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Delhi Development Authority v. Jagdish Chander Khanna & Sons. *2833*

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attributed to petitioner in Court of Inquiry do not even remotely resemble his admitted signatures or signatures on Court Record—Court of Inquiry has in fact proceeded to return findings which effect character and reputation of petitioner and hold that petitioner was responsible for injuries sustained—Such Court of Inquiry could not have been legally held in absence of petitioner who had to be given opportunity to challenge statement of witnesses, if any, against him as well as record of finding against him—Court of Inquiry conducted in this case, is contrary to provisions of Army Regulations Rule 520—Petitioner was discharging duty while participating in operation Rakshak in Kargil area which operation had been specially notified by GOI in terms of Clause (i) of Category E in para 4.1 of circular dated 31st January, 2001—This aspect has not been noted by Tribunal in its judgment—As a result, it has to held that petitioner is entitled to all benefits including monetary benefits.

J.P. Bhardwaj v. *UOI and Ors.* *2767*

— Denial of appointment to the post of Constable (GD) in the Central Armed Forces—Signatures in Capital letters in English—Petitioner's entire signatures consists of the four letters which constitute his name "ARIF". Petitioner writes the letter 'A' 'R' and 'F' in capital letters while the letter 'I' is in running hands—A short issue which arises in this case is as to whether the petitioner, whose signatures are entirely in capital letters in English can be denied appointment to the post of Constable (GD) in the Central Armed Forces i.e. BSF, CISF, CRPF, SSB etc. Held—This issue has been dealt with earlier vide a pronouncement dated 24th February, 2012 in W.P. (C) 1004/2012 titled as *Delhi Subordinate Services Selection Board and Another v. Neeraj Kumar and Another*—A similar issue thereafter was decided in favour of the writ petitioner in W.P. (C). 6959/2012 vide an order dated 5th November, 2012 titled as *Bittoo v. Union of India and Another*—The order dated 4th December, 2012 in W.P. (C) 7158/2012 titled *AS Pawan Kumar v. Union of India and*

Another deals with the same issue and was also decided in favour of writ petitioner—It is well settled that there is no law which prohibits a person to sign in capital letters—It has been held in the judgment of this Court in *Pawan Kumar* (Supra) that a signature is a trait which a person develops over a period of time and these traits can develop even with reference to capital letters—Petitioner cannot be denied consideration for appointment if otherwise eligible for the appointment to the post of Constable in the CISF on the ground that the candidature of the petitioner was rejected mainly due to his signatures being done in English capital letters—Writ petition is allowed.

Arif v. *UOI and Anr.* *2780*

ARMS ACT, 1959—Section 25—Appellant (accused) was convicted under Section 302 for death of the victim in the event of robbery—Appeal filed—Only motive was robbery and there was no ill-will between the accused and the victim—Whether conviction fell under Section 302 or 304, IPC—Held:- Accused was armed with dangerous weapon and victim was unarmed—Sufficient to indict the accused with the offence of murder—Accused may not have intention to kill but he voluntarily caused death—Appeal dismissed.

Ramesh v. *State (NCT) of Delhi* *2597*

— Section 25—Appellant (convicts) argued that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error by relying into testimony of sole witness—Respondent argued that there are no valid reasons to discard the cogent testimony of the victim who had no prior animosity with the assailants. Held, it is settled legal proposition that while appreciating evidence of witness minor discrepancies on trivial matters, which do not affect prosecution's case may not prompt Court to reject the evidence its entirety. The Court can convict an accused on the statement of the sole witness provided that the statement of such witness should satisfy legal parameters i.e. it is trustworthy, cogent

and corroborated with the oral of documentary evidence. Only when single eye witness is found to be wholly unreliable by the Court, his testimony can be discarded in toto—Appeal dismissed due to lack merit of the case.

Naresh & Anr. v. *State of Delhi* *2622*

BORDER SECURITY FORCE ACT, 1968—Section 19(a), 40, 46, 74(2) and 117—Border Security Force Rules, 1969—Rule 45 and 51—CCS (Pension) Rules—Rule 41—Indian Penal Code, 1860—Section 354—Petitioner assailed finding and sentence of Summary Security Force Court (SSFC) and order passed by DG, BSF rejecting statutory appeal against same—Plea taken, petitioner was denied opportunity to effectively defend himself for reason that proceedings were conducted in Bengali, a language he was not conversant with—Second ground of challenge is that conviction and sentence of SSFC are based on no evidence at all for reason that complainant has failed to identify him and also her testimony renders occurrence of incident impossible in given circumstances—Held—Respondents had appointed two interpreters—One interpreter was conversant with Hindi and English language and second with Bengali and other languages—During trial, petitioner made no objection at all to proceedings of SSFC or that he was unable to understand proceedings—There is no merit in Petitioner's plea that he was prejudiced in any manner for reason that some of witnesses were local civilians or he was not able to understand their deposition—There is ample evidence which establishes that petitioner entered house of PW6 without authority and with intention to outrage her modesty for which he was accosted by civilians—Challenge by way of instant writ petition has to be rejected.

Vijay Kumar v. UOI and Ors. *2875*

— Section 20(a) and 22(a)—Border Security Force Rules, 1969—Rule, 45, 99 and 149—Petitioner found guilty of both charges framed against him by Summary Security Force Court (SSFC)—Statutory appeal filed by Petitioner rejected

contended—Role played by the Respondents were aimed at deliberately assisting the accused—Court is to satisfy whether it would expedient in the interest of the justice to make complaint—Merits of the case cannot be looked into only comparison of statements made is to be done—Held:- PW Shyam Munshi is the author of FIR duly signed by him—Admitted to have witnessed the entire episode yet declined to identify the offender—Attempted to mention two persons firing relied on accused's counsel prima facie indicative of attempt to not stating the facts suppressing it with a view to help the accused action prima facie warranted against him (PW2)—PW95 Prem Shanker Manocha—A ballistic expert—Discrepancy between the opinion and his deposition in Court—Testified correctness of his report—Expressed inability to give an opinion about the weapon during Court deposition stated cartridges appear to be fired by two separate weapons—helped the defence to urge two weapon theory—Theory accepted by trial Court—Failed in his duty as an expert—A case for further proceeding against him—Other witnesses resiled from their statements recorded under section 161—Unsigned—Not made under oath—No adverse comments by the Court—Notices discharged.

State (GNCT of Delhi) v. *Sidhartha Vashisht @ Manu Sharma & Ors.* *2627*

— Section 427 & 428—Appellant was convicted on 04/11/09 for offences punishable U/s 397/394/392/34 IPC in FIR No. 346/05—He was also sentenced on 02/11/09 for offences punishable U/s 392/397 IPC in case FIR No. 877/05 and convicted on 15/09/09 in case FIR No. 375/05—His sentence for offences emerging in FIR No. 375/05 & 877/05 were already over—Appellant filed appeal against his conviction for FIR No. 346/05 but he did not contest appeal on merits and only prayed for his sentence to run concurrently to enable him to come out of jail earlier. Held:- A person already undergoing sentence of imprisonment in one case and is further sentenced in a second case, the second sentence shall commence at the expiry of the imprisonment to which he had been previously

sentenced, unless the Court directs the subsequent sentence to run currently. The power of the Court U/s 482 of the Code to direct sentences to run concurrently is unquestioned yet to be decided on the facts and circumstances of each case.

Rajesh @ Raju v. *State (NCT of Delhi)* *2855*

CONSTITUTION OF INDIA, 1950—Article 226—Petitioner challenges action of the respondents in not considering him for award grace marks in the examination held for the post of SI/GD through limited departmental competitive examination (LDCE) 2011, in terms of standing order 01-2011—Held:- there is nothing in the standing order which stipulates that a candidate who has failed to obtained the prescribed marks in the examination shall be entitled to the award of grace marks and the standing order merely sets out the guidelines for conducting the LDCE—Petition found without merit.

Purkha Ram v. *UOI & Ors.* *2619*

— Petitioner assailed findings of disciplinary proceedings conducted against him, accepting recommendations and findings of Inquiry Officer and imposing punishment of dismissal from service—It was urged, disciplinary authority had sought advice of Union Public Service Commission (UPSC) which recommended imposition of penalty of dismissal from service upon petitioner—But petitioner was not given copy of advice of UPSC so that he could make representation against advice and submit his point of view. Held:- It is settled principle of natural justice that if any material is to be relied upon in departmental proceedings, a copy of the same must be supplied in advance to the charge-sheeted employee so that he may have a chance to rebut the same.

C.P. Gupta v. *Union of India and Ors.* *2859*

— Petitioner held posts of Charge Electrician, Charge Mechanic, Superintendent (E&M), Overseers, Superintendent (B&R) in GREF—Aggrieved with pay fixation w.e.f 01/01/1996 and its

consequential impact, he filed writ petition claiming similar rights and privileges as made available to other employees holding similar positions as that of petitioner—Also, said issue was adjudicated in other writ petition which had attained finality as even SLP was dismissed. Held:- When a principle of law pertaining to payment on fixation is decided by a Court on a writ petition filed by an individual but decision relates to a matter of principle of law to be applied, the said decision has to be implemented in rem, i.e. with respect to all such persons who hold similar posts and not qua the persons who approach the Court.

Gulbir Singh v. *Union of India & Ors.* *2868*

— Article 226-227—Writ Petition—Fundamental Rights Article 14,19, 21—Passport Act—Revocation of Passport—Principles of Natural Justice—Violation of—Foreign Exchange & Management Act, 1999 (FEMA)—Code of Civil Procedure—S. 32—Territorial Jurisdiction—The Petitioner Commissioner, Indian Premiere League (IPL)—Organizing Cricket matches proceeded against by Directorate of Enforcement (DoE) for FEMA violation in parking funds in foreign bank—The petitioner based abroad summoned to appear in person before the authorities to explain certain aspect of his dealing as Commissioner, IPL avoided to appear ground security threat to his life in India—Kept making representation through his attorney—DoE not satisfied with explanation referred the matter to passport authority for impounding/revocation of passport-passport authority revoked his passport vide order dated 3.3.2011—Petitioner appealed to Regional Passport Officer (RPO) without success preferred writ petition—Held—Passport Act does not contemplate division of proceedings before passport authority into two half—Show cause notice clearly put the petitioner in picture that if he failed to satisfy officer with regard to tenability of his defence charge made against him—Action under Passport Act would follow—Last Clause (e) of S. 10 (3) of the Passport Act invest the passport authority to impound/revoke passport in 'general public interest' as well as input provided by statutory authority

and other wings of government in the possession of actionable material—No fault found with passport authority—Assistant Passport Officer (APO) received information—Actionable provided necessary jurisdictional facts to exercise power under S. 37 to take recourse to provision of Section 32 CPC against witnesses and noticee—Show cause notice issued by APO while hearing held by superior officer RPO—This did not involve violation of principle of natural justice—Response of EOW of Bombay Police to RTI application made to it did not supprt petitioner's case in the absence of passport being available with authority the only order which would be passed is of revocation—Writ petition dismissed.

Lalit Kr. Modi v. *Union of India and Ors.* *2484*

— Article 14—Policy making—Validity of provision in the office memorandums issued by UOI from time to time requiring the petitioners to achieve minimum benchmark qua production of single Super Sulphate Fertilizer (SSP) challenged on the grounds of unreasonableness—Held:- in view of case set up by UOI, the policy under challenge was introduced in order to increase productivity and the fact that since the introduction of the policy in August, 2009, there was been an increase in the production shows that the policy has worked and petitioner's contention that the provision for minimum benchmark for production ought to be declared production ought to be declared unreasonable and discriminatory is without merit—Further held, main thrust of the policy under challenge is to provide good quality SSP fertilizer in optimum quantities to the farmers and as long as the Government is able to achieve this objective, the incidental impact on inefficient manufacturers cannot render the policy illegal on the grounds of arbitrariness or unreasonableness and if by and large a policy is fair and achieves the object it seeks to achieve, the Court is not called upon to iron out the creases in the policy just because there is another point of view available—Petitions are without merit and dismissed.

— Petitioners held posts of Charge Electrician, Charge Mechanic, Superintendent (E&M), Overseers, Superintendent (B&R) in GREF—Aggrieved with pay fixation w.e.f 01/01/1996 and its consequential impact, they filed writ petition claiming similar rights and privileges as made available to other employees holding similar positions as that of petitioners—Also said issue was adjudicated in other writ petition which had attained finality as even SLP was dismissed. Held:- When a principle of law pertaining to payment on fixation is decided by a Court on a writ petition filed by an individual but decision relates to a matter of principle of law to be applied, the said decision has to be implemented in rem, i.e. with respect to all such persons who hold similar posts and not qua the persons who approach the Court.

— Petitioner preferred writ petition praying for staying of his movement order whereby he stood posted to Barrackpore w.e.f. 24/06/13—Petitioner alleged he had to contest Transfer Petition filed by his wife in Hon'ble Supreme Court of India listed for 22/07/13—Also, he was entitled to normal tenure of five years at Barrackpore instead of three years restricted tenure posting for which petitioner had made representation before competent authority and was pending disposal. Held:- Respondents to consider the representation made by petitioner with applicable statutory provisions and policies, pass an order thereon and communicate the same to petitioner forthwith thereafter.

FACTORIES ACT—Section 31—Appellant (convict) argued that the Trial Court fell into grave error while relying upon testimonies of hostile witness—No due weightage was given to the testimonies of the defence witnesses—Vital

discrepancies emerging in the statement of the witnesses were ignored—Held—The testimony of an illiterate and rustic witness is to be appreciated, ignoring minor discrepancies and contradictions—Credibility of the testimony, oral or circumstantial depends considerably on the judicial evaluation of the totality, not isolated scrutiny—The Court has to appraise the evidence to see to what extent it is worthy of acceptance—For conviction under Section 307 IPC it is not essential that bodily injury capable of causing death should have been inflicted—It is not necessary that the injury actually caused to the victim should be sufficient under ordinary circumstances to cause death of the victim—The Court will be give regard to intention, knowledge and circumstance irrespective of the result of conviction under Section 307 IPC—It requires an enquiry into the intention and knowledge of the accused and whether or not by his act, he intended to cause death that would amount to murder under Section 300 IPC—The nature of weapon used, the intention expressed by the accused at the time of the act, the motive, the nature and size of injuries, the part of the body where injuries were caused and severity of the blows are the relevant factors to find out intention/knowledge—Appeal dismissed.

FINANCE ACT, 1994—Section 65B (44)—Chit Fund Business—Petitioner, an Association of Chit Fund Companies challenged the notification that sought to subject the activities of business of chit fund companies to service tax to the extent of 70% of the consideration received for the services—Petitioner contended that as per law, such services are not taxable at all, therefore, there is no scope for exempting a part of consideration received for the services—Nature of chit fund activities explained in details—Held:- in chit business, the subscription is tendered in any one of the forms of money as defined under Section 65B(33), therefore, it would be a transaction in money and accordingly would fall within the exclusionary part of the definition of the word "service" as being merely a transaction in money, as such there can be no

FOREIGN EXCHANGE & MANAGEMENT ACT, 1999 (FEMA)—Code of Civil Procedure—S. 32—Territorial Jurisdiction—The Petitioner Commissioner, Indian Premiere League (IPL)—Organizing Cricket matches proceeded against by Directorate of Enforcement (DoE) for FEMA violation in parking funds in foreign bank—The petitioner based abroad summoned to appear in person before the authorities to explain certain aspect of his dealing as Commissioner, IPL avoided to appear ground security threat to his life in India—Kept making representation through his attorney—DoE not satisfied with explanation referred the matter to passport authority for impounding/revocation of passport-passport authority revoked his passport vide order dated 3.3.2011—Petitioner appealed to Regional Passport Officer (RPO) without success preferred writ petition—Held—Passport Act does not contemplate division of proceedings before passport authority into two half—Show cause notice clearly put the petitioner in picture that if he failed to satisfy officer with regard to tenability of his defence charge made against him—Action under Passport Act would follow—Last Clause (e) of S. 10 (3) of the Passport Act invest the passport authority to impound/revoke passport in 'general public interest' as well as input provided by statutory authority and other wings of government in the possession of actionable material—No fault found with passport authority—Assistant Passport Officer (APO) received information—Actionable provided necessary jurisdictional facts to exercise power under S. 37 to take recourse to provision of Section 32 CPC against witnesses and noticee—Show cause notice issued by APO while hearing held by superior officer RPO—This did not involve violation of principle of natural justice—Response of EOW of Bombay Police to RTI application made to it did not supprt petitioner's

case in the absence of passport being available with authority the only order which would be passed is of revocation—Writ petition dismissed.

INCOME TAX ACT, 1961—Section 14, 80IA, 139, 142(1), 143(3), 147, 148, 260A—Notice issued to Petitioner by Deputy Commissioner of Income Tax (DCIT) indicating that he has reason to believe that Petitioner's income chargeable to tax for Assessment Year (AY) 2000-01 has escaped assessment and re-assessment of income for said AY was proposed—Petitioner was required to deliver a return in prescribed form for said AY within 30 days—Two purported reasons for re-opening of case were pertaining to non eligibility of deduction in respect of steam turbine of combined cycle gas power stations belonging to Petitioner and taxability of income tax recoverable by NTPC from State Electricity Boards—Writ petition filed seeking quashing of notice—Plea taken, there is no income chargeable to tax which has escaped assessment not has there been any failure on part of assessee to disclose fully and truly all material facts necessary for assessment—Held—Impugned notice was issued beyond period of four years from end of relevant AY i.e. from end of 31.03.2001—In order that such a notice could be sustained in law, ingredients and pre-conditions set out in proviso to Section 147 have to be satisfied—First condition is that income chargeable to tax must have escaped assessment—Second condition is that such escapement from assessment must be by reason of failure on part of assessee to, inter alia, disclose fully and truly all material facts necessary for his assessment for that AY—If either of these two conditions is missing, exception to bar not up in provisio, does not get triggered—Consequence being that assessment cannot be re-opened—Entire process of generation of electricity has been explained by petitioner in great detail in assessment proceedings for AY, 1998-99 which has been taken notice of by Assessment Officer (AO)—It was not as if it was a fact or a figure hidden in some books of accounts which AO could have, with due

Each fact must be proved individually and only thereafter the Court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the 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/themselves, is/are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved.

