant averring that Respondent has clearly violated order of Court. Held—Reliance placed on *Midnapore* case (2006) 5 SCC 399—Appeal u/s 19 of the Act only maintainable against order imposing punishment for contempt—Order dropping contempt proceedings or acquitting contemnor not appealable—However Court may pass orders necessary for preserving directions which contemnor has not followed.

DELHI COOPERATIVE SOCIETIES RULES, 1973—Rule 24(2)—Applicability to persons enrolled as members through auction sale—Petitioners enrolled as members through inviting

of bids for flats by Society-defaulters in payment—Request of Society for enrolling petitioners as members—Rejected on the ground of violation of Rule 24(2)—Vacancies could only be filled pursuant to advertisement—Allotment of flats-could only be by draw. Held—Rule 24(2) protects only valid existing members in waiting list in terms of the decision of *Rajib Mukhopadyaya and others v. Registrar Cooperative Societies* WP(C) No. 15741/2006 decided on 17.11.2008—Enrollment through auction illegal—Petitioners—Not existing members-rejection justified.

DELHI MUNICIPAL CORPORATION ACT, 1957—Section 126,129 and 346- Aggrieved petitioner filed Writ Petition against order of Joint Assessor & Collector of MCD fixing ratable value of his property—Petitioner urged upon completion of construction of his building he gave notice to Respondent MCD and applied for grant of occupancy certificate which was rejected—Subsequently MCD issued notice to petitioner under Section 126 of the Act for enhancing ratable value—Objections filed by petitioner were dismissed—Petitioner contended without issuance of Occupancy Certificate and till when property was occupied, no property tax as of completed building could be levied—As per Respondent, under Section 129, liability for property tax accrues from date when notice of completion or occupation whichever is earlier, is given irrespective of grant of occupancy certificate—Also petitioner itself gave notice of completion, cannot be heard to contend that property is not assessable from date of notice—Question which arose for determination is whether notice of completion under building bye-law 7.5.2 can be treated as notice of completion under Section 129. Held:- The two notices cannot be equated and

when assessee sold same to consumers—Assessee/appellant failed to produce original books of accounts or invoices before Assessing Officer as same were lost for which FIR was lodged—Percontra, respondent pleaded appellant/assessee not entitled to relief in absence of original invoices. Held : provisions of Delhi Sales Tax Act and rules framed thereunder were mandatory in nature and it was necessary to construe them strictly in order to avoid misuse—Rule 9 requires the dealer to produce a declaration in or ST-3 duly filled in and signed by the dealer selling the goods which has to be produced in original—No doubt when these original forms ST-3 are lost or destroyed because of circumstances beyond the control of the assessee he should not be punished and denied the benefit - To avail the benefit the dealer has to necessarily seek exemption in the manner as provided in the rules - As the appellant failed to file satisfactory proof in the manner provided under the Act and rules, not entitled to the benefit as claimed.

Alpine Agencies Pvt. Ltd. v. *Commissioner of Value Added Tax & Others* *108*

EMPLOYEES STATE INSURANCE ACT, 1948—Section 45A, 82—Aggrieved appellant, challenged judgment passed by ESI court, urging appellant though registered as Establishment under Delhi Shops & Establishment Act, but is not a shop as not covered by notification dt.30.09.1988—Therefore—appellant cannot be assessed under Section 45A of the Act—Also, less than 20 employees working in Establishment which was not involved in any manufacturing activity—As per Respondent, appellant covered within purview of Act w.e.f. 02.10.1988 and appellant failed to furnish complete and correct particulars in Form—01, thus liable to be assessed under Section 48-Held: It is not that a place where goods are sold is only a shop—A place where services are sold on retail basis is also a shop—When services are being sold, it becomes a

commercial activity—Since the Act is intended for social benefit of the workers, it has to be given an extended meaning—Petitioners are not providing anything for free—Petitioner also admitted the strength of their employees on a particular day as 65, thus they are covered under the Act.

Machine Tools (India) Ltd. v. *The Employees State Insurance Corporation* *268*

INCOME TAX ACT, 1961—Section 260(A), 263—Held—Twin conditions for invoking Section 263 of IT Act-One order is erroneous; two order is prejudicial to the interest of the revenue—Conditions not met out-No case made out for invoking jurisdiction u/s 263.

Commissioner of Income Tax v. *Dhanpat Rai* *20*

— Section 11(1)(a), 11(2) 260(A)—Whether a trust can donate its entire income to another trust—Whether "Explanation" appended under Section 11(2) and inserted by the Finance Act applies to accumulations mentioned in Section 11(1) (a) of the IT Act—Held—Explanation applies only to Section 11(2) and not to Section 11(1) of the IT act.

