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CRL. APPEAL

RANI **....APPELLANT**

VERSUS

THE STATE OF NCT OF DELHI **....RESPONDENTS**

(SHIV NARAYAN DHINGRA, J.)

CRL. APPEAL NO. : 93/2004 **DATE OF DECISION: 02.12.2010**

Indian Penal Code, 1860—Section 304-B/498A/34 Trial Court convicted appellant u/s 304-B/498A/34 IPC and sentenced her to RI of 7 years and fine of Rs. 1,000/- No evidence on record as to who in the family of the in laws had put demand of Rs. 50,000/- and scooter—No evidence to show that cruelty of any kind was perpetuated on the deceased for this demand—Mere demand is not pre requisite of Section 304-B; there should be demand coupled with cruelty or harassment in connection with demand—List of articles of dowry and istridhan filed in court by brother of deceased in Court showed that not a case where dowry was demanded—To convict person for abetment of suicide apart from suicide it has to be proved that the appellant or accused was instrumental in commission of suicide—Since no evidence of cruelty presumption u/s 113 Cr.PC cannot be raised—Conviction cannot also be u/s 306—Trial Court should not act as mere umpires but should ask questions to the witnesses to ascertain the truth—Appeal allowed—Appellant acquitted.

It is apparent that the allegations were very vague in nature. Who demanded Rs. 50,000/- and scooter, whether it was the demand of husband or of mother-in-law or of father-in-law, when was it made – answers to all these questions are absent. Even if it is presumed that demand was made, the ingredients of Section 304B IPC were totally absent in this case as there was no evidence on record to show that

cruelty of any kind was perpetuated on Janki for this demand. Section 304B IPC reads as under:

> "(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death" and such husband or relative shall be deemed to have caused her death.
>
> (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

To bring home an offence under Section 304-B IPC it is an obligation of the prosecution to prove in those cases where death of a woman occurs within 7 years of her marriage, that soon before her death, she was subjected to cruelty or harassment by her husband or any other relative, in connection with a demand of dowry. Mere making of demand is not the only pre-requisite for proving an offence under Section 304B IPC. The prosecution was thus supposed to prove that the demand made by the accused was coupled with a harassment or cruelty in connection with the demand. Unnatural death can be called a dowry death only if, after making a demand of dowry, the accused perpetuates cruelty on the victim so that the demand made by him is got fulfilled by perpetuation of cruelty on the victim. If the alleged demand of dowry is not coupled with cruelty, harassment or any other such act on the part of accused, Section 304B of IPC would not be made out. In this case, none of the three brothers stated that cruelty was perpetuated on Janki or she was harassed by the appellant or by any other

relative for not fulfilling the demand. I consider in these circumstances conviction of the appellant under Section 304B IPC was totally illegal and unjust. The conviction seems to be the result of a callous criminal justice system where neither the defence counsel prepared the case nor the prosecutor discharged his duty in an impartial manner nor the Judge considered it as his duty to see what offence was made out and everyone acted in a mechanical manner. **(Para 8)**

The other question arises whether the appellant could be convicted under Section 306 IPC i.e. for the offence of abetment of suicide, since the deceased committed suicide within three months of her marriage. In order to convict a person for abetment of suicide, apart from proving suicide, it has to be proved that the appellant or accused was instrumental in commission of suicide. Section 113A of Evidence Act which raises a presumption regarding abetment of suicide in respect of a married woman reads as under:

> **"113A. Presumption as to abatement of suicide by a married women -** When the question is whether the commission of suicide by a women had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband has subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband."

A perusal of above section would show that abetment of suicide of a married woman by relatives would be presumed by the Court if it is shown that her husband or such other relative of husband had subjected her to cruelty. In the present case, there is not an iota of evidence in respect of cruelty perpetuated upon the victim, either medical evidence or oral evidence. I,

therefore, consider that that the appellant could not have been convicted even under Section 306 IPC. **(Para 9)**

Important Issue Involved: To prove an offence u/s 304-B IPC mere demand is not the pre requisite, there should be demand coupled with cruelty or harassment in connection with demand.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Mr. Bhanu Pratap Singh, Advocate.

FOR THE RESPONDENT : Mr. O.P. Saxena, Addl. PP for the State.

RESULT: Appeal allowed.

SHIV NARAYAN DHINGRA, J.

1. Present Appeal has been preferred against the Judgment dated 1st October, 2003, and order on Sentence dated 13th October, 2003, whereby the Appellant was convicted under Section 304B/498-A IPC read with Section 34 IPC and sentenced to undergo Rigorous Imprisonment for a period of 7 years with fine of Rs. 1,000/-.

2. Janki was married to son of the Appellant on 5th December, 2000. She committed suicide by hanging herself on 1st March, 2001. After her death, her brother Ved Prakash, PW-2 gave a statement to SDM that he had visited Janki's house on 23rd February, 2001 and found her in a sad mood. She told him that her in-laws were asking for Rs. 50,000/- and a scooter as they wanted to open a shop and the scooter was required for roaming around. Ved Prakash stated that thereafter he talked to in-laws of her sister and told them that he would respond after thinking over. He asked them to send Janki with him. On this, he was told that they would take her to his house after 2-3 days. After that he received information that Janki had died. ˇHe expressed his doubt that his sister had been killed by her husband, parents of her husband and husband's sister Kiran.

3. In the name of investigation, police took photographs of deceased, recorded statement of brothers of Janki, collected postmortem report about the cause of her death, and FSL report of viscera. Even the site plan of the place of suicide and of the house was not prepared. The postmortem report shows that there was no external injury on the body of Janki. The cause of death was given due to asphyxia. Ligature mark present on the neck showed that there was no ligature mark on left side of neck showing that ligature was caused due to hanging. FSL report showed presence of insecticide in the body. No investigation was done by the police on the aspect of purchase of insecticide or administration of insecticide etc. Charges against the accused persons were framed under Section 304B read with Section 498-A IPC read with Section 34 of IPC.

4. Prime witnesses in this case are PW-2 Ved Prakash and PW-7 Jai Prakash, the two brothers of the deceased Janki. Ved Prakash is the one who claimed to have visited Janki on 23rd February, 2001 and stated that Janki was in sad mood and she complained that her in-laws were demanding Rs. 50,000/- and a scooter. PW-7 Jai Prakash stated that Janki had come to his house in the village after about a week of her marriage and had told him that her in laws were demanding scooter and Rs. 50,000/-. He then sent his brother Jaidev @ Ali to the house of his sister Janki and this demand was repeated to him and Jaidev informed him about the demand.

5. PW-4 Laxman is 3rd brother of Janki. He testified that he had visited his sister at her matrimonial house after about a month of her marriage. He stayed there for few moments and at that time he had no talks with his sister. Thus, as per his testimony, no complaint was made to him by his sister about demand of Rs. 50,000/- and a scooter.

6. These three witnesses were practically not cross examined on the charges framed against the accused persons. The only cross examination done by the defence counsel was putting to the witnesses statement recorded under Section 161 Cr. P.C. and giving suggestion regarding denial of the demand.

7. On the basis of the testimony of two brothers i.e. PW-2 and PW-7, the appellant and other two accused persons were convicted under Section 304B/ 498-A/34 IPC.

8. It is apparent that the allegations were very vague in nature. Who demanded Rs. 50,000/- and scooter, whether it was the demand of husband or of mother-in-law or of father-in-law, when was it made – answers to all these questions are absent. Even if it is presumed that demand was made, the ingredients of Section 304B IPC were totally absent in this case as there was no evidence on record to show that cruelty of any kind was perpetuated on Janki for this demand. Section 304B IPC reads as under:

> "(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death" and such husband or relative shall be deemed to have caused her death.
>
> (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less ˇthan seven years but which may extend to imprisonment for life."

To bring home an offence under Section 304-B IPC it is an obligation of the prosecution to prove in those cases where death of a woman occurs within 7 years of her marriage, that soon before her death, she was subjected to cruelty or harassment by her husband or any other relative, in connection with a demand of dowry. Mere making of demand is not the only pre-requisite for proving an offence under Section 304B IPC. The prosecution was thus supposed to prove that the demand made by the accused was coupled with a harassment or cruelty in connection with the demand. Unnatural death can be called a dowry death only if, after making a demand of dowry, the accused perpetuates cruelty on the victim so that the demand made by him is got fulfilled by perpetuation of cruelty on the victim. If the alleged demand of dowry is not coupled with cruelty, harassment or any other such act on the part of accused, Section 304B of IPC would not be made out. In this case, none of the three brothers stated that cruelty was perpetuated on Janki or she was harassed by the appellant or by any other relative for not fulfilling the demand. I consider in these circumstances conviction of the appellant

under Section 304B IPC was totally illegal and unjust. The conviction seems to be the result of a callous criminal justice system where neither the defence counsel prepared the case nor the prosecutor discharged his duty in an impartial manner nor the Judge considered it as his duty to see what offence was made out and everyone acted in a mechanical manner.

9. The other question arises whether the appellant could be convicted under Section 306 IPC i.e. for the offence of abetment of suicide, since the deceased committed suicide within three months of her marriage. In order to convict a person for abetment of suicide, apart from proving suicide, it has to be proved that the appellant or accused was instrumental in commission of suicide. Section 113A of Evidence Act which raises a presumption regarding abetment of suicide in respect of a married woman reads as under:

> **"113A. Presumption as to abatement of suicide by a married women -** When the question is whether the commission of suicide by a women had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband has subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband."

A perusal of above section would show that abetment of suicide of a married woman by relatives would be presumed by the Court if it is shown that her husband or such other relative of husband had subjected her to cruelty. In the present case, there is not an iota of evidence in respect of cruelty perpetuated upon the victim, either medical evidence or oral evidence. I, therefore, consider that that the appellant could not have been convicted even under Section 306 IPC.

10. It is seen that the Appellant herein belonged to a very poor family of vegetable seller. She had three young daughters and two sons. She herself was a house-wife and not working and that seems to be reason that during trial she and her husband and son could not engage a counsel with some experience who could have done justice to the brief. The witnesses were not cross-examined in a proper manner and cross-

examination done to the witness was only to confront them with their statements under Section 161 Cr. P.C. Along with the Appellant, her husband and her son were also convicted. Even during Appeals, this family could not engage an efficient counsel and that is why her husband and son remained in JC during entire Appeal period. After undergoing entire sentence, they appeared in the court and stated that they do not wish to pursue their Appeals, so, the Appeals were dismissed.

11. A perusal of record shows that the deceased's brother had made application before the Court for return of dowry articles and Istridhan during trial and gave a list of the articles given at the time of engagement ceremony (sagai) and marriage. The list reads as under;

> (i) One Silver Coin, (ii) One Three Piece Suit for Boy, (iii) One Gold Ring, (iv) 51 Utensils, (v) Fruits and Dry Fruits, (vi) Nine Sarees, (vii) Nine Gents Shirts, (viii) Four Pairs of Clothes for Children and (ix) Rs. 501/-.

At marriage the dowry list is as under;

> (i) One Silver Coin, (ii) 5 Units of Clothes for Boy, (iii) One HMT Wrist Watch, (iv) 27 Utensils (of Steel and Brass), (v) Ear-ring (Kundal) + 'LONG' of Gold for Girl, (vi) A set of Silver pajeb + Key Ring, (vii) One Double-Bed with Matress, Quilt and Pillow, (viii) One Chair, One Table, One Stool, One Dressing Table, One Cooler, One Godrej Almirah and One Small Box.

This list, prepared at the time of marriage was duly signed by husband Raju. The list would show that both parties belonged to poor strata of society and except Rs. 501/-, there was no cash transaction as dowry between the parties and the parties knew each-other's financial position well. No question was asked about the list nor the investigating agency made the list as a part of their investigation nor the dowry list attracted attention of the Judge concerned. This list would have shown that it was not a case where dowry has been demanded. Where the parties knew that the status of girl was such that even at marriage and engagement ceremonies only Rs. 501/- cash was given, the husband of relatives would not have thought of demanding Rs. 50,000/- and scooter within few days of marriage. The most disturbing factor is that no

evidence, whatsoever, was collected by the police about the real facts. No effort was made by learned Public Prosecutor or by Trial Judge to even go through the evidence and consider what charges were made out. Charges seemed to have been framed in a mechanical manner. No effort is seem to have been made by the Trial Judge either at the time of framing charge or later on as to what offence was made out.

12. Every suicide after marriage cannot be presumed to be a suicide due to dowry demand. The tendency of the Court should not be that since a young bride has died after marriage, now somebody must be held culprit and the noose must be made to fit some neck.

13. There is an unfortunate development under criminal justice system that even in those cases where accused should be examined as a witness by the defence, the accused persons are not examined as a witness. In matrimonial offences, it is the accused and his family members who know what transpired within the family and they should always volunteer themselves as witnesses in the Court so that the Court gets their side of the version by way of evidence and testimony. Under Section 106 of Evidence Act, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. When a death takes place within the four walls of matrimonial home, the husband and in-laws should come forward and depose as to what was the real cause of death. The criminal practice in India has been on the lines of old track that accused must not speak and he should not be examined as a witness. I do not know why this practice developed but in all matrimonial offences, this practice is shutting the doors of the Court, to the version of the other side, by their advocates.

14. Adversarial system of trial being followed in this country has turned most of the trial court judges into umpires and despite having sufficient power to ask questions to the witnesses and to find out truth, most of them do not ask questions to the witnesses to know the truth. In fact, the witnesses are left to the Advocates and the Judges just sit and watch. This tendency of being only umpires works heavily against the poor who are normally not defended by Advocates of competence and standing, as they cannot afford their fee. The Trial Courts, therefore, must shed their inertia and must intervene in all those cases where intervention is necessary for the ends of justice.

15. In this case the High Court did not find time to hear the appeals of other two appellants, who continued to remain in jail during trial period as well as appeal period for no crime. In all such cases where appellants are in jail and sentence is not suspended, the High Court should fix a time limit for disposing of such appeals. Neither the criminal should be let off by default as High Court has no time to hear appeals nor should the innocents rot in jail by default. The whole criminal justice system needs overhauling so that the constitutional mandate of equality before law is made meaningful and it should not be the case that higher courts are kept occupied by the person with money or power, as is the case today.

16. The appeal is allowed. The appellant is acquitted.

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CRL. APPEAL

SATYA PRAKASH ....PETITIONER

VERSUS

STATE ....RESPONDENT

(MUKTA GUPTA, J.)

CRL. APPEAL NO. : 220/2001 DATE OF DECISION: 06.12.2010

Indian Penal Code, 1860—Sections 304 Part II—Son of the deceased and complainant was coming on the scooter when the appellant stopped him and a quarrel took place between them—When the deceased and his wife were separating them appellant gave a fist blow on the chest of deceased because of which he fell and became unconscious—He was declared brought dead in the hospital—On statement of the wife of the deceased, FIR lodged—Trial Court convicted appellant for offence u/s 304-B (II) and sentenced him

to undergo RI for a period of 3 years and to pay fine of Rs. 10,000/- and in default RI for three months—Held, proved by medical evidence that deceased died due to heart attack and that death natural due to disease process—Wife of deceased testified that he was a heart patient—Appellant cannot be attributed any intention or knowledge to cause an injury likely to cause death—One single blow on chest region cannot be said to be with the intention or knowledge of causing grievous hurt—Conviction altered to offence u/s 323 IPC and sentence to period already undergone—Appeal disposed of.

On the facts of the present case, the Appellant cannot be attributed with any intention or knowledge to cause an injury that is likely to cause death. The death in the present case has been opined to be natural due to disease process. Moreover, one single blow on the chest region which is covered with ribcage in the attending circumstances, cannot be said to be with the intention or knowledge of causing grievous hurt. **(Para 7)**

Important Issue Involved: Where only one fist blow given on the chest, accused cannot be attributed with any intention or knowledge to cause an injury likely to cause death or grievous hurt but only simple hurt.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. B.S. Rana & Mr. Pawan Sehrawat, Advocates.

FOR THE RESPONDENT : Mr. Manoj Ohri, APP.

CASE REFERRED TO:

1. *Mohammad Sharif* vs. *State,* Crl. Appeal 468 of 1999.

RESULT: Appeal dismissed.

MUKTA GUPTA, J.

1. By this appeal, the Appellant challenges his conviction for offence punishable under Section 304 Part (II) IPC and the order of sentence directing him to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs. 10,000/- and in default of payment of fine to further undergo rigorous imprisonment for three months.

2. Briefly, the prosecution case is that, on 31st December, 1996 at about 10.30 p.m. when Hansraj, son of the deceased and complainant was coming by his scooter, the Appellant stopped him and a quarrel took place between them. On hearing the noise of quarrel, besides one or two other persons, his parents also reached there who separated PW 9 Hansraj from the clutches of the Appellant and took him towards one side. On this, the Appellant gave a fist blow on the chest of his father due to which he fell down and became unconscious. He was taken to the hospital where he was declared brought dead. On the information being sent to the police, statement of Smt. Dalip Kaur PW 8 the wife of deceased was recorded on the basis of which an FIR was registered. After completion of investigation on a charge-sheet being filed, the Appellant was charged for offence punishable under Section 304 IPC.

3. Learned counsel for the Appellant assailing the judgment contends that the only role assigned to the Appellant is giving one fist blow on the chest of the deceased. In the MLC Ex. PW5/A the deceased was stated to be brought dead on 31st December, 1996 at 11.23 p.m. and there was no external sign of any injury. As per the postmortem report, Ex. PW6/A the cause of death was due to "Acute Myocardial Ischaemia (heart attack) subsequent to Aortic Valve Stenosis & Fresh Blood Clots present in the Right Coronary Artery". The mode of death was due to natural disease process. It is stated that since the deceased died of natural death, no case for conviction for an offence under Section 304 Part (II) IPC is made out.

4. Learned APP, on the other hand, contends that in view of the testimony of PW 6 Smt. Dilip Kaur, the complainant and wife of the deceased and PW9, Hans Raj, son of the deceased, it is proved beyond reasonable doubt that the Appellant gave a fist blow on the chest of the deceased resulting in his death.

5. I have heard the learned counsel for the parties. The testimony of PW 8, the complainant who is the wife of the deceased and PW9 Hansraj, son of the deceased proves that there was a quarrel on the 31st December, 1996 at about 10:30 p.m. between the Appellant and PW9. When the deceased intervened the Appellant gave a fist blow on the chest of the deceased, due to which he fell down and became unconscious. Nothing contrary has been elicited in the cross-examination of these witnesses on this count.

6. The moot issue would however be whether in such a case, the Appellant can be convicted for an offence punishable under Section 304 Part(II) IPC. As per the opinion of the PW 6, the doctor who conducted the postmortem, the deceased died due to "Acute Myocardial Ischaemia(heart attack) subsequent to Aortic Valve Stenosis & Fresh Blood Clots present in the Right Coronary Artery". The mode of death is opined as natural death process. Moreover, PW8 Dilip Kaur in her cross-examination has admitted that her husband was a heart patient. This court in **Mohammad Sharif vs. State,** Crl. Appeal 468 of 1999 has dealt with the issue whether on such facts the offence would fall within the ambit of 304 or 325 or 323 IPC.

7. On the facts of the present case, the Appellant cannot be attributed with any intention or knowledge to cause an injury that is likely to cause death. The death in the present case has been opined to be natural due to disease process. Moreover, one single blow on the chest region which is covered with ribcage in the attending circumstances, cannot be said to be with the intention or knowledge of causing grievous hurt.

8. The conviction of the Appellant is thus altered to one for an offence punishable under Section 323 IPC. The sentence that can be awarded for an offence punishable under Section 323 IPC is rigorous imprisonment upto one year or with fine or both. The Appellant has already undergone a sentence of more than one month. As the Appellant is not involved in any other case and considering that the incident is 14 years old, it would be appropriate to modify the sentence of the Appellant to the period already undergone.

9. The appeal is, accordingly, disposed of by modifying the conviction of the Appellant to one for an offence punishable under Section 323 IPC and sentence of rigorous imprisonment for the period already undergone. The Appellant, who is presently in judicial custody, be released forthwith.

ILR (2011) DELHI 14
CRL.A.

RAJESH BHALLA **....APPELLANT**

VERSUS

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

(HIMA KOHLI, J.)

CRL. MB. NO. : 561/2010 IN CRL.A. NO. : 450/2010 **DATE OF DECISION 23.12.2010**

Code of Criminal Procedure, 1973—Section 389—Suspension of sentence—Narcotic Drugs and Psychotropic Substance Act, 1985—Sections 27-A, 32-A & 37—Vide Trial Court Judgment appellant convicted and sentenced u/s 27-A—Appeal—Application for suspension of sentence—Held, Courts under legal obligation to exercise power of suspension of sentence within parameters of Section 37—When granting suspension of sentence Court has to satisfy itself not only on broad principles of law laid down for suspension of sentence but also the parameters provided u/s 37(1)(b)(ii)—The satisfaction that needs to be recorded at this stage is of "reasonable grounds" which means something more than prima facie grounds—Roving enquiry of evidence not required at this stage—Appellate Court only needs to satisfy itself that prima facie there exists grounds because of which the appeal when heard may result in decision favourable to appellant—On facts held, considering

that only piece of evidence to connect appellant to the offence was disclosure statement which is not substantive piece of evidence, he did not misuse liberty granted during bail, his jail conduct was satisfactory, his age and ill-health and he had a daughter of marriageable age with no one in the family to take care of her needs, he was entitled to suspension of sentence—Application allowed.

In the present case, the first stage of enquiry is whether there exist reasonable grounds to believe that the appellant is not guilty of the offence. A roving enquiry of the evidence relied on by the trial court is not required at this stage. The appellate court needs only satisfy itself that prima facie there exist grounds because of which the appeal, when heard, may result in a decision favourable to the appellant. **(Para 8)**

Important Issue Involved: When granting suspension of sentence u/s 37 of NDPS Act Court has to satisfy itself not only on broad principles of law laid down for suspension of sentence but also the parameters provided u/s 37(1)(d)(ii) of NDPS Act.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Mr. Sandeep Sethi, Sr. Advocate with Mr. Yogesh Saxena, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, Sunil Sharma, APP for State/respondent.

CASES REFERRED TO:

1. *Ashish* vs. *State* 2010 [2] JCC 1353.
2. *Mahendra Kumar* vs. *State* 2010 [4] JCC 2648.
3. *Union of India* vs. *Rattan Mallik* reported as (2009) 2 SCC 624.

4. *Union of India* vs. *Shiv Shanker Kesari* (2007)7 SCC 798.
5. *Anter Singh* vs. *State of Rajasthan* reported as (2004) 10 SCC 657.
6. *Dadu @ Tulsidas* vs. *State of Maharashtra* (2000) 8 SCC 437.
7. *Om Parkash Bakshi* vs. *The State* reported as 1989 Cri.L.J 1207).
8. *Mohd. Inayatullah* vs. *State of Maharashtra* (1976)1 SCC 828.

RESULT: Application Allowed

HIMA KOHLI, J.

1. This application is filed by the appellant under Section 389 of the Cr.P.C. praying inter alia for suspension of sentence during the pendency of the accompanying appeal. By the impugned judgment dated 17.03.2010, the appellant was found guilty and convicted of the offence under Section 27-A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as **'the Act'**) by the learned Special Judge, NDPS. As per the order on sentence dated 20.03.2010, the appellant was awarded a sentence of rigorous imprisonment for a period of ten years and a fine of Rs. 1,00,000/-. In default of payment of fine, it was directed that the appellant would undergo simple imprisonment for a period of one year.

2. The brief facts of the case are that on 24.08.2001, based on secret information received by the Special Cell, Lodhi Colony, a raiding party was formed and at 10.20 pm at night, two persons were apprehended from near the Ambassador Hotel. One Naquibullah, was apprehended by the police, while supplying 1 gm of cocaine to one Neeraj Wadhera. In the disclosure statement of Naquibullah as recorded on 30.8.2001, he disclosed that he used to receive financial assistance from the appellant. Pursuant to this disclosure statement, recovery was made of two 'self cheques' amounting to Rs. 20,000/- each, issued by the appellant and allegedly encashed by Naquibullah. The appellant surrendered on 20.2.2002 and pursuant to the disclosure statement made by him, recovery was made of two more 'self cheques' of Rs. 10,000/- and Rs. 5,000/-, issued

by the appellant and allegedly encashed by Naquibullah.

3. At the outset, the learned APP for the State challenged the maintainability of the application for the suspension of sentence in the light of Section 32-A of the Act, which prohibits suspension of any sentence awarded under the Act, except under Section 27 of the Act. He also opposed the grant of suspension of sentence on merits, on the ground that there is no infirmity in the order of conviction passed by the Special Judge, NDPS, as there exists sufficient evidence on record to show that the appellant was involved in financing of the drug trade.

4. In reply, learned Senior Advocate for the appellant asserted that the present application is maintainable, and placed reliance on the three-judge bench judgment of the Supreme Court in the case of **Dadu @ Tulsidas v. State of Maharashtra** reported as (2000) 8 SCC 437. On merits, he submitted that apart from the disclosure statement of Naquibullah, there was no other evidence against the appellant before the learned Special Judge, NDPS to have convicted him under Section 27-A of the Act. He further submitted that the only evidence relied upon by the prosecution were the four 'self cheques' issued by the appellant, which were recovered pursuant to the disclosure statements of Naquibullah and the appellant. It was urged that the disclosure statement of Naquibullah cannot be treated as a substantive piece of evidence as it is merely the disclosure of a co-accused. He, further, argued that the statement of Naquibullah would be admissible only to the extent to which it states that cheques were issued to him by the appellant, but not that he was being financed by the appellant in the aid of his drug trade. In the alternative, it was argued, that even if the disclosure statements of Naquibullah and the appellant, which led to the recovery of four cheques, are considered admissible in evidence, the same cannot lead to the conclusion that the appellant was financing Naquibullah's drug trade, as the cheques were self-encashed by the appellant who had stated that he had to make payments to one Ali, a carpet seller, a fact which is supported by the testimony of PW-15, A.N. Dhawan, the accountant of the appellant. In support of his submission that the appellant is entitled to grant of suspension of sentence in the present case, counsel for the appellant placed reliance on the following judgments:

(i) **Om Parkash Bakshi v. The State** 1989 Cri.L.J 1207

(ii) **Dadu @ Tulsidas v. State of Maharashtra** (2000) 8 SCC 437

(iii) **Anter Singh v. State of Rajasthan** (2004) 10 SCC 657

(iv) **Union of India v. Rattan Mallik** (2009) 2 SCC 624

(v) **Ashish v. State** 2010 [2] JCC 1353

(vi) **Mahendra Kumar v. State** 2010 [4] JCC 2648

In light of the above submissions, counsel for the appellant submitted that there are reasonable grounds for allowing suspension of sentence.

5. This Court has heard the counsels for the parties and carefully considered their respective submissions. Coming first to the issue of maintainability of the present application, **Dadu's** case (supra) has decisively struck down Section 32-A of the Act as being ultra vires Article 21 of the Constitution to the extent that it completely debars the appellate court from the power to suspend the sentence awarded to a convict under the Act. While holding Section 32-A void to the aforesaid extent, the Supreme Court went on to hold that it would neither entitle such convicts to ask for suspension of the sentence as a matter of right in all cases nor would it absolve the courts of their legal obligations to exercise the power of suspension of sentence within the parameters prescribed under Section 37 of the Act. In view of the aforesaid decision in **Dadu's** case (supra), the question of maintainability of the present application of the appellant for suspension of sentence has to be decided in his favour.

6. It now remains to be seen whether the suspension of sentence sought by the appellant is permissible within the stringent parameters laid down under Section 37(1)(b) of the Act. Though these parameters are in reference to grant of bail, they have been held to be applicable to cases of suspension of sentence under the Act, as well. Section 37 of the Act, as substituted by Act 2 of 1989 with effect from 29-5-1989, with further amendment by Act 9 of 2001 reads as follows:

> **"37. Offences to be cognizable and non-bailable.**—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—
>
> (a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless— (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

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

7. As stated above, the court has to satisfy itself not only on the broad principles of law laid down for grant of suspension of sentence, but also of the parameters provided for under Section 37(1) (b)(ii) of the Act. The satisfaction that needs to be recorded at this stage is of .reasonable grounds. and whether such grounds exist to grant suspension of sentence to the appellant. In the case of **Union of India v. Rattan Mallik** reported as (2009) 2 SCC 624 , the Supreme Court opined on the meaning of "reasonable grounds" and the standard of scrutiny required under Section 37 of the Act, as follows:-

> **"Para 13**…. The expression "reasonable grounds" has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn, points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence (vide **Union of India v. Shiv Shanker Kesari** (2007)7 SCC 798). Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.
>
> **Para 14.** We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS

> Act, the court is not called upon to record a ˇfinding of 'not guilty'. **At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail.** The satisfaction of the court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.. (emphasis added)

8. In the present case, the first stage of enquiry is whether there exist reasonable grounds to believe that the appellant is not guilty of the offence. A roving enquiry of the evidence relied on by the trial court is not required at this stage. The appellate court needs only satisfy itself that prima facie there exist grounds because of which the appeal, when heard, may result in a decision favourable to the appellant.

9. Coming to the argument of the counsel for the appellant that the disclosure statement of Naquibullah cannot be used against the appellant, it is settled law that the statement of a co-accused is not a substantive piece of evidence and at best it can only be used against the appellant as a piece of corroborative evidence. (Refer: **Om Parkash Bakshi v. The State** reported as 1989 Cri.L.J 1207). In **Ashish v. State** reported as 2010 [2] JCC 1353, a Division Bench of this Court has held that recoveries made by the co-accused are not incriminating evidence against the other. Further, in the case of **Mahendra Kumar v. State** reported as 2010 [4] JCC 2648, it has been held that it is a clear mandate of Section 27 of the Evidence Act, 1872 that only that part of the disclosure statement which leads to a recovery, would be the part that would be is admissible in court. In this case, the Division Bench held as below:–

> **"Para 18.** …. The extent of the information admissible under the section would depend on the exact nature of the fact discovered, to which such information is required to relate. "The fact discovered" is not equivalent to the object produced by the accused or recovered by the police. It embraces the place from which the object is produced or recovered and knowledge of the accused

as to this. **The statement made by the accused, which is not directly or necessarily connected with the fact discovered, is not admissible in evidence. If the accused makes a compound statement, the court needs to divide it into various parts and admit only that part which has led to discovery of a particular fact. The rest of the statement needs to be rejected…..”** (emphasis added)

10. The Supreme Court in the case of **Anter Singh v. State of Rajasthan** reported as (2004) 10 SCC 657, has clarified the expression, ‘as relates distinctly to the fact thereby discovered’ in Section 27 of the Evidence Act, 1872 to state:

> **“Para 14.** … It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. **The last but the most important condition is that only “so much of the information” as relates distinctly to the fact thereby discovered is admissible.** The rest of the information has to be excluded. The word “distinctly” means “directly”, “indubitably”, “strictly”, “unmistakably”. The word has been advisedly used to limit and define the scope of the provable information. **The phrase “distinctly” relates “to the fact thereby discovered” and is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery.** The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered. (See **Mohd. Inayatullah v. State of Maharashtra** (1976)1 SCC 828.). (emphasis added)

Having regard to the abovementioned cases, this court is of the view that strong reliance cannot be placed on the disclosure statements of Naquibullah and the appellant, and on the recoveries made pursuant to them.

11. This court is inclined to agree with the learned counsel for the appellant that, prima facie, having regard to the fact that the only piece of evidence on the record, to connect the appellant to the offence, is the disclosure statements, which in themselves are not substantive pieces of evidence, there exist reasonable grounds to conclude that the appellant is entitled to grant of suspension of sentence.

12. Counsel for the appellant states that the appellant fulfils the second requirement under Section 37 of the Act, which is that he should not be likely to commit any offence, once he is out on bail or after suspension of his sentence, inasmuch as when the appellant was granted bail during the course of the trial, vide order dated 6.10.2005, he did not misuse the liberty granted to him at that time. This fact has not been controverted by the prosecution.

13. The nominal roll of the appellant has been placed on record. As per the said nominal roll, against a quantum of sentence of rigorous imprisonment for a period of ten years and a fine of Rs. 1,00,000/-, in default thereof, simple imprisonment for one year, the appellant had undergone a sentence of three years, eleven months and nine days as on 9.07.2010. As on date, he has remained in custody, for approximately a period of four years four months. His jail conduct for the past one year is stated to be satisfactory and there are no other pending criminal cases against him.

14. In light of the aforesaid facts and circumstances and taking into consideration the fact that the appellant has served a few months short of half of his term of sentence and keeping in mind the fact that he is 57 years of age, stated to be suffering from various liver and lung ailments, and has a daughter of marriageable age and there is no one else in his family to take care of her needs, the present application is allowed. It is directed that the sentence of the appellant shall remain suspended during the pendency of the appeal, on his furnishing a personal bond in the sum of Rs. 50,000/- with one surety of the like amount to the satisfaction of the trial court, and subject to his depositing the fine as

imposed on him, if not already paid.

15. The application is disposed off.

16. Needless to state that the aforesaid prima facie view is expressed only for the purpose of disposing the present application and is not a conclusive view of the court, which shall be arrived at only after hearing the appeal on merits.

A copy of the order be forwarded forthwith to the Jail Superintendent, for information.

ILR (2011) DELHI 23
FAO(OS)

WALCHANDNAGAR INDUSTRIES LTD. ....APPELLANT

VERSUS

SARASWATI INDUSTRIAL SYNDICATE LTD. ....RESPONDENT

(VIKRAMAJIT SEN AND G.P. MITTAL, JJ.)

FAO(OS) NO. : 405/09, 406/09, 461/09, 462/09 DATE OF DECISION: 24.12.2010

(A) Code of Civil Procedure, 1908—Order 6, Rule 17—Section 96(3)—Order 2 Rule 2—Respondent No. 1 filed suit for perpetual and mandatory injunction on tort of interference allegedly committed by respondent no.2 by interfering with their contract and illegally conspiring to replace Respondent No.1 with another party which according to written statement, is appellant—As Respondent No.2 had conceded, application of respondent no.1 to amend plaint and to implead appellant was allowed by Ld. Single Judge—Order challenged in appeal—Plea taken, complete and total

concession had not been expressed—Cause of action and nature of suit has changed by inclusion of new amendment—Held—Appellant should have filed review application before Ld. Single Judge stating that only a partial concession was made and had opposed inclusion of amended prayer when orders were reserved—Having failed to do so, appellant foreclosed from contending that impugned order records position incorrectly—Amendments in prayer clause would follow as a natural and essential consequence to amendments in plaint—This is vital for holistic determination of dispute—It shall be allowed so as to avoid multiplicity of litigation amongst parties—New prayer added on strength of some new averments added by amendments will not qualitatively alter suit in every case—Where amendment prayer is sought to be added on basis of facts which are immcately attached to original cause of action and either happens subsequently or comes to knowledge subsequently such amendment cannot be said to substantially alter nature of suit—It would be allowed if no prejudice is caused to other party and plaintiff is not barred from filing fresh suit for these reliefs—Amendment to prayers is essential and unavoidable and impugned decision must be upheld—Grounds on which the Courts are reluctant to allow an amendment is where the plaintiff, through an amendment seeks to change the nature of the suit or change the cause of action originally pleaded in his plaint, or seeks to claim a relief which stands time barred. This however, does not preclude the plaintiff to plead, through an amendment additional grounds or cause of action, that came to his knowledge after filing of the suit or those which happened subsequently but relate back to the original cause of action pleaded in the original plaint.

The original Plaint may not have contained their name yet the cause of action, as pleaded therein, categorically

expresses concerns of the contesting defendant introducing a third party to the subject contracts to the detriment of the Plaintiffs 'interests'. It is Walchandnagar Industries Ltd. which is that very third party. This subsequence of events has come into the limelight because of pleadings in the Written Statement. Keeping the nature of the transactions in mind, it is difficult at this stage to come to a firm conclusion that the Plaintiff was aware of the role of Walchandnagar Industries Ltd. at the time when the Plaint was filed. We can conceive of no reason for the Plaintiff not to implead Walchandnagar Industries Ltd. had it been aware of the grant or the impending and likely grant of the contract to Walchandnagar Industries Ltd. vice the Plaintiffs. The original reliefs are for mandatory injunction, that is, restraining OIA from orchestrating events with the objective that the Plaintiffs are substituted by a third party, which in the sequence of events is Walchandnagar Industries Ltd. Learned counsel for the Appellants/Defendants have voiced the view that the cause of action and nature of Suit has changed by inclusion of the new amendments. We are unable to find even an iota of substance in this submission. The Plaintiffs have based their Suit on the tort of interference allegedly committed by OIA by interfering with their contract with TENDAHO and illegally conspiring to replace them with another party who, as per the Written Statement filed by Defendant No.1, is Walchandnagar Industries Ltd. Black's Law Dictionary defines "tortious interference with contractual relations" as a third party's intentional inducement of a contracting party to break a contract, causing damage to the relationship between the contracting parties. As soon as opposition to the proposed amendments stands withdrawn, the argument that the nature of the Suit has been transformed pales into significance. The case before us is not one where the sequence of events and additional pleas are barred from adjudication for any reason. A fresh suit could always have been filed. Therefore, upon a concession having been made, there can be no conceivable reason for the Court to decline leave to amend the plaint. **(Para 14)**

Grounds on which the Courts are reluctant to allow an amendment is where the Plaintiff, through an amendment seeks to change the nature of the suit or change the cause of action originally pleaded in his Plaint, or seeks to claim a relief which stands time barred. This however, does not preclude the Plaintiff to plead, through an amendment, additional grounds or cause of action, that came to his knowledge after filing of the Suit or those which happened subsequently but relate back to the original cause of action pleaded in the original Plaint. **(Para 26)**

(B) Code of Civil Procedure, 1908—Order 1 Rule 9 and 10—Order impleading appellant as co-defendant challenged—Plea taken, appellant not a necessary party for suit between plaintiff and defendants and at best appellant could have been called as witnesses in trial Court and their presence is not necessary as parties—Held—Since suit is one of tortious interference containing allegations of conspiracy, presence of alleged co-conspirator, who is also beneficiary as a party is not only proper but also is necessary—Injustice would be caused to appellant if it were not to be impleaded since there is always likelihood of order being passed which may be adverse to its interests—Plaintiff would have run risk of being non suited for non joinder of appellant who is a necessary party—Ld. single judge committed no error in impleading appellant.

In the normal course, it is a contradiction in terms to issue notice of an application seeking the impleadment of a party to the party proposed to be so impleaded. If the Court is convinced by the Plaintiffs' submission of the necessity and expediency of impleading the proposed parties, the proposed party should be impleaded and notice would thereafter be issued to it. There is no scope, nor is this the practice, for obvious reasons, at the very first instance and at the very initiation of the suit to show cause why it should be arrayed

as a defendant. Of course, it is always open to the defendant as it would be available to a party impleaded in the course of litigation to file an application under Order I Rule 10(2) of the CPC for striking it out of the array of parties.**(Para 8)**

(C) Delhi High Court Act, 1966—Section 10—Refusal to amend as well as refusal to implead are of such moment as would justify appeal under Letters Patent or in case of Delhi High Court under Delhi High Court Act.

Finally, we must record our views on the question of maintainability of the Appeals. This question was raised at the very threshold of arguments. Section 10 of the Delhi High Court Act, 1966 reads as follows:-

10. Powers of Judge

(1) Where a single Judge of the High Court of Delhi exercises ordinary original civil jurisdiction conferred by sub-Section(2) of Section 5 on that Court, an appeal shall lie from the judgment of the Single Judge to a Division Court of that High Court.

(2) Subject to the provisions of sub-section(1), the law in force immediately before the appointed day relating to the powers of the Chief Justice, single Judges and Division Courts of the High Court of Punjab and with respect to all matters ancillary to the exercise of those powers shall, with the necessary modifications, apply in relation to the High Court of Delhi.

Such like provisions do not create the right to appeal but are merely indicative of the forum which will hear the appeal. Letters Patent have become necessary because of orders passed in the High Court were appealable only before the Privy Council in England. This unnecessarily entailed not only Court expense but also the discomfort and difficulty in arranging legal counsel. If legal annals are comprehensively and meaningfully stated, it will become evident that this was

why the need to provide for an appeal within India was found expedient. This should not be confused to hold that Appeals are maintainable even where the CPC does not provide for them. After Order XLIII Rule 1 of the CPC is read, it will be evident that appeals have been provided for in all those cases where a remedy by way of a second look at the controversy was expeditiously essential. We think this is why the word "judgment" has been used in contradistinction to the word 'order'; both in Letters Patent as well as Section 10 of the Delhi High Court Act. Judgment has been defined in **Shah Babulal Khimji vs. Jayaben D.Kania,** (1981) 4 SCC 8. This celebrated Judgment also indicates in paragraph 116 that refusal to amend as well as refusal to implead are of such moment as would justify an appeal under Letters Patent or in the case of Delhi High Court under the Delhi High Court Act. **(Para 24)**

Important Issue Involved: (A) Where appellant contends that they had made only partial concession before of the Trial Court, proper course is to file a review and if fails to do so, appellant shall be for enclosed from contending that the impugned order records the position incorrectly position incorrectly.

(B) It is not judicious to allow an unrelated aspect of the case to influence the decision on another aspect or nuance of the lis.

(C) Amendments in prayer clause would follow as a natural and essential consequence to the amendments in the plaint.

(D) Where suit is one of tortious interference containing allegations of conspiracy, the presence of the alleged co-conspirator, who is also the beneficiary as a party, is not only proper but also is necessary.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANT : Mr. Sunil Gupta, Sr. Adv. with Mr. Jatin Zaveri, Mr. Gaurav Aggarwal & Mr. Tanmaya Aggarwal, Advs.

FOR THE RESPONDENT : Mr. P.V. Kapur, Sr. Adv. with Ms. Ekta Kapil & Mr. Gaurav Chauhan, Advs. for Respondent No.1. Mr. Arun Bhardwaj, Sr. Adv. with Mr. Manish Sharma, Mr. Amit Bhardwaj & Mr. Vishal Malhotra, Advs. for Respondent No.2.

CASES REFERRED TO:

1. *Neena Khanna* vs. *Peepee Publishers,* 167(2010) DLT 247(DB).
2. *Revajeetu Builders & Developers* vs. *Narayanaswamy,* (2009) 10 SCC 84.
3. *Bharat Karsondas Thakkar* vs. *Kiran Construction Co.,* (2008) 13 SCC 658.
4. *Rajesh Kumar Aggarwal* vs. *K.K. Modi,* (2006) 4 SCC 85.
5. *Pushpa Devi Bhagat* vs. *Rajinder Singh,* AIR 2006 SC 2628.
6. *Kasturi* vs. *Iyammperumal* (2005) 650 SCC 753.
7. *Andhra Bank* vs. *Official Liquidator,* (2005) 5 SCC 75.
8. *Kedar Nath Agarwal* vs. *Dhanraji Devi,* (2004) 8 SCC 76.
9. *Sampath Kumar* vs. *Ayyakannu,* AIR 2002 SC 3369.
10. *Anil Kumar Singh* vs. *Shionath Mishra,* (1995) 3 SCC 147.
11. *Shah Babulal Khimji* vs. *Jayaben D.Kania,* (1981) 4 SCC 8.

12. *Kumaraswami Gounder* vs. *D.R. Nanjappa,* AIR 1978 Mad. 285 (FB).
13. *A.K. Gupta* vs. *Damodar Valley Corporation,* AIR 1967 SC 96.

RESULT: Dismissed.

VIKRAMAJIT SEN, J.

1. The facts germane for a decision in these Appeals are that in respect of a Sugar Mill Project to be established in Ethiopia, funding has been made available by the Government of India through the aegis of EXIM Bank. The Project has been sub divided into seven sub-projects for which separate and independent tenders were floated. These are – (1) Steam Generation (2) Process House (3) Juice Extraction (4) Power Generation (5) Diesel Generation (6) Factory Workshop and (7) Plant Water System. It was further decided that for ease and facility of implementation of the Project, instead of dealing separately with all the successful Tenderers, the Tenderer who had been awarded the largest number of projects, would act as the lead party; a single Engineering, Procurement and Construction (EPC) contract would be entered into with this party. Saraswati Industrial Syndicate Ltd. was the Successful Tenderer in respect of Steam Generation; Uttam Sucrotech International Pvt. Ltd. in respect of Process House; and since in respect of Juice Extraction and Power Generation the successful Tenderer was OIA, it was agreed that Overseas Infrastructure Alliance India Pvt. Ltd. (OIA) would act as the single EPC Contractor.

2. The Appellants assert that a completed contract had already evolved in their favour, whereas OIA contends that while Saraswati Industrial Syndicate Ltd. and Uttam Sucrotech International Pvt. Ltd. were successful Tenderers, a contract between them was required to be executed and this had not transpired. It is not in controversy that OIA had demanded fifteen per cent commission/charges from the Appellants and all other successful Tenderers ostensibly to cover expenses that OIA would inevitably have to incur as the single EPC Contractor. The Appellants assert that Walchandnagar Industries Ltd. was illegally introduced into the subject Sugar Mill Project by OIA by engineering the removal of both Saraswati Industrial Syndicate Ltd. and Uttam Sucrotech International Pvt. Ltd. owing to their reluctance to make the payment of the said

fifteen per cent commission/charges. The Ethiopian party, namely, TENDAHO Sugar Factory Project has not contested either the suit or this Appeal.

3. Saraswati Industrial Syndicate filed a Suit for perpetual and mandatory injunction, being CS(OS) No.1368/2008, pleading, *inter alia*, in paragraph 16 that OIA "has failed and/or neglected to execute the formal contract document with the plaintiff and is threatening to introduce a third party in place of the plaintiff". Most significantly, in paragraph 7 of the original Plaint, it has been pleaded that on or about 7th December, 2007, TENDAHO reiterated in writing to OIA that "the winning bidders of other packages are to be retained as sub contractors without any alteration in the agreed technical and financial aspects as already finalized with the individual bidder". This averment has not been denied but in response to the said paragraph, OIA has pleaded as follows:

> … The correct position, however, is that the right and the power to fix a sub contract on terms and conditions to be negotiated between the answering defendant and the sub contractors is a matter which is entirely within the domain of the answering defendant's function as the main EPC contractor. The Defendant No.1 after signing of contract dated 10.01.2008 and addendum no.1 dated 21.02.2008 of contract had tried to persuade the Plaintiff by verbal and writing communication to sign the contract at the earliest so that the project should not be jeopardized. The answering defendant may also at this stage point out that since the plaintiff was dillydallying the finalization of the terms of the sub contract to be executed, the said matter was therefore brought to the notice of the defendant No.2 vide letter dated 13th June 2008 as also by letter dated 16th June 2008 in pursuance of which clear cut instructions were issued to the answering defendant to finalize the sub contract agreement with all the sub contractors by 27th June, 2008 with a view to avoid any further delay in the start of the work. A copy of the minutes is being filed by the answering defendant in the list of documents and shall be referred to at an appropriate stage. Pursuant to the said instructions, the answering defendant requested the plaintiff to finalize the contract by the 27th of June 2008. As submitted earlier the plaintiff failed to settle the terms of the contract and

> therefore in order to save the project from being jeopardized on account of price and other relevant factor entered into a Memorandum of Understanding dated 8th July, 2008 with M/s Walchandnagar Industries Limited (WIL) which has agreed to undertake the construction of the Steam Generation Plant for the Tendhao sugar factory project. Further, the answering Defendant no.1 has signed a definite contract with Messrs WI, Mumbai for execution of Project as a sub-contractor to answering Defendant on 12.07.2008. The answering defendant has thereafter proposed the name of Messrs WI, Mumbai as proposed sub-contractor to defendant no2 vide letter dated 11th of June 2008. In light of these developments, it is futile for the plaintiff to allege that the sub contracts had already come into existence between the plaintiff and the answering defendant or defendant No.2 for that matter.

4. The similar position obtains so far as Uttam Sucrotech International Pvt. Ltd. is concerned which has filed Suit No.1447/2008 averring, *inter alia*, that while it had been extending all cooperation to OIA, the latter "has been illegally trying to avoid the conclusion of any such contract and is delaying the process unnecessarily for its vested interests of ousting them from the contract completely and illegally replacing it with its own parties". In the Plaint, there are allegations kindred to those of Saraswati Industrial Syndicate Ltd., namely, that OIA "has threatened to introduce a third party in place of the plaintiff". Uttam Sucrotech International Pvt. Ltd has also asserted that a concluded contract has already emerged between itself and TENDAHO. OIA pleads in the Written Statement as follows:

> The answering defendant further submits that the plaintiff failed to meet the deadline and settle the terms of subject contract resulting in the answering defendant entering into a memorandum of understanding with Walchandnagar Industries Ltd. on 8.7.2008 for the construction of the process house project. Defendant No.2 vide their letter reference no.TSPFOI/12/201 dated 5.8.2008 accepted the substituted offer for process house package of TSPF in favour of OIA and Walchandnagar Industries Ltd. on the basis of the substituted technical offer submitted by answering defendant dated 18.7.2008.

5. Both the Plaintiffs assert that the contract with Walchandnagar

Industries Ltd. was predated with the purpose of defeating the interim orders passed by the learned Single Judge. Contempt proceedings have been initiated by the plaintiff and are presently pending.

6. It is at this juncture that Saraswati Industrial Syndicate filed IA No.13366/2008 in CS(OS) No.1868/2008 under Order VI Rule 17 read with Order I Rule 10 read with Section 151 of the Code of Civil Procedure (CPC for short) praying for amendment of the Plaint to be 'taken on record'; and for Walchandnagar Industries Ltd. as well as EXIM Bank to be allowed to be impleaded as Defendant Nos.3 and 4. The amendments have been allowed and the impleadment of only Walchandnagar Industries Ltd. has been permitted in terms of the impugned Order. OIA and Walchandnagar Industries Ltd. have filed separate Appeals.

7. Uttam Sucrotech International Pvt. Ltd. has, in familiar fashion, filed IA No.1938/2009 in CS(OS) No.1447/2008 under Order VI Rule 17 read with Order I Rule 10 read with Section 151 of the CPC. Reliefs similar to Saraswati Industrial Syndicate have been made which have been also allowed in the impugned Order, declining, however, to implead EXIM Bank.

8. It seems to us that because a composite application had been filed by both the Plaintiffs praying for the amendment of ˇthe Plaint as well as for impleadment of parties, notice thereof came to be issued to the party proposed to be impleaded, namely, Walchandnagar Industries Ltd. In the normal course, it is a contradiction in terms to issue notice of an application seeking the impleadment of a party to the party proposed to be so impleaded. If the Court is convinced by the Plaintiffs' submission of the necessity and expediency of impleading the proposed parties, the proposed party should be impleaded and notice would thereafter be issued to it. There is no scope, nor is this the practice, for obvious reasons, at the very first instance and at the very initiation of the suit to show cause why it should be arrayed as a defendant. Of course, it is always open to the defendant as it would be available to a party impleaded in the course of litigation to file an application under Order I Rule 10(2) of the CPC for striking it out of the array of parties. We must immediately clarify that this relief is not available in the present cases since Walchandnagar Industries Limited has already been extensively heard on the question of whether it should be impleaded as a party to the respective suits.

9. The refusal by the learned Single Judge in the impugned Order to implead EXIM Bank was also challenged by Uttam Sucrotech International Pvt. Ltd. in the form of FAO(OS) No.460/2009. However, on 18.11.2009 the Appeal was dismissed as withdrawn.

10. In the course of the hearing of the two composite applications for amendment of the plaint as well as for the impleadment of Walchandnagar Industries Ltd. and EXIM Bank, learned counsel for OIA had uncontrovertedly been conceded on 30.7.2009 that the amendments prayed for by Saraswati Industrial Syndicate in paragraph 15(1) and paragraphs 18A to 18K may be permitted to be incorporated in the amended Plaint. On that date, it was specifically noted that – "insofar as amendments to the prayer clause are concerned, counsel submit that he is seriously opposing the same. In this view of the matter, list on 3.8.2009 at 2:30 P.M. for further argument on the remaining reliefs prayed for in the application". However, the impugned Order categorically mentions that learned counsel for OIA has no objection to the amendments being carried out. The learned Single Judge recorded that "as far as the prayer for amendment is concerned, it need not detain me for long and the reason is that after the application had suffered lengthy arguments, for and against, the learned counsel for defendant no.1 conceded that the amendment sought could be allowed subject to liberty to it to raise such objections as may be available to it and to this, it may be noted, the learned counsel for the plaintiff had no objection". In other words, the reservation viz.-a-viz., the amended Prayers was abandoned and given up.

11. The same sequence of events occurred in the Suit and Application filed by Uttam Sucrotech International Pvt. Ltd. The learned Single Judge has recorded in the Order dated 30.7.2009 that counsel for OIA "states that without prejudice to its rights and contentions, he has no objection if the proposed amended plaint except the reliefs claimed in the prayer clause is taken on record. Insofar as prayer clause is concerned, he states that he is opposing the amendments proposed therein". The learned Single Judge records in the impugned Order thus – "it is time now to come straight to the application for amendment and impleadment. Should it be allowed? As far as prayer for impleadment is concerned, it need not detain me for long and the reason is that after the application had suffered lengthy arguments, for and against, learned counsel for defendant no.1

conceded that the amendments sought should be allowed subject to liberty to it to raise such objections as may be available to it and to this, ˘it may be noted, the learned counsel for the plaintiff has no objection. Keeping this in view and keeping also in view the nature of the amendments and so also the fact that the amendments have their seed in subsequent developments, the amendments sought are allowed". As already noted, it is palpably clear that the earlier objection to the Court allowing the Prayers to be augmented was not agitated any longer.

12. In view of the recorded concession, we are unable to appreciate how the present Appeals are maintainable since on the face of it they endeavour to reverse orders passed on concession. Learned Senior Counsel appearing for the Appellants/Defendants have strenuously contended that complete and total concession, as mentioned in the impugned Order, had not been expressed. We are firmly of the opinion that it is not open to the Appellants to take this plea. The proper course would have been to file a Review before the learned Single Judge articulating therein the factum of the Appellants/Defendants allegedly having steadfastly made only a partial concession and having opposed the inclusion of the amended prayers on the date on which orders were reserved. We need not go further than **Pushpa Devi Bhagat vs. Rajinder Singh,** AIR 2006 SC 2628 in which their Lordships have held that an Appeal is not maintainable against a consent Decree having regard to the specific bar contained in Section 96(3) of the CPC and that the proper course to adopt was to approach the Court which passed the consent Decree with a view to establishing that there was no compromise. On a parity of reasoning, we are of the view that the Appellants should have filed Review Petitions before the learned Single Judge on this aspect and having failed to do so are foreclosed from contending that the impugned Order records the position incorrectly.

13. Since, however, lengthy arguments have already been heard on the merits of the amendments, we think it proper to return a complete and comprehensive answer to the amendment of Plaint controversy. The facts which stand incorporated in the respective plaints, concededly on the concessions of the Respondent/Defendant, speak voluminously and extensively of Walchandnagar Industries Ltd.

Pleadings in unamended Plaint (Saraswati Industrial Syndicate Ltd.)

15. The Defendant No.1, thereafter, began to threaten the Plaintiff that they would inform Defendant No.2 that Plaintiff was delaying execution of a formal contract. The Plaintiff meanwhile drafted a contract that was acceptable to the Plaintiff and in line with the agreement arrived at between all parties on 19th & 20th December, 2007 and the concluded contract terms and conditions between Defendant No.2 and the Plaintiff which was forwarded to the Defendant No.1 on June 28, 2008.

….

18. In the agreement between defendant No.1 and defendant No.2 and/or the Plaintiff, there exists a positive covenant coupled with an implied negative which the defendant No.1 is threatening to breach. This Hon'ble Court ought to grant injunction to perform the negative covenant. The implied negative covenant is contained in letter dated 7.12.2007 from defendant No.2 to defendant No.1 as under:-

> The winning bidders of other packages are to be retained as sub contractors without any alteration in the agreed technical and financial aspects as already finalized with the individual bidder.

Further in letter dated 7.12.2007 from defendant No.2 to Plaintiff:-

> You, as winning Bidder of Steam Generation Plant Bid Tender No.TSFP-F/002/06/SG, will be retained as sub-contractor to the main EPC Contractor without any alteration in the agreed technical and commercial aspects including the time schedule, as already negotiated and finalized.

Further, in the joint meeting, inter alia, Plaintiff, defendant No.1 and defendant No.2:-

> All winning bidders were informed that as per the directive from the Government of Ethiopia, the managements of TSFP & FSF intend to appoint one single EPC contractor and all other winner bidders shall work as sub contractor

to the proposed single EPC contractor.

Contract agreement between EPC contractor and winner bidder shall be seamless and address all issues as per original tender documents including GCC, SCC and other financial conditions.

The aforesaid clauses clearly stipulates that the defendant No.1 is by way of an implied negative covenant not permitted to modify and/or attempt to modify any agreed technical, commercial including price aspects already finalized between the plaintiff and defendant No.2.

Pleadings in amended Plaint

15. The Defendant No.1, thereafter, began to threaten the Plaintiff that they would inform Defendant No.2 that Plaintiff was delaying execution of a formal contract. The Plaintiff meanwhile drafted a contract that was acceptable to the Plaintiff and in line with the agreement arrived at between all parties on 19th & 20th December, 2007 and the concluded contract terms and conditions between Defendant No.2 and the Plaintiff which was forwarded to the Defendant No.1 on June 28, 2008.

….

18. In the agreement between defendant No.1 and defendant No.2 and/or the Plaintiff, there exists a positive covenant coupled with an implied negative which the defendant No.1 is threatening to breach. This Hon'ble Court ought to grant injunction to perform the negative covenant. The implied negative covenant is contained in letter dated 7.12.2007 from defendant No.2 to defendant No.1 as under:-

The winning bidders of other packages are to be retained as sub contractors without any alteration in the agreed technical and financial aspects as already finalized with the individual bidder.

Further in letter dated 7.12.2007 from defendant No.2 to Plaintiff:-

You, as winning Bidder of Steam Generation Plant Bid Tender No.TSFP-F/002/06/SG, will be retained as sub-

contractor to the main EPC Contractor without any alteration in the agreed technical and commercial aspects including the time schedule, as already negotiated and finalized.

Further, in the joint meeting, inter alia, Plaintiff, defendant No.1 and defendant No.2:-

All winning bidders were informed that as per the directive from the Government of Ethiopia, the managements of TSFP & FSF intend to appoint one single EPC contractor and all other winner bidders shall work as sub contractor to the proposed single EPC contractor.

Contract agreement between EPC contractor and winner bidder shall be seamless and address all issues as per original tender documents including GCC, SCC and other financial conditions.

The aforesaid clauses clearly stipulates that the defendant No.1 is by way of an implied negative covenant not permitted to modify and/or attempt to modify any agreed technical, commercial including price aspects already finalized between the plaintiff and defendant No.2.

18(A). That this Hon'ble Court on 23.7.2008, passed an Order that, "having regard to the facts of the case and taking the consideration the documents placed on the record, till the next date of hearing, the defendant No.1 shall not take any measures to introduce a third party in respect of the tender floated by defendant No.2 for Steam Generating Plant for which the plaintiff has been accepted by the defendant No.2 as the successful bidder". The said order was duly served on the defendant No.1 on 24.7.2008 and has also been served on Defendant No.2. The defendant No.1 has filed its written statement on 4.8.2008 wherein it has alleged in paragraph 1 of the Preliminary Objections that the defendant No.1 has already singed a definite contract with defendant No.3 for execution of the power project as a Sub-contractor for construction of the steam generation plant for the Tendaho Sugar Factory Project (purportedly just about 11 days before the passing of the ex parte injunction order). Therefore,

in light of the said development, it has been alleged that the said suit filed by the plaintiff has become infructuous. A copy of the purported Sub-Contract Agreement between defendant No.1 and the said defendant No.3 has been filed by the defendant No.1

18(B). The said purported Sub-Contract Agreement is clearly antedated and has been fabricated with a view to frustrate the injunction order dated 23.7.2008 and/or to overreach the Order dated 23.7.2008 passed by this Hon.ble Court.

18(C). The first telltale sign is in the Written Statement itself where in para 7, it has been alleged that a Memorandum of Understanding (MOU) was signed between Defendant No.1 and defendant No.3 on 8th July, 2008 and thereafter, a definite purported contract was signed on 12th July, 2008, i.e. within 4 days of the MOU despite the MOU being valid for a period of 30 days – seemingly, a tearing hurry indeed. However, the Defendant No.1 proposed the name of defendant No.3 to defendant No.2 long after 12th July 2008.

18(D). It is also relevant to note that in the alleged sub-contract Agreement dated 12th July, 2008 filed by the Defendant No.1, Defendants Nos.1 and 3 have purported to create a definition of "contract documents" which includes documents that have not yet been finalized but are only 'proposed'. One of the documents forming part of Contract document is "Minutes of Package Negotiations meeting (proposed) to be held between Employer and Sub-Contractor (WIL), for the Package Facilities on technical aspects". Firstly, there cannot be a meeting or minutes of a meeting which are qualified as "proposed". Secondly, there cannot be minutes of a meeting which is yet "to be held". It is obvious that the documents have been prepared in a hurry only to be produced before this Hon'ble Court with a view to mislead this Hon'ble Court and to frustrate and overreach the orders of this Hon'ble Court.

18(E). That even as late as on 5th August, 2008, in the meeting between the Defendant No.1 and Defendant No.2, there is no mention that a definite contract had been signed with defendant No.3. In fact defendant No.1 informed defendant No.2 that only

negotiations were being conducted with defendant No.3.

18(F). Further and in any event, the defendant No.2 has not been shown to have ever authorized appointment of the said defendant No.3 as a Sub-Contractor in substitution of the plaintiff. This is apparent from the letter dated 30.6.2008 written by defendant No.2 to its Board of Management on 30.6.2008 alongwith the legal opinion and the opinion of the consultant which clearly reveal that the minutes dated 19.6.2008 and 20.6.2008 and the letter dated 12.6.2008 sought to be relied upon by the defendant No.1 did not constitute any approval of substituting the plaintiff as alleged by the defendant No.1. The defendant No.1 is clearly suppressing all material facts as the aforesaid documents are within the knowledge of defendant No.1 who has chosen to conceal the same from this Hon.ble Court. Neither the negotiations nor the minutes and/or any alleged MOU can be given effect to in teeth of the order dated 23.7.2008 passed by this Hon'ble Court and the Defendant No.1 ought not to be permitted to defeat the bonafide rights of the plaintiff and/or overreach this Hon'ble Court.

18(G) It is relevant to note that in a similar contract, which relates to another Govt. of Ethiopia company known as Wonji Shoa Sugar Factory, the Plaintiff had a bid for a Juice Extraction Plant. The EPC Contractor in that case is one M/s. Uttam Sucrotech International Pvt. Ltd. The said M/s. Uttam Sucrotech International Pvt. Ltd. has signed a Sub-Contract with the Plaintiff without making any demand for 15% of contract price for discharge of its obligations as a lead EPC/Contractor. It has now come to the knowledge of the plaintiff that defendant No.1 was not even entitled to become the EPC contractor and the defendant No.1 and 2 have manipulated records to make defendant No.1 become the EPC contractor who is demanding unreasonable and absolutely uncalled for 15% of the contract price from plaintiff and other similarly placed sub-contractors. That defendant Nos.1, 2 and the said Walchandnagar Industries Ltd. are acting in concert and are attempting to defeat the order of this Hon.ble Court and perpetrate a fraud which they cannot be permitted to do.

18(H) In fact, defendant No.1 has itself subsequently filed a

letter dated 5th August, 2008 purportedly issued by defendant No.2 permitting the defendant No.2 to substitute the plaintiff (the authenticity of the said letter is denied). Clearly the said letter dated 5th August, 2008 shows that there could be no contract between defendant No.1 and the said defendant No.3 prior thereto and further that defendant No.1 and 2 were acting in concert and in teeth of the order dated 23rd July, 2008 passed by this Hon.ble Court which is in force even till date.

18(I). The attempt of Defendant No.1 of clandestinely introducing the purported Sub-Contractor who did not even participate in the tender, is not only contrary to the entire tender process but is also malafide and an attempt to overreach this Hon'ble Court. Further, till date no termination of Plaintiff's sub-contract has been communicated.

18(J). The aforesaid facts clearly reveal that the purported sub-contract Agreement dated 12rth July ,2008 which was allegedly entered into within four days of signing the Memorandum of understanding which was valid for 30 days is clearly ante dates with a view to defeat the injunction order passed by this Hon'ble Court. The said purported sub-contract Agreement cannot be permitted to be implemented and be proceeded with and being in teeth of the order dated 23rd July, 2008 is void ab initio. Even the purported permission dated 5th August, 2008 cannot be acted upon and is void ab initio as defendant No.2 was also informed of the order dated 23rd July, 2008.

18(K). As stated in the plaint, the defendant No.2 is proceeding with modernization essentially financed by credit line from the Exim Bank of India. The said Exim Bank of India being State is bound to act fairly and not to act in violation of the order of Hon.ble Court. In any event, Exim Bank of India being a banking institution has a duty of care and cannot allow fraud to be perpetrated by defendant No.1 and/or 2 and cannot approve substitution of the plaintiff by the said defendant No.3 contrary to the order of this Hon'ble Court.

18(L). That defendant Nos.1, 2 and 3 are acting in concert and are attempting to defeat the order of this Hon'ble Court and

perpetrate a fraud which they cannot be permitted to do.

Unamended Pleadings (Uttam Sucrotech International Pvt. Ltd.)

7. That vide the letter dated 7.12.2007, the Defendant No.2 also informed the Plaintiff in writing that as per the requirement of Exim Bank's disbursement schedule it was decided to proceed through a single EPC Contract method, that is, any bidder who won two or more bid package amongst the four major bids viz. Juice Extraction Plant, Steam Generation Plant, Power Generation Plant and Process House Plant will become eligible to act as 'Single EPC Contractor'. Since, the Defendant No.1 won two bids, it was appointed to act as 'Single EPC Contractor'. It was further conveyed to the Plaintiff that the Plaintiff who was the winning bidder of the Process House bid, would be retained as sub-contractor to the EPC Contractor without any alternation in the agreed technical and commercial aspects including the time schedule already finalized. The relevant excerpt of the said letter has been extracted hereunder for ready reference:

> You as winning Bidder of Process House Bid Tender No.TSFP-F/007/07/PG, will be retained as sub-contractor to the main EPC Contractor without any alternation in the agreed technical and commercial aspects including the time schedule, as per our bid document and subsequent clarifications given by our Consultant JPMA."

10. That therefore the Defendant No.1 clearly agreed to the unanimous decision taken in the aforementioned meetings dated 19th and 20th of December to the effect that the contract shall be seamless and that the rights of the winning bidders and their bid award prices shall be adequately protected in the sub-contractor agreement. In view thereof, the Defendant No.1, was under a legal obligation to finalize the modus of implementing all the various packages (sub-contracts) of the project along with his own award of work/contract. The Defendant No.1 was further required to do so at the earliest and on the same terms and conditions as agreed to between the parties in the aforementioned meetings.

11. That subsequently it was also revealed that on 20th February,

2008 a contract was executed between the Defendant No.2, Ehiopia on behalf of Government of Federal Democratic Republic of Ehiopia and the Defendant No.1. In the said agreement also it has been agreed that there shall be a contract between the contractor and the sub contractor and that the agreement shall be entered into without any alternation in the agreed technical and commercial aspects of the original tender documents including the price of the bids. It is pertinent to mention herein that the Plaintiff has been mentioned as a sub-contractor in Appendix 5 of the contract dated 20th February, 2008.

12. That therefore in accordance with the procedure agreed and settled on 19th December and 20th December, 2007 and also in view of the directions of the Defendant No.2, a formal seamless contract was required to be entered into between the Plaintiff and the Defendant No.1 at the earliest, on the same terms and conditions as those of the original tender documents.

15. That the Plaintiff, vide their letter dated 26.3.2008 replied to the aforesaid letter dated 6.3.2008 issued by the Defendant No.1 specifically stating that the demand of the Defendant No.1 directing the plaintiff to discount its offer price at least by 15%, is absolutely illegal and contrary to the terms agreed between the parties including the Defendant No.1,2 and the Plaintiff in the meetings dated 19th December and 20th December, 2007.

Amended Pleadings (Uttam Sucrotech International Pvt. Ltd.)

7(ii) Para 2 of the Plaint would stand amended as follows:

"That the Defendant No.1 is a company incorporated under the Companies Act, 1956 having its registered office at 1205, Surya Kiran Building, 19, Kasturba Gandhi Marg, New Delhi-110001. The Defendant No.2 is a company incorporated under the laws of Ethiopia having its principal office at Addis Ababa and is owned and/or controlled by the Government of Federal Democratic Republic of Ethiopia. The Defendant No.3 is a company incorporated under the Companies Act, and having its registered office at 3 Walchand Terracesopp Air Conditioned Market, Tardeo, Mumbai, Maharashtra-40034 and branch office at 201, Milap Niketan (2nd Floor) 8-A, Bahadur Shah Zafar

Marg, New Delhi: 110002. That the Defendant No.4 is the Exim Bank having its registered office at Centre One Building, Floor 21, World Trade Centre Complex, Cuffe Parade, Mumbai.

(ii) After para 7 the following para needs to be added:

Para 7A:- As is evident from the internal letter dated 3.12.2007 issued by TSFP to TSFP Management Board Addis Ababa, Defendant No.1 had been trying to defeat the rights of the plaintiff at very stage so as to oust the plaintiff from the subject project completely. The said letter clearly reveals that apart from the Process House Package which was allotted to the Plaintiff, vide Defendant No.2's letter dated 7.12.2007, the Plaintiff was also the lowest bidder in the Power Generation Plant which also ought to have been awarded to the plaintiff. So plaintiff was awarded both the Process House and Power Generation plant bid and was eligible to be appointed as a EPC Contractor. However, strangely, just about 4 days later i.e. on 7.12.2007, facts and records were illegally pruned to a large extent and the Plaintiff was declared winning bidder only in the Process House Package and not in the Power Generation Package.

(iv) Para 10 of the plaint would be amended as under:-

"That therefore the Defendant No.1 clearly agreed to the unanimous decision taken in the aforementioned meetings dated 19th and 20th of December to the effect that the contract shall be seamless and that the rights of the winning bidders and their bid award prices shall be adequately protected in the sub-contractor agreement. In view thereof, the Defendant No.1, was under a legal obligation to finalize the modus of implementing all the various packages (sub-contracts) of the project alongwith his own award of work/contract. The Defendant No.1 was further required to do so at the earliest and on the same terms and conditions as agreed to between the parties to the said meetings inter alia the Plaintiff. Defendant No.1 and the Defendant No.2 in the aforementioned meetings. Further an agreement dated 10.1.2008 was entered into between the Defendant No.1 and Defendant No.2, wherein the name of the Plaintiff was clearly mentioned as a sub contractor albeit only for Process House

Package. The said Contract contains Technical Bid Commitments and Tender Bid Prices, which have been clearly conducted between the Plaintiff and the Defendant No.2, and which form an integral part of the said Contract between the Defendant No.1 and Defendant No.2. In fact, in the Process House Packages technical and commercial annexures, it is clearly stated that these are as submitted by USIPL (short for Uttam Sucrotech International Private Limited) and form an integral part of the contract. In the said contract it had been specifically agreed that there shall be a contract between the contractor and the sub contractor and that the agreement shall be entered into without any alteration in the agreed technical and commercial aspects of the original tender documents including the price of the bids. It has been alleged that the terms of the said Agreement dated 10.1.2008 were changed without the consent of the Plaintiff vide an Addendum No.1 dated 21.2.2008. Therefore, without prejudice, the mother contract of 10.1.08 could not have been altered vide any addendum as alleged, without involving the Plaintiff andobtaining its consent, and any such addendum subsequently altering the terms and conditions of the said agreement is illegal, null and void."

(v) Para 11 of the Plaint would be amended as under:-

"That subsequently it was also revealed that on 20th February, 2008 a contract was executed between the Defendant No.2, Ethiopia on behalf of Government of Federal Democratic Republic of Ethiopia and the Defendant No.1. In the said agreement also it has been agreed that there shall be a contract between the contractor and the sub contractor and that the agreement shall be entered into without any alteration in the agreed technical and commercial aspects of the original tender documents including the price of the bids.

(vi) Para 12

That therefore in accordance with the procedure agreed and settled on 19th December and 20th December, 2007 and also in view of the directions of the Defendant no.2, a formal seamless contract was required to be entered into between the Plaintiff

and the Defendant No.1 at the earliest, on the same terms and conditions as those of the original tender documents. It is further pertinent to mention herein that a binding contract had already come into existence between the Defendant No.2 and the Plaintiff vide the letter dated 7.12.2007 which was preceded by detailed technical and commercial meetings between Defendant No.2 and Plaintiff and also the contract dated 10.1.2008 on the same terms and conditions as per the original bid documents on the basis of which the Plaintiff had prepared and put in its bid. Therefore, no alterations whatsoever could have been made in the same.

(v) para 15

"That the Plaintiff, vide their letter dated 26.3.2008 replied to the aforesaid letter dated 6.3.208 issued by the Defendant No.1 specifically stating that the demand of the Defendant No.1 directing the Plaintiff to discount its offer price at least by 15%, is absolutely illegal and contrary to the terms agreed between the parties including the Defendant No.1,2 and the Plaintiff in the meetings dated 19th December and 20th December, 2007 and also vide the letter dated 7.12.2007, which created a formal concluded and binding contract between the Plaintiff and the Defendant No.2 in terms of the instruction to Bidders issued along with the tender documents.

(ii) After para 16

Para 16A- The defendant No.2 is also acting malafide and is acting in concert with other defendants to perpetrate a fraud on the plaintiff and defeat and disobey the orders of this Hon'ble Court.

(iii) Para 17

"That even, the draft of agreement received from the Defendant No.1 by the Plaintiff on 16.4.2008, failed to consider the submissions made by the Plaintiff. The said draft was contrary to the agreement arrived at in the Joint Session Meeting held on 19th & 20th December, 2007, and the same was pointed out to the Defendant No.1 by the Plaintiff. The Defendant No.1, most significantly, attempted to renegotiate the contract price to be

able to receive a part thereof for discharging its obligation of a lead contractor. Not only the renegotiation of price was contrary to the mandate of Defendant No.2 and the agreement between the Plaintiff and the Sugar Factory Project as well as the minutes of 19th and 20th December, 2007, and also the letter dated 7.12.2007 but also the Defendant No.1 is stopped from claiming any moneys from the Plaintiff to discharge his own obligations to the Defendant No.2 as a lead contractor after having accepted the said contract/duty without recourse to additional consideration from the Plaintiff expressly and/or by conduct."

17. That even, the draft of agreement received from the Defendant No.1 by the Plaintiff on 16.4.2008, failed to consider the submissions made by the Plaintiff. The said draft was contrary to the agreement arrived at in the Joint Session Meeting held on 19th & 20th December, 2007, and the same was pointed out to the Defendant No.1 by the Plaintiff. The Defendant No.1, most significantly, attempted to renegotiate the contract price to be able to receive a part thereof for discharging its obligation of a lead contractor. Not only the renegotiation of price was contrary to the mandate of Defendant No.2 and the agreement between the Plaintiff and the Sugar Factory Project as well as the minutes of 19th & 20th December, 2007, but also the Defendant No.1 is stopped from claiming any moneys from the Plaintiff to discharge his own obligations to the Defendant No.2 as a lead contractor after having accepted the said contract/duty without recourse to additional consideration from the Plaintiff expressly and/or by conduct.

The Plaintiff submits that there is already a concluded contract between the Defendant No.2 and the Plaintiff and the Defendant No.1 cannot renegotiate the terms thereof. In any event, the Defendant No.1's consideration for managing the entire project as a lead contractor must necessarily be included in his consideration of the contract with Defendant No.2 and defendant No.1 cannot insist on consideration from the Plaintiff as execution of a contract between the Plaintiff and the Defendant No.1 is a mere formality for due implementation of a project and/or a condition imposed by the Defendant No.2 which has been

accepted by the Defendant No.1 without any protest or demur. Further and/or in any event, the consideration received by Defendant No.1 from Defendant No.2 includes the discharge of obligation by Defendant No.1 as a lead contractor. Without prejudice, it is further submitted that the same is a matter between the Defendant No.1 and the Defendant No.2 and the Plaintiff is neither involved nor concerned with it, however, the same cannot be allowed to prejudicially affect the Plaintiff. The Defendant No.1 is estopped from claiming to the contrary. The Defendant No.1 is attempting to jeopardize the agreement between the plaintiff and the said Defendant No.2 and cause irreparable loss including loss of reputation of the Plaintiff. The Defendant No.1 is attempting to interfere in the implementation and/or performance of the contract between the Plaintiff and the Defendant No.2 tortuously by attempting to deliberately induce a third party instead, which the Defendant No.1 is not entitled to do. The Defendant No.1 is bound and liable to give effect to the concluded contract between the Plaintiff and Defendant No.2 and sign the formal contract between the Plaintiff and Defendant No.1 in regard thereto. The Plaintiff has spent huge amount of monies and manpower time in preparation of discharge of its obligations including more than 25 man-visits by Senior Officers to Ethiopia at exorbitant cost. The Defendant No.1 cannot jeopardize the interest of the Plaintiff. It is further submitted that if the Defendant No.1 is allowed to proceed in its malafide intentions it would not only be illegal, it would also render the plaintiff without any remedy whatsoever for the colossal losses that would be caused to it.

20A. In the agreement between defendant No.1 and defendant No.2 and/or the Plaintiff, there exists a positive covenant coupled with an implied negative which the defendant No.1 is threatening to breach. This Hon'ble Court ought to grant injunction to perform the negative covenant. The implied negative covenant is contained in letter dated 7.12.2007 from defendant No.2 to defendant No.1 as under:-

> The winning bidders of other packages are to be retained as sub contractors without any alteration in the agreed

technical and financial aspects as already finalized with the individual bidder.

Further in letter dated 7.12.2007 from defendant No.2 to Plaintiff:-

You, as winning Bidder of Steam Generation Plant Bid Tender No.TSFP-F/002/06/SG, will be retained as sub-contractor to the main EPC Contractor without any alteration in the agreed technical and commercial aspects including the time schedule, as already negotiated and finalized.

Further it is evident from the joint meeting, inter alia, Plaintiff, defendant No.1 and defendant No.2:-

All winning bidders were informed that as per the directive from the Government of Ethiopia, the managements of TSFP & FSF intend to appoint one single EPC contractor and all other winner bidders shall work as sub contractor to the proposed single EPC contractor.

Contract agreement between EPC contractor and winner bidder shall be seamless and address all issues as per original tender documents including GCC, SCC and other financial conditions.

The aforesaid clauses clearly stipulates that the defendant No.1 is by way of an implied negative covenant not permitted to modify and/or attempt to modify any agreed technical, commercial including price aspects already finalized between the plaintiff and defendant No.2.

20B. That the purported MOU dated 8th July 2008 and the sub-contract Agreement of 12 July 2008 between Defendant No.1 and Walchandnagar Industries are clearly antedated and have been fabricated with a view to frustrate and/or to overreach the injunction Order dated 30.7.2008 passed by this Hon'ble Court.

20C. That in the Written Statement filed by the Defendant No.1 it has been alleged that a Memorandum of Understanding (MOU) was signed between Defendant No.1 and Walchandnagar Industries Ltd. on 8th July, 2008 and thereafter, a definite purported contract was signed on 12th July, 2008, i.e. within 4 days of the MOU

despite the MOU being valid for a period of 30 days, and not withstanding that the Defendant No.1 proposed the name of defendant No.3 to defendant No.2 long after 12th July 2008.

20D. The alleged sub-Contract Agreement dated 12th July, 2008 filed by Defendant No.1, Defendants Nos.1 and 3 have purported to create a definition of "contract documents" which includes documents that have yet not been finalized but are only "proposed". One of the documents forming part of Contract document is "Minutes of Package Negotiations meeting (proposed) to be held between Employer and Sub-contractor (WIL), for the Package Facilities on technical aspects". Firstly, there cannot be a meeting or minutes of a meeting which are qualified as "proposed". Secondly, there cannot be minutes of a meeting which is yet "to be held". It is obvious that the documents have been prepared in a hurry only to be produced before this Hon.ble Court with a view to mislead this Hon.ble Court and to frustrate and overreach the orders of this Hon.ble Court.

20(E). In fact, defendant No.1 has itself subsequently filed a letter dated 5th August, 2008 purportedly issued by defendant No.2 permitting the defendant No.2 to substitute the plaintiff(though the authenticity of the said letter is denied). The said letter clearly reveals that even as late as on 5th August, 2008, in the meeting between the Defendant No.1 and Defendant No.2, there is no mention that a definite contract had been signed with Walchandnagar Industries Ltd. In fact defendant No.1 informed defendant No.2 that only negotiations were being conducted with Walchandnagar Industries Ltd.

20(F). That the contents and tenor of the letter dated 5.8.2008 issued by the Defendant No.2 to the Defendant No.1 clearly substantiates the fact that the alleged MOU dated 8.7.2008 and also the alleged sub contract agreement dated 12.7.2008 have been fabricated and antedated with the malafide intention. The letter dated 5.8.2008 specifically states that it was only in a joint meeting dated 10.7.2008 held under the Chairmanship of the Minister of Trade, that it was decided to consider substitute Sub-contractor proposed by OIA. The letter clearly states thus:-

We refer to the joint meeting dated July 10, 2008 held under the Chairmanship of His Excellency the Minister of Trade and Industry, where by it was decided to consider substitute Sub-Contractors/Consortium Partners proposed by OIA and conduct technical evaluation of substitute offers for the subject packages.

However, as stated by the Defendant No.1 themselves in their written statement, they had entered into an MOU on 8.7.2008 (which is even two days prior to the proposed decision to substitute which was only taken on 10.7.2008). It is submitted that the decision to consider substitute Sub-Contractors/ Consortium Partners was taken only on 10.7.2008 and thus there could have been no MOU on 8.7.2008 between the Defendant No.1 and WIL inasmuch as the Defendant No.1 had no authority to enter into any agreement with WIL prior to the alleged approval of Defendant No.2 for changing the sub-contractor. Therefore, this clearly reveals that the alleged MOU was illegal and void ab initio.

20G. That, the letter dated 5.8.2008 further states as under:

In line with the above, TSFP has given original bid documents and invited OIA to submit substitute technical offers for the subject packages on July 11, 2008. Substitute offers were opened in the presence of Tender committee of TSFP, Consultant's and Bidder's representatives on July 18, 2008.

Strangely, Defendant No.2 gave the original bid documents and invited/directed the Defendant No.1 to submit substitute technical officers for the packages on 11.07.2008 i.e. just one day after the Defendant No.2 decided to consider substitute sub-contractors.

20(H) The letter further states thus:

TSFP is pleased to inform you that our top management has hereby accepted your substitute technical offer dated 18th July 2008 for above packages with Walchandnagar Industries Ltd. (WIL) as Sub-Contractor abiding to technical specifications given in or bid documents and

minutes of technical negotiation meeting held on August 4 and 5 2008, for turnkey supply, erection and commissioning with manpower training for both phase I and II of the project.

As stated above the sub-contractor agreement was allegedly executed on 12.7.2008. The technical offer allegedly accepted only on 5.8.2008. Glaring infirmities and illegalities in the alleged agreement dated 12.7.2008 and further highlighted by the fact that the offers of WIL bidding as OIA's sub-contractor was opened and accepted by the Defendant No.2 only on 5.8.2008, so how could a contract between Defendant No.1 and WIL (defendant No.3) as contractor and sub contractor can claimed to have been entered into on 12.7.2008 which is completely arbitrary and devoid of any merits. This clearly demonstrates that the Defendant No.1 has filed a false affidavit and has committed an act of perjury. This further reveals the glaring infirmities and illegalities in the alleged sub contractor agreement dated 12.7.2008.

20I. Furthermore, the contract dated 12.7.2008 is not only antedated, it is void inasmuch as it fraught with false and misleading contents, which is clearly evident from Clause 4 of the said agreement, which provides as under:-

Article 4 Technical Conditions

The technical aspects of the project as already agreed between the Employer and the Sub-contractor shall not be altered and shall be adhered to by the Sub-contractor.

The said clause portrays as if the technical aspects had already been agreed upon prior to 12.7.2008, whereas allegedly the technical aspects of the project was agreed only allegedly vide the Letter dated 5.8.2008. This fact clearly demonstrates that the said sub-contract was antedated inasmuch as on 12.7.2008, the technical aspects of the project between the Employer and the sub-contractor qua the project in question was never accepted.

20J. That even as late as on 4th or the 5th August, 2008, in the meeting between the Defendant No.1 and Defendant No.2, there

is no mention that a definite agreement had been signed with Walchandnagar Industries Ltd. In fact the letter dated 5.8.2008 clearly states that the technical negotiation meetings were held on August 4 and 5, 2008 with OIA-WIL experts. It is further revealed from the minutes of the tender committee meeting dated 5.8.2008, that on 5.8.2008, the evaluation report submitted by the consultants was forwarded to the General Manager for approval of substitute offers of Defendant No.1 – Defendant No.3. Therefore, there is no way in which a definite contract could have been entered into with WIL. And even if assuming but not admitting that a contract was entered into between OIA and WIL such a contract prior to 5.8.2008, would be illegal, null and void in the eyes of law.

20K. The minutes of the tender committee meeting dated 5.8.2008 further record as follows:

> (e) Detailed technical & commercial negotiations were held thoroughly between OIA-WIL, TSFP technical committee members and consultants team regarding the deviations specified in the tender documents by OIA.

Therefore, this clearly reveals that the Defendant No.1 has been deliberately violating the stay order dated 30.7.2008 passed by this Hon'ble Court and in complete violation of the same has been taking active measures to substitute Defendant No.3 instead of the Plaintiff. It is further pertinent to mention herein that the Defendants actively participated in the technical negotiations meeting held on 4.8.08 and the minutes of the said meeting clearly bears the signatures of the representatives of the Defendant No.1 and the stamp of the Defendant No.1.

20L. That assuming but not conceding the alleged sub-contract agreement dated 12.07.2008, as per its own terms and conditions could not become effective without approval from the employer, which was allegedly granted only on 5.8.2008. The said approval on the face of it is Nullis juris and in the teeth of the injunction operating.

20M. That Article 3 of the alleged agreement dated 12.7.2008

clearly demonstrates that the same has been ante-dated. In fact, the said agreement has not become effective even today and hence has no legal validity. Article 3 has been extracted hereunder to illustrate the point further:

> Article 3 Effective Date
>
> The subcontract Agreement shall become effective when all of the following conditions are fulfilled to the satisfaction of the EPC Contractor:
>
> (a) This Contract Agreement has been duly and validly executed by both parties and a duly authorized counter copy is exchanged between the parties hereto.
>
> (b) The subcontractor has submitted to the Employer (through the EPC Contractor) the Performance Security and the Advance Payment Guarantee as specified in Appendix 9-10 attached herein for the value defined in SCC and GCC;
>
> (c) The EPC contractor has paid 10% of the Contract value to the Sub contractor as the advance payment
>
> (d) Technical and commercial approval of WIL by the Employer.

It is submitted that Sub-Clause (b), (c) and (d) of the said Article 3 is yet to be fulfilled till date inasmuch as inter alia the performance security and the advance payment as stipulated under the Agreement has not been made and neither have the technical and commercial approvals as required been granted. It is submitted that the alleged technical approval as required under the clause was granted if at all, only 5.8.2008 and not before and the same was in blatant disregard and violation of the order dated 30.7.2008 passed by this Hon'ble Court. No commercial approval of the appropriate value was granted. No payment has been made by the Defendant No.2 to WIL.

20N. Furthermore, despite being specifically restrained by this Hon'ble Court, the Defendant No.1, in furtherance of its malafide intention of appointing M/s. Walchandnagar Industries Ltd., deliberately violated the said Order and attended the technical

negotiation meetings on 4th and 5th August, 2008. The Minutes of the meeting dated 4.8.2008 bears the signatures of representatives of the Defendant No.1 and the Delhi office stamp of the Defendant No.1. Therefore, the alleged technical approval dated 5.8.2008 being in clear disregard to the Order passed by this Hon'ble Court is illegal and bad in law, which consequently also implies that another essential criteria stipulated under Article 3(d) of the agreement dated 12.7.2008 also has not been fulfilled.

20O. That further, assuming but not conceding that the alleged contract dated 12.7.2008 had been entered into, and the approval was granted on 5.8.2008, yet the said contract is invalid and null and void in the eyes of law. It is submitted that the alleged approval dated 5.8.2008 clearly states that the prices for the substitute packages shall be as per the main contract dated 10th January 2008 executed between Defendant No.2 and Defendant No.1, which is admittedly US$ 65 million, however, under the said agreement dated 12.7.2008 it has been specifically provided under Clause 2.1 as only 2.1 million. Therefore, there are huge discrepancies and contradictions between the terms of the approval and the contract dated 12.7.2008 and it is not known as to where would these monies which are actually public Indian funds be used for is not known.

20P. That clearly the said letter dated 5th August, issued by defendant No.2 permitting the defendant No.2 to substitute the plaintiff shows that there could be no contract between defendant No.1 and the said Walchandnagar Industries Ltd. prior thereto and further that defendant No.1 and 2 were acting in concert and were completely aware of the order dated 30th July, 2008 passed by this Hon'ble Court which is in force even till date.

20Q. Further, and in any event, the defendant No.2 has not been shown to have ever authorized till end June/July 2008, appointment of the said Walchandnagar Industries Ltd. as a Sub-Contractor in substitution of the plaintiff. This is also apparent from the letter dated 30.6.2008 written by defendant No.2 to its Board of Management on 30.6.2008 which clearly reveal that the minutes dated 19.6.2008 and 20.6.2008 and the letter dated 16.6.2008 sought to be relied upon by the defendant No.1 did not constitute

any approval of substituting the plaintiff as alleged by the defendant No.1. The defendant No.1 is clearly suppressing all material facts as the aforesaid documents are within the knowledge of defendant No.1 who has chosen to conceal the same from this Hon'ble Court. Assuming without conceding, neither the negotiations nor the minutes and/or any alleged MOU could have been entered into or be given effect to in view of clear restraint imposed by the order dated 30.7.2008 passed by this Hon.ble Court and the Defendant No.1 ought not to be permitted to defeat the bonafide rights of the plaintiff and/or overreach this Hon.ble Court.

20R. The Petitioner recently discovered that a consortium Agreement dated 16.7.2008 was entered into between the Defendant No.1 and Defendant No.3, wherein it was agreed that the parties would enter into a definitive transaction agreement subsequently. The relevant clause of the said Consortium Agreement has been extracted hereunder:

> (3) The parties shall enter into a "definitive transaction agreement" on being qualified by the Employer. The "definitive transaction agreement" shall include all terms and conditions to implement the packages including the payment mechanisms.

Therefore, a bare perusal of the said Consortium agreement clearly reveals that prior to 16.7.2008 no agreement had come into existence and in fact a subsequent agreement had to be entered into, which never happened. In fact, the agreement dated 16.7.2008 has actually been notarized on 28.7.2008, which is the date on which it becomes effective. The consortium agreement further reveals that till 28.7.2008 no price had been agreed to between the parties, whereas in the alleged contract dated 12.7.2008, the price has been specified under clause 2.1 and 2.2 therein.

20S. That in furtherance of their illegal designs and malafide intentions Defendants No.1 and 2 on 15.9.2008 made amendment in the contract agreement dated 10.1.2008 allegedly entered into inter-se in an attempt to oust the plaintiff from the entire project.

The name of the Plaintiff has been allegedly substituted by joint names of Defendant No.1 and Defendant No.3. In the garb of Defendant No.3, it is Defendant No.1 who has attempted to substitute the plaintiff.

20T. It is relevant to note that in a similar contract, which relates to another Govt. of Ethiopia company known as Wonji Shoa Sugar Factory, where the Plaintiff has been appointed as the EPC Contractor, it has entered into contracts with the sub-contractors without making any demand for 15% of contract price for discharge of its obligations as a lead EPC/Contractor.

It has subsequently now come to the knowledge of the plaintiff that defendant No.1 was not even entitled to become the EPC contractor and the defendant No.1 and 2 have manipulated records to make defendant No.1 become the EPC contractor who is demanding unreasonable and absolutely uncalled for 15% of the contract price from plaintiff and other similarly placed sub-contractors. It is further submitted that defendant Nos.1, 2 and the said Walchandnagar Industries Ltd. are acting in concert and are attempting to defeat the order of this Hon'ble Court and perpetrate a fraud which they cannot be permitted to do.

20U. The attempt of Defendant No.1 of clandestinely introducing the purported Sub-Contractor who did not even participate in the tender, is not only contrary to the entire tender process but is also malafide and an attempt to overreach the orders passed by this Hon'ble Court. Further, till date no termination of Plaintiff's sub-contract has even been communicated.

20V. The aforesaid facts clearly reveal that the purported sub-contract Agreement dated 12th July, 2008 which was allegedly entered into within four days of signing the Memorandum of Understanding which was valid for 30 days is clearly ante dated with a view to defeat the injunction order passed by this Hon'ble Court. The said purported sub-contract Agreement cannot be permitted to be implemented and be proceeded with and being in complete violation of the order dated 30th July, 2008 is void ab initio. Even the purported permission dated 5th August, 2008 cannot be acted upon and is void ab initio as defendant No.2 was

also informed of the order dated 30th July, 2008.

20W. That defendant Nos. 1, 2 and 3 are acting in concert and are attempting to overreach the issues pending before this Hon'ble Court and perpetrate a fraud which they cannot be permitted to do.

14. The original Plaint may not have contained their name yet the cause of action, as pleaded therein, categorically expresses concerns of the contesting defendant introducing a third party to the subject contracts to the detriment of the Plaintiffs, interests. It is Walchandnagar Industries Ltd. which is that very third party. This subsequence of events has come into the limelight because of pleadings in the Written Statement. Keeping the nature of the transactions in mind, it is difficult at this stage to come to a firm conclusion that the Plaintiff was aware of the role of Walchandnagar Industries Ltd. at the time when the Plaint was filed. We can conceive of no reason for the Plaintiff not to implead Walchandnagar Industries Ltd. had it been aware of the grant or the impending and likely grant of the contract to Walchandnagar Industries Ltd. vice the Plaintiffs. The original reliefs are for mandatory injunction, that is, restraining OIA from orchestrating events with the objective that the Plaintiffs are substituted by a third party, which in the sequence of events is Walchandnagar Industries Ltd. Learned counsel for the Appellants/ Defendants have voiced the view that the cause of action and nature of Suit has changed by inclusion of the new amendments. We are unable to find even an iota of substance in this submission. The Plaintiffs have based their Suit on the tort of interference allegedly committed by OIA by interfering with their contract with TENDAHO and illegally conspiring to replace them with another party who, as per the Written Statement filed by Defendant No.1, is Walchandnagar Industries Ltd. Black's Law Dictionary defines "tortious interference with contractual relations" as a third party's intentional inducement of a contracting party to break a contract, causing damage to the relationship between the contracting parties. As soon as opposition to the proposed amendments stands withdrawn, the argument that the nature of the Suit has been transformed pales into significance. The case before us is not one where the sequence of events and additional pleas are barred from adjudication for any reason. A fresh suit could always have been filed. Therefore, upon a concession having been made, there can be no conceivable reason for the Court to

decline leave to amend the plaint.

15. A reading of Order VI Rule 17 of the CPC reveals that, even without any motion having been filed by the Plaintiff, it is more than just arguable that the Court ought to have suo moto impleaded Walchandnagar Industries Ltd. since its presence is undeniably necessary for determining the real question in controversy between the parties. This is especially so since the Plaintiff has pleaded that the contract with Walchandnagar Industries Ltd. has been predated and that they are the co-conspirators and beneficiaries of the alleged tort.

16. Learned counsel for the Appellants have also submitted that the relief is essentially in the nature of specific performance of a contract and such a relief cannot be granted in the form of mandatory injunction. This is altogether a different aspect of the case, not related in any wise with the conundrum of whether the amendments should be permitted. It would not be judicious to allow an unrelated aspect of the case to influence the decision on another aspect or nuance of the lis.