Musa Singh v. *State* *2833*

— Section 375—Rape—Section 376—Punishment for rape—Section 506—Threat to kill—Code of Criminal Procedure, 1973—Section 313—Statement of the accused—Section 357—Compensation to victim appellant father of the prosecutrix charge sheeted for offences under section 376 and 506—Male child born after registration of FIR—Charges framed—Pleaded not guilty—Prosecution examined 14 witnesses—Statement of accused recorded denied committing rape—Convicted—Sentenced to imprisonment for life with rider and fine—Compensation awarded to the victim—Preferred appeal—Contended—DNA test not properly conducted—Falsely implicated by the wife and daughter for money—Taken possession of his assets including land—Victim of conspiracy—Sexual act was consensual—Held:- Prosecutrix and her mother are the material witnesses baby delivered after registration of FIR—Blood samples of the baby, prosecutrix and appellant collected under the order of the Court—Appellant voluntarily agreed sample drawn by an expert—No fault with drawl of blood sample—No suggestion given to expert as to non conduct of DNA test properly during cross examination—No such plea can be permitted—Expert opined the appellant and the prosecutrix to be the biological parents of the child—Appellant had sexual intercourse with the prosecutrix established was aged about 17 years on the date of commission of offence tenor of cross examination implies plea of informed consent to the sexual act—

Prosecutrix testified the act committed by keeping her at knife point and under threat—No reason to disbelieve dependent on appellant for shelter, bread and butter did not have the choice to resist appellant's act—Consent under threat is no consent—There cannot be voluntary participation in the act—Conviction proper—Case did not fall in any clause under sub section (2) of section 376—Not liable to be punished with imprisonment for life with rider—Sentence maintained but without the rider—Appeal disposed of.

Sant Ram @ Sadhu Ram v. *The State* *2894*

INDUSTRIAL DISPUTES ACT, 1947—Section 25-B—Petitioner claimed he was a regular employee and had served continuously for 240 days—Onus to prove on him—Failed to prove—His contention that his statement in the affidavit to this effect was by itself sufficient proof—Not Correct.

Mohd. Zulfikar Ali v. *(Wakf) Hamdard Laboratories Thr. Its Head Hr, P & A Hamdard Building* *2801*

INTERNATIONAL LAW—Covenant on Civil and Political Right (CCPR)—Article 12 not applicable—Expression in the interest of general public in Passport Act, cannot be construed as per Article 12 of Covenant on Civil and Political Right (CCPR) in view of the fact that the municipal law holds the field.

Lalit Kr. Modi v. *Union of India and Ors.* *2484*

NARCOTICS DRUGS AND PSYCHOTROPIC SUBSTANCES ACT (NDPS ACT)—Section 21, 29, 67, 42(1), 42(2), 43, 50 & 57—Appellant argued that Trial Court wrongly acquitted the respondents on technical grounds for non compliance of Sections 42(1), 42(2), 40 & 57 of NDPS Act—It was further argued that Section 41(1) was not attracted as secret information is required to be recorded in writing only if the information that narcotics drugs are kept or concealed in any building, conveyance or an enclosed place—Held, when there is specific information that narcotics drugs were concealed at a particular place, it is immaterial whether the said place is

a public place or private place, provisions of Section 42 would apply—If the information is not reduced in writing, there is a violation of Section 42 (1)—The Court reiterated that if the search is to be conducted at a public place which is open to general public, Section 42 would not be applicable—But the same would not be the case if the search is being conducted on the basis of prior information and there is enough time to for compliance of reducing the information into writing—The language of Section 42 is the penal provision and prescribe very harsh punishment for the offender—It is settled principle that the penal provisions particularly with harsher punishment and with clear intendment of legislature for definite compliance, ought to be construed strictly—The principle of substantial compliance would be applicable to cases where the language of the provisions strictly or by necessary implication admits such compliance—Non compliance of Section 50 amounts to denial of fair trial—If two views are possible on evidence adduced in the case, then one favorable to the accused should be adopted.

Narcotics Control Bureau v. *Kulwant Singh* *2732*

LABOUR LAW—Industrial Disputes Act, 1947—Section 25-B—Petitioner claimed he was a regular employee and had served continuously for 240 days—Onus to prove on him—Failed to prove—His contention that his statement in the affidavit to this effect was by itself sufficient proof—Not Correct.

Mohd. Zulfikar Ali v. *(Wakf) Hamdard Laboratories Thr. Its Head Hr, P & A Hamdard Building* *2801*

PENSION REGULATION FOR THE ARMY 1961 (PART-II)—Regulation 12—Petitioner's husband, a Sepoy in Indian Army was detected as suffering from Cancer—Release Medical Board assessed his percentage of disability at 90% and invalidated him out of service in medical category EEE-Claim of disability pension of jawan was rejected—Appeal and second appeal of widow of deceased jawan against rejection of her husband's disability pension were rejected by

Government of India (GOI)—Writ petition challenging all those orders was rejected by Armed Forces Tribunal (AFT) it holding that prayer cannot be granted under any applicable rules and regulations—Order challenged before HC—Plea taken, there is no record with regard to any ailment or disease which affected Petitioner at time of his initial recruitment—Deceased husband of Petitioner was diagnosed as suffering from Cancer which he acquired only after he joined service—Per contra plea taken, ailment of diseased was not connected with exigencies of service—Held—A presumption is required to be drawn with regard to fitness of jawan at time of his original enrolment and consequential benefits to petitioner upon presumption in his favour—There is no record to show petitioner had any kind of medical ailment at time of entering into service—It has to be held that service conditions would have aggravated his condition and disease, its progression—Petitioner would be entitled to relief prayed—Rejection of claim of jawan for award of disability pension and petitioner's claim for special family pension by respondents as well as order of AFT are contrary of law—Late Sepoy entitled to disability pension based on 90% disability from date of invalidation from service till his death and Petitioner entitled to award of special family pension w.e.f. death of her husband during her life time.

Kamlesh Devi v. *Union of India and Ors.* *2911*

PREVENTION OF CORRUPTION ACT, 1988—Sections 7, 13(1)(d) and 13(2)—Appellants (convicts) argued that offence under section 120-B IPC could not be established as the main culprit/offender B.K. Ahluwalia expired during trial—Appellants never challenged the recovery of bribe money from their possession—Held, it is not essential that more than one person should be convicted for offence of criminal conspiracy—It is enough if the Court is in a position to find out that two or more persons were actually concerned in the criminal conspiracy—All conspirators are liable for the offences even if some of them have not actively participated—Merely because one offender died during trial, it does not absolve the

appellants of the offence whereby they actively participated and assisted B.K. Ahluwalia for committing the crime—Prosecution of appellants upheld—Sentence reduced due to mitigating circumstances.

Bimal Kishore Pandey v. *C.B.I.* *2785*

SERVICE LAW—Respondents engaged on contract basis, while performing the duties of motor lowry driver (MLD) filed OAs before the Central Administrative Tribunal which were allowed on the basis of judgment in the case of *Lalji Ram* by the Tribunal holding that the respondents are entitled to consideration for temporary status—Order of the Tribunal challenged by the petitioners, which writ petitions were disposed of by the Delhi High Court observing that if the contract labour was employed after the date from which the private respondents were deployed and have been given permanent status, then on parity such benefits should also be made available to the private respondents—Held, the respondents working against group C are not entitled to the grant of temporary status under the provisions contained in the scheme and therefore, the department cannot absorb them on the post of MLD as no other contract labour was deployed after the date of deployment of the respondents.

UOI & Ors. v. *Vijender Singh and Ors.* *2555*

— Petitioners challenged the order of the Central Administrative Tribunal, New Delhi whereby the Tribunal allowed the OA and quashed the order of the petitioners and directed the petitioners to open the sealed cover adopted in the case of the respondent in the matter of promotion to the post of Commissioner Income Tax—While the respondent was working as Additional Commissioner of Income Tax, CBI registered a case against her under Prevention of Corruption Act and sanction to prosecute was accorded and at that stage, the respondent was considered for promotion but recommendations of the DPC were kept in sealed cover—Held:- On mere issuance of sanction order, the DPC

proceedings could not have been kept in sealed cover and since the charge sheet was filed later on, the procedure of sealed cover was wrongly adopted—No infirmity in the order of Tribunal.

UOI & Ors. v. *Doly Loyi* *2566*

— Petitioner, working as HC was recruited as constable in CRPF in 1983 and medically examined several times and was found in medical category of shape-I and promoted to the post of HC in 1989—After petitioner cleared promotion cadre course in 2012, he was recommended for promotion as ASI but in the medical examination, he was declared unfit for the reasons of colour blindness and was based in medical category of shape-III —The respondents cancelled the promotion order of the petitioner—Challenged in writ petition—Held, in view of the judicial precedents, cited, since the colour blindness of the petitioner also could not be detected at the time of original induction but was detected subsequently, petitioner also is entitled to the same benefits which were given in the cited judicial precedents.

Ram Pyare v. *UOI & Ors.* *2576*

— Departmental proceedings—Parity in punishment—The petitioner was chargesheeted by the respondents on several counts alleging that he acted in connivance with another employee Mr. S.C. Saxena enquiry officer held the charges proved—Disciplinary authority remitted the case to the enquiry officer for further examination of some witnesses—Enquiry officer held further enquiry and reported that all the charges against the petitioner were not proved—Disciplinary authority did not agree with the findings of the enquiry officer and issued a disagreement note thereby affording the petitioner an opportunity to submit representation—After considering the representation the disciplinary authority came to a conclusion which was challenged by the petitioner in the Allahabad Bench of Central Administrative Tribunal—The OA of petitioner was allowed but in the writ proceedings filed by the respondents,

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W.P. (C)

NTPC LTD. ....PETITIONER

VERSUS

DCIT & ORS. ....RESPONDENTS

(BADAR DURREZ AHMED & VEENA BIRBAL, JJ.)

W.P. (C) NO. : 14562/2006 DATE OF DECISION: 10.01.2013

Income Tax Act, 1961—Section 14, 80IA, 139, 142(1), 143(3), 147, 148, 260A—Notice issued to Petitioner by Deputy Commissioner of Income Tax (DCIT) indicating that he has reason to believe that Petitioner's income chargeable to tax for Assessment Year (AY) 2000-01 has escaped assessment and re-assessment of income for said AY was proposed—Petitioner was required to deliver a return in prescribed form for said AY within 30 days—Two purported reasons for re-opening of case were pertaining to non eligibility of deduction in respect of steam turbine of combined cycle gas power stations belonging to Petitioner and taxability of income tax recoverable by NTPC from State Electricity Boards—Writ petition filed seeking quashing of notice—Plea taken, there is no income chargeable to tax which has escaped assessment not has there been any failure on part of assessee to disclose fully and truly all material facts necessary for assessment—Held—Impugned notice was issued beyond period of four years from end of relevant AY i.e. from end of 31.03.2001—In order that such a notice could be

sustained in law, ingredients and pre-conditions set out in proviso to Section 147 have to be satisfied—First condition is that income chargeable to tax must have escaped assessment—Second condition is that such escapement from assessment must be by reason of failure on part of assessee to, inter alia, disclose fully and truly all material facts necessary for his assessment for that AY—If either of these two conditions is missing, exception to bar not up in provisio, does not get triggered—Consequence being that assessment cannot be re-opened—Entire process of generation of electricity has been explained by petitioner in great detail in assessment proceedings for AY, 1998-99 which has been taken notice of by Assessment Officer (AO)—It was not as if it was a fact or a figure hidden in some books of accounts which AO could have, with due diligence, discovered but had not done so—This is not a case where assessee/petitioner can be said to have failed to disclose fully and truly all material facts necessary for assessment in respect of AY, 2000-01—Thus, this by itself, is sufficient for us to conclude that exception carved out in proviso to Section 147 is not attracted and, therefore, there is a bar from taking action under Section 147 inasmuch as the period of four years has expired—Impugned notice is, therefore, liable to be quashed on this ground—Second purported reason for re-opening assessment pertains to taxability of income tax recoverable by petitioner from State Electricity Boards—Perusal of actual figures with regard to assessee's method of grossing up rate of tax and departments proposed method of grossing up of income shows no income has escaped assessment—As such, precondition for triggering exception in proviso to Section 147 are not satisfied—Impugned notice quashed.

Important Issue Involved: No action under Section 147 of the Income Tax Act, 1961 can be taken beyond the period of four years from the end of the relevant assessment year unless and until the conditions precedent mentioned in the proviso are satisfied. The first condition is that the income chargeable to tax must have escaped assessment. The second condition is that such escapement from assessment must be by reason of failure on the part of the assessee to inter alia, disclose fully and truly all material facts necessary for his assessment for that assessment year. If either of these two conditions is missing, the exception to the bar set up in the proviso, does not get triggered. The consequence being that the assessment cannot be reopened.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. S.E. Dastur, Sr. Advocate with Mr. Muralidhar, Ms. Bindu Saxena, Ms. Aparajita Swarup, Ms. Neha Khattar and Mr. K.K. Patra.

FOR THE RESPONDENTS : Ms. Prem Lata Bansal, Sr. Advocate with Mr. Ruchir Bhatia.

CASES REFERRED TO:

1. *Honda Siel Power Products Ltd vs. DCIT:* [2012] 340 ITR 53.
2. *Dalmia Cement Pvt. Ltd vs. CIT:* WP(C) 6205/2010 decided on 26.09.2011.
3. *Indian Hume Pipe Co. Ltd vs. ACIT:* WP No. 1017/2011 decided on 08.11.2011.
4. *The Central India Electric Supply Co. Ltd vs. ITO:* [2011] 333 ITR 237 (Del).
5. *Commissioner of Income Tax vs. Simbhaoli Sugar Mills Limited:* [2011] 333 ITR 470 (Delhi).
6. *Ritu Investments Private Limited vs. DCIT:* (2011) 51 DTR (Del) 162.
7. *Sarthak Securities Co. Pvt. Ltd. vs. Income Tax Officer :* [2010] 329 ITR 110 (Delhi).
8. *Diwakar Engineers Ltd vs. Income Tax Officer:* [2010] 329 ITR 28 (Del).
9. *CIT vs. Kelvinator of India Limited* : [2010] 320 ITR 561 (SC).
10. *CIT vs. Modi Industries Ltd:* [2010] 48 DTR 364 (Del).
11. *Consolidated Photo and Finvest Ltd vs. ACIT:* [2006] 281 ITR 394 (Del).
12. *CIT vs. Kelvinator of India Ltd. :* [2002] 256 ITR 1 (Del) (FB).
13. *Ess Ess Kay Engineering Co. P. Ltd vs. Commissioner of Income Tax:* (2001) 247 ITR 818 (SC).
14. *Raymond Woollen Mills Ltd vs. ITO & Ors.:* [1999] 236 ITR 34 (SC)
15. *Rakesh Agarwal vs. ACIT:* [1996] 221 ITR 492 (Del).
16. *CIT vs. Paul Brothers:* [1995] 216 ITR 548 (Bom).
17. *Phool Chand Bajrang Lal & Anr. vs. ITO & Anr.* : [1993] 203 ITR 456 (SC).
18. *CIT vs. Bhilai Engineering Corporation Pvt. Ltd:* [1982] 133 ITR 687 (M.P.).
19. *Saurashtra Cement & Chemical Industries Ltd. vs. CIT:* [1980] 123 ITR 669 (Guj).
20. *Chhugamal Rajpal. vs. S. P. Chaliha and Ors. (SC):* [1971] 79 ITR 603 (SC).

RESULT: Allowed.

BADAR DURREZ AHMED, J.

1. By way of this writ petition, the National Thermal Power Corporation Limited (NTPC Limited), a public sector undertaking, is seeking the quashing of a notice dated 03.02.2006 issued by the respondent No.1 (Deputy Commissioner of Income Tax, New Delhi) issued purportedly under Section 148 of the Income Tax Act, 1961 (hereinafter

referred to as 'the said Act'), whereby the said respondent No.1 has indicated that he has reason to believe that the petitioner's income chargeable to tax for the assessment year 2000-01 has escaped assessment within the meaning of the said Section 148 and, therefore, the respondent No. 1 proposes to re-assess the income for the said assessment year. By virtue of the said notice, as is the requirement under law, the petitioner was required to deliver a return in the prescribed form for the said assessment year within thirty days of the service of the notice. The said notice was accompanied by a copy of the purported reasons for reopening of the case.

2. The reasons are in respect of several assessment years, namely, 1999-2000, 2000-01, 2001-02, 2002-03 and 2003-04. However, we are, in this petition, concerned only with the assessment year 2000-01. Two reasons have been set out in the said document. Reason one pertains to the non-eligibility of deduction under Section 80IA in respect of the steam turbine of the combined cycle gas power stations belonging to the petitioner. The second reason pertains to the taxability of income tax recoverable by NTPC from the State Electricity Boards'. We shall deal with these purported reasons in greater detail later. For the present, it would be necessary to set out in brief the challenge of the petitioner to the impugned notice dated 03.02.2006. According to the petitioner, the notice is barred by limitation inasmuch as it has been issued beyond four years from the end of the relevant assessment year. In the present case, 2000-01 is the relevant assessment year. Therefore, the four-year period would have ended on 31.03.2005. The notice which is impugned in this petition has been issued on 03.02.2006. This is clearly beyond the period of four years. The only way in which this notice can be saved is if the factual position falls within the parameters specified under the proviso to Section 147 of the said Act.

3. It was contended on behalf of the petitioner that before the proviso to Section 147 of the said Act can be invoked by the revenue, it has to be shown that there is an escapement of income chargeable to tax from the assessment done under Section 143(3) of the said Act and that this has been occasioned by reason of failure on the part of the assessee to make a return under Section 139 or in response to a notice under Section 142(1) or Section 148 or a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. In the present case, the question

of non-filing of a return does not arise and, therefore, the only two things that need to be seen are whether any income chargeable to tax has escaped assessment and whether this has been occasioned by the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment in respect of the assessment year 2000-01.