Director of Income Tax (Exemption) v. *M/s. Bagri Foundation* *6*

— Section 256, 271—Assessee/Respondent filed assessment for year 1979-80 and also raised claim for payment of commission to Mrs. Ritu Nanda, Director of Respondent Company amounting to Rs. 2,74,617/- —Assessing Officer found services not rendered by Mrs. Ritu Nanda for which she was purportedly given commission @3% of Contract Value—Also, at relevant time for which payment of commission claimed, Mrs. Ritu Nanda not found to be Director of Company—Thus,

AO held claim for Ritu Nanda bogus and imposed penalty of Rs. 1,05,730/- on Respondent—Assessee/Respondent challenged order of penalty in appeal before CIT (Appeal) but dismissed—In further appeal to Income Tax Appellate Tribunal, assessee succeeded as order of penalty set aside—Appellant/Revenue Authority moved petition under Section 256 (2) of the Act seeking reference, "Whether the Tribunal was correct in law in deleting the penalty imposed under the Income-Tax Act, 1961?"—Held: The penalty on the ground of concealment of particulars of non-disclosure of full particulars can be levied only when in the accounts/return an item has been suppressed dishonestly or the item has been claimed fraudulently or a bogus claim has been made—When facts are clearly disclosed in the return of income, penalty cannot be levied and merely because an amount is not allowed or taxed to income it cannot be said that the assessee had filed inaccurate particulars or concealed any income chargeable to tax—Further, conscious concealment is necessary—Even if some deduction or benefit is claimed by the assessee wrongly but bona fide and no malafide can be attributed, the penalty would not be levied—Even if there is no concealment of Income or furnishing of in accurate particulars, but on the basis there of the claim which is made ex facie bogus, it may still attract penalty provision—Order of Assessing Officer imposing penalty was without any blemish.

The Commissioner of Income Tax v. *M/s Harparshad & Company Ltd.* *22*

INDIAN COMPANIES ACT, 1956—Quashing of criminal complaint filed by the Registrar of Companies u/s 62 r/w section 68 of Companies Act in court of ACMM—Allegation that petitioners were signatories to prospectus containing misstatement of facts—Company had collected Rs 210 lakhs

from public issue but had failed to accomplish the promises made in the prospectus—Held, compensation in respect of violation of Section 62 can be claimed by filing appropriate civil suit and no criminal complaint under Section 62 would be maintainable—U/s 68 prior sanction of the competent authority is required before launching prosecution which was not done in the case—Petition allowed and proceedings pending before ACMM quashed.

Dharmendra Kr. Lila v. *Registrar of Companies* *158*

INDIAN ELECTRICITY ACT, 1910—Section 39—Dishonest abstraction of energy—Petitioners main averment that inspection team failed to point out any dishonest abstraction of energy through deployment of artificial means—FIR registered under Section 39 and 44—Trial Court did not find circumstances justifying framing of charges u/s 44—Proving dishonest intention matter to be examined after evidence led by both parties.

Sh. Kapil Mahajan v. *The State* *592*

— Section 39—Use of artificial means—Burden of proof shifts on consumer to prove no dishonest abstraction of electricity energy.

Sh. Kapil Mahajan v. *The State* *592*

Precedents—Word of caution against citing judgments even when there is only a parapharase which supports the case—Little difference in facts may make a lot of difference in precedential value.

Sh. Kapil Mahajan v. *The State* *592*

INDIAN EVIDENCE ACT, 1872—Section 45—Reliance on expert witness—Suit filed by plaintiff to recover entire sale consideration paid for purchase of land—Alleged as per Agreement to Sell entered into defendant failed to handover possession—Defendant inter-alia submitted Agreement to Sell to be forged—Plaintiff examined handwriting expert, who deposed in favour of plaintiff—Court found as there was no close friendship between the parties factum of making entire payment even before possession unnatural—Held, expert witness agreed to support case of a party which engaged them—Hence not much reliance can be placed on them—Taking into consideration inherent improbabilities of case set up by the plaintiff, no reliance placed on opinion of expert.