17. The Appellants assert that they had not given their consent vis-à-vis introduction of the additional prayers which stand introduced because of permitting the amendments. It is argued that Defendant No.1 had only conceded to amendment of some of the pleadings but had seriously contested the inclusion of new prayers. It is argued that the learned Single Judge erred in allowing the amendments in the prayers as well, taking it as a fait accompli to the amendments in the pleadings, though it amounts to altering the entire complexion of the suit. In our opinion, however, the amendments in prayer clause would follow as a natural and essential consequence to the amendments in the Plaint. This is vital for a holistic determination of the dispute; it shall be allowed so as to avoid multiplicity of litigation amongst the parties. The details pertaining to Walchandnagar Industries Ltd. exist in the Plaint itself and it becomes obvious that the grant of an injunction against OIA is most certainly likely to affect Walchandnagar Industries Ltd., it would be a travesty of justice if the litigations were to continue without giving Walchandnagar Industries Ltd. complete opportunity to present its defence. The Plaintiffs had prayed for various ad interim reliefs which would have had the effect of bringing the progress of the Project to a grinding halt. As we see it, this is the reason why both OIA as well as Walchandnagar Industries Ltd. are

objecting even to its impleadment. Another attractive argument made by the Appellants to impugn the amendment is based on Order VII Rule 7 of the CPC which requires the Plaintiff to specifically state the reliefs claimed by him in the Plaint. It is argued that by an amendment the Plaintiff may claim new Reliefs which arise from the same cause of action and not on new facts and cause of action. A distinction is thereby sought to be made between qualitative changes and quantitative changes. Addition of new facts along with new Prayers is said to be a qualitative change. We are of the opinion that a new Prayer added on the strength of some new averments added by amendments will not qualitatively alter the suit in every case. Where an amendment prayer is sought to be added on the basis of facts which are intricately attached to the original cause of action and either happens subsequently or comes to the knowledge subsequently, such an amendment cannot be said to substantially alter the nature of the Suit, it would be allowed if no prejudice is caused to the other party and the Plaintiff is not barred from filing a fresh suit for these reliefs. Our conclusion, therefore, is that amendment to the prayers is essential and unavoidable and the impugned decision must unequivocally be upheld.

18. The prayers, as they stood in the original Suit Nos. CS(OS) No.1368/2008 and 1447/2008 and as they are after the amendments were allowed by the impugned Order, are reproduced for ease of reference:-

Prayers in Original Suit

(a) Grant a decree of perpetual injunction restraining the Defendant No.1 from interfering in the contract/award of contract between Plaintiff and Defendant No.2.

(b) Grant perpetual injunction restraining the defendant No.1 from modifying any technical and/or commercial terms including price agreed/finalized between the Plaintiff and the Defendant No.2.

(c) Grant perpetual injunction restraining the defendant No.1 from engaging any third party in respect of the Process House Project.

(d) Grant a decree of mandatory injunction directing defendant no.1 to execute the obligation of signing a formal contract

with the plaintiff in accordance with the terms and conditions agreed between the plaintiff and defendant no.2 contained in letter dated 7.12.2007.

(e) Costs; and

(f) Pass such further order as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

Prayers in amended Suit

(a) Grant a decree of perpetual injunction restraining the Defendant No.1 and Defendant No.3 from interfering in the contract/award of contract between plaintiff and Defendant No.2 as contained in letter dated 7th December 2007 including appointing/engaging any third party in respect of the Process House Project.

(b) Grant perpetual injunction restraining the Defendant No.1 from committing a breach of the negative covenant enumerated in Para 20A above and restrain the defendant No.1 from modifying any technical and/or commercial terms including price agreed/finalized between the Plaintiff and the Defendant No.2.

(c) Grant a decree of mandatory injunction directing defendant No.1 to execute the obligation of signing a formal contract with the plaintiff in accordance with terms and conditions agreed between the plaintiff and defendant no.2 contained in letter dated 7th December 2007.

(d) Grant perpetual injunction restraining the defendant no.1 from modifying any technical and/or commercial terms including price agreed/finalized between the plaintiff and defendant no.2.

(e) Grant a decree of declaration that the purported sub-contract Agreement dated 12th July, 2008 between defendant No.1 and defendant No.3 is invalid and void ab initio.

(f) Declare that the alleged consortium agreement dated 16.7.08 entered into between the Defendant No.1 and Defendant No.3 is illegal and void ab initio and cancel the

said Consortium Agreement dated 16.7.2008.

(g) Declare that the addendum No.1 dated 21.2.2008 to the Agreement dated 10.1.2008 is illegal void ab initio and cancel the said addendum No.1 dated 21.2.2008 to the Agreement dated 10.1.2008.

(h) Declare that the amendment dated 15.9.2008 to the agreement dated 10.1.2008 is illegal and void ab initio and cancel the said amendment dated 15.9.2008 to the agreement dated 10.1.2008.

(i) Grant a decree to the perpetual injunction restraining the defendant No.1 and 2 from taking any steps in furtherance of the amendment dated 15.9.2008 illegally made to the contract agreement dated 10.1.2008 allegedly entered into between defendant no.1 and defendant no.2 or crating any right in favour of defendant no.3.

(j) Grant a decree of perpetual injunction restraining defendant No.1, 2 and 3 from proceeding with and/or acting upon in any manner whatsoever on the purported sub-contract Agreement dated 12th July, 2008; or on any subsequent date.

(k) Grant a decree of declaration that the purported permission granted vide letter dated 5.8.2008 issued by defendant no.2 to defendant no.1 is invalid and/or void ab initio and cancel the said permission dated 5.8.2008.

(l) Declare that the amendment dated 15.9.2008 to the agreement dated 10.1.2008 is illegal and void ab initio and cancel the said amendment dated 15.9.2008 to the agreement dated 10.1.2008.

(m) Grant a decree of permanent injunction restraining defendant no.1, 2 and 3 from taking any action pursuant to the purported letter dated 5.8.2008.

(n) Grant a decree of mandatory injunction directing the defendant no.1 and 2 to undo the contemptuous and illegal acts done and status quo ante as on 30.7.2008 be restored.

(o) Grant a decree of perpetual injunction restraining defendant

no.4 from disbursing any funds in the line of credit opened by it from the Government of Ethiopia.

(p) Costs; and

(q) Pass such further order/s as this Hon'ble Court may deem fit and proper in the facts and circumstances of this case.

Unamended prayers (Uttam Sucrotech International Pvt. Ltd.)

(a) grant a decree of perpetual injunction restraining the Defendant No.1 from interfering in the contract/award of contract between Plaintiff and Defendant No.2.

(b) grant perpetual injunction restraining the defendant No.1 from modifying any technical and/or commercial terms including price agreed/finalized between the Plaintiff and the defendant No.2.

(c) grant perpetual injunction restraining the defendant No.1 from engaging any third party in respect of the Process House project.

(d) grant a decree of mandatory injunction directing Defendant No.1 to execute the obligation of signing a formal contract with the Plaintiff in accordance with the terms and conditions agreed between the Plaintiff and Defendant No.2 contained in letter dated 7.12.2007.

(e) costs; and

(f) pass such further order as this Hon.ble Court may deem fit and proper in the facts and circumstances of the case.

Amended Prayers (Uttam Sucrotech International Pvt. Ltd.)

(a) grant a decree of perpetual injunction restraining the Defendant No.1 and Defendant No.3 from interfering in the contract/award of contract between Plaintiff and Defendant No.2 as contained in letter dated 7th December 2007 including appointing/engaging any third party in respect of the Process House Project.

(b) grant perpetual injunction restraining the defendant No.1 from committing a breach of the negative covenant enumerated in Para 20A above and restrain the defendant No.1 from modifying any technical and/or commercial terms including price agreed/

finalized between the Plaintiff and the Defendant No.2.

(c) grant a decree of mandatory injunction directing Defendant No.1 to execute the obligation of signing a formal contact with the Plaintiff in accordance with the terms and conditions agreed between the Plaintiff and Defendant No.2 contained in letter dated 7th December, 2007.

(d) grant perpetual injunction restraining the Defendant No.1 from modifying any technical and/or commercial terms including price agreed/finalized between the Plaintiff and the Defendant No.2.

(e) grant a decree of declaration that the purported sub-contract Agreement dated 12th July, 2008 between defendant No.1 and Defendant No.3 is invalid and void ab initio, and cancel the said Contract Agreement dated 12th July, 2008.

(f) declare that the alleged consortium agreement dated 16.7.08 entered into between the Defendant No.1 and the Defendant No.3 is illegal and void ab initio and cancel the said Consortium Agreement dated 16.7.2008.

(g) declare that the addendum No.1 dated 21.2.2008 to the Agreement dated 10.1.2008 is illegal void ab initio and cancel the said Addendum No.1 dated 21.2.2008 to the agreement dated 10.1.2008.

(h) declare that the Amendment dated 15.9.2008 to the agreement dated 10.1.2008 is illegal and void ab initio and cancel the said Amendment dated 15.9.2008 to the agreement dated 10.1.2008.

(i) grant a decree of perpetual injunction restraining the defendant No.1 and 2 from taking any steps in furtherance of the amendment dated 15.9.2008 illegally made to the contract agreement dated 10.1.2008 allegedly entered into between Defendant No.1 and Defendant No.2 or creating any rights in favour of defendant No.3.

(j) grant a decree of perpetual injunction restraining defendant No.1, 2 and 3 from proceeding with and/or acting upon in any manner whatsoever on the purported sub-contract Agreement

dated 12th July, 2008; or on any subsequent date;

(k) grant a decree of declaration that the purported permission granted vide letter dated 5.8.2008 issued by the Defendant No.1 is invalid and/or void ab initio and cancel the said permission dated 5.8.2008.

(l) grant a decree of permanent injunction restraining the Defendant Nos. 1, 2 & 3 from taking any action pursuant to the purported letter dated 5.8.2008.

(m) grant a decree of mandatory injunction, directing the defendant No.1 and 2 to undo the contemptuous and illegal acts done and status quo ante as on 30.7.2008 be restored.

(n) grant a decree of perpetual injunction restraining defendant No.4 from disbursing any funds in the line of credit opened by it from the Government of Ethiopia.

(o) costs; and

(p) pass such further order as this Hon.ble Court may deem fit and proper in the facts and circumstances of the case.

We have reproduced in extensio the amendments to the Plaint as well as to the Prayers in order to make this Judgment self contained as well as to adumbrate the fact that, in the sequence of events as they have unfolded, there cannot be any valid or substantial opposition to the amendments being followed.

19. The remaining nodus pertains to the impleadment of Walchandnagar Industries Ltd. as Defendant to the Suit. We reiterate that notice to Walchandnagar Industries Ltd. on the application for its impleadment was not in conformity with the logic or with law. This perhaps was done because of the compendious nature of the application filed by the Plaintiffs since both the prayers, that is, amendment of pleadings as well as impleadment of Walchandnagar Industries Ltd. were combined in one. Learned Senior Counsel for the Appellant, Walchandnagar Industries Ltd. has contested the Order allowing impleadment of Walchandnagar Industries Ltd. on the grounds that Walchandnagar Industries Ltd. is not a necessary party for the Suit between Plaintiffs and Defendants/OIA and that, at best, they could have been called as

witnesses in the Trial and their presence is not necessary as parties. Secondly, it is urged that the impleadment of Walchandnagar Industries Ltd. is sought on an entirely new cause of action which does not form part of the Original Suit and, therefore, the Plaintiffs are now seeking to alter the entire nature of suit by urging new causes of action and adding Walchandnagar Industries Ltd. as parties. Reliance is placed on **Anil Kumar Singh vs. Shionath Mishra,** (1995) 3 SCC 147, **Kasturi vs. Iyammperumal** (2005) 650 SCC 753 and **Bharat Karsondas Thakkar vs. Kiran Construction Co.,** (2008) 13 SCC 658 to buttress the argument that a third party or an outsider to a suit between Plaintiff and Defendant, who is unrelated to the controversy between the parties to the suit, is not allowed to be impleaded as party.

20. In **Anil Kumar Singh,** the Plaintiff sought to implead the Respondent who he alleged had obtained a collusive Decree in connivance with his sons and wife and had thus become a co-sharer to the property to be conveyed under the Agreement to Sell which was the bedrock of the Specific Performance Suit filed by him. Their Lordships, while rejecting his prayers for amendment and impleadment of the Respondent, noted that:-

> 3 …. The obtaining of a decree and acquiring the status as a co-owner during the pendency of a suit of Specific Performance, is not obtaining, by assignment or creation or by devolution, an interest. Therefore Order 22 Rule 10 has no application to this case.
>
> 4. Equally, Order I Rule 3 is not applicable to the Suit for Specific Performance because admittedly, the respondent was not a party to the contract…
>
> 5. In this case, since the Suit is based on agreement of sale said to have been executed by Mishra, the sole defendant in the suit, the subsequent interest said to have been acquired by the Respondent by virtue of a decree of the Court is not a matter arising out of or in respect of the same act or transaction or series of acts or transactions in relation to the claims made in the Suit.
>
> ….

> 9. Sub-rule(2) of Rule 10 of Order 1 provides that the Court may either upon or without an application of either party, add any party whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit. Since the Respondent is not a party to the agreement of sale, it cannot be said that without his presence the dispute as to Specific Performance cannot be determined.

21. In **Kasturi,** their Lordships were again dealing with impleadment of a third party in a Suit for Specific Performance of a contract. Relying on the ratio of **Anil Kumar Singh,** it was held that:-

> 17. It is difficult to conceive that while deciding the question as to who is in possession of the contracted property, it would be open to the court to decide the question of possession of a third party or a stranger as first the lis to be decided is the enforceability of the contract entered into between the appellant and Respondent 3 and whether contract was executed by the appellant and Respondents 2 and 3 for sale of the contracted property, whether the plaintiffs were ready and willing to perform their part of the contract and whether the appellant is entitled to a decree for specific performance of a contract for sale against Respondents 2 and 3. Secondly in that case, whoever asserts his independent possession of the contracted property has to be added in the suit, then this process may continue without a final decision of the suit. Apart from that, the intervener must be directly and legally interested in the answers to the controversies involved in the suit for specific performance of the contract for sale. In **Amon v. Raphael Tuck and Sons Ltd.**[5] it has been held that a person is legally interested in the answers to the controversies only if he can satisfy the court that it may lead to a result that will affect him legally.

22. In **Bharat Karsondas Thakkar,** the facts were that the High Court had granted leave to the Plaintiff to amend his Suit for declaration to be virtually transformed into a suit for Specific Performance and had also allowed the impleadment of the subsequent purchaser. The Hon.ble Supreme Court applied the ratio of **Kasturi** and **Anil Kumar Singh** to hold that the Plaintiff was trying to materially alter the suit and the

impleadment of the subsequent purchaser sought by him could not be granted in law.

23. We do not appreciate any manner in which the rationale of these cases support the Appellants' case. The Suits filed by the Plaintiffs before us are of tortuous interference where the allegations are that OIA conspired and colluded with Walchandnagar Industries Ltd. to oust them from the contract with TENDAHO. The stage to test the merits of their claim has not come as yet, but since the Suit is one of tortuous interference containing allegations of conspiracy, the presence of the alleged co-conspirator, who is also the beneficiary as a party, is not only proper but also is necessary. The principles for impleadment for a Specific Performance of immoveable property will, therefore, not be attracted in these facts. As soon as the amended Plaint is perused, there can be no two opinions that an injustice would be caused to Walchandnagar Industries Ltd. if it were not be impleaded since there is always a likelihood of an order being passed which may be adverse to its interests. If efficacious interim orders had been passed, bringing the Project to a standstill, we are in no manner of doubt that the OIA as well as Walchandnagar Industries Ltd. would have come screaming to Court asking for impleadment of Walchandnagar Industries Ltd. Order I Rule 10 of the CPC postulates impleadment of a person whose presence is pertinent for the determination of the real matter in dispute, which is a consideration similar to that for permitting an amendment to pleadings. We may also add that since in the present form, Walchandnagar Industries Ltd. is very much a necessary party as reliefs are claimed qua it and the various interim relief sought are likely to affect Walchandnagar Industries Ltd.'s, the Plaintiffs would have run the risk of being non-suited for non-joinder of a necessary party as stipulated under Order I Rule 9 of the CPC. The learned Single Judge, therefore, did not commit any error in ordering the impleadment of Walchandnagar Industries Ltd.

24. Finally, we must record our views on the question of maintainability of the Appeals. This question was raised at the very threshold of arguments. Section 10 of the Delhi High Court Act, 1966 reads as follows:-

10. Powers of Judge

(1) Where a single Judge of the High Court of Delhi exercises

ordinary original civil jurisdiction conferred by sub-Section(2) of Section 5 on that Court, an appeal shall lie from the judgment of the Single Judge to a Division Court of that High Court.

(2) Subject to the provisions of sub-section(1), the law in force immediately before the appointed day relating to the powers of the Chief Justice, single Judges and Division Courts of the High Court of Punjab and with respect to all matters ancillary to the exercise of those powers shall, with the necessary modifications, apply in relation to the High Court of Delhi.

Such like provisions do not create the right to appeal but are merely indicative of the forum which will hear the appeal. Letters Patent have become necessary because of orders passed in the High Court were appealable only before the Privy Council in England. This unnecessarily entailed not only Court expense but also the discomfort and difficulty in arranging legal counsel. If legal annals are comprehensively and meaningfully stated, it will become evident that this was why the need to provide for an appeal within India was found expedient. This should not be confused to hold that Appeals are maintainable even where the CPC does not provide for them. After Order XLIII Rule 1 of the CPC is read, it will be evident that appeals have been provided for in all those cases where a remedy by way of a second look at the controversy was expeditiously essential. We think this is why the word "judgment" has been used in contradistinction to the word 'order'; both in Letters Patent as well as Section 10 of the Delhi High Court Act. Judgment has been defined in **Shah Babulal Khimji vs. Jayaben D.Kania,** (1981) 4 SCC 8. This celebrated Judgment also indicates in paragraph 116 that refusal to amend as well as refusal to implead are of such moment as would justify an appeal under Letters Patent or in the case of Delhi High Court under the Delhi High Court Act.

25. A catena of Judgments has been cited by both the adversaries on the aspect of principles to be adopted by the Civil Courts for amendment of pleadings. The Judgments cited in support of the amendments allowed by the learned Single Judge are **Sampath Kumar vs. Ayyakannu,** AIR 2002 SC 3369, **Kedar Nath Agarwal vs. Dhanraji Devi,** (2004) 8 SCC 76, **Andhra Bank vs. Official Liquidator,** (2005) 5 SCC 75 and **Rajesh Kumar Aggarwal vs. K.K. Modi,** (2006) 4 SCC 85 and the ones cited to oppose by the other party are **A.K. Gupta vs. Damodar Valley**

Corporation, AIR 1967 SC 96, **Kumaraswami Gounder vs. D.R. Nanjappa,** AIR 1978 Mad. 285 (FB), **Bharat Karsondas Thakkar vs. Kiran Construction,** AIR 2008 SC 2134 and **Neena Khanna vs. Peepee Publishers,** 167(2010) DLT 247(DB). We have digested all these precedents and in our considered view the general principle adopted by the Courts while deciding an application for amendment of pleadings is that the exercise of discretion to allow an amendment has to be exercised liberally, unless serious injustice or irreparable loss is caused to the other party or the Court comes to the conclusion that the prayer of amendment is vexatious and mischievous. The true purpose of Order VI Rule 17 of the CPC is to allow the parties to bring forth the true nature of dispute or controversy before the Court. The rule of pleadings that the parties have to confine their arguments and the evidence they adduce in support of their case to the averments in the pleadings, makes the provision for amendment further significant. At the stage of determining the merits of an amendment application, the Court is not supposed to go into the merits of the controversy itself and should confine itself to the merits of the amendment sought.

26. Grounds on which the Courts are reluctant to allow an amendment is where the Plaintiff, through an amendment seeks to change the nature of the suit or change the cause of action originally pleaded in his Plaint, or seeks to claim a relief which stands time barred. This however, does not preclude the Plaintiff to plead, through an amendment, additional grounds or cause of action, that came to his knowledge after filing of the Suit or those which happened subsequently but relate back to the original cause of action pleaded in the original Plaint.

27. The Court may also allow the Plaintiff to add new prayers to the suit if, by doing so, no violence will be caused to the nature of the suit as it originally stood, nor a right, which gets vested in the Defendant on account of limitation or because of an admission by the Plaintiff is taken away. Prevention of multiplicity of Suits, and a holistic disposal of a dispute are material considerations that the Courts consider while favourably receiving an amendment plea. The courts, while allowing the amendment, may balance the equities by awarding costs to the other party in case some prejudice is seen to be caused which can be adequately compensated in monitory terms.

28. There is such a plentitude of precedents on this aspect of law

that making even the briefest and cryptic reference thereto will result in rendering these opinion avoidably prolix. We shall, therefore, restrict our reference to the most recent exposition and enunciation of the law which is to be found in **Revajeetu Builders & Developers vs. Narayanaswamy,** (2009) 10 SCC 84 :

Whether amendment is necessary to decide real controversy

58. The first condition which must be satisfied before the amendment can be allowed by the court is whether such amendment is necessary for the determination of the real question in controversy. If that condition is not satisfied, the amendment cannot be allowed. This is the basic test which should govern the courts' discretion in grant or refusal of the amendment.

No prejudice or injustice to other party

59. The other important condition which should govern the discretion of the court is the potentiality of prejudice or injustice which is likely to be caused to the other side. Ordinarily, if the other side is compensated by costs, then there is no injustice but in practice hardly any court grants actual costs to the opposite side. The courts have very wide discretion in the matter of amendment of pleadings but court's powers must be exercised judiciously and with great care.

…..

Factors to be taken into consideration while dealing with applications for amendments

63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other

side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.

64. The decision on an application made under Order 6 Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments.

65. When we apply these parameters to the present case, then the application for amendment deserves to be dismissed with costs of Rs 1,00,000 (Rupees one lakh) because the respondents were compelled to oppose the amendment application before different courts. This appeal being devoid of any merit is accordingly dismissed with costs.

29. In this analysis, our conclusion is that even if the Appellants had not conceded to the incorporation in the Plaint of the amended Prayers, no sooner had the amended narration of facts and events been allowed in the Plaint, the logical consequence would be that the amended Prayers should also have been permitted. If this were not to be so, the Plaintiffs would have been precluded from making these Prayers in a subsequent Suit because of the rigours of Order II Rule 2 of the CPC. The Prayers should also have been allowed in the interest of justice in order to avoid multiplicity of proceedings between the same parties. This is especially so since we are unable to discern any malafide advantage

that the Plaintiffs would stand to gain on allowing amended Prayers to come on the record. Conversely, we are unable to locate any disadvantage that would visit the Defendants because of the presence of the amended Prayers. Indeed, it is in the interest of all the parties that all relevant facts, all complexions and hues of the cause of action, and all the Prayers should be decided by the Court within the circumference of a single comprehensive lis.

30. The Appeals are devoid of merit and are dismissed along with pending Applications with costs of Rs. 50,000/- in each Appeal, of which half shall be payable to the Prime Minister Relief Fund and the half to the Respondents, to be paid within four weeks from today.

ILR (2011) DELHI 73
RFA

SMT. PHOOL KAUR & ORS. .....APPELLANTS

VERSUS

SARDAR SINGH & ORS. ....RESPONDENTS

(REVA KHETRAPAL, J.)

RFA NO. : 44/1986 DATE OF DECISION: 24.12.2010

Indian Stamp Act, 1899—Section 36—Specific Relief Act, 1963—Section 16(c), 19(a) and (b), 20—Code of Civil Procedure, 1908—Order XLI Rule 22—Suit for specific performance of agreement to sell filed by Respondent No. 1 and 2 against mother of Respondent No. 3 to 6 and appellants who were subsequent purchasers—Case of Respondent No. 3 to 6 that their mother had already entered into agreement to sell with appellants and question of entering into agreement to sell with Respondent No. 1 and 2 did not arise—Agreement to sell and documents of

Respondent No.1 and 2 are fabricated—Rather Respondent No.1 and 2 had agreed to sell their land to mother of Respondent No.3 to 6—Trial Court decreed the suit—Order assailed in appeal—Plea taken, agreement to sell with appellants was entered into prior to alleged agreement to sell with Respondent No. 1 and 2—By virtue of registered receipt, irrevocable power of attorney and registered sale deed, appellants were full owners of suit land—Per contra, case of Respondent No. 1 and 2 that agreement to sell in favour of appellants not proved in evidence as it was on unstamped paper—Held—Once instrument has been admitted in evidence, such admission should not be questioned subsequently on ground that instrument was not duly stamped—Subsequent agreement to sell can be of no significance in view of prior agreement to sell more so as prior agreement to sell ultimately culminated in execution of duly registered sale deed in favour of appellants—If a party relies upon agreement to sell of a date prior to date of agreement to sell of which specific performance is claimed, relief of specific performance cannot be granted to party whose agreement to sell is of a subsequent date—After entering into agreement to sell vendor was in a position of trust qua purchaser and if vendor thereafter conveys title to a third party, title of such party is subject to agreement of its vendor—Even if appellants had been subsequent transferees (which they are not), no decree for specific performance could have been passed by Trial Court without joining them in conveyance deed—Respondent No. 1 and 2 have paid only Rs. 1,000/- and are not entitled to decree of specific performance on payment of Rs. 59,000/- On balancing equities, there is no justification for exercise of discretionary powers of this Court to grant equitable relief of specific performance—Impugned judgment and decree of Trial Court set aside with cost.

If a party challenges admissibility of a document being

unstamped or inadequately stamped, the opposite party can make up the deficiency with penalty and overcome the legal bar. The party challenging the admissibility of a document is, therefore, required to be alert to see that the document is not admitted in evidence by the Court, but once admitted in evidence the document cannot be discarded for insufficiency of stamp. **(Para 26)**

Important Issue Involved: (A) The mere production and marking of a document as an exhibit by the Court cannot be held to be due proof of its contents. Its execution has to be proved by admissible evidence.

(B) Once an instrument has been admitted in evidence, such admission should not be questioned subsequently on the ground that the instrument was not duly stamped.

(C) If a party relies upon on agreement to sell of which specific performance is claimed, the relief of specific performance cannot be granted to a party whose agreement to sell is of a subsequent date.

(D) The conduct of the plaintiff prior and subsequent to the filing of the suit must, therefore, be scrutinized by the Court and from the said conduct the Court may infer whether the plaintiff is ready and was always ready and willing to perform his part of the contract.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANTS : Mr. Rahul Gupta, Mr. Swasting Singh and Ms. Ira Gupta, Advocates.

FOR THE RESPONDENTS : Mr. Rajesh Yadav, Ruchira Arora, Ms. Divya Bhalla and Mr. Samit Khosla, Advocates for the Respondent No.2.

Mr R.P. Vats, Advocate of the legal representatives of the deceased-respondent, Smt. Khazani.

Mr. J.K. Jain, Advocate for the applicants in CM No. 10058/2008.

CASES REFERRED TO:

1. *Deewan Arora* vs. *Tara Devi Sen & Ors.* (2009) 163 DLT 520.
2. *Rekha Nankani* vs. *Kulwant Singh Sachdeva and Anr.*, 2009 (107) DRJ 282.
3. *Bal Krishna & Anr.* vs. *Bhagwan Das (D) through LRs & Ors.* 2008 (12) SCC 145.
4. *Bharat Karsondas Thakkar* vs. *Kiran Construction Company and Ors.* (2008) 13 Supreme Court Cases 658.
5. *Ramesh Chandra Pattnaik* vs. *Pushpendra Kumari and Ors.* (2008) 10.
6. *Seenivasan* vs. *Peter Jebaraj and Anr.* (2008) 12 SCC 316.
7. *Shyamal Kumar Roy* vs. *Sushil Kumar Agarwal* AIR 2007 SC 637.
8. *Shri Vishwa Nath Sharma* vs. *Shyam Shankar Goela and Anr.* (2007) 10 SCC 595.
9. *Kasturi* vs. *Iyyamperummal* (2005) 6 SCC 733.
10. *Sahadeva Gramani (Dead) by Lrs.* vs. *Peruman Gramani and Ors.* (2005) 11 SCC 454.
11. *S.K. Gupta (Through LRs)* vs. *Avtar Singh Bedi Ors.* 122 (2005) DLT 437.
12. *Vemi Reddy Kota Reddy* vs. *Vemi Reddy Prabhakar Reddy* [(2004) 3 ICC 832].
13. *Banarsi & Ors.* vs. *Ram Phal* 2003 (9) SCC 606.

14. *Nirmala Anand* vs. *Advent Corporation (P) Ltd. and Ors.* (2002) 8 SCC 146.
15. *Dilip Bastimal Jain* vs. *Baban Bhanudas Kamble and others* AIR 2002 Bombay 279.
16. *Lalit Kumar Jain and Anr.* vs. *Jaipur Traders Corporation Pvt. Ltd.* (2002) 5 SCC 383.
17. *Superintending Engineer and Ors.* vs. *B. Subba Reddy* 1999 (4) SCC 423.
18. *Lourdu Mari David and Ors.* vs. *Louis Chinnaya Arogiaswamy and Ors.* (1996) 5 SCC 589.
19. *N.P. Thirugnanam (D) by LRs* vs. *Dr. R. Jagan Mohan Rao & Ors.* JT 1995 (5) SC 533.
20. *Vimala Ammal* vs. *C. Suseela and Ors.,* AIR 1991 Mad. 209.
21. *Jadunath Basak* vs. *Mritunjoy Sett and Ors.* AIR 1986 Calcutta 416 (DB).
22. *Delhi Box Factory and Anr.* vs. *Munshi Lal Abhinandan Kumar* 28 (1985) DLT 272.
23. *Dwarka Prasad Singh* vs. *Harikant Prasad Singh* [1973] 2 SCR 1064.
24. *Kedar Nath & Anr.* vs. *Smt. Mohani Devi & Ors.* 1972 ILR (2) 936.
25. *Mahabir Prasad* vs. *Jage Ram and Ors.* AIR 1971 SC 742.
26. *Javer Chand and Others* vs. *Pukhraj Surana,* AIR 1961 SC 1655.
27. *Sampat Ram* vs. *Baboo Lal* AIR (1955) All.
28. *Durga Prasad* vs. *Deep Chand* [1954] 1 SCR 360.
29. *Durga Prasad and Anr.* vs. *Deep Chand and Ors.,* AIR 1954 SC 75.
30. *Kali Charan* vs. *Janak Deo,* A.I.R. 1932 All 694 (B).
31. *Kafiladdin* vs. *Samiraddin',* A.I.R. 1931 Cal 67.
32. *Devachand and Anr.* vs. *Harichand Kama Raj,* ILR (1889) 13 Bombay 449 (FB).
33. *Potter* vs. *Sanders,* (1846) 67 ER 1057 (D).
34. *Tasker* vs. *Small* 1834 (40) Eng R 848.

RESULT: Allowed.

REVA KHETRAPAL, J.

CM No.3698/2010 (under Order XXII Rule 4 read with Section 151 CPC)

This is an application filed by the appellants for impleadment of the legal representatives of Sardar Singh, who died during the pendency of the appeal.

An attempt was made by the learned counsel for the respondents No.1 and 2 to contend that the appeal has abated on account of the legal representatives of Sardar Singh not having been brought on record.

In view of the fact, however, that one of the legal representatives of Sardar Singh, namely, Ishwar Singh is on the record, the appeal cannot be said to have abated. It has been so held by the Supreme Court in **Mahabir Prasad vs. Jage Ram and Ors.** AIR 1971 SC 742 and by a Division Bench of this Court in **Kedar Nath & Anr. vs. Smt. Mohani Devi & Ors.** 1972 ILR (2) 936.

In view of the aforesaid, the prayer for impleadment of the legal representatives of the deceased Sardar Singh is allowed.

The application stands disposed of. The amended memo of parties is taken on record.

RFA 44/1986

1. This appeal arises from a decree of specific performance of the Agreement to Sell dated 25th June, 1973 (Exhibit PW-3/1) passed in favour of the respondents No.1 and 2 and against Shri Chandan Singh and the other legal representatives of Smt. Khazani, the respondents No.3 to 6 herein, on payment of Rs.59,000/- with the direction to the respondents No.1 and 2 to purchase the stamp paper and deposit the same in Court for the execution of the sale deed, costs of the sale deed and its registration charges within one month.

2. The facts as asserted in the plaint filed by the respondents No.1 and 2 are that Smt. Khazani (now deceased) represented by Chandan Singh and others was inter alia in possession of the land comprised in Khasra Nos.485/1 (4 big. 8 bis.), 553 (8-18), 728 (0-17), 827 (0-11), 830 (2-3), 1332 (3-19), 1336 (1-1), 1572 (1-9), 1825 (1-6), 1919/2 (0-12), 2011 (3-3), 2936/1920 (1-6), 3285/2614 (0-11), total 30 bighas 4 biswas situated in village Bijwasan and Khasra No.18/13 (4-9), 18/1 (2-12) measuring 7 bighas 1 biswa situated in village Salhapur, total 37 bighas and 5 biswas and a residential house and a Ghaiwer (enclosure) situated in the abadi of village Bijwasan, Delhi. By an agreement dated 25.06.1973, Smt. Khazani agreed to sell and the respondents No.1 and 2 agreed to purchase the said land for a consideration of Rs. 60,000/- on the terms and conditions mentioned therein. The respondents No.1 and 2 paid a sum of Rs. 1,000/- as earnest money to Smt. Khazani at the time of the execution of the agreement dated 25.06.1973. A receipt in the sum of Rs. 1,000/- dated 25.06.1973 was also executed by Smt. Khazani in favour of the respondents No.1 and 2 by affixing her thumb impression on the same (Exhibit PW-3/2). The balance sale price was agreed to be paid to the vendor on the execution and registration of the sale deed before the Sub-Registrar. The Sale Deed was to be executed within one month after Smt. Khazani had obtained a 'No Objection Certificate' from the Competent Authority. It was further agreed that in case the sale deed was not executed within one month after getting the 'No Objection Certificate', the respondents No.1 and 2 could get the sale deed executed through a court of law at the expense of the vendor, Smt. Khazani. However, if the respondents No.1 and 2 did not purchase the land, the earnest money would stand forfeited.

3. On 26.06.1973, Smt. Khazani represented to the respondents No.1 and 2 that she was badly in need of `Rs. 55,000/- and she requested that the respondents No.1 and 2 pay the aforesaid amount to her. On the same day, i.e., on 26.06.1973, Smt. Khazani executed an Agreement to surrender the cultivation and possession of the land in question, being Exhibit PW-3/3, wherein she stated that she had received Rs.1,000/- as earnest money from the purchasers, who had paid Rs. 55,000/- as part payment, the receipt of which had been issued and the possession of the vacant land had ben handed over to the purchasers, namely, Sardar Singh and Ishwar Singh (the respondents No.1 and 2 herein) and in future the purchasers will be entitled to cultivate the land. A receipt was also

executed by her dated 26.06.1973, which was thumb marked by her and is placed on record as Exhibit PW-3/4.

4. It is further alleged in the plaint that a 'No Objection Certificate' was obtained by Smt. Khazani from the department concerned on 11.09.1973. On the same day, the respondents No.1 and 2 requested Smt. Khazani to execute the Sale Deed and to get it registered before the Registrar after receiving the balance of Rs. 4,000/-, out of the sale consideration of Rs. 60,000/-, since Rs. 56,000/- had already been paid by the respondents no.1 and 2. A registered legal notice was also sent to Smt. Khazani on 14.09.1973, Exhibit PW-9/1, calling upon her to execute the sale agreement within a period of seven days from the date of the receipt of the notice. However, subsequently, the respondents No.1 and 2 came to know that on 13.09.1973 itself, Smt. Khazani had executed a sale deed in respect of the suit land and got it registered in favour of the appellants for the sale consideration of Rs. 40,000/-.

5. The respondents No.1 and 2 accordingly filed a Civil Suit, being Suit No.439/1973 against Smt. Khazani, who was arrayed as defendant No.1 therein, with the appellants arrayed as defendants No.2 to 4. It was alleged in the said suit that the sale deed dated 13th September, 1973 executed by Smt. Khazani in favour of the appellants was a sham document and was null and void, as the respondents No.1 and 2 had been in cultivatory possession of the land ever since 26.06.1973, and had paid a sum of Rs. 56,000/- to Smt. Khazani as part payment towards the price of the land, out of the total sale consideration of Rs. 60,000/-, as agreed between the parties. It was also alleged that the agreement dated 25.06.1973 was executed by Smt. Khazani in favour of the respondents No.1 and 2 after consulting the appellants, who had shown their unwillingness to purchase the suit property. It was asserted that the respondents No.1 and 2 had suffered damages on account of the breach of contract on the part of Smt. Khazani, but were still ready and willing to purchase the land in question and to pay the balance amount of the sale price of the said land. The respondents No.1 and 2 were, therefore, entitled to specifically enforce the agreement dated 25.06.1973 and compel Smt. Khazani to transfer the land and complete the sale by execution of a sale agreement in favour of the respondents No.1 and 2. In the alternative, it was prayed that a decree for compensation/damages and for the return of the said amount of Rs. 56,000/- or any other relief which the Court

deemed fit and proper be granted.

6. Smt. Khazani having died during the pendency of the suit, the respondents No.3 to 6, as stated above, were impleaded as the legal representatives of Smt. Khazani. The said respondents filed a written statement denying that any agreement for sale of land was executed by Smt. Khazani in favour of the respondents No.1 and 2. It was asserted by the said respondents that Smt. Khazani had already entered into an Agreement to Sell the suit land with the appellants on 04.05.1973 (Exhibit D1W1/1) for a sum of Rs. 40,000/-, and had received a sum of Rs. 10,000/- as part payment of the sale price, and transferred the possession to the appellants. So, the question of entering into an Agreement to Sell the suit land to the respondents No.1 and 2 did not arise.

7. It was submitted further in the written statement of the respondents No.3 to 6 that the respondent No.1, Shri Sardar Singh was the owner of land measuring 71 kanals 8 marlas, bearing Kila Nos.17(7.8), Kila No.18 (8 Kanal), Kila No.19 (8 Kanal), Kila No.20 (7.8 Kanal), Kila No.23 (8 Kanal), Kila No.24 (8 Kanal), Kila No.25 (8 Kanal) of rectangle No.69 and Kila No.12 (8 Kanal) of Rectangle No.71 and Rectangle No.76 (5 Kanal), situate in the revenue estate of Village Bamnaula, Tehsil Jhajjar, District Rohtak, Haryana State. Smt. Khazani wanted to sell the suit land to the appellant No.2, Hazari and in return wanted to buy the aforesaid land of the respondent No.1, Shri Sardar Singh. She approached Sardar Singh, the respondent No.1 along with her husband Chandan Singh for the purchase of the land and the bargain was struck at Rs. 20,000/-. Smt. Khazani asked the respondent No.1 to get the Agreement to Sell executed at Jhajjar, but the respondent No.1 told Smt. Khazani that an agreement to that effect could be executed at Delhi. Smt. Khazani also wanted to sell her land, measuring about 8 bighas 1 biswas at Bijwasan, to one Shri Ramanand of Kapashera District, Delhi and settled with the said Ramanand that as she was going to Delhi, the agreement with him could also be executed at the same time at Delhi.

8. On 25-6-1973, a number of papers were purchased by the respondent No.1, Sardar Singh at Delhi and got written by the same deed writer, which were got thumb marked by Smt. Khazani by being told that as the land was situated in different States, several documents were required to be executed. Sardar Singh executed an agreement to sell on 25.06.1973 of his land for Rs. 20,000/- and received a sum of Rs. 1,000/-

as earnest money from Smt. Khazani. Smt. Khazani and her husband Chandan Singh, being illiterate persons, were not aware of the contents of the documents, which were neither read out to them nor explained to them. Smt. Khazani neither agred to sell her land in suit to the respondents No.1 and 2 nor received any amount whatsoever from them. Rather, she paid a sum of Rs. 1,000/- to the respondent No.1, as stated above. Thus, Smt. Khazani and Chandan Singh had come to Delhi only once, i.e., on 25.06.1973 and the object was to execute an Agreement to Sell her land measuring about 8 bighas to the aforesaid Ramanand of Kapashera and to enter into an agreement to purchase the land of the respondent No.1 at village Bijwasan (District Rohtak), for which Smt. Khazani had to pay the balance sum of Rs. 19,000/- to the respondent No.1, as balance of the sale price in terms of the agreement entered into between them. No agreement as alleged was executed on 26.06.1973 and no amount whatsoever was received by Smt. Khazani, for which the receipt of Rs. 55,000/- is alleged to have been executed. The possession of the suit land was with the appellants on 26.06.1973. A sale deed was also executed in favour of the appellants on 16-08-1973 by the Attorney of Smt. Khazani, in terms of the agreement dated 04.05.1973.

9. The appellants who were arrayed as the defendants No.2 to 4 in the Suit also filed written statement, and after the respondents No.1 and 2 amended the plaint, filed an amended written statement. It was denied by the appellants that Smt. Khazani had entered into an agreement to sell the suit land to the respondents No.1 and 2. It was asserted that Smt. Khazani had already entered into an agreement to sell the suit land with the appellants on 04.05.1973 for a sum of Rs. 40,000/- and had received a sum of Rs. 10,000/- as part payment of the sale price. It was submitted that the alleged agreement produced by the respondents No.1 and 2 was a fabricated document. The appellants had come to know on 25.06.1973 that the respondent No.1 Shri Sardar Singh had agreed to sell to Smt. Khazani some land in village Bamnaula for Rs. 20,000/- and had received a sum of Rs. 1,000/- from Smt. Khazani as advance, and some documents were executed. Apparently, the above occasion afforded an opportunity and the respondents No.1 and 2 had fabricated the documents in suit at that time. The allegations as to the delivery of possession of the suit land, to the respondents No.1 and 2 were specifically denied. It was asserted that on the day in question, Smt. Khazani was not in possession of the suit property. The appellants were reversioners of Smt. Khazani, who

was living in village Kharkhari, and the suit land was in the cultivatory possession of the appellants even prior to 04.05.1973. The sale in favour of the appellants was legal and binding and the appellants were the full owners of the suit land.

10. On the pleadings of the parties, the following issues were framed for consideration on 12.02.1975:-

> "1. Whether there was any agreement dated 25th June, 1973, whereby the late Smt. Khazani agreed to sell the land in suit to the plaintiffs and whether she received a sum of Rs.1,000/- at that time?
>
> 2. Whether there was any subsequent agreement dated 26th June 1973, whereby the said Smt. Khazani received Rs.55,000/- and delivered possession to the plaintiffs?
>
> 3. If issue Nos.1 and 2 are decided in the affirmative, whether the said agreements were invalid and in-operative because of fraud, misrepresentation on account of the fact that Smt. Khazani had not willingly given her consent to the same.
>
> 4. Whether the said Smt. Khazani had executed a previous agreement to sell in favour of defendants 2 to 4 on 4th May 1973, and if so, what effect has that agreement on the agreements relied upon by the plaintiffs.
>
> 5. In case defendants 2 to 4 are found to have an earlier agreement to sell in their favour, which has resulted in a sale deed in their favour, are the plaintiffs entitled to a decree for specific performance based on subsequent agreements?
>
> 6. Whether the plaintiffs were ready and willing to perform their part of the contract, if any and whether Smt. Khazani failed to perform her part of the contract?
>
> 7. Are the plaintiffs entitled to the alternative relief of return of Rs.56,000/- or any lesser sum against the estate of Smt. Khazani or against her legal representatives?
>
> 8. Relief."

11. Additional issues were also framed on 23.09.1983:-

> "1. Whether after the execution of the sale deed dated 16.8.1973 deceased defendant No.1 was left with less than the 8 standard acres of land with her as alleged? If so to what effect.
>
> 2. Whether deceased defendant No.1 after the execution of the agreement to sell dated 25.6.1973 was left with less than 8 standard acres of land. If so to what effect?
>
> 3. Whether the agreement to sell dated 25.6.1973 is hit by Section 5 of Delhi Land (Restriction of Transfer) Act 1972 as alleged' OPD"

12. It is proposed to deal with the appeal in issue-wise for the sake of clarity and with a view to avoid prolixity in view of the voluminous records.

ISSUE NO.1

> "Whether there was any agreement dated 25th June, 1973, whereby the late Smt. Khazani agreed to sell the land in suit to the plaintiffs and whether she received a sum of Rs.1,000/- at that time?"

13. As regards Issue No.1, the learned trial court came to the conclusion that the agreement dated 25.06.1973 was executed by Khazani Devi voluntarily for the sale of the property and she had received Rs. 1,000/- as earnest money and agreed to sell the property to the respondents No.1 and 2 on execution of sale deed after obtaining "No Objection Certificate" In arriving at the aforesaid conclusion, the learned trial court took into account the testimony of PW-3 Dalel Singh, who deposed that Khazani had agreed to sell the land to Sardara plaintiff and the agreement to sell dated 25th June, 1973 Exhibit PW-3/1 was executed in his presence and in the presence of Chandan Singh, husband of Khazani. He deposed that both he and Chandan Singh had put their signatures on the Agreement to Sell as witnesses. He stated that on the execution of the document, Sardara paid Rs. 1,000/- to Khazani and a receipt was duly executed, which is Exhibit PW-3/2. The said receipt was thumb marked by Khazani and signed by him as well as by Chandan Singh. As per this witness, on 26.06.1973, another document was also executed in the same manner, which was Exhibit PW-3/3. It is Exhibit PW-3/3 by which Khazani had received Rs. 55,000/- more. Dalel Singh proved the receipt for the aforesaid

sum of Rs. 55,000/- as Exhibit PW-3/4, which, he stated, was thumb marked by Khazani and signed by Chandan Singh and him. According to this witness, Khazani delivered possession to Sardara and the defendants No.2 to 4 (the appellants herein) were never in possession of the land.

14. In the course of his cross-examination, PW-3 Dalel Singh admitted that Sardar Singh owned land in village Bamnaula, Tehsil Jhajjar, which Sardar Singh had agreed to sell to Khazani and an Agreement to Sell was executed in respect of this land on 26.06.1973, which is Exhibit D-1 and bears his signatures. Receipt Exhibit D-2, he admitted, also bears his signatures, which Sardar Singh had signed. Subsequently however, he stated that the first agreement, i.e., PW-3/1 and Exhibit D-1 were arrived at and executed on the same day. PW-3 Dalel Singh also admitted that 2 Kilas of land were agreed to be sold to one Ramanand of Village Kapashera by Khazani, which agreement was also executed in his presence. All the aforesaid documents, he stated, were executed by a scribe. Significantly, though Dalel Singh stated that Khazani had told Sardar Singh to take possession of the suit land, he admitted:

> "It is correct that Settlement Officer recognized defendants 2 to 4 in possession of the land at the time of preparation of Consolidation record. ..... I do not know that the Girdawari from the very beginning is entered in the names of defendants 2 to 4."

15. Mr. Gupta, the learned counsel for the appellants contended that Smt. Khazani had never agreed to sell the land to the plaintiffs as alleged. In fact, Sardar Singh had land in village Bamnaula, Tehsil Jhajjar and Sardara had approached Khazani (deceased) for sale of the said property for which an Agreement to Sell was to be executed. Khazani came to Delhi for the execution of the said Agreement to Sell and also because she had already planned to come to Delhi for the execution of an Agreement to Sell with Ramanand, who was purchasing a part of her land. She had not agreed to sell the suit land as in fact she had already agreed to sell the said land to the appellants on 04.05.1973 for a sum of Rs. 40,000/- by Agreement to Sell Exhibit D1W1/1 and had received a sum of Rs. 10,000/- from them as earnest money. Several documents were executed, which were thumb marked by Khazani. Both Khazani and her husband Chandan Singh were illiterate and Sardara, who had accompanied Khazani, might have got her thumb impression and the

signatures of Chandan Singh by fraud on some papers. Moreover, the appellants were collaterals of the father of Khazani. They were already in possession of the property as Khazani was a resident of Kharkhari. On 16th August, 1973, Khazani had received the balance sale price in the sum of Rs. 30,000/- from them and executed a sale deed Exhibit D2W1/1, which was duly registered with the Sub-Registrar on 13th September, 1973. She had also executed an irrevocable Power of Attorney in favour of Jagdish, who completed the formalities for the execution of the sale deed and for obtaining the 'No Objection Certificate'. Thus, not only the Agreement to Sell dated 04.05.1973 was entered into prior to the alleged Agreement to Sell dated 25.06.1973, but a registered receipt for a sum of Rs. 30,000/, Ex.D2W1/2 and a registered irrevocable Power of Attorney for the execution of the sale deed, both dated 16th August, 1973 and a registered Sale Deed dated 13th September, 1973 were on record by virtue of which the appellants were full owners of the suit land.

16. Mr. Rajesh Yadav, the learned counsel for the plaintiffs No.1 and 2 late Sardar Singh and his son Ishwar Singh, on the other hand, contended that the Agreement to Sell dated 25.06.1973 had been proved to the hilt by PW-3 Dalel Singh, whose testimony was corroborated by PW-9 Tara Chand and PW-10 (wrongly numbered as PW9) Sardar Singh, the respondent No.1 herein. It was further contended that all the aforesaid documents stood proved by the testimony of PW-4, Shri G.C. Kumar, Advocate. It was the case of the respondents No.1 and 2 that all the documents had been scribed by scribe Fateh Chand, who having died, his son G.C. Kumar, Advocate was examined by the respondents as PW-4. PW-4 identified the signatures of his father on documents PW-3/1 to PW-3/4 and stated that the same were in the handwriting of his father and were also entered in the register maintained by his father. He placed on record copies of the relevant extracts of the relevant register as Exhibit D-3. This witness was not at all cross-examined.

17. Reference was also made by Mr. Yadav to the testimony of PW-8 Ramanand, who stated in the witness box that Khazani, who was the daughter of Raja Ram of Village Bijwasan and whose husband was Chandan, had entered into an Agreement to Sell with Sardar Singh on payment of Rs. 1,000/- by Sardar Singh as earnest money. Mr. Yadav contended that not even a suggestion was put to this witness that no Agreement to Sell was arrived at between Sardar Singh and Khazani,

apart from a vague suggestion that Sardar Singh did not pay anything to Khazani. Mr. Yadav further contended that the Agreement to Sell dated 25.06.1973, Exhibit PW-3/1 was on a stamp paper. Khazani had admitted that she had gone to Delhi along with her husband Chandan Singh and had signed some papers for the purchase of property from Sardara and for the sale of a small portion of land to Ramanand. On the other hand, the alleged agreement in favour of the appellants was on an unstamped paper and no explanation has come forward as to why it was not executed on stamp paper. The learned trial court had, therefore, rightly come to the conclusion that the document dated 04.05.1973 was a fabricated document and that Khazani, being a relative of the appellants, had come under their pressure to execute the aforesaid document.

18. Mr. Rajesh Yadav, the learned counsel for the respondents, further submitted that insofar as the Agreement to Sell dated 4th May, 1973 (Exhibit D1W1/1) is concerned, the same has not been proved in evidence by the appellants nor any of the witnesses to the said agreement have appeared in the witness box to depose about the execution of the agreement. Further, a reading of the said agreement shows that the said agreement does not contain any description of the land and the place where the land is situated is not set out in the agreement, which merely states:

> "whereas the executant has agreed to sell 37 bighas 5 biswas of land comprising in Khasra No. 485/1(4-8) 533, (8 bighas 8 bis.) 888 (17 bis.) 887 (11 bis.) 830 (2 big. 3 bis) 1332 (3 bighas 19 bis.) 1336 (1 big. 1 bis.) 1572 (1 big. 9 bis.) 1825 (1 big. 6 bis.) 1919/2 (12 bis.) 1936/1920 (1 big. 6 bis.) 2011 (3 big. 3 bis.) 3285/2164 (11 bis.) 18/13 (4 big. 9 bis.) 18/1 (2 big. 12 bis.)."

19. Rejoining to the arguments raised by Mr. Yadav, Mr. Gupta on behalf of the appellants contended that no objection having been raised to the Agreement to Sell dated 4th May, 1973 Exhibit D1W1/1, being unstamped, either in the pleadings or at the time of exhibiting of the said document, the respondents had lost the right to raise such an objection. In this context, he relied upon the decisions rendered in **Delhi Box Factory and Anr. vs. Munshi Lal Abhinandan Kumar** 28 (1985) DLT 272; **S.K. Gupta (Through LRs) vs. Avtar Singh Bedi Ors.** 122 (2005) DLT 437 and **Shyamal Kumar Roy vs. Sushil Kumar Agarwal** AIR

2007 SC 637.

20. Mr. Gupta contended that the learned trial court though rightly disbelieved the agreement dated 26.06.1973 Exhibit DW-3/3 and the receipt for the sum of Rs. 55,000/-, Exhibit DW-3/4, and to this extent discarded the testimony of PW-3 Dalel Singh, as a matter of fact the entire testimony of PW-3 Dalel Singh was unworthy of credence as was evident from the cross-examination of PW-3 Dalel Singh. In his said cross-examination, PW3 admitted that the agreement between Khazani and Sardara for the purchase of land by Khazani from Sardara, Exhibit D-1 was executed in his presence as also the receipt Exhibit D-2, upon which he (Dalel Singh) identified the signatures of Sardara. In the course of his cross-examination also, PW-3 Dalel Singh admitted that 2 Kilas of land was agreed to be sold by Khazani to Ramanand of Village Kapashera, and that this agreement was also executed along with the document Exhibit D-1, at the same time. In subsequent cross-examination, Dalel Singh falsified the earlier statement made by him that possession was handed over to the respondents No.1 and 2 by admitting that at the time of consolidation proceedings, the Settlement Officer had recognised the appellants to be in possession of the land at the time of the preparation of the Consolidation Record. Dalel Singh also admitted that he did not know that in the Girdawari from the very beginning, the names of the appellants were entered and also as to whether Sardara had applied for correction of the Girdawari in his favour.

21. As regards the testimony of PW-9 Tara Chand, Mr. Gupta the learned counsel for the appellants pointed out, and I think rightly so, that the testimony of PW-9 Tara Chand is entirely hearsay and that no part of his deposition is from his own knowledge, except possibly the assertion that he knew Khazani, daughter of Raja Ram, Village Bijwasan, Delhi and her husband Chandan Singh as also the plaintiff. As regards PW-10 Sardar Singh, who appeared as his own witness, the learned counsel for the appellants pointed out that this witness has falsified the entire case of the respondents as set out in the plaint. According to this witness, on 25th June, 1973, a sum of Rs. 1,000/- was paid as earnest money to Khazani and agreement Exhibit PW-3/1 as well as receipt Exhibit PW-3/2 were executed. After the agreement, when they went to their village and were sitting at the tea stall of Tara Chand, Khazani stated that she was required to give "bhaat" on the occasion of the marriage of some

child of the sister of Chandan and as such needed money badly and that they wanted the whole sale consideration at once, and thereupon on the next day, i.e., on the 26th, he (Sardara) paid Rs. 55,000/-. On that day, there was an agreement executed about possession, which was Exhibit PW-3/3. Receipt Exhibit PW-3/4 was also obtained from Khazani. Thereafter, on 27th, he took possession of the land in the presence of Chandan and one other relation of theirs, whose name he did not recollect.

22. Mr. Gupta rightly pointed out that the 'bhaat' story narrated by PW-10 Sardar Singh, in his examination-in-chief, was entirely beyond pleadings. His further statement made in chief that he took possession of the land on 27th was also not in consonance with the averments set out in the plaint. The witness stated that he had taken possession of the land in the presence of D1W1 Chandan Singh, but the said witness categorically stated that the possession was in fact given to the appellants in whose favour the Agreement to Sell dated 04.05.1973 had been executed. Then again, in cross-examination, PW-10 Sardar Singh stated that stamp was purchased from the treasury for the agreement dated 26th June, 1973, but the said agreement was in fact executed on a stamp paper dated 25th June, 1973.

23. Having heard the learned counsel for the parties, I am of the view that the trial court was not correct in discarding the Agreement to Sell dated 04.05.1973 executed by Khazani in favour of the appellants herein, who were her collaterals. The legal position is not in dispute that the mere production and marking of a document as an exhibit by the Court cannot be held to be due proof of its contents. Its execution has to be proved by admissible evidence. But it is equally well settled that once an instrument has been admitted in evidence, such admission should not be questioned subsequently on the ground that the instrument was not duly stamped. Section 36 of the Indian Stamp Act mandates so and reads as under:

> "*Admission of instrument where not to be questioned* - Where an instrument has been admitted in evidence, such admission shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

24. In **Javer Chand and Others vs. Pukhraj Surana,** AIR 1961

SC 1655, it was observed as under:

> "That section (section 36 of the Indian Stamp Act) is categorical in its terms that when a document has once been admitted in evidence, such admission cannot be called in question, at any stage of the suit or the proceeding on the ground that the instrument had not been duly stamped. The only exception recognised by the section is the class of cases contemplated by section 61 which is not material to the present controversy. Section 36 does not admit of other exceptions. Where a question as to the admissibility of a document is raised on the ground that it has not been stamped, or has not been properly stamped it has to be decided then and there when the document is tendered in evidence. Once the Court rightly or wrongly decides to admit the document in evidence, so far as the parties are concerned, the matter is closed. Section 35 is in the nature of a penal provision and has far- reaching effects. Parties to a litigation, where such a controversy is raised, have to be circumspect and the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the Court. The Court has to judicially determine the matter as soon as the document is' tendered in evidence and before it is marked as an exhibit in the case."

25. In **Devachand and Anr. vs. Harichand Kama Raj,** ILR (1889) 13 Bombay 449 (FB) unstamped promissory notes were admitted in evidence. It was held that the promissory notes having been once admitted in evidence could not afterwards be rejected on the ground of their not being duly stamped.

26. This Court in the case of **Delhi Box Factory and Anr.** (supra), following the decision of the Supreme Court in **Javer Chand** (supra), held that under Section 36 of the Indian Stamp Act, even an unstamped receipt requiring stamp duty once admitted into evidence cannot be rejected later on. A similar view was expressed by the Delhi High Court in **S.K. Gupta's** case (supra) wherein it was reiterated that once a document has been marked as an exhibit in a case and has been used by the parties in examination and cross-examination of their witnesses, Section 36 of the Stamp Act, 1899 comes into operation. The reasons are obvious. If a party challenges admissibility of a document being unstamped or

inadequately stamped, the opposite party can make up the deficiency with penalty and overcome the legal bar. The party challenging the admissibility of a document is, therefore, required to be alert to see that the document is not admitted in evidence by the Court, but once admitted in evidence the document cannot be discarded for insufficiency of stamp.

27. In a recent judgment, the Supreme Court in **Shyamal Kumar Roy** (supra) referring to its earlier judgment in **Javer Chand** (supra) held as under:

> "16. The said decision, therefore, is an authority for the proposition that Section 36 would operate even if a document has been improperly admitted in evidence. It is of little or no consequence as to whether a document has been admitted in evidence on determination of a question as regards admissibility thereof or upon dispensation of formal proof therefore. If a party to the lis intends that an instrument produced by the other party being insufficiently stamped should not be admitted in evidence, he must raise an objection thereto at the appropriate stage. He may not do so only at his peril.
>
> x x x x
>
> 20. If no objection had been made by Appellant herein in regard to the admissibility of the said document, he, at a later stage, cannot be permitted to turn round and contend that the said document is inadmissible in evidence.
>
> 21. Appellant having consented to the document being marked as an exhibit has lost his right to reopen the question.
>
> 22. What was necessary was that the document should be marked in presence of the parties and they had an opportunity to object to the marking of the document. The question of judicial determination of the matter would arise provided an objection is taken what document is tendered in evidence and before it is marked as an exhibit in the case. Before the learned Trial Judge, reliance was placed on a decision of a learned Single Judge of the Andhra Pradesh High Court in **Vemi Reddy Kota Reddy v. Vemi Reddy Prabhakar Reddy** [(2004) 3 ICC 832]. In that case there was nothing on record to show that the document

> was marked as an exhibit after an objection has been raised. The said case, therefore, has also no application to the facts of the present case."

28. There was, therefore, in my view, no justification for the trial court to have discarded the Agreement to Sell dated 04.05.1973 Exhibit D1W1/1 on the ground that it was not executed on a stamp paper, more so, when there was not a whisper in the pleadings to this effect nor any objection was raised in the course of evidence to its admissibility on this score. This document though was proved in evidence by D1W1 Chandan Singh, its execution was corroborated by the appellant Hazari, who appeared in the witness box as D2W1. Hazari also stated that they (the appellants) were in occupation of the land in suit at the time of execution of Exhibit D1W1/1, and that symbolic possession of the land in suit was also delivered to them after the execution of the sale deed Exhibit D2W1/1. He further stated that at the time of payment of Rs. 30,000/- balance consideration on 16-08-73, a receipt was executed and the same was got registered before the Sub-Registrar, which was Exhibit D1W1/2 as also a registered Power of Attorney by Khazani appointing Jagdish as her attorney to execute the sale deed in favour of the appellants Exhibit D1W1/3.

29. The testimony of the appellant Hazari is borne out by the testimony of D1W1 Chandan Singh, husband of Khazani who categorically stated in the witness box that his wife had executed an Agreement to Sell in regard to the suit land in favour of the appellants in his presence, Exhibit D1W1/1, which bears the thumb mark of his wife and his own thumb mark as a witness. He also stated that he had seen the receipt dated 16.08.1973 Exhibit D1W1/2 which bears the thumb mark of his wife, which was also got registered with the Sub-Registrar and at the time of registration he was present. He further stated that his wife nominated the son of Hazari, as her attorney to execute the sale deed, by a Power of Attorney dated 16th August, 1973, which bears the thumb mark of Khazani and his own thumb mark as a witness. In his cross-examination, he stated that Jagdish had executed a sale deed Rs. 40,000/- in favour of the appellants in his presence on behalf of his wife, on a stamp paper, which was also got registered and so from their side the possession of the land in suit had been given to the appellants. In the course of his cross-examination, he categorically denied the suggestion

that his wife had agreed to sell 37.5 bighas of land along with the house to Sardara and further denied the suggestion that Khazani had received by her, Rs. 1,000/- on 25th June, 1973 and that on 26.06.1973 a sum of Rs. 55,000/- was received and thereafter documents Exhibit PW-3/3 and Exhibit PW-3/4 were executed. He, however, admitted his signatures on Exhibit PW-3/3, but stated that he did not know if Exhibit PW-3/3 and Exhibit PW-3/4 bear the thumb mark of his wife.

30. In view of the aforesaid, in my view, the Agreement to Sell dated 04.05.1973 executed by Khazani in favour of the appellants ought not to have been disbelieved by the learned trial court. Even assuming for the sake of argument that Khazani thereafter executed another Agreement to Sell dated 25th June, 1973, the said Agreement to Sell can be of no significance in view of the prior Agreement to Sell, more so, as the prior Agreement to Sell ultimately culminated in the execution of a duly registered sale deed in favour of the appellants.

31. Issue No.1 was, therefore, wrongly decided by the trial court and the findings of the trial court on this issue are held to be unsustainable in view of the evidence on record.

ISSUE NO.2

> "Whether there was any subsequent agreement dated 26th June 1973, whereby the said Smt. Khazani received Rs.55,000/- and delivered possession to the plaintiffs?"

32. The findings of the learned trial court on this issue succinctly stated are that from the examination of the document Exhibit PW-3/3 dated 26th June, 1973 and more particularly from the vendor's note thereon that the stamp paper was sold on 25.06.1973, it is clear that the document is a fabricated document. The trial court also noted that PW-3 Dalel Singh also does not support about the talk when money was demanded, and that there are discrepancies in the statements of PWs Sardara and Tara Chand to prove this fact. PW10 Sardar Singh in his testimony stated that when the agreement dated 25.06.1973 was executed they went to the village and sat at the tea stall of PW9 Tara Chand, where Khazani stated that she wanted to give 'bhaat' on the occasion of the marriage of child of sister of Chandan and as such needed money badly, and thereupon on the next day, i.e., on 26th June, 1973, a sum of Rs. 55,000/- was paid to her. This version is not corroborated by PW-

9 Tara Chand and the testimony of this witness shows that there was no talk of demand of Rs. 55,000/- on 25.06.1973 at his tea stall, and the execution of the receipt and agreement on 26.06.1973 on the next day. All that the witness stated was that on 26.06.1973, he was told in the evening that Rs. 55,000/- had been paid to Khazani on that day and Khazani told him that she had received Rs. 56,000/- and had delivered possession to the plaintiffs. The trial court further held that there was no explanation as to why the stamp paper was purchased on 25.06.1973 for the execution of this agreement, which, it is claimed was executed on 26.06.1973. Moreover, there was no proof as to how this amount had been arranged by the respondents. The explanation of PW-9 Sardar Singh that he had received some money from the bank and some money from his sons does not prove that he was in possession of the sum of Rs. 55,000/-.

33. So, a doubt was cast upon the execution of the agreement dated 26.06.1973 by Smt. Khazani and regarding the receipt for the aforesaid amount Exhibit PW-3/4. By a necessary corollary, if no agreement to surrender possession of the land dated 26th June, 1973 was executed, there can be no question of handing over the possession to the respondents. Accordingly, this issue was rightly decided by the trial court in favour of the appellants and against the respondents.

ISSUE NO.3

> "If issue Nos.1 and 2 are decided in the affirmative, whether the said agreements were invalid and in-operative because of fraud, misrepresentation on account of the fact that Smt. Khazani had not willingly given her consent to the same.?"

34. In view of the fact that Issue No.1 was decided by the trial court in favour of the respondents and Issue No.2 in favour of the appellants, the trial court decided this issue regarding agreement dated 25th June, 1973 in favour of the respondents. However, in view of my findings recorded on Issue No.1, this issue must necessarily be decided in favour of the appellants. It is not in dispute that a number of papers were thumb marked by Smt. Khazani on 25-6-73, on which day she was simultaneously entering into an Agreement to sell a part of her land to PW8 Ramanand and at the same time entering into an Agreement to Purchase land from the deceased respondent no.1, Sardar Singh. In such

a situation, the statement of D1W1 Chandan Singh, husband of Khazani, must be believed that he and his wife being illiterate had affixed their thumb-marks on various documents, assuming that the same related to one of the aforesaid two transactions, and that no agreement had been entered into between Sardar Singh and Smt. Khazani for the sale of Khazani's land, in view of the Agreement to Sell dated 4-5-1973 already entered into in respect of the suit land between Smt. Khazani and the appellants.

ISSUE NO.4

"Whether the said Smt. Khazani had executed a previous agreement to sell in favour of defendants 2 to 4 on 4th May 1973, and if so, what effect has that agreement on the agreements relied upon by the plaintiffs?"

35. In view of my findings contained in Issue No.1, this issue must be decided in favour of the appellants who have duly proved on record the execution of the agreement dated 4th May, 1973 apart from receipt for the balance sum of Rs. 30,000/- executed on 16th August, 1973, Power of Attorney dated 16th August, 1973, and affidavit dated 16th August, 1973 of Smt. Khazani that she had sold her land to the appellants and had delivered possession to them and Sale Deed dated 16th August, 1973. The receipt, the Power of Attorney and the Sale Deed, all dated 16th August, 1973, are registered documents and in all the said documents there is a specific reference to the agreement dated 4th May, 1973. There does not, therefore, appear to be any plausible reason to disbelieve the Agreement to Sell executed on 4th May, 1973. The contention of the contesting respondents that the Agreement to Sell must be on a stamp paper has been dealt with hereinbefore. As for the finding of the learned trial court that there was no necessity for the registration of the receipt dated 16th August, 1973 and the registration thereof shows the malafides of the appellants, the same is meaningless and far-fetched. Accordingly, this issue is also decided by this Court in favour of the appellants and against the respondents No.1 and 2.

ISSUE NO.5

"In case defendants 2 to 4 are found to have an earlier agreement to sell in their favour, which has resulted in a sale deed in their favour, are the plaintiffs entitled to a decree for specific

performance based on subsequent agreements?"

36. On this issue, the learned trial court held the respondents entitled to a decree for specific performance on payment of the balance sale consideration of Rs. 59,000/- to the legal representatives of Smt. Khazani. However, in view of my findings rendered hereinbefore, that the appellants had an earlier Agreement to Sell in their favour, which had culminated in the execution of a sale deed in their favour, the learned counsel for the parties were heard on this issue.

37. Mr. Gupta, the learned counsel for the appellants submitted that para 11 of the plaint shows that the respondents No.1 and 2 had specific knowledge of the sale deed registered on 13th September, 1973 at the time of the filing of the suit by them. In para 11, it is set out by the respondents that they had come to know that on 13th September, 1973, Khazani Devi had executed a sale deed and got it registered in favour of the appellants for a consideration of Rs. 40,000/-, in respect of the land mentioned in para No.1 of the plaint, and which was the subject matter of the agreement dated 25.06.1973. This being so, Mr. Gupta contended that it was indeed surprising that the legal notice dated 14th September, 1973 (Exhibit PW-9/1) sent to Khazani Devi by the respondents No.1 and 2 was conspicuously silent about the sale consideration for the alleged agreement dated 25th June, 1973, about the alleged agreement dated 26.06.1973 and about the readiness and willingness of the respondents No.1 and 2 to execute the sale deed. All that the notice dated 14th September, 1973, which was sent a day after the respondents No.1 and 2 came to know about the execution of the sale deed in favour of the appellants, states that a 'No Objection' had been issued by the revenue department on 11.09.1973 and, therefore, the noticee was requested to have the land mentioned in the agreement dated 25.06.1973 registered in the name of Sardar Singh and Ishwar Singh, failing which a suit would be filed by the latter. This notice, Mr. Gupta contended, and I think rightly so, shows that the agreement dated 26.06.1973 was a fabricated document, fabricated after the respondents No.1 and 2 came to know about the execution of the sale deed in favour of the appellants. Mr. Gupta contended that in spite of this, no prayer was made by them for a declaration that the sale deed dated 16th August, 1973 be declared null and void or even that the appellants should be asked to join in the Deed of Conveyance in their favour. The learned trial court also did not deem

it expedient to frame any issue as to whether the appellants were bonafide purchasers for consideration, despite the fact that a specific plea had been raised in the written statement filed to the amended plaint, that the appellants were bonafide purchasers for consideration, as under:

> "Para 9 of the plaint is wrong and denied. Shrimati Khajani could not sell the suit land to the plaintiffs or to any one else. The answering defendants are full owners of the suit land. They are bonafide purchasers for consideration and knew nothing about the alleged deal between the plaintiffs and Shrimati Khajani.
>
> ……."

38. The contention of Mr. Gupta was that if the appellants were bonafide purchasers for consideration and fell within the scope and ambit of the exception carved out by Section 19(b) of the Specific Relief Act, it was incumbent upon the respondents to have sought cancellation of the sale deed of the appellants or to have asked them to be joined in the execution of the sale deed in their favour. Reference was made in this regard by Mr. Gupta to the judgment of the Hon'ble Supreme Court in **Durga Prasad and Anr. vs. Deep Chand and Ors.,** AIR 1954 SC 75, wherein the Supreme Court has dealt with the question as to what should be the proper form of a decree in such cases. In paragraph 37 of its aforesaid decision, the Supreme Court observed that "according to one point of view, the proper form of decree is to declare the subsequent purchase void as against the plaintiff and direct conveyance by the vendor alone. A second considers that both vendor and vendee should join, while a third would limit execution of the conveyance to the subsequent purchaser alone". After weighing the pros and cons of all three points of view, the Supreme Court in paragraphs 40 to 42 of its decision discussed the issue as follows:

> "40. First, we reach the position that the title to the property has validly passed from the vendor and the resides in the subsequent transferee. The sale to him is not void but only voidable at the option of the earlier "contractor". As the title no longer rests in the vendor it would be illogical from a conveyancing point of view to compel him to convey to the plaintiff unless steps are taken to re-vest the title in him either by cancellation of the subsequent sale or by reconveyance from the subsequent

> purchaser to him. We do not know of any case in which a reconveyance to the vendor was ordered but Sulaiman C.J. adopted the other course in – **'Kali Charan vs. Janak Deo',** A.I.R. 1932 All 694 (B). He directed cancellation of the subsequent sale and conveyance to the plaintiff by the vendor in accordance with the contract of sale of which the plaintiff sought specific performance. But though this sounds logical the objection to it is that it might bring in its train complications between the vendor and the subsequent purchaser. There may be covenants in the deed between them which it would be inequitable to disturb by cancellation of their deed. Accordingly, we do not think that is a desirable solution.
>
> 41. We are not enamoured of the next alternative either, namely, conveyance by the subsequent purchaser alone to the plaintiff. It is true that would have the effect of vesting the title to the property in the plaintiff but it might be inequitable to couple the subsequent transferee to enter into terms and covenants in the vendor's agreement with the plaintiff to which he would never have agreed had he been a free agent; and if the original contract is varied by altering or omitting such terms the court will be remaking the contract, a thing it has no power to do; and in any case it will no longer be specifically enforcing the original contract but another and different one.
>
> 42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in – **'Kafiladdin v. Samiraddin',** A.I.R. 1931 Cal 67 (C) and appears to be the English practice. See Fry on Specific Performance, 6th Edn., page 90, paragraph 207; also – **'Potter v. Sanders',** (1846) 67 ER 1057 (D). We direct accordingly."

39. It may be noted at this juncture that the aforesaid decision of the Supreme Court was followed recently in atleast two subsequent

decisions viz., **Shri Vishwa Nath Sharma v. Shyam Shankar Goela and Anr.** (2007) 10 SCC 595 and **Seenivasan vs. Peter Jebaraj and Anr.** (2008) 12 SCC 316.

40. Section 19(a) and (b) of the Specific Relief Act, 1963, provides as under:

> **"19. Relief against parties and persons claiming under them by subsequent title.-** Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against-
>
> (a) either party thereto;
>
> (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;"

41. It is well settled that ordinarily, specific performance of a contract can be enforced only against a party thereto. However, Section 19(b), as is apparent from a reading thereof, allows specific performance to be enforced against persons acquiring title subsequent to the date of the agreement between the parties except he falls within the exception carved out by the legislature. In equity, it was felt that after entering into an Agreement to Sell the vendor was in a position of trust qua the purchaser and if the vendor thereafter conveys title to a third party, the title of such third party is subject to the agreement of its vendor. Thus viewed, I find that in the present case the respondents No.1 and 2 could not have been allowed the relief of specific performance qua the appellants, the Agreement to Sell in whose favour is of a date prior to that in favour of the respondents No.1 and 2. Section 19(b) of the Specific Relief Act, 1963 has thus to be read to mean that if a party relies upon an Agreement to Sell of a date prior to the date of the Agreement to Sell of which specific performance is claimed, the relief of specific performance cannot be granted to the party whose Agreement to Sell is of a subsequent date. Reference in this regard may be made to a recent decision of this Court in **Rekha Nankani vs. Kulwant Singh Sachdeva and Anr.,** 2009 (107) DRJ 282, wherein it was held as under:

> "9. Ordinarily, specific performance can be ordered only against

> parties to the contract. However, Section 19 (b) (Supra) allows specific performance to be enforced against persons acquiring title subsequent to the date of the agreement on the principle of equity. It was felt that after entering into an agreement to sell the vendor was in a position of trust qua the purchaser and if conveys title to a 3rd party, such third party takes such title subject to the agreement of its vendor. The principle was that a vendor could not convey more than what he himself has. If property was bound by the agreement of the owner/vendor, then merely because the vendor had transferred the property, the transferee will not acquire rights better than that of the vendor and will be subject to the liability of the vendor. The division bench in **Sampat Ram vs. Baboo Lal** AIR (1955) All. 24 held that the plaintiff can claim no equities against a subsequent title holder whose agreement was of a date prior to that of the plaintiff. I respectfully concur with the views of Lord Buckmaster and of the division bench of the Allahabad High Court and find the plaintiff in the present case not entitled to the relief of specific performance, against defendant No.2, agreement to sell in whose favour is of a date prior to that in favour of plaintiff. Section 19 (b) of the Specific Relief Act, 1963 has thus to be read to mean that even if title in favour of defendant is of a date subsequent to the date of agreement to sell of which specific performance is claimed, but if such title is relatable to an agreement to sell of a date prior to the date of the agreement of which specific performance is claimed, the relief will not be granted."

42. Dealing next with the contention raised by the counsel for the appellants that the appellants were bonafide purchasers for consideration and accordingly it was incumbent upon the respondents no.1 and 2 to have sought cancellation of the appellants. Sale Deed or in the alternative to have made a prayer that the appellants be asked to join in the execution of the decree, Mr. Yadav referred to three Supreme Court decisions dealing with the scope of suits for specific performance and the legal position of the real and the subsequent purchaser therein. First, reference was made to the decision of the Supreme Court in the case of **Ramesh Chandra Pattnaik vs. Pushpendra Kumari and Ors.** (2008) 10 Supreme Court Cases 708 wherein the Supreme Court held, while dismissing the application for impleadment filed by the subsequent

purchaser that the subsequent purchaser, was not at all a necessary party for the determination of the question arising in the suit for specific performance as to the genuineness of the agreement for sale. Paragraphs 5 and 6 of the said judgment which are apposite read as under: -

> "5. It is not in dispute that the petitioner filed suit in the year 1979 for specific performance of the alleged agreement of sale dated 10-4-1977. In that suit, the only scope of enquiry would be as to whether the said agreement was, in fact, executed between the petitioner and Respondent 1.
>
> 6. Respondent 10 is alleged to have entered into an agreement with Respondent 1 on 15-11-1984 for sale of the property, which is the subject-matter of the suit filed by the petitioner. In respect of such an agreement, Respondent 10, could have filed a suit for specific performance but, as stated by the learned counsel appearing for the parties, no such suit has been filed. In our opinion Respondent 10 was not at all a necessary party for determination of the genuineness or otherwise of the agreement of sale which is said to have been entered into between the petitioner and Respondent 1."

43. Next reference was made to the case of **Bharat Karsondas Thakkar vs. Kiran Construction Company and Ors.** (2008) 13 Supreme Court Cases 658. In the said case the question arose as to whether in a suit for specific performance of an agreement of sale of immovable property instituted by the beneficiary of the agreement against the vendor, a stranger or a third party to the agreement who had acquired an interest in the same property is either a necessary or a proper party to the suit. Answering the question in the negative, the Supreme Court observed:

> "28. Along with that is the other question, which very often raises its head in suits for specific performance, that is, whether a stranger to an agreement for sale can be added as a party in a suit for specific performance of an agreement for sale in view of Section 15 of the Specific Relief Act, 1963. The relevant provision of Section 15 with which we are concerned is contained in clause (a) thereof and entitles any party to the contract to seek specific performance of such contract. Admittedly, the appellant herein is a third party to the agreement and does not, therefore, fall within the category of "parties to the agreement". The appellant also does not come within the ambit of Section 19 of thesaid Act, which provides for relief against parties and persons claiming under them by subsequent title. This aspect of the matter has been dealt with in detail in **Kasturi's** case (supra). While holding that the scope of a suit for specific performance could not be enlarged to convert the same into a suit for title and possession, Their Lordships observed that a third party or a stranger to the contract could not be added so as to convert a suit of one character into a suit of a different character."

44. In the aforesaid decision reliance was placed by the Supreme Court on an earlier decision by it in the case of **Kasturi vs. Iyyamperummal** (2005) 6 SCC 733 which was a three-Judge Bench decision. Paragraphs 11,12,15,17 and 19 of the said decision were relied upon, which read as follows:

> "11. As noted herein earlier, two tests are required to be satisfied to determine the question who is a necessary party, let us now consider who is a proper party in a suit for specific performance of a contract for sale. For deciding the question who is a proper party in a suit for specific performance the guiding principle is that the presence of such a party is necessary to adjudicate the controversies involved in the suit for specific performance of the contract for sale. Thus, the question is to be decided keeping in mind the scope of the suit. The question that is to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered into between the parties to the contract. If the person seeking addition is added in such a suit, the scope of the suit for specific performance would be enlarged and it would be practically converted into a suit for title. Therefore, for effective adjudication of the controversies involved in the suit, presence of such parties cannot be said to be necessary at all. Lord Chancellor Cottenham in **Tasker vs. Small** 1834 (40) Eng R 848 made the following observations:
>
> > "It is not disputed that, generally, to a bill for a specific performance of a contract for sale, the parties to the contract only are the proper parties; and, when the ground

of the jurisdiction of Courts of Equity in suits of that kind is considered it could not properly be otherwise. The Court assumes jurisdiction in such cases, because a Court of law, giving damages only for the non- performance of the contract, in many cases does not afford an adequate remedy. But, in equity, as well as in law, the contract constitutes the right and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it." [Emphasis supplied]

12. The aforesaid decision in Tasker (1834) 40 E.R. 848 was noted with approval in (1886) 2 Ch. 164 (**De Hogton v. Money**) at page 170 Turner, L.J. observed:

"Here again his case is met by (1834) 40 E.R. 848 in which case it was distinctly laid down that a purchaser cannot, before his contract is carried into effect, enforce against strangers to the contract equities attaching to the property, a rule which, as it seems to me, is well founded in principle, for if it were otherwise, this Court might be called upon to adjudicate upon questions which might never arise, as it might appear that the contract either ought not to be, or could not be performed."

x x x x

15. As discussed herein earlier, whether respondent Nos. 1 and 4 to 11 were proper parties or not, the governing principle for deciding the question would be that the presence of respondent Nos. 1 and 4 to 11 before the Court would be necessary to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit. As noted herein earlier, in a suit for specific performance of a contract for sale, the issue to be decided is the enforceability of the contract entered into

between the appellant and the respondent Nos. 2 and 3 and whether contract was executed by the appellant and the respondent Nos. 2 and 3 for sale of the contracted property, whether the plaintiffs were ready and willing to perform their part of the contract and whether the appellant is entitled to a decree for specific performance of a contract for sale against the respondent Nos. 2 and 3. It is an admitted position that the respondent Nos. 1 and 4 to 11 did not seek their addition in the suit on the strength of the contract in respect of which the suit for specific performance of the contract for sale has been filed. Admittedly, they based their claim on independent title and possession of the contracted property. It is, therefore, obvious as noted herein earlier that in the event, the respondent Nos. 1 and 4 to 11 are added or impleaded in the suit, the scope of the suit for specific performance of the contract for sale shall be enlarged from the suit for specific performance to a suit for title and possession which is not permissible in law. ……

17. It is difficult to conceive that while deciding the question as to who is in possession of the contracted property, it would be open to the Court to decide the question of possession of a third party/ or a stranger as first the lis to be decided is the enforceability of the contract entered into between the appellant and the respondent No. 3 and whether contract was executed by the appellant and the respondent Nos. 2 and 3 for sale of the contracted property, whether the plaintiffs were ready and willing to perform their part of the contract and whether the appellant is entitled to a decree for specific performance of a contract for sale against the respondent Nos. 2 and 3. …….

19. ……It is well settled that in a suit for specific performance of a contract for sale the lis between the appellant and the respondent Nos. 2 and 3 shall only be gone into and it is also not open to the Court to decide whether the respondent Nos. 1 and 4 to 11 have acquired any title and possession of the contracted property as that would not be germane for decision in the suit for specific performance of the contract for sale, that is to say in a suit for specific performance of the contract for sale the controversy to be decided raised by the appellant against

respondent Nos. 2 and 3 can only be adjudicated upon, and in such a lis the Court cannot decide the question of title and possession of the respondent Nos. 1 and 4 to 11 relating to the contracted property."

45. Mr. Yadav, the learned counsel for the respondents no.1 and 2 submitted that in view of the fact that no appeal had been filed by the legal representatives of Khazani nor any cross-objections had been filed, the respondents no.1 and 2 were entitled to the confirmation of the decree for specific performance in their favour. He pointed out that in the prayer clause, the plaintiff had claimed a decree for specific performance of the agreement dated 25th June, 1973 in their favour and against Smt. Khazani, directing her to execute the Sale Deed and to get it registered "or any other subsidiary relief to the claim for specific performance." The appellants had been arrayed in the suit as defendants no.2 to 4 and hence there was no impediment to the grant of a decree for specific performance in favour of the plaintiffs with a direction to the defendants no.2 to 4 (the appellants herein) to execute the said decree and to get the same registered.

46. Reference was made in this regard by Mr. Yadav to the decision of the Supreme Court in the case of **Durga Prasad** (supra) and in particular to paragraph 42 of the said judgment wherein it is held that:

"42. The proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff."

47. Reliance was placed by Mr. Yadav on the decision rendered by the Bombay High Court in **Dilip Bastimal Jain vs. Baban Bhanudas Kamble and others** AIR 2002 Bombay 279, wherein the plaintiff who had filed a suit against the vendor and also arrayed the subsequent transferees as co-defendants, had claimed specific performance of the contract of the agreement of sale dated 28th May, 1982 and prayed for cancellation of the sale deeds obtained by the subsequent transferees as also the original defendants. In paragraphs 12 and 13, the law was enunciated thus by the High Court:

"12. Having heard the parties at length, it is necessary to note

that in order to decide the question relating to the pecuniary jurisdiction of the court, what is required to be seen is the allegations made, and relief claimed in the plaint. The allegations made in the plaint, if perused, it will be clear that the suit in question is nothing but a suit seeking substantive relief of specific performance of contract. The declaration of the invalidity of the sale deed in favour of the subsequent transferees. i.e., the relief against defendant Nos. 6, 13 and 14 is nothing but an ancillary relief. If the plaintiff is able to establish his case of the specific performance against the defendant No. 1 (respondent No. 1) then it would be enough, if the defendant Nos. 6, 13 and 14 are joined as parties, to the suit because the only decree to be passed in the suit for specific performance against the subsequent transferees would be to ask them to join in conveyance with the defendant No. 1 owner. In that sense, it was not necessary at all for the plaintiff to ask for any such declaration as he did. It would have been enough for the plaintiff to have joined them as co-defendants so as to contend that the subsequent sale deeds were not binding on him. The argument of the learned Counsel appearing for the petitioner that the relief of declaration prayed for against the defendant Nos. 6, 13 and 14 was required to be valued in terms of money has, therefore, to be rejected.

13. The above legal position is no more res integra and is laid down in **Vimala Ammal v. C. Suseela** AIR 1991 Mad 209. **Dwarka Prasad Singh v. Harikant Prasad Singh** [1973] 2 SCR 1064 and **Durga Prasad v. Deep Chand** [1954] 1 SCR 360. In all these cases, it has been held that when an action is brought for specific performance, the subsequent transferee would be a necessary party to the suit as the only decree that is required to be passed in such a suit (for specific performance) is against the original vendor. The subsequent transferees are required to be directed to join in the sale which is directed by a decree for specific performance of contract. It has been held that the proper form of decree is to direct specific performance of the contract between the vendor and the prior transferee and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him, to the prior transferee. He does not

join in any special convenants made between the prior transferee and his vendor, all that he does is to pass on his title to the prior transferee. This law was laid down by the Supreme Court firstly, in Durga Prasad's case (cited supra), would dispense with the necessity of obtaining any specific declaration against the subsequent transferee. It would not, therefore, be necessary at all to claim a declaration as such. This law was again reiterated in **Dwarka Prasad Singh's** case [1973] 2 SCR 1064 and subsequently followed in **Vimala Ammal's** case AIR 1991 Mad 209 . Thus it was not at all necessary for plaintiff to claim declaration of invalidity of transfer of property made in favour of the subsequent transferees."

48. Having considered the matter from all angles, I am of the view that the Agreement to Sell in favour of the appellants in this case being a prior agreement qua the Agreement to Sell dated 25th June, 1973, on the basis of which specific performance is sought by the respondents No.1 and 2, the decisions of the Supreme Court relied upon by Mr. Yadav are clearly distinguishable on facts. In **Ramesh Chandra Pattnaik's** case (supra), the Supreme Court was dealing with the case where specific performance was sought of an Agreement to Sell entered into prior to the Agreement to Sell relied upon by the contesting respondent. The Supreme Court rightly held that no suit for specific performance having been filed on the basis of the subsequent Agreement to Sell, the earlier Agreement to Sell must prevail and there was, therefore, no necessity for impleading the alleged subsequent vendee as a necessary party. Significantly also, there was no sale deed in the said case. In **Bharat Karsondas Thakkar** (supra), the Supreme Court was dealing with the issue as to whether a third party or a stranger to a contract can be added as a party in a suit for specific performance of the agreement and rightly observed that it would not be proper to convert the nature of the suit into a suit for title and possession by adding a third party thereto. In **Kasturi's** case (supra), which was relied upon in **Bharat Karsondas Thakkar** (supra) also, the admitted position was that certain parties who sought their addition did not seek their addition in the suit on the strength of the contract in respect of which the suit for specific performance of the contract for sale had been filed. Admittedly, they based their claim on independent title and possession of the contracted property. In the circumstances, the Supreme Court held that the scope of the suit for specific performance

of the contract for sale could not be enlarged to a suit for title and possession, the same being impermissible in law. The aforesaid decisions, therefore, are of no assistance to the respondents No.1 and 2 as the facts in the said cases are of a different nature altogether.

49. In **Dilip Bastimal Jain's** case (supra), however, the Bombay High Court only reiterated the law as laid down by the Supreme Court in the case of **Durga Prasad** (supra) and in the case of **Vimala Ammal vs. C. Suseela and Ors.,** AIR 1991 Mad. 209. In both these cases, it was held that when an action is brought for specific performance, the subsequent transferee would be a necessary party to the suit as the subsequent transferees are required to be directed to join in the sale. It was held that the proper form of decree is to direct the specific performance of a contract between the vendor and the prior transferee and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him, to the prior transferee. Thus, it was not at all necessary for the plaintiff to claim declaration and invalidity of transfer of property made in favour of the subsequent transferees. This is undoubtedly the correct law and the judgment in **Durga Prasad** (supra), as noted above, is also relied upon by the appellants. counsel to contend that even if the appellants had been subsequent transferees (which they are not), no decree for specific performance could have been passed by the learned trial court without joining them in the conveyance deed.

50. It is proposed next to deal with the contention of the learned counsel for the appellants that the findings on the Issue No.2 having gone against the respondents No.1 and 2 and the said findings not having been challenged by the respondents No.1 and 2 by filing an appeal or even cross-objections, the decree passed by the trial court cannot be modified so far as Issue No.2 is concerned. Reliance was placed in this regard by Mr. Gupta on the judgments rendered in the cases of **Jadunath Basak vs. Mritunjoy Sett and Ors.** AIR 1986 Calcutta 416 (DB), **Superintending Engineer and Ors. vs. B. Subba Reddy** 1999 (4) SCC 423 and **Banarsi & Ors. vs. Ram Phal** 2003 (9) SCC 606, to contend that the respondents even though they have not appealed may support the decree on any other ground, but if they want modification of the same, they have to file cross-objections to the appeal, which objections they could have taken earlier by filing an appeal. It was so held by the Supreme Court in the case of **Superintending Engineer and Ors.** (supra)

and the aforesaid decision was followed in **Banarsi's** case (supra), where it was held that a respondent may defend himself without filing any cross objection to the extent to which the decree is in his favour. However, if he proposes to attack any part of the decree, he must take cross objections. The provisions of Order XLI Rule 22 pre and post-amendment were discussed at length and it was amplified that where the decree is entirely in favour of the respondent though an issue has been decided against the respondent, pre-amendment CPC did not entitle or permit the respondent to take any cross objection as he was not the person aggrieved by the decree but under the amended CPC, read in the light of the explanation, though it may still not be necessary for the respondent to take any cross objection to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross objection, it would be advantageous for him to prefer such cross objections if he proposes to attack any part of the decree.

51. It is not in dispute that no cross appeal or cross objections have been preferred in the instant case by the respondents No.1 and 2 qua the findings rendered against them by the learned trial court while deciding Issue No.2. This being so, it must be presumed that the respondents No.1 and 2 were not seriously aggrieved by the aforesaid findings and the said findings, therefore, cannot now be challenged by the respondents No.1 and 2 for the purpose of seeking modification of the decree. If this be the correct legal position, in view of the fact that the decree requires the respondents No.1 and 2 to pay a sum of Rs. 59,000/- to the legal representatives of Smt. Khazani, the question which arises for the consideration of this Court is as to whether the respondents No.1 and 2 having paid only a sum of Rs. 1,000/- as earnest money to Smt. Khazani on 25th June, 1973 are entitled to specific performance of the agreement, more as in view of the phenomenal increase in the price of land since the year 1973.

52. In **Nirmala Anand vs. Advent Corporation (P) Ltd. and Ors.** (2002) 8 SCC 146, a three Judge Bench of the Supreme Court, while dealing with the issue of price escalation, stressed that Court must keep in view the totality of facts and circumstance; that though ordinarily the plaintiff is not be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation, that may be, in a given case, one of the considerations besides

many others to be taken into consideration for refusing the decree of specific performance. It further held "while balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen."

53. In **Sahadeva Gramani (Dead) by Lrs. Vs. Peruman Gramani and Ors.** (2005) 11 SCC 454, the Supreme Court, while dealing with a case where no material was placed on record to show that the vendee was aware of the earlier agreement executed between the appellant and the vendor, after holding that the vendee was a bonafide purchaser with valuable consideration without notice of the previous agreement of sale executed between the appellant and the vendor, held that Section 20 of the Specific Relief Act provides that the jurisdiction of the Court to decree specific performance of the agreement is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so.

54. In **Lourdu Mari David and Ors. vs. Louis Chinnaya Arogiaswamy and Ors.** (1996) 5 SCC 589, it was emphasized that the plaintiff seeking the equitable relief of specific performance should come to the Court with clean hands. A party who makes false allegations does not come with clean hands and is not entitled to equitable relief. Thus, a person who comes to Court with a false plea disentitles himself to the relief of specific performance, being equitable relief as in the instant case where a fabricated agreement dated 26th June, 1973 has been set up by the respondents No.1 and 2, which, as already stated, has been rightly discarded by the learned trial court.

55. In **Lalit Kumar Jain and Anr. vs. Jaipur Traders Corporation Pvt. Ltd.** (2002) 5 SCC 383, it was again emphasized that the conduct of the plaintiff who seeks equitable relief should be kept upper most in the mind of the Court and where such conduct is blameworthy or the plaintiff has approached the Court with unclean hands, the plaintiff must be held disentitled to the equitable relief of specific performance.

56. In view of the aforesaid and in view of my findings rendered

on Issues No.1 to 4, I am unable to agree with the findings on this issue rendered by the learned trial court, that the respondents No.1 and 2 who have paid only a sum of Rs. 1,000/- and have not even cared to challenge the findings rendered against them by the trial court while dealing with Issue No.2 are entitled to a decree for specific performance on payment of Rs. 59,000/-. Accordingly, this issue is decided in favour of the appellants and against the respondents No.1 and 2.

ISSUE NO.6

> "Whether the plaintiffs were ready and willing to perform their part of the contract, if any and whether Smt. Khazani failed to perform her part of the contract?"

57. On this issue, the learned trial court, as noted above, has held that the plaintiffs were ready and willing to perform their part of the contract, but they could not do so as Smt. Khazani Devi intentionally failed to perform her part of the contract in collusion with defendants No.2 to 6.

58. The law is well settled that Section 16(c) of the Specific Relief Act, 1963 makes it mandatory for the person seeking specific performance of the contract to allege and prove that he has performed or has been ready and willing to perform the contract according to its true construction, and in the absence of proof that the plaintiff has been ready and willing to perform his part of the contract, a suit for specific performance cannot succeed. It is also well settled by various decisions of the Courts that by virtue of Section 20 of the said Act, the relief for specific performance lies in the discretion of the Court and the exercise of such discretion would require the Court to satisfy itself that circumstances exist that make it equitable to grant the decree for specific performance of the agreement. It was so held in **N.P. Thirugnanam (D) by LRs vs. Dr. R. Jagan Mohan Rao & Ors.** JT 1995 (5) SC 533, **Bal Krishna & Anr. vs. Bhagwan Das (D) through LRs & Ors.** 2008 (12) SCC 145 and **Deewan Arora vs. Tara Devi Sen & Ors.** (2009) 163 DLT 520. In the case of N.P. Thirugnanam, the Supreme Court emphasized that the factum of readiness and willingness of the plaintiff to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The conduct of the plaintiff prior and subsequent to the filing of the suit must, therefore, be scrutinized

by the Court and from the said conduct the Court may infer whether the plaintiff is ready and was always ready and willing to perform his part of the contract.