4. According to the learned counsel for the petitioner, neither of these two conditions have been satisfied. In other words, there is no income chargeable to tax which has escaped assessment nor has there been any failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment.

5. It has also been contended that for these reasons the proviso to Section 147 of the said Act is not triggered and, therefore, the impugned notice dated 03.02.2006, having been issued beyond the period of four years from the end of the relevant assessment year, is clearly time barred and, therefore, ought to be quashed as also all proceedings pursuant thereto.

6. We shall now set out the sequence of events. On 27.11.1998, the petitioner filed its income tax return with the respondent No.1 for the assessment year 1998-99. In the assessment order pertaining to the year 1998-99, the entire manner of functioning of the gas turbine unit and the steam turbine unit at the four different projects of the petitioner at Anta, Auraiya, Kawas and Dadri were discussed. The assessee had been asked to explain as to how the fuel cost in the steam unit was shown as zero by the petitioner. By a letter dated 10.01.2001, the petitioner replied as under:

''CONSUMPTION OF FUEL IN GAS POWER STATION

NTPC has set up Gas Power Station at Anta, Auraiya, Kawas, Dadri, Jhanor Gandhar and Faridabad as combined cycle gas power stations. These stations have number of gas turbines, which independently generate power, by separately feeding fuel in the form of natural gas/HSD or Naptha. The natural gas after mixing with the air is burnt in the gas combustion chamber to produce gases at a very high temperature. These gases are used to run gas turbines for generation of electricity. The Gas Turbine exhaust hot air gases, which otherwise have no commercial value, are then released into atmosphere. With the advancement in technology the waste heat recovery boilers have been invented

to utilize such hot exhaust gases.

The exhaust hot gases from gas turbine are routed through the waste heat recovery boilers to utilize it in heating water and producing steam. The steam produced in waste heat recovery boilers is then run to generate electricity in the steam turbine attached separately with such boilers. The steam turbine can only be run from hot gases released from the gas turbine. In case of any failure of the steam turbine the hot gases being released after generation of power in gas turbine has to be discharged in the atmosphere since it has no other commercial value. All gas turbine and steam turbines separately generate electricity and have separate control system, separate turbines, separate gas combustion chambers for gas turbines and boiler for steam turbine for generation.

As explained above the steam turbine does not consume any fuel except waste hot gases of gas turbine. In view, thereof, no fuel cost has been indicated in steam turbines.''

Thereafter, the petitioner furnished another letter dated 27.02.2001 indicating the working of the steam turbine at the gas power station. The said working was described as under:

''WORKING OF STEAM TURBINE AT GAS POWER STATION

NTPC has set up Gas Power Station at Anta, Auraiya, Kawas, Dadri, Jhanor Gandhar and Faridabad. These power station have two distinct types of prime movers gas Turbines and Steam Turbines. The fuel (Natural Gas/KSD/Naptha) is burnt in the combustion chamber of Gas Turbine and the product of combustion (hot gases) is expanded in Gas Turbine. The mechanical power thus developed drives an electric generator for generating electricity.

Hot gases are exhausted after their expansion in the gas turbines. As the exhausted gases are no longer required they are known as waste hot gases and are let out in the atmosphere. These waste hot gases do not have any combustion properties. With the availability of technology, steam turbines are installed at a massive cost, which is higher than the cost of the normal gas turbine. These waste hot gases are routed through the waste

heat recovery boilers for generation of power. These waste exhaust hot gases from gas turbines can also be let out to the atmosphere directly through a by pass stack. If waste hot gases are exhausted directly to the atmosphere the residual heat contained in it is totally lost. However, when it is passed through a Waste Heat Recovery Boiler, it is possible to partly reclaim the residual heat for generation of power.

No fuel is required to be used for generation of power by the waste heat recovery boiler (WHRB). In other words, the steam turbine uses only the waste exhausted heat of such gases in WHRB for generation of power.

You have desired us to furnish quantity and cost of exhausted hot gases used in waste heat recovery boiler. On this point we wish to submit that it is not possible to work out actual quantity of exhaust hot gases consumed in WHRB. Depending on grid conditions flow of gases in the waste heat recovery boiler varies from time to time on continuous basis. At times on account of technical reasons the gas station is run in an open cycle and therefore waste hot gases are being discharged into atmosphere.

In view of above the flow of waste hot gases in waste heat recovery boilers is neither practicable nor being measured on actual basis. We reiterate that since no fuel is being consumed in waste heat recovery boiler there is no fuel cost that can be allocated to generation of power by steam turbine.

It may be mentioned here that the waste hot gas is not a commercial commodity and is not brought to the market for sale and purchase. It is not capable to being transported to a distant place because it would lose it potential heat. Moreover, because of huge requirement of compressor power for transportation and capital cost of equipment like compressor, piping, etc., it is uneconomical to transport the gases even to a nearby location as these waste hot gas is of very low pressure and density.

In view of the above, it is submitted that waste hot gases are not marketable nor are being sold or bought in the market. They have not market value at all.''

7. From the above, it is clear that the petitioner had made it known

to the respondent No.1 that the gas turbine exhausts hot air gases, which otherwise have no commercial value and would normally be released into the atmosphere. However, with the advancement of technology, waste heat recovery boilers have been invented to utilize such hot exhaust gases, which, in turn, run the steam turbines to generate additional electricity. It has been clearly pointed out by the petitioner that the power stations of the petitioner have two distinct types of prime movers, gas turbines and steam turbines. The fuel which could be naptha, natual gas or HSD is burnt in the combustion chamber of the gas turbine and the product of combustion - hot gases, generates mechanical power which drives the electric generator for generating electricity. These hot gases are exhausted after their expansion in the gas turbines, as they are no longer required in the gas turbine unit. However, because of the technology of waste heat recovery boilers, the exhaust gases from the gas turbine unit are utilized by the steam turbine unit for further generation of electricity. In this manner, through the use of the waste heat recovery boiler, it is possible to partly reclaim the residual heat for generation of additional power. The steam turbine uses only the waste exhaust heat of such gases generated in the gas turbine unit through the technology of waste heat recovery boiler. One of the contentions of the petitioner was that the fuel cost of the steam turbine unit was zero. We shall deal with this aspect of the matter subsequently. For the present, it is clear that the waste hot gases produced in the gas turbine unit in the course of generating electricity are re-utilized through the waste heat recovery boiler for driving the steam turbine which, in turn, generates additional electricity. The entire process of generation of electricity was clearly set out by the petitioner before the respondent No.1 in respect of the assessment year 1998-99.

8. We may also point out that in the course of finalizing the assessment for the assessment year 1998-99, the respondent No.1 wrote a letter to the petitioner to clarify, inter alia, the following:

> ''1. Income-tax recoverable from customers -On page 157 of the Return of Income, it is stated (point no. 13) that as per Tariff Notification issued by the Govt. of India. The Incidence of Income tax on the Income from generation of electricity is recoverable from customers. For the A.Y. 1998-99, this amount is Rs. 86081 lacs. This has not been taken as part of income or as part of sales of electricity. Why?''

The said letter was replied to by the petitioner on 05.03.2001, wherein they enclosed a detailed note regarding the impact of income tax liability of NTPC with regard to generation of income.

9. On 29.11.2000, the petitioner filed its original return for the assessment year 2000-01. We may point out that being aggrieved by the assessment order in respect of the assessment year 1998-99 dated 22.03.2001, the petitioner preferred an appeal being Appeal No. 2/200102 before the Commissioner of Income Tax (Appeals) sometime in April, 2001. During the pendency of the appeal for the assessment year 199899, the assessment in respect of the assessment year 2000-01 was completed under Section 143(3) on 27.02.2002, whereby the respondent No.1 followed the orders in respect of the assessment year 1998-99 and 1999-2000 and the deduction under Section 80IA was re-worked by taking a part of the fuel cost against the profits of the steam undertaking. The respondent No.1 also noted that the income tax liability on generation had to be grossed up on account of the State Electricity Boards' liability to bear the tax.

10. On 28.02.202, the Commissioner of Income Tax dismissed the appeal in respect of the assessment year 1998-99. Being aggrieved by the order passed by the Commissioner of Income Tax (Appeals) in respect of the assessment year 1998-99, the petitioner preferred an appeal before the Income Tax Appellate Tribunal (ITAT) being ITA 1377/Del/2002, sometime in April, 2002. A similar appeal was also filed by the petitioner before the ITAT in respect of the assessment year 1999-2000 being ITA No. 2188/Del/2002. We may also point out that by virtue of the minutes of meeting held on 13.09.2002, the Committee on Disputes had permitted the petitioner to pursue the appeals before the Tribunal. On 26.05.2004, the Income Tax Appellate Tribunal decided the appeals in favour of the petitioner and held that there was no basis to apportion the cost of fuel to the steam turbine undertakings. In the said order, the ITAT noted that it was the case of the Assessing Officer that the profits of each unit had to be determined independently as if such units were the only source of income of the assessee/ petitioner. The Tribunal observed that there was no dispute to such a submission and that, according to it, profits of the gas unit as well as the steam unit must be determined independently as the sole source of income of the assessee and consequently, the expenditure incurred for the generation of electricity by the gas unit cannot be shifted

to any other unit, even by the logic of the Assessing Officer. The Tribunal further held that for similar reasons, profit of the steam unit had to be determined independently on the basis of the expenditure incurred by such unit. Since the steam unit had not incurred any expenditure for acquiring the hot gas, the question of reducing the profits of such unit by any notional figure did not arise. Consequently, the Tribunal accepted the pleas of the petitioner and rejected those of the revenue.

11. We are not so much concerned about the merits of the decision but with the fact that the entire process of production of electricity by both the gas turbine and the steam turbine were examined threadbare at all stages - before the Assessing Officer, The Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal. The petitioner had clearly set out and explained the method of electricity generation by both the units and it is the Tribunal which held that it should not be regarded as an integrated unit but as two separate and independent units. This was also the stand taken by the Assessing Officer with regard to the nature of the two units being independent and not integrated.

12. Thereafter, on 23.09.2004, the respondent No.1 forwarded a letter to the Commissioner of Income Tax (Appeals) along with a copy of the purported inspection report which had been allegedly carried out on 02.09.2004 and to consider the same in the pending appeals of the petitioner for the assessment years 2000-01, 2001-02, 2002-03 and 200304. In this inspection report, it has been stated that the contention of the assessee (NTPC), that it has two separate units for generating electricity, cannot be accepted to be correct as the waste heat utilization plant is basically a dependent unit of the first plant, that is, the gas turbine plant and is completely dependent on its working. As per the report, ''by no stretch of imagination, can it be inferred that these are two different units as the second unit i.e. the waste heat utilization plant is totally dependent on the first unit.'' It was further stated in the said report that the second plant cannot be said to be an identifiable undertaking separate and distinct from the existing business. The report, therefore, concluded by noting that it would not be correct to say that the assessee has two different units for generation of electricity and, therefore, the assessee is not right in claiming deduction under Section 80IA on two different profits by showing two different P & L Accounts of these units.

13. The petitioner sent a response on 27.04.2005 to the inspection

report and stated that there are no fresh facts in the report and that, in any event, the ITAT's order was applicable. The petitioner also submitted that mere dependence of one unit on the other did not mean that the steam undertaking was not an industrial undertaking for the purpose of Section 80IA of the said Act.

14. In the meanwhile, on 20.10.2004, the respondent No.1 applied to the Committee on Disputes for permission to file an appeal from the Tribunal's said order to this Court under Section 260A of the said Act. During the pendency of the application for permission to file an appeal, the respondent No.1 filed an appeal before this Court being ITA 756/ 2004. However, by an order dated 03.12.2004, this Court disposed of that appeal on the ground that since the High Powered Committee on Disputes had not granted permission till then, this Court was not inclined to entertain the petition at that stage. This Court, however, directed that it would be open to the revenue to apply for re-filing of the appeal after the clearance is given by the High Powered Committee in favour of the revenue. The clearance was not given inasmuch as, on 08.06.2005, the Committee on Disputes rejected the application of the revenue. The relevant portion of the minutes of the meeting pertaining to the petitioner are as under:

> ''Meeting of the Committee on Disputes was held at 1030 hours on 08.05.2005 in the Committee Room, Cabinet Secretariat, Rashtrapati Bhavan, New Delhi. The items considered and the minutes thereon are as under:

a) Item no. b) Case status	a) Appellant b) Respon-dent	Issue (s) Involved	a) Appl. Ref. No. b) Date c) appeal in	Appln against a) auth. Whose order is disputed b) oder no. c) order date	a) Quantum Involved b) period Involved
1 NG	Central Board of Direct Taxes National Thermal Power Corporation	Assessee has not debited the fuel cost utilized for generation of power in 16 units of	UO Note No. 279A/CID/ 107/ 2004 13.12.2004 High Court	ITAT ITA . No1377& 2188/ Del of 2002 26.05.2004	Amt - 54575.93 1998-2000

	Limited	various projects. Therefore, the AO calculated the fuel cost involved & debited it to the P&L account and reduced u/s 801 & 801A for the A.Y. 1998-99 and 1999-2000			

The Committee heard the parties in detail w.r.t. the orders of the CIT (A), agenda note submitted by CBDT and the orders dated 26.05.2004 of the Delhi Bench of IT AT. The Committee noted that the contention of the D/o revenue is that the assessee has not debited the fuel cost utilized for generation of power in the units under reference and further that AO has appropriately calculated the fuel cost involved and debited it to the P&L A/c and reduced the deduction u/s 801 and 80-1 A. The Committee expressed the view that the ITAT has very appropriately observed that if the assessee had not set up the steam units in their projects, such hot gas would have to be exposed to the open atmosphere and also that there is no evidence that such hot gas can be sold in the open market. Advanced technological innovations have prevented such hot gas going to waste, which can be utilized for generation of electricity. Since there is no evidence of any market for sale of such waste hot gas, the Committee did not find any merit in the contentions of the CBDT. The Committee accordingly decided not to accept the request of CBDT for giving clearance for filing an appeal in High Court against the orders of the ITAT.''

15. From the above extract, it is apparent that the Committee on Disputes had agreed with the view taken by the Tribunal that if the petitioner had not setup the steam units in their projects, such hot gases would have to be released to the open atmosphere and secondly that there was no evidence that the hot gases could be sold in the open market. Since there was no evidence of any market for the sale of such hot gases, the Committee on Disputes did not find any merit in the contentions of the revenue. It is on this basis that the permission to file an appeal was rejected and clearance was not given. The matter, therefore, rested there.

16. It is then that on 03.02.2006, the impugned notice was issued to the petitioner accompanied by the purported reasons for issuing the same.

17. The petitioner objected to the impugned notice as also the reasons by virtue of his letter dated 12.06.2006. The objections were rejected by the respondent No.1 by an order dated 16.06.2006. Thereafter, inter alia, the present writ petition was filed by the petitioner, whereon, this Court, on 18.09.2006, issued notice to the respondents and directed that till further orders, the assessment order be not passed. The writ petition was ultimately admitted for hearing on 17.05.2007 when Rule DB was issued and it was directed that no final order shall be passed by the Assessing Officer till the disposal of the writ petition.

18. The learned counsel for the petitioner submitted that both the reasons for re-opening the assessment in respect of the assessment year 2000-01 are non-existent. First of all, we shall record his submissions with regard to the first reason. The learned counsel for the petitioner submitted that the petitioner had setup gas and steam undertakings from 01.08.1990 onwards. In the assessment proceedings for the assessment year 1998-99, which we have dealt with in detail above, the Assessing Officer had, after a detailed discussion, granted deduction under Section 80IA in respect of the separate profits of the gas and steam undertakings, though on the basis that they were integrated, he adjusted the quantum of deduction. It was further submitted that this was also followed by the Assessing Officer in respect of the assessment year 1999-2000 and the assessment year 2000-01. The Tribunal reversed the findings of the Assessing Officer in respect of the assessment years 1998-99 and 19992000 and this, according to the learned counsel for the petitioner, had become final as the Committee on Disputes did not permit the department to file an appeal against the order passed by the Tribunal. Insofar as the assessment year 2000-01 is concerned, the Commissioner of Income Tax (Appeals) followed the Tribunal's order and reversed the findings of the Assessing Officer. According to the learned counsel for the petitioner this has also become final as the department had not filed any appeal.

19. It is contended that the Assessing Officer is now seeking to re-open the assessment for the assessment year 2000-01 on the ground that the steam undertaking is not a separate undertaking. But, according to the

learned counsel, being aware of the existence of the two undertakings, the Assessing Officer had drawn the inference in the course of the regular assessment that the claim for deduction from the profits of the steam undertakings should be reduced on account of his understanding that the fuel cost could not have been zero. However, the Assessing Officer now seeks to draw the inference that the two undertakings should be treated as one. It was contended that this clearly constituted an entire shift in the stand of the Assessing Officer from the stand taken by him in the course of the original assessment proceedings.

20. The learned counsel for the petitioner submitted that, in any event, the impugned notice was bad in law as there was no failure on the part of the petitioner to disclose fully and truly all material facts. It was contended that the reason for re-opening, as mentioned in the purported reasons, is that the combined cycle gas power stations are integrated undertakings and the steam turbine unit is completely dependent on the gas turbine unit. It was contended that these were the very same findings given by the Assessing Officer in the course of the regular assessment proceedings for the assessment year 1998-99 and which were followed in respect of the assessment year 2000-01. This was the very basis for curtailing the Section 80IA deduction eligible on the steam undertaking. It was also contended that the so-called reasons places reliance on the said inspection report but the Commissioner of Income Tax (Appeals), in respect of the assessment year 2000-01, held that there is nothing new in the inspection report which differentiates the case from the assessment years 1998-99 and 1999-2000. Paragraph 3.11 of the order dated 04.05.2006 passed by the Commissioner of Income Tax (Appeals) in respect of the assessment year 2000-01 is as under:

> ''3.11 I have gone through the facts of the case, the submission made by the appellant and the decision of The ITAT, Delhi Bench in the case of the appellant for A.Y. 1998-99 & 1999-2000. It is an admitted fact that the facts of the case under appeal are same as for A.Y. 1998-99 & 1999-2000 for which ITAT has decided the issue. I have also considered the decision of Delhi High Court of not entertaining the appeal filed by the Income Tax Department, as the approval was not granted by the Committee on disputes. The Inspection Report of Addl CIT, Range 13, New Delhi dated 23rd September 2004 and the reply filed by the appellant dated 27th April 2005 were also considered.