Mrs. Indira Rai v. *Shri Bir Singh*..... *442*

— Section 137—Suit for partition—Lt Col. Gurupuran Singh, father of the plaintiff and defendants no. 1 to 4 died—Plaintiff claimed 1/5th in the estate of Lt. Col. Gurupuran Singh, on the basis of the Will dated 04.03.1992—Defendant no.3 had not specifically denied the execution of the Will dated 04.03.1992—She took the stand that high agricultural land was given to her by the deceased father, vide Will dated 29.01.1982—Defendant no. 4 also admitted the execution of Will dated 04.03.1992—Defendant no.1 denied the execution of both the Wills—Affidavit of PW1 tendered for examination—Witness was to be cross examined—Controversy arose, as to who is to cross examine the said witness first—Held—The *Hiralal's* case has rightly classified the defendants into three categories—Firstly those who are supporting the case of the plaintiff fully, secondly those who are partially supporting the case of the plaintiff and thirdly those who are not at all supporting the case of the plaintiff. The classification of the defendants in the aforesaid three

categories must regulate the cross examination of the plaintiff's witness. Accordingly, so far as the facts of the present case are concerned, the defendants no.3 & 4 are supporting the case of the plaintiff both partially and fully respectively and therefore they must first cross examine the witness of the plaintiff first rather than the defendant no.1 who is contesting the claim of the plaintiff.

Mrs. Sarabjit Singh v. *Mr. Gurinder Singh Sandhu & Bros.* *624*

INDIA PARTNERSHIP ACT, 1932—Section 69 and Code of Civil Procedure, 1908—Section 115, Order 7 Rule 11—Petition against Trial Court dismissing the application of the Petitioner under Order 7 Rule 11—Respondent filed a Suit for Permanent and Mandatory Injunction against the Petitioner and Municipal corporation of Delhi—Respondent had taken the Suit Property on rent from the father of Petitioner—Respondent contended that Petitioner had been threatening to raise construction over the roof of suit property which form part of Respondent's tenancy—Petitioner pleaded that Respondent is an illegal and unauthorized sub tenant in the property and Respondent was never accepted as a tenant—Petitioner also filed Application under Order 7 Rule 11, CPC on the ground that the Respondent firm has not been registered with the Registrar of firms and as such the suit is barred under Section 69 of the Indian Partnership Act which mandates that an unregistered firm cannot file a suit against any third party on a cause of action arising out of a contract entered into by the partnership firm—Respondent in reply stated that suit filed by it is for injunction, which is not arising out of any contract between the parties and as such, Section 69 (2) of the Act has no application—Held—Petitioner's own case is that Respondent was never accepted as tenant and therefore there

is no privity of contract between him and the Respondent—Under these circumstances, when there is no contract between the Petitioner and the Respondent, provisions of Section 69 (1) & (2) of the Act, are not applicable to the facts of the case—Thus, Petition dismissed.

Kewal Kishan v. *M/s. Khurana Kaj House* *543*

INDIAN PENAL CODE, 1860—Sections 397/392/457—Appellant convicted by trial court u/s 397/392/457 and sentenced to RI for 7 years and fine of Rs 500/—For offence u/s 397 r/w 392 IPC and RI for 3 years and fine of Rs 500/—for offence u/s 457 IPC—Allegation that appellant along with three others committed robbery in house of complainant—Contention of appellant that Section 397 not applicable since in the absence of recovery of knife purportedly used by appellant, it cannot be presumed that it was a deadly weapon and so charge u/s 397 could not be established and conviction could only be u/s 392—Held, since knife not recovered or produced during trial appellant could not be sentenced u/s 397 but only u/s 392—Order on sentence modified to one u/s 392 awarding RI for four years—Appeal partly allowed.

Samiuddin @ Chotu v. *The State of NCT Delhi* *399*

— Section 363/366/376—Respondents appointed on probation against temporary post of Warder Prison in Tihar—Pursuant to registration FIR, respondents sent to judicial custody—Competent Authority terminated services by non stigmatic orders of discharge simpliciter—Representations made to appointing authority to re-induct respondents in service after their acquittal in criminal trial rejected—Representations styled as appeals also rejected—Impugned orders challenged before

Administrative Tribunal to set aside order of termination—Plea taken, order terminating services being penal in nature, department was obliged to hold enquiry—Administrative Tribunal allowed application—Order of Tribunal challenged in High Court—Plea taken, applications before Tribunal were time barred—Respondents being accused of serious offences and arrest was motive and not foundation of order terminating their services—Held, Non statutory representation can never extend limitation—Merely by labelling representation as appeal and said work being reflected in order communicating rejection of representation would not make representation appeal—It is substance which matters not label—Representations questioning order terminating services were highly belated and barred by limitation before Tribunal—Employer has legal right to dispense with services of employee without anything more during or at end of prescribed period—Where no findings are arrived at any inquiry or no inquiry is held but employees chooses to discontinue services of employee against whom complaints are received it would be a case of complaints motivating action and would not be bad—Order of Tribunal quashed.