59. In the instant case, it is noteworthy even the notice dated 14th September, 1973 issued by the respondents No.1 and 2 to Smt. Khazani, Exhibit PW-9/1, makes no mention of the readiness and willingness of the respondents No.1 and 2 to perform their part of the contract. The bald averment contained in the plaint that the plaintiffs are ready and willing to perform their part of the contract has not been proved and substantiated. The conduct of the respondents No.1 and 2 has been far from blemishless. The entire story of the agreement dated 26.06.1973 disbelieved by the trial court and by this Court, in my view, by itself disentitles the respondents No.1 and 2 to the equitable relief of specific performance. With an agreement of Rs. 1,000/-, the respondents No.1 and 2 seek specific performance in a case where land prices have shot up phenomenally, by pleading that they are ready to pay the balance price of Rs. 4,000/-. The averment that they are in possession has also been falsified by the witnesses whose evidence has been discussed hereinabove. On balancing the equities, there is, therefore, no justification in my view for the exercise of the discretionary powers of this Court to grant the equitable relief of specific performance to the said respondents. This is all the more so, as the trial court has not undertaken the exercise of scrutinizing the three registered documents placed on record by the appellants, including the sale deed in their favour, to contend that they are bonafide purchasers of the land of Khazani without notice of the Agreement to Sell dated 25th June, 1973. The trial court no doubt dealt with the agreement dated 4th August, 1973 and discarded the same on the ground that it was not stamped, but no finding was rendered by the trial court on the remaining three documents, all of which were registered documents, nor the trial court has held that the appellants had notice of the agreement of 25th June, 1973. In this scenario, the trial court wrongly exercised the jurisdiction of granting the discretionary relief of specific performance to the respondents No.1 and 2.

60. Issue No.6 must accordingly be decided in favour of the appellants and against the respondents No.1 and 2.

ISSUE NO.7

"Are the plaintiffs entitled to the alternative relief of return of Rs.56,000/- or any lesser sum against the estate of Smt. Khazani or against her legal representatives?"

61. The entire case of the respondents No.1 and 2 with regard to the payment of Rs. 56,000/- having been disbelieved by the trial court and by this Court, the question of the said respondents being entitled to the alternative relief of refund of Rs. 56,000/- does not arise.

ISSUE NO.8

"Relief."

62. In view of my aforesaid findings, the decree in favour of the respondents for specific performance on payment of Rs. 59,000/- with costs passed by the learned trial court is set aside.

63. Before concluding, however, two aspects of the matter deserve to be noticed. The first is that an attempt was made by Mr. R.N. Vats, the learned counsel for the legal representatives of Smt. Khazani to contend that the additional issues have not been decided by the learned trial court and the case should, therefore, be remanded to the learned trial court for decided the aforesaid issues. The second is that Mr. R.N. Vats, the learned counsel for the legal representatives of Smt. Khazani addressed arguments in support of the respondents No.1 and 2 and contended that the appeal was not at all maintainable.

64. As regards the contention of Mr. R.N. Vats that the additional issues have not been decided by the learned trial court, this contention may be dealt with by noting that the trial court in its judgment has held as under:

"No party has advanced any arguments. These issues affect both the parties. So, that is why they have avoided to advance any arguments. So, I decide all the three issues accordingly as they have no effect on the Agreement to Sell the property and the rights of the parties for specific performance."

65. It is abundantly clear from the above that the parties not having addressed any arguments on the additional issues and by necessary implication having given up the aforesaid issues, it does not now lie with any of the parties to contend that the matter should be remanded back

to the learned trial court for deciding the additional issues. This position is not controverted either by the appellants or by the respondents No.1 and 2, who are the contesting respondents.

66. Adverting to the contention of Mr. Vats on behalf of the legal representatives of Smt. Khazani that the appeal is not at all maintainable, it only needs to be noted that all the submissions of Mr. Vats were in direct contradiction of the pleadings of the parties and in particular the written statement filed by Smt. Khazani herself as well as the evidence adduced by the parties, including the evidence of D1W1 Chandan Singh, the husband of Khazani. Further, no appeal having been filed by the legal representatives of Smt. Khazani, to my mind, there exists no cogent reason for this Court to entertain the contentions raised at the bar by her legal representatives 25 years after the passing of the decree. The pleadings of these respondents and the evidence adduced by them clearly show that these respondents have all along opposed the grant of the decree for specific performance. For them to change their stance and do a somersault to now strengthen the case for the respondents No.1 and 2, is neither understandable nor can be countenanced.

67. To conclude, the appeal succeeds. The impugned judgment and decree of the trial court is set aside with costs.

CM No.10058/2008

In view of the findings recorded hereinabove, the present application which has been filed by a third party for being impleaded in the suit for specific performance cannot be entertained. The same is accordingly dismissed leaving the applicants to pursue the remedy available to them in law, if any.

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RFA

M/S. JAGDAMBA INDUSTRIES ....APPELLANT

VERSUS

SH. KRISHAN PRATAP ....RESPONDENT

(VALMIKI J. MEHTA, J.)

RFA NO. : 603/1999 DATE OF DECISION: 03.01.2011

Code of Civil Procedure, 1908 (CPC)—Order XIV, Rule 2—Appellant filed a suit for recovery—Contended in plaint that Appellant was a registered partnership firm under Indian Partnership Act 1932 ("PA")—Fact denied by the Respondent—Issues framed by Trial Court—Subsequently Respondent filed an application under Order VII Rule 11 seeking that suit be dismissed as it was not filed by competent person—The person was not shown as a partner of the firm in the Register of firms as on the date of filing of the suit (a plea absent in the written statement)—Trial Court dismissed the suit by reference to documentary evidence. Held—A disputed question of fact cannot be tried either as preliminary issue or by application under Order VII Rule 11 CPC—Respondent was not entitled to raise new issue in an application under Order VII Rule 11 CPC—Departure from written statement/pleading possible only by means of amendment, Court had not decided the preliminary issue by taking the averments of the plaint as correct but the judgment had been passed by reference to documents filed by parties—Disputed questions of fact (Such as Whether a person was a partner of the firm as on the date of institution of the suit) cannot be decided as a preliminary issue or by an application under Order VII Rule 11.

Order 14 Rule 2 of CPC and which reads as under:-

" Order 14 Rule 2 CPC Court to pronounce judgment on all issues:- (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues. (2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

The Supreme Court in its recent decision reported as **Ramesh B. Desai v. Bipin Vadilal Mehta,**(2006) 5 SCC 638, has laid down that Order 14 Rule 2 of CPC confers no jurisdiction on a Court to decide the mixed questions of fact and law as a preliminary issue. It is clearly held in this judgment that where for a decision on an issue of law (such as a suit being barred by a particular law) depends firstly upon the decision of a disputed fact then the issue cannot be tried as a preliminary issue. The Supreme Court has therefore made it clear that once there are disputed questions of facts which require trial, the issue cannot be decided as a preliminary issue. Paras 13, 15 and 16 of this judgment are relevant and the same read as under:-

"13. Sub-rule (2) of Order 14 Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the court is of the opinion that the

case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the court, or (b) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before this Court in **Major S.S. Khanna v. Brig. F.J. Dillon4** and it was held as under: (SCR p. 421)

"Under Order 14 Rule 2, Code of Civil Procedure where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the court; not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lopsided trial of the suit."

Though there has been a slight amendment in the language of Order 14 Rule 2 CPC by the amending Act, 1976 but the principle enunciated in the abovequoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.

15. The principle underlying clause (d) of Order 7 Rule 11 is no different. We will refer here to a recent decision of this Court rendered in Popat and Kotecha Property v. State Bank of India Staff Assn.10 where it was held as under in para 10 of the report: (SCC p. 515)

"10. Clause (d) of Order 7 Rule 7 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force."

16. It was emphasised in para 25 of the report that the statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11 CPC. The principle is, therefore, well settled that in order to examine whether the plaint is barred by any law, as contemplated by clause (d) of Order 7 Rule 11 CPC, the averments made in the plaint alone have to be seen and they have to be assumed to be correct. It is not permissible to look into the pleas raised in the written statement or to any piece of evidence. Applying the said principle, the plea raised by the contesting respondents that the company petition was barred by limitation has to be examined by looking into the averments made in the company petition alone and any affidavit filed in reply to the company petition or the contents of the affidavit filed in support of Company Application No. 113 of 1995 filed by the respondents seeking dismissal of the company petition cannot at all be looked into."

(Emphasis added) **(Para 2)**

Clearly, the issue No.1 was a factual issue in view of the fact that the plaintiff in the plaint asserted existence of a registered partnership under the Indian Partnership Act, 1932 and the defendant denied the same. The defendant, however, subsequently filed an application on 3.4.1992 under Order 7 Rule 11 CPC on a totally new ground praying that the issue no.1 be treated as a preliminary issue and the suit be dismissed being barred by Section 69 of the Indian Partnership Act, 1932 not because the partnership firm is not registered but because Rajender Kumar who has signed the plaint was not shown to be a partner of the firm in the Registrar of firms on the date of filing of the suit on 22.7.1989 and he was shown as a partner only on 1.4.1990. Paras 1 to 4 of this application and the replies thereto on behalf of the appellant/plaintiff are relevant and the same read as under:-

PARAS OF APPLICATION

"1.That the captioned suit for recovery etc., instituted by the plaintiff firm M/s Jagdamba Industries is pending adjudication in the Hon.ble Court.

2.The plaintiff firm on its own showings claims to be a duly registered firm. The plaintiff firm has also averred that Shri Rajinder Kumar is one of its registered partners and is thus competent to sign and verify the plaint for and on behalf of the plaintiff firm.

In support of its claim, the plaintiff firm has produced on record certain documents.

3.That on the plaintiffs own allegations and documents, it is apparent that Shri Rajinder Kumar has been registered as a partner of the plaintiff firm only w.e.f. 1.4.1990. This record bears out that this suit has been instituted on 22.7.1989.

4.Thus, on the plaintiffs own showings, it is apparent that the said Shri Rajinder Kumar was not a duly

registered partner of the plaintiff firm on the day this suit was instituted."

PARAS OF REPLY

"1.Para 1 of the application except the matter of court record is wrong and is denied.

2.Para 2 of the application except the matter of court record is wrong and is denied.

3.Para 3 of the application is wrong and is denied. It is submitted that in Form 'A', is issued by Registrar of Firms under Indian Partnership Act, Sh. Rajinder Kumar has been shown to have joined the plaintiff/ firm on 1-4-89, and form 'C' has also been issued to this effect by the Registrar of Firms. The said documents are on court's record. It is denied that Sh. Rajinder Kumar has been registered as partner in the firm w.e.f. 1-4-1990 as alleged.

4.Para 4 of the application is wrong and is denied. It is denied that Sh. Rajinder Kumar was not duly registered partner of plaintiff firm on the day of filing of the present suit as alleged. Rajinder Kumar is the partner and duly registered under Indian Partnership Act with Registrar of Firms since 1-4-1984."

Clearly therefore there was a disputed question of fact because the averments of the respondent/defendant in his application were denied by the appellant/plaintiff. **(Para 4)**

Be that as it may, this plea of Rajender Kumar being not shown as a registered partner in the Registrar of firms on the date of filing of the suit was a plea conspicuous by its absence in the written statement and was taken up only for the first time in the application filed by the respondent/ defendant under Order 7 Rule 11 CPC and which application was filed after completion of pleadings and framing of issues. A reference to Order 6 Rule 7 of the CPC shows that

no pleading shall, except by way of amendment, raise any new ground of claim or contain any fact inconsistent with the previous pleading of the party pleading the same. Order 6 CPC pertains to pleadings generally i.e. to pleadings of both the plaintiff and the defendant i.e. to both the plaint as also the written statement. The new ground of claim which was raised in the application under Order 7 Rule 11 CPC of Rajender Kumar not being shown in the Registrar of firms as a partner of the firm on the date of filing of the suit being clearly a new ground of claim for dismissing the suit, the same was wholly impermissible in view of Order 6 Rule 7 CPC. If the defendant/respondent wanted to raise such a plea he was bound to have applied for an amendment of its written statement to raise such a plea and admittedly the written statement was never applied for being amended to include the plea that Rajender Kumar was not shown as a partner of the firm in the Registrar of firms on the date of filing of the suit. **(Para 5)**

A reading of the impugned judgment shows that the trial Court has decided the preliminary issue not by taking the averments in the plaint as correct but the judgment has been passed by reference to the documents filed by the respective parties i.e. with reference to documentary evidence. It appears that pursuant to the application under Order 7 Rule 11 being filed by the respondent/defendant, the appellant/plaintiff sought to file documents to justify the filing of the suit by Sh. Rajender Kumar as Rajender Kumar was claimed to be a registered partner of the firm on the date of filing of the suit. Thus the impugned judgment has for the purpose of deciding the application under Order 7 Rule 11 CPC referred to and relied upon documentary evidence to allow the application under Order 7 Rule 11 CPC though the settled legal position is that for deciding either a preliminary issue under Order 14 Rule 2 CPC or an application under Order 7 Rule 11 CPC only the averments in the plaint can be looked into and disputed questions of facts cannot be decided by reference to documentary evidence. Surely a

disputed question of fact cannot be decided in a summary manner by reference to documentary evidence without allowing parties to lead complete evidence of all its witnesses, and, disputed questions of facts cannot be the subject matter of a preliminary issue as held by the Supreme Court in the case of **Ramesh B. Desai** (supra). **(Para 6)**

On the basis of the above discussion the following conclusions emerge:-

(i) A disputed question of fact cannot be a question of law and such a question of law which before the same can be decided requires decision upon a disputed question of fact, cannot be tried either as a preliminary issue or by an application under Order 7 Rule 11 CPC vide the decision of **Ramesh B. Desai** (supra). Whether or not Sh. Rajender Kumar was a registered partner of the appellant/plaintiff partnership firm on the date of the filing of the suit is a factual issue because the appellant had disputed that Rajender Kumar was an unregistered partner and had sought to sustain the suit by filing of different documents from the Registrar of firms to show that Rajender Kumar was in fact entitled to file the suit because he was a registered partner of the firm on the date of filing of the suit. The fact that ultimately on merits the respondent/defendant may succeed at the stage of final arguments in the suit after evidence is lead on all issues including the issue of bar under Section 69 of the Partnership Act, 1932, however cannot mean that the mandated procedure of trial of all issues together and non trial of issues of facts as a preliminary issue can be given a go bye.

(ii) The respondent/defendant was not entitled to raise a totally new issue in an application under Order 7 Rule 11 viz of Rajender Kumar being not a registered partner of the firm because there was no such defence in the existing written statement where the only defence was that the partnership firm was not registered. There was no defence in the written statement that Rajender Kumar was not shown as a registered

partner of the firm on the date of filing of the suit. Any departure from an existing pleading/written statement could because of Order 6 Rule 7 CPC have been done by means of an amendment application, and which procedure has admittedly not been followed in the present case.

(Para 10)

Important Issue Involved: A disputed question of fact cannot be tried either as preliminary issue or by application under Order 7 Rule 11 CPC. A new issue cannot be raised by way of an application under Order 7 Rule 11 CPC but only by amendment in pleadings.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Sindhu Sinha, Advocate.

FOR THE RESPONDENT : Ms. Iti Sharma, Advocate.

CASES REFERRED TO:

1. *Ramesh B. Desai* vs. *Bipin Vadilal Mehta*,(2006) 5 SCC 638.
2. *Salem Advocate Bar Association* vs. *Union of India* (2005) 6 SCC 344.

RESULT: Appeal accepted and impugned judgment set aside with costs of Rs. 20,000/-.

VALMIKI J. MEHTA, J (ORAL)

1. The present first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree dated 31.3.1994 whereby the suit of the appellant/plaintiff for recovery has been dismissed on an application filed by the respondent/defendant under Order 7 Rule 11 CPC by treating the issue No.1 as a preliminary issue and which issue was with regard to the bar to the suit under Section 69 of the Indian Partnership Act, 1932. The impugned judgment passed in the present case has resulted not only in stalling the suit for recovery filed against the respondent/defendant with respect to goods supplied, at the stage of

a preliminary issue for about 21 years since the filing of the suit in the year 1989 but also in negating the mandate of the Legislature brought about by amending Order 14 Rule 2 of the Code of Civil Procedure, 1908 (CPC) in the year 1976 by Act 104 of 1996. The object of the amendment of 1976 was that the Court should decide all issues together and there should not be piecemeal decisions on separate issues, unless the issue is an issue of law pertaining either to the suit being barred by law or lack of jurisdiction of the Court. The issue to be tried as a preliminary issue has been so mandated to be decided only if no evidence is required to be led on the same and which becomes clear from the expression "issue of law" as appearing in Order 14 Rule 2 of CPC.

2. Order 14 Rule 2 of CPC and which reads as under:-

> **" Order 14 Rule 2 CPC Court to pronounce judgment on all issues:-** (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues. (2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-
>
> (a) the jurisdiction of the Court, or
>
> (b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

The Supreme Court in its recent decision reported as **Ramesh B. Desai v. Bipin Vadilal Mehta,**(2006) 5 SCC 638, has laid down that Order 14 Rule 2 of CPC confers no jurisdiction on a Court to decide the mixed questions of fact and law as a preliminary issue. It is clearly held in this judgment that where for a decision on an issue of law (such as a suit being barred by a particular law) depends firstly upon the decision of a disputed fact then the issue cannot be tried as a preliminary issue. The Supreme Court has therefore made it clear that once there are disputed questions of facts which require trial, the issue cannot be decided as a preliminary issue. Paras 13, 15 and 16 of this judgment are relevant

and the same read as under:-

"13. Sub-rule (2) of Order 14 Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the court, or (b) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before this Court in **Major S.S. Khanna v. Brig. F.J. Dillon4** and it was held as under: (SCR p. 421)

"Under Order 14 Rule 2, Code of Civil Procedure where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the court; not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lopsided trial of the suit."

Though there has been a slight amendment in the language of Order 14 Rule 2 CPC by the amending Act, 1976 but the principle enunciated in the abovequoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.

15. The principle underlying clause (d) of Order 7 Rule 11 is no different. We will refer here to a recent decision of this Court rendered in Popat and Kotecha Property v. State Bank of India

Staff Assn.10 where it was held as under in para 10 of the report: (SCC p. 515)

"10. Clause (d) of Order 7 Rule 7 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force."

16. It was emphasised in para 25 of the report that the statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11 CPC. The principle is, therefore, well settled that in order to examine whether the plaint is barred by any law, as contemplated by clause (d) of Order 7 Rule 11 CPC, the averments made in the plaint alone have to be seen and they have to be assumed to be correct. It is not permissible to look into the pleas raised in the written statement or to any piece of evidence. Applying the said principle, the plea raised by the contesting respondents that the company petition was barred by limitation has to be examined by looking into the averments made in the company petition alone and any affidavit filed in reply to the company petition or the contents of the affidavit filed in support of Company Application No. 113 of 1995 filed by the respondents seeking dismissal of the company petition cannot at all be looked into."

(Emphasis added)

3. Keeping in mind the aforesaid settled legal position let us turn to the facts of the present case. The appellant/plaintiff filed against the respondent/defendant on 22.7.1989 a suit for recovery of Rs.98,000/- for goods (chemicals) supplied by the appellant/plaintiff to the respondent/ defendant. In this suit, the appellant/plaintiff in para 1 stated that plaintiff is a registered partnership firm under the Indian Partnership Act, 1932. In the written statement, the defendant denied the factum of plaintiff being registered as a partnership under the Indian Partnership Act, 1932. After pleadings were complete, the trial Court framed the following issues:-

"1. Is the plaintiff firm registered and the suit has been filed by

a competent person, if so to what effect? OPP

2. Whether the plaintiff has supplied the goods mentioned in para 4 of the plaint? And is there privity of contract? OPP

3. Whether the defendant made any payment of Rs.12107 in account if so to what effect? OPP

4. Is the plaintiff entitled to any interest, if so on what amount and at what rate? OPP

5. Relief."

4. Clearly, the issue No.1 was a factual issue in view of the fact that the plaintiff in the plaint asserted existence of a registered partnership under the Indian Partnership Act, 1932 and the defendant denied the same. The defendant, however, subsequently filed an application on 3.4.1992 under Order 7 Rule 11 CPC on a totally new ground praying that the issue no.1 be treated as a preliminary issue and the suit be dismissed being barred by Section 69 of the Indian Partnership Act, 1932 not because the partnership firm is not registered but because Rajender Kumar who has signed the plaint was not shown to be a partner of the firm in the Registrar of firms on the date of filing of the suit on 22.7.1989 and he was shown as a partner only on 1.4.1990. Paras 1 to 4 of this application and the replies thereto on behalf of the appellant/plaintiff are relevant and the same read as under:-

PARAS OF APPLICATION

"1. That the captioned suit for recovery etc., instituted by the plaintiff firm M/s Jagdamba Industries is pending adjudication in the Hon.ble Court.

2. The plaintiff firm on its own showings claims to be a duly registered firm. The plaintiff firm has also averred that Shri Rajinder Kumar is one of its registered partners and is thus competent to sign and verify the plaint for and on behalf of the plaintiff firm.

In support of its claim, the plaintiff firm has produced on record certain documents.

3. That on the plaintiffs own allegations and documents, it is apparent that Shri Rajinder Kumar has been registered

as a partner of the plaintiff firm only w.e.f. 1.4.1990. This record bears out that this suit has been instituted on 22.7.1989.

4. Thus, on the plaintiffs own showings, it is apparent that the said Shri Rajinder Kumar was not a duly registered partner of the plaintiff firm on the day this suit was instituted."

PARAS OF REPLY

"1. Para 1 of the application except the matter of court record is wrong and is denied.

2. Para 2 of the application except the matter of ˇcourt record is wrong and is denied.

3. Para 3 of the application is wrong and is denied. It is submitted that in Form 'A', is issued by Registrar of Firms under Indian Partnership Act, Sh. Rajinder Kumar has been shown to have joined the plaintiff/firm on 1-4-89, and form 'C' has also been issued to this effect by the Registrar of Firms. The said documents are on court's record. It is denied that Sh. Rajinder Kumar has been registered as partner in the firm w.e.f. 1-4-1990 as alleged.

4. Para 4 of the application is wrong and is denied. It is denied that Sh. Rajinder Kumar was not duly registered partner of plaintiff firm on the day of filing of the present suit as alleged. Rajinder Kumar is the partner and duly registered under Indian Partnership Act with Registrar of Firms since 1-4-1984."

Clearly therefore there was a disputed question of fact because the averments of the respondent/defendant in his application were denied by the appellant/plaintiff.

5. Be that as it may, this plea of Rajender Kumar being not shown as a registered partner in the Registrar of firms on the date of filing of the suit was a plea conspicuous by its absence in the written statement and was taken up only for the first time in the application filed by the respondent/defendant under Order 7 Rule 11 CPC and which application was filed after completion of pleadings and framing of issues. A reference

to Order 6 Rule 7 of the CPC shows that no pleading shall, except by way of amendment, raise any new ground of claim or contain any fact inconsistent with the previous pleading of the party pleading the same. Order 6 CPC pertains to pleadings generally i.e. to pleadings of both the plaintiff and the defendant i.e. to both the plaint as also the written statement. The new ground of claim which was raised in the application under Order 7 Rule 11 CPC of Rajender Kumar not being shown in the Registrar of firms as a partner of the firm on the date of filing of the suit being clearly a new ground of claim for dismissing the suit, the same was wholly impermissible in view of Order 6 Rule 7 CPC. If the defendant/ respondent wanted to raise such a plea he was bound to have applied for an amendment of its written statement to raise such a plea and admittedly the written statement was never applied for being amended to include the plea that Rajender Kumar was not shown as a partner of the firm in the Registrar of firms on the date of filing of the suit.

6. A reading of the impugned judgment shows that the trial Court has decided the preliminary issue not by taking the averments in the plaint as correct but the judgment has been passed by reference to the documents filed by the respective parties i.e. with reference to documentary evidence. It appears that pursuant to the application under Order 7 Rule 11 being filed by the respondent/defendant, the appellant/plaintiff sought to file documents to justify the filing of the suit by Sh. Rajender Kumar as Rajender Kumar was claimed to be a registered partner of the firm on the date of filing of the suit. Thus the impugned judgment has for the purpose of deciding the application under Order 7 Rule 11 CPC referred to and relied upon documentary evidence to allow the application under Order 7 Rule 11 CPC though the settled legal position is that for deciding either a preliminary issue under Order 14 Rule 2 CPC or an application under Order 7 Rule 11 CPC only the averments in the plaint can be looked into and disputed questions of facts cannot be decided by reference to documentary evidence. Surely a disputed question of fact cannot be decided in a summary manner by reference to documentary evidence without allowing parties to lead complete evidence of all its witnesses, and, disputed questions of facts cannot be the subject matter of a preliminary issue as held by the Supreme Court in the case of **Ramesh B. Desai** (supra).

7. Before this Court, the learned counsel for the respondent/

defendant, and which defendant has successfully prolonged the suit for recovery till date for over two decades has argued three points for dismissing the appeal. The first point is that under Order 14 Rule 2 CPC, a bar of law can be tried as a preliminary issue and the bar of a suit under Section 69 of the Partnership Act, 1932 was a bar of law and hence such a plea could form the basis for seeking decision on the same as a preliminary issue. The second point which was argued was that in the application under Order 7 Rule 11 when this plea of Rajender Kumar being not a partner as shown in the Registrar of firms on the date of filing the suit, this aspect was not denied in the reply filed to the application. Thirdly, it is argued that the appellant has been endeavouring to manipulate the record of the Registrar of firms after filing of the application under Order 7 Rule 11 CPC by the respondent/defendant so as to show that Rajender Kumar was a partner of the appellant/defendant firm on the date of the suit.

8. In my opinion, the first and third arguments are inter-related and can be dealt with together. The third argument pertains to the alleged manipulation of record on behalf of the appellant/plaintiff for showing Rajender Kumar as partner of the firm in the Registrar of firms on the date of the suit was filed which is a question of fact. The argument No.1 with respect to bar of law under Section 69 being capable of being decided as a preliminary issue also has to be decided keeping in mind that questions of facts cannot be decided by a preliminary issue. I have already referred to the decision of the Supreme Court in the case of **Ramesh B. Desai** (supra) and which clearly lays down that an issue of fact cannot be the subject matter of a preliminary issue under Order 14 Rule 2 CPC. Once it is a disputed question of fact whether Rajender Kumar was or was not a partner of the appellant/plaintiff partnership firm on the date of filing of the suit surely the issue could not have been decided as a preliminary issue, because for deciding the alleged bar to the suit by virtue of Section 69 of the Indian Partnership Act, 1932 first the question of fact will have to be decided whether Rajender Kumar was or was not the partner of the firm shown in the Registrar of firms when the suit was instituted. Thus the issue is not a 'question of law' simplicitor but it is a mixed question of fact and law. We also cannot lose sight of the fact that the issue was raised for the first time independently by means of an application under Order 7 Rule 11 CPC after pleadings were complete and which defence was not found in the written statement that

Rajender Kumar was not a partner shown in the Registrar of firms as a registered partner on the date of the filing of the suit.

9. That takes me to the second argument which was advanced that in the reply to the application under Order 7 Rule 11 CPC it was not disputed by the appellant/plaintiff that Rajender Kumar was not a registered partner of the appellant partnership firm on the date of filing of the suit. Firstly, this argument is not correct as I have already reproduced above the replies of the appellant/plaintiff to paras 1 to 4 of the application under Order 7 Rule 11 CPC and in which it is denied that Rajender Kumar was not the registered partner of the firm on the date of institution of the suit. Secondly this sort of piecemeal filing of documents/evidence on an issue and piecemeal decision of a suit by deciding of an issue on the basis of certain documents filed, without complete evidence being led on all issues, is exactly the situation which was sought to be prevented by the amendment to Order 14 Rule 2 CPC by Act 104 of 1976. Unfortunately, the trial Court has failed to consider this vital aspect while passing the impugned judgment and decree dismissing the suit on the basis of an application under Order 7 Rule 11 CPC by holding that Rajender Kumar was not shown to be a registered partner of the firm in the Registrar of firms on the date of filing of the suit.

10. On the basis of the above discussion the following conclusions emerge:-

(i) A disputed question of fact cannot be a question of law and such a question of law which before the same can be decided requires decision upon a disputed question of fact, cannot be tried either as a preliminary issue or by an application under Order 7 Rule 11 CPC vide the decision of **Ramesh B. Desai** (supra). Whether or not Sh. Rajender Kumar was a registered partner of the appellant/plaintiff partnership firm on the date of the filing of the suit is a factual issue because the appellant had disputed that Rajender Kumar was an unregistered partner and had sought to sustain the suit by filing of different documents from the Registrar of firms to show that Rajender Kumar was in fact entitled to file the suit because he was a registered partner of the firm on the date of filing of the suit. The fact that ultimately on merits the respondent/ defendant may succeed at the stage of final arguments in the suit after evidence is lead on all issues including the issue of bar under Section 69 of the Partnership Act, 1932, however cannot mean that the mandated

procedure of trial of all issues together and non trial of issues of facts as a preliminary issue can be given a go bye.

(ii) The respondent/defendant was not entitled to raise a totally new issue in an application under Order 7 Rule 11 viz of Rajender Kumar being not a registered partner of the firm because there was no such defence in the existing written statement where the only defence was that the partnership firm was not registered. There was no defence in the written statement that Rajender Kumar was not shown as a registered partner of the firm on the date of filing of the suit. Any departure from an existing pleading/written statement could because of Order 6 Rule 7 CPC have been done by means of an amendment application, and which procedure has admittedly not been followed in the present case.

11. In view of the fact that the impugned judgment decides disputed questions of facts as a preliminary issue/under Order 7 Rule 11 CPC without calling upon the parties to lead complete evidence and simply on the basis of documents which have been filed, the impugned judgment is clearly unsustainable and is therefore liable to be set aside and is accordingly set aside. Since this is a commercial matter and the appellant has been put to delay of 21 years in progress of its suit for recovery of money with respect to goods supplied I hold that in terms of para 37 of the decision of the Supreme Court in the case of **Salem Advocate Bar Association Vs. Union of India** (2005) 6 SCC 344 appropriate costs should be imposed on the respondent/defendant for causing unnecessary delay in the trial of the suit. Accordingly, the present appeal is accepted and the impugned judgment is set aside with costs of Rs.20,000/- in favour of the appellant/plaintiff and against the respondent/defendant and which costs shall be paid within two weeks from today.

The appeal is therefore disposed of as allowed.

C.M. No.1651/1999 in RFA No.603/1999 No orders are required to be passed in this application which is disposed of as such.

ILR (2011) DELHI 133
RSA

BADRI PRASAD TIWARI ....APPELLANT

VERSUS

THE DIRECTORATE OF EDUCATION & ORS. ....RESPONDENTS

(INDERMEET KAUR, J.)

RSA NO. : 161/2003 DATE OF DECISION: 04.01.2011

Code of Civil Procedure, 1908, (CPC)—Order 6 Rule 17—Amendment Application—Rejection by First Appellate Court upheld—Appellant filed a suit for declaration that the Appellant stood duly selected to the post of Assistant teacher and was entitled to all consequential benefits—Suit dismissed by the Trial Court—Before first Appellate Court—Appellant filed an application under Order 6 Rule 17 CPC contending that he had made representations to Respondents to absorb him in another school as similarly placed persons—Application dismissed; no appeal filed against the order dismissing appeal—Challenged as one of the grounds in second appeal. Held—No revision or appeal had been filed against the order dismissing application even assuming, plea can be taken in second appeal, it would raise a new cause of action application therefore rightly rejected.

On 1.7.2002 the application of the applicant seeking amendment of his plaint had been dismissed; he had not been permitted to incorporate the plea that from four other similarly placed persons had been absorbed in Government Schools and he had been discriminated upon. No revision or appeal had been filed against the said order. Even presuming that this order can be the subject matter of challenge under Section 105 of the Code in the present proceedings yet this

plea if permitted to be incorporated at the second appellate level would bounce back the whole case raising a new cause of action and setting up an altogether new foundation for a new case. Application for amendment was rightly rejected. The question of discrimination qua the appellant thus does not arise. There was no pleading before the trial judge that similarly placed persons had been absorbed and he had been left out. Rule 47 of the Delhi School Education Rules would also be inapplicable as the present school was an unaided school. His challenge on this ground must also fail. **(Para 9)**

Important Issue Involved: Amendment application under Order 6 Rule 17 CPC which, if allowed, would change the entire structure of case, ought to be dismissed.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Vijay Hansarai, Sr. Advocate with Ms. Sneha and Mr. B.K Mishra, Advocates.

FOR THE RESPONDENTS : Ms. Avnish Ahlawat, Advocate.

CASE REFFERED TO:

1. *S.Ghoshal & Ors.* vs. *Smt.Deorajin Debi & Anr.* AIR 1969 Supreme Court 941.

RESULT: Appeal dismissed.

INDERMEET KAUR, J. (Oral)

1. This appeal has been directed against the impugned judgment and decree dated 1.7.2002 which had endorsed the finding of the Trial Judge dated 17.2.1998 whereby the suit of the plaintiff, Badri Prasad Tiwari had been dismissed.

2. The plaintiff had been appointed as a teacher in the 'Sita Ram Sanskrit Vidya Mandir' w.e.f. 12.10.1984 at a salary of Rs.350/- per month. It was a recognized school. The plaintiff had appeared before the

Selection Committee for the post of Assistant teacher against which he was selected; thereafter the school had closed for summer vacation; on 16.7.1988, the school was finally closed. Contention of the plaintiff was that the select list of the candidates in which the plaintiff had been selected was not acted upon; present suit was accordingly filed for declaration and injunction seeking a declaration that the plaintiff stood duly selected against the post of Assistant teacher and was entitled to all consequential benefits.

3. In the course of the proceedings the plaintiff had withdrawn his claim against the defendants no. 3 and 4 who had been struck off from the array of parties; defendants no. 1 and 2 had not contested the proceedings. Plaintiff had examined himself as PW-1. Trial Judge held that the plaintiff had failed to produce on record any document/agreement by virtue of which he claimed entitlement to the post of Assistant Teacher. Trial Judge had dismissed the suit of the plaintiff.

4. Before the first Appellate Court, an application under Order 6 Rule 17 of the Code of Civil Procedure (hereinafter referred to as the 'Code') had been filed by the plaintiff. In para 5 of the application, he had contended that he had made several representations to the Director of Education to absorb him in another school as similarly placed persons, that is, Mahesh Chand Satyawali, Krishan Prasad, Ahsok Kumar Singh and Jagdish Mathpal had been absorbed by the department. This application was dismissed vide a speaking order dated 1.7.2002. The contention of the appellant is that in the reply filed to this application it was not disputed by the department that the representations mentioned by him had been made by him to the department to absorb him. It is further contended that although admittedly no appeal had been filed against the order dated 1.7.2002 dismissing his application under Order 6 Rule 17 of the Code, he could nevertheless challenge the same under Section 105 of the Code even at the stage of second appeal provided that this grouse found mention in the memo of appeal. Attention has also been drawn to the memo of appeal where this ground finds mention. Counsel for the appellant places reliance upon the judgment of the Apex Court reported in AIR 1969 Supreme Court 941 **S.Ghoshal & Ors. vs. Smt.Deorajin Debi & Anr.** to substantiate this submission.

5. Be that as it may even presuming that this contention can be raised by the appellant at this stage and representations had been made

by the appellant to the department to absorb him, yet this fact cannot be overlooked that the contention now raised that other four similarly placed persons (names mentioned supra) had been absorbed in the Government Schools was an amendment which had been sought for by the appellant but which amendment had been refused. The Court while disposing off the amendment application had correctly noted that if the amendment is allowed, it would change the entire structure of the case raising a new cause of action and had thus rightly dismissed the said application.

6. Counsel for the appellant has placed reliance upon the provisions of Rule 47 of the Delhi School Education Act and Rules 1973. His contention is that he is adequately covered by the said Rule. The said Rule inter alia reads as follows:

> "47. Absorption of surplus [employee] etc. – (1) where as a result of –
>
> (a) the closure of an aided school or any class or classes in any aided school; or
>
> (b) withdrawal of recognition from an aided school; or
>
> (c) withdrawal of aid from an aided school,
>
> Any student or employee becomes surplus, such student or employee, as the case may be absorbed as far as practicable, in such Government school or aided school as the Administrator may specify:"

7. Averments made in the present plaint have been perused. Contention of the plaintiff is that the Sita Ram Sanskrit Vidya Mandir is a recognized school. There was no positive contention that it is an aided school. Before the trial judge, defendants no. 1 and 2 were ex parte. In the reply filed in the present proceeding, it is stated that the said school was unaided and no grant was given by the NCT to the said school. The applicability of the provisions of Rule 47 of the Delhi School Education Act and 1973 would thus be excluded and being an un-aided school this Rule cannot come in aid of the appellant.

8. This is the second appeal and the substantial question of law had been formulated on 20.9.2010. It inter alia reads as follows:

"Whether the impugned judgment dated 14.05.2003 disentitling the appellant for the relief of absorption was discriminatory and if so, its effect?"

9. On 1.7.2002 the application of the applicant seeking amendment of his plaint had been dismissed; he had not been permitted to incorporate the plea that from four other similarly placed persons had been absorbed in Government Schools and he had been discriminated upon. No revision or appeal had been filed against the said order. Even presuming that this order can be the subject matter of challenge under Section 105 of the Code in the present proceedings yet this plea if permitted to be incorporated at the second appellate level would bounce back the whole case raising a new cause of action and setting up an altogether new foundation for a new case. Application for amendment was rightly rejected. The question of discrimination qua the appellant thus does not arise. There was no pleading before the trial judge that similarly placed persons had been absorbed and he had been left out. Rule 47 of the Delhi School Education Rules would also be inapplicable as the present school was an unaided school. His challenge on this ground must also fail.

10. At this stage learned counsel for the appellant sub mits that he wishes to place on record certain documents. Admittedly these documents had not seen the light of the day in either of the two Courts below i.e. either before the trial judge or before the first appellate Court. This request cannot be acceded to at this stage.

11. There is no merit in the appeal. It is dismissed.

ILR (2011) DELHI 138
RFA

SHRI THAKUR DASS VERMA & ANR. ....APPELLANTS

VERSUS

SHRI HARISH CHAND ....RESPONDENT

(VALMIKI J. MEHTA, J.)

RFA NO. : 163/1998 DATE OF DECISION: 04.01.2011

(A) Code of Civil Procedure, 1908 (CPC)—Section 96—Total sale consideration was Rs. 90,000 of which Rs. 10,000 had been paid on the date of Agreement to Sell dated 6.10.86—Balance was to be paid within one month by 6.11.86—Trial Court decreed the suit of the Respondent for specific performance—Balance consideration deposited after passing of the decree—Judgment and decree challenged in first appeal. Held—Court of first appeal is Competent for examining both findings of fact and law—Findings of Trial Court perverse—Respondent did not file documents to prove his capacity to pay balance consideration—Evidence relied upon, grossly insufficient—Readiness and willingness to pay must be on the date of performance and not date of decree.

During the course of arguments, I put it to the learned counsel for the respondent as to whether the respondent/plaintiff had before the trial court filed his statement of bank account to show whether he had with him a sum of Rs.80,000/- in October/November,1986, and to which, the counsel for the respondent/plaintiff said that no such copy of the bank account was filed in the trial court. I further put it to the counsel for the respondent/plaintiff as to whether the copies of the title documents of the property which the respondent/plaintiff allegedly owned at Shankar Nagar were filed in the

trial court, and again to which, the learned counsel for the respondent/plaintiff replied in the negative. My further query was that whether the respondent/plaintiff had filed in the trial court copies of the documents showing the sale of the Shankar Nagar property, and once again learned counsel for the respondent/plaintiff said that no such documents were filed in the trial court. The conclusion therefore which emerges is that the readiness and willingness to pay the balance amount of consideration which the respondent/plaintiff claimed and his consequent capacity to pay such consideration on the basis of sale of an alleged Shankar Nagar property whose number cannot be said to emerge from the evidence led in the trial court. Thus, the ownership documents with respect to the Shankar Nagar property are not existing in the trial court record, the transfer documents by which the Shankar Nagar property was sold are not existing in the trial court record and finally there is also no statement of bank account on record so as to substantiate the availability of monies to the extent of Rs.80,000/- to pay the balance sale consideration. **(Para 5)**

Learned counsel for the respondent/plaintiff very vehemently argued that the respondent/plaintiff had given legal notice dated 3.11.1986 (Ex.PW1/2) specifically asking the appellant/defendant to appear before the sub-Registrar for execution of the sale deed and which was followed up by a telegram and a subsequent legal notice dated 6.12.1986 (Ex.PW1/6) and since the appellant/defendant failed to appear before the sub-Registrar and failed to reply to the legal notices a presumption should be raised that the respondent/plaintiff had the necessary monies with him to make the payment of the balance sale consideration. I am unable to agree with the contention of the learned counsel for the respondent / plaintiff because mere silence to the legal notices is at best only one of the factors which has to be considered by court at the time of final arguments in the case. Non reply to a legal notice can raise a presumption against a person who does not reply to the same however this would not be conclusive for determination of the issue. The determination

of the issue ultimately depends upon various evidences which are put in a scale, in a civil case, to arrive at the balance of probabilities for determination of the issue. In a case where specific performance of a property is asked for, the courts have insisted on clear cut proof of readiness and willingness because it deprives a seller of a property his valuable ownership rights. This is all the more accentuated in the present case because specific performance is sought of an agreement of the year 1986 when we are today in the year 2011 and the property prices would have multiplied manifold. It is also not a case where a substantial part or most of the consideration under the agreement to sell has been received by the seller. Only an amount of Rs.10,000/- was paid out of the total consideration of Rs.90,000/-. Specific performance is necessarily predicated on the proof with regard to availability of balance monies so as to pay the sale consideration. On this aspect, in my opinion, the respondent/plaintiff has miserably failed. The learned trial court in my opinion has clearly committed an illegality and perversity in holding the respondent/plaintiff was ready and willing to perform his part of the contract. The relevant observations of the trial court in this regard for holding that the respondent/plaintiff was ready and willing are as under:-

> "xxxxxx
>
> He had the money ready for getting the execution of required document as he sold a residence for Rs.70,000/- at Shankar Nagar and remaining amount was available with him at his home. He further stated that he sold a plot at Shankar Nagar of after four-five days of the agreement number of which he does not remember and he does not remember the name of the buyer but was a sweetmeat maker. He categorically denied that there was no plot on his name at Shankar Nagar which he did not sell and also denied that he had no money to pay the seller the balance consideration between the period of 6-10-86 to 6-11-86. He admitted that he told this fact that he has

money ready with him to his counsel."

"xxxxxx

PW1 has stated that Rs.70,000/- he received from a sale proceedings of a plot after four-five days of the agreement and balance amount was ready with him at his home whereas it appears from the record that after the agreement defendant no.1 has not turned up for giving the possession and taking the money from the plaintiff."

I have already discussed above that the aforesaid evidence is grossly insufficient because neither are there copies of the documents of title of the Shankar Nagar property nor are there documents showing transfer of the Shankar Nagar property and also, there is no specific proof of the alleged Shankar Nagar property and further there is no document on record to show the existence in the bank account of the respondent/plaintiff for a sum of Rs.80,000/- for payment of the balance sale consideration. **(Para 6)**

This court sitting in first appeal is a court for examining both findings of facts and law. If the findings of facts are clearly perverse, this court is fully justified in interfering with the impugned judgment and decree. In the facts of the present case, in my opinion, the impugned judgment and decree clearly suffers from a clear cut illegality and perversity in arriving at a finding, as the aforesaid discussion, that the respondent/plaintiff was ready and willing because he had the balance sale consideration for payment of the balance price of the property. **(Para 7)**

At this stage, I may deal with another contention of the learned counsel for the respondent/plaintiff with regard to readiness and willingness. This contention was that immediately after the passing of the decree by this trial court, the respondent/plaintiff had deposited the balance sale consideration in the court showing that the respondent/ plaintiff was always ready and willing. In my opinion, this

argument is mis-placed because the issue of readiness and willingness is not to be decided on the date of the decree but on the date of the performance which was required under the subject agreement to sell. The period of performance under the agreement to sell was October/ November, 1986 and for which period the respondent/ plaintiff has failed to prove any resources with him to make payment of the balance sale consideration.

The learned counsel for the appellant/defendant sought to draw my attention to a judgment passed by the Additional Rent Controller against the respondent/plaintiff who is a tenant in the property and as per which judgment, the respondent/plaintiff had even failed to pay the amount of rent of Rs.35 per month. The learned counsel for the appellant also sought to place before me to a certified copy of another judgment, which is not in the trial court record, holding the respondent guilty of nonpayment of rent. I am not going into all these aspects firstly because the judgment of the leaned Addl. Rent Controller filed in the trial court has been set aside by the Rent Control Tribunal and the second judgment which is relied upon by the appellant/defendant is not in trial court record. In any case, I have already adverted to the aspect of lack of readiness and willingness of the respondent/plaintiff and I have mentioned the aforesaid facts of the decrees of Rent Controller against the respondent/plaintiff of non-payment of rent on account of the arguments raised by counsel for the appellant only. I, therefore, am not adverting to these arguments as raised by the counsel for the appellant with regard to the lack of financial capacity of the respondent/plaintiff. **(Para 8)**

(B) Forfeiture of Advance—Entire amount cannot be forfeited—Only that part which has reasonable nexus to total price.

The counsel for the respondent/plaintiff then finally argued that the respondent/plaintiff should be refunded the amount of 10,000/- in terms of his prayer in the suit where this relief

is claimed in alternate to decree of specific performance because the buyer is always entitled to refund of his advance amount paid. The stand of the appellant/defendant is that this amount has been forfeited on account of the breach committed by the respondent/plaintiff and which has been so deposed by the appellant/defendant in his evidence.

In law, the entire amount of advance cannot be forfeited and only that part of advance can be forfeited which has a reasonable nexus to the total price. This is the ratio of various decisions of the Supreme Court starting from the Constitution Bench decision in the case of **Fateh Chand Vs. Balkishan Das** AIR 1963 SC 1485 in which it was said that there can be forfeiture only of a nominal amount when no other loss is proved by the seller. In the facts of the present case I find that the appellant should only forfeit a sum of Rs.2,000/- on account of the respondent/plaintiff being guilty of breach of contract in not being ready and willing on the part of promise because no other loss is alleged or proved. The appellant/defendant should therefore refund to the respondent/plaintiff the sum of Rs.8000/- along with interest at the rate of 9% per annum from 6.11.1986 till the date of payment. This payment be deposited in this court by the appellant/defendant to the respondent/ plaintiff within a period of six weeks from today. Since there are many respondents to whom this amount would have to be apportioned, this amount can be released to the respondents on an appropriate application being filed in this court. **(Para 9)**

Important Issue Involved: (A) The Court of first appeal is a Court for examining both findings of fact and law and can set aside perverse findings of Trial Court on re-appreciation of evidence.

(B) The capacity and willingness is to the ascertained as on the date of the performance and not decree.

(C) The entire advance amount cannot be forfeited in case of non-performance of an agreement. Only that part can be fortified which has reasonable nexus to total consideration.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANTS : Mr. Vivek Singh, Advocate.

FOR THE RESPONDENT : Mr. L.D. Adhlakha, Advocate.

CASE REFERRED TO:

1. *Fateh Chand* vs. *Balkishan Das* AIR 1963 SC 1485.

RESULT: Appeal allowed. Appellant only to forfeit Rs.2,000/- and refund Rs. 8,000/- with interest @ 8% p.a.

VALMIKI J. MEHTA, J (ORAL)

1. The present first appeal under Section 96 of the Code of Civil Procedure, 1908 impugns the judgment and decree dated 12.1.1998 whereby the suit of the respondent/plaintiff for specific performance was decreed. The agreement to sell in question is dated 6.10.1986 with respect to the property No.874 (Old No.355/56) Prem Gali No.3-C, Gandhi Nagar, Delhi-31. The total consideration under the agreement to sell was Rs.90,000/- of which Rs.10,000/- was paid on the date of the agreement to sell. The balance amount of Rs.80,000/- was to be payable in one month by 6.11.1986 when the sale deed was to be executed and registered.

2. It is not in dispute that there was an agreement to sell and nor is the consideration amount in dispute. It is also not disputed that the agreement to sell was to be performed within one month by the respondent/plaintiff getting executed the sale deed in its favour. Though various defences were raised by the appellant/defendant the main defence was the lack of readiness and willingness of the respondent/plaintiff.

3. The trial court framed the following issues for consideration.

" 1. Which of the parties is guilty of committing a breach of the agreement to sell dated 6-10-86? Onus on parties.

2. Whether the suit is within time as alleged? OPP

3. Whether the suit is without any causes of action as alleged? OPP

4. Whether the suit is bad for mis-joinder of defendant no.2 as alleged ? If so to what effect? OPD

5. Whether the plaintiff is entitled to a decree for specific performance of the agreement as alleged ?OPP

6. Relief."

4. The learned counsel for the appellant has very vehemently argued before this court that the trial court clearly erred in its finding with regard to the issue no.5 because the respondent/plaintiff failed to show his capacity to pay the balance consideration of Rs.80,000/- during the period when performance of this obligation was to be done viz in October/ November,1986. The learned counsel for the appellant referred to the statement of PW-1 (respondent/plaintiff) and which is the only evidence led in the trial court with regard to the financial capacity of the respondent/ plaintiff.

"XXXXXX

I had the money ready for getting executing the required document as I sold a residence for Rs.70,000/- at Shankar nagar and the remaining amount was available at my home. It was a plot at Shankar nagar which I sold about after 4-5 days of the agreement. Number of which I do not remember. And I have given over the documents pertaining to that plot to the buyer. I do not remember the name of the buyer."

Referring to the aforesaid portion, counsel for the appellant argued that even this evidence is in the cross examination of PW1 and not in the examination in chief of the respondent/plaintiff. Nothing further was proved so as to show the readiness and willingness in terms of availability of money with the respondent/plaintiff for payment of the balance consideration for execution of the sale deed.

5. During the course of arguments, I put it to the learned counsel for the respondent as to whether the respondent/plaintiff had before the trial court filed his statement of bank account to show whether he had with him a sum of Rs.80,000/- in October/November,1986, and to which, the counsel for the respondent/plaintiff said that no such copy of the

bank account was filed in the trial court. I further put it to the counsel for the respondent/plaintiff as to whether the copies of the title documents of the property which the respondent/plaintiff allegedly owned at Shankar Nagar were filed in the trial court, and again to which, the learned counsel for the respondent/plaintiff replied in the negative. My further query was that whether the respondent/plaintiff had filed in the trial court copies of the documents showing the sale of the Shankar Nagar property, and once again learned counsel for the respondent/plaintiff said that no such documents were filed in the trial court. The conclusion therefore which emerges is that the readiness and willingness to pay the balance amount of consideration which the respondent/plaintiff claimed and his consequent capacity to pay such consideration on the basis of sale of an alleged Shankar Nagar property whose number cannot be said to emerge from the evidence led in the trial court. Thus, the ownership documents with respect to the Shankar Nagar property are not existing in the trial court record, the transfer documents by which the Shankar Nagar property was sold are not existing in the trial court record and finally there is also no statement of bank account on record so as to substantiate the availability of monies to the extent of Rs.80,000/- to pay the balance sale consideration.

6. Learned counsel for the respondent/plaintiff very vehemently argued that the respondent/plaintiff had given legal notice dated 3.11.1986 (Ex.PW1/2) specifically asking the appellant/defendant to appear before the sub-Registrar for execution of the sale deed and which was followed up by a telegram and a subsequent legal notice dated 6.12.1986 (Ex.PW1/ 6) and since the appellant/defendant failed to appear before the sub-Registrar and failed to reply to the legal notices a presumption should be raised that the respondent/plaintiff had the necessary monies with him to make the payment of the balance sale consideration. I am unable to agree with the contention of the learned counsel for the respondent /plaintiff because mere silence to the legal notices is at best only one of the factors which has to be considered by court at the time of final arguments in the case. Non reply to a legal notice can raise a presumption against a person who does not reply to the same however this would not be conclusive for determination of the issue. The determination of the issue ultimately depends upon various evidences which are put in a scale, in a civil case, to arrive at the balance of probabilities for determination of the issue. In a case where specific performance of a property is asked

for, the courts have insisted on clear cut proof of readiness and willingness because it deprives a seller of a property his valuable ownership rights. This is all the more accentuated in the present case because specific performance is sought of an agreement of the year 1986 when we are today in the year 2011 and the property prices would have multiplied manifold. It is also not a case where a substantial part or most of the consideration under the agreement to sell has been received by the seller. Only an amount of Rs.10,000/- was paid out of the total consideration of Rs.90,000/-. Specific performance is necessarily predicated on the proof with regard to availability of balance monies so as to pay the sale consideration. On this aspect, in my opinion, the respondent/plaintiff has miserably failed. The learned trial court in my opinion has clearly committed an illegality and perversity in holding the respondent/plaintiff was ready and willing to perform his part of the contract. The relevant observations of the trial court in this regard for holding that the respondent/plaintiff was ready and willing are as under:-

"xxxxxx

He had the money ready for getting the execution of required document as he sold a residence for Rs.70,000/- at Shankar Nagar and remaining amount was available with him at his home. He further stated that he sold a plot at Shankar Nagar of after four-five days of the agreement number of which he does not remember and he does not remember the name of the buyer but was a sweetmeat maker. He categorically denied that there was no plot on his name at Shankar Nagar which he did not sell and also denied that he had no money to pay the seller the balance consideration between the period of 6-10-86 to 6-11-86. He admitted that he told this fact that he has money ready with him to his counsel."

"xxxxxx

PW1 has stated that Rs.70,000/- he received from a ˇsale proceedings of a plot after four-five days of the agreement and balance amount was ready with him at his home whereas it appears from the record that after the agreement defendant no.1 has not turned up for giving the possession and taking the money from the plaintiff."

I have already discussed above that the aforesaid evidence is grossly insufficient because neither are there copies of the documents of title of the Shankar Nagar property nor are there documents showing transfer of the Shankar Nagar property and also, there is no specific proof of the alleged Shankar Nagar property and further there is no document on record to show the existence in the bank account of the respondent/plaintiff for a sum of Rs.80,000/- for payment of the balance sale consideration.

7. This court sitting in first appeal is a court for examining both findings of facts and law. If the findings of facts are clearly perverse, this court is fully justified in interfering with the impugned judgment and decree. In the facts of the present case, in my opinion, the impugned judgment and decree clearly suffers from a clear cut illegality and perversity in arriving at a finding, as the aforesaid discussion, that the respondent/plaintiff was ready and willing because he had the balance sale consideration for payment of the balance price of the property.

8. At this stage, I may deal with another contention of the learned counsel for the respondent/plaintiff with regard to readiness and willingness. This contention was that immediately after the passing of the decree by this trial court, the respondent/plaintiff had deposited the balance sale consideration in the court showing that the respondent/plaintiff was always ready and willing. In my opinion, this argument is mis-placed because the issue of readiness and willingness is not to be decided on the date of the decree but on the date of the performance which was required under the subject agreement to sell. The period of performance under the agreement to sell was October/November, 1986 and for which period the respondent/plaintiff has failed to prove any resources with him to make payment of the balance sale consideration.

The learned counsel for the appellant/defendant sought to draw my attention to a judgment passed by the Additional Rent Controller against the respondent/plaintiff who is a tenant in the property and as per which judgment, the respondent/plaintiff had even failed to pay the amount of rent of Rs.35 per month. The learned counsel for the appellant also sought to place before me to a certified copy of another judgment, which is not in the trial court record, holding the respondent guilty of nonpayment of rent. I am not going into all these aspects firstly because the judgment

of the leaned Addl. Rent Controller filed in the trial court has been set aside by the Rent Control Tribunal and the second judgment which is relied upon by the appellant/defendant is not in trial court record. In any case, I have already adverted to the aspect of lack of readiness and willingness of the respondent/plaintiff and I have mentioned the aforesaid facts of the decrees of Rent Controller against the respondent/plaintiff of non-payment of rent on account of the arguments raised by counsel for the appellant only. I, therefore, am not adverting to these arguments as raised by the counsel for the appellant with regard to the lack of financial capacity of the respondent/plaintiff.

9. The counsel for the respondent/plaintiff then finally argued that the respondent/plaintiff should be refunded the amount of 10,000/- in terms of his prayer in the suit where this relief is claimed in alternate to decree of specific performance because the buyer is always entitled to refund of his advance amount paid. The stand of the appellant/defendant is that this amount has been forfeited on account of the breach committed by the respondent/plaintiff and which has been so deposed by the appellant/ defendant in his evidence.

In law, the entire amount of advance cannot be forfeited and only that part of advance can be forfeited which has a reasonable nexus to the total price. This is the ratio of various decisions of the Supreme Court starting from the Constitution Bench decision in the case of **Fateh Chand Vs. Balkishan Das** AIR 1963 SC 1485 in which it was said that there can be forfeiture only of a nominal amount when no other loss is proved by the seller. In the facts of the present case I find that the appellant should only forfeit a sum of Rs.2,000/- on account of the respondent/plaintiff being guilty of breach of contract in not being ready and willing on the part of promise because no other loss is alleged or proved. The appellant/defendant should therefore refund to the respondent/ plaintiff the sum of Rs.8000/- along with interest at the rate of 9% per annum from 6.11.1986 till the date of payment. This payment be deposited in this court by the appellant/defendant to the respondent/plaintiff within a period of six weeks from today. Since there are many respondents to whom this amount would have to be apportioned, this amount can be released to the respondents on an appropriate application being filed in this court.

10. In view of the above, the impugned judgment and decree being clearly illegal and perverse is therefore set aside. The appeal is accepted by set aside the judgment and decree dated 12.1.2008, the suit for specific performance of the respondent /plaintiff will accordingly stand dismissed. Decree sheet be prepared. Trial Court records be sent back.

ILR (2011) DELHI 150
RSA

SHRI BHUPINDER SINGH ....APPELLANT

VERSUS

SHRI MAHAVIR SINGH & ORS. ....RESPONDENTS

(INDERMEET KAUR, J.)

RSA NO. : 1/2011 & CM NO. : 90-91/2011 **DATE OF DECISION: 07.01.2011**

Code of Civil Procedure, 1908—Order 41, Rule 27—Respondent filed a suit for possession and mesne profits—Appellant did not lead evidence to support his case—Suit decreed by Trial Court—Affirmed in first appeal—Application under Order 41 Rule 27 for placing on record documents filed for the first time before Appellate Court—Dismissed—Submitted in second appeal—Appellant, Canadian resident, was contesting through Power of Attorney (PoA) who did not appear in Court after strained relations subsequently fresh PoA executed by Appellant—Application under Order 41 Rule 27 CPC filed after 51 days of fresh PoA—Held, delay in filing application explained—Case of appellant, no borne from records as even the said documents did not establish the Appellant's locus qua the suit property—Only an attempt to delay proceedings.

Important Issue Involved: Application under Section 41 Rule 27 to place on record documents not filed before Trial Court rightly dismissed on account of unexplained lapse.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Vinay Kumar Garg, Mr. Fazal Ahmad, Mrs. Namrata Singh and Mr. Nilansh Gaur, Advocates.

FOR THE RESPONDENTS : Mr. Sanjay Jain, Sr. Advocate with Ms. Mamta Jha, Mr. Sumit Rajputm, Ms. Prabhsay Kaur, Ashok Sethi and Mr. S.K. Jain, Advocates.

CASES REFERRED TO:

1. *Akhtari Khatoon (since deceased) (Mst.)* vs. *Smt. Rajeshwari Devi* 2010 VI.
2. *C. Albert Morris* vs. *K.Chandrasekaran and Ors.* 2006 (1)ALD 106(SC).
3. *Ram Sarup Gupta* vs. *Bishun Narain Inter Collected and Ors.* (1987) 2 SCC 555.
4. *Mohammad Sher Khan* vs. *Amjad Husain* AIR 1929 All.494.

RESULT: Appeal dismissed.

INDERMEET KAUR, J. (Oral)

CM No.92/2011 (for exemption)

Allowed subject to just exceptions.

RSA No.1/2011 & CM No.90-91/2011

1. This appeal has been directed against the impugned judgment and decree dated 24.11.2010 which had endorsed the finding of the trial judge dated 01.3.2008 whereby the suit of the plaintiffs seeking possession of the suit property as also mesne profits was decreed.

2. The factual matrix of the case is as follows:

i. Plaintiffs/respondents were the legal heirs of Munil Lal Singh. A family partition was entered into between the parties by virtue of which the plaintiff became the owner of the suit property i.e. land measuring 114 sq. yards in Khasra No.31, Abadi Khampur, Delhi.

ii. The predecessor of the plaintiff had executed a lease deed dated 31.3.1971 in favour of Harpal Singh. This was a registered document. The lease was for a period of 20 years. Pursuant to this lease deed a construction was raised on this vacant land by Harpal Singh.

iii. After the death of Harpal singh the appellant/ defendant Bhupinder Singh continued to retain the possession of the suit property.

iv. Vide legal notice dated 14.12.1997, the defendant was asked to vacate the suit property and to pay damages.

Request was not acceded to. Present suit was filed.

v. Defendant contested the suit. It was stated that the registered document dated 31.3.1971 had created a licence in favour of Harpal Singh; by virtue of this document Harpal Singh had got executed a work of permanent character and incurred heavy expenses on the suit property and got constructed three rooms, kitchen, latrine, bathroom on the ground floor and one room on the first floor in the year 1971-72 itself with the consent and knowledge of the predecessor of the plaintiff. This licence was coupled with a grant; it was permanent and irrevocable . Suit was liable to be dismissed.

vi. Trial judge framed eight issues. Oral and documentary evidence was led by the respective parties. The plaintiff produced three witnesses in his support. The lease deed dated 31.3.1971 was proved as Ex.PW-1/2. Defendant in spite of opportunities did not produce any evidence. Defendant evidence was closed on 22.02.2007. The suit was decreed for possession and mesne profits vide impugned judgment and decree dated 01.3.2008.

vii. First appeal was filed against the judgment and decree of trial court; it was accompanied by an application under Section 5 of

Limitation Act. The application under Section 5 of Limitation Act was dismissed on 12.11.2008; the appeal also stood dismissed being barred by limitation.

viii. A revision was filed against the said order which was allowed by the High Court. Matter was remanded back to he heard afresh on merits. The judgment of the trial judge was reaffirmed in the impugned judgment dated 24.11.2010. The appeal was dismissed. The court held that the document dated 31.3.1971 was a lease which has been executed between the parties which had expired by efflux of time on 31.3.1991. The contention of the appellant that it was a licence was repelled. The court had re-appreciated the testimony of the witnesses of the plaintiff. It was observed that no suggestion has been given to any of the witnesses of the plaintiff i.e. either PW-1, PW-2 or PW-3 that the document in dispute (dated 31.3.1971) was a licence and not a lease; in fact, the cross-examination of the witnesses of the plaintiff had suggested that lease money was being collected; there being no reference to any licence.

ix. On the same date i.e. 24.11.2010 the application of the appellant under Section 41 Rule 27 of the Code of Civil Procedure (hereinafter referred to as 'the Code') had also been dismissed by speaking order. The relevant extract of this order reads herein as under:

> "By this application, the appellant is seeking to place on record the documents which were not filed before the ld.trial court. Order 41 Rule 27 CPC makes a provisions for production of additional evidence before the appellate court when the appellant is able to establish that despite the exercise of due diligence such evidence was not within his or her knowledge or after the exercise of due diligence could not be able to produce at the time when the decree was passed. There is no such averment in this application though it is stated in the application under Order 41 Rule 27 CPC filed on 20.7.2009 that the attorney of the appellant did not pursue the interest of the appellant in the suit. No specific date or incident has been mentioned by the appellant when the appellant came to know about the alleged

negligence of the attorney of the appellant before the ld. trial court. It is not stated when the appellant came to know that unattentiveness of the attorney caused prejudice to the case of the appellant. Trial court record is perused. On 20.12.2005, PE was closed in the presence of counsels for the parties. Thereafter, the case was adjourned for DE. On 31.8.2006, an application under Order 8 Rule 1 CPC was filed. Affidavit of one DW Sh.Kulwant Singh was also filed. The ld.trial court by order dated 21.2.2007 dismissed the application under Order 8 Rule 1 CPC. Thereafter, the case was adjourned for 07.7.2007 for DE. After that the case was adjourned for 27.10.2007 for DE and when none appeared on behalf of the defendant despite calls then ld. trial court at 2.00 p.m. closed DE. Moreover, before the ld.trial court, counsel for the appellant was Sh. P.K.Malik, Advocate. The memorandum of appeal before this court has also filed by the same counsel. In this memorandum of appeal, it is not a ground that due to inaction or negligence of the attorney, the appellant could not examine the witness. An application earlier under Order 41 Rule 27 CPC was moved by Sh.P.K.Malik wherein it was not the ground that due to inaction or unattentiveness of the attorney of the appellant, the appellant could not lead evidence. Thereafter, another application on 19.3.2009 was moved by the appellant wherein ground for inaction on behalf of the attorney has been stated. Thus, the appellant for the same relief had moved applications with different grounds. Thereafter, the application dated 19.3.2009 was dismissed as withdrawn. On 20.7.2009, another application under Order 41 Rule 27 CPC was moved. It was observed by this court on 20.10.2009 that in application dated 19.3.2009, nothing was disclosed about the previous application. Counsel for the appellant sought time to convince this court that during pendency of application under the same provision of law, another application could be moved. However, for the same relief and under the same provisions of law, different applications have been filed mentioning different grounds. Thus, it

appears that the appellant has not applied due diligence in this case and has only come before this court to delay the disposal of the case. Even otherwise, during the pendency of the case before the ld. trial court, it was not the case of the appellant that the appellant had taken care of proceedings of each and every date from the attorney of the appellant. Even otherwise if it is assumed that the attorney of the appellant was not taking care of the case then also memorandum of appeal was filed by the same counsel before this court. Earlier application under order 41 Rule 27 CPC was also moved by the same counsel. Thus, till the stage of filing of memorandum of appeal and the application, the appellant had no grievance against the said attorney. Thus, it appears that the appellant has made the ground of the attorney as an afterthought and only with a view to delay the disposal of this case. Therefore, the appellant has made malafide submissions before this court and the submission made by the appellant before this court do not inspire confidence. Moreover, an application under Order 41 Rule 27 CPC has already been dismissed as withdrawn moved on 19.3.2009. I do not find any merit in the application."

x. Record shows that in fact three applications under Order 41 Rule 27 of the Code had been filed; the first of which was dated 21.8.2008; the second was dated 19.3.2009. Both these applications were dismissed as withdrawn. The third application dated 27.2.2009 met the fate of dismissal. This was vide speaking order dated 24.11.2010 and reproduced hereinabove.

3. This is a second appeal. It is yet at its initial stage. On behalf of the appellant, it has been urged that the appellant had exercised all "due diligence". But in spite of the exercise of the said "due diligence" he could not produce his evidence in defence before the trial judge. Contention is that the appellant/defendant was a resident of Canada. He had given a power of attorney to his friend Kulwant Singh who had appeared in Court but thereafter because of strained relations between the parties he did not choose to contest the case. A fresh power of attorney in favour of the daughter of the appellant/defendant was executed on 21.8.2008

and on the same day she had moved an application under Order 41 Rule 27 of the Code seeking permission to file additional evidence. Bonafide and due diligence on the part of the appellant are made out. Appellant had suffered because of the negligence and indifference of his friend Kulwant Singh over whom he had complete trust but this trust was betrayed by him. This is a fit case where permission should have been granted to adduce additional evidence. It is pointed out that an application of similar nature is pending before this Court also. Reliance has been placed upon a judgment reported in 2010 VI **Akhtari Khatoon (since deceased) (Mst.) Vs. Smt. Rajeshwari Devi** to support his submission that the provisions of 41 Rule 27 of the Code are attracted and the additional evidence can be led even at this stage. On merits, it is contended that the document in question i.e. the document dated 31.3.1971 had to be read not from its nomenclature but from the contents of the document; attention has been drawn to para 5 of the said document. It is pointed out that what was intended between the parties was the creation of a licence and not a lease. Admittedly, after the execution of this document, the defendant had created a super structure of permanent character on the vacant land. In terms of Section 60 of the Indian Easement Act, the licence was an irrevocable licence and the defendant could not have been evicted from the suit property. Counsel for the appellant has placed reliance upon a judgment of the Apex court reported in (1987) 2 SCC 555 **Ram Sarup Gupta Vs. Bishun Narain Inter Collected and Ors.** as also placed upon AIR 1929 All.494 **Mohammad Sher Khan Vs. Amjad Husain** to substantiate these submissions.

4. Arguments have been countered.

5. Reliance has been placed upon a judgment of the Supreme Court reported in 2006 (1)ALD 106(SC) **C. Albert Morris Vs. K.Chandrasekaran and Ors.**

6. Record shows that the appellant/defendant was pursuing the said proceedings through power of attorney holder Kulwant Singh. Kulwant Singh has filed his affidavit by way of evidence but thereafter he had chosen not to appear before the Court below; this was in spite of several opportunities having been granted to him. On 20.12.2005, the plaintiff evidence was closed and the matter was adjourned for defence evidence. On 07.7.2007 the matter was again adjourned for defendant evidence for 27.10.2007 when in spite of calls the defendant did not appear, at 2.00

P.M.; defendant evidence stood closed. Counsel appearing for the defendant was Mr.P.K.Malik. He was same counsel who had filed the first appeal before the first appellate Court. It was not contended in the grounds of the appeal in the first appellate court that because of the negligence or inaction of the attorney holder evidence could not be led in defence. The record shows that in fact three applications under Order 41 Rule 27 of the Code had been filed. The first of which is dated 21.8.2008. The second is dated 19.3.2009. Both the said applications had been withdrawn as they were lacking in material particulars. Contention of the appellant that he had exercised "due diligence" is not inspiring. The suit was decreed on 01.3.2008. Even presuming for the sake of argument that the appellant became aware of the decree only on 01.3.2008; his contention is that he has given a fresh power of attorney in favour of his daughter on 21.8.2008 which is after five months. Perusal of this power of attorney in favour of his daughter shows that this power of attorney is in fact dated 01.7.2008 and not 21.8.2008. There is no explanation for having filed application under Order 41 Rule 27 of the Code on 21.8.2008 as the Power of Attorney was admittedly executed in favour of his daughter on 01.7.2008 itself. These lapses in this intervening period have not been explained. The fresh power of attorney dated 01.7.2008 in favour of the daughter of the appellant also does not state that the earlier power of attorney in favour of Kulwant Singh (his friend) has been revoked as has now been vehemently urged orally before this Court. Contention of the appellant that Kulwant Singh had malafidely not deposed in the trial court because of strained relations for which reason he had withdrawn the earlier power of attorney is not borne out from the record.

7. There was also no evidence before the trial judge to establish the locus of the plaintiff. The contention of the appellant is that he is deriving his title from Harpal Singh and Har Pal Singh had executed a will in his favour allowing him to retain the suit property. This will has not seen the light of the day.

8. The first appellate Court had rightly rejected the application of the appellant under Order 41 Rule 27 of the Code. The successive applications filed by the appellant were deliberate attempts on his part to delay the proceedings as far as possible. The appellant is sitting in the suit property which had admittedly not been leased out to him. Document was in favour of Har Pal Singh. How he is deriving his title or right from

Har Pal Singh is not made out or established. Appellant was clearly an unauthorized occupant.

9. This is a second appellate Court and unless the findings of the two fact finding Courts are perverse this court is not inclined ˇto re-examine a document as to whether this is a lease or licence. The document has been perused. The nomenclature describes it as a lease deed. Be that at it may, it is not always the nomenclature which is binding; the contents of the document have to be seen to appreciate the intention of the parties. Whether it is a lease or licence has to be construed from its essential features. Does it create an interest in the property or is it a permissive user which has been granted to the second party; in this context the trial court after examining the law in the case reported in AIR 1959 SC 1262 **Associated Hotels of India Vs. R.N.Kapur** had inter alia in this context observed as follows:

> "If the substance of document Ext.PW-1/2 is given its true construction it emerge out that the intention of parties was to create a lease only and not licence. The exclusive possession has been given to Sh.Harpal. Not only this, he was permitted to raise certain construction. The terms used in the document should be given their plain meaning until contrary is proved.

10. This finding of the trial judge was reaffirmed by the appellate court. Findings in the impugned judgment qua this observation are inter alia extracted as follows:

> "During the course of arguments before this court, the appellant's main contention is that there was no relationship of lessor or lessee but in fact it was the relationship of licensor and licencee. Cross-examination of PW1 and PW2 is again perused. During cross-examination, no suggestion has been put by the defendant either to PW1 or to PW2 that the relationship between the parties was not of lessor or lessee but it was of licensor and licencee. No suggestion was given by the defendant to the witnesses of the plaintiff that Ex.PW-12 was infact a licence not a lease deed. During cross examination, a suggestion was given by counsel for the defendant to PW1 regarding the rent used to be received from the defendant. A question was also put how much rent was collected. A suggestion was also given for the lease money used

to be collectively after every two years and the said suggestion was denied. In the entire cross examination phrases were used "lease deed" or 'lease money' but nowhere phrase either of licence or licence deed is used. Thus, in the entire cross examination of PW1 and PW2 the defence of the defendant was that Ex.PW-1/2 was a lease deed but not a licence. During cross examination of PW3, it was the defence of the defendant that the property was let out for commercial purpose but again there was no defence that it was a licence. In the written statement, the defence of the defendant is that the same was licence deed but during cross examination of any of the witnesses of the plaintiff, defendant did not challenge any of the witnesses of the plaintiff and put a case that Ex.PW-1/2 was infact a licence deed."

11. The judgments relied upon by the learned counsel for the appellant are distinct. In the case of **Ram Sarup Gupta** (supra) the question before the Supreme court was as to whether an oral agreement between the parties had created an irrevocable licence or not. The judgment of the Allahabad High Court in the case of **Mohammad Sher Khan** (supra) also proceeded on the assumption that a licence deed had been executed between the parties. The judgment of **Akhtari Khatoon** (supra) is also inapplicable as it is not a case where the two Courts below have ignored the evidence; this is a case where no evidence has been led by the appellant/defendant.

12. There is no merit in the appeal. Suit for possession was rightly decreed in favour of the respondent/appellant. Appeal as also the pending applications are dismissed.

ILR (2011) DELHI 160
W.P. (C)

M/S. UTTAM SUCROTECH INTERNATIONAL (P) LIMITED **....PETITIONER**

VERSUS

UNION OF INDIA & ANOTHER **....RESPONDENTS**

(DIPAK MISRA, CJ. & MANMOHAN, J.)

WP (C) NO. : 8084/2010 **DATE OF DECISION: 07.01.2011**

Limitation Act, 1963—Section 4 & 14, General Clauses Act, 1897—Section 10, Central Excise Act, 1944—Section 35—Petitioner engaged in export of various goods under Rule 19 of Central Excise Rules, 2002—It executed bond with Respondents for exporting goods by purchasing manufactured excisable goods duty free on basis of CT-1, issued from time to time by Respondents—Necessary documents for scrutiny of Respondents furnished by petitioner but show cause notices served on petitioner—Replies tendered by petitioner with prayer to drop proceedings and show cause notices—Assistant Commissioner dealt with Show Cause Notices and ordered to make demand of Rs. 3,29,819/- in terms of Section 11-AC of Act—Appeal preferred by aggrieved petitioner dismissed being time barred by one day and application for condonation of delay rejected—Revision petition also dismissed—Accordingly, petitioner preferred writ petitioner urging period for reckoning limitation has to be computed from day the right to prefer an appeal had accrued which was wrongly computed by Commissioner—Percontra, Respondent no.2 submitted, method of computation of limitation period adopted by Commissioner not faulty—Held:- Sections 4 and 14, Limitation Act, are not similar in their effect—Whereas

under Section 14 of the Act the time spent can be excluded, Section 4 does not entitle a person to add he days on which the Court is closed to the statutory period—Section 4 of Limitation Act and Section 10 of the General Clause Act enable a person to do what the could not have done on a holiday on the next working day—Commissioner and the revisional authority had correctly computed the period of limitation.

It is also evincible that where Section 4 of the Limitation Act is not applicable, Section 10 of the General Clauses Act comes into aid by extending period to the next day of reopening of the Court. It is also demonstrable that the said provisions do not entitle a person to add the days on which the Court is closed to the statutory period. To put it differently, if the period of the last day of filing of an appeal comes in the midst of a vacation or a holiday, the said period would not get excluded but is extended by applicability of Section 4 of the Limitation Act or Section 10 of the General Clauses Act which enables the affected party to prefer the appeal on the date when the Court or the office reopens. The submission of Mr. Gupta, learned counsel for the petitioner is that as limitation period of 60 days expired on 28th October, 2006 which was a Saturday, the petitioner was entitled to benefit of 28th and 29th October, 2006 being Saturday and Sunday and, thereafter, the further period of 30 days would commence and, therefore, the appeal was presented within the period of limitation. The said proposition, in our considered opinion, runs counter to the principles which are culled out from the authorities we have referred to hereinbefore. We are disposed to think that the Commissioner as well as the revisional authority has correctly computed the period of limitation and appositely opined that the memorandum of appeal was presented on the 91st day and hence, the Commissioner could not have condoned the delay even if sufficient grounds have been shown beyond 30 days, i.e., 90 days in toto. Thus, the finding recorded on that score stands on terra firma. **(Para 24)**

Important Issue Involved: Sections 4 and 14, Limitation Act, are not similar in their effect—Whereas under Section 14 of the Act the time spent can be excluded, Section 4 does not entitle a person to add the days on which the Court is closed to the statutory period—He must do the act on the very next day on which the Court is open.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Dinesh Kumar Gupta, Advocate.

FOR THE RESPONDENTS : Mr. Rajdipa Behura, Mr. C.S. Chauhan Advocates for Respondent no.1, Mr. Mukesh Anand Advocate for Respondent no.2.

CASES REFERRED TO:

1. *Commissioner of Customs and Central Excise* vs. *Hongo India Pvt. Ltd. and Anr.*, (2009) 5 SCC 791.
2. *Singh Enterprises* vs. *Commissioner of Central Excise, Jamshedpur*, (2008) 3 SCC 70.
3. *Jindal Steel and Power Ltd. and Anr.* vs. *Ashoka Alloy Steel Ltd. and Ors.*, (2006) 9 SCC 340.
4. *Saketh India Ltd. & Ors.* vs. *India Securities Ltd.*, (1999) 3 SCC 1.
5. *Manohar Joshi* vs. *Nitin Bhau Rao Patil and Anr.*, (1996) 1 SCC 169.
6. *Ramakant Mayekar* vs. *Celine D' Silva*, (1996) 1 SCC 399.
7. *M/s Flowmore Pvt. Ltd.* vs. *Keshav Kumar Swarup*, AIR 1983 Delhi 143.
8. *Haru Das Gupta* vs. *State of W.B.*, (1972) 1 SCC 639.
9. *Ramlal* vs. *Rewa Coalfields Ltd.*, AIR 1962 SC 361.
10. *Ramlal, Motilal and Chhotelal* vs. *Rewa Coalfields Ltd.* AIR 1962 SC 361.

11. *H.H. Raja Harinder Singh* vs. *S. Karnail Singh,* AIR 1957 SC 271.

12. *Rambir Narhargir Gosai* vs. *Prabhakar Bhaskar Gadhaway & Ors.,* AIR 1955 Nagpur 300.

13. *Samala Sundari Dassi & Ors.* vs. *Sridam Chandra,* AIR 1954 Calcutta 569.

14. *Umedsingh Baliram Raghubanshi* vs. *Shankerlal Jhanaklal & Ors.,* AIR (35) 1948 Nagpur 63.

15. *Maqbul Ahmad & Ors.* vs. *Onkar Pratap Narain Singh & Ors.,* AIR 1935 Privy Council 85.

16. *Dhanusingh* vs. *Keshoprasad,* AIR 1923 Nag 246 (D).

17. *Balkrishna* vs. *Tima* 7 Nag LR 176 (C).

RESULT: Writ petition dismissed.

DIPAK MISRA, CJ.

1. Invoking the extraordinary and inherent jurisdiction of this Court under Articles 226 and 227 of the Constitution of India, the petitioner has prayed for issue of a writ of certiorari for quashment of the order No. 137/10-CX dated 8.1.2010 passed by the Joint Secretary of the Government of India, Ministry of Finance, whereby he has concurred with the order dated 8.6.2007 passed by the Commissioner, Customs and Central Excise, the second respondent herein, who had dismissed the appeal preferred by the petitioner under Section 35 of the Central Excise Act, 1944 (for brevity 'the Act') on the ground that the appeal was barred by limitation.

2. The facts which are essential to be stated for adjudication of this petition are that the petitioner, a company incorporated under the Companies Act, 1956, is a merchant exporter and engaged in the export of various engineering goods under Rule 19 of the Central Excise Rules, 2002. It had executed bond with the respondents for exporting the goods by purchasing manufactured excisable goods duty free on the basis of CT-1 issued from time to time by the respondents. It had submitted necessary documents on 28.7.2004 and 19.10.2004 which had been scrutinized by the respondents and thereafter show cause notice No.6 dated 25.7.2005 and show cause notice No.9 dated 30.09.2005 had been

served on the petitioner company. The petitioner explained all queries which were made in the aforesaid show cause notices in its replies dated 24.08.2005 and 04.10.2005 and made a prayer to the respondents to drop the proceedings and to withdraw the show cause notices.

3. As put forth, the adjudicator, namely, the Assistant Commissioner of Central Excise, dealt with the show cause notices jointly and issued an order dated 22.8.2006 making a demand of Rs.3,29,819/- in terms of the provisions of Section 11-AC of the Act.

4. The aforesaid composite order passed on 22.8.2006 was received by the petitioner on 29.8.2006 against which the petitioner preferred an appeal on 28.11.2006. The second respondent by order dated 8.6.2007 came to hold that the appeal had been preferred on the 91st day, one day beyond the condonable period of limitation and, accordingly, rejected the application for condonation of delay which was filed along with the memorandum of appeal.

5. Grieved by the aforesaid order, the petitioner company preferred a revision before the first respondent who by the impugned order contained in Annexure 'F' without adverting to the merits of the case gave the stamp of approval to the order passed by the first appellate authority on the basis that the appeal was barred by time as the delay was not condonable by the appellate authority.

6. In the writ petition, though numerous averments have been made contending, inter alia, that the petitioner is entitled to exemption and the demand made by the authorities is totally unsustainable, yet the gravamen of the stand that arises for consideration is whether the respondent No.2 was justified in rejecting the appeal on the ground that delay was non-condonable and the revisional authority was correct in treating the said order as impeccable.

7. We have heard Mr. Dinesh Kumar Gupta, learned counsel for the petitioner and Ms. Rajdipa Behura along with Mr. C.S. Chauhan, learned counsels for respondent No.1 and Mr. Mukesh Anand, learned counsel for respondent No.2.

8. It is submitted by Mr. Gupta, learned counsel for the petitioner that the petitioner received the order passed by the adjudicating officer on 29th August, 2006 and the right to prefer an appeal under Section 35

of the Act was in subsistence for a period of 60 days and the said period expired only on 28th October, 2006 which was a Saturday and, therefore, he was entitled to have the benefit of 28th and 29th October, 2006 being Saturday and Sunday and, therefore, the Commissioner of Appeal has erred in computing the period of limitation. To put it differently, it is urged by Mr. Gupta that the period has to be computed from the date the right to prefer an appeal had accrued but the Commissioner computed the said period fallaciously and expressed the view that the appeal was preferred on the 91st day and, therefore, he had no authority to condone the delay. To bolster his submissions he has placed reliance on the decisions rendered in **Manohar Joshi v. Nitin BhauRao Patil and Anr.,** (1996) 1 SCC 169, **Ramakant Mayekar v. Celine D' Silva,** (1996) 1 SCC 399 and **Jindal Steel and Power Ltd. and Anr. v. Ashoka Alloy Steel Ltd. and Ors.,** (2006) 9 SCC 340.

9. Combating the aforesaid submissions Ms. Rajdipa Behura, learned counsel for the respondent No.1 and Mr. Mukesh Anand, learned counsel for the respondent No.2 submitted that the method of computation adopted by the Commissioner of Appeals cannot be faulted with as the memorandum of appeal was presented on 28th November, 2006 which was a Tuesday. It is submitted by them that had it been filed on 27th November, 2006 the benefit of the Saturday and Sunday prior to the Monday, would have enured to the benefit of the petitioner for the purpose of computation of period of limitation. It is their further submission that if the method of computation as suggested by the learned counsel for the petitioner is accepted then every Saturday and Sunday which will come within 60 days of preferring the appeal would stand excluded which the law of extension of period of limitation does not conceive of and further such a method of computation is totally impermissible.

10. Ms. Rajdipa Behura, learned counsel for the respondent No.1 has commended us to the decisions in **Singh Enterprises v. Commissioner of Central Excise, Jamshedpur,** (2008) 3 SCC 70 and **Commissioner of Customs and Central Excise v. Hongo India Pvt. Ltd. and Anr.,** (2009) 5 SCC 791.

11. First we shall refer to the decision render in **Hongo India Pvt. Ltd.** (supra) wherein the Apex Court was dealing with the question whether the High Court has power to condone the delay in presentation

of the "reference application" under unamended Section 35(H)(1) of the Act beyond the prescribed period by applying Section 5 of the Limitation Act. A three-Judge Bench referred to Section 35H of the Act, Sections 5 and 29(2) of the Limitation Act, 1963 and eventually held as follows:

> "32. As pointed out earlier, the language used in Sections 35, 35-B, 35-EE, 35-G and 35-H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore, justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days.
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> 33. Even otherwise, for filing an appeal of the Commissioner, and to the Appellate Tribunal as well as revision to the Central Government, the legislature has provided 60 days and 90 days respectively, on the other hand, for filing an appeal and reference to the High Court larger period of 180 days has been provided with to enable the Commissioner and the other party to avail the same. We are of the view that the legislature provided sufficient time, namely, 180 days for filing reference to the High Court which is more than the period prescribed for an appeal and revision.
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> 34. Though, an argument was raised based on Section 29 of the Limitation Act, even assuming that Section 29(2) would be attracted, what we have to determine is whether the provisions of this section are expressly excluded in the case of reference to the High Court.
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> 35. It was contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the

Limitation Act of which the operation is to be excluded. In this regard, we have to see the scheme of the special law which here in this case is the Central Excise Act. The nature of remedy provided therein is such that the legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If, on an examination of the relevant provisions, it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our considered view, that even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent, the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. In other words, the applicability of the provisions of the Limitation Act, therefore, is to be judged not from the terms of the Limitation Act but by the provisions of the Central Excise Act relating to filing of reference application to the High Court.

36. The scheme of the Central Excise Act, 1944 supports the conclusion that the time-limit prescribed under Section 35-H(1) to make a reference to the High Court is absolute and extendable by a court under Section 5 of the Limitation Act. It is well-settled law that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Limitation Act."

12. In **Singh Enterprises** (supra) while dealing with the issue relating to jurisdiction of appellate authority to condone delay beyond permissible period provided under Section 35 of the Act, a two-Judge Bench of the Apex Court after referring to Section 35 of the Act which provides "appeals to Commissioner (Appeals)" held thus:

"8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period upto which the prayer for condonation can be accepted is statutorily provided. It was submitted that the

logic of Section 5 of the Limitation Act, 1963 (in short "the Limitation Act") can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days time can be granted by the appellate authority to entertain the appeal. The proviso to Sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days period."

13. In view of the aforesaid, there can be no scintilla of doubt that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days after expiry of initial 60 days. In the case at hand, the admitted position is that the order passed by the adjudicating officer was received by the petitioner on 29th August, 2006. The appeal was preferred on 28th November, 2006. The Commissioner excluded the date of receipt of the order in-original by the petitioner in terms of provision contained in Section 35-O and took note of the fact that the appeal was presented on the 91st day of the period commencing after the said date of receipt, i.e., one day beyond the condonable period of 30 days and, hence, the same could not have been condoned. Similar view has been expressed by the revisional authority.

14. The question that emanates for consideration is whether the authorities below were justified in declining to condone the delay. The submission of Mr. Gupta is that the initial period of filing of an appeal

is 60 days and the 60th day fell on a Saturday and, therefore, the Saturday and the following Sunday have to be excluded and, in that event, it can safely be held that the appeal was presented on the 90th day. The learned counsel, to buttress his submission, as has been indicated earlier, has commended us to certain authorities. In **Manohar Joshi** (supra), the Apex Court was dealing with presentation of an election petition under Representation of the People Act, 1951 (hereinafter referred to as 'the RP Act'). The last date for filing the election petition according to the limitation prescribed in sub-section (1) of Section 81 of the RP Act was 14.4.1990, but the election petition was actually presented in the High Court on 16.4.1990. It was an admitted position that 14.4.1990 was a Saturday on which the High Court as well as its office was closed on account of a public holiday and 15.4.1990 was a Sunday on which date also the High Court as well as its office was closed and, therefore, the election petition was presented on 16.4.1990. Their Lordships referred to the amended sub-section (1) of Section 81 of the RP Act and also the decision in **Ramlal v. Rewa Coalfields Ltd.,** AIR 1962 SC 361 and posed the question whether Section 10 of the General Clauses Act, 1897 is applicable to the election petition under the RP Act. After posing the question, their Lordships answered the issue as follows:

> 13. It is settled by the decision of this Court in **Ramlal, Motilal and Chhotelal v. Rewa Coalfields Ltd.** AIR 1962 SC 361 that the litigant has a right to avail of limitation upto the last day and his only obligation is to explain his inability to present the suit/ petition on the last day of limitation and each day thereafter till it is actually presented. This being the basic premise, it cannot be doubted that the election petitioner in the present case was entitled to avail of the entire limitation of 45 days upto the last day, i.e., 14.4.1990 and he was required to explain the inability of not filing it only on 14.4.1990 and 15.4.1990 since the petition was actually presented in the High Court on 16.4.1990. If Section 10 of the General Clauses Act applies, the explanation is obvious and the election petition must be treated to have been presented within time.
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> 14. The question now is: Whether the applicability of Section 10 of the General Clauses Act to the presentation of election petitions under the R.P. Act is excluded? No doubt the R.P. Act is a self-

contained code even for the purpose of the limitation prescribed therein. This, however, does not answer the question. It has to be seen whether the context excludes the applicability of Section 10 of the General Clauses Act which is in the part therein relating to the General Rules of Construction of all Central Acts. The legislative history of prescribing limitation for presentation of election petitions in accordance with sub-section (1) of Section 81 is also significant for a proper appreciation of the context. Admittedly, Section 10 of the General Clauses Act applied when by virtue of the requirement in the then existing sub-section (1) of Section 81, the period of limitation was prescribed by Rules framed under The R.P. Act, in Rule 119 of the 1951 Rules. This was expressly provided by Rule 2(6) of the 1951 Rules. There is nothing to indicate that providing the period of limitation in sub-section (1) of Section 81 itself by substitution of certain words by Act 27 of 1956 instead of prescribing the limitation by Rules, was with a view to exclude the applicability of Section 10 of the General Clauses Act. The change appears to have been made to provide for a fixed period in the Act itself instead of leaving that exercise to be performed by the rule-making authority. An express provision in Rule 2(6) of the 1951 Rules was required since the General Clauses Act ipso facto would not apply to Rules framed under the Central Act, even though it would to the Act itself. The context supports the applicability of Section 10 of the General Clauses Act instead of indicating its exclusion for the purpose of computing the limitation prescribed in sub-section (1) of Section 81 for presentation of election petitions.

15. In view of the basic premise that the election petitioner is entitled to avail of the entire limitation of 45 days for presentation of the election petition as indicated by **Ramlal** (supra), if the contrary view is taken, it would require the election petitioner to perform an impossible task in a case like the present, to present the election petition on the last day of limitation on which date the High Court as well as its office is closed. It is the underlying principle of this legal maxim which suggests the informed decision on this point, leading to the only conclusion that Section 10 of the General Clauses Act applies in the computation of the limitation prescribed by sub-section (1) of Section 81 of the R.P. Act for

presentation of an election petition. So computed, there is no dispute that the election petition presented in the present case on 16.4.1990 was within limitation and there was no non-compliance of sub-section (1) of Section 81 of the R.P. Act."

15. In **Ramakant Mayekar** (supra), the Apex Court referred to its earlier decision in **Manohar Joshi** (supra) and came to hold that the election petition was filed within time. The principle laid down therein, we have no shadow of doubt, has no application to the case of the petitioner and hence, the said decision does not render any assistance to the proposition canvassed by the learned counsel for the petitioner.

16. In **Jindal Steel and Power Ltd.** (supa), the Apex Court was considering the legal validity of an order passed by the High Court which had quashed the prosecution under Section 138 of the Negotiable Instruments Act, 1881 and Section 420 of the Indian Penal Code on the ground that the complaint was filed two days after the expiry of the period of limitation. Their Lordships came to hold that the cause of action to file the complaint accrued on 26.1.1997 which has to be excluded in computing the period of limitation as required under Section 12(1) of the Limitation Act, 1963 and, therefore, the limitation would be counted from 27.1.1997 and the complaint was filed on 26.2.1997 within a period of one month from that day. To arrive at the said conclusion, their Lordships referred to the decision in **Saketh India Ltd. & Ors. v. India Securities Ltd.,** (1999) 3 SCC 1. In the said case, their Lordships referred to the decision in **Haru Das Gupta v. State of W.B.,** (1972) 1 SCC 639 wherein it was held thus:

> "7. The aforesaid principle of excluding the day from which the period is to be reckoned is incorporated in Section 12(1) and (2) of the Limitation Act, 1963. Section 12(1) specifically provides that in computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded. Similar provision is made in sub-section (2) for appeal, revision or review. The same principle is also incorporated in Section 9 of General Clauses Act, 1897 which, inter-alia, provides that in any Central Act made after the commencement of the General Clauses Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from" and for the purpose

> of including the last in a series of days or any other period of time, to use the word "to".
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> 8. Hence, there is no reason for not adopting the rule enunciated in the aforesaid case which is consistently followed and which is adopted in the General Clauses Act and the Limitation Act, Ordinarily in computing the time, the rule observed is to exclude the first day and to include the last…."

17. In view of the aforesaid dicta, it is quite clear that the day the cause of action arose for preferring the appeal, that is, the date of receipt of the order from the adjudicator is to be excluded. The Commissioner (Appeals) has excluded the same. Hence, the said decision is also of no help to the learned counsel for the petitioner.

18. In this context, we may refer with profit to the decision in **H.H. Raja Harinder Singh v. S. Karnail Singh,** AIR 1957 SC 271, wherein the Apex Court stated that the basic object under Section 10 of the General Clauses Act is to enable a person to do what he could not have done on a holiday on the next working day.

19. In **Rambir Narhargir Gosai v. Prabhakar Bhaskar Gadhaway & Ors.,** AIR 1955 Nagpur 300, a Division Bench has held thus:

> "(4) Section 4, Limitation Act and S. 10, General Clauses Act embody by general principles enshrined in the two maxims 'Lex non cogit and impossibilia & Actus curiae neminem gravabit'. Even if S.4, Limitation Act is not applicable as contended by the appellant, the respondents can invoke S.10, General Clauses Act. If neither of the provisions can assist the respondents, they can still invoke the general principles embodied in the two provisions: **'Balkrishna v. Tima'** 7 Nag LR 176 (C) and **'Dhanusingh v. Keshoprasad',** AIR 1923 Nag 246 (D).
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> In **'Baghelin v. Mathura Prasad',** 4 All 430 at p.434 (E), a cross-objection filed on the reopening day after the vacation during which the last day for filing it expired was held to be in time. We hold that the cross-objection cannot be dismissed as barred by time."

20. In this context, we may fruitfully refer to the decision in **Umedsingh Baliram Raghubanshi v. Shankerlal Jhanaklal & Ors.,**

AIR (35) 1948 Nagpur 63, wherein Hidayatullah, J. (as his Lordship then was), while dealing with the concept of Court closed when period of limitation expires under Section 4 and Article 166 of the Limitation Act, 1908 held as follows:

> 5. It has been held in 57 ALL. 242 that Ss. 4 and 14, Limitation Act, are not similar in their effect. Whereas under S.14 of the Act the time spent can be excluded, S.4 does not entitle a person to add the days on which the Court is closed to the statutory period. He must do the act on the very next day on which the Court is open. Applying these rulings in the light of the Privy Council case just referred to here, it was imperative for Umed Singh to file his application and make the necessary deposit on 23rd September 1944 when presumably the Court was present. The applicant has been unable to show why he should be excused for not filing his application on 23rd September 1944 and for not making the deposit also on the same date."
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> [Emphasis supplied]

21. In **Maqbul Ahmad & Ors. v. Onkar Pratap Narain Singh & Ors.,** AIR 1935 Privy Council 85, it has been held that what Section 4 provides is that, where the period of limitation prescribed expires on a day when the Court is closed, the application may be made on the day when the Court re-opens, that means the proper Court in which the application ought to have been made.