> Para 3.7 on page 9 of this order details the contents of a brief provided by the AO given as annexure 'A' to letter F.No.CIT/ Delhi-v/2004-05/646 dated 20.10.2004. This letter was addressed to the COD in order to obtain it's approval to file an appeal before the high court. This brief has discussed all the points that were mentioned in the inspections report mentioned above. However the COD did not accord approval to the AO for filing an appeal against the order of the ITAT. I have found that the facts of the case as mentioned in the inspection report were also before the COD when they withheld the approval for further appeal. There is nothing new which differentiates the facts of the case as such.''

21. Thus, according to the learned counsel for the petitioner, the department had accepted the finding of the Commissioner of Income Tax (Appeals) as it had not filed any appeal before the Tribunal. Having done so, there was no occasion for the department to have issued the impugned notice dated 03.02.2006.

22. The learned counsel for the petitioner referred to the decisions of this Court in the case of **Sarthak Securities Co. Pvt. Ltd. v. Income Tax Officer** : [2010] 329 ITR 110 (Delhi) and **Commissioner of Income Tax v. Simbhaoli Sugar Mills Limited:** [2011] 333 ITR 470 (Delhi) in support of his contention that the recorded reasons must state what material the assessee had failed to disclose and if there was no failure to disclose the material facts, re-opening was not justified at all.

23. The learned counsel for the petitioner also submitted that this was a case of change of opinion which was also not a permissible ground for reopening an assessment already completed under Section 143(3) of the said Act. It was contended that in the course of the regular assessment proceedings for the assessment years 1998-99 to 2000-01, the Assessing Officer had taken the view that the undertakings, though separate, were integrated and that the expenses should be apportioned to the steam undertaking so as to reduce the Section 80IA deduction. In contrast, it has now been suggested by the Assessing Officer on the very same basis that the undertakings are integrated to allow deduction under Section 80IA by clubbing the profits of steam and gas undertakings. This was clearly, according to the learned counsel for the petitioner, a case of change of opinion which is impermissible in law. He placed reliance

on the following decisions:

(i) **CIT v. Kelvinator of India Ltd.** : [2002] 256 ITR 1 (Del) (FB);

(ii) **CIT v. Kelvinator of India Limited** : [2010] 320 ITR 561 (SC); and

(iii) **Ritu Investments Private Limited v. DCIT:** (2011) 51 DTR (Del) 162

24. The next point urged by the learned counsel for the petitioner was that the Section 80IA deduction cannot be withdrawn mid-term inasmuch as it is only the first year of the deduction which is relevant. Once it is allowed in the first year, the subsequent years cannot be interfered with. As such, there is no escapement of income from assessment. It was contended by the learned counsel for the petitioner that the steam undertaking is setup from 01.08.1990 onwards and in the earlier years, deduction for the steam undertaking had been allowed to the assessee and, therefore, could not be withdrawn for the subsequent years. Reliance was placed on the following decisions:

(i) **CIT v. Modi Industries Ltd:** [2010] 48 DTR 364 (Del);

(ii) **Saurashtra Cement & Chemical Industries Ltd. v. CIT:** [1980] 123 ITR 669 (Guj);

(iii) **CIT v. Paul Brothers:** [1995] 216 ITR 548 (Bom); and

(iv) **CIT v. Bhilai Engineering Corporation Pvt. Ltd:** [1982] 133 ITR 687 (M.P)

25. Lastly, it was contended by the learned counsel for the petitioner that the sanction required for issuance of a notice under Section 147/148 of the said Act after the period of four years was granted by the Commissioner of Income Tax in a mechanical fashion and without application of mind. The sanction was, according to the learned counsel, given in a proforma with the words ''I am satisfied''. It was contended that this was not sufficient to show application of mind on the part of the Commissioner of Income Tax. Reliance was placed on **The Central India Electric Supply Co. Ltd v. ITO:** [2011] 333 ITR 237 (Del) and **Chhugamal Rajpal. v. S. P. Chaliha and Ors.** (SC): [1971] 79 ITR 603 (SC).

26. Mrs. Prem Lata Bansal, the learned senior counsel appearing on behalf of the revenue, submitted that this was a case in which the proviso to Section 147 was attracted. She submitted that insofar as the assessment order 1998-99 is concerned, the Assessing Officer had considered the question of the two units, namely, the gas turbine unit and the steam turbine unit not from the standpoint of whether they were integrated or they were separate units, but only in the context of the fuel cost argument. The learned senior counsel submitted that the examination was not whether the units by themselves or as a whole were entitled to deduction under Section 80IA or not but from the angle of what would be the fuel cost of the steam unit, insofar as the hot waste gases were concerned. It was only the question of allocation of fuel cost which was considered by the Assessing Officer and the question of units being separate or integrated was not specifically examined by the Assessing Officer. Therefore, there is no question of there being any change of opinion. She also submitted that the impugned notice dated 03.02.2006 was necessitated because of the inspection report of September, 2004. According to her, the said inspection report brought out fresh factual material to indicate that the gas turbine unit and the steam turbine unit were an integrated whole industrial undertaking and were not separate industrial undertakings or units. According to her, the inspection report threw light on the question as to whether the steam unit was merely an expansion of the gas unit or was an altogether separate unit. According to her, the report clearly indicated that the steam unit was entirely dependent on the gas unit and was, therefore, integrated with the gas unit and did not have an independent existence. According to her, this fact was not known to the Assessing Officer when he concluded the assessments for the assessment year 1998-99 or even for the assessment year 2000-01. She submitted that this was also not disclosed by the petitioner and, therefore, there was failure on the part of the petitioner to fully and truly disclose the material facts. As such, one of the conditions of the proviso to Section 147 got triggered. She submitted that the Commissioner of Income Tax (Appeals)' order in respect of the relevant assessment year as also the Income Tax Appellate Tribunal's orders in respect of the assessment years 1998-99 and 1999-2000 were before the inspection of September, 2004. Moreover, insofar as the opinion of the Committee on Disputes is concerned, the issue before it was only with regard to the allocation of fuel cost between the two units. She submitted that the issue whether the two units were separate or integrated was not

before the Committee on Disputes and, therefore, it would be wrong to say that the latter issue had attained finality. According to her, the only issue that had attained finality was with regard to the allocation of fuel cost and not the question of whether the two units were separate or integrated. She also referred to the assessment order as well as the order of the Commissioner of Income Tax (Appeals) for the assessment year 2004-05, copies of which were handed over to us in the course of arguments, to submit that in the earlier round the issue was with regard to fuel cost, whereas in the assessment year 2004-05, the issue was whether the two units were independent or one integrated unit. She also referred to the Committee on Disputes' opinion pertaining to the assessment year 2004-05 which granted permission for appeal to the Income Tax Appellate Tribunal. Therefore, according to her, it was an entirely new issue which had not been examined in the earlier round of assessment and, therefore, there was no question of change of opinion. She also submitted that the fresh examination was necessitated because of the new facts which were revealed in the inspection report of September, 2004 which ought to have been brought to the notice and disclosed by the petitioner at the time of the original assessment but the petitioner had failed to disclose the same. Consequently, she submitted that the ingredients of the proviso to Section 147 of the said Act were clearly satisfied and, therefore, the impugned notice dated 03.02.2006 was not without jurisdiction and was also within time.

27. She also submitted that the other condition of income having escaped assessment has also been satisfied in the present case and she placed reliance on Explanation 2(c)(i), (iii) and (iv). She also submitted that Explanation 1 to Section 147 also made it clear that mere production of books of accounts etc. did not necessarily mean that there was disclosure on the part of the assessee. She reiterated that it was only on inspection that it was found that the steam unit and the gas unit were an integrated whole. 28. She also submitted that at the time of issuance of a notice under Section 147/148 of the said Act, only a prima facie view has to be taken and it is obviously not a final view. The final view would only emerge when the assessment order is passed. Therefore, she submitted that there was no cause for any interference with the notice under Section 148 which is impugned in the present petition. She referred to **Raymond Woollen Mills Ltd v. ITO & Ors.:** [1999] 236 ITR 34 (SC), wherein it was observed that it is only to be seen whether there was,

prima facie, some material on the basis of which the department could re-open a case. The Supreme Court further observed that sufficiency or correctness of the material is not a thing to be considered at that stage. She then referred to **Ess Ess Kay Engineering Co. P. Ltd v. Commissioner of Income Tax:** (2001) 247 ITR 818 (SC), wherein the Supreme Court observed that the Income Tax Officer is not precluded from re-opening of the assessment of an earlier year on the basis of his findings of fact made in respect of fresh materials in the course of assessment of the next assessment year. The learned senior counsel then referred to **Diwakar Engineers Ltd v. Income Tax Officer:** [2010] 329 ITR 28 (Del), wherein it was observed that at the stage of issuing notice under Section 148 it was not necessary that the materials must be extensive and detailed. The court also felt that one of the methods by which materials could come into the possession of the Assessing Officer was by the assessment proceedings in subsequent assessment years. A reference was also made to **Phool Chand Bajrang Lal & Anr. v. ITO & Anr.** : [1993] 203 ITR 456 (SC), wherein the Supreme Court observed as under:

> ''Acquiring fresh information, specific in nature and reliable in character, relating to the concluded assessment which goes to expose the falsity of the statement made by the assessee at the time of original assessment is different from drawing a fresh inference from the some facts and material which was available which the Income Tax Officer at the time of original assessment proceedings. The two situations are distinct and different. Thus, where the transaction itself on the basis of subsequent information, is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings, cannot be said to be disclosure of the ''true'' and ''full'' facts in the case and the Income Tax Officer would have the jurisdiction to reopen the concluded assessment in such a case.''

29. Mrs. Bansal also placed reliance on **Rakesh Agarwal v. ACIT:** [1996] 221 ITR 492 (Del) to submit that embedded material may not be considered as disclosure. In the said decision, this Court had come to the conclusion that mere filing of documents in that case cannot be deemed to be a disclosure of all the material facts particularly on the ground that what might have been discovered by the Assessing Officer cannot be construed as a disclosure in terms of Section 147 of the said Act. Mrs

Bansal also referred to a decision of this Court in the case of **Consolidated Photo and Finvest Ltd v. ACIT:** [2006] 281 ITR 394 (Del), wherein this Court observed as under:

> ''The principle that a mere change of opinion cannot be a basis for reopening computed assessments would be applicable only to situations where the assessing officer has applied his mind and taken a conscious decision on a particular matter in issue. It will have no application where the order of assessment does not address itself to the aspect which is the basis for reopening of the assessment, as is the position in the present case. It is in that view inconsequential whether or not the material necessary for taking a decision was available to the assessing officer either generally or in the form of a reply to the questionnaire served upon the assessed. What is important is whether the assessing officer had based on the material available to him taken a view. If he had not done so, the proposed reopening cannot be assailed on the ground that the same is based only on a change of opinion.''

The decision in **Honda Siel Power Products Ltd v. DCIT:** [2012] 340 ITR 53 was also referred to by Mrs Bansal to explain what is the meaning of the expression ''disclose fully and truly all material facts'' appearing in Section 147 of the said Act. In that decision, this Court observed as under:

> ''12. The law postulates a duty on every assessee to disclose fully and truly all material facts for its assessment. The disclosure must be full and true. Material facts are those facts which if taken into accounts they would have an adverse affect on assessee by the higher assessment of income than the one actually made. They should be proximate and not have any remote bearing on the assessment. Omission to disclose may be deliberate or inadvertent. This is not relevant, provided there is omission or failure on the part of assessee. The latter confers jurisdiction to reopen assessment.''

30. Mrs Bansal submitted that the question of change of opinion would arise only when the Assessing Officer had formed an opinion and was now trying to alter that opinion. She placed reliance on **Dalmia Cement Pvt. Ltd v. CIT:** WP(C) 6205/2010 decided on 26.09.2011 by

a Division Bench of the Delhi High Court. The learned counsel also placed reliance on the decision in **Indian Hume Pipe Co. Ltd v. ACIT:** WP No. 1017/2011 decided on 08.11.2011 by a Division Bench of the Bombay High Court. The Bombay High Court observed that the basic principle laid down by the Supreme Court was whether the assessee had disclosed the primary facts which were necessary for assessment, fully and truly. The court observed that if the assessee had done so, the Assessing Officer was not entitled to a mere change of opinion to commence proceedings for re-assessment. However, the court also observed that mere production of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer does not necessarily amount to disclosure within the meaning of Proviso to Section 147.

31. In rejoinder, the learned counsel for the petitioner submitted that in the factual backdrop of the present case, there was nothing in the decisions which were cited by the learned counsel for the revenue which would militate against the case of the petitioner. It was submitted that in the present case the facts were the same and it was only that another inference was being drawn on the basis of the same facts. Such a situation clearly meant that there was only a change of opinion. Even the so-called inspection report did not reveal anything new. The facts were the same. It was only a new way to look at the very same facts.

32. It was submitted by the learned counsel for the petitioner that each case has to be judged on its own facts. He submitted that even in the recorded reasons, there is no indication as to what was the failure on the part of the petitioner and what did the petitioner fail to disclose. Unless and until it is made clear that there was a failure and what was that failure, assessment cannot be re-opened with the aid of Section 147/ 148 of the said Act. It was contended that the Assessing Officer was fully aware of the entire facts and methods of production and the manner in which the two units operated. He drew one set of inferences at the time of the original assessment and is now seeking to draw another set of inferences by issuing the impugned notice. This is nothing but a mere change of opinion based on the very same facts. And, that is impermissible in law.

33. It was contended that the learned counsel for the revenue had cited some decisions which have been noticed above, wherein facts

discovered in a subsequent assessment year could be the basis in re-opening of an assessment completed in respect of an earlier assessment year. But, according to the learned counsel for the petitioner, those decisions are not at all relevant in the present factual matrix. This is so because the assessment order in respect of the assessment year 2004-05 was issued on 27.02.2006, whereas the impugned notice had already been issued on 03.02.2006. Therefore, the assessment order for the assessment year 2004-05 could not have been the basis for issuing the notice and that is why, according to the learned counsel for the petitioner, the assessment order for the assessment year 2004-05 is not even mentioned in the recorded reasons. The permission granted by the Committee on Disputes in respect of the assessment year 2004-05 is, therefore, of no consequence. The learned counsel for the petitioner submitted that the jurisdictional question has to be decided and that mere escapement is not sufficient. The case of **Diwakar Engineers Ltd.** (supra) was distinguished by stating that in that case, details had not been provided by the assessee despite enquiry. Therefore, it was not a case of full and true disclosure. Once again, the learned counsel reiterated that each case has to be decided on its own facts. With regard to **Phool Chand Bajrang Lal** (supra), the learned counsel submitted that the case was entirely distinguishable inasmuch as in that case there was a cash loan which later turned out to be false and, therefore, re-opening of the assessment was sustained. He submitted that the facts are entirely different in the present case. In **Raymond Woollen Mills Ltd.** (supra) also, there was a clear finding of failure to disclose, which is not the case in the present petition. As regards **Consolidated Photo and Finvest Ltd.** (supra), the learned counsel for the petitioner submitted that that case was also distinguishable on its own facts. In that case certain expenses had been claimed. Subsequently, it was found that they were personal expenses and ought to have been disallowed. The facts in the present case are entirely different. As regards **Honda Siel Power Products Ltd.** (supra), the learned counsel for the petitioner submitted that in that case the petitioner had accepted and admitted that he did not give the details in respect of the tax free income in the context of Section 14A of the said Act. Therefore, that case is also decided on an entirely different set of facts.

34. As far as the principles of law set out in the decisions cited by the learned counsel for the revenue are concerned, it was submitted by

the learned counsel for the petitioner, no exception can be taken in respect of that. However, what must be seen is whether the factual matrix of the case fits in within the principles of law indicated therein. He submitted that the impugned notice was clearly time barred inasmuch as the preconditions for invoking the proviso to Section 147 had not been satisfied. In the present case, there was no failure on the part of the petitioner to fully and truly disclose all material facts and there was a clear-cut change of opinion insofar as the revenue was concerned. Even the escapement of income from assessment has not been indicated. Thus, according to the learned counsel for the petitioner, the impugned notice dated 03.02.2006, insofar as the first reason indicated therein is concerned, is liable to be set aside.

35. Having considered the factual background and the arguments advanced by the learned counsel for the parties as also the decisions referred by them in great detail, we are of the view that the plea advanced by the learned counsel for the petitioner requires acceptance. This is so because it is an admitted position that the impugned notice dated 03.02.2006 was issued beyond the period of four years from the end of the relevant assessment year i.e., from the end of 31.03.2001. In order that such a notice could be sustained in law, the ingredients and pre-conditions set out in the proviso to Section 147 have to be satisfied. Section 147, as it stood at the time of issuance of the impugned notice, is as under:

> ''147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :
>
> **Provided** that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment

year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

Explanation 1.-Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2. - For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) where an assessment has been made, but-

(i) income chargeable to tax has been under-assessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.]''

The proviso is couched in negative terms. It states that where an assessment, *inter alia,* under Section 143(3) has been made for the relevant assessment year ''no action shall be taken under this section

after the expiry of four years from the end of the relevant assessment year.'' There is, however, an exception and that begins with the words ''unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.'' Therefore, no action under Section 147 can be taken beyond the said period of four years unless and until the conditions precedent mentioned in the proviso are satisfied. The first condition is that income chargeable to tax must have escaped assessment. The second condition is that such escapement from assessment must be by reason of failure on the part of the assessee to, inter alia, disclose fully and truly all material facts necessary for his assessment for that assessment year. If either of these two conditions is missing, the exception to the bar setup in the proviso, does not get triggered. The consequence being that the assessment cannot be reopened.