Govt. of NCT of Delhi & Ors. v. *Naresh Kumar* *132*

— Sections 420, 468, 471, 120-B—Accused company falsified accounts to show lesser liability and induced complainant Bank to sanction credit facility—Company did not pay back and cheated bank of more than Rs 6 crores—Trial Court framed charges against petitioner company u/sections 420, 468, 471 read with 120-B IPC—Whether company being a juristic person can have mens rea for the purpose of Section 120 B—Held, Company acts through its Board of Directors—If company can enter into contracts and perform other legal obligations it can also be party to criminal acts—If the

company can have a right to do things through its Board of Directors it can have necessary mens rea also through its Board of Directors—Mens rea can be fastened on the company if it is an essential element of crime on the ground that mens rea was present in the officers of the company who were acting as mind of the company—Just because offence u/s 420, 468 and 471 IPC included the punishment of imprisonment does not mean company cannot be prosecuted as court can always resort to punishment of imposition of fine—Petition dismissed.

Morgan Tectronics Ltd. v. *CBI* *29*

— Section 500—Quashing of order of ASJ upholding order of MM dismissing the complaint filed by the petitioner u/s 200 Cr.PC against the respondent for defaming him—Mother of petitioner had filed criminal complaint against respondent and others u/s 133 Cr. PC before SDM—Responsdent vide a notice was called upon to reply—In response to notice respondent submitted reply which was considered as defamatory by the petitioner—Complaint u/s 200 filed before MM—Complaint dismissed—Contention of petitioner that the court below could not have gone into the merits of the case, as at the stage of presummoning, statement made by the petitioner have to be accepted as true and correct—Held, eight exception to Section 499 IPC applicable—Reply filed by respondent in proceedings initiated by the mother of the Petitioner u/s 133 Cr.PC were filed in the Court of Law which had authority over subject matter in dispute—Reply was filed in good faith to get complaint dismissed—Not case of petitioner that apart from filing on record the reply was circulated to any person—No infirmity in order—Petition dismissed.

Sardar Gurdial v. *Dr. Sandeep Sharma* *193*

— Section 120-B—Trial Court convicted appellants u/s 120-B IPC r/w Section 7,13(2), and 13(1)(d) of PC Act and also for substantive offences u/s 7 and 13(2) r/w Section 13(1)(d) of the PC Act and passed sentence—Allegation that appellants who were in police had picked up the complainant and two others and on being released the appellants demanded bribe of Rs 5,000/- from complainant—The complainant lodged complaint—Appellant Ram Chander was caught pursuant to the trap—Contention of appellants that trial court wrongly relied upon statement of the complainant which was contradictory, also he was an accomplice, the two independent witnesses had also not supported the prosecution—Held, when appreciating evidence minor discrepancies on trivial matters which do not affect the core of the prosecution case should not weigh with the court to reject evidence—Discrepancies in testimony of complainant few and so testimony cannot be discarded as the same is supported by other evidence on record—No doubt two independent witnesses declared hostile but have still partially corroborated the complainant—Enough evidence on record to hold that appellant Ram Chander caught red handed at the spot with bribe money after he demanded money from complainant—Conviction and sentence of Ram Chander upheld—Allegation of conspiracy of demanding bribe against appellant Prem Dutt Sharma doubtful since he not specifically named in testimony of complainant, he did not come to the place fixed for payment of bribe and not at the spot at the time of the trap—Also although evidence similar third person named by complainant i.e. one ASI Ram Babu and appellant Prem Dutt Sharma, the former was not prosecuted—No evidence to show that the scooter used by Ram Chander belonged to appellant Prem Dutt Sharma—Prem Dutt Sharma given benefit of doubt and acquitted.

Ram Chander Singh Prem Dutt Sharma v. *CBI* *372*

INDIAN SUCCESSION ACT, 1925—Intention of testator in propounding the Will—Which interferes or disturbs the natural line of succession—Mere fact some heirs excluded is not a ground to conclude that Will was executed in suspicious circumstances—When all facts point to a valid Will—Delay in overall circumstances—Not fatal.

Mahabir Prasad & Another v. *State* *166*

— Section 63, 70—Suit for declaration—Property No. B-4/196, Safdarjung Enclave, New Delhi, was owned by late Smt. Shakuntala Devi Mathur, mother of the parties—She expired on 05th November, 1998, leaving a registered Will dated 17th September, 1981—It is alleged that Testator changed her mind in November, 1997, by writing a letter, addressed to her children, on a non-judicial stamp paper, annexing therewith some pieces of paper written in her own handwriting and containing her real intention—This document constituted a deemed codicil to the Will dated 17th September, 1981—Defendant took the objection that since the alleged deemed codicil has not been attested by any witness, it does not comply with the mandatory requirement of law—Held—The same rule of execution apply to a codicil, which apply to a Will to which the codicil relate and the evidence adduced in proof of execution of codicil must satisfy the same requirements as apply to the proof of execution of a Will—Since none of the documents out of Exs. PW 4/1 to PW4/7 has been executed in the manner, prescribed in Section 63(C) of the Indian Succession Act, they cannot be considered as a valid Will or codicil to the Will dated 17th September, 1981.