22. In **Samala Sundari Dassi & Ors. v. Sridam Chandra,** AIR 1954 Calcutta 569, a Division Bench has opined that the whole effect of Section 4 of the Limitation Act is indirectly to extend the period of limitation. The time limited by law would, therefore, be the time prescribed by the relevant Article as extended or enlarged by Section 4.

23. In **M/s Flowmore Pvt. Ltd. v. Keshav Kumar Swarup,** AIR 1983 Delhi 143, this Court after referring to Section 10 of the General Clauses Act, 1897 came to hold that if the office of the Rent Controller is closed, an application for leave to appear and contest the eviction petition would be filed on the next day of the re-opening of the Court by virtue of Section 10 of the General Clauses Act, 1897.

24. From the aforesaid pronouncement of law, it is clear as crystal

that Section 4 of the Limitation Act, 1963 and Section 10 of the General Clauses Act, 1897 enable a person to do what he could not have done on a holiday on the next working day. If the last day for filing an appeal expires on a holiday when the Court is closed and the memorandum of appeal cannot be presented, it is obligatory on the part of the appellant to present the same day when the Court reopens. It is also evincible that where Section 4 of the Limitation Act is not applicable, Section 10 of the General Clauses Act comes into aid by extending period to the next day of reopening of the Court. It is also demonstrable that the said provisions do not entitle a person to add the days on which the Court is closed to the statutory period. To put it differently, if the period of the last day of filing of an appeal comes in the midst of a vacation or a holiday, the said period would not get excluded but is extended by applicability of Section 4 of the Limitation Act or Section 10 of the General Clauses Act which enables the affected party to prefer the appeal on the date when the Court or the office reopens. The submission of Mr. Gupta, learned counsel for the petitioner is that as limitation period of 60 days expired on 28th October, 2006 which was a Saturday, the petitioner was entitled to benefit of 28th and 29th October, 2006 being Saturday and Sunday and, thereafter, the further period of 30 days would commence and, therefore, the appeal was presented within the period of limitation. The said proposition, in our considered opinion, runs counter to the principles which are culled out from the authorities we have referred to hereinbefore. We are disposed to think that the Commissioner as well as the revisional authority has correctly computed the period of limitation and appositely opined that the memorandum of appeal was presented on the 91st day and hence, the Commissioner could not have condoned the delay even if sufficient grounds have been shown beyond 30 days, i.e., 90 days in toto. Thus, the finding recorded on that score stands on terra firma.

25. In view of our aforesaid premised reasons, we do not perceive any merit in this writ petition and accordingly the same stands dismissed with costs which is assessed at Rs.20,000/- only.

ILR (2011) DELHI 175
RSA

SHRI SANATAN DHARAM SABHA, NEW DELHI **....APPELLANT**

VERSUS

SH. CHANDER BHAN (SINCE DECEASED) THROUGH LRS. **....RESPONDENT**

(INDERMEET KAUR, J.)

RSA NO. : 2/2011 **DATE OF DECISION: 10.01.2011**

Suit—Institution—Filed by non-authorised individual—Liable to be dismissed if same not corrected within reasonable time. Plaintiff Society instituted suit in 1983 for possession and perpetual injunction qua suit property—Suit filed through its Secretary—Secretary duly authorised vide resolution dated 14.11.1982—Issues framed on 03.09.2001—Preliminary issue whether suit instituted by duly authorised person—Plaintiff society filed application in 2004 for amendment of plaint—Averred that no resolution dated 14.11.1982, appropriate resolution dated 20.10.1982—No reason given for delay of 21 years—Civil Court dismissed suit—No resolution authorizing Secretary of Plaintiff Society—Hence suit not maintainable—Appellate Court endorsed finding of Civil Court—Hence present second appeal. Technicalities—No perversity in finding—Suit filed in 1983—Specific objection taken in written statement filed in 1983—Amendment application filed after more than two decades—Even new resolution does not pertain to Plaintiff—Categorical averment with reference to resolution by Plaintiff subsequently found to be non-existent—Hence no substantial question of law—Dismissed.

The substantial questions of law had been formulated in the body of the appeal. It has been urged that the provisions of Order 29 Rule 1 of the Code had not been adhered to; technicalities should not come in the way of justice. This argument is without any force. Order 29 Rule 1 of the Code refers to verification of pleadings on behalf of a corporation by its secretary or by director or other principal officer of the corporation who is able to depose to the facts of the case. In the plaint there is a categorical averment that the plaintiff is relying upon the resolution dated 14.11.1982 which in the subsequent statement made by the plaintiff was stated to be non-existent. This provision does not come to the aid of the appellant. **(Para 6)**

Important Issue Involved: No perversity in finding—Suit filed in 1983—Specific objection taken in written statement filed in 1983—Amendment application filed after more than two decades—Even new resolution does not pertain to Plaintiff—Categorical averment with reference to resolution by Plaintiff subsequently found to be non-existent—Hence no substantial question of law—Dismissed in limine.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Sanjay Aggarwal, Advocate.

FOR THE RESPONDENT : Nemo.

CASE REFERRED TO:

1. *United Bank of India* vs. *Naresh Kumar*, 1996 (6) Scale 764.

RESULT: Appeal dismissed.

INDERMEET KAUR, J. (Oral)

CM No.275/2011

Exemption is allowed subject to just exceptions.

RSA No.2/2011

1. This second appeal has impugned the judgment and decree dated 16.9.2010 which had endorsed the findings of the Civil Judge dated 27.4.2006 whereby the suit of the plaintiff seeking possession and perpetual injunction qua the suit property had been dismissed.

2. Present suit had been filed on 15.3.1983 . The plaintiff was a society i.e. Sanatan Dharam Shabha, New Delhi, Laxmi Narain Templa (Birla Mandir). Suit had been filed through its secretary M.L.Anand. Averment in the plaint was that M.L.Anand was duly authorized vide resolution dated 14.11.1982 to file the present suit. On 07.1.2006, a preliminary issue had been framed by the trial court it reads as follows:

> "Whether the suit of the plaintiff has been duly instituted and by a duly authorized person? OPP

3. An application under Order 6 Rule 17 of the Code of Civil Procedure (hereinafter referred to as 'the CPC') had been preferred by the plaintiff on 15.1.2004 seeking a amendment in the plaint to the effect that in fact no resolution dated 14.11.1982 authorizing M.L.Anand to file the present suit was on record; the amendment sought was that the resolution is dated 20.10.1982. In the amendment application, it has been averred that this fact that there was no such resolution dated 14.11.1982 had come to light only recently; application seeking amendment has thus been filed. Trial judge had recorded that the suit had been filed in the year 1983; issues were framed on 03.9.2001. Plaintiff had taken numerous opportunities for the purpose of leading plaintiff evidence as also for filing the present application i.e. the application under Order 6 Rule 17 of the Code. The application was thereafter filed only on 15.01.2004 i.e. after a lapse of almost 21 years for which there was no explanation. Application for amendment had been dismissed. The court had recorded that since there was no resolution authorizing M.L.Anand to file the present suit, his suit was not maintainable; it was dismissed.

4. This finding of the trial court was affirmed by the first appellate court. The finding in the impugned judgment is recorded as under:

> "9. In the memorandum of appeal the terminology society/trust has been used for the appellant reflecting that it is not sure about its constitution. Despite a specific objection having been taken

> by the respondent in written statement dated 27.5.83 appellant chose not to file the registration certificate. It needs to be appreciated that there are separate authorities for registration of a trust under Act No.2 of 1882 and a society under Act No.21 of 1860. In order to remove the ambiguity, the appellant was required to submit a certificate of registration. As appearing in the letter heard on which the resolution dated 16.07.07 in favour of Sh.Vinod Kr Mishara, signatory of appeal, has been engrossed I would take the appellant to be a registered society.
>
> 10. As has been put by the appellant that only minor correction in the date of resolution in favour of Sh.Madan Lal Anand was to be affected by way of amendment, let us examine whether there is anything more than what meets the eye.
>
> 11. The amendment application was filed by appellant when the suit was already pending in the trial court for more than 20 years. By then the plaintiff had availed not less than 10 opportunity for leading evidence over about 2½ years. Absolutely no reasons for the delay in detecting so called "typographical error" have been disclosed. There is nothing to discern the action taken by it against the defaulting official. Having filed a copy or resolution with plaint on 15.05.83 in compliance of Order 7 Rule 14 CPC, Plaintiff was conscious of the fact that original thereof has to be retained in its custody for being produced in court during evidence, in case of need. Apparently the elementary exercise of matching the original with copy to be produced in the court was not performed. The Plaintiff neglected to carryout this exercise even when a specific objection about the quality of resolution dated 14.11.82 was taken by the defendant in his written statement.
>
> 12. While perusing the copy of resolution dated 14.11.82 filed with the plaint, it transpires that it is a typed copy attested by Sh. Madan Lal And as Secretary of plaintiff himself. It must have been prepared from the original and no particulars has been putforth as to had prepared the copy and how only the date mentioned at the top got wrong.
>
> 13. It has been represented that the resolution had in fact been passed on 20.10.82 in the meeting of Plaintiff in favour of

Sh.Anand. A comparison of the two resolutions however, reveals the folly. The resolution dated 20.10.82 pertains to Shri Sanatan Dharma Sabha Lakshmi Narain Temple Trust and has been attested by its Secretary. The name of Plaintiff on the other hand is Shri Sanatan Dharma Sabha, New Delhi. Apparently the projected resolution does not belong to the plaintiff. While the resolution dated 14.11.82 was passed by the working committee of plaintiff, the one dated 20.10.82 was passed in the general meeting of temple trust. The contents of resolution on being minutely perused have also been found to be materially different. It would therefore be exaggerated to contend that resolution of 14.11.82 and 20.10.82 are same except qua their dates. There is nothing to perceive that temple trust and the Plaintiff are identical bodies. Reliance of appellant on the ratio of **United Bank of India Vs. Naresh Kumar,** 1996 (6) Scale 764 does not help it out in the facts of the case in view of the above reasons.

14. In para 16 of the plaint the date of accrual of cause of action had been specified to be 13.11.82 and 15.11.82 and that the same was continued. Through the amendment these dates are not sought to be altered. The mentioned of resolution dated 20.10.82 for initiating legal action against the defendant for a cause of action which had accrued more than three weeks thereafter was unmatched. It would have rendered the plaint diabolical. Had the Plaintiff really aggrieved with the conduct of defendant prior to the date of passing of resolution in favour of its Secretary, it would have revealed the actual date of accrual of cause of action instead of leaving it to be a make believe story.

15. Since the amendment amounted to withdrawal of admission which remained on record for more than 20 years and would have render the plaint incongruous and diabolical to the prejudice of defendant, it could not have been allowed. The consequent observations of ld.trial court on preliminary issue were only corollary.

16. The impugned order and the decree passed by Ld.trial court thus are upheld for the additional reasons given above. The appeal is dismissed."

5. There is no perversity in this finding. It has come on record that the suit was filed in the year 1983; a specific objection had been taken in the written statement which was filed on 27.5.1983 that the suit has not been filed through a duly authorized person. Amendment application was filed after more than two decades. Resolution dated 20.10.1982 on which the plaintiff had sought to rely related to Shri Sanatan Dharam Sabha, Laxmi Narain Temple Trust whereas the plaintiff is one Shri Sanatan Dharam Sabha, New Delhi; even the said resolution dated 20.10.1982 did not pertain to the plaintiff.

6. The substantial questions of law had been formulated in the body of the appeal. It has been urged that the provisions of Order 29 Rule 1 of the Code had not been adhered to; technicalities should not come in the way of justice. This argument is without any force. Order 29 Rule 1 of the Code refers to verification of pleadings on behalf of a corporation by its secretary or by director or other principal officer of the corporation who is able to depose to the facts of the case. In the plaint there is a categorical averment that the plaintiff is relying upon the resolution dated 14.11.1982 which in the subsequent statement made by the plaintiff was stated to be non-existent. This provision does not come to the aid of the appellant.

7. No substantial question of law having arisen the appeal is dismissed in limine.

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EX. P.

PENN RACQUET SPORTS ....DECREE HOLDER

VERSUS

MAYOR INTERNATIONAL LIMITED ....JUDGEMENT DEBTOR

(VIPIN SANGHI, J.)

EX. P. NO. : 386/2008 & E.A. NOS. : 451/2010, 704-705/2009 & 77/2010

DATE OF DECISION: 11.01.2011

Civil Procedure Code, 1908—Section 148—Arbitration and Conciliation Act, 1996—Sections 48, 49—Decree holder, company based in Arizona, USA and Judgment Debtor, Indian Company at New Delhi entered into Trade Mark Licence Agreement which contained Arbitration Clause—Dispute arose between parties, matter referred to Arbitration of International Chambers of Commerce, Paris—Arbitration Award passed in favour of decree holder which moved execution petition to seek enforcement of foreign award—Objection filed by JD; it urged, award contrary to public policy of India as it was contrary to express terms of contract between parties—As per decree holder, foreign award cannot be challenged on merits and it did not violate public policy of India—Held:- In respect of foreign awards, the defence of "public policy" should be construed "narrowly" and the contraventions should be "something more than the contravention of the law of India—The doctrine must be construed in the sense as applied in the field of private international law i.e. being contrary to the fundamental policy of Indian Law—Also the foreign award should be contrary to the interest of India or justice or morality—Merely because a monetary award has been made against an Indian entity on account of its commercial dealings would not make the award either contrary to the interests of India or justice or morality.

For proceedings under Section 34, the challenge is to the validity of an award before it becomes a decree under Section 36 i.e. before it becomes final and executable. While Section 48 is for enforcement of an award when the award is final, and the position is akin to execution of a decree. The foreign award could be challenged in the jurisdiction it is made under the laws of that jurisdiction. But if it is not so challenged, or if after such challenge, the same is upheld, it cannot be challenged in the Indian Courts like a domestic award. The Court is therefore precluded from going behind the foreign award, which is akin to a decree. This is also part of India's treaty obligations under the New York Convention to recognize arbitral awards and to enforce the same without hindrance or delay (except to the limited extent provided in Section 48). **(Para 28)**

Important Issue Involved: In respect of foreign awards, the defence of "public policy" should be construed "narrowly" and the contraventions should be "something more than the contravention of the law of India—The doctrine must be construed in the sense as applied in the field of private international law i.e. being contrary to the fundamental policy of Indian Law—Also the foreign award should be contrary to the interest of India or justice or morality.

[Sh Ka]

APPEARANCES:

FOR THE DECREE HOLDER : Mr. Darpan Wadhwa, Mr. Rishi Agrawala and Mr. Rajeev Kumar, Advocates.

FOR THE JUDGMENT DEBTOR : Mr. Prakash Gautam with Mr. Aman Walesha, Advocates.

CASES REFERRED TO:

1. *Jindal Exports* vs. *Furest Day Lawson* (OMP 29/2003 decided on 11.12.2009).
2. *Venture Global Engineering* vs. *Satyam Computer Services Limited and Anr.,* AIR 2008 SC 1061.
3. *ONGC* vs. *Saw Pipes Limited,* (2003) 5 SCC 705.
4. *Sohan Lal Gupta* vs. *Asha Devi,* (2003) 7 SCC 492.
5. *Furest Day Lawson* vs. *Jindal Exports,* AIR 2001 SC 2293.
6. *Smita Conductors Ltd.* vs. *Euro Alloys Ltd.,* (2001) 7 SCC 728.
7. *Minmetals Germany GmbH* vs. *Ferco Steel Ltd.(UK)* [1999] 1 All ER (Comm) p.315.
8. *Renusagar Power Co. Ltd.* vs. *General Electric Co.,* (1994) Supp (1) SC 644.

RESULT: Petitions dismissed.

VIPIN SANGHI, J.

E.A. No.705/2009

This application has been moved under section 148 CPC to seek enlargement of time for filing of objections under section 48. For the reasons stated in the application, the same is allowed.

EX.P. 386/08 & E.A. Nos.451/2010 & E.A 704/2009

1. This execution petition has been preferred under section 49 of the Arbitration and Conciliation Act, 1996 (the 'Act') to seek the enforcement of a foreign award dated 27.3.2008 in case no. 14582/JHN between the parties.

Decree Holder's case:

2. The decree holder is a company based in Arizona, USA while the judgment debtor is an Indian company at New Delhi. On 1.1.2003 decree

holder entered into a Trade Mark License Agreement (TLA) with the defendant, whereunder the decree holder had granted the judgment debtor license to use the trademark "Penn" for use in certain territories for certain products. In consideration of the said license, the judgment debtor agreed to pay annual royalty to the decree holder. This agreement was effective initially from 1.1.2003 to 31.12.2005. A second TLA was executed for the period 1.1.2006 to 31.12.2009, on similar terms and conditions.

3. Clause 18 of the said TLAs contained an arbitration clause for settlement of any dispute with regard to construction, meaning and effect of provisions of the agreement by arbitration of the International Chamber of Commerce (ICC), Paris. Clause 17 of the said TLAs provided that the agreement shall be governed by, and in accordance with, the laws of Austria.

4. The royalty was due at the beginning of each year, yet payable in quarterly installments. Default in punctual payment of the royalty attracted penal interest of 1.5% compounded monthly. The judgment debtor failed to pay the installments and accordingly, the decree holder terminated the contract on 13.6.2006 and appointed another licensee. On 20.9.2006, the decree holder invoked the arbitration before the International Chamber of Commerce, Paris to seek the appointment of an independent arbitrator. Ms. Gabrielle Nater-Bass, was appointed as the sole arbitrator.

5. The plaintiff having filed its claim before the said arbitrator, the judgment debtor took the objection that it was not liable to pay royalty since the decree holder had breached both the agreements by granting a license to Nebus Loyalty Limited ("Nebus") on 26.7.2005 for Europe, when Nebus was known to be the judgment debtor's existing sub-licensee.

6. After considering the judgment debtor's defence, the arbitrator, upon interpretation of the contracts, concluded that the decree holder had not breached the contracts by granting the license for loyalty programmes to Nebus, since the grant of such a license was permitted by clause 2.2.2 of the TLAs. The claim for outstanding royalties plus interest, and costs was allowed in the arbitral award. The award having been rendered in favor of the plaintiff, the plaintiff has filed the present execution petition to seek the enforcement thereof.

Judgment Debtor's case:

7. The judgment debtor was granted an exclusive agreement to use decree holder's aforesaid trademark. The license was to be an exclusive non transferable license, without the right to further sublicense the same. The decree holder had also agreed not to grant a license, exclusive or non exclusive, to any third party with the proviso that the decree holder could, however, grant such a license to a licensee only for the purposes of supplying licensed products to a consumer either free, or at a reduced cost, as a reward in retailer loyalty and continuity programmes.

8. The judgment debtor submits that the trademark "Penn" of the decree holder did not have market recognition in the sector of golf balls and accessories and inflatable balls. The judgment debtor, therefore, had to incur substantial expenditure on advertising and promotional activities to develop markets for the said products.

9. The judgment debtor entered into an agreement with a company called Nebus Loyalty of Netherlands. Nebus was purchasing Footballs, Volleyballs and Basketballs from the judgment debtor. To bypass the role of judgment debtor, Nebus commenced direct liaison and contact with the decree holder, who authorized it to purchase certain quantity of balls from a source other than the judgment debtor.

10. It is further asserted that the decree holder, in contravention of the TLA, granted a license to Nebus effective from 1.1.2005 to 31.12.2007. Due to the said license being granted by the decree holder to Nebus, it stopped purchasing the balls from the judgment debtor and it also raised various disputes as regards the supplies made by the judgment debtor to Nebus. In June 2005 Nebus raised quality issues. As a confidence building measure, a five member team from Nebus corporate office visited India to look into the matter. A joint inspection was carried out in the presence of Nebus representatives and the balls were found to meet the required specifications and the problem was identified as over inflation of the volleyballs. Judgment debtor alleges that while judgment debtor was sorting out the issues with Nebus regarding the quality of its products, the decree holder in an unethical manner entered directly into discussion with Nebus and openly supported the stand of Nebus, without any basis, that the judgment debtor was supplying defective balls.

11. The judgment debtor vide its email dated 2.7.2005 conveyed their grievance to the decree holder. In response to same, the decree holder wrote a letter dated 4.7.2005 in which the decree holder took an unreasonable stand that supply for Loyalty Programmes were excluded from the scope of the license agreement and also informed the judgment debtor of its decision to deal with another entity called Texaco. By granting an independent license to Nebus and Texaco, the decree holder committed breach of the agreement.

12. Judgment debtor further states that various communications were exchanged between the decree holder and judgment debtor and, finally, in a meeting between the parties held on 28.7.2005, the judgment debtor expressed its concern and also about the adverse effect on judgment debtor's business, owing to grant of direct license to Nebus by the decree holder. However, decree holder responded in a completely uncooperative manner and even showed its ignorance about the judgment debtor's contract with Nebus. On being told that due to the parallel license granted to it by the decree holder, Nebus is defaulting in performing their obligation towards the judgment debtor, the decree holder simplicitor took a stand that the said issue should be sorted out between the judgment debtor and Nebus.

13. It is further stated that the judgment debtor was compelled to stop manufacturing since November, 2005 as Nebus had stopped lifting its orders and the judgment debtor was compelled to sell large number of balls not accepted by the Nebus, at a discounted price to reduce its costs. The judgment debtor at its factory premises had unlifted stock of 60000 balls which were ordered by Nebus and not lifted by it due to grant, by the decree holder, of the direct license to Nebus.

14. The judgment debtor vide its communication dated 2.6.2006 attributed the disruption in the performance of the license agreement on the decree holder, and further claimed that it stood discharged from the obligation under the contract due to the breach committed by the decree holder by granting parallel license to Nebus.

15. The decree holder vide its letter dated 13.6.2006 asserted that the grant of license to Nebus, and the judgment debtor's failure to perform the obligations under the license agreement were separate and unrelated issues. The decree holder terminated the contract between the

parties on alleged breach of nonpayment of royalty. The judgment debtor subsequently addressed a letter dated 20.6.2006 to the decree holder denying its liability to pay any to the decree holder.

16. The dispute was referred to ICC and sole arbitrator was appointed. Thereafter, the learned sole arbitrator drew up the terms of reference on 15.5.2007 and the same were forwarded to the parties on 16.5.2007 for their signature. The decree holder signed the same on 21.5.2007 and forwarded them for the signatures of the judgment debtor. However, the judgment debtor did not sign the same. The sole arbitrator made certain amendments to the terms of reference on 27.6.2007 and sent them to the decree holder for signature. Having obtained decree holder's signature, the sole arbitrator sent the terms of reference to ICC for approval and the same were approved on 23.7.2007.

17. It is further asserted that judgment debtor herein also had filed its counter claim before the said arbitrator, who, on account of the want of deposit of heavy amount of fee, declined to entertain the said counter claim. The judgment debtor was also denied the reasonable opportunity to provide its written defense. It was vide order no.5 dated 5.9.2007 that the arbitrator had rejected the request of the judgment debtor to extend time for filing its statement of defense.

Judgment Debtor's Submissions:

18. The judgment debtor opposes the foreign award and has filed E.A. No.704/2009 under section 48 of the Act to challenge the award on the ground that the impugned award is contrary to public policy of India inasmuch, as, it is contrary to the express terms of the contract between the parties. The grounds of challenge also include the ground that the judgment debtor was otherwise unable to present its case.

19. The controversy revolves around the clause 2.2 of the Standard Terms and Conditions of TLA, which reads as under:

> 2.2 LICENSOR hereby grants LICENSEE a non transferrable exclusive license during the term of this Agreement, without the right to sub license, to apply the Licensed Trademarks to the Licensed Products manufactured by or for LICENSEE and to distribute, advertise, promote and sell such Licensed Products bearing the Licensed Trademarks in the Territory. LICENSOR

> agrees not to grant a license, whether exclusive or non exclusive, to any third party to use the Licensed Trademarks on the licensed products in the Territory, provided that nothing in this Agreement shall prevent LICENSOR from granting such a license:
>
> 2.2.1 pursuant to LICENSOR'S right to do so under the specific circumstances defined in Section 9.2 of this Agreement; or
>
> 2.2.2 to a licensee for the purpose of supplying Licensed Products to consume either free or at a reduced cost, as a reward in retailer loyalty and continuity programmes approved by LICENSOR.

20. Counsel for judgment debtor submits that the interpretation given to Clause 2.2.2 by the arbitrator is contrary to the terms of contract in as much, as, the arbitrator has broken the words "Retailer Loyalty" to arrive at its conclusion, which is not permissible, and the intent of the parties while entering the agreement has to be looked into.

21. Mr. Tikku submits that the Supreme Court in **Venture Global Engineering v. Satyam Computer Services Limited and Anr.,** AIR 2008 SC 1061 has held that even a foreign award is subject to challenge under section 34 of the Act. According to the judgment debtor, the arbitrator has gone beyond her jurisdiction in as much, as, she has gone contrary to the terms of the contract. It is argued that the conclusion drawn by the Arbitrator is totally erroneous and against not only the intention of the parties but also against the express terms of the contract, which renders the award against the public policy of India, as interpreted in **ONGC v. Saw Pipes Limited,** (2003) 5 SCC 705. Mr. Rakesh Tikku, learned counsel for judgment debtor submits that the award, being against the terms of contract, is patently illegal.

22. Learned counsel for the judgment debtor submits that the closure of the right of defence by arbitrator was manifestly unjust and against the principles of natural justice. It is further submitted by Mr. Tikku that since the judgment debtor had already suffered huge losses, it could not pay the separate advances on cost, due to which counter claims of the judgment debtor were not entertained by the arbitral tribunal. The procedural time table was amended by the arbitrator. The judgment debtor is an Indian Company and was undergoing a bad phase due to the breach

committed by Nebus as well as the decree holder. For this reason, the judgment debtor could not arrange a counsel who could represent it before the tribunal.

Decree Holder's Submissions:

23. Learned counsel for the decree holder Mr. Darpan Wadhwa submits that the objections have been filed under section 48 of the Act, which is in Chapter I of Part II of the Act dealing with **"enforcement"** of New York Convention awards. There was no challenge raised to the said foreign award by the judgment debtor either in Switzerland, or in India. The scheme of the Act provides that the award would be deemed to be a decree of this court. He submits that the Award cannot be challenged on its merits and the expression 'public policy of India' in relation to Section 48(2) does not permit such a challenge at all. In **Renusagar Power Co. Ltd. v. General Electric Co.,** (1994) Supp (1) SC 644, the scope of challenge to a foreign award before the Court has been considered extensively, where it has been categorically held that it is impermissible to assail a foreign award on merits. He refers to paragraphs 31-37 of this judgment which read as follows:

> I. Scope of enquiry in proceedings for recognition and enforcement of a foreign award under the Foreign Awards Act
>
> **31. During the course of his submissions, Shri Venugopal has assailed the award of the Arbitral Tribunal on grounds touching on the merits of the said award** insofar as it relates to the award of compensatory damages on regular interest (item No. 2), delinquent interest (item No. 3), compensatory damages on delinquent interest (item No. 4) and compensatory damages on the price of spare parts (item No. 6). **This gives rise to the question whether in proceedings for enforcement of a foreign award under the Foreign Awards Act it is permissible to impeach the award on merits.**
>
> **32.** With regard to enforcement of foreign judgments, the position at common law is that a foreign judgment which is final and conclusive cannot be impeached for any error either of fact or of law and is impeachable on limited grounds, namely, the court of the foreign country did not, in the circumstances of case, have jurisdiction to give that judgment in the view of English

> law; the judgment is vitiated by fraud on part of the party in whose favour the judgment is given or fraud on the part of the court which pronounced the judgment; the enforcement or recognition of the judgment would be contrary to public policy; the proceedings in which the judgment was obtained were opposed to natural justice. (See : Dicey & Morris, The Conflict of Laws, 11th Edn., Rules 42 to 46, pp. 464 to 476; Cheshire & North, Private International Law, 12th Edn., pp. 368 to 392.)
>
> **33. Similarly in the matter of enforcement of foreign arbitral awards at common law a foreign award is enforceable if the award is in accordance with the agreement to arbitrate which is valid by its proper law and the award is valid and final according to the arbitration law governing the proceedings. The award would not be recognised or enforced if, under the submission agreement and the law applicable thereto, the arbitrators have no justification to make it, or it was obtained by fraud or its recognition or enforcement would be contrary to public policy or the proceedings in which it was obtained were opposed to natural justice** (See : *Dicey & Morris, The Conflict of Laws*, 11th Edn., Rules 62-64, pp. 558 & 559 and 571 & 572; Cheshire & North, *Private International Law*, 12th Edn., pp. 446-447). The English courts would not refuse to recognise or enforce a foreign award merely because the arbitrators (in its view) applied the wrong law to the dispute or misapplied the right law.
>
> (See : Dicey & Morris, *The Conflict of Laws*, 11th Edn., Vol. II, p. 565.)
>
> **34.** Under the Geneva Convention of 1927, in order to obtain recognition or enforcement of a foreign arbitral award, the requirements of clauses (a) to (e) of Article I had to be fulfilled and in Article II, it was prescribed that even if the conditions laid down in Article I were fulfilled recognition and enforcement of the award would be refused if the Court was satisfied in respect of matters mentioned in clauses (a), (b) and (c). The principles which apply to recognition and enforcement of foreign awards are in substance, similar to those adopted by the English courts at common law. (See : Dicey & Morris, The Conflict of Laws,

11th Edn., Vol. I, p. 578). It was, however, felt that the Geneva Convention suffered from certain defects which hampered the speedy settlement of disputes through arbitration. The New York Convention seeks to remedy the said defects by providing for a much more simple and effective method of obtaining recognition and enforcement of foreign awards. **Under the New York Convention the party against whom the award is sought to be enforced can object to recognition and enforcement of the foreign award on grounds set out in sub-clauses (a) to (e) of clause (1) of Article V and the court can, on its own motion, refuse recognition and enforcement of a foreign award for two additional reasons set out in sub-clauses (a) and (b) of clause (2) of Article V. None of the grounds set out in sub-clauses (a) to (e) of clause (1) and sub-clauses (a) and (b) of clause (2) of Article V postulates a challenge to the award on merits.**

35. Albert Jan van den Berg in his treatise The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation, has expressed the view:

> "It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator. Furthermore, under the Convention the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration." (p. 269)

36. Similarly Alan Redfern and Martin Hunter have said:

> **"The New York Convention does not permit any review on the merits of an award to which the Convention applies and in this respect, therefore, differs from the provisions of some systems of national law governing the challenge of an award, where an appeal to the courts on points of law may be permitted."** (Redfern & Hunter, Law and Practice of International Commercial Arbitration, 2nd Edn., p. 461.)

37. In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits. (emphasis supplied.)

24. While considering the question as to whether a 'broad' or 'narrow' meaning to be assigned to the expression *"public policy of India", the court held that "a distinction is drawn while applying the said rule of public policy between a mater governed by domestic law and a matter involving conflict of laws. The application of doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to involve public policy in cases involving a foreign element than when a purely municipal legal issue is involved"*. Considering various judgments of the English, US and French courts, the Supreme Court came to the conclusion that in respect of foreign awards, the defence of "public policy" should be construed "narrowly", and the contraventions should be "something more than contravention of the law of India." It was also held that the doctrine must be construed in the sense as applied in the field of private international law, which means, if it is "(i) contrary to the fundamental policy of Indian law".

25. This principle was reiterated by the Supreme Court in **Smita Conductors Ltd. v. Euro Alloys Ltd.,** (2001) 7 SCC 728, in paras 11 and 12; which read as follows:-

> "11. This Court in Renusagar case examined the scope of enquiry in proceedings for recognition and enforcement of a foreign award under the Act and after referring to the concepts in private

international law, the Geneva Convention of 1927 and the New York Convention on Arbitration of 1958, held that it is limited to the grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits.

12. Shri Venugopal next contended that the award is contrary to public policy of India and Reserve Bank of India had issued certain circulars imposing restrictions on imports and, therefore, attracted the force majeure clause. The question of what is the "public policy" has been considered by this Court in Renusagar case6 by interpreting the words in Section 7(1)(b)(ii) of the Act to mean "public policy of India and not of the country whose law governs the contract or of the country of the place of arbitration" (SCC Headnote). In doing so, this Court took note of the fact that under the Arbitration (Protocol and Convention) Act, 1937 the expression "public policy of India" had been used, whereas the expression "public policy" is used in the Act; that after the decision of this Court in **V.O. Tractoroexport v. Tarapore & Co.** Section 3 was substituted to bring it in accord with the provisions of the New York Convention on Arbitration of 1958 which seeks to remedy the defects in the Geneva Convention of 1927 that hampered the speedy settlement of disputes through arbitration; that to achieve this objective by dispensing with the requirement of the leave to enforce the award by the courts where the award is made and thereby avoid the problem of double exequatur; that the scope of enquiry is restricted before the court enforcing the award by eliminating the requirement that the award should not be contrary to the principles of the law of the country in which it is sought to be relied upon; that enlarging the field of enquiry to include public policy of the country whose law governs the contract or of the country of place of arbitration, would run counter to the expressed intent of the legislation. Therefore, it was held that the words "public policy" are intended to broaden the scope of enquiry so as to cover the policy of other countries, that is, the country whose law governs the contract or the country of the place of the arbitration. In the absence of a definition of the expression "public

policy", it is construed to mean the doctrine of public policy as applied by the courts in which the foreign award is sought to be enforced and this Court referred to a large catena of cases in this regard. **Therefore, we will proceed on the basis that the expression "public policy" means public policy of India and the recognition and enforcement of foreign award cannot be questioned on the ground that it is contrary to the foreign country public policy and this expression has been used in a narrow sense must necessarily be construed as applied in private international law which means that a foreign award cannot be recognised or enforced if it is contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality.** Shri Venugopal strongly attacked the correctness of the conclusions reached by the arbitrators on the effect of force majeure clause." (emphasis supplied).

26. In **Saw Pipes** (supra), the Supreme Court was faced with the question of the scope of interference for setting aside a domestic award under Section 34 of the Act. The expression 'public policy of India' was considered and it was held that in the context of challenge to the validity of domestic awards, the scope of interference should be broader. It was, therefore, held that 'hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar case it is required to be held that the award could be set aside if it is patently illegal".

27. Mr. Wadhwa submits that the Supreme Court accepted the submission of Mr. Desai that the expression "public policy" as used in Section 34 has wider scope than that used in Section 48. He refers to the following passage from this decision.

> "20. Mr Desai submitted that the narrow meaning given to the term "public policy" in Renusagar case is in context of the fact that the question involved in the said matter was with regard to the execution of the award which had attained finality. It was not a case where validity of the award is challenged before a forum prescribed under the Act. He submitted that the scheme of Section 34 which deals with setting aside the domestic arbitral award and Section 48 which deals with enforcement of foreign

award are not identical. A foreign award by definition is subject to double exequatur. This is recognized inter alia by Section 48(1) and there is no parallel provision to this clause in Section 34. For this, he referred to Lord Mustill & Stewart C. Boyd, Q.C.'s Commercial Arbitration 2001 wherein (at p. 90) it is stated as under:

> "Mutual recognition of awards is the glue which holds the international arbitrating community together, and this will only be strong if the enforcing court is willing to trust, as the convention assumes that they will trust the supervising authorities of the chosen venue. It follows that if, and to the extent that the award has been struck down in the local court it should as a matter of theory and practice be treated when enforcement is sought as if to the extent it did not exist.

21. He further submitted that in foreign arbitration, the award would be subject to being set aside or suspended by the competent authority under the relevant law of that country whereas in the domestic arbitration the only recourse is to Section 34.

22. The aforesaid submission of the learned Senior Counsel requires to be accepted. From the judgments discussed above, it can be held that the term "public policy of India" is required to be interpreted in the context of the jurisdiction of the court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under the Code of Civil Procedure that once the decree has attained finality, in an execution proceeding, it may be challenged only on limited grounds such as the decree being without jurisdiction or a nullity. But in a case where the judgment and decree is challenged before the appellate court or the court exercising revisional jurisdiction, the jurisdiction of such court would be wider. Therefore, in a case where the validity of award is challenged, there is no necessity of giving a

narrower meaning to the term "public policy of India". On the contrary, wider meaning is required to be given so that the "patently illegal award" passed by the Arbitral Tribunal could be set aside. If narrow meaning as contended by the learned Senior Counsel Mr Dave is given, some of the provisions of the Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which specifically provides that "Arbitral Tribunal shall decide in accordance with the terms of the contract". Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produced on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of sub-sections (2) and (3) of Section 28. Section 28(2) specifically provides that the arbitrator shall decide ex aequo et bono (according to what is just and good) only if the parties have expressly authorised him to do so. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of "patent illegality".

…. … …

…. … …

…. … …

"31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy

connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. **Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case it is required to be held that the award could be set aside if it is patently illegal.** The result would be – award could be set aside if it is contrary to:

(a) Fundamental policy of Indian law; or

(b) The interest of India; or

(c) Justice or morality, or

(d) In addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

28. On the basis of the above decision, counsel for the decree holder submitted that the proceedings under Section 48 are distinct from those under Section 34. For proceedings under Section 34, the challenge is to the validity of an award before it becomes a decree under Section 36 i.e. before it becomes final and executable. While Section 48 is for enforcement of an award when the award is final, and the position is akin to execution of a decree. The foreign award could be challenged in the jurisdiction it is made under the laws of that jurisdiction. But if it is not so challenged, or if after such challenge, the same is upheld, it cannot be challenged in the Indian Courts like a domestic award. The Court is therefore precluded from going behind the foreign award, which is akin to a decree. This is also part of India's treaty obligations under the New York Convention to recognize arbitral awards and to enforce the same without hindrance or delay (except to the limited extent provided in

Section 48).

29. Mr. Wadhwa further submitted that the Judgment debtor's reliance on **Venture Global** (supra) is misplaced. The ratio of that case is that even a foreign award can be challenged under Section 34, if Part I of the Act is not expressly or impliedly excluded by contract. In that context, the wider meaning of public policy would apply, which adds the ground of 'patent illegality'. The said judgment is, in any case, not applicable since the substantive law applicable to the dispute in the present case is Austrian Law, and according to **Venture Global** (supra), the challenge to the award on the grounds under Section 34 of the Act would lie only if the substantive law applicable to contract is the Indian Law. He submits that since parties had agreed to apply the ICC Rules, Part I of the Act, in any case, is impliedly excluded in view of Section 28(1)(b) of the Act. It is submitted that the Judgment debtor has not filed any proceedings under Section 34, and cannot now file the same, since the same would be beyond limitation.

30. He further submits that the Supreme Court has, in **Furest Day Lawson v. Jindal Exports,** AIR 2001 SC 2293 held, after discussing the old and new Act, that earlier the award was made a rule of the court, and now it is already stamped as a decree and executed accordingly. In this decision, the Supreme Court held:

"31. Prior to the enforcement of the Act, the law of arbitration in this country was substantially contained in three enactments, namely, (1) the Arbitration Act, 1940, (2) the Arbitration (Protocol and Convention) Act, 1937, and (3) the Foreign Awards (Recognition and Enforcement) Act, 1961. A party holding a foreign award was required to take recourse to these enactments. The Preamble of the Act makes it abundantly clear that it aims at consolidating and amending Indian laws relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. The object of the Act is to minimize supervisory role of the court and to give speedy justice. In this view, the stage of approaching the court for making the award a rule of court as required in the Arbitration Act, 1940 is dispensed with in the present Act. If the argument of the respondent is accepted, one of the objects of the Act will be frustrated and defeated. Under the old Act, after making award and prior to

execution, there was a procedure for filing and making an award a rule of court i.e. a decree. Since the object of the Act is to provide speedy and alternative solution to the dispute, the same procedure cannot be insisted upon under the new Act when it is advisedly eliminated. **If separate proceedings are to be taken, one for deciding the enforceability of a foreign award and the other thereafter for execution, it would only contribute to protracting the litigation and adding to the sufferings of a litigant in terms of money, time and energy. Avoiding such difficulties is one of the objects of the Act as can be gathered from the scheme of the Act and particularly looking to the provisions contained in Sections 46 to 49 in relation to enforcement of a foreign award. In para 40 of Thyssen1 judgment already extracted above, it is stated that as a matter of fact, there is not much difference between the provisions of the 1961 Act and the Act in the matter of enforcement of foreign award. The only difference as found is that while under the Foreign Awards Act a decree follows, under the new Act the foreign award is already stamped as the decree. Thus, in our view, a party holding a foreign award can apply for enforcement of it but the court before taking further effective steps for the execution of the award has to proceed in accordance with Sections 47 to 49. In one proceeding there may be different stages. In the first stage the court may have to decide about the enforceability of the award having regard to the requirement of the said provisions. Once the court decides that the foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award a rule of court/decree again. If the object and purpose can be served in the same proceedings, in our view, there is no need to take two separate proceedings resulting in multiplicity of litigation. It is also clear from the objectives contained in para 4 of the Statement of Objects and Reasons, Sections 47 to 49 and the scheme of the Act that every final arbitral award is to be enforced as if it were a decree of the court.** The submission that the execution petition could not be permitted to convert as an

application under Section 47 is technical and is of no consequence in the view we have taken. In our opinion, for enforcement of a foreign award there is no need to take separate proceedings, one for deciding the enforceability of the award to make it a rule of the court or decree and the other to take up execution thereafter. In one proceeding, as already stated above, the court enforcing a foreign award can deal with the entire matter. Even otherwise, this procedure does not prejudice a party in the light of what is stated in para 40 of Thyssen1 judgment." (emphasis supplied)

31. This Court, in a recent judgment of **Jindal Exports v. Furest Day Lawson** (OMP 29/2003 decided on 11.12.2009) again reiterated that a narrow meaning must be given under Section 48 proceedings for enforcement of a foreign award and affirmed the principle that only when the nation's "most basic notions of morality and justice" are violated, would the public policy doctrine be applied to refuse enforcement. It was also held that such an award cannot be challenged on its merits. The Court held as follows:-

"42. Mr. Singh lastly submitted that in the present case the Arbitrator had given no interpretation with regard to Clause 8 of GCC. According to him, there was a complete abdication of the said exercise. Consequently, according to him, the question of substituting the view of the Arbitrator of interpretation did not arise at the first place in the present case. He submitted that judgments cited by respondent with regard to power of this Court to interpret a particular clause of the contract were under the Arbitration Act, 1940 – which did not take into account the new Section 28 of Act, 1996.

43. After hearing the parties, I am of the view that all the cases proceed on admitted facts and the legal issues raised by petitioner have to be determined in accordance with the directions given by the Supreme Court in the judgment rendered in the case between the parties. It is pertinent to mention that in para 33 of **Fuerst Day Lawson Ltd.** (supra), the Supreme Court while remitting the case had directed this Court .for proceeding with enforcement of the award in the light of the observations made.. Consequently,

what I have to first consider is whether the impugned Awards are enforceable or not.

44. In my opinion, Part II Chapter I is an integrated scheme which has to be applied to New York Convention awards. Mr. Ramesh Singh's argument that validity of the arbitration clause between the parties had to be tested under Sections 44 and 47 read with New York Convention de hors Section 48(1)(a) of Act, 1996 is untenable in law. In fact, Section 44 of Act, 1996 has to be read in conjunction with Section 48(1)(a) of Act, 1996 and New York Convention as would be apparent from the juxtaposition of the relevant portion of the said two Sections along with the New York Convention which reads as under :-

> **44.** Definition. – In this Chapter, unless the context otherwise requires, .foreign award. means an arbitral award ……. (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies…
>
> xxxx xxxx xxxx xxxx
>
> 48. Conditions for enforcement of foreign awards. – (1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that –
>
> (a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or…
>
> xxxx xxxx xxxx xxxx
>
> ARTICLE II……. 3. The Court of a Contracting State when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said **agreement** is null and void, inoperative and incapable of being performed. (emphasis supplied)

45. Consequently, on a conjoint reading of the relevant provisions of Part II Chapter I of Act, 1996, I am of the opinion that any challenge to the validity of the arbitration clause has to be determined with reference to the substantive law governing the contract itself. In fact, the expression "Agreement" in Sections 44 and 48 has to be given the same meaning."

32. Counsel for the decree holder further submits that the challenge raised by the judgment debtor otherwise only relates to the interpretation of the terms of the contract and more specifically of Clause 2.2.2 in the present enforcement proceedings. This challenge is not maintainable for the following reasons: -

(i) Interpretation of contract as done by the arbitrator is final. It is not subject to challenge even under Section 34 of the Act even if it is a domestic award. In the present case, no challenge under Section 34 of the Act has been made, yet the Judgment debtor is seeking to challenge the award and the interpretation of the contract by the Arbitrator under Section 48 of the Act which is impermissible in law.

(ii) The governing law of the contract was Austrian Law. The Judgment debtor, however, is now seeking to interpret the contract as per Indian Law in the present Enforcement proceedings which is impermissible in law. Such application of Indian law after the arbitration award has been passed for interpreting the contract is not permitted even by the contract, and would have been disallowed even by the Arbitrator. The Judgment debtor has not produced any expert witness under Austrian Law to sustain its objection on the point of interpretation of Clause 2.2.2 in its favour. Therefore, the Judgment debtor cannot be allowed to reopen the arbitration proceedings through the objections.

(iii) The defence of the Judgment debtor even before the Arbitrator as recorded by the Arbitrator itself was only an afterthought.

(iv) The Arbitrator has clearly held that Clause 2.2.2 permitted

the decree holder to appoint Nebus. Once the Arbitrator has held that no breach of Clause 2.2.2 had been committed by the Decree holder, the defence of the Judgment debtor before the Arbitrator was liable to fail and now the said defence cannot be reopened in the present enforcement proceedings.

33. Counsel for the decree holder submits that the ground of violation of the principles of natural justice is based on the premise that the ICC arbitrator declined the judgment debtor's prayer for extension of time to file its statement of defence. Mr Wadhwa submits that the judgment debtor was given ample opportunity to file the defence. In the agreed procedural time table of 15.5.2007, the judgment debtor was to file its statement of defence by 17.8.2007. Even though no extension was sought, the arbitrator extended the time upto 27.8.2007. Only thereafter, the arbitrator rejected this request for further extension. He further submitted that judgment debtor has raised issues of advance costs and an amendment to the terms of reference as being against the principles of natural justice. However there is no specific ground taken, raising this defence, let alone any "proof" under section 48. No objection was raised before the arbitrator. Judgment debtor abandoned the arbitration and now cannot be heard to say that it had not been given adequate opportunity.

34. Mr. Wadhwa submitted that the judgment debtor did file its reply to the claim, documents in support thereof and gave its views on the Terms of Reference. This establishes that full opportunity was given and duly utilized. He drew the courts attention to page 18/33 of the award para 73 where the judgment debtors arguments were considered by the arbitrator.

> "73. Mayor argues that clause 2.2.2 STC is not applicable to loyalty companies such as Nebus. Mayor seems to argued that Nebus does not sell their products directly to the final customers but rather to supermarkets, gas stations etc., who then provide the products as part of reward to loyalty programee for free or at a reduced price to their customers. In other words, according to Mayor Nebus does not deliver the products directly to the final customer as would be expected of a licensee in the sense of clause 2.2.2 of STC (cf. explanations in R-Answer, N18)"

35. Mr. Wadhwa has relied on Supreme Court judgment in **Sohan Lal Gupta v. Asha Devi,** (2003) 7 SCC 492 where court has observed that *"each party complaining violation of natural justice will have to prove the misconduct of the arbitration tribunal in denial of justice to them. The appellant must show that he was otherwise unable to present his case which would mean that the matters were outside his control and not because of his own failure to take advantage of an opportunity duly accorded to him."* Counsel for the decree holder has also placed reliance on Queens Bench decision in **Minmetals Germany GmbH v. Ferco Steel Ltd.**(UK) [1999] 1 All ER (Comm) p.315, wherein it had been held in para 12:

> "In my judgment, the inability to present a case to arbitrators within section 103(2)(c) contemplates atleast that the enforcee has been prevented from presenting his case by matters outside his control. This will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice. Where, however, the enforcee has due to matters within his control not provided himself with the means of taking advantage of an opportunity given to him to present his case, he does not in my judgment bring himself within that exception to enforcement under the convention. In the present case, that is what has happened. I, therefore, reject the submissions of Ferco that it was unable to present its case."

36. Before I proceed to consider the rival submissions of the parties, I may note that the judgment debtor moved EA No.451/2010 to seek the permission of the Court to lead evidence in support of the objections raised by it. However, by order dated 01.06.2010, the judgment debtor had already been granted final opportunity to place on record whatever documents the judgment debtor desire to rely upon. On 30.07.2010, another opportunity was granted to the judgment debtor to file the compilation of documents. Eventually, they were filed by the judgment debtor on 10.08.2010. As the proceedings conducted before the learned arbitrator are a matter of record, and in the light of the objections raised by the judgment debtor, it was not considered necessary to require the judgment debtor to lead any further evidence.

Discussion & Conclusion:

37. Having heard learned counsels for the parties and considered their submissions, the award in question and the precedents cited by them, I am of the view that there is no merit in the objections raised by the judgment debtor, and consequently E.A. No.704/2009 preferred by the judgment debtor under section 48 of the Act is liable to be dismissed, and the foreign award in question is enforceable under Chapter I Part II of the Act. Consequently, the award is deemed to be a decree of this Court.

38. There is merit in the submission of Mr. Wadhwa that the expression "Public Policy of India" as under in section 48(2)(b) of the Act carries a narrow meaning when compared to the meaning assigned to the same expression in the context of section 34(2)(b)(ii) of the Act. As rightly pointed out by Mr. Wadhwa, proceedings under section 48 and 49 falling in Chapter I Part II of the Act are proceedings for enforcement of foreign awards, namely, the New York Convention Awards. The grounds on which the foreign award may not be recognized, and consequently may not be enforced, are contained in section 48.

39. Pertinently, it is not the case of the judgment debtor that any of the grounds set out in section 48(1)(a) to (e) or under section 48(2)(a) is made out in the facts of the present case. The only ground of challenge is that the enforcement of the award would be contrary to the Public Policy of India. In support of this submission, Mr. Tikku has submitted that the interpretation to clause 2.2.2 of the agreement in question given by the learned arbitrator goes against the spirit of the contract.

40. Firstly, I may note that the interpretation of a term of the agreement squarely falls within the domain of the arbitral tribunal, and even in the case of domestic awards, the Court would not interfere with the award, unless it can be shown that the said interpretation is contrary to the contractual terms. In the present case, the task of the judgment debtor is even more onerous inasmuch, as, this Court is dealing with a foreign award, and the agreement of the parties was that the agreement would be governed by the Austrian law. Consequently, the interpretation of the contract cannot be done by application of Indian law. Left to itself, this Court would interpret the contractual terms by application of the Indian law. As to what is the Austrian law has not even cited before me. No expert opinion has been led in evidence to controvert the opinion of

the learned arbitrator. The endeavour of the judgment debtor has been to interpret the contractual clause in question by application of the Indian law, which is not permissible.

41. In any event, even if the submission of Mr. Tikku were to be accepted that because of the decision of the Supreme Court in **Venture Global** (supra), the foreign award can be subjected to challenge under section 34 of the Act, and even if the application preferred by the judgment debtor under section 48 of the Act were to be treated as objections filed under section 34 of the Act, even so, I find no merit in the submission of Mr. Tikku that the award suffers from a patent illegality. The interpretation given by the learned arbitrator to clause 2.2.2 is a plausible interpretation of the said clause. Under clause 2.2.2 of the agreement, nothing in the agreement prevented the licensor-decree holder from granting a license to a third party *"for the purposes of supplying licensed products to consume either free, or at a reduced cost, as a reward in retailer loyalty and continuity programmes approved by licensor"*. Consequently, the licensee could supply the licensed products to another entity which could in turn, consume the said products by free distribution or by distribution at reduced cost, as a reward in retailer loyalty and continuity programmes.

42. The submission of Mr. Tikku that the license could be granted by resort to clause 2.2.2 only to that entity which itself consumes either free, or at reduced costs the licensed products, has not been accepted by the arbitrator, and on a plain reading of clause 2.2.2 of the agreement, it cannot be said that the interpretation given to the said clause by Mr. Tikku is the only plausible interpretation that could be given to the said clause, even on the application of the Indian law.

43. It is pertinent to note that the decree holder had made known to the judgment debtor its interpretation of clause 2.2.2, and the judgment debtor was also aware of the fact that the decree holder granted a license to Nebus with effect from 01.01.2005 by resort to clause 2.2.2, yet the judgment debtor admittedly entered into a second LTA for the period 01.01.2006 to 31.12.2009.

44. As held by the Supreme Court, the recognition and enforcement of a foreign award cannot be denied merely because the award is in contravention of the law of India. The award should be contrary to the

fundamental policy of Indian law, for the Courts in India to deny recognition and enforcement of a foreign award. The other grounds recognized by the Supreme Court to refuse recognition and enforcement of a foreign award are that the award is contrary to the interests of India, or justice or morality. Merely because a monetary award has been made against an Indian entity on account of its commercial dealings, would not make the award either contrary to the interests of India or justice or morality.

45. The submission of Mr. Tikku that the award in question was made in breach of the principles of natural justice is also meritless. A perusal of award reveals that terms of reference were drawn up by the sole arbitrator and discussed with parties on 15.5.2007. On 16.5.2007 terms were circulated to parties for signing. Decree holder signed and forwarded the terms to judgment debtor on 21.5.2007. The judgment debtor failed to sign them, despite reminders being sent on 5.6.2007 and 13.6.2007. Upon expiry of deadline to sign the terms, amendments were made on 27.6.2007 and sent to decree holder for signing. Thereafter they were sent to ICC court of international arbitration. ICC court of international arbitration informed the approval on 23.7.2007. Judgment debtor was again invited to sign the terms of reference within 15 days, which it failed to do.

46. The submission of the judgment debtor that it could not otherwise pursue its counter claim before the learned arbitrator also has no merit. A perusal of award reveals that ICC fixed the cost of counter claim as USD 53000 payable by judgment debtor on 29.5.2007. Final opportunity for making payment was granted on 5.7.2007 within 15 days. As per ICC rules, the counterclaims were to be considered withdrawn from the current proceedings, if the fee was not paid. The judgment debtor was supposed to submit its 1st submission, the full statement of counterclaim by 2.7.2007. Due to judgment debtors nonpayment of the advance on costs the ICC decreed on 7.8.2007 that the counterclaims were considered withdrawn. The sole arbitrator sent out revised timetable on 16.8.2007 and judgment debtor was to submit statement of defence by 17.8.2007. After judgment debtor failed to submit the statement of defence, the arbitrator granted final 10 day extension till 27.8.2007, even though the same was not sought by the judgment debtor. The judgment debtor submitted a belated request for extension on 30.8.2007, which was rejected

by arbitrator.

47. The judgment debtor having agreed to the resolution of the disputes between the parties by resort to arbitration, to be conducted by ICC, Paris, was bound by the Rules of the said organization. If, for entertainment of the judgment debtors counter claim, the ICC costs and fee of the arbitrator had to be deposited in advance, the judgment debtor cannot raise a grievance that merely because the judgment debtor could not afford to make payment thereof, its counter claim ought not to have been left unconsidered.

48. Consequently, I dismiss E.A. No.704/2009 filed by the judgment debtor, and hold that the foreign award in question is enforceable under Chapter I Part II of the Act, and the award is deemed to be decree of this Court.

E.A. NO.77/2010

This application has been moved by the decree holder to require the judgment debtor to deposit the awarded amount in this Court pending the hearing of the application preferred by the judgment debtor under section 48 of the Act. No specific orders were passed in this application and the same remained pending. Now that the objections of the judgment debtor under section 48 of the Act (E.A. No.704/2009) have been dismissed, this application has become infructuous. The same is dismissed as such.

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RSA

MANAGER, SHRI SANATAN DHARAM SARASWATI BAL MANDIR SCHOOL & ANR. **....APPELLANTS**

VERSUS

SHRI K.P. BANSAL & ORS. **....RESPONDENTS**

(INDERMEET KAUR, J.)

RSA NO. : 3/2011 **DATE OF DECISION: 11.01.2011**

(A) Specific Relief Act, 1963—Section 14, 34—Declaration of subsistence of employment contract—Plaintiff/ Respondent selected as TGT Math treacher by Appellant—Forced to submit letter of resignation after working for 12 years—Suit filed for declaration and mandatory injunction that resignation letter obtained under pressure and coercion—Decree of declaration passed by Civil Court—Mandatory injunction passed directing reinstatment with full back wages and consequential benefits—Appellate Court upheld decision of Civil Court—Hence present second appeal—Held—Plaintiff has made clear averment of harassment—Resignation forcibly obtained on 18.08.1991—Resignation accepted on 19.08.1991 with immediate effect—Resolution accepting resignation also passed on 19.08.1991—Entire process completed within 3 days—Hence conclusion that resignation tendered under coercion—Evident that Plaintiff had no intention of resigning—No perversity in finding of Courts below.

Record has been perused. The plaint has made a clear averment that the plaintiff had been harassed by the defendant and under his dictation was forced to write a resignation letter which was not binding upon him. 18.8.1991 was admittedly a Sunday. It was a holiday. Prior to this resignation, Exhibit DW1/1 (dated 18.4.1991), Exhibit DW1/3 (dated 24.9.1991), Exhibit DW1/4 (dated 6.5.1991) and Exhibit DW 1/5 (dated 15.5.1991) were memos issued by the defendant School to the plaintiff. The Trial Judge has delved into these documents and recorded that these repeated memos had built up pressure upon the plaintiff. The resignation letter dated 18.8.1991 was proved as Exhibit PW1/D4. It was forwarded to the Manager under the signatures of the Principal of the School. Exhibit DW1/17 (dated 19.8.1991) was issued by the General Secretary of the Samarth Siksha Samiti, Jhandewalan informing the plaintiff that his resignation has been accepted with immediate effect. On the same date, i.e. 19.8.1991 itself, a resolution Exhibit DW2/P1 was passed which was a resolution by circulation whereby the resignation of the plaintiff had been accepted by all the members of the Samarth Siksha Samiti, i.e., defendant No.3. On 21.8.1991, Exhibit PW1/D6 was issued by the Principal of the defendant School informing the plaintiff that his resignation letter dated 18.8.1991 has been accepted with immediate effect. All this happened in a span of three days. **(Para 8)**

10. Exhibit PW1/D2 is the letter dated 9.8.1991 written by the plaintiff explaining the fact that he had issued the said school leaving certificate in accordance with the practice prevailing at that time; he had handed it over to the Librarian for checking it; his intention was not malafide. Even upto 9.8.1991, it is evident that the plaintiff had no intention of resigning. After this letter of 9.8.1991, there was no documentary evidence which was produced by either party but it is obvious that in this intervening period i.e., between 9.8.1991 to 18.8.1991 the plaintiff had changed his mind and tendered his resignation; the pressure which had

been built up over him in this preceding period had in fact necessitated this resignation. The cumulative effect of all these facts had been considered by the Trial Judge and upheld by the First Appellate Court. The findings in the impugned judgment of this proposition, inter alia, are recorded as under:-

"7. The only crucial issue on which the present appeal hinges upon is whether the resignation tendered by the plaintiff was voluntary or whether it was tendered under coercion and duress practiced upon the plaintiff by defendant Nos. & 4. It was the case of the plaintiff that on 18.08.1991, he was summoned to the school and he was forced to pen down his resignation. Whereas it was the case of defendant Nos. 3 & 4 that to avoid a stigma on his career and to avoid any inquiry against him he tendered his resignation willingly vide letter dated 18.08.1991 handed on 19.08.1991. The documents which have been placed on record by both the parties have been carefully scrutinized by this court. There is a well known old adage that Humans have a tendency to lie but the documents do not. The resignation letter proved as Ex.PW.1/D4 is dated 18.08.1991 which day was admittedly a Sunday. In the said letter, it has been categorically stated that **"kindly treat this as my notice period right from today i.e. 18.08.1991"** The endorsement of defendant No. 1 **"Forwarded to Manager"** is also undated. The bare perusal of the letter shows that there is nothing in the letter which indicates that the resignation letter was given on 19.08.1991 and not on 18.08.1991 as alleged by defendant Nos. 3 & 4. The second letter of even date proved as Ex.PW.1/5 is a letter addressed to the management SDM Saraswati Bal Mandir by the plaintiff Shri K.P. Bansal which is with respect to waiver of deposition of three months salary. The said letter categorically mentions that:

"As per talk when I resigned so you should not ask not to deposit three months salary from me and oblige".

The implication of phrase "As per talk when I resigned so you should not ask" is very significant. The same implies that the resignation was preceded by some conversation between the parties wherein some element of force/coercion can be visualized. As per the said letter, it appears that the plaintiff was being insisted upon to deposit three months salary because he purportedly showed his desire to resign with immediate effect, to make it some genuine. However, in view of his forced resignation, considering the said condition to be penal, the plaintiff made a request to the management not to ask him to deposit the three months salary. The said letter appears to have been written under protest on the same day i.e., on 18.08.1991. From the careful scrutiny of the said letters, it appears that soon after the plaintiff was forced to write the letter of resignation on 18.08.1991 at the behest of defendant Nos. 3 & 4, he on the same date after leaving the room, wrote and handed letter requesting the management not to ask him to deposit of three months salary.

8. It was further alleged by the plaintiff that on 19.08.1991 he went to the school, marked his attendance and then went to withdraw his resignation which was not permitted by defendant Nos. 3 & 4. The pace at which the resignation of plaintiff was accepted also contradicts the stand of defendant Nos. 3 & 4. Ex. DW.1/17 is a letter dated 19.08.1991 addressed to the plaintiff written by Shri Om Parkash Nigam, General Secretary on behalf of Samarth Siksha Samiti which states that the resignation of Shri K.P. Bansal is accepted with immediate effect and he is relieved from the service. It further states that **"the cheque with respect to his dues and salary upto 19.08.1991 is attached herewith, please accept the same".** Thereafter another letter dated 21.08.1991 proved as Ex.PW1/D.6 was written to the plaintiff by

the Principal in Hindi on the letter head of the school wherein it has been specifically mentioned (English Translation):

"That as per the letter of Samarth Siksha Samiti, resignation letter given on 18.08.1991 by you is being accepted with immediate effect. Your salary upto 19.08.1991 has been deposited in your bank account.

Enclosed herewith:

1) Letter of Samarth Siksha Samiti accepting resignation.

2) Photocopy of cheque with respect to salary upto 19.08.1991

3) Photocopy of deposit slip for the aforesaid cheque.

It is very relevant to note that the aforesaid letter dated 21.08.1991 Ex.PW.1/D6 mentions that **"your resignation letter dated 18.08.1991 given on 18.08.1991 has been accepted with immediate effect."** The phrase **"given on 18.08.1991"** is self explanatory and needs no corroboration. It necessarily means that the said letter dated 18.08.1991 was indeed given on 18.08.1991 and not on 19.08.1991 as alleged. It also mentions that attached herewith is a copy of Letter of Samarth Siksha Samiti acception your resignation. It is rather strange that if the plaintiff had handed over his resignation dated 18.08.1991 on 19.08.1991 when he came to the school in regular course of business, then why was the cheque dated 19.08.1991 of his dues not handed over to him personally although letter dated 19.08.1991 (Ex.DW.1/17) written by Shri Om Parkash Nigam, General Secretary on behalf of Samarth Siksha Samiti mentions enclosure of the said cheque. Then again if the said

cheque was sent to plaintiff vide Ex. DW1/17 what was the necessity of enclosing photocopy of cheque alongwith deposit slip vide letter date 21.08.1991 Ex. PW1/D6. Sending original cheque to the plaintiff vide Ex. DW.1/17 and deposit of same cheque vide deposit slip is also self contradictory. Since it is claimed by defendant Nos. 3 & 4 that cheque in question ˇwas deposited directly in the bank account of plaintiff, therefore an adverse inference is liable to be drawn against the defendant No. 3 & 4 with respect to Ex. DW.1/17 not being authentic. It is the admitted case of defendant Nos. 3 & 4 that after the said cheque was deposited in the account of plaintiff photocopy of the cheque in question and its deposit slip was sent to the plaintiff. However, as per the communication between defendant Nos. 3 & 4 and Syndicate Bank with which the school was maintaining the account of the plaintiff, the said cheque was not credited as per the deposit slip dated 21.08.1991 in the account of the plaintiff on 21.08.1991. When the plaintiff made enquiries regarding the deposit of the cheque in his account on 21.08.1991, he was informed that 21.08.1991 was a bank holiday and no such cheque was deposited in his account. From the aforesaid it is very obvious that no such deposit was made by the school in the account of the plaintiff on 21.08.1991 because defendant Nos. 3 & 4 had any intention to pay the salary of the plaintiff, the plaintiff would have been handed his dues on 19.08.1991 itself when the plaintiff came to the school to withdraw his resignation and according to the defendant Nos. 3 & 4 to tender his resignation.

9. Another argument which was put forth by the defendant Nos. 3 & 4 was that vide Resolution by Circulation dated 19.08.1991 (Ex. DW.2/P.1), the Members of the Managing Committee resolved that the resignation tendered by the plaintiff be accepted

with immediate effect i.e. 19.08.1991. The perusal of the Resolution by Circulation shows that it bears the signatures of some signatories whose designation is not given. The said resolution is also not signed by the Principal, Shri Satish Kalra who was the ex-officio member of the managing committee and a necessary signatory. It is rather important to note that it has been claimed by the Principal Shri Satish Kalra that the resignation dated 18.08.1991 was given to him by the plaintiff on 19.08.1991 meaning thereby that the Principal was present in the School on 19.08.1991. However, the Resolution by Circulation does not bear his signature even though he was an important signatory. The said fact only leads to one conclusion that Resolution by Circulation was also resolved on 18.08.1991 and not 19.08.1991 as alleged. The said contradiction also lends credence to the stand of the plaintiff that the Resolution by Circulation dated 19.08.1991 was circulated and signed by signatories/ people present in the room at that point of time on 18.08.1991 itself and not on 19.08.1991. The date 19.08.1991 was written only to corroborate the stand of defendant Nos. 3 & 4.

10. It is also relevant that minutes of meeting purported to have been recorded for the meeting which took place allegedly on 19.08.1991 were not produced. Rule XXIII of The Delhi School Education Act and Rules 1973 provides that "Records of the proceedings of the Managing Committee shall be kept in a book or a register where the pages shall be numbered consecutively with the signature and stamp of the Chairman or the Manager on each page. **As per Rule 17 of the said Act, the Managing committee is bound to observe the provisions of the Act and the rules made there under faithfully and scrupulously".** The mandate of the said rules has obviously not been followed. Even no documentary

proof was placed on record to show that the signatories to the Resolution by Circulation were members of the Managing Committee of the school. The entire proceeding were completed within a day i.e., on 19.08.1991 so as to not give any time to the plaintiff to withdraw his resignation. In the absence of the aforesaid necessary conditions, I am of the opinion that conduct of defendant Nos. 3 & 4 in accepting the so-called voluntary resignation of the plaintiff show utter haste and is malafide. **(Para 10)**

There is no perversity in this finding. It is in detail and after an indepth examination of the oral and documentary evidence drawn the said conclusion. The judgment of **Jagdish Singh** (supra) is also inapplicable as this is not a case where relevant evidence has been ignored or the Court below has followed an illegal approach. **(Para 11)**

(B) Delhi School Education Rules, 1973—Rule 114A—Resignation by employee to be accepted within 30 days by managing committee with approval of Director—Requires fulfillment of both conditions—Acceptance of resignation tendered and approval by directorate of Education—Twin conditions are cumulative and not alternative—Failing one, resignation cannot be said to be final.

Issue No.3 had been framed with regard to the applicability of Rule 114 A of the Delhi School Education Rules. Para 12 of the impugned judgment has dealt with this contention. \While dealing with applicability of Rule 114 A of the Rules, the Court had recorded as under:--

"The import of the said rule in such cases has been explained in **MALA TANDON THUKRAL Vs. DIRECTOR OF EDUCATION AND ORS.** (Supra). In the said case on similar facts the acceptance of resignation of Mala Tandon Thukral was struck down as the conditions under Rule 114 A were not complied

with. It was held therein that the bilateral act of resignation requires two conditions to be fulfilled;

(i) tendering of the resignation of the petitioner and acceptance by the school and

(ii) approval by Directorate of Education within a period of 30 days.

The second condition being not fulfilled in the case, the resignation of the plaintiff cannot be said to be operative. The twin conditions above stated are cumulative and not in the alternative and failing one of these, the resignation cannot be said to be final."

Approval by the Directorate of Education in this case was on 13.12.1991 i.e., after lapse of 30 days. This answers the second submission made by learned counsel for the appellant.

The judgment of the Executive Committee of Vaish Degree College, Shamli and others (supra) is also inapplicable. Para 17 postulates that although normally a Court would not give a declaration about the subsistence of the contract of an employee after he has been removed from service but there are three well-recognized exceptions – (i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India; (ii) where a worker is sought to be reinstated on being dismissed under the Industrial Law; and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute."

There has been a breach of Rule 114A of the Delhi School Education Rules; defendant has acted in breach of it. **(Para 12)**

(C) Service Law—Declaration of subsistence of contract of employee after removal from service—Normally not given—Three exceptions—Where removal of public servant in contravention of Article 311—Where worker is sought to be reinstated on being dismissed—Where statutory body acts in violation of statutory provisions—School has acted in breach of Section 114A of Delhi School Education Rules—No substantial question of law—Hence appeal dismissed.

Issue No.3 had been framed with regard to the applicability of Rule 114 A of the Delhi School Education Rules. Para 12 of the impugned judgment has dealt with this contention. \While dealing with applicability of Rule 114 A of the Rules, the Court had recorded as under:--

"The import of the said rule in such cases has been explained in **MALA TANDON THUKRAL Vs. DIRECTOR OF EDUCATION AND ORS.** (Supra). In the said case on similar facts the acceptance of resignation of Mala Tandon Thukral was struck down as the conditions under Rule 114 A were not complied with. It was held therein that the bilateral act of resignation requires two conditions to be fulfilled;

(i) tendering of the resignation of the petitioner and acceptance by the school and

(ii) approval by Directorate of Education within a period of 30 days.

The second condition being not fulfilled in the case, the resignation of the plaintiff cannot be said to be operative. The twin conditions above stated are cumulative and not in the alternative and failing one of these, the resignation cannot be said to be final."

Approval by the Directorate of Education in this case was on 13.12.1991 i.e., after lapse of 30 days. This answers the second submission made by learned counsel for the appellant.

The judgment of the Executive Committee of Vaish

Degree College, Shamli and others (supra) is also inapplicable. Para 17 postulates that although normally a Court would not give a declaration about the subsistence of the contract of an employee after he has been removed from service but there are three well-recognized exceptions – (i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India; (ii) where a worker is sought to be reinstated on being dismissed under the Industrial Law; and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute."

There has been a breach of Rule 114A of the Delhi School Education Rules; defendant has acted in breach of it.

(Para 12)

Important Issue Involved: Declaration of subsistence of contract of employee after removal from service—Normally not given—Three exceptions—Where removal of public servant in contravention of Article 311—Where worker is sought to be reinstated on being dismissed—Where statutory body acts in violation of statutory provisions.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANTS : Mr. S.K. Taneja, Sr. Advocate with Mr. Puneet Taneja, Advocate.

FOR THE RESPONDENT : Nemo.

CASES REFERRED TO:

1. *Jagdish Singh* vs. *Natthu Singh* AIR 1992 Supreme Court 1604.
2. *Executive Committee of Vaish Degree College, Shamli and others* vs. *Lakshmi Narain and others.* AIR 1976 Supreme Court 888.

RESULT: Appeal dismissed.

INDERMEET KAUR, J. (Oral)

C.M.No.326/2011

Exemption allowed subject to all just exceptions.

RSA No.3/2011 & C.M.No.325/2011

1. This appeal has impugned the judgment and decree dated 1.11.2010 which has endorsed the finding of the Trial Judge dated 21.4.2009, whereby the suit of the plaintiff, Shri K.P. Bansal, seeking a decree of declaration and mandatory injunction to the effect that his resignation letter dated 18.8.1991 had been obtained under pressure and coercion was decreed in his favour. A decree of declaration was passed in favour of the plaintiff and against the defendant that the said resignation was obtained by force by the defendant; decree for mandatory injunction had also been passed directing the reinstatement of the plaintiff with full back wages and consequential benefits with effect from 18.8.1991.

2. The plaintiff had been selected in the Sanatam Dharam Saraswati Bal Mandir School, Punjabi Bagh as a TGT Maths teacher. He worked there for about 12 years. On 18.8.1991, the plaintiff was called to the school and forced to write a letter of resignation. The plaintiff lodged a police complaint dated 24.8.1991. A representation to the Director of Education was also forwarded on 26.8.1991 to which no reply was received. The appeal filed by the plaintiff before the appellate body i.e., the Delhi School Education Tribunal was dismissed on 11.6.1992. The plaintiff also filed a writ petition wherein it was observed that the dispute raised by the plaintiff could only be decided by a suit. The present suit was accordingly filed.

3. In the written statement the contention was that the plaintiff had voluntarily accepted his guilt by tendering his letter dated 19.8.1991. His resignation was not given under force or coercion. The suit was also not maintainable in the present form.

4. The Trial Judge had framed the following nine issues:-

"1. Whether on 18.08.1991, defendant No.4 took the resignation of the plaintiff forcibly as averred in para-6 of the plaint? OPP.

2. Whether plaintiff is entitled to decree for mandatory

injunction as prayed for? OPP.

3. Whether approval given by defendant No.2 deserves to be declared as null and void as same has been sought and had come beyond the prescribed time as prescribed by rules no.114 A of the Delhi School Education Rules? OPP.

4. Whether the management sanctioned the resignation is proper or not? OPP.

5. Whether suit as framed is not maintainable? OPD.

6. Whether present suit is barred by provisions of Section 25 of the Delhi School Education Rules? OPD.

7. Whether suit of the plaintiff is barred by principle of resjudicata and the plaintiff is estopped from filing the present suit? OPD.

8. Whether the conduct of the plaintiff is such as to disentitle him to the discretionary relief of declaration and injunction? OPD.

9. Relief."

5. On the basis of the oral and the documentary evidence led by the respective parties, the suit of the plaintiff was decreed.

6. The First Appellate Court had endorsed this finding.

7. This is a second appeal. On behalf of the appellant, it has been urged that the impugned judgment is a perversity; the circumstances and the background in which this resignation had been tendered and accepted by the defendants has not been adverted to; the impugned judgment has only gone into the question as to whether the resignation letter dated 18.8.1991 was voluntary or unvoluntary; the other prior circumstances have been ignored. The Court has overlooked the fact that the racket of fake certificates was going on in the school since April, 1991 and in fact a complaint to the said effect had also been forwarded to the concerned Police Station in May, 1991. On 9.8.1991, the plaintiff had voluntarily admitted his guilt. All these prior circumstances have been illegally ignored. The finding in the impugned judgment are perverse and liable to be set aside as the relevant evidence has been ignored. For this proposition, reliance has been placed on AIR 1992 Supreme Court 1604 **Jagdish**

Singh Vs. Natthu Singh. This is a substantial question of law. The Court has also not approached the proposition with regard to the applicability of Rule 114A of the Delhi School Education Rules, 1973 in the correct perspective. It has lastly been submitted that a contract for personnel service could not have been enforced in the manner in which the suit was decreed. For this proposition, reliance has been placed upon a judgment of the Apex Court reported in AIR 1976 Supreme Court 888 **Executive Committee of Vaish Degree College, Shamli and others Vs. Lakshmi Narain and others.**

8. Record has been perused. The plaint has made a clear averment that the plaintiff had been harassed by the defendant and under his dictation was forced to write a resignation letter which was not binding upon him. 18.8.1991 was admittedly a Sunday. It was a holiday. Prior to this resignation, Exhibit DW1/1 (dated 18.4.1991), Exhibit DW1/3 (dated 24.9.1991), Exhibit DW1/4 (dated 6.5.1991) and Exhibit DW 1/5 (dated 15.5.1991) were memos issued by the defendant School to the plaintiff. The Trial Judge has delved into these documents and recorded that these repeated memos had built up pressure upon the plaintiff. The resignation letter dated 18.8.1991 was proved as Exhibit PW1/D4. It was forwarded to the Manager under the signatures of the Principal of the School. Exhibit DW1/17 (dated 19.8.1991) was issued by the General Secretary of the Samarth Siksha Samiti, Jhandewalan informing the plaintiff that his resignation has been accepted with immediate effect. On the same date, i.e. 19.8.1991 itself, a resolution Exhibit DW2/P1 was passed which was a resolution by circulation whereby the resignation of the plaintiff had been accepted by all the members of the Samarth Siksha Samiti, i.e., defendant No.3. On 21.8.1991, Exhibit PW1/D6 was issued by the Principal of the defendant School informing the plaintiff that his resignation letter dated 18.8.1991 has been accepted with immediate effect. All this happened in a span of three days.

9. Trial Court after a close scrutiny of the said documents had drawn a conclusion that this appeared to be a pre-planned venture by the School; the School was well aware of the fact that the resignation would be tendered by the plaintiff which on 19.8.1991 itself was accepted and on the same date the members of defendant No.3 passed a resolution by circulation accepting the said resignation. Approval of the resignation was also accorded on the same date and informed to the plaintiff. It was

in this background and in these circumstances that the Court drew a conclusion that this resignation appears to have been tendered by the plaintiff under pressure and coercion. The repeated memos issued to the plaintiff (noted supra) followed by a letter dated 19.7.1991 issued to Ashok Arora , father of the child, in whose favour the School Leaving Certificate had allegedly been issued were all documents adverted to by the Trial Judge before drawing this conclusion.

10. Exhibit PW1/D2 is the letter dated 9.8.1991 written by the plaintiff explaining the fact that he had issued the said school leaving certificate in accordance with the practice prevailing at that time; he had handed it over to the Librarian for checking it; his intention was not malafide. Even upto 9.8.1991, it is evident that the plaintiff had no intention of resigning. After this letter of 9.8.1991, there was no documentary evidence which was produced by either party but it is obvious that in this intervening period i.e., between 9.8.1991 to 18.8.1991 the plaintiff had changed his mind and tendered his resignation; the pressure which had been built up over him in this preceding period had in fact necessitated this resignation. The cumulative effect of all these facts had been considered by the Trial Judge and upheld by the First Appellate Court. The findings in the impugned judgment of this proposition, inter alia, are recorded as under:-

> "7. The only crucial issue on which the present appeal hinges upon is whether the resignation tendered by the plaintiff was voluntary or whether it was tendered under coercion and duress practiced upon the plaintiff by defendant Nos. & 4. It was the case of the plaintiff that on 18.08.1991, he was summoned to the school and he was forced to pen down his resignation. Whereas it was the case of defendant Nos. 3 & 4 that to avoid a stigma on his career and to avoid any inquiry against him he tendered his resignation willingly vide letter dated 18.08.1991 handed on 19.08.1991. The documents which have been placed on record by both the parties have been carefully scrutinized by this court. There is a well known old adage that Humans have a tendency to lie but the documents do not. The resignation letter proved as Ex.PW.1/D4 is dated 18.08.1991 which day was admittedly a Sunday. In the said letter, it has been categorically stated that **"kindly treat this as my notice period right from today i.e. 18.08.1991"** The endorsement of defendant No. 1 **"Forwarded to Manager"** is also undated. The bare perusal of the letter shows that there is nothing in the letter which indicates that the resignation letter was given on 19.08.1991 and not on 18.08.1991 as alleged by defendant Nos. 3 & 4. The second letter of even date proved as Ex.PW.1/5 is a letter addressed to the management SDM Saraswati Bal Mandir by the plaintiff Shri K.P. Bansal which is with respect to waiver of deposition of three months salary. The said letter categorically mentions that:

> **"As per talk when I resigned so you should not ask not to deposit three months salary from me and oblige".**

The implication of phrase "As per talk when I resigned so you should not ask" is very significant. The same implies that the resignation was preceded by some conversation between the parties wherein some element of force/coercion can be visualized. As per the said letter, it appears that the plaintiff was being insisted upon to deposit three months salary because he purportedly showed his desire to resign with immediate effect, to make it some genuine. However, in view of his forced resignation, considering the said condition to be penal, the plaintiff made a request to the management not to ask him to deposit the three months salary. The said letter appears to have been written under protest on the same day i.e., on 18.08.1991. From the careful scrutiny of the said letters, it appears that soon after the plaintiff was forced to write the letter of resignation on 18.08.1991 at the behest of defendant Nos. 3 & 4, he on the same date after leaving the room, wrote and handed letter requesting the management not to ask him to deposit of three months salary.

8. It was further alleged by the plaintiff that on 19.08.1991 he went to the school, marked his attendance and then went to withdraw his resignation which was not permitted by defendant Nos. 3 & 4. The pace at which the resignation of plaintiff was accepted also contradicts the stand of defendant Nos. 3 & 4. Ex. DW.1/17 is a letter dated 19.08.1991 addressed to the plaintiff written by Shri Om Parkash Nigam, General Secretary on behalf of Samarth Siksha Samiti which states that the resignation of

Shri K.P. Bansal is accepted with immediate effect and he is relieved from the service. It further states that **"the cheque with respect to his dues and salary upto 19.08.1991 is attached herewith, please accept the same".** Thereafter another letter dated 21.08.1991 proved as Ex.PW1/D.6 was written to the plaintiff by the Principal in Hindi on the letter head of the school wherein it has been specifically mentioned (English Translation):

"That as per the letter of Samarth Siksha Samiti, resignation letter given on 18.08.1991 by you is being accepted with immediate effect. Your salary upto 19.08.1991 has been deposited in your bank account.

Enclosed herewith:

1) Letter of Samarth Siksha Samiti accepting resignation.

2) Photocopy of cheque with respect to salary upto 19.08.1991

3) Photocopy of deposit slip for the aforesaid cheque.

It is very relevant to note that the aforesaid letter dated 21.08.1991 Ex.PW.1/D6 mentions that **"your resignation letter dated 18.08.1991 given on 18.08.1991 has been accepted with immediate effect."** The phrase **"given on 18.08.1991"** is self explanatory and needs no corroboration. It necessarily means that the said letter dated 18.08.1991 was indeed given on 18.08.1991 and not on 19.08.1991 as alleged. It also mentions that attached herewith is a copy of Letter of Samarth Siksha Samiti acception your resignation. It is rather strange that if the plaintiff had handed over his resignation dated 18.08.1991 on 19.08.1991 when he came to the school in regular course of business, then why was the cheque dated 19.08.1991 of his dues not handed over to him personally although letter dated 19.08.1991 (Ex.DW.1/17) written by Shri Om Parkash Nigam, General Secretary on behalf of Samarth Siksha Samiti mentions enclosure of the said cheque. Then again if the said cheque was sent to plaintiff vide Ex. DW1/17 what was the necessity of enclosing

photocopy of cheque alongwith deposit slip vide letter date 21.08.1991 Ex. PW1/D6. Sending original cheque to the plaintiff vide Ex. DW.1/17 and deposit of same cheque vide deposit slip is also self contradictory. Since it is claimed by defendant Nos. 3 & 4 that cheque in question was deposited directly in the bank account of plaintiff, therefore an adverse inference is liable to be drawn against the defendant No. 3 & 4 with respect to Ex. DW.1/17 not being authentic. It is the admitted case of defendant Nos. 3 & 4 that after the said cheque was deposited in the account of plaintiff photocopy of the cheque in question and its deposit slip was sent to the plaintiff. However, as per the communication between defendant Nos. 3 & 4 and Syndicate Bank with which the school was maintaining the account of the plaintiff, the said cheque was not credited as per the deposit slip dated 21.08.1991 in the account of the plaintiff on 21.08.1991. When the plaintiff made enquiries regarding the deposit of the cheque in his account on 21.08.1991, he was informed that 21.08.1991 was a bank holiday and no such cheque was deposited in his account. From the aforesaid it is very obvious that no such deposit was made by the school in the account of the plaintiff on 21.08.1991 because defendant Nos. 3 & 4 had any intention to pay the salary of the plaintiff, the plaintiff would have been handed his dues on 19.08.1991 itself when the plaintiff came to the school to withdraw his resignation and according to the defendant Nos. 3 & 4 to tender his resignation.

9. Another argument which was put forth by the defendant Nos. 3 & 4 was that vide Resolution by Circulation dated 19.08.1991 (Ex. DW.2/P.1), the Members of the Managing Committee resolved that the resignation tendered by the plaintiff be accepted with immediate effect i.e. 19.08.1991. The perusal of the Resolution by Circulation shows that it bears the signatures of some signatories whose designation is not given. The said resolution is also not signed by the Principal, Shri Satish Kalra who was the ex-officio member of the managing committee and a necessary signatory. It is rather important to note that it has been claimed by the Principal Shri Satish Kalra that the resignation dated 18.08.1991 was given to him by the plaintiff on 19.08.1991

meaning thereby that the Principal was present in the School on 19.08.1991. However, the Resolution by Circulation does not bear his signature even though he was an important signatory. The said fact only leads to one conclusion that Resolution by Circulation was also resolved on 18.08.1991 and not 19.08.1991 as alleged. The said contradiction also lends credence to the stand of the plaintiff that the Resolution by Circulation dated 19.08.1991 was circulated and signed by signatories/people present in the room at that point of time on 18.08.1991 itself and not on 19.08.1991. The date 19.08.1991 was written only to corroborate the stand of defendant Nos. 3 & 4.

10. It is also relevant that minutes of meeting purported to have been recorded for the meeting which took place allegedly on 19.08.1991 were not produced. Rule XXIII of The Delhi School Education Act and Rules 1973 provides that "Records of the proceedings of the Managing Committee shall be kept in a book or a register where the pages shall be numbered consecutively with the signature and stamp of the Chairman or the Manager on each page. **As per Rule 17 of the said Act, the Managing committee is bound to observe the provisions of the Act and the rules made there under faithfully and scrupulously".** The mandate of the said rules has obviously not been followed. Even no documentary proof was placed on record to show that the signatories to the Resolution by Circulation were members of the Managing Committee of the school. The entire proceeding were completed within a day i.e., on 19.08.1991 so as to not give any time to the plaintiff to withdraw his resignation. In the absence of the aforesaid necessary conditions, I am of the opinion that conduct of defendant Nos. 3 & 4 in accepting the so-called voluntary resignation of the plaintiff show utter haste and is malafide.

11. There is no perversity in this finding. It is in detail and after an indepth examination of the oral and documentary evidence drawn the said conclusion. The judgment of **Jagdish Singh** (supra) is also inapplicable as this is not a case where relevant evidence has been ignored or the Court below has followed an illegal approach.

12. Issue No.3 had been framed with regard to the applicability of Rule 114 A of the Delhi School Education Rules. Para 12 of the impugned judgment has dealt with this contention. \While dealing with applicability of Rule 114 A of the Rules, the Court had recorded as under:--

"The import of the said rule in such cases has been explained in **MALA TANDON THUKRAL Vs. DIRECTOR OF EDUCATION AND ORS.** (Supra). In the said case on similar facts the acceptance of resignation of Mala Tandon Thukral was struck down as the conditions under Rule 114 A were not complied with. It was held therein that the bilateral act of resignation requires two conditions to be fulfilled;

(i) tendering of the resignation of the petitioner and acceptance by the school and

(ii) approval by Directorate of Education within a period of 30 days.

The second condition being not fulfilled in the case, the resignation of the plaintiff cannot be said to be operative. The twin conditions above stated are cumulative and not in the alternative and failing one of these, the resignation cannot be said to be final."

Approval by the Directorate of Education in this case was on 13.12.1991 i.e., after lapse of 30 days. This answers the second submission made by learned counsel for the appellant.

The judgment of the Executive Committee of Vaish Degree College, Shamli and others (supra) is also inapplicable. Para 17 postulates that although normally a Court would not give a declaration about the subsistence of the contract of an employee after he has been removed from service but there are three well-recognized exceptions – (i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India; (ii) where a worker is sought to be reinstated on being dismissed under the Industrial Law; and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute."

There has been a breach of Rule 114A of the Delhi School Education

Rules; defendant has acted in breach of it.

13. No substantial question of law has arisen. Appeal as also the pending application is dismissed.

ILR (2011) DELHI 229
CS(OS)

SHRI NARENDER GUPTA ....PLAINTIFF

VERSUS

M/S RELIANCE POLYCRETE LTD. & ORS. ....DEFENDANTS

(V.K. JAIN, J.)

CS(OS) NO. : 1588/2008 DATE OF DECISION: 11.01.2011

Code of Civil Procedure, 1908—Order 17 Rule 2—Leave to defend—Defendant no.2 to 4 Directors of Defendant no. 1 Ltd. Company—Defendant no.5 subsidiary of Punjab Agro Industries Corporation Ltd. (an Associate of Defendant no.1)—Plaintiff alleged that Defendant no.2 to 4 induced him to part with Rs. 2.40 Crores for supply of wheat—Said amount deposited with Defendant no. 5 in account of Defendant no.1—Defendant no.5 issued two orders for release of wheat in account of Defendant no.1—Defendant no.5 informed plaintiff about refund of remaining amount and first sought his affidavit prior to releasing the amount to Defendant no.1—Plaintiff filed affidavit dropping claims qua Defendant no.5—Subsequently money released to Defendant no.1—Defendant no.1 also released amount to plaintiff leaving outstanding balance of Rs. 37,82,000—Cheque issued by Defendant no.1 for the said sum—Cheque dishonoured—Suit for recovery filed under Order XXXVII Code of Civil Procedure—

Applications filed by defendant for leave to contest—Held—Defendant no.1 admittedly issued cheque—Though claimed name of payee left blank—Cheque was left blank—Cheque stated to be delivered to Defendant no.5—No reason given why name of left blank—Company does not ordinarily issue cheques in such manner nor are the same accepted—Said contention difficult of accept—No dispute as to the issuance of cheque—Thus no worthwhile defence raised—Inevitable conclusion that balance amount was agreed to be paid by Defendant no.1 to Plaintiff—No triable issue raised—Defence raised highly implausible that Defendant could defeat case of Plaintiff—Hence application of Defendants dismissed—Defendant no.2 to 4 Directors of Defendant no.1—Hence not personally liable—Plaintiff not entitled to decree against them—Defendant no.5 is separate company—No privity of contract between Plaintiff and Defendant no.5—Thus no decree can be passed against Defendant no.5 as well.

Important Issue Involved: Leave to Defend—When it is to be granted—Ratio of Mechalec Engineers referred to—When Defendant satisfied Court that he has a good defence—Where Defendant raises triable issue indicating reasonable defence—Where Defendant discloses facts as may be deemed sufficient to entitle him to defend—Then leave to contest must be granted—Where Defendant has no defence of defence set up is illusory or sham defence—Leave to contest need not be granted—Or leave granted only if amount claimed is paid into Court or otherwise secured.

[Sa Gh]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Rajeev Kumar.

FOR THE DEFENDANTS : Mr. M.M. Ansari, Advocate for D-1 to D-4. None for D-5.

CASE REFERRED TO:

1. *M/s Mechalec Engineers and Manufactures* vs. *M/s Basic Equipment Corporation* (1977) 1 SCR 1060.

RESULT: Suit allowed.

V.K. JAIN, J

CS(OS) No. 1588/2008 & IAs 515/2010, 516/2010, 517/2010 & 3106/2010

1. This is a suit for recovery of Rs.46,82,000/-. It is alleged in the plaint that defendant No.1 - Reliance Polycrete Ltd. is an associate of defendant No.5 –Punjab Agro Foodgrains Corpn. Ltd. in terms of an agreement dated 30.6.2005 between them for rendering services for export/domestic sale of Indian Wheat. Defendants 2 to 4 are directors of defendant No.1. It is alleged in the plaint that defendants 1 to 4 induced the plaintiff to part with a sum of Rs.2.40 crores for supply of wheat and pursuant thereto the aforesaid amount was deposited by the plaintiff with defendant No.5 in the account of defendant No.1. Defendant No.5 issued two orders; one for release of 2500 MT of wheat and the other for release of 1250 MT of wheat, to the plaintiff, in the account of defendant No.1. Vide letter dated 23.8.2005, defendant No.5 informed the plaintiff about refund of his money and sought an affidavit from him for release of an amount of Rs.20,218,000/- in favour of defendant No.1, to the effect that he shall not claim any financial compensation or wheat stock from defendant No.5. The plaintiff submitted the affidavit accordingly and a cheque of Rs.2,02,18,000/- was issued by defendant No.5 in favour of defendant No.1 which released that amount to the plaintiff leaving an outstanding balance of Rs.37,82,000/-. After due discussion amongst the defendants, defendant No.1 issued a cheque of Rs.46,82,000/- to the plaintiff comprising principal amount of Rs.37,82,000/- and interest on that amount amounting to Rs.9 lakhs. When presented to the bank, the cheque was dishonoured for want of sufficient funds. Another cheque of Rs.2 lakhs was thereafter issued by defendant No.1 to the plaintiff which also was dishonoured for want of funds. The plaintiff has, therefore, filed this suit under Order XXXVII of CPC for recovery of Rs.46,82,000/-.

2. IA 3106/2010 has been filed by defendants 1 to 4 seeking leave

to contest the suit. In their application for leave to contest, these defendants have claimed that there was no contract between defendant No.1 and the plaintiff for supply of any food item. It is further alleged that the cheque for Rs.46,82,000/- as also the cheque for Rs.2 lakhs were issued by defendant No.1 to defendant No.5 after filling the cheque amount, but without filling the name of the payee of the cheques. It is further alleged that the plaintiff in collusion with defendant No.5, prepared these cheques in his favour and on coming to note of it, defendant No.1 asked defendant No.5 to return those cheques to it. On the failure of defendant No.5 to return the cheques, defendant No.1 stopped the payments of the cheque. It is further alleged that the covering letter was also not issued by defendant No.1 or defendant No.2 and was prepared by the plaintiff in collusion with defendant No.5, as defendant No.1 used to send blank letter heads with the signatures of defendant No.2 to defendant No.5 for business purposes. It is, however, admitted that the signatures of defendant No.2 on the covering letters appear to be genuine.

3. IA 516/2010 has been filed by defendant No.5 seeking leave to contest the suit. Vide IA 515/2010, defendant No.5 has sought condonation of delay in filing memo of appearance whereas condonation of delay in filing leave to appeal has been sought by defendant No.5 vide IA 517/2010. In its application for leave to contest, defendant No.5 has alleged that it had no role whatsoever in the contract/deal between the plaintiff and defendant No.1. It is further alleged that the associate agreement dated 30.5.2005 was executed between defendant No.1 and defendant No.5, but, since defendant No.1 could not arrange the required amount, the agreement was terminated on its request and the lease orders issued to it were cancelled. It is further alleged that an amount of Rs.13.2 crores which defendant No.1 had deposited with defendant No.5 was duly refunded to it. It has been pointed out that release orders for wheat were issued by defendant No.5 in favour of defendant No.1 and not in favour of the plaintiffs. It is also alleged that defendant No.1 has not only acknowledged the receipt of payment, it also indemnified defendant No.5 vide indemnity bond vide 24.8.2005.

4. In **M/s Mechalec Engineers and Manufactures v. M/s Basic Equipment Corporation** (1977) 1 SCR 1060, the Supreme Court set out the following principles:-

"(a) If the defendant satisfies the Court that he has a good defense to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) if the defendant raises a friable issue indicating that he has a fair or bona fide or reasonable defense although not a positively good defense the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he had a defense, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defense to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defense or the defense set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defense or the defense is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defense to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defense."

5. Coming to the application of defendant No.1 for leave to contest, it is an admitted case of the parties that two cheques one of Rs.46,82,000/- and the other of Rs.2 lakhs were issued by defendant No.1. The plea taken by defendant No.1 is that though the amount of the cheques was filled by it, the name of the payee was left blank and the cheques were delivered to defendant No.5. However, the application/affidavit filed by defendants 2 to 4 does not disclose as to why these two cheques were

delivered by defendant No.1 to defendant No.5. This is not their case in the application/affidavit filed by them that they owed the amount of these cheques to defendant No.5. This is also not their case that these two cheques were issued by defendant No.1 to defendant No.5 towards some advance payment or towards some other contractual obligation towards defendant No.5. Defendant No.5 does not support the case of defendant No.1 that the aforesaid two cheques were delivered to it by defendant No.1. In these circumstances, it appears highly improbable that these cheques were issued by defendant No.1 to defendant No.5 and not to the plaintiff.