36. In the present case, we find that the whole issue is with regard to the method of production and the manner in which electricity is generated. The entire process of generation of electricity, both by the gas turbine unit and the steam turbine unit, has been explained by the petitioner in great detail in the assessment proceedings for the assessment year 1998-99 which has been taken notice of by the Assessing Officer. He was fully aware that there is a gas turbine unit which generates electricity and which has a waste product which is in the form of hot waste gases. It is through the technology of the waste heat recovery boiler that these hot waste gases are utilized for driving the steam turbine which, in turn, generates additional electricity. So both the gas turbine as well as the steam turbine generate electricity independently. It is another matter that the waste product of the gas turbine is utilized as the only input for driving the steam turbine.

37. Although the learned counsel for the revenue was at pains to try to explain that the focus of the Assessing Officer was on the fuel cost issue and not on the issue of whether the two units were separate or integrated, we are not impressed by that argument. This is so because whatever may have been the focus of the Assessing Officer, the matter has to be looked at from the standpoint of the assessee/ petitioner. The petitioner had disclosed fully and truly the entire process of manufacture

and generation of electricity by the gas turbine unit as well as by the steam turbine unit. It was not as if it was a fact or a figure hidden in some books of accounts which the Assessing Officer could have, with due diligence, discovered but had not done so. The Assessing Officer had asked specific queries with regard to the manner of functioning of the two units and the petitioner had provided detailed answers. All facts were staring the Assessing Officer at his face. He could have drawn his own inferences and, in fact, he did by treating them as separate units. On the very same facts, he is now trying to draw a different set of inferences which is nothing but a mere change of opinion. The inspection report of September, 2004 does not indicate anything new. While considering the fuel cost argument in the earlier assessment year, when the matter travelled right up to the Tribunal, the entire factual position was examined by the Assessing Officer, the Commissioner of Income Tax (Appeals) as well as by the Tribunal and also by the Committee on Disputes and the two units were treated as separate units. We have already extracted the relevant portion of the Tribunal's order which notices the same. Therefore, in our view, this is not a case where the assessee/ petitioner can be said to have failed to disclose fully and truly all material facts necessary for assessment in respect of the assessment year 2000-01. Thus, this by itself, is sufficient for us to conclude that the exception carved out in the proviso to Section 147 is not attracted and, therefore, there is a bar from taking action under Section 147 inasmuch as the period of four years has expired. The impugned notice dated 03.02.2006 is, therefore, liable to be quashed on this ground.

38. We now come to the second purported reason for re-opening the assessment which pertains to taxability of income tax recoverable by the petitioner from the State Electricity Boards. It is stated in the recorded reasons that as per tariff notification issued by the Government of India the incidence of Income Tax on Income from generation of electricity is recoverable from the customers of NTPC, who are the State Electricity Boards. According to the recorded reasons, the amount of income tax recoverable by NTPC from the State Electricity Boards, inter alia for the assessment year 2000-01, have not been fully reported by NTPC Limited as revenue receipts and instead major portions of such amounts had been kept out of the credit side of the Profit & Loss Account. This, according to the respondent No.1, resulted in the income tax recoverable from the customers of NTPC escaping assessment due to the reason of the failure

on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the assessment year in question.

39. The learned counsel for the petitioner submitted that, first of all, no income had escaped assessment. It was contended that the petitioner had paid tax on the generation income by grossing up the rate of tax instead of grossing up the income. The rate of grossed up tax is 62.60162% as against the normal rate of 38.50% [35% tax + 10% surcharge]. It was also contended that there was no failure to disclose material facts inasmuch as the figures which have been referred to by the respondent No.1 in the recorded reasons were all taken from the audited accounts and, in any event, the respondent No.1 has not alleged as to which material fact was omitted to be disclosed. It was also contended that there was due application of mind on this issue at the stage of the original assessment itself. In fact, there was a reference to the assessment order for the assessment year 2000-01, wherein the Assessing Officer observed as under:

> ''Out of this Rs. 670,67,20,000/- is non-generation income as shown in the return. Hence, Rs. 3163,97,88,398 Rs. 670,67,20,000/- i.e. Rs. 2493,30,68,398/- represents the generation profit which has to be grossed up to account for tax on tax on this profit.''

40. Thus, the issue of grossing up was also considered by the Assessing Officer at the time of the original assessment. It was contended that for all these reasons, there was no occasion for re-opening of the assessment. On the other hand, the learned counsel for the revenue supported the recorded reasons and submitted that the manner in which the figures have been displayed is not correct and that by itself would lead to a wrong conclusion. 41. Having considered the arguments advanced by the counsel for the parties, we are of the view that here, too, the submissions of the petitioner need to be accepted. The learned counsel for the petitioner, in the course of arguments, submitted the actual figures with regard to the assessee's method of grossing up the rate of tax and the department's proposed method of grossing up of income. The same are as under:

> ''(Assessee's method - Grossing up of rate of tax (38.50%)
>
> (Rs. in crores)

Generation income as assessed by the AO		2493.31
Normal rate of tax	38.50%	
As the tax has to be borne by the customer, it has to be ''grossed up'' on tax on tax basis (38.50 x 100/61.50)	62.60162%	
Grossed up tax payable by NTPC on the generation income		1,560.85
The said grossed up tax of Rs. 1,560.85 crores is recoverable from the customer. (What is shown as recoverable from the customer in the balance sheet is a lesser figure of Rs. 1345.50 crores worked out on a provisional basis at the time of finalizing the accounts)		
Add: Tax on non-generation income of Rs. 670.67 crores at the normal rate of tax of 38.50%		258.20
Total tax payable by NTPC as per the assessment order		1819.05

(Department's method - Grossing up of income):

	(Rs. in crores)
Generation income as assessed by the AO	2493.31
Add: Amount of tax on generation income recoverable from the customer (the amount shown as recoverable in the balance sheet is lesser figure of Rs. 1345.50 crores worked out on a provisional basis at the time of finalizing the accounts)	1,560.85
Generation income to be taxed	4054.16

Normal rate of tax	38.50%
Tax payable by NTPC on the generation income	1,560.85
Add: Tax on non-generation income of Rs. 670.67 crores at the normal rate of tax of 38.50%	258.20
Total tax payable by NTPC assessment order as per the	1819.05''

It is clear that by virtue of either method, the total tax payable by NTPC, as per the assessment order would come to ' 1819.05 crores. Therefore, this is a clear case where no income has escaped assessment. As such, the pre-conditions for triggering the exception in the proviso to Section 147 are not satisfied. Thus, on this ground also, the impugned order is liable to be set aside.

42. No other reasons have been indicated in the recorded reasons. As such, the writ petition is allowed and the impugned notice dated 03.02.2006 is quashed and so also all proceedings pursuant thereto. The parties shall bear their own costs.

ILR (2013) IV DELHI 2484
W.P. (C)

LALIT KR. MODI ....PETITIONER

VERSUS

UNION OF INDIA AND ORS. ....RESPONDENTS

(RAJIV SHAKDHER, J.)

W.P. (C) NO. : 376/2012 DATE OF DECISION: 16.01.2013

(A) Constitution of India, 1950—Article 226-227—Writ Petition—Fundamental Rights Article 14, 19 and 21—

Passport Act—Revocation of Passport—Principles of Natural Justice—Violation of—Foreign Exchange & Management Act, 1999 (FEMA)—Code of Civil Procedure—S. 32—Territorial Jurisdiction—The Petitioner Commissioner, Indian Premiere League (IPL)—Organizing Cricket matches proceeded against by Directorate of Enforcement (DoE) for FEMA violation in parking funds in foreign bank—The petitioner based abroad summoned to appear in person before the authorities to explain certain aspect of his dealing as Commissioner, IPL avoided to appear ground security threat to his life in India—Kept making representation through his attorney—DoE not satisfied with explanation referred the matter to passport authority for impounding/revocation of passport-passport authority revoked his passport vide order dated 3.3.2011—Petitioner appealed to Regional Passport Officer (RPO) without success preferred writ petition—Held—Passport Act does not contemplate division of proceedings before passport authority into two half—Show cause notice clearly put the petitioner in picture that if he failed to satisfy officer with regard to tenability of his defence charge made against him—Action under Passport Act would follow—Last Clause (e) of S. 10 (3) of the Passport Act invest the passport authority to impound/revoke passport in 'general public interest' as well as input provided by statutory authority and other wings of government in the possession of actionable material—No fault found with passport authority—Assistant Passport Officer (APO) received information—Actionable provided necessary jurisdictional facts to exercise power under S. 37 to take recourse to provision of Section 32 CPC against witnesses and noticee—Show cause notice issued by APO while hearing held by superior officer RPO—This did not involve violation of principle of natural justice—Response of EOW of Bombay Police to RTI application made to it did not supprt petitioner's case in the

absence of passport being available with authority the only order which would be passed is of revocation—Writ petition dismissed.

On behalf of the petitioner an elaborate argument has been raised with regard to breach of principle of natural justice. In this regard broadly four submissions were made. First, the proceedings before the RPO were abruptly terminated on 26.11.2010. Second, that the show cause notices were issued by the APO, while the impugned order dated 03.03.2011 was passed by the RPO. Third, the material on which the show cause notice was issued to the petitioner was not supplied to the petitioner. Fourth, no opportunity was granted to cross-examine the officers of DOE. As regards the first submission, it may be noted that the material on record suggests that lengthy hearings were held both on 18.11.2010 and 26.11.2010. In the hearing held on 18.11.2010 time was granted to the petitioner between 1630 hours and 2030 hours. Similarly, while time for hearing on 26.11.2010 was slotted between 1430 hours to 1700 hours, the proceedings actually terminated at 1930 hours. This was followed by permission granted to the petitioner to file his written submissions. Written submissions ran into 438 pages, which was in addition to the written statement filed on his behalf. These aspects have been duly recorded by the APO in his communication dated 10.12.2010. In my view, the right to have interminable hearings, as demanded by the petitioner, cannot be a ground to lay challenge to the impugned order on the ground of breach of principles of natural justice.

49.1 The second limb of this argument which pertains to the aspect that show cause notice was issued by one authority i.e., the APO while the impugned order dated 03.03.2011 was passed by the another i.e., the RPO and hence breached the principles of natural justice, is once again misconceived. This ground is invoked by the learned counsel for the petitioner by referring to the definition of the passport authority contained in Section 2(c) read with Rule 3 column

(2) of schedule I of the Passports Act. It was contended that since the term 'passport authority' found in Section 10(3)(c) includes an APO, the said officer was competent to, not only issue a show cause notice but also pass the impugned order.

49.2 It is seen that against item no. 7A(a) of Schedule I the RPO (Mumbai) is also described as a passport authority alongwith the APO. Therefore, it is not as if the RPO does not have the necessary power invested in him in Section 10(3)(c) of the Act. This is not a case where a hearing was held by the APO and the impugned order was passed by the RPO. This is a case where show cause notices were issued by the APO, while hearing in the matter was held by a superior officer, i.e., the RPO. Therefore, this argument is also not tenable. I may only note that even in a case where a hearing is held by one officer and an order is passed by another officer, there is an authority for the proposition that, in an institutional hearing, that is, in a case involving the government or institution, where the government or institution is not in lis, with aggrieved party, such an order of the Government or institution will not get impacted on this ground, as the contours of natural justice will vary with the nature of the inquiry. See observations in **Local Government Board vs Alridge,** 1915 AC 120; Ridge vs Baldwin 1964 AC 40; **Regina vs Race Relations Board, Ex parte Selvarajan** (1975) 1 WLR 1686 and in de Smiths Judicial Review of Administrative Action (4th edn., pp. 219-220). Also see observations in **Ossein and Gelatine Manufacturers' Association of India vs Modi Alkalies & Chemicals Limited & Anr.** (1989) 4 SCC 264 at page 268 para 6, which has noticed the said authorities. However, I have not been called upon to deal with such a situation. The submission of the learned counsel for the petitioner on this score is therefore rejected.

49.3 The third limb of this argument which is that the relevant material which formed the basis for issuing the show cause notice was not supplied ,is also not quite

correct. The APO vide letter dated 01.11.2010, admittedly had given extracts of the material, which was supplied by the DOE to him. The receipt of the said letter is not denied by the petitioner. It is also not denied by the petitioner that he was made available the complaint filed by the DOE under Section 16(3) of FEMA. The petitioner was well aware of the charge against him and the material which formed the basis of the charge, and therefore, cannot be heard to plead that he had not been supplied with the requisite material to answer the charge.

49.4 The fourth submission made that no right was given to cross-examine officers of DOE, is also untenable for two reasons. First, that there is no inalienable right to cross-examine, it is not unknown to law that proceedings can be decided based on documents; especially documents which form the basis of the decision are not in dispute. Second, while the petitioner chooses to keep himself from his investigators, he seeks to subject his investigators to cross-examination; a request if granted would really turn the situation on its head. **(Para 49)**

(B) International Law—Covenant on Civil and Political Right (CCPR)—Article 12 not applicable—Expression in the interest of general public in Passport Act, cannot be construed as per Article 12 of Covenant on Civil and Political Right (CCPR) in view of the fact that the municipal law holds the field.

The argument made on behalf of the petitioner that the expression 'in the interest of general public' appearing in Section 10(3)(c) of the Passport Act should take its colour from a similar provision appearing in Article 12 of the CCPR, does not impress me for the following reason: Firstly, as indicated above, the action taken by the DOE to protect the economic interest of the country in respect of which the allegation is that money to the tune of hundreds of crores has been parked by the petitioner outside the country, would require examination. Secondly, there is no scope for

invoking the provisions of Article 12 of the CCPR once the municipal law on a given subject occupies the field. See observations of the Supreme court in **Vishakha and Ors. Vs. State of Rajasthan and Ors.,** AIR 1997 SC 3011 at page 298 para 7 and **Jolly George Varghese & Anr. vs The Bank of Cochin** (1980) 2 SCC 360 at page 364 para 6. It is not the case of the petitioner before me, that there is any doubt with regard to the interpretation to be given to the expression "in the interest of the general public", appearing in Section 10(3)(c) of the Passports Act. Therefore, this submission of the petitioner is also without merit and is, accordingly, rejected. **(Para 51)**

Important Issue Involved: (a) If a hearing is given by one officer and order is passed by another of the same institution not being in lis with aggrieved party, there is no violation of principle of natural justice (b) the expression in the interest of general public in Passport Act, cannot be construed as per Article 12 of Covenant on Civil and Political Right (CCPR) in view of the fact that the municipal law holds the field (c) It is discretion of the Court to entertain the writ petition in case the jurisdiction is invoked only on the basis of order passed by authority and where the cause of action has arisen in the territorial jurisdiction of other Court.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Mr. U.U. Lalit, Sr. Advocate with Mr. Swadeep Hora, Ms. Bansuri Swaraj, Ms. Sangeeta Mandal, Ms. Mama Tiwari, Ms. Taruna A. Prasad, Mr. Mohit Garg, Mr. Sangram Singh and Mr. Abhishek Singh, Advocates.

FOR THE RESPONDENTS : Mr. Rajeeve Mehra, learned ASG with Mr. Jatan Singh, CGSC, Mr. Ashish Virmani and Mr. Tushar Singh, Advocates.

CASES REFERRED TO:

1. *Sterling Agro Industries Ltd.* vs. *Union of India and Ors.,* 181(2011) DLT 658.
2. *AdityaKhanna* vs. *The Regional Passport Officer* 156(2009) DLT 17.
3. *Canon Steels (P) Ltd.* vs. *Commissioner of Customs,* (2007) 14 SCC 464 and 2.
4. *Rajiv Tayal* vs. *Union of India and Ors.* (2005) 85 DRJ 146 (DB).
5. *Kusum Ingots and Alloys Ltd.* vs. *Union of India (UOI) and Anr.,* (2004) 6 SCC 254.
6. *Vishakha and Ors.* vs. *State of Rajasthan and Ors.,* AIR 1997 SC 3011 at page 298 para 7.
7. *Syed Abdul Gani Syed Abdul Kader* vs. *The Regional Passport Officer and Ors.,* 1997 (1) CTC 180.
8. *Ossein and Gelatine Manufacturers' Association of India* vs. *Modi Alkalies & Chemicals Limited & Anr.* (1989) 4 SCC 264 at page 268 para 6.
9. *Jolly George Varghese & Anr.* vs. *The Bank of Cochin* (1980) 2 SCC 360.
10. *Maneka Gandhi* vs. *Union of India* (1978) 1 SCC 248.
11. *Regina* vs. *Race Relations Board, Ex parte Selvarajan* (1975) 1 WLR 1686.
12. *Bhagwati Prasad* vs. *Chandramaul* AIR 1966 SC 735 at para 10 to 13].
13. *State of Madras* vs. *A.R. Srinivasan,* AIR 1966 SC 1827.
14. *Ridge* vs. *Baldwin* 1964 AC 40.
15. *Local Government Board* vs. *Alridge,* 1915 AC 120.

RESULT: Writ Petition allowed.

RAJIV SHAKDHER, J.

1. The challenge in the captioned writ petition has been laid to the order dated 03.03.2011 passed by the Regional Passport Officer i.e.,

Respondent no.3 (hereinafter referred to as the RPO) and the order-in-appeal dated 31.10.2011 passed by the Chief Passport Officer (hereinafter referred to as the CPO).

2. The order-in-original, referred to above, which is passed by the RPO, is based on a communication received by his office from the Directorate of Enforcement, Mumbai (in short DOE) vide letter dated 04.10.2010 stating therein that a complaint had been filed under section 16(3) of : The Foreign Exchange and Management Act, 1999 (in short FEMA) against the petitioner in view of his failure to comply with the summons issued under section 37, on 02.08.2010 and 24.08.2010, qua proceedings proposed to be taken out against him under section 13 of the FEMA. This communication apparently, also informed the RPO, that notice on the said complaint had been issued on 20.09.2010.

3. The petitioner has challenged, the aforementioned impugned orders, on various grounds, which I will refer to and deal with in the latter part of my judgment. For the moment, it may be relevant to refer to the material and relevant facts which have led to the institution of the present writ petition under Article 226 of the Constitution of India.