Suresh Chand Mathur v. *Harish Chand Mathur* *632*

— Section 138, 131—Suit for declaration—Property No. B-4/196, Sarfdarjung Enclave, New Delhi, was owned by late Smt. Shakuntala Devi Mathur, mother of the parties—She expired on 05th November, 1998, leaving a registered Will dated 17th September, 1981—It is alleged that restrictions contained in the Will on transfer of share is void and invalid Under Section 138 of the Indian Succession Act—Held—The will executed by the Testator in this case is a conditional bequest—A conditional bequest does not come within the purview of Section 138 of Indian Succession Act, which applies to altogether different situation where there is an absolute bequest of the legatee, but his right to deal with the property as its absolute owner is sought to be curtailed by the Testator—In fact, Section 131 of the Indian Succession Act is the provision which applies to the bequest made by Late Smt. Shakuntala Devi—This Section deals with a defeasance cause of course, the defeasance must be in favour of somebody in existence at the time the bequest is made—The restrictions in Will are valid.

Suresh Chand Mathur v. *Harish Chand Mathur* *632*

INDUSTRIAL DISPUTES ACT, 1947—Section 2(oo) and 25 F—Services of workman were terminated vide termination letter service of which is not disputed—Plea of workman that action of requiring workman to come and collect dues instead of sending amount due alongwith letter is illegal—Per contra. plea of petitioner is that this technical defect is not such that any huge benefit would have accrued as to employer if provision of payment of dues was to have been complied with—Held—It is discretion of courts as to whether facts of case justify reinstatement or compensation would be adequate relief—Reinstatement is not automatic and facts of each case have to be seen to whether reinstatement should be granted or compensation is adequate remedy—Various factors such

as industry in question, financial capacity of employer, peculiar circumstances of each case, nature and period of employment have to be seen—Employment of workman was towards working on printing machine which was sold—Plea of workman that there is no inherent right to retrenchment and valid reasons must be given for retrenchment rejected—Only requirement for retrenchment is it must be of type falling under Section 2 (oo) and letter must be accompanied by amount which would be 15 days pay for each year of service and a 30 days notice pay—There is indeed retrenchment but there is a technical violation in that instead of sending amount alongwith termination letter, workman was asked to collect amount—Employment is not of a very large number of years—Award set aside in that it directs reinstatement—Instead of reinstatement, workman should receive a sum of Rs. 1 lac as compensation for illegal retrenchment.

M/s. Genesis Printers v. *Shri Rati Ram Jatav Presiding Officers & Ors.* *279*

— Section 17B—Payment under Section 17B can not be treated as subsistence allowance, if workman is having other sources of income—Workman directed to file affidavit alongwith copies of his bank accounts that he had no other source(s) of income during period he received payment pursuant to order under section 17B so that there is no need of any recovery from him.

M/s. Genesis Printers v. *Shri Rati Ram Jatav Presiding Officers & Ors.* *279*

LIMITATION ACT, 1963—Applicability to Probate Petitions—Testator bequeathed his property entirely to petitioner—Contention of other heirs—Will not genuine and fabricated-

Testator was an old and infirm man-did not possess testamentary capacity—Delay of seven years in propounding the Will—Held—The Limitation Act mention applicability to applications, suits and appeals but it does not mention Petition in form of probate claims or any proceedings under the Indian Succession Act.

Mahabir Prasad & Another v. *State* *166*

— Article 65—Appellant filed suit seeking possession of property; decreed in his favour—On appeal, findings of Trial Judge reversed—Aggrieved appellant preferred appeal, urging Respondent failed to prove hostile and uninterrupted possession of suit property qua appellant for last 12 years, thus appellant entitled to possession of suit property—Per contra, as per Respondent, his title by adverse possession perfected and suit of appellant hopelessly barred by time—Held—The assertion of title adverse to the true owner must be clear and unequivocal, though not necessarily addressed to the real owner—It is not always necessary for the person claiming adverse possession to know who the real owner is—It may not be within his knowledge; however what is within his knowledge is that he is occupying land which is of another and upon which he has set up his title adversely—The period of limitation starts running from the date both actual possession and assertion of title are shown to exist—Respondent perfected his title by adverse possession and suit filed more than 12 years being barred by limitation.