6. Defendant No. 1 is a Limited Company and defendant No. 5, which is a subsidiary of Punjab Agro Industries Corporation, as is evident from the documents placed on record, appears to be a Government company. No reason has been given by defendant No. 1 for leaving the name of the payee blank in the cheques issued by it. Ordinarily, a company is not likely to issue cheques leaving the name of the payee blank on them and nor is a Government company like defendant No.5 likely to accept cheques in which the name of the payee is left blank. It is, therefore, difficult to accept that the name of the payee was left blank when these cheques were issued by defendant No.

7. The plaintiff issued a legal notice dated 21st March, 2006 to the defendants before filing this suit. In para 7 of the notice, it was specifically stated that defendants issued a cheque of Rs 46,82,000/- to the plaintiff comprising Rs 37,82,000/- towards principal sum of Rs 9,00,000/- towards interest. It was further stated in para 8 of the notice that defendant No. 2 had also issued a letter confirming that the cheque was in respect of refund of the balance due amount and interest therein and had also given an undertaking that the cheque was good for payment and would be clear on presentation. The plaintiff has also placed on record copies of postal receipts and certificates of posting, whereby this notice was sent to the defendants as also the A.D. cards, whereby receipts of the notice was acknowledged by defendant No. 2 Shri S.K. Jain, Managing Director of defendant No.1. The receipt of this notice had not been denied in the application/affidavit of defendant No.1. No reply was sent by defendant No. 1, disputing issue of cheque of Rs 46,82,000/- by it to the plaintiff or issue of letter by defendant No. 2 to the plaintiff undertaking that the cheque, when presented to the bank, would be encashed.

In these circumstances, it appears to me that defendant No. 1 has no worthwhile defence with respect to the cheques issued by it to the plaintiff.

8. As regards the letter written by defendant No. 2, CMD of defendant No. 1, to the plaintiff, the case of defendant No. 1 is that blank letterhead with signature of defendant No. 2 on them used to be kept by them with defendant No. 5 and has been misused by defendant No. 5 by forging this letter using a blank letterhead with signature of defendant No. 2 on it. The genuineness of the signature of defendant No. 2 on the letter has, however, not been disputed by defendant No. 1. It is difficult to accept that defendant No. 1, which is a company, used to keep blank letterheads with signature of its CMD on them with defendant No. 5. No particular reason has been given by defendant No.1 for keeping blank letterheads with signature of its CMD on them with defendant No. 5. Even otherwise, it is unacceptable that defendant No. 5 would be keeping blank letterheads of defendant No. 1 with signature of its Managing Director on them with it and would then part with such signed letterheads to the plaintiff. It would be worthwhile to note here that there is no dispute that the plaintiff had deposited a sum of Rs 2.40 crores with defendant No. 5 in the account of defendant No. 1 and out of that only a sum of Rs 20,21,8000/- was paid by defendant No. 5 to defendant No. 1 and that too after obtaining an affidavit from the plaintiff to the effect that the aforesaid cheque in the name of defendant No. 1 had been received by him on account of refund which he had deposited with defendant No. 5 through defendant No. 1 on account of purchase of wheat from defendant No. 5 and he would not claim any financial compensation from defendant No. 5 nor would he file any legal/criminal case against it. In these circumstances, the inevitable conclusion is that the amount of Rs 46,82,000/- was agreed to be paid by defendant No. 1 to the plaintiff and it was towards payment of that amount that the cheque in question was issued by it to the plaintiff.

9. The case of the defendant N. 1 is that on coming to know that the cheques which it had kept with defendant No. 5 had been handed over by it to the plaintiff, the payment of cheques was stopped by it. However, the Bank Memo dated 16th January, 2006, pertaining to cheque of Rs 46,82,000/-, shows that the cheque was dishonoured for want of sufficient funds. It was only when presented for the second time that the

cheque was returned on 14th March, 2006 with the endorsement "payment stopped by drawer". Similarly, cheque of Rs 2 lakh was also returned for want of sufficient funds vide cheque return Memo dated 23rd February, 2006. This is yet another circumstance which corroborates the case set up by the plaintiff and falsifies the plea taken by defendant No. 1.

10. In these circumstances, I am satisfied that no triable issue has been raised by defendant No.1, it has no plausible defence to the case of the plaintiff and the defence set up by it is absolutely highly improbable and is practically sham and bogus. The plea taken in the application filed by defendant No. 1 does not make out a bona fide defence to the case of the plaintiff. The averments made in the application/affidavit of defendant No. 1 do not indicate any reasonable likelihood of the defendant being able to defeat the claim of the plaintiff in case leave to defend is granted to it. Hence, following the guidelines laid down by Supreme Court in **M/s Mechalec Engineers and Manufactures,** I am of the view that defendant No. 1 is not entitled to leave to contest the suit.

IA No. 3106/2010, to the extent it pertains to defendant No.1 M/s Reliance Polycrete Ltd., is dismissed.

As far as defendant Nos. 2 to 4 are concerned since they are only Directors of defendant No. 1 and, therefore, are not personally liable to pay amount of cheque to the plaintiff, the plaintiff is not entitled to any decree against them.

As far as defendant No. 5 is concerned, admittedly, it is a separate company and there is no privity of contract between the plaintiff and defendant No. 5. This is plaintiff's own case that amount of Rs 2.40 crores was deposited by it with defendant No. 5 in the account of defendant No. 1. Admittedly, cheque of Rs 20,21,8000/- was issued by defendant No. 5 in the name of defendant No. 1 and not in the name of the plaintiff. The cheques, on which the suit is based, were issued by defendant No. 1 and not by defendant No. 5. Thus, there is no privity of contract between the plaintiff and defendant No. 5. Moreover, vide his affidavit submitted to defendant No. 5, the plaintiff undertook not to file any legal/criminal case against defendant No. 5 and subsequently agreed that he will claim no financial compensation from it. Therefore, the plaintiff is not entitled to any decree against defendant No.5.

For the reasons given in the preceding paragraphs, a decree for recovery of Rs 46,82,000/- with costs and pendente lite and future interest at the rate of 12% is hereby passed in favour of the plaintiff and only against defendant No.1. The suit against other defendants is dismissed, without any order as to costs. The suits as well as the applications stand disposed of accordingly.

ILR (2011) DELHI 237
FAO

SMT. VIDYAWATI ....APPELLANT

VERSUS

UNION OF INDIA ....RESPONDENT

(MOOL CHAND GARG, J.)

FAO NO. : 418/2008 DATE OF DECISION: 12.01.2011

Railway Claims Tribunal Act, 1987—Section 16, 123(c) (2), 124A (b) and (c)—Appellant filed claim before Railway Tribunal for payment of compensation on account of death of a bona fide passenger—Case of appellant before Tribunal that deceased while proceedings towards door of train for throwing out contents of stomach, accidentally fell down from train due to jerk and sustained injuries on his person and died—Per contra, case of respondent was that death of deceased had occurred on account of his own negligence in as much as he was hit by pole of signal and not due to jerk—Railway Tribunal dismissed claim—Order challenged before High Court—Held—Even if DRM's report is taken as correctly made, situation would still not warrant that passenger was guilty of any criminal act so as to cover case under clause (c) of proviso to Section 124 A—No evidence has been led even by the respondent to prove that anybody saw passenger travelling in train negligently so as to bring his conduct in exceptions provided for under Section 124A of Act—Respondents directed to pay Rs. 4 lakhs which is amount fixed towards compensation in case of death along with interest @ 9% per annum w.e.f. date of filing of claim petition.

In any event, no evidence has been led even by the respondent to prove that anybody saw the passenger travelling in the train negligently so as to bring his conduct in the exceptions provided for under Section 124A of the Railway Claims Tribunal Act. In these circumstances, considering the law laid down by the Apex Court in the case of **Jameela & Ors.** (supra), the order passed by the Tribunal cannot be sustained. **(Para 9)**

[Ar Bh]

APPEARANCES:

FOR THE APPELLANT : Mr. N.K. Gupta, Advocate.

FOR THE RESPONDENT : Ms. Rajdipa Behura with Mr. Satish Mishra, Advocate.

CASE REFERRED TO:

1. *Jameela & Ors.* vs. *Union of India,* 2010 ACJ 2453.

RESULT: Allowed.

MOOL CHAND GARG, J.

1. This appeal arises out of an order dated 18.02.2008 passed by the Railway Claims Tribunal, Principal Bench, Delhi, (hereinafter referred to as "the Tribunal"), whereby the learned Tribunal has dismissed the claim of the appellant filed under Section 16 of the Railway Claims Tribunal Act for payment of compensation on account of death of Sh. Vijay Kumar, who was admittedly a bona fide passenger.

2. According to the appellant, the deceased boarded the EMU passenger train from Palwal Railway Station for Delhi and when the train

was running between Faridabad and TKD railway stations, the deceased while proceeding towards the door of the train for throwing out the contents of the stomach, accidentally fell down from the train due to jerk and sustained injuries on his person and died.

3. The claim was contested by the respondent-Railway Administration by filing a written statement, wherein they had taken a plea that the death of the deceased had occurred on account of his own negligence inasmuch he was hit by the pole of signal and not due to jerk as alleged.

4. The Tribunal recorded the evidence led by the parties which comprises of the statement made by the appellant as AW-1. The appellant also examined another witness as AW-2 and also placed on record the documents which are exhibited as AW1/2 to 1/10. On behalf of the respondents, three witnesses, namely, RW 1, 2 and 3 were examined. They also filed a document which was exhibited as Ex.R1.

5. While deciding Issue No.1 in favour of the appellant by holding that the deceased passenger was a bona fide passenger in the train on the relevant day, the Tribunal relying upon the documents placed on record by the appellant took a view that in terms of the verification report of the SHO and the Final report as per Exhibits A3 and A4, the deceased was travelling by hanging to the door of the train and was struck or hit by the signal pole and then fell down from the train. It was observed that these documents were part of the documents exhibited by the appellant herself and these could be used against the appellant. 6. Admittedly, AW-1 being the mother of the deceased was not an eye-witness to the incident. She has filed the documents which were supplied by the Railway Administration. As far as the testimony of AW-2 is concerned, it has not been accepted by the Tribunal. However, despite there being no evidence to show that RW-3 was an eye-witness, the Tribunal has accepted his statement and thereby, has also accepted the correctness of the DRM's report. The Tribunal ruled out the possibility of the falling of the deceased as an accidental fall in terms of Section 123(c)(2) of the Railways Act but observed that in this case, the deceased fell down on account of his negligence and thus, was responsible for his own death. It was, therefore, observed that it was a self-inflicted injury as per clause (b) of proviso to Section 124 A of the Railways Act and, therefore, decided Issue No.2 against the appellant and consequently, dismissed the claim.

7. I have heard the submissions made on behalf of the parties and have gone through the judgment delivered by the Apex Court in the case of **Jameela & Ors. Vs. Union of India,** 2010 ACJ 2453, which appear to be fully applicable to the facts of the present case. In the aforesaid case, in a similar situation where the deceased passenger fell down while standing at the open door of the train compartment allegedly in a negligent manner, the Apex Court held it to be an 'accidental fall' and being not involved in a criminal act so as to attract clause (c) of proviso to Section 124-A, the Apex Court held that the Railway was liable for compensation. Relevant observations made by the Apex Court in the aforesaid judgment appear in para 5, 6, 9 and 10, which are quoted hereunder for the sake of reference:-

> "5. We are of the considered view that the High Court gravely erred in holding that the applicants were not entitled to any compensation under Section 124A of the Act, because the deceased had died by falling down from the train because of his own negligence. First, the case of the Railway that the deceased M. Hafeez was standing at the open door of the train compartment in a negligent manner from where he fell down is entirely based on speculation. There is admittedly no eyewitness of the fall of the deceased from the train and, therefore, there is absolutely no evidence to support the case of the Railway that the accident took place in the manner suggested by it. Secondly, even if it were to be assumed that the deceased fell from the train to his death due to his own negligence it will not have any effect on the compensation payable under Section 124A of the Act.
>
> 6. Chapter XIII of the Railways Act, 1989 deals with the Liability of Railway Administration for Death and Injury to Passengers due to Accidents. Section 123, the first section of the Chapter, has the definition clauses. Clause (c) defines "untoward incident" which insofar as relevant for the present is as under:
>
> 123 (c) untoward incident means-
>
> (1) (i) xxxxxxxx
>
> (ii) xxxxxxxx
>
> (iii) xxxxxxxx
>
> (2) the accidental falling of any passenger from a train

carrying passengers.

Section 124A of the Act provides as follows:

> 124A. Compensation on account of untoward incident. - When in the course of working a railway an untoward incident occurs, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitle a passenger who has been injured or the dependant of a passenger who has been killed to maintain an action and recover damages in respect thereof, the railway administration *shall, notwithstanding anything contained in any other law, be liable to pay compensation* to such extent as may be prescribed and to that extent only for loss occasioned by the death of, or injury to, a passenger as a result of such untoward incident:
>
> Provided that no compensation shall be payable under this section by the railway administration if the passenger dies or suffers injury due to
>
> (a) suicide or attempted suicide by him;
>
> (b) self-inflicted injury;
>
> (c) his own criminal act;
>
> (d) any act committed by him in a state of intoxication or insanity;
>
> (e) any natural cause or disease or medical or surgical treatment unless such treatment becomes necessary due to injury caused by the said untoward incident.
>
> Explanation - For the purposes of this section, "passenger" includes -
>
> (i) a railway servant on duty; and
>
> (ii) a person who has purchased a valid ticket for travelling by a train carrying passengers, on any date or a valid platform ticket and becomes a victim of an untoward incident.
>
> (emphasis added)

xxx xxx xxx

> 9. The manner in which the accident is sought to be reconstructed by the Railway, the deceased was standing at the open door of the train compartment from where he fell down, is called by the railway itself as negligence. Now negligence of this kind which is not very uncommon on Indian trains is not the same thing as a criminal act mentioned in Clause (c) to the proviso to Section 124A. A criminal act envisaged under Clause (c) must have an element of malicious intent or mens rea. Standing at the open doors of the compartment of a running train may be a negligent act, even a rash act but, without anything else, it is certainly not a criminal act. Thus, the case of the railway must fail even after assuming everything in its favour.
>
> 10. We are, therefore, constrained to interfere in the matter. The judgment and order of the High Court coming under appeal is set aside and the judgment and order of the Tribunal is restored. Since a period of more than 10 years has already elapsed from the date of the judgment of the Tribunal, the compensation money along with interest need not be kept in fixed deposits, but should be paid to the appellants in the ratio fixed by the Tribunal. The payment must be made within 2 months from today."

8. In the present case, even if the DRM's report, which has been accepted by the Tribunal as a gospel truth is taken as correctly made, the situation would still not warrant that in the present case, the passenger was guilty of any criminal act so as to cover the case under clause (c) of proviso to Section 124-A.

9. In any event, no evidence has been led even by the respondent to prove that anybody saw the passenger travelling in the train negligently so as to bring his conduct in the exceptions provided for under Section 124A of the Railway Claims Tribunal Act. In these circumstances, considering the law laid down by the Apex Court in the case of **Jameela & Ors.** (supra), the order passed by the Tribunal cannot be sustained.

10. Consequently, the appeal is allowed and the respondents are directed to pay Rs. 4 lakhs, which is the amount fixed towards compensation in case of death, to the appellant along with interest @ 9% per annum w.e.f the date of filing of the claim petition. The amount shall

be paid by the respondent within one month from today, failing which the claim amount and the interest amount as has been accrued on the compensation amount shall carry further interest @9% p.a. from the date of this order till the realization of amount. A copy of this order be sent to the Tribunal along with records.

ILR (2011) DELHI 243
CRL. APPEAL

GANESH **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

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

CRL. APPEAL NO. : 4/2002 **DATE OF DECISION: 13.01.2011**

Indian Penal Code, 1860—Section 302—On receipt of DD, the police reached the spot where deadbody of wife of appellant found in shop/room where appellant staying with her, his three children and nephew—Cause of death was opined as death due to throttling—As per prosecution case, the appellant had throttled the deceased in the course of a quarrel which was on account of illicit relationship of the deceased with the nephew of the appellant—Next day of incident appellant made extra judicial confession to PW12 about the murder of his wife—Relying on the circumstances of extra judicial confession, motive—Illicit relationship of wife with nephew, evidence of last seen and subsequent conduct in absconding after the offence trial Court convicted appellant u/s 302—Held, on the basis of testimony of PW12, it cannot be held that

extra judicial confession was made by accused—No evidence on record to prove motive or even the approximate time or date of death in order to prove evidence of "last seen"—Subsequent conduct by itself insufficient to prove that it could only be the appellant who was responsible for the murder—Where a case rests on circumstantial evidence, it is bounden duty of prosecution to establish that from the circumstances the only conclusion that can be drawn is the guilt of the accused and the circumstance established must be inconsistent with the innocence of the accused—Appellant acquitted—Appeal allowed.

Where a case rests on circumstantial evidence it is bounden duty of the prosecution to establish that from the circumstances which should have been proved on record the only conclusion that can be drawn is the guilt of the accused and the circumstances established must be inconsistent with the innocence of the accused. The observation of the Supreme Court in a recent judgment in **G. Parshwanath vs. State of Karnataka,** (2010) 8 SCC 593 are quite apposite. We would like to extract Para 23 and 24 hereunder:-

> "23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of

doubt applied. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.

24. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court." **(Para 29)**

Important Issue Involved: Where a case rests on circumstantial evidence, it is bounden duty of prosecution to establish that from the circumstances the only conclusion that can be drawn is the guilt of the accused and the circumstance established must be inconsistent with the innocence of the accused.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Mr. Sumeet Verma, Advocate with Appellant in person.

FOR THE RESPONDENT : Mr. Jaideep Malik, APP HC Rajbir Singh, P.S. Geeta Colony.

CASES REFERRED TO:

1. *Mukesh* vs. *State*, 2010 (2) Crimes 441.
2. *G. Parshwanath* vs. *State of Karnataka*, (2010) 8 SCC 593.
3. *Subramaniam* vs. *State of Tamil Nadu & Ors.*, (2009) 14 SCC 415.

RESULT: Appeal allowed.

G.P. MITTAL, J.

1. This is an Appeal against the judgment dated 6th July, 2001 and order on sentence dated 9th July, 2001 whereby the Appellant Ganesh was convicted for the offence punishable under Section 302 of the Indian Penal Code (for short 'the Code') and was sentenced to undergo rigorous imprisonment for life with fine of Rs.2,000/- and in default to undergo Simple Imprisonment for three months.

2. On receipt of DD No.11-A dated 22.03.2000 recorded at Police Station Geeta Colony that dead body of a woman was lying in house No.15/28, Geeta Colony, SI Satender Mohan reached the spot alongwith Const. Sheikh Sazid. He found that dead body of a woman aged 26-27 years was lying in the room/shop on the First Floor of the aforesaid house. Saliva was found to have come out of the mouth of the deceased.

3. Inspector T.R. Mudgal, SHO Police Station Geeta Colony and the Assistant Commissioner of Police also reached the spot. Sub-Divisional Magistrate, Gandhi Nagar was informed and he also reached there. Inquiries were made from Mr. Sharvan Kumar son of Laxman Das, r/o 15/2, Geeta Colony, who was the landlord of the premises as also from the neighbours. It was revealed that the deceased was the wife of one Ganesh (the Appellant), resident of Village Lanhua, District Badayun, U.P.

4. It was found that the Appellant was working as a rickshaw-pullar in the area. He was staying in the shop/room along with his wife, three children and his Nephew Kuldeep. The crime team was called at the spot. The scene of the crime was got photographed.

5. Inquest proceedings were conducted and the dead body was sent to Subzi Mandi Mortuary to be preserved for 72 hours. (as no person had come forward to identify the deed body). Inquiries were made from Village Lanhua. It transpired that the Appellant had left the village 15 years back and the villagers had no knowledge about the Appellant. Since nobody came forward to claim the dead body for 72 hours, autopsy on the dead body was got conducted from Dr. Sarvesh Tandon PW-1 on 28.3.2000. Vide Postmortem Report Ex.PW-1/A, Dr. Tandon opined the cause of death to be asphyxia due to ante-mortem smothering.

6. All the injuries were found to be ante-mortem in nature. Injuries to the neck tissues was opined due to attempt at throttling. There was obstruction of respiratory passages by blockage of mouth and nostrils which was sufficient to cause death in the ordinary course of nature.

7. During further investigation of the case it was revealed that there was a quarrel between the Appellant and his Nephew Kuldeep 2/3 days prior to the incident (22.03.2000). According to the prosecution, cause of quarrel was illicit relationship of the deceased with Kuldeep. The Appellant, it is alleged had seen Kuldeep in an objectionable position with the deceased, his wife, on 09.03.2000 when he had returned from the village. On 19.03.2000, the Appellant had given beatings to Kuldeep on this count.

8. It is further the case of the prosecution that on 20.03.2000 (the day of festivial of Holi) at about 11:00 P.M., the Appellant had gone to

PW-12 Santosh Sharma and had made an extra judicial confession about the murder of his wife (deceased Rakhi).

9. During the course of investigation, the Appellant was arrested on 4.04.2000. It is alleged that he had made a disclosure statement regarding commission of the crime however, there was no discovery of any fact in pursuance of the said disclosure statement.

10. The Trial Court vide impugned order came to the conclusion that the circumstances proved during the trial established that the Appellant had committed murder of his wife. Para 18 of the impugned judgment regarding finding of the Trial Court is extracted hereunder for ready reference:-

> "18. As already discussed the prosecution has proved beyond reasonable doubt on record that it was the accused who was living in the shop/house where the dead body of the deceased was found and on the fateful day of 20.03.2000 he smothered his wife whose dead body was found by the landlord of the house on 22.3.2000 which fact is also established beyond reasonable doubt that it was a case of Homicidal death committed by the accused as per opinion of the Dr. who conducted the Post Mortem that the time since death was about 6/7 days before conduct of Post Mortem which was conducted on 28.3.2000. It has been proved on record that only inference which can be drawn in respect of commission of the offence is towards the accused which is cogently established on record. There is a chain of events i.e. residing of the accused with the deceased and his leaving the house on that very day when the murder took place alongwith his children leaving behind his deceased murdered wife in the tenanted room and thereafter absconding and was arrested later on. These facts goes (sic) against the accused to establish the commission of the offence by him beyond reasonable doubt. The motive as already discussed is also proved on record by the prosecution."

11. We have heard Mr. Sumeet Verma, learned counsel for the Appellant and Mr. Jaideep Malik, learned Additional Public Prosecutor for the State and have perused the record.

12. There is no direct evidence to connect the Appellant with the

offence with which he was charged. The case rests solely on circumstantial evidence. The circumstances relied upon by the prosecution while sending the Appellant for trial are:-

A. Extra judicial confession.

B. Motive - illicit relationship between Kuldeep and the deceased.

C. Evidence of last seen.

D. Subsequent conduct in absconding after the offence.

13. The law regarding circumstantial evidence is well settled. When a case rests upon circumstantial evidence, such evidence must satisfy three tests:-

(1) The circumstances, from which an inference of guilty is sought to be drawn, must be cogently and firmly established.

(2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) The circumstances, taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

14. During the course of trial, the prosecution had examined as many as 19 witnesses. PW-3 Sharvan Kumar, the landlord and owner the rickshaw which the Appellant used to ply; PW-10 Kuldep, the Nephew of the Appellant with whom the deceased was alleged to be having illicit relationship; PW-12 Santosh Sharma, to whom the Appellant had allegedly gone for shelter, with his children on 20.03.2000 at 11:00 P.M.; PW-16 Jogender Sharma are the witnesses examined by the prosecution to prove various circumstances against the Appellant.

15. PW-15 SI Satender Mohan had reached the spot on receipt of

DD No.11-A along with other police officials and had carried out the initial investigation whereas PW-19 Insp. T.R.Mudgal, SHO Police Station Geeta Colony is the Investigating Officer of the case. Rest of the witnesses are of a formal nature.

16. In his examination under Section 313 of the Code of Criminal Procedure, the Appellant admitted that he used to reside on the first floor of shop No.15/28, Geeta Colony along with his wife, three children and nephew Kuldeep. He also admitted to plying a rickshaw belonging to PW-3 Sharvan Kumar on hire basis for 1½ months prior to the alleged incident. The Appellant, denied that any quarrel had taken place on 10th March, 2000 or on 19th March, 2000. He, however, did not come out with any explanation as to when and how his wife Rakhi had died.

17. We shall be dealing with the circumstances relied upon by the prosecution one by one.

A. Extra Judicial Confession:-

18. According to the prosecution, the Appellant had made an extra judicial confession of his guilt to PW-12 Santosh Sharma. During his examination-in-chief Santosh Sharma simply deposed that the Appellant was the maternal uncle of one Kamal. He (the witness) used to visit said Kamal. On the day of festival of Holi the Appellant along with his two children had come to his house (In fact, as per the case of the prosecution the Appellant had three children i.e. however not very significant for the purpose of appreciating this argument) and requested PW-12 Santosh Sharma for shelter. He, however, did not allow the Appellant to stay there. The witness stated that he did not enquire from him about his wife nor did the Appellant tell him anything about the same. The witness was permitted to be cross examined by the learned APP. The witness denied that the Appellant had informed him that he had killed his wife or that there was illicit relation between Kuldeep and Rakhi, his wife. The witness was confronted with his statement Ex.PW-12/A portion A to A and B to B. However, nothing could be elicited during his cross examination which could be of any help to the prosecution. There is no other evidence on this circumstance led by the prosecution. On the basis of testimony of PW-12 Santosh Sharma it cannot be said that any extra judicial confession was made by the Appellant to him.

B. Motive – Illicit Relationship between Kuldeep and the deceased.

19. To prove this circumstance, the prosecution examined PW-3 Sharvan Kumar, PW-10 Kuldeep, PW-12 Santosh Sharma and PW-16 Jogender Sharma. PW-3 Sharvan Kumar was completely silent on this aspect of the case of the prosecution. He was not even cross examined on behalf of the State nor confronted with his statement under Section 161 Cr.P.C. PW-10 Kuldeep, PW-12 Santosh Sharma and PW-16 Jogender Sharma did not support the case of the prosecution on the factum of alleged illicit relationship between Kuldeep and the deceased. They were allowed to be cross examined by the learned Additional Public Prosecutor for the State. However, nothing could be brought out in their cross examination which suggested that these witnesses had told a lie on this count. In any case, the factum of illicit relationship between the deceased and Kuldeep could not be proved. There is no manner of doubt that the prosecution has utterly failed to prove that there was any illicit relationship between Kuldeep and deceased.

20. Normally, there is a motive behind every criminal act. However, where there is direct ocular evidence to prove the charge of murder against the accused, the question of establishing motive becomes merely academic. Motive, however, assumes importance in a case where the evidence is only of circumstantial nature. The absence of motive is a circumstance in faovur of the accused. The absence of motive coupled with the fact that there is no circumstance against the Appellant except that he is husband of the deceased takes out the bottom of the prosecution case.

C. Evidence of "last seen".

21. The prosecution cited Sharvan son of Laxman Das, the landlord and the rickshaw owner, as a witness to prove this circumstance; he was examined as PW-3. This witness deposed that the Appellant Ganesh used to ply his rickshaw on hire basis. 1/½ months prior to the incident, the Appellant used to live on the first floor of Shop no.15/28, Geeta Colony along with his wife, three children and his Nephew named Kuldeep. 2/3 days prior to the incident (the incident he was referring is discovery of the dead body on 22.03.2000) some altercation/quarrel had taken place between the Appellant and his Nephew Kuldeep. He wanted to know the reason for the same and was informed that it was a domestic problem and they would solve the same. Since the Appellant had not paid the hire charges for using the rickshaw for 3-4 days, he went to the shop/room

on 22.03.2000 at about 9:00 A.M.. He noticed the shutter of the shop to be partially open. He opened it and found the Appellant and his children missing. He further noticed that the Appellant's wife was lying on the floor and some foam was coming out of her mouth. He suspected foul play and therefore informed the police.

22. Thus, this witness is categorical that he had seen the Appellant's wife alive and the Appellant as well as his wife together in the shop/room 2/3 days prior to 22.03.2000 and that the wife was found to be dead on 22.03.2000 at 9:00 A.M.

23. In this regard, the testimony of PW-1 Dr. Sarvesh Tandon becomes quite relevant. He had performed autopsy on the dead body of a female, aged about 25-30 years (which was later identified to that of the Appellant's wife) on 28.03.2000 at 2:30 P.M. The cause of death as stated hereinbefore was found to be asphyxia due to ante-mortem smothering. The time since death was given to be 6-7 days approximately. If we go back by six days from the date of the postmortem examination the date of death comes to 22nd March and if we go back by seven days, then the date of death would be 21st March, 2000. Of course, this witness had given the time of death by approximation. Therefore, it was essential for the prosecution to elicit from this witness, if the time could be between 6-7 days or it could be 8 days or 9 days: which has not been done by the prosecution. It, therefore, remains in the realm of speculation as to when the death of Smt. Rakhi (wife of the Appellant) had taken place and whether the same coincided with the time when the deceased and the Appellant were seen together on 19.03.2000, or immediately thereafter.

24. As per case of the prosecution itself the deceased, the Appellant and Kuldeep (PW-10) were residing in the room/shop aforesaid along with the Appellant's children. On 19th PW-3 Sharvan Kumar had seen all the three when there was a quarrel/giving of beatings by the Appellant to Kuldeep. The prosecution has not produced any evidence that after the quarrel Kuldeep had left the room where he was staying (with the Appellant and the deceased) and the only two i.e. the Appellant and the deceased remained there, along with the children. PW-3 Sharvan Kumar was a witness on this aspect as per the prosecution case; yet during his statement in the Court he was completely silent on this point. The prosecution did not make any attempt to examine PW-3 Sharvan Kumar on this aspect.

25. Similarly, according to the prosecution PW-10 Kuldeep had also left the room on 19.03.2000 and deposited the cycle rickshaw with Sharvan Kumar but a different story was given by Kuldeep when he was examined as PW-10. He deposed that on 19th (March, 2000), the Appellant had forced him to drink liquor and thereafter he started quarreling with him as well as with his wife. During the quarrel the Appellant bit his left wrist and thereafter called his brother and sister from Ghaziabad. They also gave beatings to him and threatened him with imprisonment. After two days he went to Moradabad and before this he left the house and went to Ghaziabad. Therefore, even according to PW Kuldeep he had not left the room which was being shared by him along with Appellant and the deceased on 19th March, 2000. In these circumstances, there is no reliable evidence of the Appellant and the deceased being last seen together. Instead, what can be inferred from the statement of PW-10 is that he had left the room on or about 21st March, 2000.

26. As discussed earlier, the date of death of the deceased as per the post mortem is 21st or 22nd of March, 2000. No evidence has been produced that the Appellant and deceased Rakhi were seen together either on 20th, 21st or 22nd of March, 2000. On the other hand, the statement of PW-12 Santosh Sharma is to the effect that the Appellant, with his children had approached him to stay there. Thus, it cannot be said that the deceased and the Appellant were last seen together just before the time of the death (of the deceased).

D. Subsequent conduct in absconding after the offence.

27. We have already discussed above, that exact or even the approximate time and date of death has not been proved on record. Of course, the Appellant has not explained as to what had happened to his wife after 19th and why and when he had left the shop/room where he was residing with his wife, children and Nephew Kuldeep. In his examination under Section 313 Cr.P.C., the Appellant has simply taken up the stand that he was not aware as to how his wife died. The police had picked him up from Bharatpur, Rajasthan and had implicated him in this case falsely. It may at the most raise some suspicion against the Appellant. Suspicion, however strong, cannot, take the place of proof.

28. In **Subramaniam vs. State of Tamil Nadu & Ors.,** (2009) 14 SCC 415, it was held that when it will be for the husband to explain the

circumstances in which his wife died when a homicidal death of a wife takes place within four walls of a house. However, that circumstance by itself is not sufficient to prove the guilt of an accused. It would be worthwhile to extract Para 23 of the report hereunder:-

> "23. So far as the circumstance that they had been living together is concerned, indisputably, the entirety of the situation should be taken into consideration. Ordinarily when the husband and wife remained within the four walls of a house and a death by homicide takes place it will be for the husband to explain the circumstances in which she might have died. However, we cannot lose sight of the fact that although the same may be considered to be a strong circumstance but that by alone in the absence of any evidence of violence on the deceased cannot be held to be conclusive. It may be difficult to arrive at a conclusion that the husband and the husband alone was responsible therefor."

29. Where a case rests on circumstantial evidence it is bounden duty of the prosecution to establish that from the circumstances which should have been proved on record the only conclusion that can be drawn is the guilt of the accused and the circumstances established must be inconsistent with the innocence of the accused. The observation of the Supreme Court in a recent judgment in **G. Parshwanath vs. State of Karnataka,** (2010) 8 SCC 593 are quite apposite. We would like to extract Para 23 and 24 hereunder:-

> "23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applied. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on

the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.

24. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court."

30. In the instant case, the prosecution has failed to prove the extra judicial confession purported to have been made to PW-12 Santosh Sharma. There is no reliable evidence of the deceased and the Appellant being last seen alive together in as much as the exact date and time of the death is not known rather there is a gap of about two days in the time of death as per the report of the postmortem examination and when the Appellant was last seen together with the deceased on 19.03.2000. Moreover, one more person i.e. Kuldeep who was examined as PW-10 was also present with the deceased and the Appellant at that time and thus, he (the Appellant) was not alone in the company of the deceased

on 19.03.2000. Absolutely, no evidence has been produced to prove the alleged motive i.e. the illicit relationship between Kuldeep and the deceased. The only thing that remains is the subsequent conduct which by itself is insufficient to prove that it could only be the Appellant who was responsible for the murder of his wife, the deceased, particularly, when according to the prosecution there was one more person with them i.e. PW-10 Kuldeep.

31. There is one more material aspect in this case. The prosecution has led evidence on the record to show that the Appellant and the deceased had three children. PW-12 Santosh Sharma has testified that the Appellant had visited his house on the day of Holi at 11:00 P.M. along with his children. The minimum age of the eldest child must be 7-8 years. In any case, it was for the prosecution to have found out the age of the children and either to examine a child who could have testified to the incident or the prosecution ought to have produced evidence that none of the children were old enough to understand the act alleged to have been committed by their father. In similar circumstances, an adverse inference was drawn against the prosecution in terms of the illustration G appended to Section 114 of the Evidence Act by a Division Bench of this Court in **Mukesh vs. State,** 2010 (2) Crimes 441.

32. The Trial Court had erred in coming to the conclusion that the circumstances established on record would lead to only one hypothesis i.e. the guilt of the Appellant and that every other hypothesis except the one i.e. the guilt of the accused is excluded or that the circumstances were incompatible with the innocence of the Appellant. The impugned judgment and order therefore, cannot be sustained. The Appeal is accordingly allowed and the impugned judgment and order of the Trial Court are set aside.

33. Bail Bonds and Surety Bonds of the Appellant are hereby discharged. Copy of the order be sent to the Trial Court.

ILR (2011) DELHI 257
WP (C)

SURINDER PRAKASH GUPTA ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(S. MURALIDHAR, J.)

WP (C) NO. : 3570/2007 DATE OF DECISION: 13.01.2011

Copyright Act, 1957—Section 63—Copyright Rules, 1958—Rule 16 (3) and (4)—Petitioner filed applications in respect of artistic works for protection under Copyright Act—Objections filed by respondent No.3 to grant of registrations—Registrar dismissed objections being time barred—In appeal, Copyright Board held objections can be filed within reasonable time immediately after person comes to know about filing of application and directed entries made in Register of Copyrights to be expunged—Order assailed before High Court—Plea taken, when admittedly objections were filed beyond thirty days of filing of application for registration in view of Rule 16, objection were clearly time barred—Per contra, plea taken, there was no provision for advertisement of filing of application seeking registration of a copyright—Knowledge of filing of application would ordinarily be only after registration is granted—Decision of board reasonable and did not call for interference—Held—Under scheme of Act and Rules there is, unlike in case of a trademark, no provision for advertisement of application—A person objecting to grant of registration can possibly know of filing of application only after registration is granted—Remedy for such a person is to file application for rectification thereafter—That by no means permits respondent No.3 to file objections beyond period of thirty days after filing of application—There is no such provision under the Act or Rules enabling objections to be filed within a 'reasonable time' after objector coming to know of filing of application seeking registration—Respondent No.3 has not stated when it came to know of filing of applications by petitioner—There was no question of computing any thirty day period from date of such knowledge—Objections filed by objectors were time barred—Order of Board holding objections filed by Respondent No.3 not time barred set aside.

Under Rule 16(4), an objection has to be filed within thirty days of the filing of the application for registration. It is correct that under the scheme of the Act and Rules there is, unlike in the case of a trademark, no provision for advertisement of an application. A person objecting to the grant of registration can possibly know of the filing of an application only after the registration is granted. The remedy for such a person is to file an application for rectification thereafter. That by no means permits the Respondent No. 3 to file objections beyond the period of thirty days after the filing of the application. In fact, the Respondent No. 3 has filed such rectification applications in relation to certain other registrations. **(Para 12)**

Important Issue Involved: Under the Copyright Act, 1957 and Copyright Rules, 1958 there is no provision for filing objections within a "reasonable time" after the objector comes to know of the filing of the application seeking registration of copyright. Objections to registration applications after 30 days of filing of application would be time barred.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Neeraj Grover and Mr. Samir Garg, Advocates.

FOR THE RESPONDENTS : Mr. Mohan Vidhani, Advocate for R-3.

RESULT: Allowed.

O R D E R

13.01.2011

CM No. 13240/2010 (for restoration)

For the reasons stated therein, the application is allowed. The petition is restored to file.

The application stands disposed of.

W.P.(C) No. 3570/2007

1. With the consent of the counsel for the parties, the petition is heard finally.

2. The challenge in this writ petition is to an order dated 31st January 2007 passed by the Copyright Board ('Board') allowing an appeal filed by the Respondent No. 3 herein against the order dated 23rd December 2005 passed by the Registrar of Copyright ('Registrar').

3. The Petitioner herein filed a set of six applications on 17th February 2005 in respect of artistic works which, according to the Petitioner, were computer outputs of basic work created by an artist in the nature of caricatures drawn by pencil. According to the Petitioner, these were entitled to protection under the Copyright Act, 1957 ('Act').

4. The Petitioner states that on 26th February 2005, he had filed a complaint with the Delhi Police against infringement of certain other artistic works already registered with the Registrar by certain persons importing towels bearing the said artistic works of Petitioner's ownership. On 3rd March 2005, the Petitioner was informed that Respondent No. 3 firm was in possession of huge quantities of infringing goods. The Petitioner has brought this fact to the notice of Delhi Police. A raiding party was formed and the premises of Respondent No. 3 were raided and

huge quantity of infringing goods were seized. An FIR No. 81 of 2005 was registered at Police Station Chandni Chowk against the partners of Respondent No. 3 for the offence of Section 63 of the Act. It is stated that thereafter on 4th March 2005 an undertaking was executed by one of the partners, Shri Janak Raj Arora admitting the Petitioner to be the owner of the copyright in respect of the original artistic works. Bail was granted to Shri Janak Raj Arora (one of the partners of Respondent No. 3) on 4th March 2005.

5. On 19th April 2005, the Respondent No. 3 filed objections before the Registrar to the grant of registration in respect of the six applications filed by the Petitioner. Respondent No. 3 also filed a suit, CS(OS) No. 781 of 2005 in this Court for cancellation of the deed of undertaking dated 4th March 2005.

6. Before the Registrar who took up the six applications of the Petitioner for consideration, one of the issues that were framed was whether the objections were time barred. The other issues related to the merits of the applications, including whether the Petitioner herein was using the said artistic works in relation to goods and whether the objections could be sustained and the registration denied. By an order dated 23rd December 2005, the Registrar rejected the objections of the Respondent No. 3 and decided all the issues in favour of the Petitioner. Specific to the issue of limitation, the Registrar held that the case would have been time barred if it could be proved that not only the objector was an interested party under Rule 16 of the Copyright Rules, 1958 ('Rules') but also that he had been duly informed in time by the applicant about the application for registration. The Registrar proceeded to hold that the objector was not an interested party and, therefore, the applicant was not obliged to inform him under Rule 16 of the fact of having filed the applications for registration of the copyright. Consequently, the objections were held to be time-barred.

7. In the appeal filed by Respondent No. 3 before the Board, the same issue concerning limitation was addressed. By the impugned order dated 31st January 2007, the Board held that since no time limit had been prescribed for a person not interested to file an objection, rule of common sense and natural justice dictated that "it has to be within a reasonable time immediately after the person comes to know about the filing of application." Consequently, it was held that there was "nothing wrong in

the objection filed by the appellant with the Registrar on this score." The Board proceeded to allow the appeal on the other issues concerning the merits as well, and directed the entries made in the Register of Copyrights to be expunged.

8. The first submission by Mr. Samir Garg, learned counsel appearing for the Petitioner is that the Board erred in holding that the objections filed by the Respondent No. 3 were not barred by limitation. He referred to Rule 16(3) and 16(4) of the Rules and submitted that when admittedly the objections were filed beyond thirty days of the filing of the application for registration, and there was no provision for condonation of delay, the objections were clearly time barred. He further submitted that the finding of the Registrar that the Respondent No.3 was not an interested person, was not set aside by the Board. Even as regards the knowledge of the Respondent No. 3, the raids were admittedly conducted on 4th March 2005 and even if that was to be taken to be the date of knowledge, the objections were filed only on 19th April 2005, i.e. more than 30 days thereafter.

9. Appearing for the Respondent No. 3, Mr. Mohan Vidhani, learned counsel submits that there was no provision in the Act for advertisement of the filing of an application seeking registration of a copyright. Secondly, knowledge of the filing of the application would ordinarily be only after the registration is granted. In the circumstances, the decision of the Board that the objections could be filed "within a reasonable period immediately after the person, i.e., the objector comes to know of the filing of the application", was reasonable one and did not call for interference.

10. In order to appreciate the above submissions, a reference may be made to relevant Rules. Rules 16(3) and 16(4) of the Rules read as under:

> **"16. Application for Registration of Copyright**
>
> .....
>
> (3) The person applying for registration shall give notice of his application to every person who claims or has any interest in the subject-matter of the copyright or disputes the rights of the applicant to it. (4) If no objection to such registration is received by the Registrar of Copyrights within thirty days of the receipt of the application by him, he shall, if satisfied about the correctness of the particulars given in the application, enter such particulars in the Register of Copyrights."

11. In the present case, the applications seeking registration of the copyright in question were filed admittedly on 17th February 2005. Further, there was no occasion for the Petitioner to presume that the Respondent No.3 was disputing the rights of the Petitioner or that Respondent No.3 had any interest in the said applications. Consequently, in terms of Rule 16(3), there was no requirement for the Petitioner to have given notice of the said applications to Respondent No. 3. The finding in this regard in favour of the Petitioner by the Registrar has not been disturbed by the Board and this Court also concurs with the said finding.

12. Under Rule 16(4), an objection has to be filed within thirty days of the filing of the application for registration. It is correct that under the scheme of the Act and Rules there is, unlike in the case of a trademark, no provision for advertisement of an application. A person objecting to the grant of registration can possibly know of the filing of an application only after the registration is granted. The remedy for such a person is to file an application for rectification thereafter. That by no means permits the Respondent No. 3 to file objections beyond the period of thirty days after the filing of the application. In fact, the Respondent No. 3 has filed such rectification applications in relation to certain other registrations.

13. This Court is unable to appreciate the impugned order of the Board which holds that the objections could be filed within a "reasonable time" after the objector coming to know of the filing of the application seeking registration. There is no such provision under the Act or the Rules. In any event, in the objections filed in the present case, nowhere has the Respondent No. 3 stated as to when it came to know of the filing of the applications by the Petitioner. For the thirty-day period to be computed in terms of Rule 16 (4), the exact date of coming to know of the filing of an application would become a question of fact for which evidence would have to be led. With Respondent No. 3 not even making an averment in this regard, there was no question of computing any thirty-day period in terms of Rule 16 (4) from the date of such knowledge.

14. Viewed from any angle, therefore, the objections filed by

Respondent No. 3 on 19th April 2005 long after the expiry of thirty days from the filing of the applications by the Petitioner for grant of registration, were time barred under Rule 16(4) of the Rules. Consequently, the impugned order of the Board holding that the objections filed by the Respondent No.3, were not time barred is hereby set aside.

15. Since the objections filed by Respondent No.3 have been held to be time barred, there is no need to examine other issues on merits. The objections should be treated as having been rejected. Consequently, the impugned order of the Board is set aside and the order dated 23rd December 2005 of the Registrar is restored.

16. The writ petition is allowed but, in the circumstances, with no order as to costs.

ILR (2011) DELHI 263
RSA

SHRI SATYA PRAKASH GUPTA ....APPELLANT

VERSUS

MANAGING COMMITTEE, RAMJAS HIGHER SECONDARY SCHOOL NO. 1 & ORS. ....RESPONDENTS

(INDERMEET KAUR, J.)

RSA. NO. : 31/2005 DATE OF DECISION: 13.01.2011

(A) Service Law—Where person illegally denied opportunity to work on promoted post, Whether entitled to full salary and allowances for that period—Plaintiff filed suit for declaration and permanent injunction—Claimed entitlement to post of Principal in Respondent School—Not called for interview for the said post—Juniors to Plaintiff called for interview—Hence suit filed—Trial Court decreed suit against

Plaintiff—Jurisdiction barred by Section 25, Delhi School Education Act ("DSEA")—Contract for personal service unenforceable—Appellate Court upheld decision of lower Court—Regular Second appeal filed—Matter remanded back to first appellate Court on 11.03.2004—Appellate Court upheld finding of trial Court—Post of principal a selection post and not promotional post—Hence present second appeal. Only issue was whether the post of Principal is a promotional post or a selection post—Before enactment of Delhi School Education Act, 1973—Terms and conditions of service of employees of Schools governed by Notifications/Circulars of Delhi Administration—Ratio of JS Arora considered—DSEA and Rules framed thereunder—Contain no provision for method of recruitment to post of Principal—Whether by direct recruitment, promotion or both.

The only issue before this Court is that as to whether the post of Principal was a promotion post or a selection post. The impugned judgment had returned a finding that this is a selection post. The second question of law framed by this Court is based on the judgment relied upon by the learned counsel for the appellant in the case of **J.S. Arora** (Supra). In this case while considering the statutory provisions of DSEA and the Rules framed thereunder it was held that before the Delhi School Education Act, 1973 came into force, the terms and conditions of service applicable to employees of the Schools were governed by the Notifications/ Circulars of the Delhi Administration framed from time to time. The Notification of 14.05.1962 and the Circular dated 10.05.1963 of the Delhi Administration for recruitment to the post of Principal had been considered wherein it was stated that the post of Principal was to be filled by promotion and in case no suitable departmental candidate was available in the next lower grade by direct recruitment. 50% of the recruitment was to be made by promotion and 50% by direct recruitment. This was prior to enactment of the Delhi School

Education Act, 1973. However, even in the legislation of Delhi School Education Act and Rules contained thereunder, there was no provision for the method of recruitment to the post of Principal of a recognized private school. Neither was there any reference in Section 8 and nor in Rule 108. Chapter VIII of the said Act deals with the terms and conditions of service of employees of recognized private school. None of the rules i.e. from Rule 96 to Rule 121 in Chapter VIII of the said Rules dealt with the method of recruitment of Principals i.e. whether by direct recruitment or promotion or by both. **(Para 13)**

(B) Ratio of Jaswant Rai examined—Existing employee entitled to opt for service conditions prevailing prior to DSEA—Thus, pre-existing rules to prevail—Usual practice of recruitment by 50% promotion and 50% by direct recruitment—Appellant not granted interview on October 1977 for reason he had qualified MA with 3rd division—Respondent relied on notification dated 13.11.1975—Said notification already nullified by subsequent notification dated 24.04.1977—Hence at time of interview, Appellant entitled to interview.

Record has thus revealed that when the suit was filed by the plaintiff on 01.10.1977, the notification which had been issued on 13.11.1975 stating that only a second divisioner MA could be considered for the post of Principal had already stood nullified by a subsequent notification dated 20.04.1977. The plaintiff had contended that the interviews to the post of Principal were fixed for October, 1977. The petitioner had not been granted interview only for the reason that he had qualified his MA degree with a third division. The Department had relied upon the notification dated 13.11.1975 not to call him for the interview. This notification already stood nullified by a subsequent notification dated 24.04.2011 meaning thereby that in October, 1977, there was no provision prohibiting the consideration of the plaintiff for interview to the post of Principal. He was legally

entitled to be considered for interview. **(Para 17)**

(C) Finding that Principal is Selection post—Based on reason that interview held for post—Ratio of Jaswant Rai ignored—Vacancies to be filled by promotion or direct recruitment according to rules made by Administrator—No such rules pointed out.

In the written statement, the contention was that this is a selection post. The impugned judgment has noted this post to be a selection post primarily for the reason that interviews were to be held for the post; that is why it should be treated as a selection post. Impugned judgment had overlooked the ratio of judgment reported in the case of Jaswant Rai wherein in-depth analysis of the Act and existing rules had been considered prior to enforcement of this Act. Even under the existing Act i.e. Delhi School Education Act and the Rules framed thereunder, the vacancies are to be filled by promotion or by direct recruitment in accordance with the rules made by the Administrator. No rules have been pointed out which have been made by the Administrator. It is also not the case of the department that the existing recruitment rules for Principal in the Government Higher Secondary School provides for recruitment to the post of Principal 50% by promotion failing which by direct recruitment. **(Para 18)**

(D) Appellant fully entitled to be called for interview—Respondent School not denied qualifications of Appellant—Impugned judgment set aside—Where person illegally denied opportunity to work on promoted post, entitled to full salary and allowances for that period—Appeal allowed—Appellant entitled to be promoted to post to Principal—All consequential benefits to be paid since Appellant retired.

In a judgment of this Court reported in 1984 (6) 211 titled **J.S. Arora Vs. Union of India & Ors** while considering the import of disciplinary proceedings and penalties falling thereupon, it was held that a person who had been illegally

denied an opportunity to work on a promoted post, would be entitled to full salary and allowances for that period. Prayer (e) in the plaint also makes a claim in this count.

(Para 21)

Important Issue Involved: Where person illegally denied opportunity to work on promoted post—Entitled to full salary and allowances for that period—Appeal allowed—Appellant entitled to be promoted to post Principal—All consequential benefits to be paid since Appellant retired.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Keshav Dayal, Sr. Advocate with Mr. Prahlad Dayal, Advocate.

FOR THE RESPONDENTS : Mr. Sunil Mittal, Advocate for R-1, R-2 & R-4. Ms. Avnish Ahlawat, Advocates for R-3.

CASES REFERRED TO:

1. *J.S. Arora* vs. *Union of India & Ors.* 1984 (6) 211.
2. *Jaswant Rai Gupta* vs. *Delhi Administration & Ors.* 1980 Lab IL, 289.

RESULT: ????.

INDERMEET KAUR, J. (Oral)

1. This appeal has impugned the judgment and decree dated 28.08.2004 which had endorsed the findings of the trial Judge dated 21.05.1997 whereby the suit of the plaintiff Shri Satya Prakash Gupta seeking declaration to the effect that he is the only person entitled to be promoted to the post of Principal in the Ramjas Higher Secondary School, Darya Gang was dismissed. The impugned judgment had although endorsed the conclusion of the trial Judge yet the reasoning in the impugned judgment was different and on different counts.

2. The plaintiff had filed his suit for declaration and permanent

injunction. His prayer as aforenoted is that he is entitled to be promoted to the post of Principal. He was eligible for the same. He was a qualified M.A.; experienced and a teacher of high calibre having academic interest in the Institution. He had joined the Ramjas School in the year 1960 as a Maths teacher. The plaintiff inspite of having all the requisite qualifications for the promotional post of Principal was not called for the interview; the contention of the defendant that a M.A. qualified with a second division was alone eligible was a mis-reading of the rules applicable to the defendant school. The candidates junior to him were called for interview. Present suit was accordingly filed.

3. The defendant contested the suit. It was stated that under the Delhi School Education Act (hereinafter referred to as 'DSEA') and the Rules applicable, the minimum qualification for the post of Principal was a M.A. with a second class and a third divisioner i.e. the petitioner was not qualified for the said post. A preliminary objection was also raised about the maintainability of the present suit being barred under Section 25 of DSEA.

4. On the pleadings of the parties, following six issues were framed:-

1. Whether the plaintiff was eligible to be considered for the post of Principal? OPP
2. Whether the Civil Court has jurisdiction to entertain the present suit? OPP
3. If the issue No. 1 is held in affirmative, is the plaintiff entitled to the declaration prayed for?
4. Whether the suit is maintainable in the present form? OPP
5. Whether the suit is bad for non-joinder and mis-joinder of the parties? OPD.
6. Relief.

5. Evidence on behalf of the plaintiff and defendant was led. The Government Notification and the Resolutions relied upon by the respective parties were adverted to. The trial Judge held that the jurisdiction of the Civil Court is barred under Section 25 of DSEA. Further in terms of the Rules applicable, only a M.A with a second division was a candidate who could be considered for the said post. It was further held that a contract for personal service cannot be enforced. The suit of the plaintiff was

dismissed.

6. The appeal filed against the impugned judgment was dismissed by the first appellate Court on 29.11.2001.

7. RSA No. 37/2002 was preferred. The High Court on the perusal of the circular dated 20.04.1977 had set aside the judgment and decree dated 29.11.2001 and the matter was remanded back to the first appellate Court to decide it afresh. This was vide order dated 11.03.2004.

8. Vide impugned judgment and decree dated 28.08.2004, the judgment of the trial Judge was affirmed. The suit of the plaintiff stood dismissed. The impugned judgment had held that in view of the fact that notification dated 13.11.1975 stood cancelled vide subsequent notification dated 20.04.1977; notification dated 24.05.1962 was revived and the plaintiff/appellant although a third divisioner was yet held to be eligible and qualified for the post of Principal. The subsequent notification dated 25.02.1980 had also been relied upon in the impugned judgment vide which for the post of Principal, master degree with atleast second division although required, was to be relaxed in case the candidate belonged to the same school. In this background, issue No. 1 was decided in favour of the plaintiff. It was further held that the suit in the present form was maintainable. The plaintiff was deprived from interview when he was eligible for the same. The Court had, however, dismissed the suit on the ground that the post of Principal was not a promotional post but it was a selection post; this was in the background of the fact that the plaintiff had admitted that he had not been called for the interview, the Court held that the interviews are held for a selection post and not for promotion post. The finding of the trial Judge was thus affirmed and the suit of the plaintiff stood dismissed.

9. This is the second appeal. After its admission on 23.04.2009, the following substantial questions of law were formulated:-

> 1. Whether in view of the finding of First Appellate Court that plaintiff was entitled to be considered for the post of Principal, the court erred in law in declining to give any relief
>
> 2. Whether the First Appellate Court was not bound to follow the ratio laid down in the judgment of this Court in Jaswant Rai Gupta v. Delhi Administration (1980 LAB LC 284) and to hold that post of the principal was a promotion post and not a selection post?
>
> 3. Whether the appellant who was the only senior most candidate being the vice principal had to be promoted to the post of principal?

10. Learned counsel for the appellant has urged that the notification dated 13.11.1975 had admittedly been struck down by a subsequent notification dated 20.04.1977. The notification dated 24.05.1962 stood revived. Giving effect to this notification, the plaintiff was eligible; this has been upheld in the impugned judgment. The finding in the impugned judgment that this is a selection post is clearly contrary to the law which has been laid down by a Bench of this Court in the judgment reported in 1980 Lab IL, 289 titled **Jaswant Rai Gupta Vs. Delhi Administration & Ors.** The Court returned a clear finding that the post of Principal in Delhi Schools is a promotional post and not a selection post. Applying the ratio of the said judgment, the plaintiff/ appellant being fully eligible to the post of Principal and he having being denied to participate in the interview, is an illegality and he is thus entitled to a decree of declaration to the effect that he was the only eligible candidate entitled to be promoted to the post of Principal. It is submitted that all consequential benefits accruing to the plaintiff would also accrue in his favour. For this proposition, reliance has been placed upon a judgment of this Court reported in 1984 (6) 211 titled **J.S. Arora Vs. Union of India & Ors.** It is submitted that in this judgment it was held that when a person has wrongly been denied opportunity to work on a promoted post, he is entitled to full salary and allowances.

11. Arguments have been countered.

12. The impugned judgment has returned a categorical finding that the notification dated 13.11.1975 had been struck down by a subsequent notification dated 20.04.1977, the notification dated 24.05.1962 stood revived. In terms of the notification dated 24.05.1962, a Master degree from a recognized university with a three year teaching experience was the qualification for the recruitment to the post of Principal. A clear and cogent finding had been returned that the appellant/plaintiff was entitled to be considered for the post of Principal. No cross-appeal has been filed by the respondent against this finding which has since attained a finality.

13. The only issue before this Court is that as to whether the post of Principal was a promotion post or a selection post. The impugned judgment had returned a finding that this is a selection post. The second question of law framed by this Court is based on the judgment relied upon by the learned counsel for the appellant in the case of **J.S. Arora** (Supra). In this case while considering the statutory provisions of DSEA and the Rules framed thereunder it was held that before the Delhi School Education Act, 1973 came into force, the terms and conditions of service applicable to employees of the Schools were governed by the Notifications/ Circulars of the Delhi Administration framed from time to time. The Notification of 14.05.1962 and the Circular dated 10.05.1963 of the Delhi Administration for recruitment to the post of Principal had been considered wherein it was stated that the post of Principal was to be filled by promotion and in case no suitable departmental candidate was available in the next lower grade by direct recruitment. 50% of the recruitment was to be made by promotion and 50% by direct recruitment. This was prior to enactment of the Delhi School Education Act, 1973. However, even in the legislation of Delhi School Education Act and Rules contained thereunder, there was no provision for the method of recruitment to the post of Principal of a recognized private school. Neither was there any reference in Section 8 and nor in Rule 108. Chapter VIII of the said Act deals with the terms and conditions of service of employees of recognized private school. None of the rules i.e. from Rule 96 to Rule 121 in Chapter VIII of the said Rules dealt with the method of recruitment of Principals i.e. whether by direct recruitment or promotion or by both.

14. Rule 108 in fact deals with filling up of vacancies and provides that every vacancy in an aided school shall be filled by promotion or by direct recruitment in accordance with such rules as may be made by the Administrator in this behalf. No rule framed by the Administrator with regard to the mode of recruitment for filling up of vacancies to the post of Principal has been brought to the notice of this Court. The existing recruitment rules for the post of Principals of Government Higher Secondary School provide that recruitment to the post of Principal will be 50% by promotion failing which by direct recruitment.

15. The judgment of the Jaswant Rai had dealt with an in-depth analysis on these Rules. While interpreting the provisions of Section 8 Sub-Clause 1 of the Act dealing with the terms and conditions of existing

employees of recognized schools, it was held that a right had been given to the existing employees of a school to the extent as applicable to them to opt for the mode of recruitment immediately before the commencement of the Act. This is contained in the second proviso to sub-section 1 of Section 8. Thus, an existing employee was entitled to opt for the service conditions prevailing prior to the enactment of Delhi School Education Act. The Act and the Rules no doubt empower the Administrator to make rules with regard to the method of recruitment. However, no such rule has been pointed out.

16. The pre-existing rules including the circular dated 14.05.1962 & 10.05.1963 would, therefore, prevail. This is also consistent with the admitted practice pertaining in Government school in Delhi where recruitment is 50% by promotion and 50% by direct recruitment.

17. Record has thus revealed that when the suit was filed by the plaintiff on 01.10.1977, the notification which had been issued on 13.11.1975 stating that only a second divisioner MA could be considered for the post of Principal had already stood nullified by a subsequent notification dated 20.04.1977. The plaintiff had contended that the interviews to the post of Principal were fixed for October, 1977. The petitioner had not been granted interview only for the reason that he had qualified his MA degree with a third division. The Department had relied upon the notification dated 13.11.1975 not to call him for the interview. This notification already stood nullified by a subsequent notification dated 24.04.2011 meaning thereby that in October, 1977, there was no provision prohibiting the consideration of the plaintiff for interview to the post of Principal. He was legally entitled to be considered for interview.

18. In the written statement, the contention was that this is a selection post. The impugned judgment has noted this post to be a selection post primarily for the reason that interviews were to be held for the post; that is why it should be treated as a selection post. Impugned judgment had overlooked the ratio of judgment reported in the case of Jaswant Rai wherein in-depth analysis of the Act and existing rules had been considered prior to enforcement of this Act. Even under the existing Act i.e. Delhi School Education Act and the Rules framed thereunder, the vacancies are to be filled by promotion or by direct recruitment in accordance with the rules made by the Administrator. No rules have been pointed out which have been made by the Administrator. It is also not

the case of the department that the existing recruitment rules for Principal in the Government Higher Secondary School provides for recruitment to the post of Principal 50% by promotion failing which by direct recruitment.

19. The instant is a classic example where the appellant/plaintiff had been denied a valuable right and not called for interview to the post of Principal only for the reason that he was a third divisioner whereas there was no such qualification; he was fully entitled to be considered and called for interview. In the plaint, the categorical averment made is that he was academically qualified and fulfilled all criteria to the post of Principal; paras 3 & 4 of the plaint clearly mentions that he was academically qualified and was in fact officiating as Principal to which averment there is no denial. This fact reinforces the averment made by the appellant that he was entitled and was the candidate entitled to be promoted as Principal. He was withheld only for a reason i.e. he being a third divisioner which was not a valid reason for disqualification. There is also no denial to the averment of the plaintiff that he was a fully qualified candidate entitled to the promoted post; he had in fact been officiating as Principal. There is also no denial to the averment that his juniors were called for the interview.

20. The findings in the impugned judgment are liable to be set aside. The appellant is held entitled to promotion to the post of Principal.

21. In a judgment of this Court reported in 1984 (6) 211 titled **J.S. Arora Vs. Union of India & Ors** while considering the import of disciplinary proceedings and penalties falling thereupon, it was held that a person who had been illegally denied an opportunity to work on a promoted post, would be entitled to full salary and allowances for that period. Prayer (e) in the plaint also makes a claim in this count.

22. Appeal is accordingly allowed. The appellant is held entitled to be promoted to the post of Principal; admittedly the appellant has since retired, all consequential benefits accruing to this post would be payable to him which shall be paid to him within a period of four weeks from today.

23. Appeal stands disposed of in the above terms.

ILR (2011) DELHI 274
FAO

SIMPLEX INFRASTRUCTURES LTD. ....APPELLANT

VERSUS

NATIONAL HIGHWAYS AUTHORITY OF INDIA ....RESPONDENT

(VIKRAMAJIT SEN & MUKTA GUPTA, JJ.)

FAO (OS) NO. : 200/2010 & DATE OF DECISION: 14.01.2011
CM NO. : 5445/2010
FAO (OS) NO. : 536/2009 &
CM NOS. : 15975/2009, 14264/2010

Arbitration and Conciliation Act, 1996—Section 9—Appellants preferred appeals against order dismissing grant of interim injunction on application moved by them under Section 9 of the Act—Appellants urged, Section 9 vests wider powers in Courts to grant interim injunctions—Per contra, Respondent urged grant of such interim injunction would have effect of granting appellant final relief—Held:- The power under Section 9 is not totally independent of the well known principles governing the grant of interim injunction that generally govern the Courts in this connection—The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governs the grant of interim injunction—Except for the residual Clause (e) which is very widely worded, the power to grant injunctions remain the same.

It appears to us, therefore, that the Learned Single Judge was not correct in declining to grant the injunction prayed

for before him viz. restraining the Respondent from implementing and/or enforcing its letter Nos. NHAI/40020/ Tech-III/EW-III/2006/WB-4/735 and NHAI/PIU/Araria/ escalation/ 2009 dated July 20, 2009 and July 29, 2009 respectively, erroneously feeling bound by Kamaluddin Ansari. In **Adhunik Steels Ltd. –vs- Orissa Manganese & Minerals Pvt. Ltd.,** AIR 2007 SC 2563, it has been opined that "it would not be correct to say that the power under Section 9 is totally independent of the well known principles governing the grant of interim injunction that generally govern the Courts in this connection". Their Lordships have also extracted portions from International Commercial Arbitration in UNCITRAL Model Law Jurisdictions by Dr. Peter Binder. Several other treatise have been referred to, and we cannot do better than commend the reading of this detailed Judgment. The following paragraph justifies reproduction:-

> 11. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of "just and convenient" while speaking of passing any interim measure of protection. The concluding words of the section, .and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. also suggest that the normal rules that govern the court in the

> grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act. **(Para 15)**

Important Issue Involved: The power under Section 9 is not totally independent of the well known principles govering the grant of interim injunction that generally governing the Courts in this connection—The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governs the grant of interim injunction—Except for the residual Clause (e) which is very widely worded, the power to grant injunctions remain the same.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. K.V. Singh & Mr. Manish Dembla, Advocates.

FOR THE RESPONDENT : Mr Sandeep Sethi, Sr. Advocate with Ms. Padma Priya & Ms. Meenakshi Sood, Advocates.

CASES REFERRED TO:

1. *Simplex Infrastructure* vs. *NHAI* FAO(OS) 383/2009.
2. *NHAI* vs. *Unitech-NCC Joint Venture*, FAO(OS) 338/ 2008.

3. *Arvind Construction Co. Ltd.* vs. *M/s. Kalinga Mining Corporation,* AIR 2007 SC 2144.

4. *Adhunik Steels Ltd.* vs. *Orissa Manganese & Minerals Pvt. Ltd.,* AIR 2007 SC 2563.

5. *Transmission Corp. of A.P. Ltd.* vs. *Lanco Kondapalli Power (P) Ltd.,* (2006) 1 SCC 540.

6. *Firm Ashok Traders* vs. *Gurumukh Das Saluja,* (2004) 3 SCC 155.

7. *Sundaram Finance Ltd.* vs. *NEPC,* (1999) 2 SCC 479.

8. *Union of India* vs. *Raghubir Singh,* (1989) 2 SCC 754.

9. *H.M. Kamaluddin Ansari* vs. *Union of India,* (1983) 4 SCC 417.

10. *Union of India* vs. *Raman Iron Foundary,* AIR 1974 SC 1265; 1974 2 SCC 231.

RESULT: (i) Appeal allowed against order dt. 04.03.2010.

(ii) Appeal dismissed against the Order dt. 04.11.2009.

VIKRAMAJIT SEN, J.

1. This Appeal is directed against the Order of the learned Single Judge dated 4.3.2010 passed in OMP No.484/2009. The learned Single Judge had turned down a request under Section 9 of Arbitration & Conciliation Act, 1996 (A&C Act for short) to pass an interim order restraining the Respondents from implementing and/or enforcing or otherwise giving effect to its letter nos. NHAI/40020/Tech-III/EW-III/ 2006/WB-4/735 and NHAI/PIU/ Araria/ escalation/2009 dated July 20, 2009 and July 29, 2009 respectively, Annexures P-1 and P-2 to the petition. Further, the Court had declined the prayer for restraining the Respondent/NHAI from deducting any amounts from the payments due to the petitioner or otherwise recovering any payments in pursuance of the said letters until the eventual resolution of the dispute between the petitioner and the Respondent. In the opinion of the Court such an Order would have the effect of directing the National Highways Authority of India (NHAI) to make payments as per the original understanding between the parties during the pendency of arbitration proceedings. Such a direction, being in the nature of a positive injunction, would, as articulated in the

impugned Order, therefore transgress the law.

2. The disputes pertain to the interpretation of a Clause 70.3 in the Contract. It is the Appellant's case that the said Clause 70.3 was construed by NHAI and understood by the parties in a particular manner and payments had been made as per that understanding for a period spanning three years; and pursuant to which 31 Interim Payment Certificates (IPCs) from the year 2006 to 2009 had been disbursed. On July 11, 2009, the Respondents issued a letter positing that excess payments had been made to the Appellant due to wrong recommendations by the Engineer. Two impugned Notifications were issued by NHAI directing the Engineer to process the IPCs as per the new interpretation of the Clause 70 pertaining to Price Adjustment.

3. Learned Counsel for the Appellant contends that in the contract between the parties Clause 70 of Conditions of Particular Application (COPA) provides for adjustment of contract price predicated on any rise or fall in cost of labour, equipment, plant, material and other inputs to the works. Heretofore, this adjustment has been made as per the actual price of the inputs of work. Vide the impugned Notification, endeavour of the Respondent is to adjust prices on the basis of base price instead of actual price. The extant method of price adjustment is stated by the NHAI to be illegal and against the spirit of the Agreement entered into by the parties viz. the Price Adjustment Clause, viz. Clause 70. The Appellant has invoked the Dispute Resolution Clause provided in COPA and has referred the disputes to Disputes Review Board (DRB) which will decide on the validity of the virtual volte-face of the Respondent. Meanwhile, the Appellant is pressing for a stay of the operation of the impugned Notification issued by NHAI.

4. Indubitably, if the prayers are granted, it will have the effect of asking the NHAI to continue the disbursement of payments as per the earlier practice. Mr. Sandeep Sethi, learned Senior Counsel for the Respondent, has sought to urge that such an interim injunction would, in turn, have the effect of granting the Appellant the final relief which he seeks by means of A&C Act through his Section 9 application. It is also argued that the Courts cannot, by means of an interim injunction or arrangement, order payment of amounts or dues which are disputed between the parties. The learned Senior Counsel relies on the **H.M.**

Kamaluddin Ansari –vs- Union of India, (1983) 4 SCC 417 to buttress his argument on this score.

5. The Appellant, however, states that the Courts under Section 9 of the A&C Act have ample powers to secure the interests of parties; and that the Petitioner merely prays for a *status quo* order in respect of the interpretation of the Contract. The learned counsel sought to controvert the argument of the Respondent on the aspect of feasibility of such an injunction on the strength of **Transmission Corp. of A.P. Ltd. –vs- Lanco Kondapalli Power (P) Ltd.,** (2006) 1 SCC 540. **Kamaluddin Ansari** is sought to be distinguished on the ground that firstly the said Judgment was delivered in the backdrop at Section 41 of Arbitration Act, 1940 which now stands replaced by Section 9 of A&C Act which vests much wider powers in the Courts to grant interim injunctions. Secondly, it is argued that in that case an injunction was sought to restrain the Respondent/Union of India from withholding the payments of the Appellant under other Bills, whereas a direction is sought in this case to continue payment on the basis on which NHAI has been paying heretofore and for as long as the immediately previous three years and in 31 instances.

6. In FAO(OS) 338/2008 titled **NHAI –vs- Unitech-NCC Joint Venture,** which we had decided on 30th August, 2010. Keeping in perspective the views of the Dispute Resolution Board as well the Arbitral Tribunal, which were adverse to the stand taken by the NHAI, we had dismissed the Appeal. The argument of the learned Additional Solicitor General to the effect that the new interpretation of a comparable Clause, sought to be enforced by a similar subsequent Notification should not be interfered with, did not find our favour. On merits, therefore, the NHAI indubitably will face insurmountable obstacles. But we are not concerned with the merits of the dispute.

7. Our attention has been drawn to the circumstances in **Transmission Corp.** which appear to be kindred to the factual matrix existing in the case in hand. In that case, the dispute pertained to payments in respect of power supply where the State Agency had been making payments on the output of the concerned Power Plant pegged at 368.144 MW. This was sought to be altered by issuing a notice that the base should have been fixed at 351.49 MW and that all future payments were to be computed and collected on that basis. The Hon'ble Supreme Court, while upholding the injunction granted by the High Court, observed as

follows:-

> 49. Conduct of the parties is also a relevant factor. If the parties had been acting in a particular manner for a long time upon interpreting the terms and conditions of the contract, if pending determination of the lis, an order is passed that the parties would continue to do so, the same would not render the decision as an arbitrary one, as was contended by Mr Rao. Even the appellant had prayed for adjudication at the hands of the Commission in the same manner. Thus, it (sic 'appellant') itself thought that the final relief would be granted only by the arbitrator.
>
> (words in parenthesis have been added by us)

8. We shall first analyse Kamaluddin Ansari to determine whether the principle laid down as regards the power to grant interim injunction holds good after coming into effect of the A&C Act. Their Lordships were called upon to decide an application under Section 41 of the Arbitration Act read with Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908. Section 41 of the Arbitration Act was couched in these words:-

> 41. Procedure and powers of Court.—Subject to the provisions of this Act and of rules made thereunder—
>
> (a) the provisions of the Code of Civil Procedure, 1908 (5 of 1908), shall apply to all proceedings before the Court, and to all appeals, under this Act; and
>
> (b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court:
>
> Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

9. Thus, the provision provides a Court seized of a matter which is subject matter of Arbitration, power to make orders in respect of the matters in the Second Schedule which reads thus:-

1. The preservation, interim custody or sale of any goods which are the subject-matter of the reference.

2. Securing the amount in difference in the reference.

3. The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

4. Interim injunctions or the appointment of a receiver.

5. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.

10. The argument is that the A&C Act provides wider powers to grant interim injunction in respect of an arbitrable dispute as would be evident from a perusal of Section 9 of the A&C Act which reads as follows:-

9. Interim measures, etc. by Court.—A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court:—

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or (*erstwhile 5th Clause of IInd Schedule*)

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

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (*erstwhile 1st Clause of IInd Schedule*)

(b) securing the amount in dispute in the arbitration; (*erstwhile 2nd Clause of IInd Schedule*)

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; (*erstwhile 3rd Clause of IInd Schedule*)

(d) interim injunction or the appointment of a receiver; (*erstwhile 4th Clause of IInd Schedule*)

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

A careful perusal discloses that except for the residual Clause (e), which is very widely worded, the power to grant injunctions remain the same in both the statutes.

11. We shall now revert to Kamaluddin Ansari. Their Lordships had extracted paragraph 6 from the previous decision in **Union of India – vs- Raman Iron Foundary,** AIR 1974 SC 1265; 1974 2 SCC 231 to underscore the distinction between a negative and a positive injunction:-

The Court has, therefore, power under Section 41(b) read with the Second Schedule to issue interim injunction, but such interim injunction can only be "for the purpose of and in relation to arbitration proceedings". The arbitration proceedings in the present case were for determination of the mutual claims of the appellant and the respondent arising out of the contract contained in the acceptance of tender dated July 16, 1968. The question whether any amounts were payable by the appellant to the respondent under other contracts was not the subject matter of the arbitration proceedings. The Court obviously could not, therefore, make an interim order which, though ostensibly in form an order of interim injunction, in substance amounted to a direction to the appellant

to pay the amounts due to the respondent under other contracts. Such an interim order would clearly not be for the purpose of or in relation to the arbitration proceedings as required by Section 41(b).

Paraphrasing these words, it seems to us that Their Lordships had highlighted the position that a breach of the Order of interim injunction would not result from the non-payment of amount since the Court had only interdicted recovery by the Respondent of its claims. After cogitating upon all the clauses in the Contract before Their Lordships, the larger Bench in **Kamaluddin Ansari** expressed the opinion that "an injunction Order restraining the Respondents from withholding the amount due under other pending bills to the Contractor virtually amounts to a direction to pay the amount to the Contractor-appellant. Such an Order was clearly beyond the purview of Clause (b) of Section 41 of the Arbitration Act. The Union of India has no objection to the grant of an injunction restraining it from recovering or appropriating the amount lying with it in respect of other claims of the contractor towards its claim for damages. But certainly Clause 18 of the standard contract confers ample power upon the Union of India to withhold the amount and no injunction order could be passed restraining the Union of India from withholding the amount."

12. We shall now proceed to discuss Transmission Corp. which has been relied upon by the Appellant. The Two Judge Bench had analysed the nature of an ad interim injunction and the concomitants of such a relief. After referring to the connotation to be drawn from the phrase 'prima facie case', the Apex Court applied the dictum in **American Cyanamid Co. –vs- Ethicon Ltd.,** (1975) I All ER 504, especially with regard to the preservation of the status quo. It reiterated that if- "other factors appear to be evenly balanced it is a council of prudence to take such measures as are calculated to preserve the status quo. If the Defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the Trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial."

13. Transmission Corp. also makes a reference to **Firm Ashok Traders –vs- Gurumukh Das Saluja,** (2004) 3 SCC 155 but only for the purpose of enunciating that it is salutary to preserve the status quo. Ashok Traders, however, also touches upon the wider amplitude of powers available to the Court under the A&C Act in contradistinction to those that had been bestowed on the Court under the 1940 Act. In **Sundaram Finance Ltd. –vs- NEPC,** (1999) 2 SCC 479, the Hon'ble Supreme Court, while distinguishing the provisions of 1940 Act from the A&C Act, observed thus – "The 1996 Act is very different from the Arbitration Act, 1940. The provisions of this Act have, therefore, to be interpreted and construed independently and in fact reference to 1940 Act may actually lead to misconstruction. In other words the provisions of 1996 Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act". Once this difference is noted, it will be clear that **Kamaluddin Ansari** does not proffer proportions which are irreconcilable with **Transmission Corp.,** which lays emphasis on the advisability of maintaining status quo, but also garners support from the principle of estoppel. It was in this analysis of the change in law that the Hon'ble Supreme Court perceived no obstacle in upholding the direction to the Union of India to continue to adhere to the payments made prior to the clarificatory notification which was predicated on the installed capacity of 368.144 MW. No sooner the significance in the change of the law is borne in mind, the need to advert to **Union of India –vs- Raghubir Singh,** (1989) 2 SCC 754 is obviated.

14. We shall briefly discuss **Indian Oil Corporation –vs- Amritsar Gas Services,** (1991) 1 SCC 533 since it is often quoted to buttress the argument that granting mandatory injunctions should be abjured by the Court. Their Lordships recorded the view that the subject contract was (a) for an indefinite period terminable by a notice and (b) the contract was avowedly terminable. Since that engagement has been terminated, the Court observed that the restoration of the dealership could not have been ordered; that would tantamount to restoring the *status quo* ante by passing a mandatory injunction. We have an altogether different factual matrix before us. The contract is operational and in the continuum status quo is to be maintained or rent asunder.

15. It appears to us, therefore, that the Learned Single Judge was not correct in declining to grant the injunction prayed for before him viz. restraining the Respondent from implementing and/or enforcing its letter Nos. NHAI/40020/ Tech-III/EW-III/2006/WB-4/735 and NHAI/PIU/Araria/ escalation/2009 dated July 20, 2009 and July 29, 2009 respectively, erroneously feeling bound by Kamaluddin Ansari. In **Adhunik Steels Ltd. –vs- Orissa Manganese & Minerals Pvt. Ltd.,** AIR 2007 SC 2563, it has been opined that "it would not be correct to say that the power under Section 9 is totally independent of the well known principles governing the grant of interim injunction that generally govern the Courts in this connection". Their Lordships have also extracted portions from International Commercial Arbitration in UNCITRAL Model Law Jurisdictions by Dr. Peter Binder. Several other treatise have been referred to, and we cannot do better than commend the reading of this detailed Judgment. The following paragraph justifies reproduction:-

> 11. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of "just and convenient" while speaking of passing any interim measure of protection. The concluding words of the section, .and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power

> conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act.

16. This is also the view preferred in **Arvind Construction Co. Ltd. –vs- M/s. Kalinga Mining Corporation,** AIR 2007 SC 2144. This position of the law would become obvious because of the introduction of Section 9(e) into the A&C Act. Under the erstwhile jural regime, postulated in Section 41 of the 1940 Act, the dictates of justice and convenience as conceptualized by the Court, has not been envisioned. The learned single Judge ought to have pursued the path traversed in **Transmission Corp.** and **Adhunik Steels Ltd.** and should have applied the principles of estoppel or the expediency of continuing the status quo albeit with protection. Russell on Arbitration, 21st Edition, in Chapter 7-128 opined that the power to grant a Mareva injunction or a mandatory injunction is available to the Court in light of Section 44 of the English Arbitration Act, 1996. It seems to us that there is a general consensus of opinion on this legal point.

17. The Appeal is accordingly allowed. CM No.5445/2010 is disposed of. Respondents are directed to continue to make payments on the foundation followed in 31 prior instances. Since we are dealing with discretionary power, which is implicit in any injunction that is passed, we think that it would be appropriate to call upon the Appellants to furnish Bank Guarantees for the differential between the formulation followed in the previous 31 payments viz-a-viz the computation and claims put forward by the Respondents as a consequence of their impugned notification. There shall be no Order as to Costs.

FAO(OS) 536/2009 & CM Nos.15975/2009, 14264/2010

18. This Appeal assails the Order dated 04.11.2009, wherein the Learned Single Judge found no justification to grant the injunction sought by the Petitioner/Appellant, namely, to stay the operation of sundry letters issued by the NHAI/Respondents. However, in light of interim orders passed on 02.09.2009 and continued thereafter by a Division Bench against similar letters issued by the NHAI, the learned Single Judge in FAO(OS) 383/2009 titled **Simplex Infrastructure –vs- NHAI** kept the petition pending with a direction to stay of the operation of letters subject

to the Petitioner furnishing fresh Bank Guarantees in favour of the Respondent with respect to each amount which the Petitioner receives in terms of the interpretation of the subject Clause 70 of the COPA. FAO(OS) 383/2009 was withdrawn as infructuous on 29.04.2010 since the final decision in that very matter (OMP 484/09) came to be delivered in terms of the Order dated 04.03.2010 impugned in the foregoing FAO(OS) 200/2010. Ironically, the same learned Single Judge has chartered a course different to the interim orders dated 02.09.2009 in Simplex Infrastructure itself whilst applying the latter in this Appeal.

19. In the present Appeal, the Appellant has sought the following reliefs:-

(i) Quashing and/or setting aside the impugned order dated 4.11.2009 passed in OMP No.545/2009 to the extent that the same is against the Appellant.

(ii) Restraining and/or staying the implementation and/or the enforcement of the impugned letter dated July 20, 2009, September 01, 2009, September 18, 2009 and October 12, 2009 and

(iii) Restraining the Respondents from otherwise giving effect to its aforesaid letters and/or deviating from the agreed interpretation of the price adjustment clause, in any manner.

20. The learned Single Judge has discussed both **Kamaluddin Ansari** and **Transmission Corp.,** and arrived at the conclusion that the later decision cannot prevail upon the earlier one, which additionally was of a larger Bench. As already discussed above, we are of the opinion that the Judgments are not in conflict with each other since **Kamaluddin Ansari** construed the relevant provisions of the 1940 Act, whereas **Transmission Corp.** has analysed the A&C Act. We have found it unignorably relevant that Section 9(e) of the A&C Act is an altogether new provision which, in essence, enables the Court to draw upon the provisions of the CPC as also the Specific Relief Act, 1963. Having said this, a perusal of the operative part of the impugned Order will disclose that it is in consonance with the Orders passed by us in FAO(OS) 200/2010. It is for this reason that the Appeal along with the pending Applications is dismissed. We clarify that the Respondent shall make payment to the Appellant by adhering to the interpretation/practice adopted

by it in the payments made heretofore upon the Appellant providing a Bank Guarantee to cover the differential.

21. Parties to bear their respective costs.

ILR (2011) DELHI 288
WP (C)

SEVEN STAR HOTEL & RESORTS PVT. LTD. ....PETITIONER

VERSUS

UNION OF INDIA & OTHERS ....RESPONDENTS

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

WP (C) NO. : 533/2010 DATE OF DECISION: 14.01.2011

Land Acquisition Act, 1894—Section 5A, Section 6, Section 17—Petitioner challenged acquisition proceeding initiated as well as notification under Section 17 (4) of Act—It claimed to be owner of land measuring 14 Biswas and 8 Biswanisi in Village Khampur, Delhi—It urged, Notification issued by Respondents required land in question for public purpose namely for construction of sewage pumping station by Delhi Jal Board—On receipt of notice, petitioner came to know for first time about acquisition proceedings—As small piece of land belonging to petitioner was to be acquired, therefore, personal service on the petitioner was necessary which was not done—Moreover, no notification under Section 4 was affixed on land in question, thus, once notification under Section 4 fails then entire acquisition proceedings also had to go—As per Respondents, valid cause for issuance of notifications under Section 4, read with Section 17 (1) and (4) of the Act existed as

sewage pump station was a part of larger grid to be constructed pursuant to orders passed in various cases by Supreme Court with respect to cleaning of river Yamuna and there was no malafide in acquisition proceedings—Held:- A conjoint reading of provisions of Section 4 & Section 45 shows that there is very much envisaged personal service upon a person in certain circumstances—Acquisition of a small portion of land belonging only to one person is a fit case where there ought to be a personal service upon the person whose land is sought to be required—In General Notification which involves acquisition of large parcels of land involving many persons, the existence of acquisition proceedings are easily known as a large section of public is affected—Accordingly, there was no due service upon the petitioner and the petitioner would be entitled to compensation as on the date of possession of land and not from the date of notification published under Section 4 of the Act.

45. Service of notices.—(1) Service of any notice under this Act shall be made by delivering or tendering a copy thereof signed, in the case of a notice under Section 4, by the officer therein mentioned, and, in the case of any other notice, by or by an order of the Collector or the Judge.

(2) Whenever it may be practicable, the service of the notice shall be made on the person therein named.

(3) When such person cannot be found, the service may be made on any adult male member of his family residing with him; and, if no such adult male member can be found, the notice may be served by fixing the copy on the outer door of the house in which the person therein named ordinarily dwells or carries on business, or by fixing a copy thereof in some conspicuous place in the office of the officer aforesaid or of the Collector or in the court-house, and also in some conspicuous part of the land to he acquired:

Provided that, if the Collector or Judge shall so direct, a notice may be sent by post, in a letter addressed to the person named therein at his last known residence, address or place of business and [registered under Sections 28 and 29 of the Indian Post Office Act, 1898], and service of it may be proved by the production of, the addressee's receipt."

(Para 45)

Important Issue Involved: A conjoint reading of provisions of Section 4 & Section 45 shows that there is very much envisaged personal service upon a person in certain circumstances—Acquisition of a small portion of land belonging only to one person is a fit case where there ought to be a personal service upon the person whose land is sought to be acquired.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Ravinder Sethi, Senior Advocate with Mr. Sumit Bansal and Mr. Ateev Mathur, Advocates.

FOR THE RESPONDENTS : Ms. Meera Bhatia & Mr. Roshan Kumar Advocate for Respondent No.1/Union of India. Mr. Sanjay Poddar Advocate for Respondents no.2 to Respondent no.4, Mr. Sanjeev Sabharawal Advocate for Respondent no. 5 MCD. Mr. Ashok Bhasin, Senior Advocate with Mr. Sumeet Pushkarna Advocate for Respondent no.6 Delhi Jal Board.

CASES REFERRED TO:

1. *Babu Ram* vs. *State of Haryana* 2009 (10) SCC 115.
2. *Competent Authority* vs. *Barangore Jute Factory* (2005) 13 SCC 477.

3. *Jai Narain* vs. *Union of India,* (1996) 1 SCC 9.

RESULT: Writ petition dismissed.

VALMIKI J. MEHTA, J.

1. The petitioner company, by means of the present writ petition under Article 226 of the Constitution of India, seeks reliefs for quashing the acquisition proceedings initiated under the Land Acquisition Act, 1894 (hereinafter referred to as the 'said Act') and also alternatively for quashing the notification under Section 17(4) of the said Act exempting the grant of hearing under Section 5A of the said Act alleging that the provision of Section 17(4) has not been validly invoked.

2. The petitioner company is the owner of land measuring 14 biswas and 8 biswansi (approximately 720 sq. yds) situated in Khasra No. 27/18/2 in village Khampur, Delhi. A notification under Sections 4 and 17(1) read with Section 17(4) of the Act was issued with respect to the land on 13.2.2009. A declaration was thereafter issued under Section 6 on 26.10.2009. The land in question was required for a public purpose namely construction of sewage pumping station by Delhi Jal Board/ respondent no.6. The petitioner received a notice under Section 9 of the said Act dated 22.12.2009, and claims that accordingly, for the first time, it came to know of the acquisition proceedings. The petitioner, therefore filed the present writ petition seeking reliefs as already stated above.

3. Before this court, the learned senior counsel for the petitioner raised the following main arguments:-

(i) The notification under Section 4 was bad because the land which was sought to be acquired was a small parcel of land belonging to the petitioner company only and therefore it was necessary to effect personal service on the petitioner company at its address and which has not been done. It was also argued that there was no notification under Section 4 which was affixed on the land in question and consequently, once the notification under Section 4 fails, the entire acquisition proceedings also have to go.

(ii) In the facts of the present case, the authorities have erred in invoking the provisions of Sections 17(1) and 17(4) of the said Act by not granting hearing to the petitioner under Section 5A of the said Act

as right to property was a valuable constitutional right under Article 300-A of the Constitution. It was urged that the subject land is part and parcel of a much larger land totaling to about approximately 4 acres being Khasra Nos. 27/18/2 (3-10), 16 (4-16), 17(4-11), 27/23/2 (2-5), 24(4-16), 25(4-16) and 26(0-5) and with respect to this land, plans for a motel were already sanctioned by MCD on 7.2.2007 which aspect has not been considered before issuing the acquisition notification. It is further urged that as per the Master Plan/Zonal Plan, the land in question was a part of green belt and is a no construction zone, being required for widening of the National Highway, and which aspects were not brought to the notice of the authorities and hence even after acquisition, this land cannot be put to use of a sewage pumping station. The authorities have failed to apply their mind in issuing the subject notifications which are therefore, liable to be quashed.

(iii) The acquisition proceedings were malafide because in reality as per the survey report dated 11.1.2008 what was sought to be acquired was actually not the subject K.No. 27/18/2 belonging to the petitioner but the adjoining K.No. 27/13. It is argued that by creating confusion and in a malafide manner, the acquisition proceedings were got altered to the K.No. 27/18/2 belonging to the petitioner.

4. The counsel for the respondent Nos. 2 to 4 being the land acquiring authorities, and the learned senior counsel for respondent no.6/ the beneficiary of acquisition, have strongly opposed the case of the petitioner. It was firstly argued in rebuttal that there exists valid cause for issuance of the notifications under Section 4 read with Sections 17(1) and 17(4) of the said Act because the sewage pumping station is part of a larger grid which is being constructed pursuant to the orders passed in various cases by the Supreme Court with respect to the cleaning of the river Yamuna. It was argued that quite clearly this is not only a valid public purpose but also that there were therefore adequate reasons for directing that hearing under the provision of Section 5A be exempted. It was argued that the applicability of the provisions of Sections 17(1) and 17(4) in the facts of the present case is fully justified and directly covered by the decision of the Supreme Court in a case involving nearly identical facts and reported as **Jai Narain v. Union of India,** (1996) 1 SCC 9. It was argued that in this decision of **Jai Narain** (supra), it has been held that the requirement of sewage plant/pumping station being

part of a larger grid for implementation of the requirement of the cleaning of river Yamuna justified the invocation of the powers under Section 17(4) for holding that Section 5A should not apply. It was urged that construction of a sewage pumping station forming part of a larger grid of sewage cleaning system is without doubt an urgent public purpose. It was argued that the land in question is a miniscule part (being only 720 sq. yards) of the total land of approximately 19000 sq. yds belonging to the petitioner and further that the land in question was right in the corner of the total land of the petitioner and would therefore not in any manner affect the motel project of the petitioner. It was further argued that there is no question of malafides because the survey report dated 11.1.2008 unnecessarily created confusion inasmuch as right from 2007, the requirement was very much for the land of the petitioner comprised in K.No. 27/18/2 and which was pursuant to a project report of a consultant and actual inspection of site in terms of a map prepared for creation of the larger grid. The confusion which was created by revenue officials on 11.1.2008 was cleared on the basis of a subsequent fresh survey conducted on 20.6.2008 where once again the actual location was co-ordinated with the grid map showing the site location and it was once again reiterated that what was required was land comprised in K.No.27/18/2 and not the adjoining land comprised in K.No. 27/13.

5. So far as the issue with regard to the issuance of the notification under Section 17(4) exempting the application of Section 5A is concerned, for the construction of a sewage pumping station, the issue is no longer res integra and is fully covered by the decision of the Supreme Court in the case of **Jai Narain** (Supra). In the case of **Jai Narain** (supra), the Supreme Court has held that requirement of creation of a sewage pumping station/plant being part of the larger sewage grid required for the project for clearing the Yamuna river justifies the invocation of the powers under Section 17(4) of the said Act. The relevant paras of the judgment in the case of Jai Narain are paras 6 to 11 which read as under:-

> **"6.** The land in dispute is being acquired for the construction of STP. This Court in M.C. Mehta case, while directing the closure of the stone-crushers in the city of Delhi, on 15-5-1992 observed as under: (SCC p. 257, para 2)
>
> "We are conscious that environmental changes are the inevitable consequence of industrial development in our country, but at the

same time the quality of environment cannot be permitted to be damaged by polluting the air, water and land to such an extent that it becomes a health hazard for the residents of the area. We are constrained to record that Delhi Development Authority, Municipal Corporation of Delhi, Central Pollution Control Board and Delhi Pollution Control Committee have been wholly remiss in the performance of their statutory duties and have failed to protect the environments and control air pollution in the Union Territory of Delhi. Utter disregard to environment has placed Delhi in an unenviable position of being the world's third grubbiest, most polluted and unhealthy city as per a study conducted by the World Health Organisation. Needless to say that every citizen has a right to fresh air and to live in pollution-free environments."

While dealing with the construction of STPs in Delhi, this Court in Mehta case1 passed the following order on 22-4-1994:

"The Delhi Development Authority has filed an affidavit through its Secretary, Mr V.N. Bansal. It is stated that the Authority is ready and willing to provide land to the MCD for setting up of the sewage treatment tanks. Keeping in view the urgency of the matter, we request Mr Subhash Sharma, Commissioner, MCD, Mr S.P. Jkhanwal, Vice-Chairman, DDA, Mr Ashok Kumar, Additional Commissioner, Water and Mr J.K. Mathur, Chief Engineer of the Delhi Water Supply and Sewage Disposal Undertaking to be present in Court on May 6, 1994. We are requesting the officers to be present in Court so that we can have their viewpoints for taking appropriate decisions on the spot. *Needless to say that with the increase of population in Delhi, it is of utmost urgency to set up the sewage treatment plants within the time-bound schedule."*

Thereafter, on 13-5-1994 this Court issued various directions regarding the transfer of land to the Delhi Water Supply and Sewage Disposal Undertaking (the Undertaking) for the STPs in Delhi and finally directed as under:

"We direct the DDA through Mr S. Roy, Commissioner, Lands to hand over the possession of the vacant land available for setting up of the sewage treatment plants in various colonies

within four weeks from today. We further direct the MCD to make payment in respect of these lands simultaneously. Mr S. Prakash, Engineer-in-Chief will be responsible for taking over the land and also for making payment to the DDA on behalf of the MCD. *The work for setting up of sewage treatment plants shall be undertaken forthwith and shall be completed at war footing.*" (emphasis supplied)

7. Further directions were issued to the Delhi Administration on 14-12-1994 to take over the land from DDA and acquire where necessary for the STPs at various places in Delhi.

8. This Court has been issuing time-bound directions for the procurement of land for the STPs in various parts of Delhi. The impugned notifications regarding Keshopur STP were issued under the directions of this Court. On 23-1-1995 this Court passed the following order regarding the land in dispute:

"Notification under Section 4 read with Section 17(1) of the Land Acquisition Act has been issued. The land in the notification has been identified by way of a plan indicating boundaries and not by the khasra numbers. To issue notification under Section 6, exact khasra numbers of the land in dispute are required . Mr Jaitley states that the DDA will give exact khasra number of the land within one week from today. The notification be issued within two weeks from today."