4. As indicated above, on 02.08.2010 summons were issued under section 37 of the FEMA, to the petitioner, in respect of investigations being carried out against him for violation of the provisions of FEMA. The petitioner was required to appear before the Assistant Director, on 10.08.2010. It appears that on 08.08.2010, a letter was received through the petitioner's General Counsel and Constituted Attorney, that the petitioner had not made himself available before the concerned officer, due to security concerns, which is why, he was stationed outside the country.

5. The concerned officer, apparently not convinced, with the reasons given in the aforementioned communication regarding the petitioner's apprehension of threat to his life, issued a second communication dated 13.08.2010. By this communication, the petitioner was required to, inter alia, provide evidence of threat to his life, and the details, if any, of complaints he had made to Government authorities in that behalf. The petitioner was also asked to supply names of persons who had advised him to stay outside the country.

5.1 The petitioner by a return communication dated 23.08.2010, evidently indicated that, on 14.10.2009, he had received an Email from

an unknown source threatening him with dire consequences. This communication apparently was intercepted by the Mumbai Police, which assessed the same, according to the petitioner, as a threat from the underworld , to liquidate the petitioner. The petitioner thus, claimed that it is because of this threat perception, that he and his family were provided protection by the Mumbai Police.

6. The concerned officer having deliberated upon the material produced by the petitioner, came to the conclusion that, the threat of assassination was made as far back as on 14.10.2009, and thereafter, the petitioner had been organizing and participating in various public and private functions, and therefore, the reason given for not appearing before him, was a ruse to avoid the process of law.

7. Accordingly, fresh summons were issued on 24.08.2010 , requiring the petitioner to appear before the concerned officer, on 07.09.2010, to tender evidence and produce documents mentioned in the schedule annexed to the said summons.

8. Admittedly, the petitioner did not appear before the concerned officer, and once again, through his General Counsel and Constituted Attorney gave his reasons for non appearance vide communication dated 07.09.2010. The reasons set out in the said communication were broadly the same, i.e., that he apprehended threat to his life from the underworld and hence had been advised not to travel to India.

8.1 The concerned officer having examined the documents submitted by the petitioner came to the conclusion that the petitioner had participated and made appearances in connection with the third (3rd) edition of the IPL tournament and therefore, the reason trotted out was a bogey, created to avoid his examination under oath, under the provisions of section 37 of FEMA.

9. Since, the officer concerned was of the view that, the petitioner had willfully avoided the summons issued to him, under section 37 of FEMA read with the provisions of section 131 and section 272(A)(i) of the Income Tax Act, 1961, to stall investigation, he decided to institute a complaint for levying penalty on the petitioner under section 13 of FEMA.

9.1. Consequently, a complaint under section 16(3) of FEMA was

filed on 16.09.2010.

10. In the said complaint, a notice was issued to the petitioner on 20.09.2010.

11. It appears that on 04.10.2010, the DOE issued a communication which was received by the Assistant Passport Officer (in short APO), on 05.10.2010 informing him with regard to the aforesaid development, with a request that action be taken in public interest for revocation of passport of the petitioner under section 10(3)(c) of the Passports Act, 1967 (in short the Passports Act).

12. On 12.10.2010, the petitioner through his solicitor had sent a reply to the notice dated 20.09.2010 issued in the aforementioned complaint, filed under section 16(3) of FEMA.

13. It appears, based on the information received by the APO, a show cause notice dated 13.10.2010 was issued to the petitioner at the address mentioned in his passport application, which is, Anand 41, Gandhi Gram Road, Juhu, Mumbai-400049. This show cause notice was, evidently, returned unserved; though this may have come to light later.

13.1 On 15.10.2010, a second show cause notice was issued by the APO, at the other address available with him, which was, Nirlon House, AB Road, Mumbai. By virtue of the said show cause notices issued by the APO, the petitioner was directed to appear before the APO alongwith his passport bearing no.Z-1784222 dated 30.07.2008.

13.2 The show cause notice issued not only directed the petitioner to appear but also to represent his case in person within 15 days from the date of issuance of the show cause notice. Since the first show cause notice was returned unserved, one would presume that the 15 day period would commence from the date of receipt of the second show cause notice dated 15.10.2010.

14. On 26.10.2010, a reply was received from the petitioner's solicitor which was, an interim reply. The solicitor of the petitioner, evidently sought two weeks to file a detailed reply, after they were supplied with the material which formed the basis for issuing the said show cause notice.

15. Since, no reply was received from the APO, the petitioner

wrote three letters of even date 28.10.2010, followed by a letter dated 29.10.2010. There was apparently no reply to the said communications, whereupon the petitioner filed a second reply, with the APO, dated 30.10.2010. The reply filed on behalf of the petitioner was also termed as an interim reply. The position taken in the said reply was that the petitioner had fully cooperated with the DOE and provided all documents sought for. It was also stated that the petitioner was not wilfully avoiding appearance as alleged, and that, he was amenable to his examination being carried out via video-link and / or a commission or any other method as envisaged under section 131 of the Income Tax Act.

16. The APO by a letter dated 01.11.2010 responded to the petitioner's letters of 26.10.2010 and the three letters of even date i.e., 28.10.2010 sent to him, in response to the show cause notices issued to the petitioner. By this communication, the APO indicated to the petitioner that, the communication received from the DOE vide letter dated 04.10.2010 and 15.10.2010, were confidential and constituted correspondence exchanged between two government departments which, could not be supplied to him. However, certain extracts from the said letters as also information gleaned from other documents, which had formed the basis, for issuance of the show cause notices were set out, and thus, made available to the petitioner. The extracts set out in the communication dated 01.11.2010, adverted broadly, to the following:-

(i). The DOE investigation had revealed that the petitioner as the Chairman of the Governing Council of the IPL of the Board of Control for Cricket in India (in short BCCI), had committed gross irregularities in the conduct of the IPL tournaments, and in the award of contracts by the BCCI to various parties in India and abroad.

(ii). The fraudulent activities of the petitioner, which were in violation of FEMA, had led to the siphoning of funds to the extent of hundreds of crores of rupees; which apparently he was suspected to have parked outside India.

(iii). The petitioner, despite, summons issued by the DOE, on 02.08.2010 and 24.08.2010, had not appeared before the concerned officer.

(iv). The petitioner had made himself scarce when, investigations against him had been intensified by various governmental agencies, and therefore, his failure to appear before the concerned authority, despite

summons amounted to non-compliance with the legal process. In this connection, the reply submitted by Sh. Modi to DOE wherein he had stated that he was advised to stay outside the country was apparently also considered.

(v). A light blue alert notice no.01/2010 had been issued against the petitioner by the Directorate of Revenue Intelligence, New Delhi (in short DRI), on 01.10.2010.

(vi). It was, in public interest, in general as also in the interest of the investigation, and having regard to the grave irregularities committed by the petitioner, that his passport be **"impounded",** so that his attendance in compliance with the summons issued, be enforced.

(vii). A reference was also made to the show cause notice dated 20.09.2010 issued in the complaint dated 16.09.2010, under section 16(3) of the FEMA.

17. The APO's communication of 01.11.2010 concluded by stating that in the interest of natural justice and fairness before, "initiating action" under section 10(3)(c) of the Passports Act, additional time of ten (10) days was being granted, to enable, the petitioner to file a reply.

18. The petitioner's solicitor apparently issued a communication dated 10.11.2010, on behalf of the petitioner, seeking once again, documents and the material relied upon. Certain clarifications were also sought as to who and what material had been supplied to the APO. The said letter was followed by yet another letter, issued by the petitioner's solicitor, dated 11.11.2010.

19. By a communication dated 15.11.2010, the APO indicated to the petitioner's solicitor that a date had been fixed for a personal hearing, on 16.11.2010 at 1600 hours at the designated address, to deliberate upon the action proposed, which is, whether the passport of the petitioner ought to be impounded or revoked.

20. By a return communication of the same date i.e., 15.11.2010, a request was made to postpone the date of hearing to 18.11.2010. As requested, the hearing was postponed to 18.11.2010; and information in that behalf was conveyed through letter dated 16.11.2010.

20.1 The petitioner's solicitor in their letter of 18.11.2010 had sought to take the stand that the hearing of 18.11.2010, could not be held

to consider aspects related to impounding or revocation of the petitioner's passport as, the show cause notice was issued only to adjudicate upon as to: whether or not proceedings under section 10(3)(c) had to be "initiated".

20.2 This stand was reiterated at the hearing held on 18.11.2010. Apart from the above, an objection was also taken to the matter being heard by the RPO, as the show cause notice was issued by the APO.

20.3 The hearing of 18.11.2010 was followed by two letters dated 19.11.2010 and 22.11.2010. In the first letter, an order was sought on the objection taken by the counsel for the petitioner to the matter being heard by the RPO, and by the second letter, a copy of the order was sought whereby, their request for inspection of records, certified copies of the Rojnama and ordersheets, had been declined.

21. The above propelled the RPO to convey to the counsel for the petitioner vide communication dated 23.11.2010 that the Passport Authority at Mumbai was headed by the RPO, Mumbai, who could call upon any officer or staff of his office to assist him and could also delegate the work assigned to him, to subordinate officials, for smooth functioning of his office. It was also communicated to the counsel for the petitioner that, they were taking such like objections only to prolong the matter, and that, final hearing in the matter would be held, on 26.11.2010, between 14.30 hours to 1700 hours.

22. On 26.11.2010, a communication was served on the APO that the petitioner's counsel should be supplied with : the documents furnished by DOE; permission be granted to inspect the official files; records of DOE be summoned and notice of hearing be issued to the DOE.

22.1 Furthermore, it was indicated that in the event, the aforesaid request was not acceded to, requisite orders be passed. A request was also made to grant permission to cross-examine the officers of the DOE.

23. The RPO, however, concluded the hearing in the matter on, 26.11.2010.

24. Undetered the counsel for the petitioner, issued two letters dated 29.11.2010 and 01.12.2010, requesting for intimation of, the next date of hearing as, according to them, hearing on 26.11.2010, was abruptly concluded.

25. On 06.12.2010, a summary of arguments advanced, was filed on behalf of the petitioner.

26. On 10.12.2010, the APO responded to the letters dated 29.11.2010, 01.12.2010 and 06.12.2010 issued on behalf of the petitioner. The APO, communicated to the counsel for the petitioner that they had been given lengthy hearings on two dates i.e., 18.11.2010 and 26.11.2010, whereafter they were also advised to file their written replies, if any. He also communicated that though the hearing on 26.11.2010, was slotted from 1430 hours to 1700 hours, it actually ended at 1930 hours. Reference was also made to the fact that the previous date i.e., 18.11.2010, hearing was conducted between 1630 hours to 2030 hours; and thus, having regard to the fact that written submissions had been submitted which ran into 438 pages followed by a written statement dated 06.12.2010, no further hearing in the matter was considered necessary.

27. It is in this background that on 03.03.2011, the first impugned order was passed by the RPO.

28. Being aggrieved, the petitioner, filed an appeal on 01.04.2011, under the provisions of section 11 of the Passports Act. The petitioner's counsel in support of the said appeal was heard on 14.07.2011 and 01.08.2011.

28.1 An opportunity was also granted to file written submissions vide communication dated 08.08.2011. In this communication, it was conveyed that hearings in the appeal had been granted on 14.07.2011, between 1500 hours and 1730 hours, while on 01.08.2011, hearing was granted between 1400 hours and 1800 hours. Furthermore, it was conveyed that since, on 01.08.2011, it was mutually agreed that, written submissions as well as additional points which the counsels were required to make, could be filed – there was need for the same to be filed at an early date, so as to enable the CPO, to take a decision in the appeal.

29. Accordingly, on 17.08.2011, written submissions were filed on behalf of the petitioner.

30. Almost simultaneously, it appears, the petitioner through his General Counsel and Constituted Attorney filed three applications of even date i.e., 17.08.2011, under the Right to Information Act, 2005 (in short the RTI Act) with : the Public Information Officer of the Ministry of

Home Affairs, Govt. of India; the office of the RPO, Mumbai; and the CPIO, Dy. Passports Officer, CPV Division of Ministry of External Affairs.

31. On 12.10.2011, the RPO's office inter alia conveyed to the querist that since information pertains to a third party, it could not be disclosed to him, as there were cases which were being pursued against the petitioner and, as per the directions of the Economic Offences Wing of the Mumbai Police, his passport had been revoked. It was further communicated that information sought for, if disclosed, would affect the economic interest of the state. An exemption was thus sought under section 8(1)(a),8(1)(j) as also under section 8(1)(h) of the RTI Act, on the ground that it would impede pending investigation, apprehension and prosecution of the offenders.

32. It appears that, in the meanwhile, on 04.10.2011, the petitioner had written to the concerned officer of the DOE to drop the show cause notice dated 20.09.2010 issued on a complaint filed under section 16(3), on the ground that, it had been pending adjudication for more than one year and, in case, it was proposed to continue with the adjudication, they should be granted a personal hearing.

33. The petitioner's counsel, by a letter dated 19.10.2011, requested the CPO to pronounce judgment in the appeal or, in the alternative, stay the impugned order of the RPO, as requested in their earlier letter dated 10.10.2011. This request was reiterated by the petitioner's counsel vide their letter dated 01.11.2011.

34. On 01.11.2011, a writ petition was filed in this court, which was numbered as: WP (C) No.7846/2011, to seek directions qua the CPO in the pending appeal.

35. Evidently, on 03.11.2011, at about 1513 hours, the petitioner's Constituted Attorney received a communication that, the CPO had disposed of the appeal vide order dated 31.10.2011.

36. Consequently, the aforementioned writ i.e., WP(C) 7846/2011 was withdrawn.

37. It is the background of the aforesaid facts and circumstances that, the captioned writ petition has been filed.

SUBMISSIONS OF COUNSELS

38. On behalf of the petitioner, arguments were advanced by Mr. U.U. Lalit, Sr. Advocate, while on behalf of the respondents, arguments were advanced by Mr.RajeeveMehra, the learned ASG.

39. The arguments advanced on behalf of the petitioner briefly went as follows :-

(i). the show cause notice dated 15.10.2010 was issued to initiate action under section 10(3)(c) of the Passports Act and not for culmination of proceedings under the said provision i.e., for revocation of the petitioner's passport. In other words, the impugned orders went beyond what was proposed in the show cause notice.

(ii). The proceedings before the Passport Authorities were initiated based on the alleged failure of the petitioner to respond to the two summons issued by the DOE dated 02.08.2010 and 24.08.2010 under section 37 of the FEMA. These summons thus, formed the basis for institution of a complaint by the DOE under section 16(3) of the FEMA, on which, notice had been issued, on 20.09.2010. The RPO and the CPO failed to take into account the fact that a detailed reply had been filed, on 12.10.2010, on behalf of the petitioner, stating therein, that he could not appear in person, on account of threat to his life.

(iii). There has been no adjudication in the complaint filed under section 16(3) of FEMA, in which, notice has been issued on 20.09.2010. This was so, despite, a reminder being sent on behalf of the petitioner, on 04.10.2011. The provisions of section 16(6) of FEMA require the adjudicating authority to complete adjudication within a period of one year from the date of receipt of the complaint and failure to dispose of the complaint within the stipulated period is required to be backed by definitive reasons. The pendency of those proceedings cannot, therefore, form the basis of the impugned orders.

(iv). Under FEMA, any violation can lead to only a civil liability as contemplated under section 13 of the said Act. The DOE, has no power of arrest or to seek the presence of a person for custodial interrogation. The powers of the officers of DOE are akin to those available under section 131 of the Income Tax Act, which invest an officer with the same powers, which are vested in a civil court. In this behalf reference was made to Sections 30(b), 31 and 32 of the Code of Civil Procedure,

1908 (in short the CPC). The argument being that: while a court could in a given case exercise coercive powers vis-a-vis a witness, a defendant in a suit cannot be coerced to give his testimony.

(v). The DOE's communications dated 04.10.2010 and 15.10.2010, which formed the basis of the APO's show cause notice of 15.10.2010, was issued in ignorance of the reply that had been filed with the DOE on 12.10.2010.

(vi). The action by the APO in issuing a show cause notice was pre-mature as no adjudication had taken place before the concerned authority vis-a-vis the complaint filed under section 16(3) of the FEMA.

(vii). At the hearing held on 18.11.2010, not only was the APO present but also the RPO. The show cause notice and all previous correspondence had been exchanged with the APO. Therefore, the impugned order of the RPO was bad in law as it was the APO who ought to have, if at all, passed the impugned order. The APO was the competent passport authority within the meaning of Rule 3 read with Schedule 1 of the Passports Act.

(viii). There was a violation of the principles of Natural Justice as the documents sought for were : not supplied; inspection of files was not given; and no opportunity was given to cross-examine the officials of the DOE.

(ix). The impugned proceedings were filed in violation of principles of Natural Justice as after the first hearing granted on 18.11.2010, at the next date of hearing i.e., on 26.11.2010, the proceedings were abruptly terminated. Despite, a request for further hearing, no further opportunity was granted; thus, breaching the principles of Natural Justice.

(x). The order of the CPO was bad in law as it was pronounced after a gap of over three months.

(xi). The DOE, in its request to the Passport Authorities, had only sought impounding of the petitioner's passport, while the impugned orders proceed to revoke the petitioner's passport. Revocation is a permanent cancellation of the petitioner's passport, while impounding would have led to a mere temporary custody of the passport.

(xii). Given the threat to the petitioner's life, he had offered to

answer any questionnaire that was submitted to him or, answer questions through video-link or, even answer to a commissioner, if so appointed by the DOE. The complete disregard to the alternative modes available, was illegal. The order of revocation of the petitioner's passport in these circumstances was a draconian measure, which failed to satisfy the test of proportionality.

(xiii). The two show cause notices issued by the DOE, were mainly directed against the officials of the BCCI which included the President and the Secretary, in respect of, IPL tournament conducted in South Africa, and the issue related to hiring of services of an entity by the name of IMG, for conduct of the said tournament. The petitioner was included as a noticee based on the provisions of section 42 of FEMA, which were pivoted on the petitioner's alleged vicarious liability. The show cause notice did not indicate any personal misdemeanour on the part of the petitioner.