Shri Ashok Babu v. *Shri Puran Mal* *786*

— Articles 34 & 39—Suit for recovery—The defendant company agreed—Plaintiff shipped 2000 metric tonnes of commodities valued at US$ 1,85,729.25 vide invoice dated 27.06.1997—

The plaintiff drew Bill of Exchange for the invoiced amount—Payment was to be made within 90 days of sight—The bill was accepted by the defendant on 29.07.1997—Defendant paid a total sum of US$ 150,820 from time to time—Balance payment was not paid, hence, the Bill of Exchange was returned to the plaintiff by its bank vide letter dated 10.05.1999—Defendant failed to make the balance payment despite notice of demand—Defendant took the preliminary objection that suit is barred by limitation—On merit, it was alleged that matter was amicably resolved and no payment was due—Counsel for the plaintiff submitted that since the suit is based on a dishonoured foreign bill, hence it will be governed by Article 39—Held—There are two prerequisites before Article 39 can be invoked. A protest should be made and notice should be given when a foreign bill is dishonoured. If either of these two prerequisite conditions is missing, Article 39 would not apply—In the present case, no protest is alleged to have been made by the plaintiff when the Bill of Exchange was dishonoured. Hence, the first prerequisite condition for applicability of Article 39 of Limitation Act does not stand fulfilled—The object of notice is not to demand payment, but to warn the party of liability and in case of a drawer to enable him to protect him, as against the drawee or acceptor, who has dishonoured the installment—Therefore, the second prerequisite condition for invoking Article 39 of Limitation Act also does not exist in this case—Hence, there is no merit in the contention that Article 39 of Limitation Act, would govern the present suit—Suit dismissed being barred by Limitation.

M/s. Sineximco PTE. Ltd. v. *M/S. Dinesh International Pvt. Ltd.* *648*

Proving a document—Opportunities to cross-examine not availed—Suit for recovery of money-decreed in favour of

respondent-instant appeal filed contention—Letter dated 07.06.2000—Crucial for calculating limitation not proved sufficient opportunity not given-to cross examine respondent. Held—Order sheets shows-opportunities for cross examination were not utilized by appellant no steps taken to cross examine appellant—In his own statement did not take stand to contradict the letter or prove it was forged—Where party fails to avail right of cross examination despite sufficient opportunity-testimony of witness remains Unrebutted—testimony has to be given due credence—In the absence of specific plea in the written statement to dispute the letter, plea of forgery cannot be taken.

Sterling Holiday Resorts (India) Ltd. v. *Manohar Nirody* *662*

MOTOR VEHICLE ACT, 1988—Section 166—Appeal against award of compensation by MACT—Fatal Accident—Gratuitous passenger—Fake driving licence—Deceased aged about 35 yrs.—Motor Mechanic—Left behind widow, three daughters and son-5 dependents-salary Rs. 4500—No documentary proof of income—Tribunal took income as per minimum wage Rs. 3000—Applied multiplier of 16—Deducted one third towards personal expenses—Respondent examined its Director—Proved driving licence issued in the name of Sonpal in December, 1998 for motorcycle plus light motor vehicle—Endorsed for heavy transport vehicle in April, 2010—DL valid upto April, 2007 and proved verification report—Appellant examined DTO Gurgaon-deposed—DL not issued from their office in the name of Rajvir Singh—Tribunal held appellant not led evidence in respect to DL issued from Mathura, therefore, DL valid—No evidence led to prove deceased gratuitous passenger—Held—Findings of Tribunal upheld—Valid driving licence—Deceased not gratuitous

passenger—Award upheld.

National Insurance Co. Ltd. v. *Raj Kumari & Ors.* *1*

NARCOTIC DRUGS AND PHYCHOTROPIC SUBSTANCES ACT, 1985—Section 68-I (3) & 68-A (2) (d) & 68-B(g)—Writ petition by petitioner against order passed by Appellant Tribunal for forfeiture of property, dismissing petitioner's appeal against order passed by Competent Authority U/s 68-I (3) of Act—Petitioner urged his brother detained for indulging in illicit trafficking of drugs and subsequently order of detention passed against him for period of two years—Property belonging to petitioner frozen by police on ground that petitioner being brother of detenu also covered under section 68-A (2) (d) of Act—Police suspected source of said property as well as another shop belonging to petitioner illegal acquired properties of detenu, brother of petitioner—Detenu filed writ petition challenging order of detention—Only initial period of detention of three months sustained and subsequent period of detention held to be vitiated—As per petitioner, for operation of section 68-A (2) (d) of Act subsisting valid order of detention required and as order of detention of his brother, declared void ab initio and only initial period of detention of 3 months sustained, therefore property of petitioner not liable to be forfeited —Also, respondent failed to discharge initial burden of showing nexus between properties acquired by petitioner with alleged illicit earnings of his brother—Respondent argued entire detention order not held to be illegal thus burden shifted on petitioner to show property was acquired by him from his own source of income. Held, If there is a violation of Article 22 (5) in not informing the detenu that he had an opportunity to represent to the declaring authority, upon the Court quashing the Section 9 declaration, the order is impliedly declared void from its inception and on that basis,

the benefit of extension of the period of 5 weeks to 4 months and 2 weeks, and the benefit of extention of 11 weeks to 5 month and 3 weeks in Section 9 (2), cease to apply—As the period of 3 months of detention was held valid, the detention order was itself held to be void ab initio and the show cause notice was issued to the petitioner thereafter when there was no valid detention order against his brother—Consequently the essential condition for invoking section 68-A of the Act had been rendered non-existent.