9. In Mehta case, this Court on 24-3-1995 observed as under:

"A very grim picture emerges regarding increase of pollution in the city of Delhi from the two affidavits filed by Shri D.S. Negi, Secretary (Environment), Government of Delhi. He has pointed out that the population of Delhi which was about 17 lakhs in 1951 has gone up to more than 94 lakhs as per the 1991 census. In fact, more than 4 lakh people are being added to the population of Delhi every year out of which about 3 lakhs are migrants. Delhi has been categorised as the fourth most polluted city in the world with respect to concentration of Suspended Particular Metal (SPM) in the ambient atmosphere as per World Health Organisation Report, 1989. From NEERI's annual report 1991 it

is obvious that the major contributions, so far as air pollution is concerned, is of the vehicular traffic but the industries in the city are also contributing about 30% of the air pollution. So far as the discharge of effluent in Yamuna is concerned, the industries are the prime contributors apart from the MCD and NDMC which are also discharging sewage directly into the River Yamuna. We are dealing with the sewage problems in separate proceedings."

Thereafter, on 21-4-1995 this Court, regarding the construction of STPs observed as under:

"Treatment of sewage is of utmost importance for health and for supply of pure water to the citizens of Delhi. Any delay in this respect is a health hazard and cannot be tolerated."

10. Various orders and directions issued by this Court from time to time in Mehta case1 clearly show that the land in dispute — for Keshopur STP — is being acquired under the directions of this Court. Even the impugned notifications under Section 4 read with Section 17 and Section 6 of the Act have been issued under the directions of this Court. This Court repeatedly indicated in the orders/directions that there was urgency in taking over the possession of the land, under acquisition, for the construction of STP at Keshopur. The authorities were directed to take up the work of land acquisition and construction of STPs on war footing. 'Likely' in the background of this Court's orders passed from time to time for a time-bound programme for setting up the STPs means, for purposes of this case, 'certainly' and 'urgently'.

11. Delhi — the capital of India — one of the world's great and historic cities has come to be listed as third/fourth most polluted and grubbiest city in the world. Apart from air pollution, the waters of River Yamuna are wholly contaminated. It is a paradox that the Delhiites — despite River Yamuna being the primary source of water supply — are discharging almost totality of untreated sewage into the river. There are eighteen drains including Najafgarh drain which carry industrial and domestic waste including sewage to River Yamuna. Thirty-eight smaller drains fall into Najafgarh drain. The Najafgarh drain basin is the biggest polluter of River Yamuna. Eight of the drains including Najafgarh

drain are untrapped, four fully trapped and remaining six are partially trapped. All these eighteen drains, by and large, carry untreated industrial and domestic wastes and fall into River Yamuna. The River Yamuna enters Delhi at Wazirabad in the North and leaves at the South after travelling a distance of about twenty-five kilometres. The water of River Yamuna till it enters Najafgarh is fit for drinking after treatment, but the confluence of Najafgarh drain and seventeen other drains makes the water heavily polluted. The water quality of Yamuna, in Delhi stretch, is neither fit for drinking nor for bathing. The Biochemical Oxygen Demand (BOD) level in the river has gone so high that no flora or fauna can survive. It is of utmost importance and urgency to complete the construction of the STPs in the city of Delhi. The project is of great public importance. It is indeed of national importance. We take judicial notice of the fact that there was utmost urgency to acquire the land in dispute and as such the emergency provisions of the Act were rightly invoked. We reject the first contention raised by the learned counsel."

(Emphasis added)

6. In view of the decision in the case of **Jai Narain** (supra) and that the acquisition of the land is for the requirement of construction of a sewage pumping station, the authorities were fully justified in invoking the provision of Section 17(4) of the said Act for exempting the application under Section 5A of the said Act on the ground that the land in question was required for an urgent public purpose viz urgency for creation of sewage pumping station which formed part of a larger grid and also that the acquisition is being made pursuant to the various judgments of the Supreme Court including "M.C.Mehta" cases.

7. It may also be noted that the land in question which is required by the petitioner is merely a very minor portion of the land of the petitioner being just 720 sq. yards and which parcel of land is right in the corner of the entire land of the petitioner and therefore the project of the petitioner of a Motel will not be affected by this acquisition. It is not correct for the petitioner to state that the requirement of the land is necessary for the construction of a Motel. It is an admitted case that no construction has to be made as per the sanctioned plan within the subject land of 720 sq. yds. Also it is logical that no construction will be made

on this land because the same is right in the corner of the larger piece of land of the petitioner.

8. It was also vehemently argued that the authorities have mis-directed themselves and have not taken into consideration the fact that the land in question would be required for road widening for the purpose of National Highway and consequently, no construction can be made as per the zonal plan on the land in question and therefore the authorities have not applied their minds by seeking to acquire the subject land. Once again, this issue is fully covered by the decision in the case of **Jai Narain** in which it has been held that different use of land as provided in the Master Plan is not a ground for quashing of the acquisition proceedings. Para 12 of the judgment in **Jai Narain's** case is relevant in this regard and which reads as under:-

> **"12.** So far as the second contention raised by Mr Vashisht, the same is mentioned to be rejected. Whatever may be the user of the land under the Master Plan and the Zonal Development Plan the State can always acquire the same for public purpose in accordance with the law of the land. In any case the object and purpose of constructing the STPs is to protect the environment, control pollution and in the process maintain and develop the agricultural green."

9. In any case, we have also satisfied our judicial conscience that the land in question is not such that if a sewage pumping station is constructed on the same there would in any manner be any hindrance to the widening of the National Highway. Pursuant to the directions of this court, the revenue authorities have filed before us a rough sketch of the present site conditions/site location of the subject land qua the National Highway. This plan has been filed on 17.11.2010 and which shows that presently the National Highway comprises of approximately 109 feet in width. After the existing road there is still a width of 43 feet on which there exists an unmetalled road and there is thereafter another 25 ft. belt on which there is a drain. The land in question is situated only thereafter, meaning thereby, there is still about 70 ft. of space available for widening of the National Highway towards the side where the subject land is located. In any case, it is not as if, the sewage pumping station which is basically to comprise a sump and one room would be built right at the edge of the plot towards the boundary wall facing the National Highway.

The authorities are well advised to avoid any future problem to make any construction in the subject plot which is sought to be acquired at a location which should be furtherest from the boundary of the plot facing the National Highway i.e., any construction be made right inside the plot. This, in our opinion, should take care of the argument raised on behalf of the petitioner that the land in question even if, acquired cannot be used for the public purpose. We, again, hasten to add that we have looked into this argument in addition although the same was not required in view of the decision of **Jai Narain's** case which states that this aspect of land use need not be considered with respect to the acquisition of land for a public purpose.

10. So far as the issue of malafides is concerned, once again we find that this argument on behalf of the petitioner is devoid of substance. The fact of the matter is that right from the inception, land which was projected as being required was the land of the petitioner comprised in K.No.27/18/2. This is clear from the first letter in this regard of the Delhi Jal Board issued on 2.11.2007 and which itself was pursuant to the key plan indicating the location of the sewage pumping station prepared as per a report of the project consultant. This letter dated 2.11.2007 clearly mentions the requirement of the land comprising K.No.27/18/2. This letter has been further followed up by the letter dated 26.12.2007 which stated the requirement was of the land of the petitioner and on the basis of which a joint survey was fixed for 11.1.2008. On 11.1.2008, when the survey was conducted, it appeared as per the survey report that the requirement of the land for Delhi Jal Board in fact could be partly in the adjoining K.No.27/13 and partly in the land of the petitioner as per the site coordinates. Obviously, there was confusion in the minds of the revenue officials and the officials of the Jal Board because it was an issue of coordinating the location in the key plan being the grid plan and the sewage pumping station thereon with its actual positioning at the ground level. The officials seem to have found that the actual land required as per the key plan may be 27/13 and part of the land of the petitioner in K.No. 27/18/2 and not the entire K.No. 27/18/2. Change of acquisition proceedings by seeking to acquire the land in K.No.27/13 would be fraught with grave consequences of enhancement of costs and delay and changing of the entire grid and four consequences were projected, and in our opinion rightly, for stopping the change of acquisition of land from the K.No.27/18/2 of the petitioner to part of this K.No. 27/18/2 and part

of K.No. 27/13 belonging to someone else. These four consequences are stated as under:-

> "A. The entire sewerage scheme of all the three villages i.e. Hamidpur, Bakoli and Khampur has to be changed including topographical survey.
>
> B. The new consultant has to be appointed as the agreement with M/s Shah Technical Consultants [P] Ltd is closed.
>
> C. Land acquisition process has to be started again.
>
> D. In view of A,B and C above the project will be delayed by 2-3 years and the cost of project will be escalated accordingly."

Clearly, the consequences being drastic leading to delay in the project and considerable escalation of cost, it was decided to conduct a fresh survey as to whether the survey of 11.1.2008 was really the correct one. A fresh survey was accordingly conducted on 20.6.2008 and this survey again checked up the site coordinates and it was found that by coordinating the location on the key plan prepared by the consultant and the actual site position that what was really required was in fact the land of the petitioner comprised in K.No. 27/18/2 and not the land comprised in K.No.27/13. We thus do not find any malafides in the stand of the respondents no.2 to 4 and the respondent no.6. It is therefore not correct that the acquisition which was projected was earlier was of different K.No. 27/13 and thereafter the acquisition proceedings are deliberately sought to be changed to K.No. 27/18/2 belonging to the petitioner.

11. On behalf of the petitioner strong reliance has been placed upon the decision in the case of **Babu Ram Vs State of Haryana** 2009 (10) SCC 115 wherein it has been held that when a sewage plant has to be constructed, there cannot be exemption of hearing under Section 5A and powers under Section 17(4) ought not to be exercised. In our opinion, this judgment is clearly distinguishable because this case did not pertain to lands in Delhi whereas the judgment in the case of **Jai Narain** (supra) specifically pertains to the requirement of lands in Delhi for construction of a sewage grid for cleaning of the river Yamuna pursuant to various directions issued by the Supreme Court from time to time in different cases. Further, in our opinion, a sewage pumping plant is a much bigger project than a small sewage pumping station which is basically just one

sump and one room. For construction of a small sewage pumping station there is no general public interest involved of a large number of persons/ public and the decision in the case of **Babu Ram** (supra) is thus also distinguishable in this ground. Therefore, there is no question of a serious consequence affecting the health of the general public by construction of sewage pumping station as compared to a sewage plant as was the case in **Babu Ram** (supra).

12. That takes us to the final issue with respect to the challenge to the notification under Section 4. The challenge which has been laid is that there was no publication of the notification in the locality and in fact in terms of Section 45 of the said Act, it was necessary that there is personal service since the land in question was only a small piece of land belonging to one person namely the petitioner. It is therefore at this stage necessary to reproduce Sections 4 and 45 of the Act which read as under:-

> **"4. Publication of preliminary notification and powers of officers thereupon.**—(1) Whenever it appears to the [appropriate Government] that land in any locality [is needed or] is likely to be needed for any public purpose [or for a company] a notification to that effect shall be published in the Official Gazette 9[and in two daily newspapers circulating in that locality of which at least one shall be in the regional language] and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality [(the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of publication of die notification)].
>
> (2) Thereupon it shall be lawful for any officer, either generally or specially authorized by such Government in this behalf, and for his servants and workmen,—
>
> to enter upon and survey and take levels of any land in such locality;
>
> to dig or bore in the sub-soil;
>
> to do all other acts necessary to ascertain whether the land is adapted for such purpose;

> to set out the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be made thereon;
>
> to mark such levels, boundaries and line by placing marks and cutting trenches; and,
>
> where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked to cut down and clear away any part of any standing crop, fence or jungle:
>
> Provided that no person shallenter into any building or upon any enclosed court or garden attached to a dwelling-house (unless with the consent of the occupier thereof) without previously giving such occupier at least seven days. notice in writing of his intention to do so.
>
> **45. Service of notices.**—(1) Service of any notice under this Act shall be made by delivering or tendering a copy thereof signed, in the case of a notice under Section 4, by the officer therein mentioned, and, in the case of any other notice, by or by an order of the Collector or the Judge.
>
> (2) Whenever it may be practicable, the service of the notice shall be made on the person therein named.
>
> (3) When such person cannot be found, the service may be made on any adult male member of his family residing with him; and, if no such adult male member can be found, the notice may be served by fixing the copy on the outer door of the house in which the person therein named ordinarily dwells or carries on business, or by fixing a copy thereof in some conspicuous place in the office of the officer aforesaid or of the Collector or in the court-house, and also in some conspicuous part of the land to he acquired:
>
> Provided that, if the Collector or Judge shall so direct, a notice may be sent by post, in a letter addressed to the person named therein at his last known residence, address or place of business and [registered under Sections 28 and 29 of the Indian Post Office Act, 1898], and service of it may be proved by the production of, the addressee's receipt."

A conjoint reading of the aforesaid provisions of Sections 4 and 45 shows that there is substance in the stand of the petitioner because the land in question in fact belongs only to one person and there was no actual service or tender of the acquisition notifications under Sections 4 and 17(4) upon the petitioner. In a general notification which involves acquisition of large parcels of land which involves many persons, the existence of acquisition proceedings are easily known because a large section of the public is affected and which is not the case where a small piece of land of one person is sought to be acquired. A reading of Section 45 shows that there is very much envisaged a personal service upon a person in certain circumstances. Acquisition of a small portion of land belonging only to one person in our opinion is a fit case whereby on a conjoint reading of Sections 4 and 45 it can be said that there ought to be a personal service upon the person whose land is sought to be acquired. After all, acquisition proceedings are harsh proceedings as the same has the effect of taking away valuable rights of ownership of land. Interpretation of the provision therefore in such cases would necessarily have to be balanced with the right of the authorities to acquire land on the one hand and the right of the individual owning the land on the other inasmuch as right to ownership of land is still very much a constitutional right under Article 300A of the Constitution. Quite clearly, therefore, the notification under Section 4 in the present case is flawed because there was no due service upon the petitioner as required by a conjoint reading of Sections 4 and 45.

13. The question therefore is what follows. Should the acquisition proceedings be necessarily set aside? The power to acquire the land is a power of eminent domain and even if the notification under Section 4 is flawed, surely, the authorities can again issue a fresh notification under Section 4 for acquisition of the land. At best, this would only result in grant of higher price of the land as would be on the date of issuing the subsequent Section 4 notification. In our opinion, this issue is fully covered by the decision in the case of **Competent Authority Vs Barangore Jute Factory** (2005) 13 SCC 477 in which it has been held that instead of quashing of the notification, the owner of land can be given a higher price of a notification issued on a subsequent date. In the facts of the case of **Barangore Jute Factory** (supra) price which was held payable was the price on the date on which possession was taken.

Paras 14 and 15 of the said judgment are relevant and the same reads as under:-

> **"14.** Having held that the impugned notification regarding acquisition of land is invalid because it fails to meet the statutory requirements and also having found that taking possession of the land of the writ petitioners in the present case in pursuance of the said notification was not in accordance with law, the question arises as to what relief can be granted to the petitioners. The High Court rightly observed that the acquisition of land in the present case was for a project of great national importance i.e. the construction of a national highway. The construction of a national highway on the acquired land has already been completed as informed to us during the course of hearing. No useful purpose will be served by quashing the impugned notification at this stage. We cannot be unmindful of the legal position that the acquiring authority can always issue a fresh notification for acquisition of the land in the event of the impugned notification being quashed. The consequence of this will only be that keeping in view the rising trend in prices of land, the amount of compensation payable to the landowners may be more. Therefore, the ultimate question will be about the quantum of compensation payable to the landowners. Quashing of the notification at this stage will give rise to several difficulties and practical problems. Balancing the rights of the petitioners as against the problems involved in quashing the impugned notification, we are of the view that a better course will be to compensate the landowners, that is, the writ petitioners appropriately for what they have been deprived of. Interests of justice persuade us to adopt this course of action.
>
> **15.** Normally, compensation is determined as per the market price of land on the date of issuance of the notification regarding acquisition of land. There are precedents by way of judgments of this Court where in similar situations instead of quashing the impugned notification, this Court shifted the date of the notification so that the landowners are adequately compensated. Reference may be made to:

(a) **Ujjain Vikas Pradhikaran v. Raj Kumar Johri**

(b) **Gauri Shankar Gaur v. State of U.P.**

c) **Haji Saeed Khan v. State of U.P.**

In that direction the next step is what should be the crucial date in the facts of the present case for determining the quantum of compensation. We feel that the relevant date in the present case ought to be the date when possession of the land was taken by the respondents from the writ petitioners. This date admittedly is 19-2-2003. We, therefore, direct that compensation payable to the writ petitioners be determined as on 19-2-2003, the date on which they were deprived of possession of their lands. We do not quash the impugned notification in order not to disturb what has already taken place by way of use of the acquired land for construction of the national highway. We direct that the compensation for the acquired land be determined as on 19-2-2003 expeditiously and within ten weeks from today and the amount of compensation so determined, be paid to the writ petitioners after adjusting the amount already paid by way of compensation within eight weeks thereafter. The claim of interest on the amount of compensation so determined is to be decided in accordance with law by the appropriate authority. We express no opinion about other statutory rights, if any, available to the parties in this behalf and the parties will be free to exercise the same, if available. The compensation as determined by us under this order along with other benefits, which the respondents give to parties whose lands are acquired under the Act, should be given to the writ petitioners along with what has been directed by us in this judgment."

In the present case, the petitioner had obtained a status quo order on 27.1.2010 when the writ petition first came up for hearing. The authorities therefore have not been able to take land pursuant to the orders of this court dated 27.1.2010. Accordingly, applying the ratio in the case of **Barangore Jute Factory,**(supra) we are of the opinion that the price of land which should be awarded to the petitioner should be the price of land as on 27.1.2010 and not the price of land when the notification under Sections 4 and 17(4) of the Act was passed on 13.2.2009.

14. In view of the above, the writ petition is disposed of with the direction that the acquisition proceedings are sustained and it is held that the authorities have validly invoked the powers under Section 17(4) of the Act exempting the application of Section 5A. It is further held that the petitioner will be entitled to price of land as on 27.1.2010 and not the price as on 13.2.2009 when the notification under Section 4 was published. The writ petition is accordingly dismissed subject to the directions made above.

ILR (2011) DELHI 306
CEAC

COMMISSIONER OF CENTRAL EXCISE ....APPELLANT

VERSUS

MINIMAX INDUSTIES & ANR. ....RESPONDENTS

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

CEAC NO. : 12/2010 DATE OF DECISION: 17.01.2011

Constitution of India, 1950—Respondent no.1, partnership firm enjoyed status of Small Scale Industry for purposes of Excise Act and was granted exemption from payment of excise duty for manufacturing machines for production of wires and cables—Central Excise Officers visited premises of Respondent no.1 with prior information that Respondent no.1 was using brand/logo/trade name of 'Minimax' which belonged to some other unit i.e. M/s Minimax Engineering Industries—Show cause notice issued to Respondent no.1 seeking explanation as to why status of small scale industry should not be withdrawn/cancelled and exemption be denied as Respondent no.1 violated

condition no.4 of the Notification No.8/99 CE by using brand name of trade name of another person—After considering reply adjudicating authority found violation of condition IV in Notification No.8/2002—Respondent no.1 preferred appeal before Commissioner of Central Excise which was dismissed—Further, appeal preferred before Custom Excise & Service Tax Appellate Tribunal was allowed—Aggrieved by said order of Tribunal, appellant department preferred appeal—Held:- In order to qualify as 'brand name' or 'trade name' it has to be established that such a mark, symbol, design or name etc. has acquired the reputation of the nature that one is able to associate the said mark etc. with the manufacturer—What is necessary is that the said mark is of the nature that it establishes connection between the product and the person—Initially three brothers were doing business together and using mark 'Minimax'—Later on, two brothers formed partnership firm and started separate business using same name 'Minimax'—In these circumstances, it cannot be said that partnership firm started using the name 'Minimax' which belong to M/s Minimax Engineering Industries.

Condition no.4 as already noted above, stipulates that the exemption contained in this Notification would not be given to a person in respect of goods where 'brand name' or 'trade name' of another person is used i.e. the goods bearing the 'brand name' or 'trade name' which belongs to some other person. It is immaterial whether such 'brand name' or 'trade name' is registered or not. However, Explanation-IX gives a unique and particular definition to the term 'brand name' or 'trade name'. It is clear from the reading of the said explanation that the definition of "brand name" or "trade name" contained therein is concerned with a particular name or mark which is used to indicate, in the course of trade, a connection between such specified goods as satisfying the criterion provided in aforesaid condition 4 and the manufacturer which is using such name or mark with

or without any indication of the identity of itself. The central idea contained in the aforesaid definition is that the mark is used with the purpose to show connection of the said goods with some person who is using the name or mark.**(Para 7)**

Important Issue Involved: In order to qualify as 'brand name' of 'trade name' it has to be established that such a mark, symbol, design or name etc. has acquired the reputation of the nature that one is able to associate the said mark etc. with the manufacturer—What is necessary is that the said mark is of the nature that it establishes connection between the product and the person.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Satish Kumar, Sr. Standing Counsel.

FOR THE RESPONDENTS : Mr. Vinay Garg, Advocate with Ms. Jyoti Sharma, Advocate.

CASES REFERRED TO:

1. *Nirlex Spares (P) Ltd.* vs. *Commissioner of Central Excise,* (2008) 2 SCC 628.
2. *Tarai Food Ltd.* vs. *CCE,* (2007) 12 SCC 721.
3. *Commissioner of Central Excise, Chandigarh II* vs. *Bhalla Enterprises,* (2005) 8 SCC 308.
4. *CCE* vs. *Bhalla Enterprises,* (2005) 8 SCC 308.
5. *CCE* vs. *Grasim Industries ltd.* (2005) 4, SCC 194.
6. *Commissioner of Central Excise, Delhi* vs. *M/s Ace Auto Comp. Ltd.*[Civil Appeal No. 3051/2003.
7. *Royal Hatcheries Pvt. Ltd.* vs. *State of A.P.*1994 Supp (1) SCC 429.

RESULT: Appeal dismissed.

A.K. SIKRI, J. (ORAL)

1. The respondent no.1 M/s Minimax Industries is a partnership firm of which respondent no.2 is one of the partners. The respondent no.1 (hereinafter referred to as the 'Partnership Firm') enjoys the status of Small Scale Industry for the purposes of Excise Act and is thus granted exemption from payment of excise duty under the said Act. It is manufacturing machines for production of wire and cables.

2. On 19th January, 2000, the Central Excise Officers visited the premises of the partnership firm with prior information that this firm was using brand/logo/trade name of 'Minimax' which belonged to some other unit i.e. M/s Minimax Engineering Industries (hereinafter referred to as the 'MEI'). The said Engineering Industries, a sole propriety concern of Mohd. Yamin is situated at 12, Krishna Kunj Market, Laxmi Nagar, Delhi. The officers on enquiries found that in the machines manufactured by the partnership firm, the name 'MINIMAX' is used alongwith the full name and address of the partnership firm i.e. M/s Minimax Industries, 93, Patparganj Industrial Area, Delhi-110092. Statement of respondent no.2 i.e. Sh. Liyakat Ali partner was recorded. Thereafter show-cause notice was issued to the partnership firm as to why the status of Small Scale Industries should not be withdrawn/cancelled and exemption be denied on the ground that the said partnership firm has violated the provisions of condition no.4 of the Notification No.1/93-CE as well as Notification No.8/99 CE. This condition no.4 stipulates that the exemption contained in the Notification would not be applied to the specified goods bearing the brand name or trade name (whether registered or not) of another person. Explanation-IX of the said Notification also defines the terms "Brand name" or "Trade name" to which we shall revert at the appropriate stage.

3. The partnership firm replied to the said show cause notice dated 5th July, 2001. In the detailed explanation submitted by the partnership firm, it was, *inter alia*, clarified as under:-

(1) MEI was the sole proprietorship concern of Mohd. Yamin who was brother of the partners of this partnership firm. Both the said MEI as well as the partnership firm were carrying on the business using the same trade mark 'MINIMAX' and same logo in their own respective rights.

(2) The trade mark "Minimax" was used by the partnership firm with complete description of its own firm name as well as address. Likewise, in the products manufactured by MEI, the said proprietorship concern was using the trade name 'Minimax' under its own name and address. Therefore, the partnership firm was not using the name of other concern/person.

(3) The logo 'Minimax' was not covered by definition 'brand name' or 'trade name' as given in Notification No.8/2000 inasmuch as it did not indicate any connection between the goods manufactured by the partnership firm and MEI. Likewise, the logo .Minimax. did not indicate any connection of the goods manufactured by MEI with the partnership firm as the name of manufacturer is prominently display right under the brand name or logo.

(4) The name 'Minimax' did not belong to MEI as alleged in the so-cause notice and this assertion in the show-cause notice was baseless. The brand name 'Minimax' was also not registered in the favour/name of MEI or its sole proprietor. In fact, during the course of investigation, both the partnership firm was as well as MEI had claimed that name 'Minimax' belonged to them. Therefore, merely because MEI had also been using the same brand name for a period longer than the partnership concern, **it would not follow that the partnership firm was using the brand name of the said MEI.**

4. The adjudicating authority after considering the aforesaid reply of the partnership firm and the submissions made at the time of hearing, returned the finding that the brand name 'Minimax' belongs to MEI which was using the same since 1980 and, therefore, condition no.4 as provided in Notification No.8/2002 was violated. On this basis, it was held that the partnership firm was not entitled to exemption under the aforesaid Notification. The appeal filed by the partnership firm before the Commissioner of Central Excise (Appeal) did not bear any favourable results as it was dismissed by the Commissioner of Central Excise (A) vide orders dated 13th July, 2004. However, on further appeal preferred before the Customs, Excise & Service Tax Appellate Tribunal (hereinafter

referred to as the 'CESTAT'), the partnership firm emerged victorious as by the impugned orders dated 12th February, 2010, the CESTAT has allowed the appeal of the partnership firm/respondent.

5. Perusal of the order of the CESTAT would reveal that the CESTAT took into consideration the aforesaid condition no.4 and the definition of 'brand name' or 'trade name' appearing in Explanation-IX thereof. The CESTAT also took note of some judgments of its different Benches as well as the Supreme Court, Circulars of the Central Excise Board as well as opinion of the Ministry of Law. After taking note of all these material, the Tribunal opined that mere use of the name or logo used by others which has not acquired the status of 'brand name' or 'trade name' within the meaning of said expression under the aforesaid Notification would not amount to violation of condition no.4 of the said Notification. In the opinion of the Tribunal, in order to acquire the status of 'brand name' or trade name' it has to be established that a particular logo or mark is associated with the person and can be related to the said person of whom the particular logo or trade mark is used by the assessee.

6. Challenging the aforesaid order of the Tribunal, the present appeal is preferred by the Department. We have already taken note of the relevant facts which were stated by the partnership firm in reply to the show cause notice and there is no dispute about those facts. The question is as to whether by use of the name 'Minimax' the partnership firm has violated condition no.4 of the said Notification. In order to appreciate this issue, we first reproduce condition no.4 and Explanation-IX which defines 'brand name' or 'trade name', which reads as under:-

> "4. The exemption contained in this notification shall not apply to the specified goods, bearing a brand name or trade name (registered or not of another person……..."
>
> Explanation IX defines the term "brand name" or "trade name" as under:-
>
> "Brand name" or "trade name" shall mean a brand name or a trade name, whether registered or not, that is to say a name or a mark, such as symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods for the purpose of indicating, or so as to indicate a

> connection in the course of trade between such specified goods and some person using such name or mark with or without any indication of the identity of that person".

7. Condition no.4 as already noted above, stipulates that the exemption contained in this Notification would not be given to a person in respect of goods where 'brand name' or 'trade name' of another person is used i.e. the goods bearing the 'brand name' or 'trade name' which belongs to some other person. It is immaterial whether such 'brand name' or 'trade name' is registered or not. However, Explanation-IX gives a unique and particular definition to the term 'brand name' or 'trade name'. It is clear from the reading of the said explanation that the definition of "brand name" or "trade name" contained therein is concerned with a particular name or mark which **is used to indicate, in the course of trade, a connection between such specified goods as satisfying the criterion provided in aforesaid condition 4 and the manufacturer which is using such name or mark with or without any indication of the identity of itself.** The central idea contained in the aforesaid definition is that the mark is used with the purpose to show connection of the said goods with some person who is using the name or mark. Therefore, in order to qualify as 'brand name' or 'trade name' it has to be established that such a mark, symbol, design or name etc. has acquired the reputation of the nature that one is able to associate the said mark etc. with the manufacturer. We are supported in this view by series of judgments of the Supreme Court.

8. In **Tarai Food Ltd. Vs. CCE,** (2007) 12 SCC 721, the expression "brand name" was explained in the following terms:-

> "7. The words brand name connotes such a mark, symbol, design or name which is unique to the particular manufacture which when used on a particular product would establish a connection between the product and the manufacturer. x x x x x x
>
> 9. Furthermore the definition of the words "brand name" shows that it has to be a name or a mark or a monogram, etc. which is used in relation to a particular product and which establishes a connection between the product and the person. This name or mark, etc. cannot, therefore, be the identity of a person itself.

It has to be something else which is appended to the product and which established the link."

9. Thus, what is necessary is that the said mark is of the nature that it establishes connection between the product and the person. To the same effect is the judgment of Supreme Court in **CCE Vs. Grasim Industries ltd.** (2005) 4, SCC 194 wherein the Supreme Court observed as under:

"15……In our view, the Tribunal has completely misdirected itself. The term "brand name or trade name" is qualified by the words "that is to say". Thus, even though under normal circumstances a brand name or a trade name may have the meaning as suggested by the Tribunal, for the purposes of such a Notification the terms "brand name or trade name" get qualified by the words which follow. The words which follow are "a name or a mark". Thus even an ordinary name or an ordinary mark is sufficient. It is then elaborated that the "name or mark" such as a "symbol" or a "monogram" or a "label" or even a "signature of invented word" is a brand name or trade name. However, the contention is that they must be used in relation to the product and for the purposes of indicating a connection with the other person. This is further made clear by the words "any writing". These words are wide enough to include the name of a company. The reasoning given by the Tribunal based on a dictionary meaning of the words "write" and "Writing" is clearly erroneous. Even the name of some other company, if it is used for the purposes of indicating a connection between the product and that company, would be sufficient. It is not necessary that the name or the writing must always be a brand name or a trade name in the sense that it is normally understood. The exemption is only to such parties who do not associate their products with some other person. Of course this being a Notification under the Excise Act, the connection must be of such a nature that it reflects on the aspect of manufacture and deal with quality of the products. No hard and fast rule can be laid down however it is possible that words which merely indicate the party who is marketing the product may not be sufficient. As we are not dealing with such a case we do not express any opinion on this

aspect.

16. This Court has, in the case of **Royal Hatcheries Pvt. Ltd. v. State of A.P.** 1994 Supp (1) SCC 429, already held that words to the effect "that is to say" qualify the words which precede them. In this case also the words "that is to say" qualify the words "brand name or trade name" by indicating that these terms must therefore be understood in the context of the words which follow. The words which follow are of wide amplitude and include any word, mark, symbol, monogram or label. Even a signature of an invented word or any writing would be sufficient if it is used in relation to the product for purpose of indicating a connection between the product and the other person/company."

10. Likewise, in **CCE Vs. Bhalla Enterprises,** (2005) 8 SCC 308 the Supreme Court was eloquent in observing that as per the aforesaid Notification, the assessee will be debarred only if it uses on the goods, in respect of which exemption is sought, the same/similar brand name with the intention of indicating a connection with the assessees. goods and such other person or uses the name in such a manner that it would indicate such connection.

11. All these judgments were taken note by the Supreme Court in a recent case in **Nirlex Spares (P) Ltd. Vs. Commissioner of Central Excise**, (2008) 2 SCC 628. On the facts of that case, the Supreme Court was of the opinion that the assessee had not offended condition no.4. In that case, the goods were manufactured by the assessee and the Marketing Company which was its marketing agent. On the packing of goods, brand names of the assessee "INTATEX" and "INTACO" were clearly and prominently printed. In between these two brand names, a hexagonal shape/design, which was claimed by the Department to be the brand of the Marketing Company, was also printed. In this backdrop, the question was as to whether the assessee company was using the said hexagonal shape/design of other person. On the facts of that case, the Court found that there was nothing on record to show that the said hexagonal shape/design belonged to or was owned by the Marketing Company and thus they had permitted the assessee to use the same on the corrugated boxes. The Court also found that the hexagonal design/shape could not be said to be descriptive enough to serve as an indicator of nexus between the goods of the assessee and the Marketing Company. On this basis, it was

concluded that the alleged monogram could not be the brand name or trade name of the Marketing Company.

12. We would also like to reproduce the following observation of the Supreme Court in the case of **Commissioner of Central Excise, Chandigarh II Vs. Bhalla Enterprises,** (2005) 8 SCC 308:-

> "The apprehension of the assessees that they may be denied the exemption merely because some other traders even in a remote area of the country had used the trade mark earlier is unfounded. The notification clearly indicates that the assessee will be debarred only if it is uses on the goods in respect of which exemption is sought, the same/similar brand name with the intention of indicating a connection with the assessees' goods and such other person or uses the name in such a manner that it would indicate such connection Therefore, if the assessee is able to satisfy the assessing authorities that there was no such intention or that the user of the brand name was entirely fortuitous and could not on a fair appraisal of the marks indicate any such connection, it would be entitled to the benefit of exemption. An assessee would also be entitled to the benefit of the exemption if the brand name belongs to the assessee himself although someone else may be equally entitled to such name."

13. These observations bring out two significant aspects namely:-

(1) As per the Notification, the assessee would be debarred only if it uses on the goods in respect of which exemption is sought, the same/similar brand name with the intention of indicating a connection with the assessees' goods and such other person or uses the name in such a manner that it would indicate such connection. If there is no such intention or that the user of the brand name was entirely fortuitous and could not on a fair appraisal of the marks indicate any such connection, it would be entitled to the benefit of exemption.

(2) The assessee would also be entitled to the benefit of exemption if the brand name belongs to the assessee himself although someone else may be equally entitled to such name.

When we apply the aforesaid principle to the facts of this case, it is not difficult to come to the conclusion that the Tribunal has perfectly applied the aforesaid principle in its order and the same and does not call for any interference.

14. As noted above, this partnership firm and MEI are being run by the family members. Two brothers are partners in the said partnership firm while the MEI is the sole proprietorship concern of third brother. Both of them have been using the mark "Minimax" for the last number of years, though, the use by MEI may be prior in point of time. However, even that is the history. Initially, all the three brothers were doing the business together, however, lateron these two brothers of partnership firm started separate business in the same line using same name i.e. "Minimax". In these circumstances, it cannot be said that the partnership firm started using the name "Minimax" which belonged to MEI. In the aforesaid circumstances, it can be said that at the most, the name "Minimax" belongs to both the entities namely, the partnership firm as well as MEI.

15. Admittedly, MEI has not got the brand name/logo "Minimax" registered either under the Registration Act or under the Trade Mark Act or any other Act. It has also never claimed, at any time, its exclusive rights over the use of logo "Minimax" and never taken any action against the partnership firm. It is not a case of the department that the said MEI has allowed the partnership firm to use the said name. The Tribunal has also arrived at a finding of fact that "Minimax" has not acquired any such reputation that it can be associated with "MEI".

16. At this stage we would like to revert to the recent pronouncement of Supreme Court in the case of **Commissioner of Central Excise, Delhi Vs. M/s Ace Auto Comp. Ltd.**[Civil Appeal No. 3051/2003 decided on 16th December, 2010]. On the facts of that case, the Supreme Court has held that the respondent assessee has infringed condition no.4 and, therefore, was not entitled to exemption. However, once we take note of the facts of that case, it would be established that this is clearly distinguishable. In that case the assessee was manufacturing cover assembly for TATA 310 vehicle under the brand name "Ace". However, since the product was manufactured for TATA, the TATA has allowed the assessee to pre-fix the symbol and logo TATA alongwith its brand name "ACE". It was on these facts that the Supreme Court has held that

the assessee was using such name or mark which clearly indicated the identity of other person. Not only TATA had allowed the assessee to use the name, it was not even in dispute that symbol/logo of TATA filled the description of 'brand name/trade name'. In fact the reading of the judgment would reveal that there was no such issue raised. The Court proceeded on the basis that TATA was a brand name and in fact it was established that this brand name was allowed to be used by the TATA to the said assessee.

On the other hand, in the present case nothing could be brought on record by the Department to demonstrate or prove that 'Minimax' has acquired any brand name or trade name as defined in Explanation IX of the Notification No.1/93-CE.

18. For all these reasons, we are of the view that no substantial question of law arises. This appeal is according dismissed.

ILR (2011) DELHI 317
CS (OS)

BHOLE BABA MILK FOOD INDUSTRIES LIMITED....PLAINTIFF

VERSUS

PARUL FOOD SPECIALITIES (P) LIMITED ....DEFENDANT

(RAJIV SHAKDHER, J.)

IA NOS. : 867/2010, 3001/2010 & 7424/2010 IN CS(OS) NO. : 107/2010

DATE OF DECISION: 19.01.2011

Trade Marks Act, 1999—Sections 9, 30, 35, 57 & 124 and Copy Right Act, 1957—Plaintiff filed suit along with interlocutory application for restraining defendants from using infringing mark KRISHNA or any other mark which was deceptively and confusingly similar to plaintiff's mark—Plaintiff urged, label mark KRISHNA depicting picture of Lord Krishna standing on lotus flower registered for plaintiff in respect of milk and dairy products falling in class 29—It also obtained copyright registration under Copyright Act and used mark Krishna since 1922 and attained valuable goodwill and reputation with respect to said trademark—Defendant used similar mark (KRISHNA) thereby infringing registered trademark of plaintiff—As per defendant, it used name "Krishna" preceded by words Parul's Lord Krishna which is qualified mark not resulting in infringement—Moreover, plaintiff could not claim monopoly on use of mark "Krishna" as several registrations used word mark Krishna in respect of various products by different persons—Held: In a case where a registered mark appears with a prefix and the registered mark over which rights are claimed is either a descriptive mark or a common name, the test for requisite distinctiveness is to be applied—Not withstanding, the registration of marks, the courts are entitled to, prima facie examine the validity of such registrations in the light of provisions of Sections 9, 30 & 35 of the Act—Defendant permitted to use label mark with condition that prefix Parul and Lord shall have a font size and prominence similar to KRISHNA.

What would have to be addressed at the final stage, in this case, would be whether the mark has achieved secondary distinctiveness of the kind which brings to mind immediately the plaintiff's product. In order to come to a conclusion whether or not the mark has achieved a distinctiveness of such distinction evidence would have to be placed on record bearing in mind, amongst others, the following: (a) does the mark remind the consumer of the trade and origin. In other words does the trade origin get related to the propounder of the mark and none other; (b) has the mark required sufficient distinctive character that the mark has become a trade

mark. The use of the mark does not automatically translate into distinctiveness. In this regard an argument was raised by Mr Vidhani that Rich Products case related to a descriptive mark whereas the present case deals with a common name. In my opinion, the test of secondary distinctiveness can be no different for a common name than that which is enunciated for a descriptive mark. Applying the same test, in my view, at this juncture, I cannot come to the conclusion that a name as common as KRISHNA; which in the cultural context of our country is as common as the word 'John' used in West, has achieved in the plaintiff's case a secondary distinctiveness of the kind that it is inalienably related by the consumers to the plaintiff's product. **(Para 14.5)**

Important Issue Involved: In a case where a registered mark appears with a prefix and the registered mark over which rights are claimed is either a descriptive mark or a common name, the test for requisite distinctiveness is to be applied—Notwithstanding, the registration of marks, the Courts are entitled to, prima facie examine the validity of such registrations in the light of provisions of Sections 9, 30 & 35 of the Act.

[Sh Ka]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Mohan Vidhani, Advocate.

FOR THE DEFENDANT : Mr. N.K. Kual, Senior Advocate with Mr. H.P. Singh, Mr. Navroop Singh & Mr. S.P. Kaushal, Advocate.

CASES REFERRED TO:

1. *Rhizome Distilleries* vs. *Pernod Ricard S.A.France* 166 (2010) DLT 12.
2. *Rich Products* vs. *Indian Nippon Foods* 2010 (42) PTC 660.
3. *M/s J K Oil Mills* vs. *M/s Adani Wilmar Ltd.* 2010 (42) PTC 639 (Del.).
4. *Marico Ltd.* vs. *Agro Tech Foods Ltd.* 169 (2010) DLT 325.
5. *Rhizome Distilleries P. Ltd. & Ors.* vs. *Pernod Ricard S.A. France & Ors.* 166 (2010) DLT 12 (DB).
6. *Cadila Healthcare Ltd.* vs. *Diat Foods (India)* 173 (2010) DLT 141.
7. *Kishore Kumar* vs. *L. Chuni Lal Kidarnath & Anr.* 2010 (42) PTC 264 (Del.).
8. *Mukesh Khadaria Trading as Aggarwal Udyog* vs. *DCM Sriram Consolidated Ltd.* 2009 (41) PTC 772 (Del.).
9. *Cadila Health Care Ltd.* vs. *Gujarat Co-operative Milk Marketing Federation Ltd.* MANU/Del./2282/2009.
10. *Begum Sabiha Sultan* vs. *Nawab Mohd. Mansur Ali Khan & Ors* (2007) 4 SCC 343.
11. *Kewal Kishan Kumar* vs. *Rudi Roller Flour Mills* 2007 (34) PTC 848 (Del.).
12. *Asian Paints Limited* vs. *Home Solutions Retain (India) Ltd* 2007 (35) PTC 697.
13. *Astrazeneca UK Ltd & Anr.* vs. *Orchid Chemicals & Pharmaceuticals Ltd.* 2006 (32) PTC 733 (Del.).
14. *Midas Hygiene Industries P. Ltd & Anr* vs. *Sudhir Bhatia & Ors.* 2004 (28) PTC 121 (SC).
15. *Proctor & Gamble* vs. *Office of Harmonization in the International Market (OHIM)* (2002) RPC 17.
16. *Automatic Electric Limited* vs. *R.K. Dhawan & Anr.* 1999 (19) PTC 81 (Del.).
17. *Satish Khosla* vs. *Eli Lily Ranbaxy* 1998 (44) DRJ (DB) 109.
18. *Competition Review P. Ltd* vs. *NN Ojha* 1996 PTC 16.
19. *J R Kapoor* vs. *Micronix India* 1994 PTC 260 (SC).
20. *SP Naidu* vs. *Jagganath* AIR 1994 SC 853.

21. *M/s Avis International Ltd.* vs. *M/s Avi Footwear Industries & Anr.* AIR 1991 Delhi 22.

22. *Kedar Nath* vs. *Monga perfumery & Flour Mills,* Delhi – 6 AIR 1974 Delhi 12.

RESULT: Application disposed off.

RAJIV SHAKDHER, J.

IA No. 867/2010 [u/s 135(2) of Trade Marks Act, 1999 & O. 39 R. 1&2 r/w S. 151 of CPC by Pltf.] IA Nos. 3001/2010 & 7424/2010 (O. 39 R. 4 r/w S. 151 of CPC by Deft.)

1. Parties in this case are locked in an intense court battle over the exclusive right to use the name of one of the reigning deity's from amongst pantheon of Hindu Gods; not for any altruistic purpose but for pure commercial gains. Since the products in issue, in respect of which the impugned mark is being used are: ghee, milk products and dairy products, the God who has been invoked; and the name which would, in the litigants. estimation, catch consumers imagination is "KRISHNA". The plaintiff claims exclusivity over the word mark and label mark KRISHNA; which includes the attendant pictorial depiction.

2. It is pertinent to note at this stage that, when the suit was first moved alongwith an interlocutory application, by an order dated 25.01.2010, the defendant had been restrained by me from using the infringing mark KRISHNA or any other mark which was deceptively and confusingly similar to the plaintiff's mark. During the course of proceedings, the defendant placed before me an alternate representation to the one which is currently being used by the defendant. The label which the defendant proposes to use, as against the one which it is currently using, was filed formally on 02.11.2010. This filing was preceded by an order dated 01.10.2010 when, the counsels representing the defendant had placed before me during the course of hearing the changes they proposed in their trade mark label for consideration of the plaintiff. At this hearing it was contended by the counsels appearing for the defendant that they had instructions to argue the application for vacation of the ad interim order dated 25.01.2010 on the basis of the suggested trade mark label. This, of course, was without prejudice to their stand taken in the pleadings before me. The reason that I have adverted to this

aspect of the matter is, for the reason, that consequent to this step of the defendant, the controversy in issue, in my view, has got substantially narrowed to usage of the word KRISHNA by the defendant as part of its trade mark. The packaging and the colour scheme and the manner of depiction of the word KRISHNA has been altered. I would deal with this in greater detail towards the end of my judgment after I have dealt with the contention of parties.

3. In this background, let me advert briefly to the case set up by the parties.

PLAINTIFF'S CASE

4. The plaintiff, it appears, was originally incorporated as a private limited company and thereafter, got converted into a public limited company. The plaintiff avers that it has been in the business of manufacturing and sale of ghee, milk and milk products, as also dairy products etc., for several years. In respect of its trademarks, it is specifically averred that the plaintiff has obtained registration of the label mark KRISHNA which, depicts the picture of Lord Krishna standing on a lotus flower. This label mark has been given the registration number of 597519 and stands registered in respect of milk and dairy products falling in class 29. It is claimed that the mark was advertized in the trade mark journal no. 1206(S) dated 08.09.2009 at pages 107-08. To be noted, I was informed during the course of hearing that the plaintiff is not using the said label mark even though it stands registered in its name.

4.1 The plaintiff also claims registration of the word mark KRISHNA which has a somewhat elliptical contour on the outside. Because of which, the plaintiff claims, that the representation is unique. This mark is, a subject matter of a certificate bearing registration no. 599070. The mark is registered in respect of ghee; once again falling in class 29. The registration relates back to 09.06.1993.

4.2 The third registration has also been obtained in respect of the trade mark KRISHNA and, is similar to the one referred to by me hereinabove, save and except to the extent that the certificate of registration bearing no. 783679B has been obtained in respect of skimmed milk powder, whole milk powder and dairy whitener falling in class 29. The registration relates back to 29.12.2007. The user, however, is claimed in Delhi since 01.01.1992. It is also averred that the registration certificates

bearing nos. 599070, 783679B are valid till 08.06.2017 and 28.12.2017 respectively.

5. Apart from the above, the plaintiff also avers that it has obtained a copyright registration bearing No. A-56134/99 under the Copyright Act, 1957 (hereinafter referred to as 'Copyright Act') in respect of the artistic work KRISHNA. It is stated that the registration under the Copyright Act is valid and subsisting. The plaintiff also claims that it is registered with the Bureau of Indian Standard (in short,'BIS') and has been certified as ISO 9001:2000. This apart, the plaintiff claims it has a valid certificate of registration from Agmark.

5.1 In sum and substance, plaintiff has been using the mark KRISHNA since 1992 and hence, the use of the same has resulted in generation of valuable goodwill in view of the reputation of its goods sold in the market. In order to substantiate this claim, there is a reference to the turnover achieved by the plaintiff between 1997-98 and 2008-09. It is averred that the sales turnover has enhanced from Rs 47.29 crores to Rs. 374.44 crores.

5.2 In order to support its case that the plaintiff's mark has achieved high visibility, reference is also made to the expenses incurred by the plaintiff, on advertisements. As in the case of sales revenue, advertisement spend figures have been given for the period 1997-98 to 2008-09. It is averred that in 1997-98, from a relatively small amount of Rs 1.02 lacs, in 2007-08 the advertisement spend stands increased to Rs 3.02 crores. It may only be noted that in 2008-09, the advertisement expenses have come down to Rs 2.35 lacs. In this connection invoices have been filed; one bill of July, 2001 and two bills of February and September, 2003 to buttress its claim of visibility. Vis-à-vis print media similar invoices have been filed of January, 2003 to support its claim of advertisement in electronic media.

6. The plaintiff thus claims that due to prior continuous user of the word mark KRISHNA in respect of the goods in issue, and given the fact that its products have substantial demand, as reflected by the sales turnover and advertisement spend – the mark has become **"well known"** within the meaning of Section 2(zg) of Trade Marks Act, 1999 (hereinafter referred to as 'Trade Marks Act'). The plaintiff has also sought to demonstrate that it has taken steps against infringers of its registered

marks by filing opposition and cancellation petitions as also by instituting criminal proceedings against offenders. In this regard certain details have been culled out in paragraph 17 of the plaint.

7. In so far as the defendant is concerned, the plaintiff has averred that it became aware of the defendant's use of the impugned mark in the third week of October, 2009 and accordingly, a cease and desist notice was issued to the defendant through its advocate on 24.10.2009. Based on the aforesaid, the plaintiff moved this court by way of the instant suit to seek reliefs qua infringement of its registered trade mark(s) and copyright, and passing off of the said marks, as also for consequential reliefs of rendition of accounts and damages.

DEFENDANT'S CASE

8. The defendant, on the other hand, has set up a defence that what it is using is a "qualified mark" in as much as the name KRISHNA is preceded by words 'Parul's Lord Krishna'. The defendant claims that the word Parul is part of its corporate name; the full form of which is given in the cause title of the suit as Parul Food Specialities (P) Ltd. It is the defendant's case that the plaintiff cannot claim exclusivity vis-à-vis the trade mark KRISHNA or with respect to the colour scheme comprising of the colour yellow and/or its combination with blue and green colours as, the same is used commonly by various manufacturers of dairy products like butter, ghee, processed cheese. A reference in this regard have been made to manufacturers of products such as Amul Butter, Britannia Cheese where various combinations alongwith the colour yellow have been used in packaging. Similarly, the colour blue, it is averred, is used in mint based products such as chewing gum etc. As a matter of fact the defendant further avers that the plaintiff cannot have any exclusivity in respect of pictorial representation in the label mark consisting of cows in a dairy farm, since such a real life situation obtains in the Indian context, in most villages in India.

8.1. As regards the use of the trade mark KRISHNA; the defendant has impugned the plaintiff's claim of monopoly on the ground that there are several registrations using the word mark Krishna in respect of various products, including the products in issue, of many other manufacturers. It is for this reason the defendant submits that it has filed a rectification proceedings before the Intellectual Property Appellate Board,

Chennai (hereinafter referred to as 'IPAB') vide application bearing no. 066/2010 dated 18.02.2010, seeking removal of plaintiff's word mark KRISHNA from the register of trade marks. Even though the defendant claims that it has been in the business of selling dairy products, including milk powder and ghee etc. under various brands since September, 1992 it does concede that it has been using the mark Parul's Lord Krishna only since September, 2009.

8.2 The defendant claims that it has substantial sales. As a matter of fact the defendant has appended a certificate of a Chartered Accountant whereby, the said Chartered Accountant has certified that between the period 01.04.2009 to 27.01.2010 the defendant has achieved a gross sales turnover of Rs 21.10 crores, out of which Rs 1.22 crores is in respect of ghee evidently sold under the trade mark Parul's Lord Krishna ghee.

8.3 The defendant has admittedly filed an application for registration of the trade mark Parul's Lord Krishna with the office of Registrar of Trade Marks. The said application bears the number 1863747 and, is dated 17.09.2009. Registration has been sought by the defendant under class 29.

8.4 The defendant also avers that it has an Agmark registration and has also received ISO 9001:2000 certification. Besides this, it also claimed that it stands registered with BIS. 8.5 Based on the aforesaid the defendant avers that there is no infringement of the plaintiff's trademark of copyright or, that a case is made out against it of passing off as alleged or at all.

9. Before I proceed further, I must refer to one other aspect of the matter which, the defendant has adverted to, in its second application filed under Order 39 Rule 4 of the Code of Civil Procedure, 1908 (in short, CPC) , to the effect that, it came across a newspaper article dated 18.05.2010 which, referred to the fact that the Central Bureau of Investigation (CBI) in one of its raids had discovered large scale misuse of Agmark certification, even while it was under suspension on account of adulteration in products, as found by the concerned department. As per the newspaper report it appears that the plaintiff had been transferring products to its sister concern. The defendant, based on these newspaper reports has averred that these were the events which occurred in May, 2009 and November, 2009 despite which, in the plaint, there is no

reference to this fact even though the suit was moved in January, 2010.

9.1 The plaintiff, of course, has taken the stand that the CBI raid did not pertain to it. The reason given to support this claim is that the plaintiff had demerged pursuant to a scheme, which resulted in formation of a demerged entity separate from the plaintiff; namely Bhole Baba Milk Food Industries (Dholpur) Pvt. Ltd. - and that this demerger took place prior to the date of raid, i.e., November, 2009. The raid, according to the plaintiff, was thus carried out on its "licencee" company, namely, Bhole Baba Milk Food Industries (Dholpur) Pvt. Ltd.. According to the plaintiff the said company is a separate legal entity and the Agmark license of the plaintiff is separate from that of demerged entity, i.e., Bhole Baba Milk Food Industries (Dholpur) Pvt. Ltd.

9.2 The defendant, however, has in its rejoinder reiterated that there is a commonality of interest between the two entities as the management of both the plaintiff and the licensee company is common. In so far as this aspect of the matter is concerned, I will deal with it in the later part of my judgment.

SUBMISISONS OF COUNSELS

10. On behalf of the plaintiff submissions were made by Mr Mohan Vidhani, while on behalf of the defendant submissions were made by Mr. N.K. Kaul, Sr. Advocate assisted by Mr H.P. Singh.

10.1 Mr Vidhani more or less replicated the averments made in the pleadings. He laid special emphasis on the fact that the plaintiff having registered mark(s) in its favour was entitled to an injunction against the defendant as a matter of right since the impugned mark was identical to the registered marks. In this connection the learned counsel relied upon the provisions of Section 28 and 29 of the Trade Marks Act. Mr Vidhani submitted that the defendants intent in using the plaintiff's mark is dishonest. In this connection he made reference to other marks which the defendant had been using such as **"Mulri", "Himalaya"** and **"Goodday"**. It was the learned counsel's contention that the impugned mark makes use of the word KRISHNA with a malafide intent so that the defendant is able to seek benefit of the goodwill and reputation which is inalienably connected with its registered marks. Mr Vidhani submitted that the use of the word KRISHNA in the impugned mark of which it forms an essential part has infringed the plaintiff's right both under the

Trade Marks Act as well as its common law rights. The learned counsel further submitted that the stand of the defendant that the plaintiff cannot claim monopoly over the word KRISHNA is belied by the fact that the defendant itself has filed an application, in September, 2009, seeking registration of the impugned mark. Therefore, according to the learned counsel, the inverse cannot but be correct, that is, that the plaintiff is also entitled to seek monopoly of the word mark KRISHNA. Mr Vidhani further submitted that the registration of the trade mark would prima facie establish its validity, and a mere addition of a prefix could not result in dilution of its rights over the word mark. The registration of the mark, according to the learned counsel, resulted in a statutory monopoly in favour of the plaintiff. In support of his submission, the learned counsel relied upon the following judgments: **Kedar Nath vs Monga perfumery & Flour Mills,** Delhi – 6 AIR 1974 Delhi 12; **M/s Avis International Ltd. vs M/s Avi Footwear Industries & Anr.** AIR 1991 Delhi 22; **Automatic Electric Limited vs R.K. Dhawan & Anr.** 1999 (19) PTC 81 (Del.); **Midas Hygiene Industries P. Ltd & Anr vs Sudhir Bhatia & Ors.** 2004 (28) PTC 121 (SC); **Astrazeneca UK Ltd & Anr. vs Orchid Chemicals & Pharmaceuticals Ltd.** 2006 (32) PTC 733 (Del.); **Kishore Kumar vs L. Chuni Lal Kidarnath & Anr.** 2010 (42) PTC 264 (Del.).

11. With regard to the proposition that the plaintiff could monopolise a name ascribed to deity 'KRISHNA', reliance was placed on the judgment in **Mukesh Khadaria Trading as Aggarwal Udyog vs DCM Sriram Consolidated Ltd.** 2009 (41) PTC 772 (Del.).

12. On the other hand, on behalf of the defendant, Mr Kaul submitted that this court has in a series of judgment taken the view that even though there is registration in favour of a party the court an examine whether a registration is prima facie valid. Taking this contention forward Mr Kaul submitted that the name KRISHNA is in the Indian context so common that it has attained a status of **publici juris.** It was contended by the learned senior counsel that since the plaintiff had chosen to use a name which was widely used by other manufacturers; both in the same field of activity and in other fields; the plaintiff had taken a risk in the same being replicated in one form or other by the other competitors. In this regard the learned counsel took me through a compilation of registrations filed alongwith their documents to support this contention.

13. A special emphasis was laid on the fact that the plaintiff had failed to disclose that there had been a CBI raid in which it was found that the plaintiff had been selling goods under Agmark certification, even though as is now admitted that Agmark certification of its licensee sister concern, i.e., Bhole Baba Milk Food Industries (Dholpur) Pvt. Ltd. was suspended. Mr Kaul submitted that a litigant such as the plaintiff, in these circumstances were not entitled to protection of court by way of an injunction, which fell, decidedly within the realm of equitable jurisdiction of the court. In support of his submissions, Mr. Kaul cited following judgments: **J R Kapoor vs Micronix India** 1994 PTC 260 (SC); **SP Naidu vs. Jagganath** AIR 1994 SC 853; **Competition Review P. Ltd vs. NN Ojha** 1996 PTC 16; and **Satish Khosla vs. Eli Lily Ranbaxy** 1998 (44) DRJ (DB) 109; **Kewal Kishan Kumar vs. Rudi Roller Flour Mills** 2007 (34) PTC 848 (Del.); **Rhizome Distilleries vs. Pernod Ricard S.A. France** 166 (2010) DLT 12; **Rich Products vs. Indian Nippon Foods** 2010 (42) PTC 660; **M/s JK Oil Mills vs. M/s Adani Wilmar Ltd.** 2010 (42) PTC 639 (Del.).

REASONS :

14. Having perused the pleadings and documents filed by the parties and considered the submissions of the counsels, in my view, the following emerges: As indicated at the very outset, in the opening part of my judgment, the controversy, in my view, now centres around the use of the word KRISHNA. There have been in my opinion substantial changes incorporated in the label mark of the defendant in so far as the colour scheme and the pictorial representation is concerned which should allay any apprehension that a prudent and a reasonable consumer would be deceived as regards the origin and the source of the goods on which such a label mark is put. This aspect was as a matter of fact was conceded before me by Mr Vidhani, though rather reluctantly. Mr Vidhani, however, pressed his application for interlocutory injunction qua use of the word KRISHNA in the label mark of the defendant. I had indicated to both parties that the usage of the word **"KRISHNA"** in the defendants mark would necessarily have to be given the same prominence as the words **"Parul"** and **"Lord"** which precede the word KRISHNA in the defendant's mark. In other words the font size and the prominence of the preceding words **"Parul"** and **"Lord"** had to be identical to that of KRISHNA. That a court can issue such directions in the interregnum is

not now in doubt. See **Cadila Healthcare Ltd. vs Diat Foods (India)** 173 (2010) DLT 141. Nevertheless since Mr Vidhani asserts his complete exclusivity to use the word "KRISHNA" I have decided to deal with that aspect of the matter as well.

14.1 In this connection, before I proceed further, it may be important to refer to the specific grievances of the plaintiff in the suit qua the defendant. For this purpose, it may be relevant to refer to the averments made in paragraph 18 and 23 of the plaint. Briefly, the plaintiff has inter alia averred as follows: The defendant's mark Parul's Lord Krishna is identical to the plaintiff's mark. The defendant's addition of the word "Parul" and Lord" is **"insignificant"**. The word **"Parul"** and **"Lord"** are much smaller as compared to the font of the word KRISHNA. The essential feature of the defendant's mark is KRISHNA to which the defendant has given prominence. The defendant has slavishly copied not only the trade mark KRISHNA but also replicated the packaging on the 15 kg and 1 ltr. Containers, used for selling ghee. The packaging of these containers uses a background colour scheme, which is, predominantly yellow with printed material depicted in red; similar to that of the plaintiff. Importantly, it is stated that the word KRISHNA is written and placed at the top centre, in the same manner, in red colour printed with white colour in the background.

14.2 A reading of paragraphs 18 and 23 of the plaint seems to suggest that the plaintiff came to court being aggrieved by the fact that the word KRISHNA forms an essential part of the defendant's trade mark and had been given greater prominence as compared to the suffix "Parul" and "Lord" and, therefore, resulted in confusion qua the plaintiff's mark. Apart from the plaintiff's grievance vis-à-vis the packaging, which in my opinion stands satisfied, the plaintiff has not set up the case of a monopolistic right to use the word KRISHNA; at least the same has not been said in so many words. But I will assume for the moment that, this is what the plaintiff intends to say in the plaint for the purposes of decision of the captioned applications.

14.3 In regard to the above, one may only notice that the plaintiff is not the only person in the business of manufacturing. A voluminous set of documents have been filed by the defendant in this regard to show several such registrations under class 29; some of them precede the period of registration of the plaintiff, while the others succeed the date.

To cite examples: **KRISHNA** mark in class 29 appears to have been registered vide registration No. 622772 in the name of one **Subhrangshu Kumar Ghosh** for ghee, butter and dairy products, the user date is given as 01.09.1989; **Krishna brand label** has been registered vide registration no. 82986, in favour of **A.N.A. Alagirisamy Naidu Bros.** in respect of ghee, the **user date is 01.01.1936; Krishna ghee label** has been registered vide registration no. 584939, in favour of one **Gobinda Chakraborty,** the user date is given as 01.10.1992. The registration seems to be restricted to sales in West Bengal and Orissa. I have deliberately not taken examples of certain registrations made post 1993 because the plaintiff claims users since 1993, but there are several registrations of the word mark KRISHNA or Krishna Label Mark even thereafter. The claim of the defendant that there is ubiquitous use of the word mark KRISHNA appears to be prima facie correct, at least at this stage.

14.4 I must here point to an argument raised by Mr Vidhani that the mere presence of such marks on the register of the Trade Mark Registry would not deprive an owner of its rights, such as the plaintiff to seek protection of the court in the event of an infringement by a competitor. In other words, Mr Vidhani sought to suggest that most of the registrations referred to by the defendant were lying dormant. In my opinion, one cannot quibble with this proposition. The use of the trade mark is important for an owner to claim rights in it. The only difficulty is, that at this stage, for me to accept the plaintiff's contention that these marks which are identical to the plaintiff's mark and which precede the date of user claimed by the plaintiff are lying dormant, without any evidence on record, would result in putting the cart before the horse. The point remains that both prior to 1993, and thereafter, there have been several manufacturers of identical goods which have, it appears been using the word mark or label mark KRISHNA. The plaintiff's claim to monopoly does not at this stage appear to be quite accurate, notwithstanding its zealous prosecution of cases against offenders, to which reference has been made in the plaint. In this regard the plaintiff had referred to the judgment of this court in the case of **DCM Sriram** (supra). The **DCM Sriram** (supra) case is distinguishable. Briefly the facts obtaining in the case were as follows: The plaintiff, who was the respondent before the Division Bench was a registered proprietor of the trademarks "Shriram" and "Shriram Nirman". The appellant i.e., the defendant in the suit was in the business of manufacturing and selling Plaster of Paris

under the name and style of "Aggarwal Shriram". The Division Bench examined the case only with respect to passing off. The plaintiff/ respondent which was a Shriram Group Company had evidently adopted "Shriram" as its trademark as it was the name of its founder promoter late Lala Shriram. The plaintiff/respondent had been using the mark "Shriram" for a considerable period of time. The appellant/defendant had in defence averred that the trademark Shriram was adopted by him as one Bajrang Lal Pareek who was connected with the appellant/defendant was an ardent devotee of lord Shriram. The Court came to the conclusion that the defence taken was dishonest. In the instant case, as discussed by me above, the facts are quite different. The plaintiff in the instant case has adopted a common name which is unconnected to the plaintiff. The plaintiff has not been able to establish, at this stage, that the name has acquired secondary distinctiveness. Notwithstanding the fact that the plaintiff has adverted to the fact that its gross sales turnover between 1997-98 and 2007-08 jumped by leaps and bounds, it cannot be said at this stage that the mark has attained a reputation which brings to mind the plaintiff's product on a mere invocation of the word KRISHNA. In my opinion, the sales alone does not necessarily transcend in the mark attaining a secondary distinctiveness of a degree which ought to give the owner of a common name, in this case, a deity's name a right to monoplise its use to the exclusion of all others.

14.5 What would have to be addressed at the final stage, in this case, would be whether the mark has achieved secondary distinctiveness of the kind which brings to mind immediately the plaintiff's product. In order to come to a conclusion whether or not the mark has achieved a distinctiveness of such distinction evidence would have to be placed on record bearing in mind, amongst others, the following: (a) does the mark remind the consumer of the trade and origin. In other words does the trade origin get related to the propounder of the mark and none other; (b) has the mark required sufficient distinctive character that the mark has become a trade mark. The use of the mark does not automatically translate into distinctiveness. [See **Rich Products Corporation and Anr. vs. Indo Nippon Food Ltd.** 2010 (42) PTC 660 (Del)]. In this regard an argument was raised by Mr Vidhani that Rich Products case related to a descriptive mark whereas the present case deals with a common name. In my opinion, the test of secondary distinctiveness can be no different for a common name than that which is enunciated for a

descriptive mark. Applying the same test, in my view, at this juncture, I cannot come to the conclusion that a name as common as KRISHNA; which in the cultural context of our country is as common as the word 'John' used in West, has achieved in the plaintiff's case a secondary distinctiveness of the kind that it is inalienably related by the consumers to the plaintiff's product.

14.6 The defendant, of course, would have to show that the usage of the mark by it, of the word KRISHNA is bonafide and honest. The defendant's stand appears to be that the name KRISHNA is commonly used in the milk products industries; and thus it was included in its trade name with a specific intent to carve out a distinct identity by prefixing it with the word "Parul's" and "Lord". The defendant appears to indicate to the consumers very categorically that the origin of the goods is Parul, by using the word Paruls.'s in its trade mark **Parul's Lord Krishna.** Prima facie there is nothing to show that the usage of the impugned mark is dishonest or lacks any bonafide. The case law cited by Mr Vidhani on this aspect of the matter is in my view, distinguishable on facts. In this regard I may only note that while the plaintiff has given the gross turnover, the requisite documents in the form of profit and loss accounts and balance sheets have not been filed. There is also no affidavits of consumers on record which would demonstrate, what was contended before me very vehemently, which is that, the word KRISHNA brings immediately to mind the plaintiff's product. Therefore, at this stage one cannot come to the conclusion that the trade mark KRISHNA has achieved the requisite distinctiveness which relates the origin of the product to the plaintiff.

15. Mr Vidhani's submission that having obtained registration the plaintiff has a right to seek an injunction as a matter of right and that adding a prefix such as "Parul's" and "Lord" to the word KRISHNA would not enure to the benefit of the defendant is misconceived, in the facts of the present case. In a case where a registered mark appears with a prefix and, the registered mark over which rights are claimed is either a descriptive mark or is, as in the instant case, a common name, the same test ought to apply. In several decisions of this court a view has been expressed that notwithstanding the registration of marks the courts are entitled to, prima facie examine the validity of such registrations, in the light of the provisions of Section 9, 30 and 35 of the Trade Marks

Act. I do not intend to replicate the exercise - relevant observations in that regard found in **Marico Ltd. vs Agro Tech Foods Ltd.** 169 (2010) DLT 325, are extracted hereinbelow by way of conversance :

> 15. On a consideration of submissions and the judgments:
>
> (i) The court can at an interlocutory stage take a prima facie view as to the validity of a registered trade mark. This view can be taken based on averments made in the written statement/ pleadings. [See Lowenbrau AG (supra)]. The pleadings in this regard, as in every other case, has to be read "meaningfully" (see **Begum Sabiha Sultan vs Nawab Mohd. Mansur Ali Khan & Ors** (2007) 4 SCC 343)
>
> (ii) Some marks are inherently incapable of distinctiveness. [See **Asian Paints Ltd** (supra)]
>
> (iii) The rights under Section 28 are subject to other provisions of the Trade mark Act. Also the registered proprietor or the permitted user can exercise his rights if the registered mark 'is valid'.
>
> (iv) A descriptive mark can be registered provided it has acquired secondary meaning [See **Girnar** (supra)] (v) If a descriptive mark is one, which is, essentially a combination of common English words the user of the marks has to bear the risk of, some amount of confusion. No monopoly can be claimed by the user of the mark. [See **Cadila Health Care** (supra) & **J.R. Kapoor** (supra)]
>
> (vi) The mark can be impugned both at the stage of registration and post registration. See provisions of Section 9(1)(a) to (c) of the Trade Marks Act for challenge at time of registration and Section 30 and 35 for challenge after registration.
>
> (vii) If the registered mark and the rival mark are not identical; in other words the two marks are similar then the same test as in the case of passing off is applicable; which is, is there a likelihood of deception or cause for confusion. [See **Ruston and Hornby Ltd** (supra)]

16. A Division Bench of this court while sustaining the judgment

went on to observe as follows:

> "In view of the judgment of the Division Bench in the **Cadila Healthcare Ltd.** (supra), and with which we respectfully agree, the appellant in the facts of the present case can have no exclusive ownership rights on the trademark "LOW ABSORB". The expression "LOW ABSORB" is quite clearly a common descriptive expression/adjective. The expression "LOW ABSORB " is not a coined word and at best it is a combination of two popular English words which are descriptive of the nature of the product as held by the Division Bench in **Cadila Healthcare Ltd.** (supra) case that such adoption naturally entails the risk that others in the field would also be entitled to use such phrases. Low Absorb is not an unusual syntax and the same can almost be said to be a meaningful part sentence or phrase in itself. The expression "LOW ABSORB" surely and immediately conveys the meaning of the expression that something which absorbs less, and when used with respect to edible oil, it is descriptive in that it refers to less oil being absorbed or low oil being absorbed. Similar to the expression "Sugar Free" being not an unusual juxtaposition of two English words the expression "LOW ABSORB" equally is not an unusual juxtaposition of words in that the same can take away the descriptive nature of the expression. The expression "LOW ABSORB" is used in the functional sense for the character of the product viz edible oil. With respect to the unregistered trademark "LOW ABSORB" we are of the firm opinion that in essence the expression "LOW ABSORB" only describes the characteristic of the product edible oil and ordinarily/ normally incapable of being distinctive.
>
> We are also of the view that it is high time that those persons who are first of the blocks in using a trade mark which is a purely descriptive expression pertaining to the subject product ought to be discouraged from appropriating a descriptive expression or an expression which is more or less a descriptive expression as found in the English language for claiming the same to be an exclusive trademark and which descriptive word mark bears an indication to the product's kind, quality, use or characteristic etc. This in our view is in accordance with the

spirit of various Sub-sections of Section 9 and Section 30 besides also Section 35 of the Act. The very fact that in terms of Section 9 of the Act, in cases falling therein, there is an absolute ground for refusal of registration of the trademark, the same clearly is an indication of ordinarily a disentitlement from claiming exclusive ownership of a descriptive expression as a trademark. We are in this entire judgment for the sake of convenience only using the expression "descriptive expression" or "descriptive word" or "descriptive trademark" "descriptive" etc. but these expressions are intended to cover cases with respect not only to a descriptive word mark used as a trademark but to all word marks used as trademarks which refer to kind, quality, intended use or other characteristics etc of the goods, and also other ingredients of Section 9(1) (b) and Section 30(2) (a).

The aforesaid observations are made by us mindful of the proviso of Section 9 as per which on account of distinctiveness, the absolute bar against registration is removed, but, we are for the present stressing on the intendment of the main part of the Section and which is to basically prevent descriptive terms from being registered as trademarks. The proviso no doubt does state that such marks can be registered as a trademarks, however, the Act itself also contains provisions for cancellation of registered trademarks including Section 57 whereby registration obtained is cancelled being violative of the applicable provisions of the Act. Our belief is further confirmed by the provision of Section 31(1) which clearly states that registration is only prima facie evidence of the validity of registration. It is only when cancellation proceedings achieve finality of the same being finally dismissed can it be said that a mark for which ordinarily there is an absolute ground for refusal of registration that it has acquired a distinctive character i.e. a secondary meaning or is a well known trademark. Section 124 of the Act is also relevant in this regard. Sub-Section 5 of Section 124 clearly provides that in spite of registration, the Court before which an action is filed seeking protection of the trademark is not precluded from making any interlocutory order it thinks fit in spite of the registration and also the fact that the suit may have to be stayed till decision of the rectification/cancellation proceedings before the Registrar/

Appellate Board filed in terms of Section 57 of the Act. This aspect of Section 124(5) and related aspects are dealt in details in the following portions of this judgment. The facts of the present case are not such that a cancellation proceeding has been dismissed and that which dismissal has obtained finality and it cannot be said that the validity of registration has been finally tested".

17. On the aspect of the case as to whether use of the word KRISHNA would constitute passing, off, I may only refer to the judgment of another Division Bench of this court in the case of **Rhizome Distilleries P. Ltd. & Ors. vs. Pernod Ricard S.A. France\& Ors.** 166 (2010) DLT 12 (DB). In Rhizome's case, the Division Bench considered the two rival marks. The plaintiff's mark was **Imperial Blue** while that of the defendant (who was the appellant before the Division Bench) was **Rhizome Imperial Gold.** During the course of hearing, it appears appellant/ defendant had offered to make changes in the trade dress. After the requisite suggestions in respect of the trade dress had been laid out before the court - the court was persuaded to hold that there could be no confusion in the mind of an average prudent consumer as regards the trade origins of the product (see observations made in paragraph 11). On the aspect of the matter as to whether the principles of law enunciated vis-à-vis a descriptive word would also apply to laudatory words, the court held, in effect, that the same principle did apply (See observations made in paragraph 16 of the judgment made by the court in that regard). On this aspect of the matter, the court noted with approval earlier decisions of this court rendered in the following cases: **Cadila Health Care Ltd. vs. Gujarat Co-operative Milk Marketing Federation Ltd.** MANU/ Del./2282/2009; **Asian Paints Limited vs Home Solutions Retain (India) Ltd.** 2007 (35) PTC 697; and **Proctor & Gamble vs. Office of Harmonization in the International Market** (OHIM) (2002) RPC 17 (See observations made in paragraph 15). With the aforesaid aspects of the case, out of the way, the court dwelled upon the remaining issue which was whether the use of the word **Imperial** in the appellant/ original defendant's trade mark would result in passing off. The relevant observations in this regard are extracted hereinbelow:

> 27. Finally, so far as prayer of passing off is concerned, we reiterate that the similarity of label/trade dress was with respect

to the Plaintiffs. ROYAL STAG and the Defendants. Imperial Gold. Substantial changes have been agreed upon by the Appellants which upon implementation removes any likelihood of deception even concerning the cognitive faculties of an average customer, if not in an inebriated stupor. It may still be pleaded by the Plaintiffs that the Defendants are guilty of passing off because of the adoption of the word IMPERIAL. **To this we may clarify that neither party has any exclusive right for the use of the word IMPERIAL.** The two labels, that is IMPERIAL BLUE and RHIZOME Imperial Gold are totally dissimilar and if a flat amber bottle is used by the Defendants/ Appellants, no deception is likely to arise. **It is also relevant to mention that the word IMPERIAL is used by several other manufacturers of alcohol** such as IMPERIAL TRIBUTE, IMPERIAL FAMOUS, TETLEY's IMPERIAL, IMPERIAL's HERO FIVE WHISKY, CAREW's IMPERIAL WHINE WHISKY, OLD IMPERIAL, SUMMERHILL IMPERIAL, XO IMPERIAL, DON FULANO IMPERIAL, RON BARCELO IMPERIAL ETC. **All these parties will have to co-exist. In view of the widespread use of the word IMPERIAL, especially in the alcohol business, it is not possible to accept the contention of Mr. Chandra that the word IMPERIAL has attained a secondary meaning which would justify exclusivity.** Moreover, secondary meaning would evolve over a number of years; in the present case, the Plaintiffs started marketing its product in 1997 and that is too short a period to make such an extreme claim. In this regard, it is also relevant that both the parties have received registration under the TM Act for their competing brands. (emphasis is mine)

18. Before I conclude let me also refer to the judgments cited by the plaintiff which have not been dealt by me, in the earlier part of my judgment.

18.1 **Astrazeneca UK** (Supra) case was cited by the learned counsel for the plaintiff to demonstrate that under Section 124 of the Trade marks Act it was incumbent on the defendant to obtain permission of this court before preferring a rectification application before IPAB. It is pertinent to note that in the said case, the two competing marks were MERONEM

and MEROMER. The court vacated the injunction, inter-alia, on the ground of balance of convenience. On the issue of whether a rectification application could be moved without having the court rule with respect to its prima facie satisfaction as regards plea of invalidity of the mark of which rectification is sought, the court held in the negative. In that case the plaintiff had moved an application for rectification. The court came to the conclusion that the plaintiff could not circumvent the condition provided in Section 124(1)(b)(ii) of the Trade Marks Act by filing a rectification application during the pendency of the suit without seeking its imprimatur. In the instant case notwithstanding the fact that the rectification application was filed by the defendant during the pendency of the suit, the fact remains that the plaintiff has come to court to seek an injunction. Whether the rectification application is maintainable is not the issue before the court in the captioned applications, therefore, the case, according to me, has no applicability.

18.2 **Midas Hygiene** (supra) case was cited by Mr Vidhani to support his submission that mere delay would not defeat his right to claim injunction. Since my conclusion is not pivoted on delay, in my view, the judgment has no applicability.

18.3 **Avis International** (supra) case was cited by Mr Vidhani to support his submission that on registration of the trade mark a "statutory monopoly" is created in favour of the owner of the mark. As indicated above, in isolation this proposition cannot be quibbled with. In this case the defendant's submission was that injunction order ought not to be passed in favour of plaintiff as there was non-user of the mark by the plaintiff over a period of more than five years. The court observed that at this stage non-user could not be established. These facts do not obtain in the present case. The case is distinguishable.

18.4 In **Kedar Nath** (supra) case the defendant was sued as he had used the plaintiff's registered mark SUDERSHAN with a pre-fix VIJAY appended to it. The court came to the conclusion that the cartons of the plaintiff and that of the defendant were similar in as much as the colour scheme and the trade dress had a striking similarity. It was also found that the plaintiff had been in the business since 1960 and had placed the relevant records before the court. In contradiction the defendant had not filed any details of advertisements carried or expenses incurred in that behalf. In my view, the decision did not deal with the issue which is

raised in the present case.

18.5 **Metro Playing Card** (supra) was cited for the same purposes. Once again it did not deal with the issue raised in the present case. It is important to stress that in the present matter a prima facie case is made out that the trade mark KRISHNA ought not to have been registered, therefore, the case is distinguishable.

18.6 **Kishore Kumar** (supra) case turned on the fact that the plaintiff had been able to establish prior adoption/user of the mark HOMELITE in relation to torches and flashlights. The defendant in that case was in the business of manufacture of dry cell, battery and flashlights. The defendant had placed on record evidence of selling its good under the mark HOMELITE from November, 2008; a period which fell, decidedly, after the date of user claimed by the plaintiff. Consequently, the injunction was granted in favour of the plaintiff. As is evident the case has no applicability to the facts obtaining in the instant matter.

18.7 **Automatic Electric** (supra): plaintiff was a registered owner of the trade mark DIMMERSTAT while, the defendant was evidently a user of an unregistered mark DIMMER DOT; though the court noted that the trade mark DIMMER DOT had been registered in Australia. In this case, one of the submissions made on behalf of the defendant was that the "Dimmer" being a descriptive word in the context of auto variable transformers it could not be monopolized. This submission was made when the counsel of the defendant appeared to have had difficulty in explaining as to how, the defendant had been conveying to the world at large that the mark was registered in India when that was not factually correct. (See observations made in paragraphs 14-17). Therefore, even though the issue of 'dimmer' being a generic word was referred to, it appears that the said submission was made by the counsel in the passing and that the court's attention was not drawn to the various provisions of the Trade Marks Act, in particular, Sections 9, 13 and 35 of the Trade Marks Act. A reading of paragraph 19 of the judgment clearly indicates that the court came to the conclusion since DIMMERSTAT was a registered mark of the plaintiff, without a disclaimer, the defendant could not have carved out from a registered mark a part for its own use; which is the correct ratio of the judgment.

18.8 **Gold Star** (supra) case was cited by Mr Vidhani to support

his point that mere institution of a rectification proceeding would not be a valid defence for infringement of a trade mark. Even though in the instant case the rectification application has been filed, as noticed by me above, the conclusion arrived at by me is not based on the institution of such an application by the defendant. The judgment, thus, in my view would not advance the case of the plaintiff for an injunction.

19. In view of the discussions above, the interim order dated 25.01.2010 is modified to the extent that the defendant is permitted to use label mark which was filed with this court on 02.11.2010 bearing in mind that the prefix "Parul's" and "Lord" shall have a font size and prominence similar to the word KRISHNA. With the aforesaid directions the captioned applications are disposed of.

ILR (2011) DELHI 340

W.P. (C)

P.N. KOHLI ....PETITIONER

VERSUS

UNION OF INDIA & OTHERS ....RESPONDENTS

(RAJIV SAHAI ENDLAW, J.)

W.P. (C) NO. : 4515/2008 DATE OF DECISION: 19.01.2011

Constitution of India, 1950—Petitioner, owner of Flat in Vasant Cooperative Group Housing Society Delhi carried out certain additions and alterations in his Flat which were booked as unauthorized by MCD and order of demolition passed—Petitioner preferred writ petition seeking direction to Government to take decision on report of Dogra Committee appointed by Government which had recommended for extention of permission for additions and alterations as in DDA Flats, to CGHS Flats also—Held:- In Government, Policy matter where power to do or not to do a thing is

optional and discretionary there is no statutory obligation—Direction to the Executive to do a particular thing cannot be given even where matter is of public importance—Courts do not interfere in the policy matters of the State unless the policy violates the mandate of the Constitution or any statutory provision or is otherwise actuated by malafides.

The petitioner is not serving any public interest. The petition has been filed in his personal private interest to perpetuate the admitted unauthorized construction carried out by him. The powers and jurisdiction of this Court in a Public Interest Litigation are vastly different and the same powers cannot be exercised in a private lis. **(Para 10)**

If the contention of the petitioner were to be accepted, then it would open doors for the Courts to issue directions to the Legislature and the Executive to take decisions on all walks of life and qua claims of citizens not presently recognized by any statute/law; it would open the doors to the litigants to then contend that the legislature should be directed to take a decision whether to make a particular law or not which would benefit the said litigant. **(Para 11)**

Important Issue Involved: In Government Policy matter where power to do or not to do a thing is optional and discretionary, there is no statutory obligation, a direction to the Executive to do a particular thing cannot be given even where matter is of public importance—Courts do not interfere in the policy matters of the State unless the policy violates the mandate of the constitution or any statutory provision or is otherwise actuated by malafides.

[Sh Ka]

APPEARANCES:

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

FOR THE RESPONDENTS : Mr. Nawal Kishore Jha, Advocate for respondent No.2, Ms. Alka Sharma, Advocate for respondent No.3.

CASES REFERRED TO:

1. *Priyanka Estates International Pvt. Ltd.* vs. *State of Assam* AIR 2010 SC 1030.
2. *Common Cause (A Regd. Society)* vs. *Union of India* (2008) 5 SCC 511.
3. *Municipal Corporation of Delhi* vs. *Rishi Raj Jain* AIR 2006 SC 3268.
4. *M.C. Mehta* vs. *Union of India* AIR 2006 SC 1325.
5. *P. Ramachandra Rao* vs. *State of Karnataka* (2002) 4 SCC 578.
6. *Common Cause* vs. *Union of India* AIR 2001 Delhi 93.
7. *Kavita* vs. *MCD* 2000 III AD (Delhi) 1.
8. *Supreme Court Legal Aid Committee* vs. *Union Of India* (1998) 5 SCC 762.
9. *Kanhaiya Lal Sethia* vs. *UOI* (1997) 6 SCC 573.
10. *Rawat Mal Jain* vs. *DDA* AIR 1995 Delhi 105.
11. *Aeltemesh Rein, Advocate, Supreme Court of India* vs. *Union of India* AIR 1988 SC 1768.
12. *Sheela Barse* vs. *Union of India* (1988) 4 SCC 226.
13. *Peoples Union for Democratic Rights* vs. *Ministry of Home Affairs* ILR (1987) 2 Del 235.
14. *State of Himachal Pradesh* vs. *Umed Ram Sharma* (1986) 2 SCC 68.
15. *State of Himachal Pradesh* vs. *A Parent of a Student of Medical College, Simla* (1985) 3 SCC 169.
16. *A.K. Roy* vs. *Union of India* AIR 1982 SC 710.
17. *Bhagwat Dayal Sharma* vs. *UOI* ILR (1974) 1 Del 847.

RESULT: Writ petition dimissed.

RAJIV SAHAI ENDLAW, J.

1. The petitioner, claiming to be the owner of Flat No.46, Vasant Cooperative Group Housing Society, Mayur Vihar Phase-I, Delhi and having carried out certain additions and alterations in his flat which have been booked as unauthorized by the MCD and with respect whereto an order of demolition has been passed, has filed this writ petition averring that similar additions and alterations are permissible in DDA Flats and that Government should take a decision on as to why the same are not being permitted in Cooperative Group Housing Society (CGHS) Flats. It is pleaded that the Government had appointed a Committee known as Dogra Committee in this regard which has recommended extension of the permission for additions/alterations as in DDA Flats, to CGHS Flats also but the Government has not taken any decision in this regard. The counsel for the petitioner confines the relief in this writ petition only to a direction to the Government to take a decision on the said report of the Dogra Committee.

2. On 21st October, 2010, it was enquired from the counsel for the petitioner as to what is the right of the petitioner to claim the relief of directing the Government to take such a decision. Attention of the counsel was invited to the judgment of this Court qua the notification of the Delhi Rent Act, 1995 and in which it has been held that no such direction can be issued to the Government. The counsel for the petitioner had then sought adjournment to address on this aspect.

3. The counsel for the petitioner has today contended that the judgments qua the Delhi Rent Act, 1995 (of this Court titled **Common Cause Vs. Union of India** AIR 2001 Delhi 93 and of the Apex Court reported in AIR 2003 SC 4493) would have no application since what was sought therein, was bringing into force a legislation and with respect whereto it was held that no mandamus can be issued by the Courts. He has contended that the petitioner herein is not seeking the relief of directing the Government to accept the recommendation of the Dogra Committee or a direction against the Government to allow in CGHS flats additions, alterations as are permissible in DDA flats; that he is only seeking a direction to the Government to take a decision.

4. It is contended that issuance of such a direction is within the domain of the Courts. Reliance in this regard is placed on:

(i) **Aeltemesh Rein, Advocate, Supreme Court of India Vs. Union of India** AIR 1988 SC 1768 where direction was given to the Central Government to, within a reasonable time consider the question whether Section 30 of the Advocates Act, 1961 was to be brought into force or not.

(ii) **Supreme Court Legal Aid Committee Vs. Union Of India** (1998) 5 SCC 762 where a direction was issued to the States/Union Territories which had till then not constituted Legal Services Committees required to be framed under Section 29A of the Legal Services Authorities Act, 1987, to constitute the various Committees under the Act within a period of two months.

(iii) Order dated 21st November, 2009 of the Government of Kerala recording that the Supreme Court had directed the Government to take a decision on the Report of the Kerala State Commission for Backward Classes.

(iv) Press Note reporting that the Supreme Court had directed the Government of India to come out with a final decision on the minority status of the Jain Community.

5. The counsel for the petitioner has contended that issuance of such a direction is in the fitness of things inasmuch as the exercise conducted by the Government of appointing the Dogra Committee and spending money thereon cannot be allowed to be wasted. It is contended that more than four years have passed since the Dogra Committee has submitted its recommendations and the Government ought to have taken a decision and if is not so taking the decision, the Court is entitled to direct it to so take the decision.

6. The counsel for the respondent No.3 (being a neighbour of the petitioner and on whose complaint action was taken against works carried out by the petitioner) has relied on:

(i) **M.C. Mehta Vs. Union of India** AIR 2006 SC 1325 observing that there is no discretion in the MCD to order or not to order demolition of unauthorized construction.

(ii) **Municipal Corporation of Delhi Vs. Rishi Raj Jain** AIR 2006 SC 3268 observing that the Courts although can interpret a statute, cannot issue a guideline which would be contrary to the provisions of the statute.

(iii) **Kavita Vs. MCD** 2000 III AD (Delhi) 1 reiterating that mandamus cannot be issued against the provisions of the statute.

(iv) **Rawat Mal Jain Vs. DDA** AIR 1995 Delhi 105 laying down that the Court while exercising the discretion will not extend a helping hand to the person invoking its equity jurisdiction for grant of an ad-interim injunction when he approaches for preserving what he has gained by violating the law.

(v) **Priyanka Estates International Pvt. Ltd. Vs. State of Assam** AIR 2010 SC 1030 holding that illegal and unauthorized construction beyond the sanctioned plans are required to be dealt with by firm hand and such violations are not likely to fall in the category of compoundable items and the necessary consequence thereof is demolition thereof

7. It is also contended that the petitioner has encroached upon the land/space outside his flat also and the unauthorized construction made by the petitioner is not permissible in DDA flats also.

8. The first question which arises for consideration is whether a direction as sought can be given to the respondents to take a decision on the recommendations of the Dogra Committee.

9. The judgment in **Aeltemesh Rein, Advocate, Supreme Court of India** (supra) on which strong reliance is placed by the counsel for the petitioner was considered by the Full Bench of this Court in AIR 2001 Delhi 93 (supra). It was observed that inspite of the direction, Section 30 of the Advocates Act, 1961 subject matter of that judgment was still not brought into force. Similarly with respect to the judgment in **Supreme Court Legal Aid Committee** (supra), it was said that the same has to be read in the context of the contents of the affidavit filed in that case and which showed the willingness of the Central Government. Else this Court reiterated the principles in **A.K. Roy Vs. Union of India** AIR 1982 SC 710 that it is not for the Courts to censure the Executive nor is it for the Courts to take over the function of the Parliament, otherwise, there will be chaos with each organ of the State overstepping its jurisdiction and interfering with the functions of another organ of the

State.

10. I am also of the view that the directions in Aeltemesh Rein and in Supreme Court Legal Aid Committee were in Public Interest Litigations. The present is not a petition of such a nature. The petitioner is not serving any public interest. The petition has been filed in his personal private interest to perpetuate the admitted unauthorized construction carried out by him. The powers and jurisdiction of this Court in a Public Interest Litigation are vastly different and the same powers cannot be exercised in a private lis.

11. If the contention of the petitioner were to be accepted, then it would open doors for the Courts to issue directions to the Legislature and the Executive to take decisions on all walks of life and qua claims of citizens not presently recognized by any statute/law; it would open the doors to the litigants to then contend that the legislature should be directed to take a decision whether to make a particular law or not which would benefit the said litigant.

12. In this regard, I may also note that taking a decision in such matter would require a complete decision on the framing of law and would result in chaos and would be in the teeth of the judgment of the Constitution Bench in **A.K. Roy** (supra).

13. I find that a Division Bench of the High Court of Himachal Pradesh had directed the Chief Secretary to the Government of Himachal Pradesh to file an affidavit setting out what action had been taken by the State Government towards implementation of the recommendations contained in the Report of the Anti-Ragging Committee. In appeal preferred by the State, the Supreme Court in the judgment reported in **State of Himachal Pradesh Vs. A Parent of a Student of Medical College, Simla** (1985) 3 SCC 169 held that the order of the High Court so directing was wholly unsustainable, even though made in a Public Interest Litigation. It was held that the direction of the High Court ostensibly did no more than call upon the Chief Secretary to inform the Court as to what action the State Government proposed to take on the recommendations, in fact and substance, intended to require the State Government to initiate legislation on the subject. It was held that the direction was nothing short of an indirect attempt to compel the Government to initiate legislation and which the Court was not entitled

to do. It was further held that it is entirely a matter for the executive branch of the Government to decide whether or not to introduce a particular legislation and is not a matter which is within the sphere of the functions and duties allocated to the judiciary under the Constitution. The Supreme Court held that the Court cannot group the function assigned to the Executive and the Legislature under the Constitution and it cannot even indirectly require the Executive to introduce a particular legislation or the Legislature to pass it or assume to itself a supervisory role over the lawmaking activities of the Executive and the Legislature.

14. In **State of Himachal Pradesh Vs. Umed Ram Sharma** (1986) 2 SCC 68, the High Court had directed the State Government to allot a particular sum for expenditure on account of particular project. The Supreme Court posed the questions, how far the Court could give directions which are administrative in nature and whether any direction could be given to build roads where there are no roads and whether the Court could direct that the administration should report from time to time so that action taken can be supervised by the Court. The Supreme Court found that the Executive was not oblivious of its obligation though in its sense of priority there may have been certain lethargy and inaction. It was observed that there had been at the highest a slow application of energy in the action by the Executive. In these circumstances, it was held that by the process of judicial review, if the High Court activates or energizes executive action, it should do so cautiously. I find that in the present case also, it cannot be said that the respondents are not conscious of the question whether the same Rules as applicable to DDA flats should apply to CGHS flats also; a Committee was constituted for the said purpose. Maybe, there has been some lethargy in taking a decision on the report of the Dogra Committee, however, the same is not such to invite interference by this Court. It was held that the Court must know its limitations in these fields; the Court should remember that the Judge is not to innovate at pleasure and is to exercise discretion informed by tradition.

15. A seven-Judge Bench of the Supreme Court in **P. Ramachandra Rao Vs. State of Karnataka** (2002) 4 SCC 578 held that instances of judicial excessivism that fly in the face of the doctrine of separation of powers which envisages that the legislature should make law, the Executive should execute it and the judiciary should settle disputes in accordance

with the existing law; the Court went to the extent of holding various dictas of two- Judge and three-Judge Benches of the Supreme Court in Public Interest Litigations to be not legitimate exercise of judicial power. It was observed that giving directions of a legislative nature is not a legitimate judicial function.

16. Reference may also be made to **Common Cause (A Regd. Society) v. Union of India** (2008) 5 SCC 511 holding that Courts cannot create rights where none exist nor they can go on making orders which are incapable of enforcement or direct legislation or proclaim that they are playing the role of a law maker merely for an exhibition of judicial valour.

17. There is another aspect of the matter. The necessary corollary of holding that such a direction can be given to the Legislature/Executive would be to, till then, protect the petitioner. It would result in perpetuating and continuing an action which under the law as existing today is admittedly illegal. This also brings to the fore the essential distinction between a Public Interest Litigation and a private lis. In a Public Interest Litigation while giving such a direction no illegality is being perpetuated but in a private lis it would be so. I may notice that it is the contention of the respondent No.3 that owing to pendency of the present petition, the demolition order against unauthorized works carried out by the petitioner is not being enforced. Public Interest Litigations are by and large meant for enforcement of Fundamental Rights. On the contrary, the petitioner here cannot be said to be having a Fundamental Right for regularization of the unauthorized constructions carried out by him. The Supreme Court in **Sheela Barse Vs. Union of India** (1988) 4 SCC 226 held that in a Public Interest Litigation unlike traditional dispute resolution mechanism, there is no determination or adjudication of individual rights; the proceedings cut across and transcend the traditional forms and inhibitions; relief to be granted looks to the future and is generally corrective as against determination of legal consequences of past events. Division Benches of this Court in **Bhagwat Dayal Sharma Vs. UOI** ILR (1974) 1 Del 847 and **Peoples Union for Democratic Rights Vs. Ministry of Home Affairs** ILR (1987) 2 Del 235 have held that where the power to do or not to do a thing is optional and discretionary and there is no statutory obligation, direction to the Executive to do a particular thing cannot be given even where matter is of public importance. In the

present case also no obligation on the part of the respondents to take a decision on the Dogra Committee is shown. It is purely a policy matter. The Supreme Court in **Kanhaiya Lal Sethia Vs. UOI** (1997) 6 SCC 573 held that it is not open to a petitioner to seek a direction to the Union of India to introduce an official Bill in the Parliament or to sponsor a Private Member's Bill to be introduced on the subject. If the argument of the counsel for the petitioner in the present case were to be accepted it could have been argued there also that merely by introduction of a Bill, its enactment was not being sought. It was held that Courts do not interfere in policy matters of the State unless the policy violates the mandate of the Constitution or any statutory provision or is otherwise actuated by mala fides.

18. I am therefore of the opinion that the petitioner is not entitled to the relief claimed of directing the respondents to take a decision on the Dogra Committee report.

19. The counsel for the petitioner has then invited attention to the prayer clause also claiming the relief of directing the MCD to consider the application of the petitioner for regularization. In view of the admitted position that the principles and rules on the basis whereof regularization is claimed are not applicable to CGHS flats, no purpose would be served therefrom. Even otherwise, I am of the opinion that the claims, if any, for regularization ought to have been made by the petitioner in the proceedings in which the order of demolition was made. The said order has now attained finality. The petitioner cannot now have a second round. If such practice were to be permitted, no order of unauthorized construction would ever be implemented.