(xiv). The RTI applications moved by the Constituted Attorney of the petitioner revealed that the petitioner's passport had been revoked as per the directions of the Economic Offences Wing of the Mumbai Police. A subsequent RTI application moved by the very same Constituted Attorney with the Economic Offences Wing of the Mumbai Police, revealed that no case was pending against the petitioner. Therefore, the impugned orders, had been passed for extraneous reasons.

(xv). The provisions of section 10(3)(c) of the Passports Act, could not be invoked in the present case, as none of the contingencies mentioned therein were fulfilled. In this regard, reliance was also placed on Article 12 of the Covenant on Civil and Political Rights (in short CCPR). It was sought to be argued that the expression "in the interest of general public" appearing in section 10(3)(c) of the Passports Act had to be construed, in accordance with, Article 12 of the CCPR.

(xvi). The impugned orders were passed in ignorance of the fact that under the provisions of the FEMA, in the adjudication proceedings, pending before it, the petitioner was entitled to be represented by a lawyer or a chartered accountant, and therefore, the personal presence of the petitioner was uncalled for.

(xvii). The CPO and the RPO failed to take into account that, in this case, no summons or warrants had been issued by any court, and it is

only when, the summons and the warrants were issued by a court under section 10(3)(h) of the Passports Act that, a passport can be impounded or revoked.

(xviii). The RPO and the CPO had failed to independently apply their minds to the matter in issue. They had acted on the recommendations of the DOE, as if, it was binding on them and in that sense, completely abdicated their role as quasi-judicial authorities.

(xix). With regard to the preliminary objection taken by the respondents qua the territorial jurisdiction of this court to entertain and adjudicate upon the captioned writ petition, it was argued that the order of the CPO was passed at Delhi which, conferred jurisdiction of the court. It was submitted that the order of the CPO, which is impugned in the present proceedings, supplied a cause of action to approach this court under the provisions of Article 226 of the Constitution of India.

39.1. In support of their arguments, the petitioner has relied upon the following judgments:- **Maneka Gandhi Vs. Union of India** (1978) 1 SCC 248; **AdityaKhanna Vs. The Regional Passport Officer** 156(2009) DLT 17 and **Canon Steels (P) Ltd. Vs. Commissioner of Customs,** (2007) 14 SCC 464 and 2.

40. On the other hand, on behalf of the respondents, the following submissions were made, beginning with a preliminary objection.

(i). The preliminary objection taken was, to this court's jurisdiction to entertain and adjudicate upon the present petition. In this regard, it was submitted that the petitioner was a resident of Mumbai and had applied for passport at Mumbai. A major part of the cause of action had arisen in Mumbai including the fact that the first impugned order, which was passed by the RPO, was passed at Mumbai. The only reason that the petitioner had chosen to approach this court, was on account of the order passed by the CPO, in the appeal, preferred by him, under section 11 of the Passports Act.

(ii). The impugned order of the RPO, was based on material made available to him, by the DOE. In this regard, a reference was made to the communication dated 04.10.2010 issued by the DOE, wherein a reference had been made to the complaint dated 16.09.2010, filed against the petitioner, under section 16(3) of the FEMA, and the issuance of a

subsequent notice on the said complaint, on 20.09.2010.

(iii). The action under section 10(3)(c) was taken in public interest.

(iv). The petitioner was given adequate opportunities, both by way of personal hearing and by allowing the petitioner's counsel to file written submissions. As a matter of fact, even extracts of relevant information were supplied by the APO vide communication dated 01.11.2010.

(v). It was contended that this court was concerned, while exercising powers under Article 226 of the Constitution of India, with the availability of the material, based on which, the impugned action had been taken and not with the sufficiency and adequacy of the material. The court could not sit in judicial review qua the satisfaction arrived at by the Passport Authority, under section 10 of the Passports Act. The court under Article 226 could interfere, only if, the reasons contained in the impugned order are found to be extraneous or, are held to have, no relevance, to the interest of the general public or, the impugned orders failed to reflect, the argument made, that they had been passed in the interest of general public.

(vi). Lastly the petitioner had failed to disclose that 14 show cause notices had been issued to the petitioner. 40.1. In support of their arguments, the respondents relied upon the following judgments:- **Maneka Gandhi Vs. Union of India** (1978) 1 SCC 248; **State of Madras Vs. A.R. Srinivasan,** AIR 1966 SC 1827; **Rajiv Tayal Vs. Union of India and Ors.** (2005) 85 DRJ 146 (DB) and **Syed Abdul Gani Syed Abdul Kader Vs. The Regional Passport Officer and Ors.,** 1997 (1) CTC 180.

REASONS

41. The core issue which thus arises for consideration is: whether the direction contained in the impugned orders of the RPO and the CPO to revoke the petitioner's passport has been exercised validly, in accordance with law. The examination of this issue, in my view, would require examination of two underlying issues. First, whether the necessary jurisdictional facts were present to enable the RPO to exercise the power of revocation? Second, whether in the given circumstances, the RPO had exercised his powers in the interest of general public? In other words, was there a case, as alleged by the petitioner, of material irregularity displayed by the RPO and the CPO, in exercising their jurisdiction.

42. A careful perusal of the facts, which have emerged from the record, would show that the impugned orders came to be passed in the background of the following events.

42.1 The petitioner was issued a summon under Section 37 of the FEMA on 02.08.2010. It was followed by yet another summon, once again, issued under Section 37 of the said Act, on 24.08.2010. The summons, admittedly, required personal appearance of the petitioner before the concerned officer. The summons were indicative of the fact that the DOE, proposed to take action against the petitioner under Section 13 of FEMA.

42.2 In response to the first summon, issued on 02.08.2010, it was sought to be conveyed on behalf of the petitioner vide communication dated 07.08.2010, which was delivered on 09.08.2010, that there was an apprehension of threat to the petitioner's life. The concerned authority not being convinced, sought further details, from the petitioner vide communication dated 13.08.2010. It is at this stage that the petitioner referred to the threat assessment made by the Mumbai Police, with regard to the petitioner's safety, and the provision made for his security, while he was in Mumbai. The concerned authority, not being persuaded, by the material supplied and the reasons put forth, issued a second summon to the petitioner under Section 37 of the Act, on 24.08.2010, requiring the petitioner to appear before him, on 07.09.2010.

42.3 Admittedly, the petitioner did not appear before the concerned authority, and trotted out the same reasons, i.e., threat to his life. It is at this stage that a complaint under Section 16(3) of the FEMA was filed, on 16.09.2010. Notice in this complaint was issued on 20.09.2010.

42.4 The DOE, in the background of these facts, issued a communication to the APO, which was received by him on 05.10.2010, to take action for revocation of the petitioner's passport under Section 10(3)(c) of the Passports Act.

42.5 In the meanwhile, the petitioner filed his reply on 12.10.2010, to the complaint filed under Section 16(3) of FEMA.

42.6 It is in the background of these circumstances that the focus qua the petitioner shifted to the authority constituted under the Passports Act. The APO, admittedly, based on the request of the DOE, issued show cause notices dated 13.10.2010 and 15.10.2010, to the petitioner,

seeking his explanation/response as to why action under Section 10(3)(c) of the Passports Act, ought not to be taken against him.

43. The argument put forth on behalf of the petitioner on this aspect is: Firstly, that the show cause notice contemplated only **"initiation"** of action under Section 10(3)(c) of the Passports Act. There was no indication in the show cause notice with regard to revocation of the petitioner's passport. Second, the authorities constituted under the Passport Act abdicated its power as they acted on the dictation of the DOE. In this regard, it was argued that the complaint filed under Section 16(3), has not been adjudicated upon despite protestation made in this regard on behalf of the petitioner. It was contended as a matter of fact, a request was made to drop the said proceedings. There are other supplementary arguments, which I would deal with by the way, in the course of my judgment.

43.1 As indicated hereinabove, the petitioner claims that he received only the second show cause notice issued by the APO which is dated 15.10.2010. I would assume that to be the correct position for the moment. A perusal of the show cause notice would show that it required the petitioner to appear before the APO, in person, within 15 days from the date of issuance of the notice alongwith his passport. The notice also indicated that if no reply is received within the stipulated period, necessary action under the Passports Act would be initiated against him.

43.2 The brief reason adverted to in the show cause notice of 15.10.2010 was that the complaint filed by the DOE dated 16.09.2010 (on which notice had been issued for non-compliance of the directions contained in summons issued to the petitioner), had been received. The non-compliance is, in substance, related to non-appearance in person by the petitioner, as directed.

43.3 Therefore, an explanation was sought, as to why, action ought not to be initiated under Section 10(3)(c) of the Passports Act. Admittedly, the petitioner did not present himself either in response to the summons issued by the DOE, to which I have made a reference above, nor in response to the show cause notice dated 15.10.2010. Replies were filed, however, on behalf of the petitioner on 12.10.2010, followed by several other communications demanding the material on the basis on which the passport authorities were proceeding to take action in the matter.

44. By virtue of the impugned order, the passport authority, in their wisdom, came to the conclusion that the reply did not answer the main charge made against the petitioner, which is, his failure to present himself in person, in response to the summons issued under Section 37 of FEMA. The copies of the summons issued under Section 37 of FEMA, and the complaint filed under Section 16(1) of FEMA were admittedly available with the petitioner. Therefore, the action of the RPO under the Passport Act, which invested upon him, amongst others, the power to impound/ revoke the passport, was clearly within the scope of the show cause notice dated 15.10.2010.

44.1 The argument of the petitioner, if accepted, would tantamount to dividing the proceedings before the passport authorities into two halves. The first halve would therefore relate to seeking an explanation on the aspect as to whether a proceeding should be initiated under Section 10(3)(c) of the Passports Act, while the second part would relate to determination of the consequences of the failure to satisfy the concerned authority with respect to the tenability of the reasons supplied qua the first aspect. The Passport Act does not contemplate a division of proceedings before the Passport authorities into two halves, as was sought to be contended before me. In any event, the show cause notice in my view, clearly put the petitioner to notice that if he failed to satisfy the concerned officer, with regard to the tenability of his defence to the charge made against him, action under the Passport Act would follow. The words 'no reply', contained in the show cause notice would have to be construed in that light.

44.2 In any event, even if one were to accept for a moment, the argument made on behalf of the petitioner that, in the notice dated 15.10.2010, no such indication was made, it cannot be argued on his behalf that he had no notice of the possibility of such an action being taken as, by a letter dated 15.10.2010 the APO adverted to the fact that a personal hearing was fixed at 1600 hours on 16.11.2010 **"regarding proposed action to impound/revoke"** the passport of the petitioner. It is on account of this communication of the APO, that on behalf of the petitioner, a return communication dated 18.11.2010 was issued, inter alia, to the effect, that the show cause notice of 15.10.2010, did not advert to this aspect. It is, therefore, quite clear, at least prior to the adjudication of the show cause notice dated 15.10.2010, that the petitioner had been put to notice of the possible consequences of the failure to give

a satisfactory explanation to the concerned officer. The test which the Supreme Court applied in the context of a suit where one party claimed, inter alia, that no relief could be given as a specific issue was not struck – was: did parties know that the matter in question was involved in the trial. [see observations in **Bhagwati Prasad vs Chandramaul** AIR 1966 SC 735 at para 10 to 13]. If the same test is applied, this objection cannot sustain. Therefore, the argument made in this behalf, is without merit.

45. The other argument that the passport authorities had abdicated their power, in as much as, they had acted on the dictation of the DOE, is premised on a submission that the said authorities ought to have examined the validity and veracity of the charge qua which the petitioner was called upon to give evidence by way of the two summons, referred to above, issued under Section 37 of FEMA. It was contended that since the petitioner had not entered into any contract and was only the Chairman of the Governing Council of the IPL tournament, and in that sense, had no direct liability in respect of the aspects which were subject matter of the summons issued under Section 37 and the complaint filed under Section 16(3) of the FEMA – these aspects should have been examined by the Passport authorities i.e., the RPO/CPO before coming to the conclusion, as contained in the impugned orders.

45.1 In my view, this argument is completely fallacious. For this purpose, one has to only briefly peruse the provisions of Section 10(3) clauses (a) to (h) of the Passports Act. Clauses (a) to (h) of Sub-Section 3 of Section 10 of the Passport Act provides for various eventualities under which a passport authority has been invested with the power to impound or cause to be impounded or revoke a passport or a travel document. Some of these powers pertain to circumstances which require either direct determination by the passport authorities of the fact situation and / or require the passport authority to seek or receive inputs from other statutory authorities with regard to the eventuality referred to the clause in issue. For example clause (a) pertains to a case of identity theft, i.e., where the holder of the passport or travel document is not the person who ought to hold the document in issue. Clause (b) provides for a situation where the passport or the travel document is obtained by suppressing material information or on the basis of wrong or incorrect information by the holder of the passport or travel document himself or any other person on his behalf. Clause (c) provides for a situation where

the sovereignty and integrity or security of the country or its relationship with a foreign country or, as in this case, the interest of general public, are involved.

45.2 Intrinsically clauses (a) to (c) of Sub-Section (3) of Section 10 of the Passports Act, contemplate a situation where a determination would have to be made either based on information available with the passport authority or, on the inputs of other statutory authorities. For example, if it is a case of identity theft under clause (a) or, under clause (b) where some information has been suppressed or incorrectly provided, say for example, with regard to the address or details of parentage, are wrongly supplied, inputs of other departments may have to be taken into account. Similarly, as to whether sovereignty and integrity or, the security of the country is endangered or, the effect on country's relationship with other countries is in issue - necessarily would require reliance to be placed on inputs provided by other wings of the Government of India. The inputs provided may not have the quality of a final determination; however, as long as the material provided is actionable, the passport authority would be well within its right to take the necessary steps for revocation and/or impounding.

45.3 If the aforesaid test is applied to the situations discussed above, I do not see how it cannot apply to the last limb of clause (c) of Sub-Section (3) of Section 10, which invests in the passport authority the power to revoke or impound a passport in the interest of general public - as long as the inputs provided by statutory authorities and other wings of the government, are in the nature of actionable material, no fault can be found with Passport authorities taking recourse to under the said provision.

45.4 The argument of the petitioner that since, the passport authority did not evaluate the merit of the allegation made by the DOE or, the reply sent by the petitioner on 12.10.2010 qua the allegation made against him; resulted in their abdicating their power, is completely without merit, as indicated above.

45.5 This view gets only fortified if one were to examine other clauses of Sub-Section (3) of Section 10. Clause (d) of Sub-Section (3) of Section 10 adverts to a situation where a person has been convicted of an offence involving moral turpitude and sentenced, in respect thereof,

for not less than for two years. Clause (e) refers to a situation where proceedings in respect to an offence are pending before a criminal court in India. Clause (h) refers to a situation where a warrant or a summon for appearance or, a warrant for arrest has been issued by a court or, if an order has been passed prohibiting departure from India, and the passport authority is satisfied, as to issuance of such a warrant or summon or an order.

45.6 In the situations, adverted to in clause (d), (e) and (h) of sub-section (3) of Section 10, it is quite obvious that the determination is of another authority, i.e., the courts. While under clause (d) the determination is final with regard to the offence, clause (e) and (h) envisage a situation where the determination is not final but an actionable information in the form of pendency of proceedings or issuance of a warrant or a summon or a prohibitory order is made available to the passport authority. It cannot be argued, in my opinion, that the passport authority would have to independently assess the quality of the material put before it. This is not the scheme of the provision in issue. The scheme which runs through clauses (a) to (h) of Sub-Section (3) of Section 10 are situations where either the passport authority has the material before it or receives actionable material from other wings of the government for taking action under the provisions of Section 10(3) of the Passport Act. Clause (f) and (g) exemplify the said construction of section 10(3)(c).

45.7 Therefore, having regard to the fact that the APO received information on 04.10.2010, which was actionable, in my view, provided the necessary jurisdictional facts to exercise power under Section 10(3)(c) of the Passports Act.

46. This brings me to the question whether the power has been exercised by the passport authorities in the interest of general public. There is no gainsaying that FEMA has been enacted by the Parliament to protect the economic interest of the country. The preamble to FEMA makes this aspect quite clear when it refers to the fact that it is an Act made to consolidate and amend the law relating to foreign exchange, with the objective of facilitating external trade and payments, and for promoting the orderly development and maintenance of foreign exchange market in India. It cannot, therefore, be said that summons issued under FEMA for unraveling details with regard to transactions referred to therein are not in public weal. The summons issued under Section 37, required the

petitioner to appear before the concerned authority, in person, to tender evidence in respect of various agreements executed by the BCCI /IPL. It is quite possible that during the course of the petitioner's examination he may have to be confronted with material that may be in possession of the concerned officers of DOE. Therefore, in my opinion, it cannot be said that there was no element of public interest in the passport authorities exercising powers under Section 10(3)(c) of the Passports Act.

46.1 Mr Lalit, learned senior counsel sought to argue that the petitioner had offered to cooperate with the concerned officer of the DOE by offering to be examined by video link or by a commissioner, in United Kingdom at the venue of the choice of the respondents including the High Commission of India in London. In this connection, it was submitted that the proceedings under Section 13 of FEMA, were in the nature of civil proceedings and failure to comply with the summons of the DOE could only lead to imposition of penalty. It was Mr Lalit's submission that the provisions of the Passports Act had been triggered to coerce the physical appearance of the petitioner disregarding the concerns about his personal security. It was argued that the officers of the DOE, had no powers under FEMA, to seek the personal appearance of the petitioner. In this behalf my attention was drawn to Section 131(1)(b) read with Section 272A(1)(c) of the Income Tax Act. It was contended that the only power which the officers of the DOE were conferred with, under the said provisions was that of the civil court, which is contained in Section 30 read with Section 32 of the CPC. Therefore, it was contended that there was no power to force the personal appearance of the petitioner even by the officers, who sought to exercise the powers under FEMA.

47. It is quite clear that the power which is conferred on DOE for investigation of the alleged contravention of the Provisions of Section 13 of FEMA, is vested under Section 37 of the FEMA. Under sub-section (3) of Section 37 of the FEMA, the concerned officer is invested with the powers which are available to an income tax authority under the Income Tax Act, in respect of, search and seizure. Under the Income Tax Act this power is contained in Section 131, which invests the officer concerned under the Income Tax Act, which are vested in a court under CPC, when trying a suit which inter alia includes the power to enforce the attendance of "any" person as also examine such person on oath.