Shahid Parvez v. *Union of India & Ors.* *297*

— Section 21, 20—Trial Court convicted appellant u/s 21—Appellant along with others apprehended on tip off about supply of drugs—Appellant given notice u/s 50—On checking drugs found on the person of accused—Contention that notice u/s 50 not as per law as appellant not informed of his right to be searched in the presence of a Magistrate or Gazetted Officer—Perusal of notice u/s 50 and testimony of IO showed that appellant was only informed about the option and not about his right of being searched before a Magistrate or a Gazetted Officer—Appellant thus entitled to be acquitted—Appeal allowed.

Parveen Singh @ Kalia v. *State of NCT of Delhi* *426*

THE NATIONAL TRUST FOR WELFARE OF PERSONS WITH AUTISM, CEREBRAL PALSY, MENTAL RETARDATION AND MULTIPLE DISABILITIES ACT, 1999 —Section 4(4) and 4(5)—Object of Trust Act—Petitioner Society was sanctioned grant of Rs. 27,89,342/—Disbursement of money was to be in installments—After sanction, President of the Petitioner Society joined the Board of Respondent Trust—Respondent Trust sought refund of

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 (DV ACT)—Section 12—Petitioner NRI was working in Luanda, Angola Africa as Manager—Wife had done MA and MBA and was working with a Multinational company—Metropolitan Magistrate allowed maintenance of Rs 5000/- per month to the wife against petitioner—Appeal against order dismissed—Held, maintenance awarded without considering that petitioner had lost his job in Angola and was unemployed in India—Maintenance can be fixed under the DV act as per the prevalent law regarding providing of maintenance by the husband to the wife as per which husband is to supposed to maintain his un-earning spouse out of the income which he earns—No law provides that a husband has to maintain a wife living separately from him irrespective of the fact whether he earns or not—Court cannot tell husband that he should beg borrow or steal but give maintenance to the wife; more so when the husband and wife are almost equally qualified and almost equally capable of earning and both claim to be gainfully employed before marriage—Order fixing maintenance with out even prima facie proof of the husband being employed in India and with clear proof of fact that his passport was seized and he was not permitted to leave the country is contrary to law—Petition allowed.

Sanjay Bhardwaj & Ors. v. *The State & Anr.*..... *58*

— Section 2 (f) & 12—Domestic relationship—Application u/s 12 filed by petitioner against her brother and his wife for allowing her to stay in her parents house whenever she visited India from the USA—Metropolitan Magistrate held there was no ground to pass interim order of residence—Appeal dismissed by ASJ—Held, Act cannot be misused to settle property disputes—Where a family member leaves the shared household, to establish his own household and actually

establishes his own household he cannot claim to have a right to move an application u/s 12 on the basis of domestic relationship—Domestic relationship comes to an end once the son along with his family moved out of joint family and establishes his own household or when a daughter gets married and establishes her own household with her husband—Such son, daughter, daughter-in-law or son-in-law if they have any right in the property because of coparcenary or because of inheritance such right can be claimed by an independent civil suit and an application under the DV act cannot be filed by a person who has established his separate household and ceased to have domestic relationship—Petitioner had settled in USA, doing a job there, she was living separately and ceased to be in a domestic relationship with her brother—No relief can be under the DV Act—Petition dismissed.

Vijay Verma v. *State (NCT) of Delhi & Anr.*..... *36*

RAILWAY PROTECTION FORCE ACT, 1957— Section 1 (i)-Railway Protection Rules, 1987- Rule 153—Central Civil Services (Classification, Control and Appeal) Rules, 1957—Rule 15 (1)—Inquiry officer absolved petitioner of charges—Disciplinary authority held that enquiry was not properly conducted and directed de novo inquiry by new IO—Petitioner absolved of first charge and found guilty of second charge—Disciplinary authority held petitioner guilty of both charges—Notice with copy of report of IO served on petitioner—After considering representation, Disciplinary authority imposed penalty of removal from service—On revision, penalty modified from removal from service to compulsory retirement—Order Challenged in High Court—Plea taken, action of respondents in directing second inquiry is without legal competence and jurisdiction—Disciplinary authority had arrived at a conclusion that petitioner was guilty of both charges—Notice to petitioner after arriving at such conclusion