The petition is therefore dismissed. I refrain from imposing any costs.

ILR (2011) DELHI 350
CS (OS)

M/S. ROSHAN LAL VEGETABLE PRODUCTS PVT. LTD. ....PLAINTIFF

VERSUS

M/S. PARAM INTERNATIONAL & ANR. ....DEFENDANTS

(J.R. MIDHA, J.)

CS(OS) NO. : 59/2006 DATE OF DECISION: 20.01.2011

Code of Civil Procedure, 1908 (CPC)—Section 2(12)—Mesne Profits—Claim at enhanced market price—Suit property was let out by the plaintiff to the defendant on a monthly rent of Rs. 72,000/-—Plaintiff terminated the lease and filed a suit for possession and recovery of rent/mesne profits—Decree of possession passed—Plaintiff directed to lead evidence on claim for rent and mesne profit—Plaintiff claimed rent at the rate of Rs. 1,52,000/- per month on ground that monthly rentals of suit property have increased from the date of lease agreement. Held—If there had been any special or unusual rise in the prevailing rents, then upon proof of such unusual rise within that period, an additional sum as mesne profits would have been payable—However the plaintiff did not prove an abnormal increase in this period—Therefore claim of the plaintiff for mesne profits at 1,52,000/- per month—Rejected—The mesne profits are allowed only at Rs. 72,000/- per month.

These being the settled principles, it needs to be considered whether by applying these principles to the facts of this case, the plaintiff is entitled to mesne profits higher than Rs.72,000/- as fixed by the original lease/licence. In the present case, the lease/licence dated 1st February, 2004, and it was for three years, i.e., from 1st February, 2004 till

31st January, 2007. The possession was given back on 2nd April, 2007, i.e., about two months later than the date originally fixed for expiry. If after the date of termination on 13th May, 2005 and till vacating of the premises on 2nd April, 2007, there had been any special or unusual rise in the prevailing rents, then upon proof of such unusual rise within that period, an additional sum as mesne profits would have been payable. The affidavit of evidence filed by the plaintiff says virtually nothing. No evidence as such has been adduced, let alone a specific instance, even a newspaper report of abnormal increase in this period has not been filed. In any case, the period here is too small to apply the principle of taking judicial notice of the rise in the rents. It would have been a different matter if the possession was still with the Defendants or the period was longer. **(Para 14)**

In this view of the matter, the claim of the plaintiff for mesne profits at Rs.1,52,000/- per month, i.e., Rs.80,000/- beyond Rs.72,000/- is rejected and the mesne profits are allowed only at Rs.72,000/- per month. **(Para 15)**

Important Issue Involved: If there had been any special or unusual rise in the prevailing rents, the upon proof of such unusual rise within that period, an additional sum as mesne profits would have been payable.

[Sa Gh]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Tanveer A. Mir, Advocate.

FOR THE DEFENDANTS : None.

CASES REFERRED TO:

1. *M.R. Sahni* vs. *Doris Randhawa,* AIR 2008 Delhi 110 = 149 (2008) DLT 635
2. *Shakti Vats* vs. *Dr. Fatima Raja,* RSA 136 of 2008.
3. *Umesh Mediratta* vs. *State Bank of Indore,* 2008 (106) DRJ 745.
4. *Consep India Pvt. Ltd.* vs. *CEPCO Industries Pvt. Ltd.,* RFA 329/2007.
5. *National Radio & Electronic Co. Ltd.* vs. *Motion Pictures Association,* 122 (2005) DLT 629
6. *UCO Bank* vs. *Vyas Aqua Products Pvt. Ltd.,* RFA No. 564/2005.
7. *Sonia and Co. (P) Ltd.* vs. *Saboo Cylinders (P) Ltd,* CS(OS) No.626/2004.
8. *Punjab National Bank* vs. *Delhi Properties,* RFA 580 of 1999.
9. *Raptakos Brett & Co. Ltd.* vs. *Ganesh Property* AIR 1998 SC 3085).
10. *Nawal Kishore Gupta* vs. *Employees State Insurance Corporation,* R.F.A. No. 269 of 1996.
11. *Tarquino Raul Henriques* vs. *Damodar Mangalji and Co. Pvt. Ltd* AIR 1989 Bombay 309.
12. *Union of India* vs. *Wing Commander R.R. Hingorani,* AIR 1987 SC 808.
13. *Lucy Kochuvareed* vs. *P. Mariappa Gounder* AIR 1979 SC 1214.
14. *Mahant Narayana Dasjee Varu* vs. *Board of Trustees* AIR 1965 SC 1231.
15. *Fateh Chand* vs. *Balkishan Das* AIR 1963 SC 1405 : [1964] 1 SCR 515.

RESULT: Suit decreed.

J.R. MIDHA, J. (Oral)

1. The plaintiff has filed this suit for possession and mesne profits in respect of the property bearing No.F-90/12, Okhla Industrial Area, Phase-I, New Delhi built over land admeasuring 1353 sqr.yrds., hereinafter referred to as the 'suit property'.

2. The suit property was let out by the plaintiff to the defendant

vide two licence agreements – Ex.PW1/2 and Ex.PW1/3 for a total monthly rental of Rs.72,000/- (Rs.32,000/- towards the licence fee and Rs.40,000/- towards fee for the facilities) for a period of three years with effect from 1st February, 2004. The defendants handed over six cheques to the plaintiff at the time of taking over the vacant possession of ˇthe suit property. However, the said cheques were dishonoured. The plaintiff terminated the defendants lease vide notice Ex.PW1/11 dated 31st March, 2005 and thereafter, filed the present suit claiming the possession and recovery of rent/mesne profits from the defendants.

3. Vide order dated 7th February, 2007, the decree of possession was passed in favour of the plaintiff and against the defendants in pursuance to which the plaintiff got back the possession on 2nd April, 2007. With respect to the claim for rent and mesne profits, the plaintiff was directed to lead the evidence.

4. The plaintiff is claiming rent for the period 1st February, 2004 to 13th May, 2005 at the rate of Rs.72,000/- per month and mesne profits at the rate of Rs.1,52,000/- per month with effect from 14th May, 2005.

5. The defendants were proceeded ex-parte vide order dated 6th August, 2010. The plaintiff has filed the evidence by way of affidavit. The plaintiff has deposed in para 18 of the affidavit by way of evidence that the monthly rentals of the suit property have doubled from the date of signing the lease agreement and therefore, the plaintiff be awarded the mesne profits at the rate of Rs.1,52,000/- per month.

6. When a lease comes to an end by efflux of time, or by notice of termination, or if there be a breach and the lessee's rights are forfeited, the lessee becomes a tenant at sufferance, and it becomes the duty of the lessee under Section 108(q) of the Transfer of Property Act to restore possession to the lessor forthwith. (**Raptakos Brett & Co. Ltd. vs Ganesh Property** AIR 1998 SC 3085).

7. By not vacating and voluntarily handing over possession to the lessor, a lessee invites upon himself the liability towards mesne profits/ damages. In **Union of India v. Wing Commander R.R. Hingorani**, AIR 1987 SC 808, the Hon'ble Supreme Court was pleased to hold in para 8:

> "… … The respondent retained the flat in question at his own peril with full knowledge of the consequences. He was bound by the declaration to abide by the Allotment Rules and was clearly liable under SR 317-B-22 to pay damages equal to the market rent for the period of his unauthorised occupation. …"

8. The liability for damages arises out of the lessee's own wrongful act. A person doing something with knowledge of its adverse consequences must face the consequences. However, it is an impression harboured by some that it will be cheaper to force the lessor to go to Court than to hire alternate accommodation, and that encourages litigation.

9. Both to do justice and to remove the factor of this difference as encouraging disputes and court delays, it is necessary that courts must assess mesne profits at a figure which closely resembles the rate at which the premises in question could have been let or the rate at which the lessee could have hired similar premises, i.e., prevalent market rate of rent.

10. On the question of evidence for assessment of mesne profits, the following decisions have been noted:

(i) **National Radio & Electronic Co. Ltd. v. Motion Pictures Association,** 122 (2005) DLT 629

(ii) **UCO Bank v. Vyas Aqua Products Pvt. Ltd.,** RFA No. 564/2005 decided by the Division Bench of the Delhi High Court on 10.10.2006

(iii) **M.R. Sahni v. Doris Randhawa,** AIR 2008 Delhi 110 = 149 (2008) DLT 635

(iv) **Shakti Vats v. Dr. Fatima Raja,** RSA 136 of 2008 decided by the Delhi High Court on 3.05.2008

(v) **Umesh Mediratta v. State Bank of Indore,** 2008 (106) DRJ 745

(vi) **Sonia and Co. (P) Ltd. v. Saboo Cylinders (P) Ltd,** CS(OS) No.626/2004 decided by the Delhi High Court on 20.01.2009

(vii) **Nawal Kishore Gupta v. Employees State Insurance Corporation,** R.F.A. No. 269 of 1996 decided by the

Delhi High Court on 20.05.2009

(viii) **Consep India Pvt. Ltd. v. CEPCO Industries Pvt. Ltd.,** RFA 329/2007 decided by the Delhi High Court on 26.03.2010

(ix) **Punjab National Bank v. Delhi Properties,** RFA 580 of 1999 decided by the Delhi High Court on 10.01.2011

11. From these decisions, it is clear that for assessing mesne profits, judicial notice can be taken of the prevailing rents and that an element of guess work is always involved.

12. Once some evidence has been adduced by the plaintiff as to the prevailing rate and judicial notice taken as supplementing that, the burden shifts to the defendant to establish his version as to the prevailing rents, or the rent at which similar premises were being leased out during the relevant period. He has also to prove the prevailing rate as being not what the lessor seeks to prove, but the rate which he contends it to be. It is on weighing the two that the Court determines the correct figure. The defendant's failure to adduce evidence to rebut leaves the Court free to draw an appropriate inference, and pass orders.

13. If premises were available at a cheaper rate than that being claimed by the lessor, the defendant always had the option of vacating and shifting to such cheaper premises. While it is advisable that sample leases are brought on record, the practical difficulties of a plaintiff in getting hold of contemporaneous leases cannot be ignored, and the non-bringing of these is not always fatal. It is on an overall conspectus of all these factors that the Court decides the rate of mesne profits. The court has to arrive at a figure that is no less than that at which the lessor could have let or the lessee could have hired similar premises.

14. These being the settled principles, it needs to be considered whether by applying these principles to the facts of this case, the plaintiff is entitled to mesne profits higher than Rs.72,000/- as fixed by the original lease/licence. In the present case, the lease/licence dated 1st February, 2004, and it was for three years, i.e., from 1st February, 2004 till 31st January, 2007. The possession was given back on 2nd April, 2007, i.e., about two months later than the date originally fixed for expiry. If after the date of termination on 13th May, 2005 and till vacating of the premises on 2nd April, 2007, there had been any special or unusual

rise in the prevailing rents, then upon proof of such unusual rise within that period, an additional sum as mesne profits would have been payable. The affidavit of evidence filed by the plaintiff says virtually nothing. No evidence as such has been adduced, let alone a specific instance, even a newspaper report of abnormal increase in this period has not been filed. In any case, the period here is too small to apply the principle of taking judicial notice of the rise in the rents. It would have been a different matter if the possession was still with the Defendants or the period was longer.

15. In this view of the matter, the claim of the plaintiff for mesne profits at Rs.1,52,000/- per month, i.e., Rs.80,000/- beyond Rs.72,000/- is rejected and the mesne profits are allowed only at Rs.72,000/- per month.

16. As far as the form for making a claim for mesne profits, and interest on mesne profits, are concerned, there is a difference between a claim for the period prior to the suit and a claim for the period subsequent to the suit. However, by the Code of Civil Procedure (Amendment) Act, 1976, clause (b) of sub-rule(1) had been redrafted in two clauses (b) and (ba); (b) for rents and (ba) for mesne profits. The Court may either order a specific amount or it may order an inquiry under Order XX Rule 12 CPC and then on the inquiry being completed, pass appropriate orders. The Court fees on the claim for pendente lite mesne profits is to be paid before framing the decree. Regarding interest on mesne profits, Section 2(12) of the CPC which defines mesne profits, itself includes interest.

17. The present suit was filed on 10th January, 2006. Regarding interest, the claim is vague. Therefore, on the mesne profits for the period prior to the suit, interest is not allowed. However, the grant of pendente lite mesne profits and interest thereon is always in the jurisdiction of the court. (**Fateh Chand v. Balkishan Das** AIR 1963 SC 1405 : [1964] 1 SCR 515; **Mahant Narayana Dasjee Varu v. Board of Trustees** AIR 1965 SC 1231; **Lucy Kochuvareed v. P. Mariappa Gounder** AIR 1979 SC 1214; and **Tarquino Raul Henriques v. Damodar Mangalji and Co. Pvt. Ltd** AIR 1989 Bombay 309).

18. In the result, the suit is decreed in favour of the plaintiff and against the defendant for recovery on the following amounts:-

(i) Licence fee for the period 1st February, 2004 to 13th May, 2005 [16 months 13 days] @ Rs.72,000 p.m. = Rs.11,83,000/-.

(ii) Mesne profits for the period 14th May, 2005 to 10th January, 2006, 7 months 27 days] @ Rs.72,000 p.m. = Rs.4,96,000/-.

(iii) The security, if any, lying with the plaintiff is treated as payment as of the date of the suit. The defendant has paid Rs.2.08 lakhs to the plaintiff during the pendency of the suit which shall be adjusted towards the decretal amount as on the date of payment.

(iv) The plaintiff shall also have interest on Rs.16,79,000/-, less the amount paid/adjusted, from the date of the suit till the date of the decree @ 9% p.a., and thereafter, the plaintiff shall have future interest on the principal sum @ 6% per annum till payment.

(v) In so far as the claim for mesne profits for the period pendente lite, i.e. the period after 10th January, 2006 and till the vacation of the premises (2nd April, 2007), is concerned, the suit is decreed as under:

(a) Mesne profits for the period 10th January, 2006 to 2nd April, 2007 [15 months 24 days] @ Rs.72,000 p.m. = Rs.11,37,600/-.

(b) The plaintiff is awarded interest @ 9% p.a. on the mesne profits from the date of accrual (each month) till the date of decree and thereafter as future interest on the principal sum adjudged (Rs.11,37,600/-) @ 6% per annum till payment.

19. The Plaintiff shall prepare a statement of account and interest in terms of this judgment duly supported by an affidavit which shall be filed with the Registry and on being verified and found correct by the Joint Registrar after notice to the plaintiff, the figures shall be included in the decree sheet. Ad-valorem court fees shall be paid on that amount, including the amount paid during the pendency of the suit, before the decree is framed.

20. The Plaintiff is awarded costs, including the Court fees paid earlier and the Court fees to be now paid.

ILR (2011) DELHI 358
W.P. (C)

EX. CT. RAJESH KUMAR ....PETITIONER

VERSUS

UOI AND OTHERS ....RESPONDENTS

(PRADEEP NANDRAJOG & SURESH KAIT, JJ.)

W.P. (C) NO. : 3270/2010 DATE OF DECISION: 25.01.2011

Indian Penal Code, 1860—Section 302, 304—Petitioner, constable under Border Security Force was on duty at Indo Bangladesh Border—He was charged under Section 302 for having murdered one woman on the border—Trial conducted at General Security Force Court which held petitioner guilty of having committed offence punishable under Section 304 Part II—Aggrieved petitioner preferred writ petition challenging the order—He urged woman indulged in smuggling of countrymade liquor to Bangladesh, and on being stopped she along with other women became aggressive—Thus, he in self defence, fired one round from his SLR which proved fatal for woman—Held:- In order to justify the act of causing death of the assailant, the accused has simply to satisfy the Court that he was faced with an assault which caused a reasonable apprehension of death or grievous hurt—Petitioner acquitted.

The question whether the apprehension was reasonable or not is a question of fact depending upon the facts and circumstances of each case and no straitjacket formula can be prescribed in this regard. The only guiding objective facts would be, the weapon used, the manner and nature of assault and other surrounding circumstances wherefrom it can be evaluated whether the apprehension was justified or not. **(Para 6)**

It has to be kept in mind that where the opposite party is proved to be the aggressor, the reaction of the accused has not to be weighed in scales of gold and it has to be kept in mind that the accused had no time to ponder over and take a reasoned decision as to how much force must he use in retaliation. The issue of force used in retaliation has to be broadly considered in view of the attendant circumstances. **(Para 7)**

Important Issue Involved: In order to justify the act of causing death of the assailant, the accused has simply to satisfy the Court that he was faced with an assault which caused a reasonable apprehension of death or grievous hurt.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mrs. Rekha Palli, Mrs. Punam Singh and Mrs. Amrit Prakash, Advocates.

FOR THE RESPONDENTS : Ms. Sonia Sharma and Mr. Anuj Aggarwal, Advocates with Asstt. Cmdt. Bhupinder Sharma, BSF.

CASE REFERRED TO:

1. *Darshan Singh* vs. *State of Punjab & Anr.*, 2010 (2) SCC 333.

RESULT: Writ petition allowed.

PRADEEP NANDRAJOG, J. (Oral)

1. Petitioner, employed as a Constable under Border Security Force and attached to the 63rd Bn. was on duty at the Indo-Bangladesh Border and deployed at BOP Ashrafpur on 25.7.2002. He caused the death of one Smt.Japani Choudhary W/o Baijnath Choudhary by firing shots from his 7.62 mm SLR (Self Loading Rifle). The petitioner was charged for the offence punishable under Section 302 IPC i.e. of having murdered Smt.Japani Choudhary as per charge dated 27.3.2009 framed against the petitioner. It may be noted that for the purposes of trial, the petitioner was attached with the 123rd Bn. BSF and the trial was at the General Security Force Court. The Presiding Officer of the Court was Deputy Inspector General P.K.Mehta and the Law Officer to advise the Court was Subhash Kumar LO GDE-II/DC.

2. After the prosecution led evidence, the petitioner, in presence of R.K.Kanwar 2-IC, the defending officer, made his statement in defence on 6.7.2009 which reads as under:-

"Before the Hon'ble members of GSFC,

On 25 July 2002, while at BOP Ashrafpur, I was detailed for OP duty at OP No.2 along with No.89007471 Ct.Pranjit Brahma who was OP Comdr. At about 1400 hrs, I observed through binocular approx 10-12 women going from village Falimari side towards IBB road and border. Some of them were carrying aluminum and plastic cans. I told about this to OP Comdr, who was making entries in register in respect of villagers who wanted to go ahead of IBB road for grass cutting, farming etc. On being told by OP Cmdr, I went to check that illegal movement of group of women since the women normally indulged in smuggling of country made liquor to Bangladesh. When I reached near them, I asked them to stop & not proceed ahead of IBB road without making entry in register at OP point and also to get their containers checked. Some of the women stepped back while others tried to forcibly go ahead by arguing and abusing me. While facing towards them I moved back towards forward slope of IBB Road. I again asked them to stop on which they started pelting stones towards me. Seeing their aggressive posture, in self-defence, I fired one round in upward direction while backing

away from them and had also slipped while moving backwards on the steep gradient of forward slope of IBBR. The women did not stop, charged and threw dahs on me. Fearing imminent threat to my life, I fired two more rounds towards the women without aiming, in self defence. One of them women was injured and was evacuated to Distt. Hosp. Malda by Offg Coy Cdr who reached the P.O. immediately after the incident. Later, I learnt that she had died in Malda. I had fired purely in self defence to save myself. Had I not fired in self defence, I may not have survived since the villagers led by women had earlier also brutally beaten up, caused grievous hurt and maimed BSF persons on duty in the same area."

3. In view of the petitioner having admitted firing the three shots which caused the fatal injuries resulting in the death of Smt.Japani Choudhary but gave justification thereof, it is apparent that the core issue to be decided was: Whether the petitioner acted bona-fide in exercise of his right of private defence even to the extent of voluntarily causing death.

4. Section 96 to Section 106 of the Indian Penal Code deal with the right of private defence and briefly stated, vide Section 96 of the Penal Code, nothing would be an offence which is done in the exercise of the right of private defence. Vide Section 97, subject to the restrictions contained in Section 99, every person has a right to defend his own body against any offence affecting the human body. The exception under Section 99 pertains to acts in relation to public servants acting in good faith and under colour of office. Section 100 of the Code illustrates the circumstances and situations where a killing is justified. In a nutshell, Section 100 of the Code justifies the killing of an aggressor when apprehension of a crime against the accused is likely, as enumerated in the 6 clauses of Section 100. The first clause applies to cases where there is reasonable apprehension of death; the second clause is attracted where a person has a genuine apprehension that his adversary is going to attack him and he reasonably believes that the attack will result in a grievous hurt. In that event, the person apprehending assault can go to the extent ˇof causing the latter's death in the exercise of the right of private defence, even though the latter may not have inflicted any blow or injury on him.

5. As held by the Supreme Court in the judgment reported as 2010 (2) SCC 333 **Darshan Singh vs. State of Punjab & Anr.,** vide para 23, in order to justify the act of causing death of the assailant, the accused has simply to satisfy the Court that he was faced with an assault which caused a reasonable apprehension of death or grievous hurt.

6. The question whether the apprehension was reasonable or not is a question of fact depending upon the facts and circumstances of each case and no straitjacket formula can be prescribed in this regard. The only guiding objective facts would be, the weapon used, the manner and nature of assault and other surrounding circumstances wherefrom it can be evaluated whether the apprehension was justified or not.

7. It has to be kept in mind that where the opposite party is proved to be the aggressor, the reaction of the accused has not to be weighed in scales of gold and it has to be kept in mind that the accused had no time to ponder over and take a reasoned decision as to how much force must he use in retaliation. The issue of force used in retaliation has to be broadly considered in view of the attendant circumstances.

8. With the aforesaid preamble i.e. the statement of law, which is our guiding star, we proceed to note the evidence led during trial and thereafter our job would be to determine: Firstly, whether the attention of the Court was drawn to the law on the subject, for if not drawn, it would obviously be a case of a misdirected trial. Secondly, if we find that the attention of the Court was drawn to the law on the subject, it would be our duty to find out whether the attention of the Court was drawn to the evidence which had emerged and was relevant to the defence of private defence. Lastly, if we find in favour of the petitioner on the first two questions, whether the defence of private defence has been made good.

9. It may be noted that the verdict of guilt returned after the trial is that the petitioner is guilty of having committed an offence punishable under Section 304 Part-II IPC i.e. the offence of culpable homicide not amounting to murder.

10. It is apparent that the General Security Force Court has held the petitioner not having any intention to cause death or to cause such bodily injury as is likely to cause death but having knowledge that his act is

likely to cause death. It is also apparent that the right of private defence pleaded as a justification has been negated.

11. At the outset, it strikes us that after noting the evidence and the defence, while recording the findings, the Court has set out 3 issues to be decided and the same excludes the specific issue of whether the petitioner acted in self-defence and if yes, whether he used excessive force i.e. acted beyond the scope of private defence. However, we hasten to add that while discussing the 3rd issue, the Court has briefly touched upon the right of private defence and the same being exceeded.

12. The 3 issues settled by the Court while returning the findings are as under:-

(i) First Issue: *That the death of Smt.Japani Choudhary W/ o Baijnath Choudhary R/o Village Falimari, was ˇcaused on 25th July 2002*

(ii) Second Issue: *That the death of said lady was caused by the accused by firing shots at her while on OP duty at OP No.2 of BOP Ashrafpur.*

(iii) Third Issue: *That the above act was done by the accused with the requisite intention/knowledge as envisaged in Section 300 IPC.*

13. In view of the defence taken by the petitioner the answer to the first 2 issues had obviously to be in the affirmative, keeping in view the fact that the post-mortem report of Smt.Japani Choudhary evidenced that she received 3 gun-shot wounds and death was a direct consequence thereof.

14. The 3rd issue settled was certainly relevant for the reason, where a soldier armed with a Self Loading Rifle, fires 3 shots, issue of his having requisite intention or knowledge needs to be considered with clarity keeping in mind the body part targeted and the nature of the firing i.e. whether it was specifically directed towards the victim or was the firing random; keeping in the background the circumstance which necessitated the firing.

15. But, we cannot refrain from holding at the outset that a 4th specific issue needed to be settled and answered; in fact it should have been the 3rd issue settled to be answered and depending upon the answer,

the 3rd issue settled was required to be considered as the 4th issue. The reason is obvious. The 3rd issue to be settled was: *Whether the act of the accused in firing was in self-defence and if yes, whether the right to self-defence was exceeded.* If the answer was in favour of the accused, nothing further was required to be considered. But if it was held that the right was exceeded, it was only then was it necessary to consider the matter further, with reference to the intention or knowledge of the accused.

16. Let us note the evidence on record and at the forefront we may note the evidence pertaining to the injuries suffered by Smt.Japani Choudhary which caused her death. The post-mortem report has not been proved by the author thereof Dr.Ajoy Kumar Das PW-8, but he deposed to the contents of the post-mortem report and his testimony evidences that the death of Smt.Japani Choudhary was due to gun-shot wounds, 2 out of 3 of which were fatal. The first gun-shot wound noted was not fatal inasmuch as the bullet pierced at a *point on the outer aspect of upper part of left arm, traversing inwards and upwards, perforating the skin tissue making an exit at outer upper part of left arm. The second gun-shot wound entered the body at left inguinal region traversing inwards and upwards towards right side of body, perforating the skin tissue muscles, the exit being at right interior abdomen below Umbilicus. The third gun-shot wound being the bullet entering at left gluttal region traversing inwards and upwards anteriorly, perforating skin tissue muscles, fracturing pelvis, intestines and urinary bladder and making no exit.*

17. Undisputably, the 3 shots fired by the petitioner have all hit Smt.Japani Choudhary. But the situs of the 3 injuries tell a story and is a circumstance relevant to the defence of private defence, and which circumstance, we find, not being highlighted in the advice Ex.R, by the Law Officer to the Court. Ex.R is the *SUMMING UP BY LAW OFFICER AT THE TRIAL*. We find that the evidence marshaled under the 3rd issue of the charge does not highlight this feature.

18. The feature of the evidence is that Japani Choudhary received 3 gun-shot wounds on the left side of her body. 1 gun-shot wound hit her on the upper part of the left arm. The 2nd gun-shot wound hit her at the left Inguinal region. It is apparent that the petitioner was facing her in the front but was towards the left side of her body. The situs of the 3rd wound, entry point, is the left gluttal region and evidenced by the

internal injury of pelvis being fractured as also the urinary bladder and intestines being damaged, it is apparent that the 3rd entry wound is towards the outer part of the left gluttal region. The 3 wounds are apparently conclusively suggestive of the fact that the first 2 shots hits Japani Choudhary before the 3rd and we say so for the reason, recreating the firing it would be apparent that as 2 shots hit Japani Choudhary, one on the upper left forearm and the other at the left inguinal region, and as she was turning, probably to retreat, the 3rd shot hit her at the left glouttal region i.e. the left buttock upper part. It is also relevant to note that the trajectory of the projectiles is upwards. It is apparent that Smt.Japani Choudhary was at a height and the petitioner was below. This explains the upward trajectory of the projectiles. The weapon of offence was a Self Loading Rifle which fires shots with rapid fire and not that one bullet is loaded in the rifle and fired, followed by the second bullet being loaded and fired and so on. The 3 injuries further show the 3 shots being fired in rapid succession, for the reason, as already reasoned by us herein before, the situs of the 3 wounds show that as Japani Choudhary received a bullet shot on the arm and the inguinal region or vice versa, she was just about to turn, when she received the 3rd shot.

19. Unfortunately, neither the Court thought it prudent to bring on record the post-mortem report nor the Law Officer guiding the Court thought it advisable to do so. It may be noted that for the incident in question, 2 cross FIRs were registered by the civil police and apparently the post-mortem report of Japani Choudhary was obtained by the Investigating Officer therein. Evidence produced before us, as recorded, shows that Dr.Ajay Kumar Das PW-8 deposed to the contents of his post-mortem report, probably with reference to his record for we find the nature of injuries noted by him on the dead body were recorded as a part of his testimony.

20. Be that as it may, suffice would it be for us to highlight at this stage that the 3 injuries suffered by Japani Choudhary evidence the same to be the result of a rapid firing and that the petitioner was armed with a Self Loading Rifle is a circumstance of relevance to consider the right of private defence and it being exceeded, the relevance would be to weigh the hostility of the situation stated to have been faced by the petitioner and his pressing the trigger of the Self Loading Rifle, which weapon is a rapid fire weapon and not that the petitioner had time to

repeatedly load bullets in his rifle and keep on firing with an interval of time, giving him space of time, to reflect whether the assailants were retreating or not.

21. Time to note the evidence i.e. of the circumstances enwombing the act of the petitioner.

22. Ct.Paramjeet Brahma PW-1 deposed that he was in the same company as that of the petitioner which was deployed at BOP Ashrafpur and was present in the company on 25.7.2002 and along with the petitioner was on duty from 06:00 hours to 18:00 hours. That the border under their area of responsibility was unfenced. At about 13:30 – 13:45 hours Ct.Rajesh i.e. petitioner observed through binocular movement 8–10 women proceed towards Bangladesh side and he proceeded to check them. A little after, a boy informed him that a quarrel had taken place between the petitioner and a group of women and as he rushed to the spot he heard sound of 3 shots within a second or two and on reaching the place of occurrence he saw petitioner on forward down-slope on the IBB Road and a women lying injured about 15 yards away. He observed one 'Dah' (chopper) and 8–10 stones near the petitioner on the down-slope and a 'Daraant' (sickle), a plastic jerry can and an aluminum container near the lady on the road. On being cross-examined he admitted that everybody proceeding towards the border ahead of the IBB Road had to make an entry in the register kept at the OP point and that no entry was made in the said register by any woman. He stated that it appeared that the women were trying to move through the border in an illegal manner. He stated that smuggling of country made liquor from India to Bangladesh was rampant in the area. On being questioned by the Court as to whether he could give the exact number of jerry cans seized from the spot, he clarified that in addition to the number he had stated in his testimony, 2 more jerry cans with country made liquor having size between 5–10 litres were also recovered. He further informed the Court that when he saw the petitioner soon after the incident, the petitioner had a minor bruise on his left little finger.

23. Relevant would it be to note that as per the testimony of PW-1 the petitioner was standing on the forward down-slope of the IBB Road and this corroborates the forensic evidence emerging from the post-mortem report of the deceased and confirms that the petitioner was at

a height disadvantage, being down-slope and the group of women of whom one died had the height advantage. This explains the upward trajectory of the 3 bullet wounds suffered by Japani Choudhary. The evidence of PW-1 further brings out that 3 plastic jerry cans and 1 aluminum container were at the site, 2 of which contained country made liquor. 1 chopper and 1 sickle was at the spot. 8–10 stones were lying near the petitioner. The chopper was near the petitioner who had a bruise injury on the left little finger. Evidence suggests that a chopper was hurled at the petitioner. Stones were thrown at him. There were more than 4 persons, presumably, for the reason 4 containers were recovered from the spot. At least 2 persons were armed.

24. PW-2 Smt. Anita Choudhary, PW-3 Smt.Shanti Choudhary, PW-4 Smt.Arthi Choudhary have deposed in sync stating that they along with late Japani Choudhary went towards border to collect grass and a quarrel ensued between the petitioner and Japani Choudhary at which Japani Choudhary threw a stone and a scuffle ensued whereupon petitioner fired 3 shots at Japani Choudhary.

25. It is apparent that the 3 witnesses are not trustworthy witnesses, not for the reason they reside in the same village and belong to the same community as the deceased, but from the fact that the purpose of their visiting the area stated by them i.e. to collect grass runs in the teeth of 4 containers, 2 of which were containing country made liquor, being recovered from the spot. Secondly, the question of any scuffle between Japani Choudhary and the petitioner does not arise for the reason if the firing was preceded by a scuffle the gun-shot wounds received by Japani Choudhary would have tatooing of the skin at the entry point of the bullets which is not the case.

26. Be that as it may, relevant would it be to note that PW-2, on being cross-examined admitted that at the relevant time Japani Choudhary was carrying an aluminum container filled with country made liquor and that even in the past she used to carry country made liquor to the border area. Questioned by the Court, she admitted that Japani Choudhary was not carrying the 'Dah' (chopper) with her; stating that Japani Choudhary was carrying a sickle with her. It be noted that even PW-3 admitted that Japani Choudhary was carrying country made liquor with her. She further admitted that neither she nor Japani Choudhary was carrying a 'Dah'. EvenPW-4, on being cross-examined, admitted Japani Choudhary carrying

one aluminum container with her and that neither she nor Japani Choudhary was carrying a 'Dah'.

27. As per PW-2, PW-3 and PW-4, they and Japani Choudhary were the only 4 persons. All the witnesses have stated in unison that neither Japani Choudhary nor any of them was carrying the 'Dah'. It is obvious that if not more, there was one more person.

28. Now, as per the petitioner, there was a group of 8-10 women.

29. The 3 stated eye-witnesses have obviously lied on oath and we see no reason not to believe the petitioner that they were a group of 8–10 women.

30. HC Gadadhar Singh PW-5 deposed that on hearing sound of fire he came out of the barrack and rushed on a motorcycle to the place wherefrom sound of fire was heard and saw a lady injured on the border road. He deposed that a 'Dah' and stones were seen lying near the petitioner. 1 sickle was also lying nearby. The aluminum container lying near the road was emitting smell of alcohol, though it was empty when he saw it. He further deposed that the accused i.e. the petitioner told him the circumstance under which he had fired, which we note is the same as per the version of the petitioner in his statement of defence.

31. Asstt. Commandant Jaswant Singh PW-6, another person who had reached the place of the occurrence, deposed that SLR issued to the petitioner on the day of the incident had body No.DC-3414 and Butt No.182. He further deposed of what the petitioner told him soon after the incident and further facts as deposed to by PW-5 with further addition that the petitioner had shown him a scratch on the Butt of his rifle caused due to the Butt being hit by a stone thrown by a lady. He confirmed that the 'Dah' was recovered where the petitioner was standing. He confirmed that local women used to smuggle country made liquor to Bangladesh and in the past incidents had taken place where civilians had attacked BSF personnel when stopped from proceeding ahead of the IBB Road towards the border.

32. HC Chandan Singh PW-7 deposed that when the SLR used by the petitioner was brought to the armory he could detect gas fouling in recoiling parts of the rifle and that he had noted that the SLR was bearing Butt No.182.

33. PW-8, as noted above was the doctor who conducted the post-mortem on the body of the deceased. PW-9 is Insp.Uday Mazumdar from the local police station who deposed that he neither had with him the rough site plan of the place of the incident as also the various recovery memos prepared by him as they were filed in the Court concerned and hence we note that the witness could throw no light on the subject with reference to the scene of the crime soon after the incident.

34. A relevant fact needs to be noted, as noted under the observation by the Court, when the rifle having body No.DC-3414 was brought in the Court it had Butt No.10 on it and the Court had noted that the rifle which was used was having Butt No.182 and the one which was brought to Court had the Butt number changed to 10.

35. Let us now note the findings on the 3rd issue returned by the Court. We reproduce the same. The finding read as under:-

> "This issue has been vehemently contested by the Defence. As regards this issue, the Court believe the testimony of PW-2 corroborated by PW-3 and PW-4 that the deceased had quarrel with the accused who was on duty at that time, and threw stone on him when he asked her not to go ahead of the IBB Road. The Court further find from the testimony of PW-9 corroborated by PW-5 and PW-6 that one 'Dah' was recovered from the place of incident by PW-9. The Court also believe the version of the accused corroborated by the direct as well circumstance evidence on record that the accused was attacked with stoned by the group of women when he stopped them from going ahead of the IBB Road without making an entry in the register at OP Point. Though, there is no independent evidence except some circumstance evidence on record to corroborate the contention of the accused that some of the women threw 'Dah' on him, the Court intend to given benefit of the doubt on this matter to the accused. Thus, the Court further believe the contention of the accused that fearing imminent threat to his life, he fired in self-defence and the alleged act of the accused which caused death of the deceased was not done with the intention or knowledge as envisaged in Sec 300 IPC and the case of the accused would be covered by exceptions II & III to section 300 of IPC. But at the same time, the Court from over all facts and circumstance

> of the case and evidence on record also find that the accused had exceeded his right of private defence as well as exercise of legal powers by firing three shots which is without any justification. In such circumstances, the offence committed by the accused is culpable homicide not amounting to murder punishable under section 304, Part II of IPC. Thus, the Court find this issue as "Proved" with above mentioned exceptions and variations."

36. A perusal of the summing up by the Law Officer at the trial would reveal that the Law Officer addressed the Court with reference to the Law of Evidence as to when would a fact be proved, disproved or not proved, followed by the enunciation of the Law of Evidence relating to circumstantial evidence, expert opinion, credibility of witnesses, discrepancies and contradictions, omissions, improvements and reasonable doubt. Thereafter, with respect to the charge, the Law Officer addressed the Court highlighting the ingredients of the offence of culpable homicide not amounting to murder and culpable homicide amounting to murder. The Law Officer drew a distinction between the three limbs of Section 299 IPC vis-à-vis the four limbs of Section 300 IPC. Intermingled with the address to the Court on the issue of when would an act be murder and when would it be culpable homicide not amounting to murder, the Law Officer highlighted the right to private defence; to quote:

> **"Right to private defence**
>
> The entire law relating to private defence of person and property including the extent of and limitation to exercise such right has been codified in Sections 96 to 106 of IPC. Sec 96 IPC provides that nothing is an offence which is done in the exercise of the right of private defence. However, it does not define the expression 'right of private defence'.
>
> Whether in a particular set of circumstances, a person acted in the exercise of right of private defence, is a question of fact to be determined on the facts and circumstances of each case. In determining this question of facts, the Court must consider all the surrounding circumstances. If the circumstances shows that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea and it is not necessary for

the accused to plead in so many words that he acted in self defence. The principles as to right of private defence of body are as follows:-

(a) There is no right of private defence against an act which is not in itself an offence under the code.

(b) The right commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit an offence. Although the offence may not have been committed; it is co-terminus with the duration of such apprehension; (Sec 102 IPC) (read).

(c) It is defensive and not a punitive or retributive right. Therefore, in no case more harm than necessary to inflict in defence is permissible;

(d) The right extends to killing of the actual or potential assailant when there is a reasonable and imminent apprehension of the crimes enumerated in the six clauses of Section 100 IPC (read)."

37. Thereafter we find that the Law Officer summed up the evidence pertaining to the three issues of the charge, and pertaining to the 3rd issue of the charge summed up the evidence as under:-

That the above act was done by the accused with the requisite intention/knowledge as envisaged in Section 300 IPC

Gentleman, this being a vital issue, you should devote full consideration to it. Your attention is invited to the evidence discussed by me while discussing first and second issue of the charge and provisions of Law relating to the charge, which I have already explained. I have also explained to you as to what is meant by 'Intention', 'knowledge' and 'motive' in the foregoing paras of my summing up, while discussing the law relating to the charge, and you may refer to the same again if need be. 'Intention' and 'knowledge' are mental attitude and not capable of positive proof. However, it can be inferred from an overt act of the accused and circumstances of the case.

In the instant case, whether the accused had an 'intention' or requisite 'knowledge', besides overall facts and circumstances

of the case, some of the points which you may consider are the type of weapon used and the part of body of the victim at where she was hit. You may also consider the various facts and circumstances of the case as brought out by the witnesses. In nutshell, you have been in the evidence through testimony of PW-1 that on the place of the incident he observed one "Dah" and 8-10 stones lying near the accused on the down slope of the IBB Road. One "Daraanti" (sickle), one plastic jerry can and aluminum "Dallu" (container) were also lying nearby the deceased on the road. He has also stated that two more plastic jerry cans of the size of about 5-10 litres and contained with country made liquor, were also lying on the road and the accused has also sustained minor bruise on little finger of left hand. PW-2, PW-3 and PW-4 have stated that when the accused stopped the deceased from going ahead of the IBB road, she had an altercation/ quarrel with the accused and threw stone on him. PW-2 has stated that the aluminum container carried by the deceased was filled with country made liquor and she used to carry country made liquor to the border area. PW-2, PW-3 and PW-4 have also stated that the deceased or they were not carrying any "Dah" at the time of incident. As per PW-2, the accused was never seen with the deceased prior to the incident. PW-5 and PW-6 have also generally corroborated the deposition of PW-1 in material particulars. PW-6 has stated that FIR bearing No.80/02 was lodged by him in Police Station Habibpur on 25 July 2002 wherein it was mentioned that the accused fired in self-defence on the ladies who attacked him with stones and 'Dah'. He has also stated that no bodily injury was received by the accused in this incident. However, the accused showed PW-6 minor scratch on Butt of the Rifle caused due to hitting by stone thrown by the lady. Dr.Ajoy Kumar Das, Medical Officer (PW-8) has stated that the deceased suffered three bullet injuries caused by three single projectiles. As per him the death was due to effect of gun shot injuries which were anti-mortem and homicidal in nature and Injury No.2 and 3 were most fatal and death was caused due to these injuries, however, first injury was not so fatal. He has also brought out that there was no blackening or tattooing surrounding the wounds.

The accused in his written statement (Exhibit-'O') has stated that he fired in his self defence. The accused in the course of his duty, after repeatedly trying to stop the women and despite firing one shot in upward direction, still found himself being attacked by the group of women throwing "Dahs" at him. The accused sensed imminent danger to his life and scenes of many such incidents in which BSF persons on duty had been brutally attacked by villagers, received grievous injuries and had been in some cases maimed for life, moved before his eyes,. Left with no other option, the accused without taking any particular aim fired towards the group of women in which the deceased got injured.

In the light of above discussion and evidence discussed in foregoing paras of my summing-up while discussing first and second issues of the charge, which you may refer to again if need be, you may decide on this issue. If you conclude in affirmative, you may convict the accused on the charge, otherwise the charge fails and the accused is entitled for acquittal as a matter of right. However, if you conclude, in view of the entire facts and circumstances of the case, that the case of the accused falls/is covered under any of the exceptions of Section 300 IPC, the law pertaining to which I have already explained to you, then the act of the accused is amounting to culpable homicide not amounting to murder and then you may record a special finding for which the Court is empowered under the provisions of Section 93 of the BSF Act read with Rule 99 of the BSF Rules (all read), otherwise the charge fails and the accused is entitled for acquittal as a matter of right. Further, if you conclude that the accused had caused the death of Smt.Japani Choudhary (the deceased) in exercise of his lawful right of private defence, law relating to which has already been discussed by me in preceding paras, you may hold him 'not guilty' of the charge. If you entertain any doubt, you must resolve it in favour of the accused."

38. We have noted hereinabove in para 35 the findings pertaining to the third issue of the charge returned by the Court. We have underlined, to emphasize, the verdict pertaining to the plea of self defence.

39. A perusal of the summing up by the Law Officer to the Court

would reveal that the evidence relatable to the plea ˇof self-defence as also whether the self defence was exceeded has been stated in a very cursory manner.

40. We may note at the outset that the learned Law Officer did not bring out the nuisances of the law pertaining to self defence in the context of the extent of force which can be used to ward off an act of aggression. It was not highlighted that at the core was to look at evidence wherefrom the mental condition of the accused could be gathered with reference to the formation of a reasonable belief in the mind of the accused that if he does not take defensive action, the aggressor may either kill him or cause grievous hurt. We highlight that if the circumstances of aggression are such that it can be reasonable inferred that the person who is the target of the aggression would form a reasonable belief/ apprehension that he was likely to be grievously hurt, even then the right of private defence would be upheld.

41. With reference to the evidence led, we find that the learned Law Officer did not highlight the following features:-

(i) That the Self Loading Rifle (SLR) has a magazine containing 40 bullets and is a rapid fire firearm.

(ii) The evidence of Dr.Ajay Kumar Dass, though establishes the deceased being hit with three bullets, brings out the trajectory of the bullets moving upwards and thus establishes that the victim had a height advantage vis-à-vis the accused.

(iii) The three gun-shot wounds establish that the petitioner and the deceased were face to face, with the petitioner being towards the left side of the victim and at a distance; i.e. the two were facing diagonally across each other.

(iv) The three shots were fired in rapid succession evidenced by what we have discussed in para 18 above and in respect where of there was corroboration through the testimony of Ct.Paramjeet Brahma who categorically stated that he heard three shots being fired within a span of a second or two.

(v) Evidence establishes three plastic jerry-can and one

aluminum container at the site, the jerry-cans containing country made liquor and the aluminum container empty but smell of liquor emitting therefrom as deposed to by HC Gadadhar Singh which establishes that liquor was being smuggled.

(vi) Evidence establishes that local women used to smuggle country made liquor to Bangladesh and there were past incidents of civilian attacking BSF personnel.

(vii) The version of PW-2, PW-3 and PW-4 that the three along with the deceased were approaching the border to collect grass was false and the purpose of the visit was to smuggle liquor.

(viii) A 'Dah' (Chopper) was found lying near the petitioner who had a bruise injury on his left little finger as deposed to by PW-1 and that he had shown the butt of his SLR, with a scratch thereon to PW-6.

(ix) There were stones lying around the place where the petitioner was standing.

(x) That the petitioner was down slope and the jerry-cans were on the IBB Road which was above where the petitioner was standing. PW-1 had clearly stated that the petitioner was seen by him on forward down slope. A conclusion could be drawn therefrom that the petitioner was cornered.

(xi) Much before the incident, when petitioner detected movement towards the border, not knowing what would happen, petitioner had told PW-1 that he had spotted 8 to 10 women move towards Bangladesh through the binoculars and this corroborated the version of the petitioner that he was attacked by a group of 8 to 10 women, all of whom were carrying 'Dah' or 'Sickle'.

(xii) Evidence establishes that other than the deceased, who could not run away as she was injured, all the women ran away and the benefit thereof had to be given to the petitioner when he stated that all the women were armed.

(xiii) A 'Dah' being thrown at the petitioner and he being pelted

with stones and the group of 8 to 10 women being armed with 'Dah' or a 'Sickle' was the evidence wherefrom it had to be inferred whether the petitioner would have formed a reasonable belief, applying the test of a reasonable man, that he was in great danger of being grievously injured, if not killed.

42. Answering the three questions which we have posed to be answered for ourselves, in para 8 above, it is apparent that the answer to the first question is that the attention of the Court was not properly drawn to the law on the subject i.e. the right to private defence and it being exceeded. The answer to the 2nd question is that the attention of the Court was not drawn to the entirety of the evidence which had emerged. Thus, we proceed to answer the last question: whether the defence of acting in private defence has been made good.

43. As noted by us in para 35 above, where we have extracted the findings returned by the Court, the Court has held that the evidence establishes that the accused, fearing imminent threat to his life, fired in self defence. Indeed, the finding is correct and we need not re-highlight the evidence on the point, save and except to briefly sum up by recording that the evidence establishes that the liquor mafia was using women to smuggle liquor at the border and there were instances in the past of BSF jawans being attacked by civilians when prevented from smuggling liquor; nobody could proceed to the border without making an entry in the register kept at the OP point and that on the day of the incident 8 to 10 women, armed with 'Dah' or 'Sickle' were attempting to smuggle liquor and had made no entry in the register at the OP point. When challenged by the petitioner to recede back to the territory of India, the women attacked him. A 'Dah' was thrown at him. Stones were pelted at him. The petitioner was outnumbered. He was stationed at a point where he had a height disadvantage. The women were close enough to launch a lethal assault evidenced by the fact that a stone thrown at ˇhim and a 'Dah' thrown at him not only reached him but injured, albeit, mildly, the little finger of the left hand and cause a scratch mark on the butt of his rifle. Any person in the given situation would reasonably form a reasonable opinion that his life and limb was in grave danger.

44. The Court has given no reasons as to why it was opining that the petitioner has exceeded his right of private defence. The only trace

of the reasoning we can find is, as noted by the Court, that the petitioner fired 3 shots.

45. But, the Court has apparently glossed over the fact that a Self Loading Rifle is a rapid fire firearm and the three bullets were obviously the result of a rapid fire when the trigger of the Self Loading Rifle was instinctively pulled, thrice in the flash of a second or two as deposed to by PW-1. The post-mortem of the dead body of the deceased, for the reasons given by us in para 18 above, also suggests that the deceased received 3 gun shots in rapid succession and not with an interval of time of even a few seconds. The third injury on the left gluttal region and the trajectory of the projectile, with reference to the situs of the first two injuries establishes that when the shots fired through a rapid fire firearm, being three in number, hit her, the first two were received within the split of the second, one after the other evidenced by the two gun-shot wounds being, one on the upper part of the left arm and the other at the left inguinal region. The trajectory of the projectiles is upward and inward towards the right. The natural reaction would be to retreat immediately and this has what has happened evidenced by the fact that just when the deceased turned the third bullet hit the left gluttal region and the trajectory of the projectile shows that the bullet travelled diagonally, inwards and upwards fracturing the pelvis, damaging the urinary bladder and thereafter the intestines. It is apparent that it is not a case where the petitioner fired once and then with a pause fired a second time and with further pause fired a third time. Had evidence been so, one would have then discussed the effect of the petitioner not allowing the women to retreat and on the contrary, out of revenge, hatred or anger, repeatedly shooting and therefore exceeding the right of private defence. It could then have been argued that evidence establishes that the aggressors were in retreat and yet in spite thereof, the petitioner acted trigger happy.

46. We bring the curtains down by emphasizing that the Court has returned the correct verdict; of the petitioner being in a situation that anyone would fear imminent threat to life and hence justified in firing in self defence. We disagree with the non reasoned conclusion by the Court that the petitioner exceeded the right of self defence and if the reasoning of the Tribunal is premised merely upon the fact that since three bullets were fired and therefrom an inference can be drawn that the right to self defence was exceeded, we have given enough reasons hereinabove to

hold to the contrary by bringing out the evidence which was relevant, but has been ignored by the Court and which evidence we note has not been highlighted by the Law Officer in his address to the Court.

47. We note that as a result of being convicted, penalty of dismissal of service has been inflicted upon the petitioner.

48. Disposing of the writ petition by allowing the same, we quash the verdict of guilt returned against the petitioner and we also quash the order dismissing the statutory petition filed by him. We declare the petitioner not guilty of the offence he was charged of and acquit him, holding that the petitioner acted in self defence and did not exceed the right of self defence. The petitioner is directed to be reinstated in service and for the period he was dismissed from service till he is reinstated, we direct the competent authority to pass a reasoned order as to the manner in which said period would be treated for purposes of pay and allowances, pensionary service rendered etc. Compliance would be made within a period of 12 weeks from today.

49. We refrain from imposing any costs against the respondent.

ILR (2011) DELHI 378
MAT APP

DR. SEEMA **....APPELLANT**

VERSUS

DR. ALKESH CHAUDHARY **....RESPONDENT**

(KAILASH GAMBHIR, J.)

MAT APP NO. : 19/2004 **DATE OF DECISION: 31.01.2011**

Hindu Marriage Act, 1955—Section 13 (1) (ia) (b), 23(1) (b) and 28—Indian Evidence Act, 1872—Section 138—Judgment and decree of divorce passed in favour of respondent and against appellant, challenged in appeal

before High Court—Plea taken, alleged act of cruelty committed by appellant stands condoned as child was conceived by appellant thereafter—Passionate letters sent by respondent also condoned cruelty—Per contra, plea taken since appellant had committed various acts of cruelty after love letters written by respondent, all previous acts of cruelty got revived—Held—Conception of child is unflinching proof of condonation of acts of cruelty of offending spouse—There cannot be condonation of cruelty if offending spouse continues to indulge in commission of further acts of cruelty, either physical or mental—Acts of cruelty got revived when a false criminal complaint was lodged by appellant with Crime Against Women Cell and also because of abusive language used by appellant in tape recorded conversation—Condition involved in case of revival of offence after condonation is not only that same matrimonial offence will not be committed but also that condoned spouse will in future fulfill in all respects obligations of marriage—Despite forgiveness and tolerance of respondent, appellant continued her vicious behaviour—In face of subsequent conduct of appellant, acts of cruelty would stand revived and respondent entitled to decree of divorce.

It is also a settled legal position that there cannot be condonation if the offending spouse continues to indulge in the commission of further acts of cruelty either physical or mental. Either a temporary stay or even resumption of conjugal rights though may be strong circumstances to infer condonation on the part of the offending spouse but the same by itself would not be sufficient to draw an inference of condonation unless such a stay and resumption of conjugal relationship is with an intent to restore back the marital relationship with a sense of forgiveness and consequently not to indulge in either repeating the previous acts or to inflict more cruelty. **(Para 12)**

Important Issue Involved: (A) There cannot be condonation if the offending spouse continues to indulge in the commission of further acts of cruelty, either physical or mental.

(B) The conception of the child is an unflinching proof of condonation of the acts of the offending spouse.

(C) Cruelty has to inferred from the social status, upbringing and educational qualifications of the parties.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANT : Mr. R.K. Kapoor and Mr. Varun Kumar, Advocates.

FOR THE RESPONDENT : Mr. Ajay Goswami with Mr. Diwakar Singh, Advocates.

CASES REFERRED TO:

1. *Jaya Ghosh* vs. *Samar Ghosh* (2007)4 SCC 511.
2. *Rajinder Pershad* vs. *Darshana Devi* (2001) 7 SCC 69.
3. *State of U.P.* vs. *Nahar Singh (dead)* : 1998CriLJ2006.
4. *Naveen Kohli* vs. *Neelu Kohli* AIR 2006 SC 1675.
5. *Dastane* vs. *Dastane*, 1975 SC 1534.
6. *K.J* vs. *K.J* AIR 1952 Nagpur 395.
7. *Henderson* vs. *Henderson* (1944) 1 All ER 44.

RESULT: Dismissed.

KAILASH GAMBHIR, J.

1. By this appeal filed under Section 28 of the Hindu Marriage Act, 1955 the appellant seeks to challenge the judgment and decree dated 5.2.2004 passed by the court of the learned ADJ whereby a decree of

divorce was passed in favour of the respondent and against the appellant.

2. Brief facts of the case relevant for deciding the present appeal are that the parties got married on 17.4.1992 at Delhi according to Hindu rites and ceremonies and a child named 'Samir' was born out of the said wedlock on 22.5.1996. The respondent alleged that the appellant did not fulfill her marital obligations and was cruel to him from the very beginning of their marriage. Therefore a petition for divorce under section 13(1) (ia) was filed by the respondent which vide judgment and decree dated 5.2.2004 was decreed in favour of the respondent and against the appellant. Feeling aggrieved with the same, the appellant has preferred the present appeal.

3. Mr. R.K. Kapoor, counsel appearing for the appellant contended that the appellant and the respondent were maintaining very happy and cordial relations and such a relationship is well reflected from the letters sent by the respondent to the appellant during the period from 14.11.1994 to 22.5.1995. Elaborating his arguments, counsel further contended that even if any alleged act of cruelty was committed by the appellant prior to the said date, the same stood condoned by the passionate letters sent by the respondent to the appellant. The other limb of argument taken by the counsel for the appellant was that a child was born out of the said wedlock on 22nd May, 1996, which would show that the child must have been conceived by the appellant somewhere in the month of August, 1995 and at least till the month of August, 1995 the relationship between the parties can be presumed to be cordial and congenial and if any alleged act of cruelty has been committed by the appellant prior to the said date of conception that also stands condoned when the said child was conceived by the appellant wife in August, 1995.

4. Counsel further contended that so far the tape recorded conversation proved on record by the respondent as Ex. PW-1/60 is concerned, the same by itself cannot be taken as an act of cruelty committed by the appellant based on which the decree of divorce can be granted. Counsel also submitted that the tape recorded conversation was recorded by the respondent with mala fide intentions so as to create evidence in his favour which is borne out of the fact that the respondent had filed the divorce petition just within a gap of about 15 days from the date of the said tape recorded conversation. Counsel also submitted that

admittedly both the parties were living together till 28th October, 1996 and 9th divorce petition was filed by the respondent on January, 1997 and except the said tape recorded conversation no other act of cruelty has been complained of by the respondent in the divorce petition. Counsel further submitted that no doubt a criminal complaint was filed by the appellant in July, 1997 before the Crime Against Women Cell, Nanakpura after filing of the divorce petition but any allegation leveled by the appellant in the said complaint cannot be taken into consideration as the said complaint was not pursued by the appellant and no arrest of the respondent or his family members was made pursuant to the lodging of the said complaint by the appellant. Counsel thus submitted that even in the absence of any evidence led by the appellant, the respondent failed to establish his case to prove the ground of cruelty envisaged under Section 13(1)(ia) of the Hindu Marriage Act, 1955. Alternatively, the counsel submitted that even if any act of cruelty is taken to have been committed by the appellant then the same already stood condoned by the respondent due to his subsequent conduct. In support of his arguments, counsel for the appellant placed reliance on the judgment of the Apex **Court in Dastane Vs. Dastane** AIR 1975 SC 1534.

5. Mr.Ajay Goswami, counsel for the respondent, refuting the said submissions of the counsel for the appellant submitted that the behaviour of the appellant throughout has been very cruel towards the respondent and this would be evident from the fact that the respondent had to send a legal notice in August, 1993 i.e. just after 1 ½ years from the date of the marriage. Counsel further submitted that since the appellant had committed various acts of cruelty after the said love letters written by the respondent to the appellant, therefore, all the previous acts of cruelty of the appellant would get revived. Counsel also submitted that the respondent has proved on record the said tape recorded conversation and the kind of language used by the appellant towards the respondent as well as his family members would clearly show the attitude of the appellant towards the respondent and his family members. The contention of the counsel for the respondent was that the abusive language used by the appellant in the said conversation caused mental cruelty to the respondent. Counsel further submitted that the appellant did not join the company of the respondent at the matrimonial home at Greater Kailash after his return from Chennai in October, 1995 and this also caused cruelty to the

respondent. Counsel thus submitted that no fault can be found with the judgment of the learned trial court and the same should be upheld.

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

7. The present case concerns the matrimony of two doctors who could not fulfill their marital obligations towards each other due to irreconcilable differences. The marriage between the parties took place on 17.4.1992 and right from the date of inception of the marriage, problems arose between them which led to the service of a legal notice by the respondent upon the appellant just within a period of one and a half years from the date of the marriage. However, they still managed to sail through somehow but ultimately a divorce petition was preferred by the respondent under Section 13 (1) (ia) of the Hindu Marriage Act in 1997. Serious allegations of mental cruelty were leveled by the respondent against the appellant and all such allegations were also proved by the respondent in his evidence. The respondent was cross examined by the appellant at length and as per the finding of the learned trial court, not even a single suggestion was given by the appellant to discredit the testimony of the respondent in his cross examination with regard to the various incidents of cruelty committed by the appellant. It is also a matter of record that the appellant failed to lead any evidence either to refute the allegations leveled by the respondent or to place on record her side of the story before the court. In this background of facts, the learned trial court proceeded with the matter taking the allegations leveled by the respondent against the appellant as correct.

8. Mr. R.K. Kapoor, learned counsel appearing for the appellant very fairly submitted that he would also proceed to argue the matter taking the allegations leveled by the respondent as correct but would impress upon this court that all such acts of cruelty, even if they are accepted as correct, were condoned by the respondent by his subsequent conduct. In such a background this court will proceed in the matter taking the entire gamut of allegations of cruelty leveled by the respondent against the appellant as correct and then examine the contention of the counsel for the appellant whether those acts of cruelty were condoned by the respondent by his subsequent conduct. As per the counsel for the appellant, two subsequent acts of the respondent would clearly show that the previous acts of cruelty committed by the appellant stood condoned

by the respondent. With the birth of the child on 22.05.1996, it would be quite apparent that there was resumption of conjugal relations between the parties, the counsel contended. The contention of the counsel for the appellant was that at least till the month of conception, which must be somewhere in the month of August 1995, the pervious acts of cruelty, even if they are taken to have been committed by the appellant, stood condoned by the respondent. The second act of condonation claimed by the counsel for the appellant was that between 14.11.1994 to 22.5.1995, various letters were written by the respondent, which were proved on record as Exs. RW1/R1 to R 31. The contention of the counsel was that these letters were written so passionately by the respondent and had there been any complaint by the respondent against the appellant on account of her cruel conduct then the respondent husband could not have written such letters displaying his love, sentiments and passion for the appellant. Counsel thus urged that all the previous acts of cruelty, if any, committed by the appellant stood condoned by the respondent by writing said letters to the appellant. Counsel thus submitted that the said two subsequent acts of the respondent would clearly show that not only there was resumption of conjugal relationship between the parties but would clearly show that the respondent had completely condoned the previous acts of cruelty, if any, committed by the appellant towards the respondent.

9. So far the subsequent acts of cruelty alleged to have been committed by the appellant are concerned, the counsel submitted that the tape recorded conversation, on which reliance was placed by the learned trial court, the same by itself cannot be taken as an act constituting cruelty as such conversation was recorded by the respondent with the sole objective to create evidence in his favour before filing divorce petition as the said tape recorded conversation was recorded by the respondent within a short gap of about 15 days before the presentation of the divorce petition by him. Counsel thus submitted that the said tape recorded conversation was doctored by the respondent in a manner so that the appellant could be shown in poor light in her utterances without correctly highlighting the fact that under what circumstances she was responding in that particular manner. Counsel thus submitted that the learned trial court has wrongly given undue weightage on self serving evidence adduced by the respondent. Counsel also submitted that the learned trial court also wrongly placed reliance on the criminal complaint filed by the appellant

with the Crime Against Women Cell despite the fact that the appellant did not pursue the said criminal complaint and such a conduct of the appellant would further show that she never wanted to create any kind of disharmony in the marital relationship.

10. The correctness and veracity of the testimony of any witness can only be tested through his cross examination. Section 138 of the Indian Evidence Act, 1872 therefore, confers a very valuable right on a party to cross-examine a witness who enters the witness box to support the case of one of the parties. It is an admitted fact between the parties that not only the appellant failed to impeach the creditability or creditworthiness of the testimony of the witnesses produced by the respondent, especially the respondent himself, with regard to the alleged incidents of cruelty committed by the appellant but the appellant even did not care to lead any evidence to counter the case of the respondent. The counsel for the appellant very fairly conceded this position and therefore, urged that he will press his plea of condonation on the part of the respondent due to his subsequent acts and also the plea that the acts of cruelty alleged to have been committed by the appellant after the condonation of pervious acts of cruelty cannot be treated as 'cruelty' as envisaged under Section 13(1) (ia) of the Hindu Marriage Act.

11. First dealing with the concept of condonation, it was defined by the Apex Court in the case of **Dastane Vs. Dastane,** 1975 SC 1534, where it held that:

> "Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things forgiveness and restoration."

12. It is also a settled legal position that there cannot be condonation if the offending spouse continues to indulge in the commission of further acts of cruelty either physical or mental. Either a temporary stay or even resumption of conjugal rights though may be strong circumstances to infer condonation on the part of the offending spouse but the same by itself would not be sufficient to draw an inference of condonation unless such a stay and resumption of conjugal relationship is with an intent to restore back the marital relationship with a sense of forgiveness and

consequently not to indulge in either repeating the previous acts or to inflict more cruelty. In the present case, the counsel for the appellant stated two instances which he contended were acts from which condonation can be clearly inferred. First, was the birth of the child on 22.5.96 and second was the writing of the passionate letters by the respondent to the appellant from 14.11.94 to 22.5.95.

13. Dealing with the first instance, the birth of the child "Samir" took place on 22.5.96 which means that the appellant must have conceived in the month of August 1995. It can be thus inferred that till August 1995 the parties had normal sexual relationship and that it was not one stray act of intimacy that must have led to the conception of the child. It would be useful here to refer to the observations of the Apex Court in **Dastane vs. Dastane** (supra) where in similar facts it was held that:

> "57. The evidence of condonation consists here in the fact that the spouses led a normal sexual life despite the respondent's acts of cruelty. This is not a case where the spouses, after separation, indulged in a stray act of sexual intercourse, in which case the necessary intent to forgive and restore may be said to be lacking. Such stray acts may bear more than one explanation. But if during co-habitation the spouses, uninfluenced by the conduct of the offending spouse, lead a life of intimacy which characterises normal matrimonial relationship, the intent to forgive and restore the offending spouse to the original status may reasonably be inferred. There is then no scope for imagining that the conception of the child could be the result of a single act of sexual intercourse and that such an act could be a stark animal act unaccompanied by the nobler graces of marital life. One might then as well imagine that the sexual act was undertaken just in order to kill boredom or even in a spirit of revenge. Such speculation is impermissible. Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfilment. Therefore, evidence showing that the spouses led a normal sexual life even after a series of acts of cruelty by one spouse is proof that the other spouse condoned that cruelty. Intercourse, of course, is not a necessary ingredient of condonation because there may be evidence otherwise to show that the offending spouse has been forgiven and has

been received back into the position previously occupied in the home. But intercourse in circumstances as obtain here would raise a strong inference of condonation with its dual requirement, forgiveness and restoration. That inference stands uncontradicted, the appellant not having explained the circumstances in which he came to lead and live a normal sexual life with the respondent, even after a series of acts of cruelty on her part."

14. Thus it is evident from above and also from the facts of the case at hand that the respondent had condoned the acts of cruelty complained of before August 1995. The conception of the child is thus an unflinching proof of condonation of the acts of the offending spouse. Coming to the second act, the 32 love letters written by the respondent husband to the appellant, which are proved on record, are from the period 14.11.1994 to 22.5.1995. A perusal of the said letters shows that the respondent had no complaint from the appellant and thus had condoned all her previous acts of cruelty. Therefore, the cumulative effect of both the above acts show that the respondent had condoned the cruel acts of the appellant prior to August 1995 and therefore if the acts of cruelty , if any as alleged by the respondent, to establish the ground of cruelty have to be looked into pertaining to the period only after August, 1995.

15. The acts of cruelty after August, 1995 committed by the appellant as alleged by the respondent can be succinctly stated as under:

The respondent was locked by the appellant three times in August, 1995

On the respondent extending a reciprocal invitation for dinner to Appaswamy on 3.9.95 in Chennai, the appellant created a scene and locked the house and the guests had to return seeing the house locked

On the day of Diwali, which was on 23.10.95, the respondent was casually asked by Mr. & Mrs. Taneja (in –laws of the brother of the respondent) to do an eye check up on which the appellant raised hue and cry causing embarrassment to the respondent

That the appellant after the delivery of the child stayed at her parents place and due to her callous attitude towards the new

born, the child got dengue on 17/19.10.96

That the appellant refused to come back to the matrimonial home and put a condition that only when the house at Greater Kailash Enclave would be transferred in the name of the appellant would she return to the matrimonial house

That the appellant left the matrimonial house on 28.10.96, one day before karva chauth which is an auspicious festival of the Hindus where the wife observes a fast for the husband

That the appellant had refused to have sexual intercourse with the respondent after 8.10.1996

That the appellant filed a criminal compliant in the Crime Against Women Cell, Nankpura against the respondent in July, 1997

That the appellant used filthy and abusive language for the respondent and his family members in the telephonic tape recorded conversation on 23.12.1996 which is proved on record as Ex PW1/59 and PW1/60

16. The above acts of cruelty were duly proved by the respondent in his evidence and by producing 4 other witnesses. It is an admitted case between the parties that the appellant did not enter the witness box to present her side of the story. The learned trial court has also categorically observed that the respondent was not cross examined on any of the above mentioned acts of cruelty by the appellant. It is a settled legal position that where the evidence of the witness is allowed to go unchallenged with regard to any point, it may safely be accepted as true. Here it would be pertinent to refer to the observations of the Apex Court with regard to the importance of cross examination in the case of **Rajinder Pershad vs. Darshana Devi** (2001) 7 SCC 69 where it was held that :

"There is an age old rule that if you dispute the correctness of the statement of a witness you must give him opportunity to explain his statement by drawing his attention to that part of it which is objected to as untrue, otherwise you cannot impeach his credit. In **State of U.P. v. Nahar Singh (dead)** : 1998CriLJ2006 , a Bench of this Court (to which I was a party) stated the principle that Section 138 of the Evidence Act confers

a valuable right to cross-examine a witness tendered in evidence by opposite party. The scope of that provision is enlarged by Section 146 of the Evidence Act by permitting a witness to be questioned, inter alia, to test his veracity. It was observed :

The oft quoted observation of **Lord Hershell, L.C. in Browne v. Dunn** clearly elucidates the principle underlying those provisions. It reads thus :

> "I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lord, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; arid, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play arid fair dealing with witnesses."

17. Thus as the appellant herself has neither contradicted the alleged acts of cruelty of the respondent to have impeached his testimony and has also chose not to enter the witness box to dispute the correctness of the allegations leveled by the respondent, this court would thus proceed assuming the above stated alleged acts of cruelty as true.

18. Section 13(1)(ia) of the Hindu Marriage Act, 1955 provides for 'cruelty' as a ground for the dissolution of marriage. Cruelty has no where been defined in the act, and rightly so, as it is difficult to put the concept in a strait jacket formula. It may be physical or mental, intentional or unintentional. In the present case, the respondent has alleged that the

acts of the appellant caused him mental cruelty. Mental cruelty can be more harmful than physical cruelty as sometimes even a gesture, the angry look, a sugar coated joke, an ironic overlook may be cruel than actual beating. Here it would be useful to refer to the judgment of the Apex Court in the case of **Vinita Saxena vs. Pankaj Pandit** where it was held that:

> "23. As to what constitute the required mental cruelty for purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home. If the taunts, complaints and reproaches are of ordinary nature only, the court perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would, otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer.
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> 24. The modern view of cruelty of one spouse to another in the eye of law has been summarised as follows in (1977) 42 DRJ 270 Halsbury Laws of England Vol.12, 3rd edition page 270:-
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> > The general rule in all kinds of cruelty that the whole matrimonial relations must be considered and that rule is of special value when the cruelty consists not of violent acts, but of injurious reproaches, complaints, accusations of taunts. Before coming to a conclusion, the judge must consider the impact of the personality and conduct of one spouse on the mind of the other, and all incidents and quarrels between the spouses must be weighed from the point of view. In determining what constitutes cruelty, regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties, and their character and social status."

19. Hence, the Apex Court has observed in a catena of judgments, including the above, that cruelty has to be inferred from the facts and circumstances of each case and what may be cruelty in one case may not be cruelty in the other. However the benchmark to judge the conduct of the spouse inflicting cruelty would be that it cannot be expected of parties to live with each other anymore due to the cruel conduct of one of the spouse. It has to be something more than the ordinary wear and tear of married life and has to touch a pitch of severity. The court has to be satisfied that the relationship between the parties has deteriorated to such an extent that it would be impossible for the parties to live with each other. Here it would be worthwhile to refer to the judgment of the Apex Court in the case of **Naveen Kohli vs. Neelu Kohli** AIR 2006 SC 1675 where it was held that:

> "56.To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

> 57. The Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However, insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent."

20. The Apex Court in the case of **Jaya Ghosh vs. Samar Ghosh** (2007)4 SCC 511 analysing all the case laws of India and other countries with regard to mental cruelty enlisted a non exhaustive list of the instances which can be considered as instances inflicting mental cruelty. Giving a treatise on mental cruelty the Apex Court held that:

> "72. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.
>
> 73. Human mind is extremely complex and human behavior is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behavior in one ˇdefinition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system. Apart from this, the concept of

mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration."

21. Therefore, it would be manifest from the above that cruelty has to be inferred from the social status, upbringing and educational qualifications of the parties. In the facts of the present case, the parties are highly qualified doctors enjoying good social status. In the background of this fact, the conduct of the appellant has to be examined in the present case. The two main acts of cruelty are the tape recorded conversation of the appellant and the filing of the criminal compliant by the appellant against the respondent. With regard to the tape recorded conversation, the learned trial court in para 58 of the judgment has clearly observed that the kind of language used by the appellant in her conversation cannot be expected from a very qualified doctor belonging to a reputed family. The learned trial court also observed that the language used by the appellant against the respondent constitutes an act of mental cruelty. It would be appropriate to reproduce relevant paras of the impugned judgment as under:

"58. I have gone through the transcription of this tape recorded conversation. From the transcription it is clear that respondent has used the word "Harmjada" for petitioner as well as his parents. She has also addressed him as "Zanvar". She has also stated that she is not interested in his patient/business. she is bent upon to ruin him. No question has been asked to the petitioner on behalf of the respondent in his cross-examination when he appeared in the witness box in this regard, no suggestion has been given to falsify it, no suggestion has been given with regard to the circumstances in which conversation has been tape recorded. Respondent has not appeared in the witness box to explain/refute the tape recorded conversation.

59. It is argued on behalf of the respondent that this tape recorded

conversation cannot be relied upon because petitioner provocated the respondent with the malafide intention and ulterior motive to create evidence in his favour and put words in the month of respondent. He immediately filed the present petition after getting the conversation between the respondent and him tape recorded.

60. Parties are highly qualified. Petitioner and respondent are renowned Doctors of Delhi. Admittedly, respondent belongs to highly educated and respectable family, her two other sisters and brother-in-law are also Doctor according to the respondent herself. Her father is a Class-I Gazetted Officer. Use of such language cannot be expected from a highly qualified Doctor belonging to a reputed family. The language shows the feeling of the respondent towards the petitioner. According to the social status and educational level of the parties, the language used by respondent against the petitioner is enough to constitute mental cruelty towards the petitioner."

22. I do not find any infirmity or illegality in the abovesaid findings of the learned trial court. I also do not subscribe to the argument of the counsel for the appellant that the said tape recorded conversation was recorded by the respondent to create an evidence in his favour as it was for the appellant to have used decent and temperate language not only for the respondent i.e. her husband but for his parents as well. In any event of the matter, it was for the appellant to have explained under what circumstances such utterances were made by her in the said tape recorded conversation. But since the appellant did not appear in the witness box, therefore, adverse inference has to be drawn against the appellant and in favour of the respondent.

23. The other act of cruelty is the filing of the criminal complaint by the appellant against the respondent in the Crime Against Women Cell. The argument of the counsel for the appellant was that filing of the complaint cannot be considered as it was not pursued by the appellant which shows that the appellant did not want to create any disharmony in the matrimonial relations. This argument of the counsel for the appellant is totally devoid of any merit and deserves outright rejection. The respondent in his testimony deposed that he was called to the police station time and again and was harassed by the police after filing of the said compliant by the appellant , on which point the appellant did not

cross examine the respondent and even did not enter the witness box to rebut the statement. Hence, the argument of the counsel for the appellant does not appeal to commonsensical notions that the filing of the criminal complaint did not cause harassment to the respondent simply because of the fact that it was not pursued by the appellant.

24. These two above acts are certainly grave acts which were capable of causing mental cruelty to the respondent. The other above enumerated acts, such as the behaviour of the appellant on the auspicious days of the Hindus like Diwali and Karva Chauth would add to causing serious mental pain to the respondent. The refusal of the appellant for sexual intercourse also contributes to inflicting further cruelty on the respondent. Hence, looking into totality of the circumstances, this court is of the clear view that the respondent has proved cruelty on the part of the appellant as envisaged under section 13(1) (ia) of the Hindu Marriage Act.

25. Now dealing with the other argument of the counsel for the respondent that even though the acts of cruelty were condoned by the respondent, but the same would stand revived by the subsequent acts of the appellant, the learned trial court held that even if it is presumed that the respondent had condoned the past acts of cruelty on the part of the appellant, the same got revived when a false criminal complaint was lodged by the appellant with Crime Against Women Cell and also because of the said abusive language used by the appellant in said tape recorded conversation. Condonation is a bar to the filing of a petition for divorce as envisaged under section 23(1) (b) of the act and thus if the cruelty is condoned by the respondent, he cannot be allowed to claim a decree of divorce. However, it is a settled principle of law that the previous acts of cruelty will get revived when the offending party keeps committing or repeating the acts of cruelty towards the other spouse even after the condonation. It was held by the House of Lords in **Henderson vs. Henderson** (1944) 1 All ER 44 that condonation is subject to the implied condition that if the spouse who has been forgiven for the past matrimonial offences is proved to commit a further matrimonial offence in the future, then the past offences are revived and become available as further ground for divorce. In the case of **K.J vs. K.J** AIR 1952 Nagpur 395, the Full Bench of the Nagpur Bench of the Bombay High Court held that:

"13. We shall now consider the question whether there has been

condonation in the case.

……

..an express promise is not necessary. It is implicit in every case where the husband forgives the wife and receives her once again as his companion in life. But even though the promise may be explicit or may be implicit in the very act of forgiving, it is not to be expected that the offence would be repeated. Indeed, the law is that if the offence is repeated or anything having the semblance of its future repetition is present, the original guilt of the erring partner is revived."

26. Hence, the law is well settled that the petitioner would not be barred from filing a petition of divorce if the offending spouse does not digress from her piquing conduct. It would be useful here to refer to the celebrated pronouncement of the Apex Court in **Dastane vs. Dastane** (supra) where the law was explicitly explained as under:

"58. But condonation of a matrimonial offence is not to be likened to a full Presidential Pardon under Article 72 of the Constitution which, once granted, wipes out the guilt beyond the possibility of revival. Condonation is always subject to the implied condition that the offending spouse will not commit a fresh matrimonial offence, either of the same variety as the one condoned or of any other variety. "No matrimonial offence is erased by condonation. It is obscured but not obliterated" See Words and Phrases Legally Defined (Butterworlhs) 1969 Fd., Vol I, p. 305, ("Condonation") Since the condition of forgiveness is that no further matrimonial offence shall occur, it is not necessary that the fresh offence should be ejusdem generis with the original offence See Halsbury's Laws of England, 3rd Ed., Vol. 12, p. 3061. Condoned cruelty can therefore be revived, say, by desertion or adultery."

27. Hence, it would be manifest from above that the condition involved in case of revival of offence after condonation is not only that the same matrimonial offence will not be committed but also that the condoned spouse will in future fulfil in all respects the obligations of marriage. In the present case it is clear that despite forgiveness and tolerance on the part of the respondent, the appellant continued her

vicious behaviour. From her callousness and brutal remarks about the respondent and his family members, it is clear that her cruelty continued and the previous acts also stood revived in the face of such a conduct. Even though the respondent by resuming connubial relations and showing overtures of forbearance had explicitly condoned the acts of cruelty prior to August, 1995, but in the face of the subsequent conduct of the appellant, the acts of cruelty would stand revived and the respondent would be entitled to the decree of divorce.

28. Before parting with the judgment, I would like to point out that this court found a ray of hope in this case by looking at the amorous epistles of the respondent and considering that the parties have a child whose future would be marred in the operoseness of the legal battle, and sent it for mediation, but in vain. The asset of a wholesome education broadens the horizons and instills the virtues of tolerance, empathy and understanding in persons and it was expected of the parties, who are highly educated, to make peace with their past and carve out their future together on a clean slate. Unfortunately, the social status and the qualifications became an anathema for the parties in which the child would bear the brunt of clashing egos. The stark realities of matrimony stare in the face through such cases evincing the vagaries and vicissitudes of, once rock steady and now fragile institution that is marriage. More often than not, in cases like the present one, the acrimony of the spouses dims the hope of eternity of the holy union into nothingness.

29. In the light of the above, I do not find merit in the present appeal and the same is hereby dismissed.

ILR (2011) DELHI 398
R.A.

BHAGWAN MAHAVEER EDUCATIONAL SOCIETY (REGD.) & ORS. ....PLAINTIFFS

VERSUS

MR. RAJESH JINDAL & ORS. ....DEFENDANTS

(S. RAVINDRA BHAT, J.)

R.A. NO. : 9418/2010, DATE OF DECISION: 03.02.2011
I.A. NO. : 9419/2010 & 9420/2010
IN CS (OS) NO. : 2366/2007

Civil Procedure Code, 1908—Order 23, Rule 3—Plaintiffs registered society, filed suit for declaration & permanent injunction claiming defendants no.2 to 4 not inducted members and elections held in March, April 2007 invalid—Also, defendant no. 1 had no lawful authority to hold himself out as President and other defendants be restrained from representing themselves to be members of society—Plaintiffs also sought for mandatory injunction and other allied consequential reliefs in respect of elections and other actions taken pursuant to it, after April 2007—During course of proceedings, on 19.05.2010, parties arrived at an arrangement and finally ended the suit on recording terms of agreement—Appeal preserved but was permitted to be withdrawn by plaintiff—However, plaintiffs challenged said order by filing a review petition—They urged recording of order dt. 19.05.2010 was without their consent and their counsel protested about disposal of suit on the basis of given proposals—As per defendants, review petition misconceived and after thought as results of election were apparent—Moreover, counsel appearing on behalf of plaintiff was authorized to make submissions and if necessary,

record concessions on their behalf who had implied authority to compromise or to agree to matter relating to parties—Held:- The Court is bound to accept the statement of the Judges recorded in their judgment, as to what transpired in Court—It cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence—The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence—If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent, upon the party, while the matter is still fresh in the minds of the Judge, to call attention of the very judges who have made the record of the fact that the statement made with regard to his conduct was a statement that had been made in error—That is the only way to have the record corrected—If no such step is taken, the matter must necessarily end there—Plaintiffs failed to establish that what was recorded was not within the authority of their counsel and they had calculatedly changed the previous counsel.

……The question whether 'signed by parties' would include signing by the pleader was considered by this Court in **Byram Pestonji Gariwala v. Union Bank of India** AIR 1991 SC 2234 with reference to Order 3 of CPC:

30. There is no reason to assume that the legislature intended to curtail the implied authority of counsel, engaged in the thick of proceedings in court, to compromise or agree on matters relating to the parties, even if such matters exceed the subject matter of the suit. The relationship of counsel and his party or the recognized agent and his principal is a matter of contract; and with the freedom of contract generally,

the legislature does not interfere except when warranted by public policy, and the legislative intent is expressly made manifest. There is no such declaration of policy or indication of intent in the present case. The legislature has not evinced any intention to change the well recognized and universally acclaimed common law tradition……

XXXXXX XXXXXX XXXXXX

38. Considering the traditionally recognized role of counsel in the common law system, and the evil sought to be remedied by Parliament by the C.P.C. (Amendment) Act, 1976, namely, attainment of certainty and expeditious disposal of cases by reducing the terms of compromise to writing signed by the parties, and allowing the compromise decree to comprehend even matters falling outside the subject matter of the suit, but relating to the parties, the legislature cannot, in the absence of express words to such effect, be presumed to have disallowed the parties to enter into a compromise by counsel in their cause or by their duly authorized agents…….

39. To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorized representative. If a power-of-attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorization by vakalatnama, act on behalf of his client.... If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated."

[Emphasis supplied]

The above view was reiterated in **Jineshwardas v. AIR** 2003 SC 4596 . Therefore, the words 'by parties' refer not only to parties in person, but their attorney holders or duly authorized pleaders. **(Para 21)**

Important Issue Involved: The Court is bound to accept the statement of the Judges recorded in their judgment, as to what transpired in Court—It cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence—The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statement by affidavit or other evidence.

[Sh Ka]

APPEARANCES:

FOR THE PLAINTIFFS : Mr. Neeraj Grover, Advocate.

FOR THE DEFENDANTS : Nemo.

CASES REFERRED TO:

1. *Pushpa Devi Bhagat (Dead) Through L.R. Sadhna Rai (Smt)* vs. *Rajinder Singh and Ors.* 2006 (5) SCC 566.
2. *D.P. Chadha* vs. *T.N. Mishra* AIR 2001 SC 457.
3. *Byram Pestonji Gariwala* vs. *Union Bank of India* AIR 1991 SC 2234.
4. *Gurpreet Singh* vs. *Chatur Bhuj Goel* AIR 1988 SC 400.
5. *State of Maharashtra* vs. *Ramdas Shrinivas Nayak & Anr.* AIR 1982 SC 1249.

RESULT: Review petition dismissed.

S.RAVINDRA BHAT, J.

1. This order will dispose of three applications preferred by two of

the plaintiffs, claiming review of an earlier order dated 19th May, 2010, which had finally disposed of the suit. The two other applications, seek condonation of delay in filing the review petition, and an ad-interim direction.

2. Brief facts, for the purpose of this suit, are that the first plaintiff claims to be a registered society; the second plaintiff cltaims to have been its president, and the other two plaintiffs, its members, as well as office bearers of the governing council of the first plaintiff (hereafter "the society"). The suit claims decrees of declaration, that the second, third and fourth defendants are not lawfully inducted members of the society. It is alleged that the first defendant deliberately manipulated and forged the records of the society, to show as if the said three members had been inducted, even though actually the agenda for the relevant meetings never listed any item in that regard, and despite absence of any discussion. It is also alleged that the minutes of meeting of the managing committee were further falsified and manipulated by the first defendant, to say that the said three defendants had been accepted as members, and had even attended later meetings in February 2007. The suit alleges that the first defendant sought to circulate an agenda, by which a general meeting of the society was purportedly called, and elections were held on 2-4-2007. The plaintiffs further argue that the second plaintiff sent a notice on 20th March, 2007, and followed it up with notices published in the newspapers, cautioning that no such general meeting and elections could be held. The suit alleges that despite these, the first defendant held out that ameeting was held on that date, and election of office bearers of the society had taken place. The suit also urges that the first defendant thus usurped the society, claiming to be its President, and started manipulating its records, and even operating bank accounts, which is contrary to the Rules and Regulations as well as constitution governing the society. On these averments, the plaintiffs claim the reliefs sought in the suit. Consequential injunctions mandatory and perpetual are sought to the effect that the elections held on 2-4-2007 are void and illegal.

3. The defendants had resisted the suit, contending that the second, third and fourth defendants were validly inducted, and with full knowledge of the plaintiffs. It is submitted that their induction was also intimated to the fifth defendant, i.e. the Registrar of Societies; a copy of the return filed in this regard with the fifth defendant, is relied on. The written

statement also submits that the society was in need of money and security for the purpose of a land purchase transaction, and received finance from a public sector bank. At that stage, the first and second defendants granted personal guarantees for huge amounts. The second plaintiff is aware of these and has at no stage disclaimed that the society is beneficiary of the said collateral security, for purchase of land. In these circumstances, to say that the second, third and fourth defendants were never made members is incorrect.

4. After summons were issued, and the pleadings were completed from time to time, the Court considered submissions on 19th May, 2010, and disposed of the suit finally, recording as follows:

> "CS(OS) 2366/2007 and IA Nos 14578/2007 (under O.39 R.1 and 2 CPC), 1549/2010
>
> (under Section 151 CPC by plaintiff), 1550/2010 (under Section 151 CPC by plaintiff), 2372/2010 (under Section 151 CPC by defendant nos 1, 3 and 6) It is an admitted fact that plaintiff no.1 which is an educational society has, at the moment, 11 members. The list of members is indicated at Page 51 of the documents filed by the plaintiffs. The objection of the plaintiffs is to the persons whose names appear at Serial nos. 9, 10 and 11 in the list set out at Page 51 (i.e., defendant nos. 2 to 4). It is also not disputed by both counsels that elections to the society i.e., plaintiff no.1 are now overdue since the term of the Governing Body ended in April, 2010. The peculiarity of this case is that the members of the society whether they are 8 or 11 are also the persons who get appointed to various posts in the society. The warring groups, i.e., the plaintiffs as well as the defendants are willing to amicably settle the disputes on the following terms:
>
> (i) Fresh elections will be called within 15 days from today. The elections will be held within 15 days thereafter.
>
> (ii) Since there is no dispute as regards membership of plaintiff nos 2 to 4, it is agreed that after the elections are held, plaintiff no.2 will be offered the post of vice-president while plaintiff no.4 shall continue as member of the governing body.
>
> (iii) The elections shall proceed on the basis of the list of eleven

> (11) members as set out at Page 51 of the documents.
>
> (iv) The defendants shall give inspection of all documents and books of plaintiff no. 1 on demand by plaintiff nos. 2 to 4. Mr Garg, the learned counsel for the plaintiffs says that plaintiff nos 2 and 4 shall Stand for the post(s) which are being offered under this agreement. The entire process shall be completed within six weeks from today. Mr Garg says that in view of the terms of settlement as indicated hereinabove, he does not wish to press the suit any further. The suit is disposed of accordingly on the terms, indicated hereinabove. All the pending applications are also stand disposed of."

5. It appears that after the suit was disposed of, an appeal was preferred before the Division Bench, being RFA (OS) 58/2010, claiming that the order was passed upon the statement of defendants' counsel, who had no instructions or authority in that regard. The appeal was subsequently permitted to be withdrawn by the Division Bench on 02.07.2010. The Division Bench, in its order listed the names of the successful candidates on the basis of the report of the Local Commissioner appointed by the Court and also required that the report of that Commissioner ought to be made available to this Court in the event the appellants/defendants preferred a review petition.

6. In these circumstances, the second and fourth plaintiffs have filed a review petition, being 9419/2010), and an application for claiming interim directions (i.e. I.A. No. 9420/2010). The review petitioners submit that they did not authorize their counsel to dispose of the suit in the manner indicated in the order dated 09.05.2010. The petitioners contend that they were informed by their counsel that while arguments were being addressed, the Court had enquired from counsel for the parties whether the disputes could be amicably settled and in this background some proposals and counter-proposals were exchanged. The review petitioners further state as follows:

> "XXXXXX XXXXXX XXXXXX
>
> ……It was further informed that all this while the Ld. Counsel appearing for the plaintiffs was under an impression that this Hon'ble Court was merely recording the proposals for arriving at an interim arrangement in the matter and that the counsels

would be granted time to put such proposals for consideration before their respective clients.

5. That it was also informed that during the aforesaid process of recording the broad proposals in the order, as soon as the Ld. Counsel for the plaintiffs realized that this Hon'ble Court had proceeded to dispose off the entire suit proceedings, he objected to the same but his objections were not taken note off by this Hon'ble Court and he was advised to take appropriate legal remedies as may be available under the law as the other had already been dictated.

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7. The present review petition was filed on 16.07.2010. The defendants/review petitioners also are now being represented by another counsel, Sh. Neeraj Grover; their instructions to the counsel who was originally present in the Court on 19.05.2010, i.e. Sh. S.C. Garg has been withdrawn. When the review petition, with the accompanying applications were placed before the Court, Rajiv Shakdher, J who had disposed of the suit recorded, on 27.07.2010, in the light of the submissions and averments made by the review petitioners, as follows:

"XXXXXX XXXXXX XXXXXX

On perusal of the application, I find that averments have been made in Paragraphs 4 and 5 by which it is sought to contend, that the counsel for the plaintiff who was then engaged in the matter was under the impression that an interim arrangement was being made in the matter, and that as soon as the learned counsel realized that the matter was being disposed of in its entirety,

"….he objected to the same but his objections were not taken note of by this Hon'ble Court and he was advised to take appropriate legal remedies as may be available under the law as the order had already being dictated….." Ordinarily, as is the practice, a Review Application is heard by the Judge who passed the original order. I would have done the same. However, in the instant case, given the assertions made in Paragraphs 4 and 5, in my view, this application ought to be heard by another Judge.

I may only record (since this information is not in the knowledge of Mr. Neeraj Grover, Advocate who appears for the plaintiff presently) that on the date when the suit was disposed of Mr. Shiv Charan Garg was present in Court with another gentleman with whom he was consistently in confabulation. As a matter of fact, when proposals and counter proposals were made, counsel for both parties stepped out of the Court to consult. I had no reason to believe that the plaintiff's counsel had no instructions in the matter. I do not wish to deliberate any further on this aspect, as this is facet which, the judge dealing with this application will perhaps allude to.

Consequently, the matter be placed before another Judge on 28.07.2010, subject to the orders of Hon'ble Judge Incharge, Original Side.

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8. In these circumstances, the review petition along with connected applications were placed before this Bench, and arguments were eventually heard on behalf of the parties.

9. The review petitioners urge that by virtue of provisions contained in Order 23 Rule 3 CPC, this Court ought not to have recorded the compromise as it did by the order dated 19.05.2010. It is submitted that the order has the effect of completely foreclosing any adjudication upon the issue of legality of the second to fourth defendants' membership in the Society. Learned counsel emphasized that this Court, while disposing of the suit in its entirety on 19.05.2010, was apparently under the impression that the relief of mandatory injunction and other similar reliefs in respect of the election that took place in 2007 had worked itself out and rendered infructuous in view of the directions to hold fresh elections. Learned counsel argued that this impression is erroneous, as is apparent from the face of the record because the plaintiffs' basic grievance was that the membership of the second, third and fourth defendants was illegal, and that their participation in the deliberations of the Governing Council or for that matter, their involvement in the Society itself lacked legal sanction. Learned counsel relied upon the judgment of Supreme Court reported as **Gurpreet Singh v. Chatur Bhuj Goel** AIR 1988 SC 400, and argued that the provisions of Order 23 Rule 3 CPC are mandatory

and do not admit of any deviation or exception. If the Court has to record a compromise, the same has to be in the form stipulated by those provisions or not at all. It is submitted that the subsequent judgment of the Supreme Court reported as **Pushpa Devi Bhagat (Dead) Through L.R. Sadhna Rai (Smt) v. Rajinder Singh and Ors.** 2006 (5) SCC 566 has also highlighted the need to adhere to the standards prescribed by the provisions of the CPC.

10. The defendants submit that the review petition is misconceived and a clear afterthought. It is submitted in this regard that not all the plaintiffs are parties to the review proceedings, and have supported it. Learned counsel points out that the third plaintiff has accepted the order of 19.05.2010. It is also stated that the second plaintiff, Sh. Sushil Kumar Jain was aware of the order and in fact had written to the Election Officer appointed by the Court on 04.06.2010, complaining that the nomination submitted by one of the respondents/defendants, i.e. Smt. Rekha Jindal had to be verified vis-à-vis its genuineness. The said letter has been placed on the record and reads as follows:

"XXXXXX XXXXXX XXXXXX

To,

Shri S.M. Aggarwal,
Kothi No. 15, Banarsi Dass Estate,
Timarpur, Delhi.

Dear Sir,

I, Sushil Jain, who submitted the nomination paper for the post of President of the above named society on 01-06-2010 submit as follow for your kind perusal.

That Smt. Rekha Jindal also submitted her nomination paper for the post of President at about 5.00 P.M. on 02-06-2010. The signatories to Smt. Jindal's nomination form are (i) Shri Kanak Mal Saklech and (ii) Shri Mahendra Pal Jain. Both these persons live at a for distant place from Delhi.

In this context I am to state that I apprehend that the signatures of both these persons, on the nomination form of Smt. Rekha Jindal do not seem to be genuine, as these persons were not available at Delhi as per my information during these two days

i.e. on 1st & 2nd June 2010. I, therefore, request your goodself to please verify the genuineness of the signatures of these two persons from any authority as you find suitable for verification for your satisfaction and for my satisfaction as well.

I shall be grateful if you could kindly spare some of your time in getting the needful done at your earliest.

Thanking you an anticipation,

Yours truly,

Sd/

(Sushil Jain)

B-270, Yojana Vihar,

Delhi-110092

9310050612

XXXXXX XXXXXX XXXXXX"

11. It is also submitted that the said Smt. Rekha Jindal's nomination was in fact rejected on the ground that even though she held herself out as a candidate, at the same time she seconded the nomination of the second plaintiff, which rendered her candidature invalid.

12. Learned counsel for the defendants argued that the pleadings on record also disclose that the Society had to purchase some land and was in need of funds, and therefore, approached the Punjab National Bank, Khanpur Branch for a loan of Rs. 10 crores. Learned counsel further stated that both the first and second defendants had, at that time, signed the bank documents and even provided the bank guarantee for return of the advance. These clearly reveal that the said defendants, along with other contesting defendants (Nos. 3 and 4) were at all material times acting as members of the Society and the plaintiffs (including the review petitioners) were fully aware not only of their induction but also had their assent. The defendants/opposite parties also point that the last date for filing nomination was 02.06.2010 and the election was actually held on 13.06.2010. They argued that the whole idea of challenging the 19th May, 2010 order is a ˇdeliberate and calculated move thought of after

the election proceedings and results were apparent.