calling upon petitioner to submit representation was meaningless—Held No rule or regulation prescribe second inquiry on identical charges by concerned authority—Disciplinary authority failed to follow a procedure prescribed by law - It was open to disciplinary to record further evidence or call material which had been ignored by IO to be produced after giving full opportunity to petitioner or IO could have been asked to record further evidence—Direction to conduct second enquiry was unwarranted and illegal—Disciplinary authority is required to record its tentative reasons for such disagreement and give opportunity to charged officer to represent before it records its findings—Communication communicating conclusions already drawn by disciplinary authority gives no real opportunity to petitioner to make a representation in respect of either points of disagreement or proposed punishment—Opportunity to represent against points of disagreement has to be meaningful—Impugned order not sustainable—Petitioner directed to be reinstated in service with national seniority but without back wages.

RIGHT TO INFORMATION ACT, 2005 —Section 8(i)(e), 8(i)(g) and 8(i)(j)—Notings and files during disciplinary proceedings—Central information Commission (CIC) allowed the appeal of Respondent directing the Central Public Information Officer (CPIO) to provide to Respondent information sought in respect of his disciplinary proceedings—CPIO had rejected the request—Contended that information attracted Section 8(i)(e), 8(i)(g) and 8(i)(j) of RTI Act. HELD—File notings, unless specifically excluded, included u/s 2(f)—File notings about performance or conduct of an officer are not given pursuant to 'fiduciary relationship' and do not attract Section 8 (i)(e), 8(i)(g) and 8(i)(j)- at best can

only be denied to third party.

SERVICE LAW—Benchmark prescribed for promotion to post of under Secretary was 'Good' till 01.06.2008 when it was enhanced to 'Very Good'—Respondent denied promotion in view of enhanced benchmark—Administrative Tribunal held that enhanced benchmark would be applicable from date of decision—Decision pertaining to enhanced benchmark cannot be made applicable to ACRs that came into existence prior to said date—Petitioner directed to hold review DPC to reconsider case of respondent for promotion—Order challenges in High Court—Plea taken, Tribunal ignored distinction between interest in promotion and right in promotion—In service jurisprudence, concepts of legitimate expectations and contract have no role—Status of Govt. servant is subject to such rules as may be framed by Govt. from time to time—Held—Higher benchmark has to apply prospectively would mean only previous DPCs cannot be reviewed—Executive has right to revise pending instructions relating to guidelines on issue of benchmark—When a benchmark is enhanced it is bound to have retroactive operation as preceding five years ACRs have to be considered—Retroactivity and restropectivity are different concepts—Tribunal is wrong in directing that notwithstanding benchmark being enhanced and DPC being convened after date when enhanced benchmark was notified, department has to consider entitlement of respondent with reference to lower benchmark—Directions passed to convey below benchmark ACR grading for year 2003-04 till 2007-08 to respondent who would have a right to file a representation which will be considered and disposed of within three weeks—If ACR

gradings are enhanced, a review DPC shall be constituted within six weeks thereafter.

Union of India Ors. v. *V Pitchandi* *835*

SERVICE TAX—Section 83—Suit filed claiming declaratory and injunctive relief as to whether it or the Defendant has to bear service tax liability in respect of the rents paid received by Plaintiff—Central government, with effect from June, 2007, levied service tax on the renting of immoveable property for business purposes—Plaintiff contended that the service tax, levied by the Government is not in the nature of tax on property but a levy on service and to be collected from the beneficiary of the service, i.e. the lessee—Defendant contends that the service tax is a tax on property, thus be borne by the lessor and if the lessor has any grievance in respect of the imposition of the service tax, it is open for the lessor to take up the matter with the appropriate forum with the Central Government—Held if the overall objective of the levy were to be taken into consideration, it is the service which is taxed and the levy is an indirect one, which necessarily means that the user/lessee has to bear it.

Pearey Lal Bhawan Association v. *M/s. Satya Developers Pvt. Ltd.* *604*

TRANSFER OF PROPERTY ACT, 1882—Section 106—Appellant at the stage of Appeal contended that there are twin requirements to be fulfilled under Section 106, TPA; the notice must give a clear 15 days period to the tenant to vacate the property coupled with the requirement that the tenancy must terminate on the last date of the calendar month—Appellant contended that the second requirement was not fulfilled—Held that the plea of non fulfillment of the requirements of the

provisions of Section 106 cannot be taken at the stage of Second Appeal by the tenant.

Baljit Singh v. *Thakaria* *563*