13. The defendants lastly rely upon the reply to an RTI query given to them on 23.07.2010 by the Public Information Officer (PIO) of this Court. It is submitted that the query pertained to which persons had been issued with Passes for entering into the High Court compound to attend the case on 19.05.2010. The reply to the query disclosed that the fourth plaintiff had been issued a Pass. The relevant question and reply are extracted below:

"XXXXXX XXXXXX XXXXXX

SI. No. Questions Reply

1. Names, address and other details of the persons in whose name Gate passes were issued for entering into the High Court Compound in CS(OS) No. 2366/2007 (titled as **Bhagwan Mahavir Education Vs. Rajesh Jindal**), listed before Hon'ble Mr. Justice Rajiv Shakdhar (Court No. 20) at item No. 4, on 19.05.2010;

(1) Sh. P.P. Jain, S/o Late D.C. Jain, age-74 years, R/o Flat No. 10, Brotghers CGHS, 16, I.P. Extn., Delhi – 92.

(2) Sh. Jogi Ram Jain, S/o K.L. Jain, age-59 years, R/o 20/7, Shakti Nagar, Delhi;

(3) Sh. Dinesh Kumar Jain, age 44 years, S/o Sh. Raj Kumar Jain, r/o GPMCE, Budhpur, Delhi;

(4) Sh. Rajesh Mittal, age-46, S/o Sh. Ishwar Chand Mittal, r/o GPMCE, Budhpur, Delhi applied for the visitors' passes for appearance in Court No. 20, Item No. 4 on 19.05.2010.

XXXXXX XXXXXX XXXXXX"

14. The circumstances of this case clearly point to the fact that the Court in fact went by the statement of counsel, who were authorized to make submissions and if necessary, record the concessions on behalf of their clients. Learned counsel relied upon the judgment reported as **D.P. Chadha v. T.N. Mishra** AIR 2001 SC 457 and contended that it had noticed the previous judgment, i.e. **Byram Pestonji Gariwala v. Union Bank of India & Ors.** JT 1991 (4) SC 15 and also spoken about the implied authority of the counsel to compromise or agree to the matter

relating to the parties. The judgment of the **D.P. Chadha** case (supra) pertinently reads as follows:

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"17. **Byram Pestonji Gariwala Vs Union Bank of India & Ors.** (1991) 4 JT (SC) 15: AIR 1991 SC2234 is an authority for the proposition that in spite of the 1976 Amendment in Order 23 Rule 3 of the CPC which requires agreement or compromise between the parties to be in writing and signed by the parties, the implied authority of Counsel engaged in the thick of the proceedings in court, to compromise or agree on matters relating to the parties, was not taken away. Neither the decision in Byram Pestonji Gariwala nor any other authority cited on 8.4.1994 before the trial court dispenses with the need of the agreement or compromise being proved to the satisfaction of the court."

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15. Learned counsel also relied upon the judgment of this Court in **M/s. Archies Greetings & Gifts Ltd. v. Garg Plastic** AIR 2003 Delhi 468. In the said ruling, this Court had noted as follows:

"XXXXXX XXXXXX XXXXXX

……No doubt the judgments in Gurpreet Singh [AIR 1988 SC 400] (supra) which is a judgment rendered by 2 Hon'ble Judges as well as Banwari Lal's judgment {(supra) (of 2 Hon'ble Judges)} hold that when a compromise is entered into during the hearing of a suit or appeal there is no reason why such a compromise should not be reduced in writing and signed by the parties. However, D.P. Chadha's case is a judgment of 3 Hon'ble Judges as contrasted with Gurpreet Singh and Banwari Lal's cases which decisions were rendered by two Hon'ble Judges and D.P. Chadha's case clearly explains **Byram Pestonji Goriwala's** case (supra) and construes it to hold that in spite of the 1976 amendment to Order 23 Rule 3 requiring the agreement or compromise to be in writing, the implied authority of counsel engaged is the thick of proceedings in Court, to compromise or agree on matters relating to parties was not taken away. I am fully bound by the view taken by three Hon'ble Judges in DP Chadha's case.

Consequently, the plea by Shri Tripathi that the view taken by the decision of the Supreme Court in Gurpreet Singh's case lays down the correct interpretation of Order 23 Rule 3 C.P.C. cannot prevail. I have no doubt that but for the judgment of the Hon'ble Supreme Court in D.P. Chadha's case, the respondent/review petitioner was fully entitled to succeed on the basis of Gurpreet singh's and Banwari Lal's judgment.

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16. The above discussion would reveal that the plaintiffs had sought for declaration and permanent injunction that some of the defendants, i.e. Nos. 2 to 4 were not validly inducted members and further that the election held in March-April 2007 was invalid. Consequently they had alleged that the first defendant had usurped office and had no lawful authority to hold himself out as President and the other defendants were likewise to be restrained from representing that they were members of the Society. Crucially, the plaintiffs had also sought for a mandatory injunction and other allied consequential reliefs in respect of the elections and other actions taken pursuant to it after April 2007.

17. During the course of the proceedings, the Court noted on 19.05.2010 that the parties had arrived at an arrangement which would finally end the suit. It proceeded to record the terms of agreement which also included an arrangement for holding of elections in June 2010 under the supervision of an agreed Local Commissioner. The review petitioners do not dispute or contest the appointment of the Local Commissioner. They, however, argue that the recording of the order dated 19.05.2010 was without their consent and that, their counsel had even protested about the disposal of the suit which was not recorded by the Court.

18. This Court is mindful of the circumstance that not all the plaintiffs have preferred the present review petition; it is supported by the affidavits of only the second and fourth plaintiff. Their learned counsel did not dispute or call into question the argument by the respondents/ defendants that one of the plaintiffs, i.e. the fourth plaintiff was issued with a Pass for attending the Court proceedings on 19.05.2010. However, he had submitted that the said fourth plaintiff along did not have the authority to instruct the counsel and that at the relevant time, he had gone outside the Court. Now this Court is of the opinion that if these

circumstances about one of the plaintiffs – who is now a review petitioner – having attended the Court is correct, it was necessary for him to place all the circumstances on the record. However, no such attempt has been made in the review petition. There is yet one more important aspect which cannot be lost sight of. The counsel, who had appeared and made submissions, recording his consent to the Court for the arrangement indicated in the order dated 19.05.2010 which also disposed of the suit – i.e. Sh. S.C. Garg has not filed his affidavit in support of the review petition. The review petitioners have also withdrawn instructions from him lends an entirely different perspective to the proceedings because this Court is called upon to judge or determine whether what was recorded on 19.05.2010 was correctly done at the mere asking of a litigant. The least that ought to have been done in the circumstances was to place the affidavit of the concerned Advocate or counsel, who assisted or represented the party seeking the review – a salutary procedure insisted upon by the Supreme Court in the judgment reported as **State of Maharashtra v. Ramdas Shrinivas Nayak & Anr.** AIR 1982 SC 1249. So far as the arguments made by the rival parties on the merits of the case are concerned, this Court is of the opinion that the same are hardly relevant to adjudicate the review proceedings as what is called into question is the correctness of the procedure adopted rather than the merits of the order. This Court is not sitting in appeal as it were while exercising review jurisdiction.

19. The plaintiffs/review petitioners had heavily relied upon the ruling in **Gurpreet Singh** (supra) to contend that the provisions of Order 23 Rule 3 admit of no exception and that a compromise between the parties has to conform to the letter, spirit and form indicated in those provisions. Any decree or order made contrary to those provisions – regarding compromise would not be binding and ought to be recalled or withdrawn. They had also relied upon the ruling in **Pushpa Devi Bhagat** (supra).

20. Whilst there can be no two opinions about the effect of what was cited in the judgment in **Gurpreet Singh** (supra), at the same time, this Court is mindful that the subsequent ruling in **D.P. Chadha** (supra) was rendered by a larger Bench of three Judges. That three Judge ruling had also taken note of the intervening decision in **Byram Pestonji Gariwala** (supra) which indicated that the counsel's implied authority to compromise

a dispute comes in the thick of the proceedings and cannot be interfered with lightly. In the opinion of this Court, the ruling in **Pushpa Devi Bhagat** (supra) does not in fact support the plaintiffs/review petitioners' case; a careful reading of that decision in paras 24, 25 indicates that in fact the Court upheld the consent decree drawn by the Court below.

21. The judgment in **Pushpa Devi Bhagat** (supra) pertinently notes as follows:

> "XXXXXX XXXXXX XXXXXX
>
> ……The question whether 'signed by parties' would include signing by the pleader was considered by this Court in **Byram Pestonji Gariwala v. Union Bank of India** AIR 1991 SC 2234 with reference to Order 3 of CPC:
>
> > 30. There is no reason to assume that the legislature intended to curtail the implied authority of counsel, engaged in the thick of proceedings in court, to compromise or agree on matters relating to the parties, even if such matters exceed the subject matter of the suit. The relationship of counsel and his party or the recognized agent and his principal is a matter of contract; and with the freedom of contract generally, the legislature does not interfere except when warranted by public policy, and the legislative intent is expressly made manifest. There is no such declaration of policy or indication of intent in the present case. The legislature has not evinced any intention to change the well recognized and universally acclaimed common law tradition…….
> >
> > XXXXXX XXXXXX XXXXXX
> >
> > 38. Considering the traditionally recognized role of counsel in the common law system, and the evil sought to be remedied by Parliament by the C.P.C. (Amendment) Act, 1976, namely, attainment of certainty and expeditious disposal of cases by reducing the terms of compromise to writing signed by the parties, and allowing the compromise decree to comprehend even matters falling outside the subject matter of the suit, but relating to the parties, the legislature cannot, in the absence of express words to such effect, be presumed to have disallowed the parties to enter into a compromise by counsel in their cause or by their

> > duly authorized agents…….
> >
> > 39. To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorized representative. If a power-of-attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorization by vakalatnama, act on behalf of his client.... If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated."
>
> [Emphasis supplied]
>
> The above view was reiterated in **Jineshwardas v. AIR** 2003 SC 4596. Therefore, the words 'by parties' refer not only to parties in person, but their attorney holders or duly authorized pleaders.
>
> XXXXXX XXXXXX XXXXXX"

22. Before parting, it would be appropriate to extract the following observations of the Supreme Court in **State of Maharashtra v. Ramdas Shrinivas Nayak & Anr.** AIR 1982 SC 1249:

> "XXXXXX XXXXXX XXXXXX
>
> "…….the Judges' record was conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, but nowhere else. The court could not launch into inquiry as to what transpired in the High Court.
>
> The court is bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. It cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict

such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is' incumbent, upon the party, while the matter is still fresh in the minds of the Judges, to call attention of the very judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there.

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23. It has been noted that no attempt has been made by the plaintiffs – not all of whom have supported the present review petition – to establish that what was recorded was without authority of their counsel. The plaintiffs have calculatedly changed the counsel; their previous counsel has not stepped forward and deposed or made any statement in support of the averments in the review proceedings. Furthermore, the basis upon which the review proceeding has been moved is without any formal foundation. In fact, the averments made in paragraphs 4 and 5 of the review petition and apparently submissions made before the Court on 27.07.2010 were of such nature and character as to persuade the learned Judge who was hearing the petition, i.e. Rajiv Shakdher, J., not to proceed with the matter and list it before the present Bench. This conduct of the review petitioners cannot also be left without comment. The statements and submissions made by the parties, and more importantly so by their counsel have to be made with responsibility and with sense of propriety and not with a view to question institutional integrity as has been attempted during the present petition.

24. The preceding discussion convinces this Court that the review petition and the allied applications are neither legally sound nor are with any factual foundation. For these reasons, the Review Petition, being R.A. No. 9418/2010 and applications, being I.A. Nos. 9419/2010 and 9420/2010 have to fail; they are accordingly dismissed.

ILR (2011) DELHI 416
RSA

SMT. SUDHA AGGARWAL & ORS. ....APPELLANT

VERSUS

SHRI SUNIL KUMAR JAIN ....RESPONDENT

(INDERMEET KAUR, J.)

RSA NO. : 23/2011 & CM NO. : 2258-2259/2011 **DATE OF DECISION: 04.02.2011**

Delhi Rent Control Act, 1950—Section 50—Regular second appeal against order of the Appellate Court endorsing the findings of the Trial Court dismissing the suit for possession, permanent injunction and damages qua suit property which is commercial. Held— *Gian Devi Anand vs. Jeevan Kumar & Ors.* not overruled by *Satyawati Sharma (Dead) by LR's vs. Union of India. Gian Devi* decided the issue of heritability of tenancy rights of commercial premises, which proposition was not in challenge in case of Satyawati. Rent less than Rs. 3500/- Defendant protected as a tenant as he inherited the tenancy, bar of Section 50 applicable, suit rightly dismissed.

This is a second appeal. At the first hearing it had been pointed out that the judgment of **Satyawati** (supra) had overruled the judgment of **Gian Devi** (supra). This is incorrect. The judgment of **Satyawati** (supra) which was pronounced more than two decades later had referred **Gian Devi** judgment although noting that with lapse of time and change of circumstances certain legislations become unreasonable and violative of the doctrine of equity. In the judgment of **Satyawati** the Court had held that part of Section 14(1)(e) of DRCA which is violative of the doctrine of equity as it discriminates between premises let out for a

residential or non-residential purpose but the same are required by the landlord bonafide as an accommodation for himself or any member of his family dependent upon him was struck down. The distinction between residential and commercial premises under Section 14 (1) (e) was struck down. **(Para 6)**

Both the Courts below had rightly held that the bar of Section 50 of the DRCA is applicable. Admittedly the rent in terms of the rent receipts Ex. PW-1/3 to Ex. PW-1/5 show that the rate of rent was less than Rs.3500/-. Defendant was protected as a tenant as he has inherited this tenancy ; suit was rightly dismissed. No question of law has arisen. Appeal as also pending applications are dismissed. **(Para 9)**

[An Ba]

APPEARANCES:

FOR THE APPELLANTS : Mr. J.C. Mahindro, Advocate.

FOR THE DEFENDANT : Nomo.

CASES REFERRED TO:

1. *Satyawati Sharma (dead) by LRs* vs. *Union of India* 148(2008) DLT 705 (SC).
2. *Gian Devi Anand* vs. *Jeevan Kumar & Ors.* 1985(1) RCR 459.

RESULT: Appeal dismissed.

INDERMEET KAUR, J. (Oral)

1. This appeal has impugned the judgment and decree dated 01.11.2010 which had endorsed the finding of the trial judge dated 17.8.2010 whereby the suit for possession, permanent injunction and damages filed by the plaintiff Nirmal Kumar qua the suit property bearing No.1715, Pilli Kothi, Nahar Sada Khan, S.P.Mukherjee Marge, Delhi had been dismissed.

2. The contention of the is plaintiff that he was the owner of the suit property and the defendant Sunil Kumar Jain is a trespasser. Admittedly,

father of Sunil Kuma Jain, Inder Kumar was his tenant but after his death on 19.2.2005 and thereafter the death of his wife Memo Devi on 9.3.2008, the defendant had become a mere trespasser and was liable to be evicted.

3. The defence of the defendant was that he was a tenant n his legal right and he had inherited the tenancy from his father; he could not be evicted by way of the present suit. Bar of Section 50 of the Delhi Rent Control Act (hereinafter referred to as 'the DRCA') was in operation as the suit property was admittedly rented out for less than Rs.3500/- per month.

4. The trial judge had framed seven issued. Issue no.3 was the contentious issue; it reads as follows:

> "Whether the suit is barred Under Section 50 of the DRC Act? OPD"

5. The trial judge had examined the judgment of the Apex Court reported in 1985(1) RCR 459 **Gian Devi Anand Vs. Jeevan Kumar & Ors.**. It was held that the tenancy had devolved upon the defendant being the legal heir of his father. The judgment reported in 148(2008) DLT 705 (SC) **Satyawati Sharma (dead) by LRs Vs. Union of India** had been distinguished. It was held that the said judgment had not in any manner overruled the proposition of **Gian Devi's** judgment; what was under examination before the Apex Court in the case of **Satyawati** was the vires of Section 14(1)(e) of the DRC Act and the Court had held that no distinction can be drawn between a non-residential or a residential property as far as the bonafide need of the landlord is concerned under Section 14(1)(e) of the Act.

6. This is a second appeal. At the first hearing it had been pointed out that the judgment of **Satyawati** (supra) had overruled the judgment of **Gian Devi** (supra). This is incorrect. The judgment of **Satyawati** (supra) which was pronounced more than two decades later had referred **Gian Devi** judgment although noting that with lapse of time and change of circumstances certain legislations become unreasonable and violative of the doctrine of equity. In the judgment of **Satyawati** the Court had held that part of Section 14(1)(e) of DRCA which is violative of the doctrine of equity as it discriminates between premises let out for a residential or non-residential purpose but the same are required by the landlord bonafide as an accommodation for himself or any member of his

family dependent upon him was struck down. The distinction between residential and commercial premises under Section 14 (1) (e) was struck down.

7. The suit filed by the plaintiff was seeking possession of the suit land; it was a commercial property. **Gian Devi** (supra) had decided the issue of heritability of the tenancy rights of commercial premises and which proposition was not in challenge in the case of **Satyawati**.

8. The oft quoted paragraph of the judgment of Gian Devi is reproduced herein below and reads as follows:

> "In the Delhi Act, the Legislature has thought it fit to make provisions regulating the right to inherit the tenancy rights in respect of residential premises. The relevant provisions are contained in Section 2(1)(iii) of the Act. With regard to the commercial premises, the Legislature in the Act under consideration has thought it fit not to make any such provision…….. As in the present Act, there is no provision regulating the rights of the heirs to inherit the tenancy rights of the tenanted premises which is commercial premises, the tenancy right which is heritable devolves on the heirs under the ordinary law of succession. …… We are of the opinion that in cases of commercial premises governed by the Delhi Act, the Legislature has not though it fit in the light of situation at Delhi to place any kind of restriction on the ordinary law of inheritance with regard to succession. In the absence of any provision restricting the heritability of tenancy in respect of the commercial premises only establishes that commercial tenancies notwithstanding the determinate of the contractual tenancy will devolve on the heirs in accordance with law and the heirs who steps into the position of the deceased tenant will continue to enjoy in the protection afforded by the Act and they; can be only be evicted in accordance with the provisions of the Act."

9. Both the Courts below had rightly held that the bar of Section 50 of the DRCA is applicable. Admittedly the rent in terms of the rent receipts Ex. PW-1/3 to Ex. PW-1/5 show that the rate of rent was less than Rs.3500/-. Defendant was protected as a tenant as he has inherited this tenancy ; suit was rightly dismissed. No question of law has arisen.

Appeal as also pending applications are dismissed.

ILR (2011) DELHI 420
RSA

CHAND KRISHAN BHALLA ....APPELLANT

VERSUS

HARPAL SINGH ....RESPONDENT

(INDERMEET KAUR, J.)

RSA NO. : 146/2004 & CMS NO. : 7992/2004 & 15002/2006 **DATE OF DECISION: 07.02.2011**

General Clauses Act, 1897—Section 27 and Indian Evidence Act, 1873—Section 14(1)(e)—Regular second appeal against order of the Appellate Court endorsing the findings of the Trial Court dismissing the suit seeking recovery of possession and damages of suit property holding tenancy was not duly terminated. Notice terminating tenancy sent vide registered A.D.—Whether there is presumption u/s 27 of General Clauses Act in favour of Plaintiff—Held—Section specifically postulates that the registered A.D. envelope must be prepaid and properly addressed to the addressee; this being missing, no presumption arises in favour of plaintiff. Appeal dismissed.

This is a second appeal. After its admission on 18.01.2010, the following substantial question of law was formulated. It reads as follows:-

> "Whether both the courts below erred in holding that the tenancy of the respondent was not duly terminated

in accordance with law?" **(Para 8)**

Even presuming that it was not necessary for the appellant/ plaintiff to have specifically pleaded in the plaint that the tenancy of Surinder Singh had stood terminated vide Ex. PW-1/7, the second question which arises for decision is as to whether in terms of Ex. PW-1/8 (Postal receipt), a presumption of service can be drawn in favour of the plaintiff and against the defendants. Ex.PW-1/8 has been perused. This is a postal receipt bearing the name of Surinder Singh. Below it ND-1, referring to New Delhi has been mentioned. There is no further details of the address of the addressee. Perusal of Ex. PW-1/8 clearly shows that it has not been properly addressed to the addressee; in fact no address finds mention therein. Question of drawing a presumption under section 27 of the General Clauses Act does not arise. This section specifically postulates that the registered A.D. envelope must be prepaid and properly addressed to the addressee; this is missing. No such presumption thus arises under Section 27 of the said Act. All these factors had weighed in the minds of the courts below to hold that in fact a notice dated 06.03.1983 was a notice which had not legally terminated the tenancy of Surinder Singh in his life time as it had never been served upon him. Both the concurrent findings of the court below had thus rightly held that the plaintiff had failed to show that this notice Ex. PW-1/7 had been served upon Surinder Singh terminating his tenancy. In this factual scenario, judgments relied upon by the learned counsel for the appellant do not come to his aid. This finding calls for no interference. **(Para 11)**

This Court is not a third fact finding Court. This Court has to answer substantial question of law which has been formulated on 18.01.2010. This Court is of the view that both the Court below had not committed any error in holding that the tenancy of the respondents was not duly terminated in accordance with law. **(Para 12)**

Important Issue Involved: The presumption u/s. 27 of General Clauses Act is regard to service through registered post can be drawn. Only if the AD envelope is prepaid and properly addressed to the addressee.

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. S.K. Bhalla, Advocate.

FOR THE DEFENDANT : Mr. M.L. Bhargava, Advocate.

CASES REFERRED TO:

1. *Keshav Metal Works* vs. *Jitender K. Verma* 1994 RLR 126.
2. *M/s Madan & Co.* vs. *Wazir Jaivir Chand* AIR 1989 SC 630.
3. *Sachindra Nath Shah* vs. *Santosh Kumar Bhattacharya* AIR 1987 SC 409.
4. *Ram Sarup Gupta* vs. *Bishun Narian Inter College & Others.* (1987) 2 SCC 555.
5. *Karbalai Begum* vs. *Mohd. Sayeed & another* AIR 1981 SC 77.
6. *Shri Madan Lal Sethi* vs. *Shri Amar Singh Bhalla.* 1980 (2) AIR SC 543.
7. *Secy. of State* vs. *Madhu Sudan Mukherjee & others.* AIR 1933 Calcutta 260.

RESULT: Appeal dismissed.

INDERMEET KAUR, J.

1. This appeal has impugned the judgment and decree dated 04.05.2004 which had endorsed the findings of the trial Judge dated 24.02.2000 whereby the suit of the plaintiff Chand Krishan Bhalla seeking recovery of possession and damages of the suit property i.e. property bearing No. 10213-17, Manak Pura, Karol Bagh, New Delhi had been dismissed.

2. The case of the plaintiff that he was the owner of the suit property in terms of a sale certificate dated 28.09.1967. The plaintiff had earlier filed suit No. 682/1982 against Surinder Singh, father of the defendants. In the course of those proceedings, Surinder Singh expired; his wife was also expired in January, 1987. After the death of Surinder Singh and his wife, the tenancy no longer devolved on any other legal representative. In fact the plaintiff had no knowledge about ˇthe death of Surinder Singh throughout the proceedings as it was not disclosed by the defendants. Surinder Singh had claimed tenancy rights in respect of the one room on the first floors and a khokha/tin store on the second floor. The plaintiff requested the defendants to surrender the vacant possession of the suit property w.e.f. January, 1987 as also to pay damages; they failed to adhere to this request, suit was accordingly filed.

3. In the written statement, it was contended that the premises had been let out to Surinder Singh for residential-cum-commercial purposes. After the death of Surinder Singh, tenancy rights were inherited by their legal heirs in terms of Delhi Rent Control Act (hereinafter referred to as 'DRCA'); suit was barred u/s 5 of the said Act. In the written statement, it was contended that notice for termination of tenancy of Surinder Singh was never given to him; notice dated 03.06.1983 is a false and fabricated document; it was contended that even after the amendment of the earlier suit i.e. Suit No. 682/1982 which was permitted on 23.07.1983, alleged factum of the notice dated 03.06.1983 was never mentioned; had this notice been given, it would have been pleaded in the amended plaint. In fact in the earlier suit, Surinder Singh had appeared as a witness and although he was cross-examined on 05.11.1986, he was never confronted with this alleged notice dated 03.06.1983. All this clearly shows that this notice is a fabricated document.

4. In the replication, this contention was denied; it was submitted that the notice dated 03.06.1983 was duly served upon Surinder Singh validly terminating his tenancy.

5. On the pleadings of the parties, the following nine issues were framed; they read as under:-

1. Whether the contractual tenancy of late Sh. Surinder Singh was terminated during his life time? OPP
2. Whether there is any cause of action in favour of the plaintiff? OPP
3. Whether the suit is bad for non-joinder of married daughters of late Sh. Surinder Singh? OPD
4. Whether the suit is barred u/o 2 Rule 2 CPC as mentioned in preliminary objections No. 5? OPD.
5. Whether the suit premises was let out for residential cum commercial purposes? OPD
6. Whether the plaintiff is entitled to the damages as claimed in the plaintiff, if so at what rate and period? OPP
7. Whether the plaintiff is entitled for the interest @ 18% per annum as claimed? OPP.
8. Whether the suit has been properly valued for the purposes of court fees & jurisdiction? OPD
9. Relief.

6. The contentious issue is Issue No. 1. The notice dated 03.06.1983 is Ex. PW-1/7 and postal receipt is Ex. PW-1/8. The contention of the appellant/ plaintiff is that this notice had been served upon Surinder Singh vide registered A.D. prepaid and properly addressed; presumption under Section 27 of the General Clauses Act, 1897 and section 14 (1) (e) of the Indian Evidence Act, 1873 has to be drawn in favour of the plaintiff/ appellant. For this proposition, reliance has been placed upon (1987) 2 SCC 555 **Ram Sarup Gupta Vs. Bishun Narian Inter College & Others.** It is pointed out that a mere denial by the defendants that the notice has not been received by them is not sufficient to rebut this presumption which has arisen in favour of the plaintiff; for this proposition reliance has been placed upon 1980 (2) AIR SC 543 **Shri Madan Lal Sethi Vs. Shri Amar Singh Bhalla.** It is pointed out that other circumstances must be shown by the defendants to show that the notice had never reached the addressee. Reliance has also been placed upon AIR 1989 SC 630 **M/s Madan & Co. Vs. Wazir Jaivir Chand** as also upon AIR 1933 Calcutta 260 **Secy. of State Vs. Madhu Sudan Mukherjee & others.** It is submitted that although it is correct that this notice dated 03.06.1983 was never pleaded in the present plaint yet it found mention in the replication; it is a settled position of law that replication is a part of pleadings. To support this submission, reliance has been placed upon 1994 RLR 126 **Keshav Metal Works Vs Jitender K. Verma** as also

(1987) 2 SCC 555 **Ram Sarup Gupta Vs. Bishun Narain Inter College & Others.** It is submitted that the plaint does not have to expressly aver each and every fact, this question of notice is even otherwise a matter of evidence and did not have to be specifically pleaded in the plaint.

7. Arguments have been countered. It is pointed out that there are concurrent findings of fact against the appellant; this Court can interfere in the impugned judgment only if there is substantial question of law which in this case has not been raised. Reliance has been placed upon AIR 1981 SC 77 **Karbalai Begum Vs. Mohd. Sayeed & another** as also another judgment of the Apex Court in AIR 1987 SC 409 **Sachindra Nath Shah Vs. Santosh Kumar Bhattacharya** to support his submission that unless the findings are perverse, no interference is called for by the High Court in second appeal on concurrent findings of fact. Both the Court below had noted these arguments which have been addressed before this Court and drawn a conclusion against the appellant.

8. This is a second appeal. After its admission on 18.01.2010, the following substantial question of law was formulated. It reads as follows:-

> "Whether both the courts below erred in holding that the tenancy of the respondent was not duly terminated in accordance with law?"

9. Perusal of the record shows that the present suit was a suit for recovery of possession and damages. Admittedly in the entire plaint, there is no averment that the tenancy of Surinder Singh, deceased father of the defendants had been terminated by notice dated 03.06.1983 which is the crucial issue now addressed before this Court. It was for the first time in the replication that this notice dated 03.06.1983 found mention by the plaintiff. On the other hand, the defendants in their written statement had averred that the alleged notice dated 03.06.1983 was never served upon their father i.e. upon Surinder Singh. It is a false and fabricated document and the reasons as aforenoted (Supra in the written statement) have emphasized. Two witnesses had been examined on behalf of the plaintiff and one witness had been examined on behalf of the defendants.

10. Suit No. 682/1982 was the first suit which the plaintiff had filed against Surinder Singh. This was on 17.11.1982. The said plaint was amended pursuant to the Court of the Court dated 23.07.1983. The amended plaint Ex. PW-1/1 was taken on record. Admittedly in this

amended plaint, the notice dated 06.03.1983 did not find mention. In fact the various other documents filed in that suit were all after the date of 03.06.1983. Relevant would it be to state that Ex.PW-1/DX1 is the application under Order 22 Rule 4 of the Code of Civil Procedure filed by the plaintiff seeking permission of the Court to bring on record the legal representatives of the deceased Surinder Singh. The contention of the learned counsel for the respondent is that even at this stage also, there was no averment that after the death of Surinder Singh his legal representatives have no right to continue in the suit property as the tenancy rights of Surinder Singh already stood terminated vide notice dated 03.06.1983; no cause of action now arises. This submission is not without any force. Similar is the effect of the other documents i.e. application under Section XXXII of the Code accompanied by the affidavit of the defendant Ex. PW-1/DX3. The defendant in the earlier suit namely Surinder Singh had been cross-examined on 05.11.1986. The said proceedings had been proved as Ex. PW-1/DX8. This was a lengthy cross-examination but perusal of the same shows that there is no reference to the notice dated 06.03.1983 alleging that the tenancy of Surinder Singh had already stood determined in terms thereof. There was no reason whatsoever for not putting this document to Surinder Singh who would have been the best person to answer this query. Perusal of the amended plaint Ex. PW-1/1 in fact shows that there is a reference to a notice dated 04.10.1982 purportedly sent by the plaintiff to the defendant; here again there was no mention of the notice dated 06.03.1983. In the sale deed Ex. DW-1/1, the defendant Surinder Singh had been described as a tenant at serial No. 11.

11. Even presuming that it was not necessary for the appellant/ plaintiff to have specifically pleaded in the plaint that the tenancy of Surinder Singh had stood terminated vide Ex. PW-1/7, the second question which arises for decision is as to whether in terms of Ex. PW-1/8 (Postal receipt), a presumption of service can be drawn in favour of the plaintiff and against the defendants. Ex.PW-1/8 has been perused. This is a postal receipt bearing the name of Surinder Singh. Below it ND-1, referring to New Delhi has been mentioned. There is no further details of the address of the addressee. Perusal of Ex. PW-1/8 clearly shows that it has not been properly addressed to the addressee; in fact no address finds mention therein. Question of drawing a presumption under section 27 of the General Clauses Act does not arise. This section specifically postulates

that the registered A.D. envelope must be prepaid and properly addressed to the addressee; this is missing. No such presumption thus arises under Section 27 of the said Act. All these factors had weighed in the minds of the courts below to hold that in fact a notice dated 06.03.1983 was a notice which had not legally terminated the tenancy of Surinder Singh in his life time as it had never been served upon him. Both the concurrent findings of the court below had thus rightly held that the plaintiff had failed to show that this notice Ex. PW-1/7 had been served upon Surinder Singh terminating his tenancy. In this factual scenario, judgments relied upon by the learned counsel for the appellant do not come to his aid. This finding calls for no interference.

12. This Court is not a third fact finding Court. This Court has to answer substantial question of law which has been formulated on 18.01.2010. This Court is of the view that both the Court below had not committed any error in holding that the tenancy of the respondents was not duly terminated in accordance with law.

13. The substantial question of law is answered accordingly. Appeal as also pending applications are dismissed.

ILR (2011) DELHI 427
W.P.(C)

M/S. DWARIKADHISH SPINNERS LIMITED ....PETITIONER

VERSUS

UCO BANK & ORS. ....RESPONDENTS

(BADAR DURREZ AHMED AND MANMOHAN SINGH, JJ.)

W.P.(C) NO. : 13887/2009 DATE OF DECISION: 08.02.2011

Sick Industrial Companies (Special Provision) Act, 1985—Section 3, 15, 16, 25; Board of Industrial and Financial Reconstruction Regulations, 1987—

Regulation 21: Reference received by the Board of directors of Company rejected by BIFR on ground that company did not approach BIFR with clean hands—Held—Once reference is received by BIFR, it is duty bound to determine whether the company has become sick or not, BIFR did not return any such finding either way. Irrespective of the alleged conduct of petitioner, once reference is received by BIFR it has to make enquiry for determining whether company has become sick or not.

Having surveyed the various statutory provisions as well as the applicable regulations, we are of the clear view that the BIFR, once it receives a reference from the Board of Directors of the company, is duty bound to determine as to whether the company has become a sick industrial company or not. In the present case, we find that he BIFR did not return any such finding either way. All that the BIFR did was to reject the reference on the plea that the petitioner company had not approached the BIFR with clean hands, inasmuch as there were serious allegations in the IA report submitted by M/s ANG and Associates. The BIFR also rejected the reference on the ground that no reply to the IA report had been submitted by the petitioner company despite repeated opportunities. We are of the view that this approach is not in consonance with the law. Irrespective of the alleged conduct of the petitioner company, once a reference is received by the BIFR it has to make an inquiry for determining whether the company in question has become a sick industrial company or not. In the present case, we find that no such inquiry, as contemplated under Section 16 of the SICA, was embarked upon by the BIFR. On the contrary, BIFR, in fact, did not give any finding in so far as the IA report in respect of the petitioner company is concerned.

(Para 18)

Important Issue Involved: Irrespective of irregularities, once reference is received by BIFR, it is duty bound to determine whether the company had become sick or not.

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Amit Sibal with Mr. Saurabh Seth, Mr. Jayant Bhatt & Mr. Shravanth Shankar.

FOR THE RESPONDENTS : Mr. Rajeev Nayyar, Sr. Advocate with Ms Sushmita Banerjee for R-2,3 & 4. Mr. Ajant Kumar, for R-5.

RESULT: Petition allowed.

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition is directed against the order passed by the Appellate Authority for Industrial & Financial Reconstruction (AAIFR) dated 16.09.2009 whereby the petitioner's appeal under Section 25 of the Sick Industrial Companies (Special Provision) Act, 1985 (hereinafter referred to as 'SICA') was dismissed. The said appeal before the AAIFR was in turn directed against the order dated 04.09.2006 passed by the Board for Industrial and Financial Reconstruction (BIFR) whereby the reference made by the Board of the petitioner company under Section 15 of SICA was rejected as non maintainable on the grounds that the company (petitioner) did not approach the BIFR with clean hands and had failed to avail the opportunities given by the Board to present its case.

2. Mr Amit Sibal, the learned counsel appearing on behalf of the petitioner, mainly canvassed two points. The first point that was urged by him was that neither the BIFR nor the AAIFR have returned any finding as to whether the petitioner company is a sick industrial company or not. According to him, this determination is the duty of the BIFR as mandated by the provisions of SICA. He further submitted that once a company is determined to be sick under the provisions of SICA, then, that company can be dealt with only as provided under the said Act. The jurisdiction in respect of such determination, that is with regard to the sickness of the concerned company, is at the sole authority of the BIFR

and there is a complete bar as provided under Section 26 of SICA for approaching any other Court including Civil Courts to enter into this domain. Mr Sibal further submitted that once the BIFR, or as the case may be, AAIFR comes to a determination that a company is a sick industrial company, the further question would have to be answered as to whether the said company can be revived or not. In either eventuality different consequences flow. If it is decided that the company is a potentially viable company then schemes can be framed as provided under Section 18 of SICA. However, if it is felt that the company is so sick that it cannot be revived or rehabilitated then consequences of winding up, as contemplated under Section 20, would flow. In this backdrop Mr Sibal submitted that it is, therefore, the duty cast upon the Board, as also the AAIFR, at the appellate stage, to return a conclusive finding as to whether the company in question is within the definition of a sick industrial company as defined in Section 3 (1)(o) of SICA or not. If the BIFR or AAIFR does not return any such finding then they could be regarded as having abdicated their primary or most important function. He submitted that in the present case this is exactly what has happened and, therefore, the impugned order passed by the AAIFR is liable to be set aside and the matter is liable to be remanded to the BIFR for conducting an inquiry in terms of Section 16 of SICA and for a clear determination as to whether the petitioner is a sick industrial company or not.

3. The second point urged by Mr Sibal, on behalf of the petitioner, is that BIFR, as also the AAIFR, has been unfair to the petitioner company, inasmuch as the case of the petitioner company has been dealt along with three other group companies, namely, M/s Shamken Spinners Limited (SSL), M/s Shamken Multifab Limited (SML) and Shamken Cotsyn Limited (SCL). He submitted that, as the facts would reveal, the other three companies of the group stood on a different footing from that of the petitioner company and the case of the petitioner company has been painted with the same brush as that of the other three companies. And, in doing so, both the BIFR and the AAIFR have committed a gross error. To substantiate this plea, Mr Sibal submitted that while the other three companies of the group had already filed references before the BIFR, the present company had filed its reference under Section 15 only on 12.07.2005. At that time, the BIFR was already seized of the references filed by the other three companies and certain orders had already been passed therein. On 19.12.2005, when the reference of SSL and the other

two group companies were considered by the BIFR, the petitioner company (DSL) was not represented as its first hearing was conducted much later, on 23.02.2006. However, there is a direction in the order dated 19.12.2005 that in future the cases of the four group companies i.e. SSL, SML and SCL and the present petitioner (DSL) be listed for hearing on the same date as in the case of SSL. It is in this order, that it is recorded for the first time that IDBI had an investigative Audit (IA) conducted in respect of the group companies and that the audit report of M/s ANG and Associates revealed serious financial irregularities including furnishing of false and misleading information to the Banks/Institutions, multiple financing of projects, submission of forged Bank Statements and "fabricated auditor's certificates" for the purpose of availing disbursements, diversion of funds to group companies etc. In the said order itself it has been observed that the said IA report had not been served on the group companies and as such they had not been in a position to comment thereon. Consequently, the BIFR directed IDBI to immediately serve the IA report on the company (SSL), which was given at the hearing itself, and to all the secured creditors. SSL was allowed four weeks time to respond to the IA report with copies to the Banks/Financial Institutions and others concerned.

4. It is the contention of Mr Sibal, on behalf of the petitioner (DSL), that the IA report was given to the other group companies but not to DSL. This is also evident from the fact that the order dated 19.12.2005 itself records that the IA report was served on the companies at the hearing itself. Since DSL was not represented, because the first date of hearing of its reference was on 23.02.2006, there was no question of the IA report having been served on the said company at the hearing on 19.12.2005. In fact, Mr Sibal, on instructions, states that even till this date the petitioner does not have a copy of the IA report in respect of DSL. Of course, there was some controversy as to whether the IA report was a composite one in respect of the four group of companies or there were separate reports. That controversy has been resolved, inasmuch as we find that the report itself comprised of four separate independent parts. It is now an admitted position that the four parts of the report pertain to each of the four group companies separately and were also furnished by the said M/s ANG and Associates to IDBI under cover of separate letters on different dates.

5. In this background, it was submitted by Mr Sibal that it was for the first time that the petitioner's reference was taken up by the BIFR on 22.03.2006, thereafter the next date was 03.07.2006 when all the group companies were directed to file their replies to their respective IAs. The next and final date before the BIFR was 04.09.2006 when the representative appearing on behalf of the petitioner had sought an adjournment. However, that adjournment was not allowed and it was observed by the BIFR that ample time had been given in the last hearings but the company had not submitted its reply to the IA report which contained very serious allegations with regard to the financial aspects of the working of the company. The reference of the petitioner company was, therefore, rejected, inter alia, on the ground that it had failed to avail the opportunities given by BIFR to present its case. According to Mr Sibal, since the petitioner was not represented by advocates on that date i.e., on 04.09.2006 and the representative was merely requesting for an adjournment, the BIFR ought to have granted further time along with a peremptory direction that in case the reply is not given, the BIFR would proceed in the absence of such a reply. Consequently, it was submitted by Mr Sibal that a proper opportunity was not given to the petitioner to give its response to the IA report, even assuming that a copy of the IA report was available with the petitioner. In this context he further submitted that the IA report itself, as would be apparent from the proceedings before the AAIFR, was not sacrosanct and was not based on authenticated evidence but was based on unauthorized and unconfirmed information supplied by the banks to the said chartered accountants.

6. Mr Nayyar, the learned Senior Counsel appearing on behalf of the respondent nos. 2, 3 and 4, submitted that in so far as the denial of opportunity argument is concerned, the petitioner had no case. He submitted that if it were true that the petitioner company did not have a copy of the IA report, it could have made a request for the same before the BIFR on 22.03.2006 or even on 03.07.2006. In fact, even on 04.09.2006 the Authorized Representative could have said that he is seeking an adjournment because he did not have a copy of the IA report and, therefore, was unable to give a response thereto. Since this is admittedly not the case, according to Mr Nayyar, the petitioner cannot take the plea that he was denied opportunity of responding to the IA report.

7. In so far as the plea that the BIFR had not performed its duty

in returning a finding as to whether the petitioner was a sick industrial company or not, Mr Nayyar submitted that the BIFR was empowered under Section 16(1)(b) to take in any information as also under Regulation 40 to rely upon any information for the purposes of coming to the conclusion as to whether the petitioner was a sick industrial company or not. Therefore, according to Mr Nayyar, the BIFR and also the AAIFR cannot be faulted for placing reliance on the IA report of M/s ANG and Associates which was uncontroverted inasmuch as the petitioner company had not filed its response thereto. The fact that the BIFR as also the AAFIR did not proceed any further with the reference implied that the petitioner company was not a sick industrial company and, therefore, on this ground also there can be no grievance on the part of the petitioner. Mr Nayyar also submitted that while the BIFR order dated 04.09.2006 did not discuss the IA report as such the same had been discussed in detail by the AAFIR and since the BIFR order merges with the AAFIR order, whatever defect was there in the order of the BIFR stands cured by the AAFIR order dated 16.09.2006.

8. He referred to the conclusions which were arrived at by the AAFIR which are in the following terms :-

> "36. To sum up, we find that the irregularities pointed out in the SIA reports were very serious in nature and the concerned companies did not clearly and convincingly rebut the specific allegations contained therein which seriously impaired the accuracy and the credibility of the accounts. In the absence of credible accounts, any exercise aimed at determining sickness and deciding subsequent measures to deal with it were bound to be vitiated. We also find that by not granting adjournment on 4/9/2006, BIFR did not violate any principle of natural justice, equity or fairplay as the companies had participated in the hearing all along. Inability to make use of given opportunities is not denial of opportunities; such inability, especially, in matters crucial to the appellant companies is unacceptable. In the case of DSP we find that non-availability of the SIA report and the consequent inability of the company to furnish replies are not supportable arguments.
>
> 37. In view of what we have said above, we feel that the impugned orders of BIFR of 4.9.2006 do not suffer from any legal infirmity and they are just and fair. We do not see any reason to interfere with these orders. We dismiss the appeals accordingly."
>
> (underlining added)

9. We have considered the arguments advanced by the counsel for the parties as well as the material on record and the statutory provisions. We find that as per the statement of objects and reasons of SICA, it has been designed to take care of not only those sick industrial companies which are potentially viable and can be revived and rehabilitated but also of the non-viable sick industrial companies. The potentially viable sick industrial companies are sought to be revived and rehabilitated under SICA whereas the non-viable sick industrial companies are to be dealt with under Section 20 of SICA in order to salvage the productive assets and realize the amounts due to the banks and financial institutions through liquidation of such companies. Before either eventuality is undertaken, the BIFR has been given the duty under the Act to determine whether an industrial company has become a sick industrial company or not. The expression sick industrial company is defined in Section 3(1)(o) as under:

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

It is apparent from the above definition that an industrial company, which has, at the end of any financial year, accumulated losses equal to or exceeding the entire net worth of the company would be termed as a sick industrial company. When an industrial company becomes sick, a duty is cast upon the Board of Directors of that company under Section 15(1) to, within sixty days from the date of finalization of the duly audited accounts of the company for the financial year as at the end of which the company has become sick industrial company, make a reference to BIFR for determination of the measures which are to be adopted in respect of the said company. We find that by virtue of Section 15(2), the Central Government or the Reserve Bank or a State Government or a public financial institution or a State level institution or a scheduled bank may, without prejudice to the requirement of the Board of Directors of an industrial company which has become sick to make a reference to the BIFR within Section 15(1), can also make a reference in respect of

a company in respect of which there are sufficient reasons to believe that it has become a sick industrial company. Thus, it is clear that a reference to BIFR can be made either by the Board of Directors of the company itself or by the Central Government, RBI etc. under Section 15(2).

10. Section 16 is of material significance and, as such, it would be appropriate to set out the same:-

> **"16. INQUIRY INTO WORKING OF SICK INDUSTRIAL COMPANIES.**
>
> (1) The Board may make such inquiry as it may deem fit for determining whether any industrial company has become a sick industrial company -
>
> (a) upon receipt of a reference with respect to such company under section 15; or
>
> (b) upon information received with respect to such company or upon its own knowledge as to the financial condition of the company.
>
> (2) The Board may, if it deems necessary or expedient so to do for the expeditious disposal of an inquiry under sub-section (1), require by order any operating agency to enquire into and make a report with respect to such matter as may be specified in the order.(3) The Board or, as the case may be the operating agency shall complete its inquiry as expeditiously as possible and endeavour shall be made to complete the inquiry within sixty days from the commencement of the inquiry.
>
> Explanation:— For the purposes of this sub section, an inquiry shall be deemed to have commenced upon the receipt by the Board of any reference or information or upon its own knowledge reduced to writing by the Board.
>
> (4) Where the Board deems it fit to make an inquiry or to cause an inquiry to be made into any industrial company under sub-section (1) or, as the case may be, under sub-section (2), it may appoint one or more persons to be a special director or special directors of the company for safeguarding the financial and other interests of the company or in the public interest.

> (4A) The Board may issue such directions to a special director appointed under sub-section (4) as it may deem necessary or expedient for proper discharge of his duties.
>
> (5) The appointment of a special director referred to in sub-section (4) shall be valid and effective notwithstanding anything to the contrary contained in the Companies Act, 1956 (1 of 1956) or in any other law for the time being in force or in the memorandum and articles of association or any other instrument relating to the industrial company, and any provision regarding share qualification, age limit, number of directorships, removal from office of directors and such like conditions contained in any such law or instrument aforesaid, shall not apply to any director appointed by the Board.
>
> (6) Any special director appointed under sub-section (4) shall -
>
> (a) hold office during, the pleasure of the Board and may be removed or substituted by any person by order in writing by the Board;
>
> (b) not incur any obligation or liability by reason only of his being a director or for anything done or omitted to be done in good faith in the discharge of his duties as a director or anything in relation thereto;
>
> (c) not be liable to retirement by rotation and shall not be taken into account for computing the number of directors liable to such retirement;
>
> (d) not be liable to be prosecuted under any law for anything, done or omitted to be done in good faith in the discharge of his duties in relation to the sick industrial company."

11. A plain reading of Section 16(1) of SICA would indicate that the prime duty of the BIFR in making an inquiry is for the purpose of determining whether an industrial company has become a sick industrial company or not. Of course, sub-section (1) of Section 16 has two parts. Clause (a) of Section 16(1) refers to a situation where the Board embarks upon an inquiry upon receipt of a reference under Section 15 of SICA. We may recall that the reference under Section 15 may be made either at the instance of the Board of Directors of the company which purports

to be a sick industrial company or under Section 15(2) at the instance of the Central Government, Reserve Bank etc. where such institution has sufficient reasons to believe that an industrial company has become a sick industrial company. Clause (b) of Section 16(1) contemplates an inquiry in a situation where the BIFR undertakes such inquiry upon information received with respect to a company or upon its own knowledge as to the financial condition of such a company. In either eventuality, that is, either upon receipt of a reference or upon information, the BIFR has to make an inquiry for determining whether the industrial company in question has become a sick industrial company or not. Of course, the type and kind of inquiry that the BIFR has to make has been left to the BIFR, inasmuch as the expression used is :- "the Board may make such inquiry as it may deem fit".

12. By virtue of sub-section (2) of Section 16 of SICA, in cases where the BIFR deems it necessary or expedient so to do for the expeditious disposal of an inquiry under Section 16(1), the BIFR may require an operating agency to inquire into and make a report with respect to such matters as may be specified in the orders passed by the BIFR in this regard. At this juncture we would like to point out that the definition of "operating agency" given in Section 3(1)(i) is as follows:

> "(i) "operating agency" means any public financial institution, State level institution, scheduled bank or any other person as may be specified by general or special order as its agency by the Board;"

In other words, the operating agency has to be appointed by the BIFR by a general or a special order as its agent for the purposes of making a report. We may also mention that by virtue of Section 16(3), it is apparent that all endeavours are to be made to complete the inquiry as expeditiously as possible and within a period of sixty days from the commencement of the inquiry. The explanation to Section 16(3) makes it clear that an inquiry is deemed to commence upon the receipt by the Board of a reference or upon its own knowledge reduced to writing by the Board.

13. In the present case since a reference has been made by the Board of Directors of the petitioner company under Section 15(1), the inquiry would be deemed to have commenced on the date on which the

reference was received, that is, on 12.07.2005. Consequently, if we were to strictly comply with the provisions of Section 16(3) of SICA, the BIFR should have endeavoured to complete the inquiry within sixty days thereof, but unfortunately that did not happen and even the first date on which the petitioner's reference was taken up by the Board was much later, on 22.03.2006. Anyhow, that is another aspect of the matter with which we are not concerned in this writ petition.

14. It is clear from the above resume with regard to the provisions of Section 16 of SICA that it is incumbent upon the BIFR to conduct an inquiry for the purpose of determining whether the industrial company has become a sick industrial company or not. Such inquiry has to be conducted upon receipt of a reference under Section 15 or upon information received by the BIFR. The inquiry has to be conducted by the BIFR itself, but as provided under Section 16(2), where it is necessary for expeditious disposal of an inquiry and where the BIFR deems it expedient to do so, the BIFR may appoint an operating agency and require it to inquire into and make a report with respect to the matters which may be specified in the order. In any event, whether the inquiry is conducted by the Board itself or through an operating agency, it is imperative that once a reference is received, such an inquiry has to be conducted for determining whether the industrial company has become a sick industrial company or not. It is not open to the BIFR to reject a reference without returning a finding as to whether the company in question has become a sick industrial company or not.

15. What has been stated by us is also borne out in Chapter IV of the Board of Industrial and Financial Reconstruction Regulations, 1987 (hereinafter referred to as the "said regulations"). The said Chapter IV deals with inquiries under Section 16. Regulation 21 specifically provides that upon a reference with respect to an industrial company under Section 15 or upon information received with respect to such company or upon its own knowledge as to the financial condition of the company, the BIFR may either itself make such inquiry, as it may deem fit, for determining whether the company in question has become a sick industrial company or if it deems it necessary or expedient so to do, for the expeditious disposal of the said inquiry, direct by an order, an operating agency, to be specified in the order, to inquire into and make a report in respect of such matters as may be specified in the said order. By

virtue of Regulation 22 the BIFR may also direct the operating agency to make a further inquiry if deemed necessary.

16. Regulation 24 is important. It reads as under:-

> "24. Where the Board after completion of its inquiry or after considering the report or, as the case may be, the further report of the operating agency, is satisfied that no case exists for coming to the conclusion that the industrial company has become a sick industrial company, it shall drop further proceedings in the reference."

It is clear that as per the said Regulation 24 also two situations are contemplated — (1) completion of the inquiry by the Board itself or (2) after considering the report of the operating agency or further report of the operating agency, as the case may be. Regulation 24 makes it clear that upon either of the two eventualities, if the BIFR is satisfied that no case exists for coming to the conclusion that industrial company has become a sick industrial company, it shall drop further proceedings in the reference. This regulation also makes it clear that it is imperative for the BIFR to record its satisfaction with regard to the question as to whether the concerned company has become a sick industrial company or not. If the satisfaction recorded indicates that the company in question is not a sick industrial company then further proceedings in the reference are to be dropped. If, on the other hand, the BIFR comes to the conclusion and is satisfied that the company in question has become a sick industrial company, it would then, as mentioned above, have to determine as to whether the said company is one which has potential for revival and rehabilitation or one where revival is not a viable option. We have already pointed out the courses that would be followed in either eventuality.

17. The learned counsel for the respondents had referred to Regulation 40 in order to submit that it is open to the BIFR to take assistance of public financial institutions, banks, other institutions, consultants, experts, chartered accountants etc. in furtherance of its functions. They placed reliance on Regulation 40 for the proposition that the IA report submitted by M/s ANG and Associates would fall within such assistance as contemplated under this Regulation. Consequently, it was submitted that the Board committed no error in relying upon the IA report in so far as the petitioner company is concerned. Regulation 40 reads as under:

> **"Assistance to the Board.**— The Board may, at any time, take the assistance of public financial institutions, banks or other institutions, consultants, experts, chartered accountants, surveyors and such other technical and professional persons as it may consider necessary and ask them to submit report or furnish any information.
>
> Provided that if the report or information so obtained or any part thereof is brought on record of any inquiry and is proposed to be relied upon by the Board for forming its opinion or view, the party or parties to the inquiry shall be given a reasonable opportunity of making his or their submissions with respect thereto."

One thing that immediately strikes us is that the assistance that is spoken of in Regulation 40 is invited at the instance of the BIFR. The language is clear, inasmuch as it contemplates that the BIFR may ask any of the said institutions, consultants, chartered accountants etc. to submit a report or furnish information. The occasion for the BIFR to do so would arise only after it commences an inquiry. As we have noticed above, the inquiry commenced, in this case, on 12.07.2005, the date on which the reference received by the BIFR. Therefore, the assistance that is contemplated in Regulation 40 is one which would be sought after the commencement of the inquiry by the BIFR and not some pre-existing report.

18. Having surveyed the various statutory provisions as well as the applicable regulations, we are of the clear view that the BIFR, once it receives a reference from the Board of Directors of the company, is duty bound to determine as to whether the company has become a sick industrial company or not. In the present case, we find that he BIFR did not return any such finding either way. All that the BIFR did was to reject the reference on the plea that the petitioner company had not approached the BIFR with clean hands, inasmuch as there were serious allegations in the IA report submitted by M/s ANG and Associates. The BIFR also rejected the reference on the ground that no reply to the IA report had been submitted by the petitioner company despite repeated opportunities. We are of the view that this approach is not in consonance with the law. Irrespective of the alleged conduct of the petitioner company, once a reference is received by the BIFR it has to make an inquiry for

determining whether the company in question has become a sick industrial company or not. In the present case, we find that no such inquiry, as contemplated under Section 16 of the SICA, was embarked upon by the BIFR. On the contrary, BIFR, in fact, did not give any finding in so far as the IA report in respect of the petitioner company is concerned.

19. An attempt was sought to be made by the learned counsel appearing on behalf of the respondents to bring the IA report within Section 16(1)(b) of SICA. But, we are afraid, it would not be possible for us to agree with that contention. This is so because Section 16(1)(b) refers to information or knowledge of the BIFR with regard to the initiation of an inquiry for determining whether the company has become a sick industrial company or not. The IA report is certainly not such an information. In any event, once a reference has been made under Section 15, then, it will be Section 16(1)(a) which would apply and not Section 16(1)(b).

20. In so far as AAIFR is concerned, we are in agreement with the submission made by Mr Sibal that while the IA reports concerning SSL, SML and SCL were considered in some detail by the AAIFR, the IA report in respect of the petitioner company was not so considered. We are also in agreement with the submission made by Mr Sibal that upon reading the discussion of the IA reports concerning SSL, SML and SCL, it appears that these companies had allegedly exaggerated their figures on the assets side and this apparently puffed up their health in order to obtain loans from financial institutions. Although these are allegations, to which Mr Sibal obviously does not agree with, he states that on a demurer, even if this were to be true, it only reflects that the health of the companies had been propped up and not the other way round. What he meant was that if the allegations contained in the IA reports were taken to be true, they would reflect that the companies were sicker than they were actually portrayed to be in the audited accounts which the said companies submitted along with their references. In any event, we need not deal with this aspect of the matter any further, inasmuch as no such exercise had been done by the AAIFR in the case of the petitioner company.

21. Furthermore, Mr Sibal also pointed out that Bank of India, which was one of the lending organizations in so far as the group companies are concerned, had filed a complaint before the Institute of

Chartered Accountants of India against Mr Kapil Dev Aggarwal who was part of M/s B. Aggarwal and Company who were the statutory auditors of the group companies including the petitioner company. The complaint essentially was that the said Chartered Accountants had wrongly certified the accounts of the said group companies as being accurate when they were allegedly not so. These very accounts were before the BIFR and AAIFR in the shape of the documents accompanying the reference. A copy of the order dated 12.06.2008 passed by the Institute of Chartered Accountants of India dismissing the complaint of Bank of India has been placed on record. Mr Sibal has taken us through paragraphs 14.1, 14.2 and certain other portions of the said order to indicate that even Mr A.N. Gupta of M/s ANG and Associates had stated before the institute that he had prepared the IA, inter alia, on the basis of unconfirmed information from unauthorized sources and that the said report comprised merely of observations and opinions based on such information.

22. On the basis of this statement Mr Sibal submitted that the IA report could not have been treated as sacrosanct as had been done by the AAIFR. It was in the light of these facts that a greater duty was cast upon the BIFR as well as the AAIFR in conducting its own inquiry and not merely relying upon the IA reports prepared by M/s ANG and Associates and that too at the instance of IDBI which was a creditor institution and was interested in opposing the reference.

23. Considering the above facts, we are in agreement with the submission made by Mr Sibal that the so-called irregularities pointed out in the IA reports ought not to have been solely relied upon by the BIFR or the AAIFR for coming to the conclusion that the said report seriously impaired the accuracy or the credibility of the accounts. In any event, there has been no discussion with regard to the IA report concerning the petitioner company and what is of greater significance even while the AAIFR considered the accounts of the other three group companies, it did not do so in the case of the petitioner company. The AAIFR was also wrong in coming to the conclusion that in the absence of credible accounts any exercise aimed at determining the sickness and subsequent measures to deal with it were bound to be vitiated. We are of the view that where the accounts presented by the company are to be trashed, it is incumbent upon the BIFR to inquire into the affairs of the company itself and to determine as to whether it is a sick company or not. In rejecting the

reference by holding that the exercise of determining the sickness was bound to be vitiated, the BIFR as also the AAIFR, has abdicated its very vital function which is mandated by Section 16 of SICA, which is to conduct an inquiry.

24. Although, we do not agree with the argument on lack of opportunity which was advanced by Mr Sibal, but, on this aspect of the matter alone that the BIFR did not return a finding with regard to the company being a sick company or not, we feel that the impugned order is liable to be set aside but, only, to the extent relating to the petitioner company in Appeal No. 242/2006. It is ordered accordingly.

25. It is made clear that while we may have made certain observations concerning the other group companies, we have not decided anything on merits in so far as those other three group companies are concerned and that the order passed by the AAIFR in respect of those group companies was also not in challenge before us. The net result of the above discussion is that the impugned order concerning the petitioner company alone is set aside and the matter is remanded to the BIFR for conducting an inquiry under Section 16 of the SICA for the purpose of determining whether the petitioner company has become a sick industrial company or not and to proceed thereafter in accordance with law. On the issue of „sickness., also, we make it clear that we have not expressed any opinion either way.

26. The parties shall appear before the BIFR for this purpose in the first instance on 09.03.2011. It is clearly understood that a copy of the IA report concerning the petitioner company shall be supplied by the counsel for respondent nos. 2 to 4 to the counsel for the petitioner company within two weeks. We may also point out that it is expected that the BIFR will conduct the inquiry, as expeditiously as possible, as is the requirement under Section 16(3) of the said Act.

27. This writ petition is allowed to the aforesaid extent. There shall be no order as to costs.

ILR (2011) DELHI 444

RSA

SMT. BHAGWANTI ....APPELLANT

VERSUS

SHRI KANSHI RAM THROUGH LEGAL HEIRS ....RESPONDENT

(INDERMEET KAUR, J.)

RSA NO. : 152-158/2006 & CM NO. : 1845/2009 **DATE OF DECISION: 08.02.2011**

Code of Civil Procedure, 1908—Order 22 Rule 4—Regular Second Appeal against the judgment of Appellate Court endorsing the judgment of Trial Court dismissing the suit seeking injunction against defendant who had died during pendency of suit. Whether right to sue survives against the legal heirs when suit is simplicitor suit for permanent injunction—Held—Cause of action against the deceased alone, grievance against defendant in his personal capacity. Cause of action does not extent to legal representatives. Appeal dismissed.

The present suit was a simplicitor suit for permanent injunction. The relief claimed was against the sole defendant Kanshi Ram to restrain him and his associates etc. from making any kind of interference in the construction work of the first floor of Shop No.136, New Rajinder Nagar Market. New Delhi. According to the plaintiff the cause of action arose when the defendant started making interference in the construction work of the plaintiff in the suit property. His case was that he has sanction from the Municipal Corporation of Delhi to carry out the construction and the interference by the defendant was unwarranted. Admittedly, the defendant had expired on 5.10.2003. It is clear from the pleadings that

the cause of action has arisen in favour of the plaintiff and against the deceased defendant alone; the grievance of the plaintiff was against the defendant in his personal capacity. It can in no manner be said that the cause of action extended to his legal representatives. The findings of the Courts below calls for no interference. In 110(2004) DLT 662 **Asha Batra Vs. Dharam Devi** a similar question had arisen wherein also a Bench of this Court had held that a suit for injunction would come to an end on the death of the sole defendant as the plea of forcible dispossession set up by the plaintiff would become an illusion on the death of the said defendant. **(Para 3)**

Important Issue Involved: In a simplicitor suit for permanent injunction where the grievance against defendant is in his personal capacity, the right to sue does not survice against the legal heirs on the death of the defendant.

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. B.K. Patel, Advocate.

FOR THE DEFENDANT : Mr. Satish Kumar Tripathi, Advocate.

CASE REFERRED TO:

1. *Asha Batra* vs. *Dharam Devi* 110(2004) DLT 662.

RESULT: Appeal dismissed.

INDERMEET KAUR, J. (Oral)

1. This appeal has impugned the judgment and decree dated 26.10.2005 which had endorsed the finding of the trial judge dated 16.10.2004 whereby the suit filed by the plaintiff Bhagwanti Devi seeking injunction against the defendant Kanshi Ram had been dismissed. The defendant Kanshi Ram had died on 10.2.2003. An application under Order 22 Rule 4 of the Code of Civil Procedure (hereinafter referred to as 'the Code') had been filed by the plaintiff seeking to implead the legal representatives of the deceased defendant. The application had been

contested on the ground that the right to sue does not survive against the legal heirs of the deceased as the suit was simplicitor a suit for permanent injunction. Allegations made in the plaint were against the defendant in his personal capacity and not against the legal heirs of the deceased defendant. These contentions of the defendant were upheld. The application under Order 22 Rule 4 of the Code had been dismissed. The result was that the suit also stood dismissed. This finding was affirmed by the first Appellate Court.

2. This is a second appeal. This Court can interfere with the fact findings of the Courts below only if a substantial question of law arises. Substantial questions of law have not been mentioned in the body of the appeal. On this ground alone the appeal is liable to be dismissed. However, in view of the oral submission made by learned counsel for the appellant as also his submission that the grounds of appeal which have been mentioned in the body of the appeal be treated as the substantial questions of law, further arguments have been addressed by the learned counsel for the parties on this score. The grounds of appeal as mentioned in the body of the appeal are accordingly treated as the substantial questions of law phrased by the appellant. They have been perused; they all border on the proposition as to whether where the sole defendant had died, the cause of action survives against his legal representatives, which is propounded on the premise of the applicability of provisions of Order 22 Rule 4 of the Code.

3. The present suit was a simplicitor suit for permanent injunction. The relief claimed was against the sole defendant Kanshi Ram to restrain him and his associates etc. from making any kind of interference in the construction work of the first floor of Shop No.136, New Rajinder Nagar Market. New Delhi. According to the plaintiff the cause of action arose when the defendant started making interference in the construction work of the plaintiff in the suit property. His case was that he has sanction from the Municipal Corporation of Delhi to carry out the construction and the interference by the defendant was unwarranted. Admittedly, the defendant had expired on 5.10.2003. It is clear from the pleadings that the cause of action has arisen in favour of the plaintiff and against the deceased defendant alone; the grievance of the plaintiff was against the defendant in his personal capacity. It can in no manner be said that the cause of action extended to his legal representatives. The

findings of the Courts below calls for no interference. In 110(2004) DLT 662 **Asha Batra Vs. Dharam Devi** a similar question had arisen wherein also a Bench of this Court had held that a suit for injunction would come to an end on the death of the sole defendant as the plea of forcible dispossession set up by the plaintiff would become an illusion on the death of the said defendant.

4. No substantial question of law has arisen. Appeal as also pending application is dismissed in limine.

5. Needless to say that the appellant may avail any other legal remedy if available to him.

ILR (2011) DELHI 447
CS(OS)

ABASKAR CONSTRUCTION PVT. LTD. ....PLAINTIFF

VERSUS

PAKISTAN INTERNATIONAL AIRLINES ....DEFENDANT

(V.K. JAIN, J.)

CS(OS) NO. : 1128/2006 DATE OF DECISION: 09.02.2011

Indian Contract Act, 1872—Section 23—Registration Act, 1908—Section 17 and 49—Transfer of Property Act, 1882—Section 106 and 116 Code of Civil Procedure, 1908—Section 34—As per lease deed, defendant/lessee agreed to pay increase in House Tax—Rateable value of property increased and NDMC demanded difference of tax—Plaintiff/lessor demanded increased tax from defendant—Suit filed to recover increased tax—Plea of defendant that defendant liable only in case of increase in levies or rates other than rates of house tax and ground rent—What has been increased is

reteable value and not the rate of house tax, no liability in respect of house tax can be imposed on it—Since no registered sale deed was executed after lease deed expired by efflux of time, terms and conditions contained in lease deed are not binding on defendant and house tax for period after expiry of agreed terms of lease cannot be recovered from defendant—Held—Agreement by tenant agreeing to bear increase in house tax of premises taken by him on rent is perfectly legal and binding on parties—There can be no logic behind agreeing to pay increase in amount of house tax as a result of increase in rate of which tax is levied on reteable value and not paying in case increase is due to enhancement of rateable value—What is material to parties is net outgo towards house tax, irrespective of whether it increases/decreases due to revision of rateable value or due to revision of rates—Even on expiry of terms of lease, terms and conditions contained in lease deed continue to bind parties, so long as defendant was holding over tenancy premises—Suit decreed.

It would be seen from a perusal of Clause 2 above that the monthly rent of Rs.3,51,200/- agreed between the parties was inclusive of house tax and ground rent besides other levies, taxes etc. and out goings, to the extent they were imposed by the Government or any local body, which in this case would be NDMC. This, of course, has been made subject to Clause 4(ix) of the lease deed. A lease deed, in which it is specifically stated that the agreed rent was inclusive of house tax, would be different from the lease deed, which provides that it will be the responsibility of the lessor. In the former case, it becomes the contractual liability of the lessee, whereas in the later case it does not form part of the rent and therefore does not become a component of his contractual obligation to the lessor. Though in its letter dated 18th May, 2004, which is Exhibit P-6, the defendant claimed that to expect a lessee to contribute towards payment

of house tax on the same being enhanced in future would be an unconscionable and illegal term of agreement, not enforceable in a Court of law, my attention has not been drawn to any legal provision, which would render such an agreement illegal or unenforceable in law. There is no illegality in the tenant agreeing to bear increase in house tax of the premises taken by him on rent. Section 23 of the Indian Contract Act, 1872, to the extent it is relevant, provides that the consideration or object of an agreement is lawful, unless (a) it is forbidden by law; or (b) is of such a nature that, if permitted, it would defeat the provisions of any law; or (c) is fraudulent; or (d) involves or implies, injury to the person or property of another; or (e) the Court regards it as immoral, or opposed to public policy. None of the above referred elements are present in an agreement by a tenant to agree to pay increase in the amount of house tax, so long as he is in occupation of the tenanted premises. Since, none of the clauses contained in Section 23 of the Indian Contract Act, 1872 are attracted to such an agreement, the agreement is perfectly legal and binding on the parties. **(Para 8)**

The next contention of the learned counsel for the defendant was that the defendant can be made liable only if there is an increase in the rate on which the house tax is levied and will not be liable in case there has been increase in the ratable value, without any change in the rate of tax. This was also the stand taken by the defendant in its letter dated 18th May, 2004. I, however, find no merit in the contention. There can be no logic behind agreeing to pay increase in the amount of house tax as a result of increase in rate at which tax is levied on the ratable value and not paying in case the increase is due to enhancement of ratable value. What is material to the parties is the net outgo towards house tax, irrespective of whether it increases/decreases due to revision of ratable value or due to revision of rates. It is important to note in this regard that the words used in Clause 4(ix) of the lease deed refer not only to rates but

also to 'all out goings', which the lessee (defendant) was liable to pay, proportionate to the area of the building 'Kailash' which it had taken on rent and the outgoing would be the amount of house tax, irrespective of the ratable value or the rate on which it is calculated. Clause 2 of the lease deed is quite clear in this regard and there can be no dispute that the amount of Rs.3,51,200/- per month, which the defendant had agreed to pay as monthly rent was inclusive of house tax meaning thereby that house tax was a contractual liability of the defendant in terms of Clause 2 of lease deed though it was included in the monthly rent agreed between the parties. In fact, there would be 'outgoings' agreed to be paid by the defendant, if house tax and ground rent are kept out of its ambit and, therefore, would form part of the 'outgoings', which the defendant was liable to pay. In fact the word 'out goings', which has been used not only in Clause 2 but also in Clause 4(ix), leaves no scope for any dispute in this regard. Hence, the amount of house tax irrespective of ratable value fixed by the NDMC or the rate of tax decided by it for a particular, which the plaintiff was required to pay the NDMC would be covered under the expression out goings used in Clause 4(ix) of the lease deed.

In fact, even the term 'levies', in the context the word has been used in Clause 4(ix) of the lease deed when read with Clause 2 thereof would also include the house tax, payable to NDMC. The term 'levy' as defined in Shorter Oxford English Dictionary includes the collection of an assessment, duty or tax and since house tax is collected on assessment and is also a tax, there is no scope for disputing that the term 'levy' would include the amount of house tax, payable to a local/statutory body such as NDMC, which imposes this levy in exercise of the statutory powers conferred on it by the NDMC Act. **(Para 9)**

It was contended by the learned counsel for the defendant that since no registered sale deed was executed after the lease deed dated 31st December, 1996 expired by afflux of

time, the terms and conditions contained in clause 4(ix) of the lease deed are not binding on the defendant and consequently, the house tax for the period after expiry of the agreed term of the lease cannot be recovered from the defendant. In this regard, he placed reliance on Section 49 of Registration Act, which provides that no document, required by Section 17 or by any provisions of Transfer of Property Act, 1982 to be registered shall affect any immovable property comprised therein, or be received as evidence of any transaction affecting such property unless it has been registered. I, however, find no merit in this contention. The reliance on Section 49 of Registration Act, in my view, is wholly misplaced for the simple reason that the lease deed dated 31st December, 1996 was duly registered on 02nd January, 1997 and, therefore, the disability attached to a document, which is required to be compulsorily registered and is not registered, is not attracted to this document.

The relevant statutory provision in this regard would be Section 116 of Transfer of Property Act which, to the extent it is relevant, provides that if a lessee remains in possession of the tenancy premises after the determination of the lease granted to him, and the lessor or his legal representative accepts rent from the lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106. Section 106 of Transfer of Property Act, to the extent it is relevant, provides that in the absence of a contract or local law or usage to the contrary, a lease of immoveable property for other than agricultural or manufacturing purposes shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice. Therefore, since the plaintiff allowed the defendant to continue in possession of the tenancy premises and also accepted rent from it, even after the term of the lease had expired by afflux of time, the lease came to be renewed from

month to month being a lease for commercial purpose. The use of the expression 'renewed' in Section 116 of Transfer of Property Act clearly implies that the parties in the event of a tenant holding over the property on determination of the lease, would be governed by the terms and conditions of the lease which stands determined, unless they enter into a fresh agreement contrary to the terms and conditions of the lease which stand determined.

This was the view taken by the Division Bench of Calcutta High Court in **Krishna Char an Sukladas vs. Nitya Sundari Devi** AIR 1926 Calcutta 1239 as well as by a Division Bench of Allahabad High Court in **Zahoor Ahmad Abdul Sattar vs. State of Uttar Pradesh and Anr.** AIR 1965, Allahabad 326 and by Madras High Court in **K. Gnanadesikam Pillai and Ors. vs. Antony Benathu Boopalarayar** AIR 1934 Madras 458. The decision of the Allahabad High Court in the case of **Zahoor Ahmad** (supra) was affirmed by Supreme Court in The **State of U.P. vs. Zahoor Ahmad and Anr.** AIR 1973 SC 2520. This was also the view of the Federal Court in **Kai Khushroo Bezonjee Capadia vs. Bai Jerbai Hirjibhoy Warden and Anr.** AIR 1949 FC 124, where the Court agreed with the following statement contained in Woodfall's "Law of Landlord and Tenant"

> "Where a tenant for a term of years holds over after the expiration of his lease he becomes a tenant on sufferance, but when he pays or expressly agrees to pay any subsequent rent at the previous rate a new tenancy from year to year is thereby created upon the same terms and conditions as those contained in the expired lease so far as the same are applicable to and not inconsistent with an yearly tenancy."

I, therefore, hold that even on expiry of the terms of the lease, the terms and conditions contained in the lease deed continued to bind the parties, so long as the defendant was holding over the tenancy premises. **(Para 16)**

Important Issue Involved: (A) A lease deed, in which it is specifically stated that the agreed rent was inclusive of house tax, would be different from the lease deed, which provides that it will be the responsibility of the lessor. In the former case, it becomes the contractual liability of the lessee, whereas in the later case it does not form part of the rent and therefore does not become a component of his contractual obligation to the lessor.

(B) Intention of the parties has to be gathered by reading the document as a whole and as far as possible, the Court, while construing the terms and conditions contained in a document, should try to construe that in such a manner so as to give effect to all of them and not to make any of them nugatory or superfluous.

(C) In the event of a tenant holding over the property on determination of the lease, he would be governed by the terms and conditions of the lease which stands determined, unless they enter into a fresh agreement contrary to the terms and conditions of the lease which stand determined.

[Ar Bh]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Neeraj Kishan Kaul, Sr. Advocate with Mr. Jasmeet Singh, Mr. Saurabh Tiwari, Mr. Karan Luthra and Mr. K.D. Sengupta, Advocates.

FOR THE DEFENDANT : Mr. Sanjeev Kappor, Ms. Shahana Farah and Mr. S. Patra, Advocates.

CASES REFERRED TO:

1. *Sharda Nath* vs. *Delhi Administration and Ors.* 149 (2008) DLT 1.

2. *State of U.P.* vs. *Zahoor Ahmad and Anr.* AIR 1973 SC 2520.
3. *DDA* vs. *Durga Chand Kaushish,* AIR 1973 (2) SCC 825.
4. *Zahoor Ahmad Abdul Sattar* vs. *State of Uttar Pradesh and Anr.* AIR 1965, Allahabad 326.
5. *Radha Sunder Dutta* vs. *Mohd. Jahadur Rahim and Ors.* AIR 1959 SC 24.
6. *Kai Khushroo Bezonjee Capadia* vs. *Bai Jerbai Hirjibhoy Warden and Anr.* AIR 1949 FC 124.
7. *K. Gnanadesikam Pillai and Ors.* vs. *Antony Benathu Boopalarayar* AIR 1934 Madras 458.
8. *Krishna Char an Sukladas* vs. *Nitya Sundari Devi* AIR 1926 Calcutta 1239.

RESULT: Allowed.

V.K. JAIN, J.

1. This is a suit for mandatory injunction and recovery of Rs.69,84,900/-. The defendant was a tenant under the plaintiff in respect of flat No.102, Kailash Building, 26 Kasturba Gandhi Marg, New Delhi-110001. The premises to the defendant were let out vide lease deed dated 31st December, 1996, which was registered on 2nd January, 1997. The case of the plaintiff is that under the terms of the lease deed, particularly Clauses 4(ix) and 5(i) thereof, the increase, if any, in the house tax was to be borne by the defendant. On receipt of bills for the assessment years 1997-98, 1998-99 and 1999-2000 for Rs.93,936/-, 93,936/- and 1,17,420/- respectively, the plaintiff demanded the aforesaid amounts from the defendant . The increase in amount of house tax for the year 1999-2000 was duly paid by the defendant. However, the bills for the years 1997-98 and 1998-99 were forwarded by the defendant to its Head Office. For the year 2000-01, the plaintiff received a bill for Rs.1,17,400/- and accordingly it requested the defendant to reimburse the amount of Rs.46,948/- being increase in house tax payable by the defendant for the year 2000-01. The defendant made payment of the increase in house tax for the years 1997-98, 1998-99 and 2000-01 vide its cheque dated 24th January, 2001. The bills for the years 2001-02 and 2002-03 were also received by the plaintiff and the defendant was asked to reimburse the

amount of Rs.70,416/- to the plaintiff being the amount of increase in house tax for the years 2001-02 and 2002-03.

2. It is further alleged that the ratable value of the property was increased to Rs.45,89,400/- with effect from 1st September, 1999 and to Rs.55,53,200/- with effect from 1st September, 2002. Based on the above referred assessment order, the NDMC issued a bill to the plaintiff demanding a sum of Rs.60,83,958/- being the difference of tax for the period from 1st April, 1999 to 31st March, 2004. Being aggrieved, the plaintiff filed a suit for injunction against the NDMC and the demand was stayed by this Court, subject to the plaintiff depositing a sum of Rs.40,00,000/- with the NDMC. The plaintiff, in compliance of the order of the Court, deposited the aforesaid amount with NDMC. The plaintiff also asked the defendant to pay the amount of Rs.40,93,884/- being the difference in the amount of house tax for the period from 1st April, 1999 to 31st March, 2004. The defendant vide its letter dated 18th May, 2004 denied its liability to make payment of increase in house tax.

3. It is also alleged that for the year 2004-05, the plaintiff received a bill for Rs.15,15,960/- from the NDMC and paid that amount on 21st November, 2004. The plaintiff, thereafter, asked the defendant to reimburse the amount of Rs.14,45,508/- along with earlier demanded sum of Rs.40,93,884/-. For the year 2005-06 also, the plaintiff received a bill for Rs.15,15,960/- and paid that amount to the NDMC. The increase in house tax which, according to the plaintiff, was payable by the defendant in terms of lease deed is claimed to be Rs.14,45,508/-. The plaintiff has now claimed the aforesaid three sums making a total sum of Rs.69,84,900/-.

4. The defendant has contested the suit. It has taken preliminary objection that the suit is barred by limitation. It is also alleged that the claim of the plaintiff for the amount of Rs.40,00,000/- deposited in compliance of the order passed by this Court in CS(OS) No.387/2004 having not attained finality, it cannot recover the aforesaid amount from the plaintiff and to this extent the suit is premature. On merits, referring to Clause 4(ix) of the lease deed, it has been stated that the aforesaid clause applies only in case of increase in levies or rates other than the rates of house tax and ground rent. It is also stated by the defendant that since what has been increased is ratable value and not the rate of house

tax, no liability in respect of house tax can be imposed it. As regards payment of Rs.46,948/- to the plaintiff with respect to increase in house tax for the year 1999-2000, it has been claimed that the letter dated 22nd February, 2000 enclosing cheque for the aforesaid amount was written under a bona fide mistake and misunderstanding. Similar stand has been taken by the defendant with respect to payment of Rs.93,916/- for the years 1997-98, 1998-99 and 2000-01.

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

(i) Whether the suit is within limitation? OPP.

(ii) Whether the increased house tax was to be borne by the defendant? OPP.

(iii) Whether the plaintiff is entitled to interest? If so, at what rate and to what amount? OPP.

(iv) Relief.

ISSUE NO.(i)

6. It is not in dispute that amount of Rs.40,00,000/-, which the plaintiff deposited in compliance with the interim order passed by this Court in CS(OS) No.387/2004 was deposited with NDMC vide cheque dated 26th April, 2004. The plaintiff had absolutely no cause of action to claim this amount from the defendant without first paying it to NDMC. Computed from 26th April, 2004, the suit, having been filed on 23rd May, 2006, is well within time. The payment of Rs.15,15,960/- for the year 2004-05 was made by the plaintiff on 20th November, 2004 whereas payment for the year 2005-06 was made on 13th January, 2006. The suit with respect to both these payments is also well within time. The issue is, accordingly, decided against the defendant and in favour of the plaintiff.

ISSUE NO.(ii)

7. There is no dispute between the parties with respect to facts and the parties agreed not to lead evidence. The lease deed executed between the parties is exhibit D-1 and is an admitted document. Clause 2, 4(ix) and 5(i) of the lease deed to which the parties have referred during arguments read as under:-

"2. The aforementioned monthly rental of Rs.338200.00 and of Rs.13000.00 totaling Rs.351200.00 is, inclusive of house

tax, ground rent and other levies, taxes, rates, cesses, out goings etc. whatsoever imposed by the Government or any authority or local body whatsoever, subject to the terms and conditions contained in Clause 4(ix) hereinafter.

4(ix) To pay to the Lessor for increase in the existing levies, rates, cesses that may be affected by the Government or any statutory authority including all out goings that a Lessee is liable to pay proportionate to the area of the Building "Kailash" in occupation of the Lessee subject to the Lessee being satisfied about the payment of the same by the Lessor.

5(i) To pay all house-taxes, ground rents and other municipal levies, cesses and taxes, out goings whatsoever etc., imposed from time to time by the Government, local authority or any other statutory body, including the Municipal Authority, Land and Development Officer, Delhi Development Authority as well as any increase therein imposed in respect of the building 'Kailash' or the demised premises, subject to the provisions of Clause (ix) of Para 4 herein before, it being further agreed that in case of reduction in any existing levies, rates cesses referred to in Clause (ix) of para 4 herein before which the Lessee is liable to pay, the Lessee shall have the benefit thereof proportionate to the area of the building 'Kailash' in occupation of the Lessee."

8. It would be seen from a perusal of Clause 2 above that the monthly rent of Rs.3,51,200/- agreed between the parties was inclusive of house tax and ground rent besides other levies, taxes etc. and out goings, to the extent they were imposed by the Government or any local body, which in this case would be NDMC. This, of course, has been made subject to Clause 4(ix) of the lease deed. A lease deed, in which it is specifically stated that the agreed rent was inclusive of house tax, would be different from the lease deed, which provides that it will be the responsibility of the lessor. In the former case, it becomes the contractual liability of the lessee, whereas in the later case it does not form part of the rent and therefore does not become a component of his contractual obligation to the lessor. Though in its letter dated 18th May, 2004, which is Exhibit P-6, the defendant claimed that to expect a lessee to contribute towards payment of house tax on the same being enhanced in future

would be an unconscionable and illegal term of agreement, not enforceable in a Court of law, my attention has not been drawn to any legal provision, which would render such an agreement illegal or unenforceable in law. There is no illegality in the tenant agreeing to bear increase in house tax of the premises taken by him on rent. Section 23 of the Indian Contract Act, 1872, to the extent it is relevant, provides that the consideration or object of an agreement is lawful, unless (a) it is forbidden by law; or (b) is of such a nature that, if permitted, it would defeat the provisions of any law; or (c) is fraudulent; or (d) involves or implies, injury to the person or property of another; or (e) the Court regards it as immoral, or opposed to public policy. None of the above referred elements are present in an agreement by a tenant to agree to pay increase in the amount of house tax, so long as he is in occupation of the tenanted premises. Since, none of the clauses contained in Section 23 of the Indian Contract Act, 1872 are attracted to such an agreement, the agreement is perfectly legal and binding on the parties.

9. The next contention of the learned counsel for the defendant was that the defendant can be made liable only if there is an increase in the rate on which the house tax is levied and will not be liable in case there has been increase in the ratable value, without any change in the rate of tax. This was also the stand taken by the defendant in its letter dated 18th May, 2004. I, however, find no merit in the contention. There can be no logic behind agreeing to pay increase in the amount of house tax as a result of increase in rate at which tax is levied on the ratable value and not paying in case the increase is due to enhancement of ratable value. What is material to the parties is the net outgo towards house tax, irrespective of whether it increases/decreases due to revision of ratable value or due to revision of rates. It is important to note in this regard that the words used in Clause 4(ix) of the lease deed refer not only to rates but also to 'all out goings', which the lessee (defendant) was liable to pay, proportionate to the area of the building 'Kailash' which it had taken on rent and the outgoing would be the amount of house tax, irrespective of the ratable value or the rate on which it is calculated. Clause 2 of the lease deed is quite clear in this regard and there can be no dispute that the amount of Rs.3,51,200/- per month, which the defendant had agreed to pay as monthly rent was inclusive of house tax meaning thereby that house tax was a contractual liability of the defendant in terms of Clause 2 of lease deed though it was included in the monthly rent agreed between

the parties. In fact, there would be 'outgoings' agreed to be paid by the defendant, if house tax and ground rent are kept out of its ambit and, therefore, would form part of the 'outgoings', which the defendant was liable to pay. In fact the word 'out goings', which has been used not only in Clause 2 but also in Clause 4(ix), leaves no scope for any dispute in this regard. Hence, the amount of house tax irrespective of ratable value fixed by the NDMC or the rate of tax decided by it for a particular, which the plaintiff was required to pay the NDMC would be covered under the expression out goings used in Clause 4(ix) of the lease deed.

In fact, even the term 'levies', in the context the word has been used in Clause 4(ix) of the lease deed when read with Clause 2 thereof would also include the house tax, payable to NDMC. The term 'levy' as defined in Shorter Oxford English Dictionary includes the collection of an assessment, duty or tax and since house tax is collected on assessment and is also a tax, there is no scope for disputing that the term 'levy' would include the amount of house tax, payable to a local/statutory body such as NDMC, which imposes this levy in exercise of the statutory powers conferred on it by the NDMC Act.

10. Clause 5 of the lease deed, to the extent it is relevant, to my mind, means that the plaintiff was required to pay, to the concerned Statutory Authority, the house tax imposed from time to time as well as any increase thereon, in respect of the tenanted premises and subjecting it to the provisions of Clause 4(ix) of the lease deed mean that the increase in house tax, once paid by the plaintiff, was to be borne by the defendant, to the extent it pertained to the premises let out to the defendant. Another noteworthy feature of Clause 5(i) of the lease deed is that any reduction in the existing levies/rates, which to my mind would include house tax and which the defendant had agreed to pay to the plaintiff, was to be passed on by the plaintiff to the defendant. Moreover, the contention that the increase in house tax, irrespective of whether it was on account of revision of retable value or revision of rates was not to be reimbursed by the defendant to the plaintiff, runs contract to the stand taken by the defendant in its letter dated 18th May, 2004.

11. It was also the contention of the learned counsel for the defendant that the terms of the lease deed do not indicate that increase in the house tax was to be reimbursed by the defendant. In this regard, his submission was that omission of house tax and ground rent in Clause 4(ix) and the

later part of Clause 5(i) of the lease deed cannot be lost sight of and that had the parties agreed for reimbursement of increase in house tax by the defendant to the plaintiff, there could be no reason for them to omit the words 'house tax and ground rent', particularly from Clause 4(ix) of the lease deed. I, however, do not find myself in agreement with the learned counsel for the defendant, for three reasons. Firstly, the term 'all out goings', which has been used in Clause 4(ix) of the lease deed, would include the liability towards house tax, which under Clause 2(i) of the lease deed was a part of the rent agreed between the parties and was an out go from the pocket of the plaintiff. There could have been no reason for the parties to use a general expression such as 'out goings', which is a word of wide amplitude, if the intention was to exclude house tax and ground rent from the scope of the sub-clause. Secondly, as I have said earlier, the term 'levy' would include the house tax, which NDMC can recover in exercise of statutory powers conferred upon it by NDMC Act and this expression has been used in Clause 4(ix) as also in the later part of Clause 5(i) of the lease deed. Thirdly, my attention has not been drawn to any other levy or cess imposed by a statutory authority on a commercial building. When the parties agreed vide clause 4(ix) that any increase in the existing levies will be paid by the lessee to the lessor, in proportionate to the area building Kailash in occupation of the lessee and further agreed vide later part of clause 5(i) that in case of reduction in any existing levies referred to clause 4(ix), the lessee shall have the benefit thereof, proportionate to the aforesaid area, there must have been some levy existing at the time the lease deed was executed. Use of the expression 'existing' in clause 4(ix) and later part of clause 5(i) cannot be meaningless and, therefore, this expression could have been intended only in respect of house tax. It is difficult to accept that the defendant agreed to pay increase in 'existing' levies, imposed by the Government or statutory authority without there being any existing at that time. Since no existing levy other than house tax has been brought to my notice, the obvious inference is that the parties, while referring to increase or decrees in existing levies, had the house tax payable in respect of the tenancy premises, in their mind.

12. It is settled rule of interpretation of document that the intention of the parties has to be gathered by reading the document as a whole and as far as possible, the Court, while construing the terms and conditions contained in an document, should try to construe them in such a manner

so as to give effect to all of them and not to make any of them nugatory or superfluous.

In **DDA vs. Durga Chand Kaushish,** AIR 1973 (2) SCC 825, the Supreme Court reiterated the following propositions of law laid down by it in **Radha Sunder Dutta vs. Mohd. Jahadur Rahim and Ors.** AIR 1959 SC 24

> "Now, it is a settled rule of interpretation that if there be admissible two constructions of a document, one of which will give effect to all the clauses therein while the other will render one or more of them nugatory, it is the former that should be adopted on the principle expressed in the maxim 'ut res magis valeat quam pereat'".

It was observed by a Division Bench of this Court in **Sharda Nath vs. Delhi Administration and Ors.** 149 (2008) DLT 1 that where two clauses of a document disclose some conflict and contradiction, but the clauses can be reconciled, one should give effect to all the clauses rather than render one or more of them as nugatory.

If the interpretation given by learned counsel for the defendant is accepted, Clause 4(ix) of the lease deed would be rendered superfluous since no levy other than house tax or ground rent was either applicable or even in contemplation of parties, at the time when the lease deed was executed.

13. The admitted facts also clearly show that the defendant had understood the terms and conditions of the lease deed to mean that any increase in the quantum of house tax was to be paid by it to the plaintiff to the extent the increase pertained to the premises let out to it in Kailash building. Admittedly, the defendant paid increase in house tax in the year 1997-98 to 2000-01. Had the intention of the parties been to the contrary, the defendant would not have reimbursed the increase in house tax for the aforesaid years to the plaintiff.

It was contended by the learned counsel for the defendant that these payments were made under a mistake. However, the written statement does not specify how and in what circumstances the alleged mistake came to be committed by the defendant. In the absence of any such explanation, the plea taken by the defendant in this regard, cannot be considered to be a genuine plea and needs to be out rightly rejected.

14. It was also contended by the learned counsel for the defendant that the suit is premature since the demand of house tax has been challenged by the plaintiff in a civil suit and in the event of the suit being decided in its father, the amount deposited by the plaintiff with NDMC would be refunded to it. In my view, the contention is misconceived. NDMC has already raised demand on the plaintiff. The demand was stayed by this Court subject to deposit of Rs 40 lakhs with NDMC. Therefore, the money has gone out of the pocket of the plaintiff to the pocket of NDMC. Once the plaintiff has made payment to NDMC, whether of its own or under an order of the Court, it is entitled to recover the increase in house tax to the extent it pertains to the premises which was let out to the defendant from the defendant. Of course, in the event of the Court deciding in favour of the plaintiff and directing NDMC to either refund or adjust the whole or part of the amount of Rs 40 lakhs deposited by it with NDMC, the defendant would be entitled to immediate refund of that amount from the plaintiff. In the event of NDMC paying any interest to the plaintiff on the aforesaid amount, the defendant will also be entitled to payment of that amount from the plaintiff. As far as demands for the years 2004-2005, 2005-2006 is concerned, the plaintiff having already deposited the same with the NDMC is entitled to recover that amount from the defendant. The issue is decided against the defendant and in favour of the plaintiff.

Issue No. 3

15. The plaintiff has not claimed any interest for the pre-suit period. The pendente lite and future interest, however, it is in the discretion of the Court, as provided in Section 34 of the Code of Civil Procedure. The issue is decided accordingly.

16. It was contended by the learned counsel for the defendant that since no registered sale deed was executed after the lease deed dated 31st December, 1996 expired by afflux of time, the terms and conditions contained in clause 4(ix) of the lease deed are not binding on the defendant and consequently, the house tax for the period after expiry of the agreed term of the lease cannot be recovered from the defendant. In this regard, he placed reliance on Section 49 of Registration Act, which provides that no document, required by Section 17 or by any provisions of Transfer of Property Act, 1982 to be registered shall affect any immovable property comprised therein, or be received as evidence of any transaction affecting

such property unless it has been registered. I, however, find no merit in this contention. The reliance on Section 49 of Registration Act, in my view, is wholly misplaced for the simple reason that the lease deed dated 31st December, 1996 was duly registered on 02nd January, 1997 and, therefore, the disability attached to a document, which is required to be compulsorily registered and is not registered, is not attracted to this document.

The relevant statutory provision in this regard would be Section 116 of Transfer of Property Act which, to the extent it is relevant, provides that if a lessee remains in possession of the tenancy premises after the determination of the lease granted to him, and the lessor or his legal representative accepts rent from the lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106. Section 106 of Transfer of Property Act, to the extent it is relevant, provides that in the absence of a contract or local law or usage to the contrary, a lease of immoveable property for other than agricultural or manufacturing purposes shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice. Therefore, since the plaintiff allowed the defendant to continue in possession of the tenancy premises and also accepted rent from it, even after the term of the lease had expired by afflux of time, the lease came to be renewed from month to month being a lease for commercial purpose. The use of the expression 'renewed' in Section 116 of Transfer of Property Act clearly implies that the parties in the event of a tenant holding over the property on determination of the lease, would be governed by the terms and conditions of the lease which stands determined, unless they enter into a fresh agreement contrary to the terms and conditions of the lease which stand determined.

This was the view taken by the Division Bench of Calcutta High Court in **Krishna Char an Sukladas vs. Nitya Sundari Devi** AIR 1926 Calcutta 1239 as well as by a Division Bench of Allahabad High Court in **Zahoor Ahmad Abdul Sattar vs. State of Uttar Pradesh and Anr.** AIR 1965, Allahabad 326 and by Madras High Court in **K. Gnanadesikam Pillai and Ors. vs. Antony Benathu Boopalarayar** AIR 1934 Madras 458. The decision of the Allahabad High Court in the case of **Zahoor**

Ahmad (supra) was affirmed by Supreme Court in The **State of U.P. vs. Zahoor Ahmad and Anr.** AIR 1973 SC 2520. This was also the view of the Federal Court in **Kai Khushroo Bezonjee Capadia vs. Bai Jerbai Hirjibhoy Warden and Anr.** AIR 1949 FC 124, where the Court agreed with the following statement contained in Woodfall's "Law of Landlord and Tenant"

> "Where a tenant for a term of years holds over after the expiration of his lease he becomes a tenant on sufferance, but when he pays or expressly agrees to pay any subsequent rent at the previous rate a new tenancy from year to year is thereby created upon the same terms and conditions as those contained in the expired lease so far as the same are applicable to and not inconsistent with an yearly tenancy."

I, therefore, hold that even on expiry of the terms of the lease, the terms and conditions contained in the lease deed continued to bind the parties, so long as the defendant was holding over the tenancy premises.

Issue No. 4

17. In view of my findings on the issues 1 to 3, the plaintiff is entitled to a decree for Rs.69,84,900/- against the defendant.

ORDER

In view of my findings on the issue, a decree for Rs.69,84,900/- with costs and pendente lite and future interest at the rate of 6% per annum is hereby passed in favour of the plaintiff and against the defendant, subject to the plaintiff filing an undertaking, in the form of an affidavit, stating therein that if any part of the amount, paid by it to the NDMC, towards payment of increase in house tax, in respect of the premises which was let out to the defendant is refunded to it, or is adjusted against any other dues/liability, it will refund that amount to the defendant, without demand from it within four weeks of getting the refund/adjustment. The plaintiff will further undertake that if any interest is paid or allowed to be adjusted to it by NDMC, in respect of aforesaid amount that also will be refunded to the defendant.

Decree sheet be prepared accordingly.