47.1 The power of the civil court is thus contained in Section 30 of the CPC, which empowers a court at any time either on its own motion or on the application of any party to inter alia issue summons to persons whose attendance is required either to give evidence or to produce documents or such other objects, as aforesaid. The coercive power of the court to compel attendance of any person to whom summons have been issued under Section 30 of the CPC are provided in Section 32 of the CPC. The coercive power includes the power to : issue warrant of arrest; order attachment and sale of the delinquents' properties; impose fine not exceeding Rs.5000; and order for furnishing security for his appearance, and in default, commit him to the civil prison.

47.2 It is, therefore, contended that this power was available only vis-a-vis a witness and not vis-a-vis a person against whom the proceedings have been initiated. The example given was that of proceedings in a civil suit where, on the failure of a defendant to appear in a proceedings initiated in a civil court, would only result in him being proceeded ex-parte, and not being subjected to the penalties, provided in Section 32 of the CPC. It was submitted that Section 31 which precedes Section 32 of the CPC makes this aspect quite obvious.

47.3 In my view, this submission is again misconceived for the reason that Section 37 is a provision which invest power of investigation for contravention of provisions of Section 13 of FEMA, which necessarily implies that the investigation is directed against the noticee. To aid the officer's investigation under Sub-section (1) of Section 37 powers under the Income Tax Act have been conferred by virtue of sub-section (3) of Section 37. Section 131 of the Income Tax Act, which is a precursor to Section 132 of the Income Tax Act, empowers an Income Tax Officer, and thus by implication an officer of the DOE, to enforce the attendance of the persons who have violated the provisions of the Income Tax Act, and by necessary implication the provisions of FEMA, and are therefore necessarily the noticees in the said proceedings. The statute quite clearly, thus empowers the officers of the DOE exercising powers under Section 37 to take recourse to the provisions of Section 32 of the CPC, even against the noticee, like the petitioner, and not just the witnesses.

47.4 The above apart, this argument of the learned senior counsel for the petitioner overlooks the fact that limitation, if any, on the power of the officer of the DOE in the FEMA, cannot circumscribe the power

of the authority constituted under the Passports Act. As long as the authority concerned is in seisin of the requisite jurisdictional and actionable material, it can exercise the power conferred on it, as it has done in the present case. If, the impact of the exercise of the power by the authority constituted under the Passports Act, results in legal coercion, that cannot in law, result in the declaration of the exercise of that power, as illegal.

48. The submission made on behalf of the petitioner that the pendency of the complaint under Section 16(3) of FEMA should have been factored in by the passport authorities, while making a determination, is in a sense putting the cart before the horse. The petitioner chooses not to appear in response to the summons issued by the DOE under Section 37 of FEMA. It is because of this that a complaint had to be filed under Section 16(3) of FEMA. On the date when the communication was sent in that regard to the passport authorities, under the cover of the letter dated 04.10.2010, the position remained the same vis-a-vis the personal appearance of the petitioner. This position obtained even when the show cause notices were issued by the passport authorities. The position was no different when the impugned order was passed. Thus, it cannot be said that the pendency of the complaint under Section 16(3) of FEMA ought to have influenced the decision of the passport authorities; a situation for which, the petitioner is himself responsible. This would also answer the submission made on behalf of the petitioner that, issuance of show cause notices by the APO was premature.

49. On behalf of the petitioner an elaborate argument has been raised with regard to breach of principle of natural justice. In this regard broadly four submissions were made. First, the proceedings before the RPO were abruptly terminated on 26.11.2010. Second, that the show cause notices were issued by the APO, while the impugned order dated 03.03.2011 was passed by the RPO. Third, the material on which the show cause notice was issued to the petitioner was not supplied to the petitioner. Fourth, no opportunity was granted to cross-examine the officers of DOE. As regards the first submission, it may be noted that the material on record suggests that lengthy hearings were held both on 18.11.2010 and 26.11.2010. In the hearing held on 18.11.2010 time was granted to the petitioner between 1630 hours and 2030 hours. Similarly, while time for hearing on 26.11.2010 was slotted between 1430 hours to 1700 hours, the proceedings actually terminated at 1930 hours. This was followed by permission granted to the petitioner to file his written

submissions. Written submissions ran into 438 pages, which was in addition to the written statement filed on his behalf. These aspects have been duly recorded by the APO in his communication dated 10.12.2010. In my view, the right to have interminable hearings, as demanded by the petitioner, cannot be a ground to lay challenge to the impugned order on the ground of breach of principles of natural justice.

49.1 The second limb of this argument which pertains to the aspect that show cause notice was issued by one authority i.e., the APO while the impugned order dated 03.03.2011 was passed by the another i.e., the RPO and hence breached the principles of natural justice, is once again misconceived. This ground is invoked by the learned counsel for the petitioner by referring to the definition of the passport authority contained in Section 2(c) read with Rule 3 column (2) of schedule I of the Passports Act. It was contended that since the term 'passport authority' found in Section 10(3)(c) includes an APO, the said officer was competent to, not only issue a show cause notice but also pass the impugned order.

49.2 It is seen that against item no. 7A(a) of Schedule I the RPO (Mumbai) is also described as a passport authority alongwith the APO. Therefore, it is not as if the RPO does not have the necessary power invested in him in Section 10(3)(c) of the Act. This is not a case where a hearing was held by the APO and the impugned order was passed by the RPO. This is a case where show cause notices were issued by the APO, while hearing in the matter was held by a superior officer, i.e., the RPO. Therefore, this argument is also not tenable. I may only note that even in a case where a hearing is held by one officer and an order is passed by another officer, there is an authority for the proposition that, in an institutional hearing, that is, in a case involving the government or institution, where the government or institution is not in lis, with aggrieved party, such an order of the Government or institution will not get impacted on this ground, as the contours of natural justice will vary with the nature of the inquiry. See observations in **Local Government Board vs Alridge,** 1915 AC 120; Ridge vs Baldwin 1964 AC 40; **Regina vs Race Relations Board, Ex parte Selvarajan** (1975) 1 WLR 1686 and in de Smiths Judicial Review of Administrative Action (4th edn., pp. 219-220). Also see observations in **Ossein and Gelatine Manufacturers' Association of India vs Modi Alkalies & Chemicals Limited & Anr.** (1989) 4 SCC 264 at page 268 para 6, which has noticed the said authorities. However, I have not been called upon to deal with such a

situation. The submission of the learned counsel for the petitioner on this score is therefore rejected.

49.3 The third limb of this argument which is that the relevant material which formed the basis for issuing the show cause notice was not supplied ,is also not quite correct. The APO vide letter dated 01.11.2010, admittedly had given extracts of the material, which was supplied by the DOE to him. The receipt of the said letter is not denied by the petitioner. It is also not denied by the petitioner that he was made available the complaint filed by the DOE under Section 16(3) of FEMA. The petitioner was well aware of the charge against him and the material which formed the basis of the charge, and therefore, cannot be heard to plead that he had not been supplied with the requisite material to answer the charge.

49.4 The fourth submission made that no right was given to cross-examine officers of DOE, is also untenable for two reasons. First, that there is no inalienable right to cross-examine, it is not unknown to law that proceedings can be decided based on documents; especially documents which form the basis of the decision are not in dispute. Second, while the petitioner chooses to keep himself from his investigators, he seeks to subject his investigators to cross-examination; a request if granted would really turn the situation on its head.

50. The other submission made on behalf of the petitioner that the impugned order is draconian in nature, in as much as, there were other modes available for tendering evidence by the petitioner. In my view, this argument is untenable for the reason that the petitioner cannot choose the manner in which he would tender evidence before statutory authorities constituted under a validly enacted law. The statutory authorities should have the opportunity to confront the petitioner with material in a face-to-face examination. The reason trotted out by the petitioner that his coming to the country would endanger his life, could be taken care of by putting in place relevant measures for his security based on the assessment of the police authorities, once he had conveyed his decision in that regard to the respondents.

50.1 In this regard the argument made that, the petitioner was only vicariously liable qua the transactions in respect of which fault had been found by the DOE, in my view, is irrelevant. As a matter of fact, it has been argued on behalf of the respondents that fourteen (14) show cause

notices have been issued to the petitioner. Learned senior counsel for the petitioner did try to submit in this behalf that the fourteen (14) show cause notices were relatable to only two transactions. Apart from the fact that this aspect was not disclosed with complete candour by the petitioner, the fact of the matter remains that, there are aspects, in respect of which, information is sought by the DOE, which can best, perhaps be obtained by securing the personal presence of the petitioner.

51. The argument made on behalf of the petitioner that the expression 'in the interest of general public' appearing in Section 10(3)(c) of the Passport Act should take its colour from a similar provision appearing in Article 12 of the CCPR, does not impress me for the following reason: Firstly, as indicated above, the action taken by the DOE to protect the economic interest of the country in respect of which the allegation is that money to the tune of hundreds of crores has been parked by the petitioner outside the country, would require examination. Secondly, there is no scope for invoking the provisions of Article 12 of the CCPR once the municipal law on a given subject occupies the field. See observations of the Supreme court in **Vishakha and Ors. Vs. State of Rajasthan and Ors.,** AIR 1997 SC 3011 at page 298 para 7 and **Jolly George Varghese & Anr. vs The Bank of Cochin** (1980) 2 SCC 360 at page 364 para 6. It is not the case of the petitioner before me, that there is any doubt with regard to the interpretation to be given to the expression "in the interest of the general public", appearing in Section 10(3)(c) of the Passports Act. Therefore, this submission of the petitioner is also without merit and is, accordingly, rejected.

52. The last argument made on behalf of the petitioner that in response to the RTI application dated 23.02.2012 moved by the Constituted Attorney of the petitioner had revealed that no case was pending before the Economic Offences Wing (in short EOW) of the Mumbai Police, is also without merit.

52.1 It is noticed that the application dated 23.02.2012 was filed with the Assistant Commissioner of Police (Administration), EOW, Mumbai. The information sought was whether any request, recommendation or directions had been made by the EOW, Mumbai Police to the RPO for impounding / revocation of the passport of the petitioner. In response to the same, a letter was apparently issued dated 22.03.2012 wherein the EOW, Mumbai Police informed the querist that

no information was available regarding seizure of the passport of the petitioner. It further went on to say that no objectionable entries were found against the petitioner and hence, a "nil" report was being submitted. Based on the aforesaid, it is sought to be argued that the DOE had not recommended revocation of the passport. There is no such stand taken by the respondents in their affidavit. In fact, they have apposed the petition and as a matter of fact quite vehemently, supported the impugned orders. I thus fail to understand, as to how, the response of the EOW of the Mumbai Police to a RTI application made to it, would support the petitioner's case. The impugned orders of the RPO and the CPO, are based on the request of the DOE.

53. This brings me to the two cases cited on behalf of the petitioner. As far as the Menaka Gandhi case is concerned, both parties have relied upon the said case. The said case essentially decided that it was an inalienable right of a person to insist on adherence to principles of natural justice; where actions of the State entail serious civil consequences. In that case, a post decisional hearing was accorded to the petitioner since an order to impound her passport had been passed without prior notice or hearing. In this case, as discussed above, hearing was granted to the petitioner prior to the RPO passing the impugned order. As a matter of fact, hearing was also accorded at the appellate stage by the CPO.

54. As regards the other judgment on which reliance is placed by the petitioner i.e., in case of Aditya Khanna, it is distinguishable on facts. In the said case, the petitioner came to the court on the ground that his passport had been revoked without issuance of the show cause notice and grant of an opportunity to represent his case before the Passport authorities. It is noticed that, the court recorded in that case that, in the affidavit of the Central Bureau of Investigation, there was "not a single allegation that the petitioner had not appeared in the past to make an appearance". In fact, it is in those circumstances that, the court directed the passport authorities to hand over the petitioner's passport in that case as the principles of natural justice had been breached. There is no such situation obtaining in the present case.

55. As regards the submissions made on behalf of the respondents to jurisdiction of the court to entertain the writ petition on the ground that the jurisdiction of this court is invoked based only on the ground that the order of appellate authority, i.e., CPO has been passed in Delhi, in my

opinion, may perhaps have enabled me to employ my discretion and relegate the petitioner to the appropriate court based on the principle of forum non conveniens. See observations in **Kusum Ingots and Alloys Ltd. Vs. Union of India (UOI) and Anr.,** (2004) 6 SCC 254 and **Sterling Agro Industries Ltd. Vs. Union of India and Ors.,** 181(2011) DLT 658. However, having regard to the fact that it is only a discretion that a court may or may not employ in a given case, and given the fact that the petitioner has been seeking a decision in regard to his case for a period of time, it was deemed fair and just to hear the petition and decide the same one way or other. Therefore, this objection of the respondent is rejected. The learned counsel for the petitioner in passing made a reference to the fact that the CPO passed the impugned order after nearly three months of the conclusion of the hearing before him. Having regard to the voluminous record produced before the CPO including the original documents, I am of the view that the orders cannot be set aside on this ground.

56. The argument that DOE has only asked for impounding and not revocation of the petitioner's passport is belied by the fact, that the petitioner has refused to surrender the passport. Therefore, in the absence of the passport being available with the authorities concerned, the only order which could have been passed in the given circumstances was of revocation.

57. For the reasons given hereinabove, I find no merit in the petition. The writ petition is, accordingly, dismissed. The parties, however, shall bear their own cost.

ILR (2013) IV DELHI 2518
W.P. (C)

DEVYANI PHOSPHATE PRIVATE LTD. & ANR. ....PETITIONER

VERSUS

UOI ....RESPONDENTS

(RAJIV SHAKDHER, J.)

W.P. (C) NO. : 7384/2010, 6573/2011, 8164/2011 & 700/2012 **DATE OF DECISION: 04.02.2013**

Constitution of India, 1950—Article 14—Policy making—Validity of provision in the office memorandums issued by UOI from time to time requiring the petitioners to achieve minimum benchmark qua production of single Super Sulphate Fertilizer (SSP) challenged on the grounds of unreasonableness—Held:- in view of case set up by UOI, the policy under challenge was introduced in order to increase productivity and the fact that since the introduction of the policy in August, 2009, there was been an increase in the production shows that the policy has worked and petitioner's contention that the provision for minimum benchmark for production ought to be declared production ought to be declared unreasonable and discriminatory is without merit—Further held, main thrust of the policy under challenge is to provide good quality SSP fertilizer in optimum quantities to the farmers and as long as the Government is able to achieve this objective, the incidental impact on inefficient manufacturers cannot render the policy illegal on the grounds of arbitrariness or unreasonableness and if by and large a policy is fair and achieves the object it seeks to achieve, the Court is not called upon to iron out the creases in the policy just because there is another point of view

available—Petitions are without merit and dismissed.

There is a case, therefore, rightly made out by the GOI that policy needed to be introduced to increase productivity. The fact that since the introduction of the policy in August, 2009, there has been an increase in the production, would show that perhaps the policy has worked. **(Para 28.2)**

The argument of the petitioners that the policy is skewed and tends to benefit the bigger players, i.e, larger manufacturers, may at first blush seem to be correct, but this argument ignores the fact that petitioners in reality do not want to take any steps for increasing their productivity and/or their efficiency. One could have understood an argument that policy over all had not resulted in increase in production of SSP; that, however, does not appear to be the case. Therefore, to suggest that the provision for minimum benchmark for production ought to be declared unreasonable and discriminatory, is without merit and hence rejected. **(Para 28.3)**

The main thrust of the policy introduced by the GOI is to provide good quality SSP fertilizer in optimum quantities to the farmers. As long as the Government is able to achieve this objective, the incidental impact on inefficient manufacturers cannot render the policy in vogue illegal, on the grounds of arbitrariness or unreasonableness. **(Para 30)**

It is well settled in framing economic policies, the GOI needs a play in the joints. There is no perfect solution to every conceivable problem which may arise in the implementation of an economic policy. If by and large the policy is fair and achieves the object it seeks to achieve, the court is not called upon to iron out the creases or correct perceived defects in the policy just because there is another point of view available. Policies are forged based on past experience, collation of empirical data and an element of experimentation. Therefore, time and again courts have indicated that policies of the State, if assailed, can be set aside on very narrow

grounds of malafides or extreme arbitrariness, or being unconstitutional or even violative of statutory or other provisions of law. In this regard there are several decisions rendered by this court as well as by the Apex Court. I need not burden the judgment by replicating the principle enunciated in this behalf. Suffice it to say, whichever way the present case is examined, it does not fall within the realm of extreme arbitrariness or any other known ground of challenge which perhaps could have persuaded me to strike down the policy in issue. **(Para 31)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. P.K. Mullick, Advocate.

FOR THE RESPONDENTS : Mr. Rajeeve Mehra, ASG with Mr. Sachin Datta, CGSC and Ms. Inderjeet Sidhu, Advocate.

CASES REFERRED TO:

1. *Sophisticated Marbles & Granite Industries* vs. *UOI & Anr.* WP(C) 13091/2009 dated 04.03.2010.
2. *Council of Scientific and Industrial Research & Ors.* vs. *Ramesh Chandra Agrawal & Anr.* (2009) 3 SCC 35.
3. *V. Sivamurthy* vs. *State of Andhra Pradesh & Ors.* (2008) 13 SCC 730.
4. *Duncan Industries Ltd.* vs. *Union of India* (2006) 3 SCC 129.
5. *UOI & Anr.* vs. *International Trading Co & Anr.* (2003) 5 SCC 437.
6. *Balco Employees' Union (Regd.)* vs. *UOI & Ors.* (2002) 2 SCC 333.
7. *Neyelignite Corporation Ltd.* vs. *Commercial Tax Officer, Cuddallore & Anr.* (2001) 9 SCC 648.
8. *P.T.R. Exports (Madras) Pvt. Ltd.* vs. *UOI & Ors.* AIR 1996 SC 3461.

RESULT: Petition dismissed.

RAJIV SHAKDHER, J.

1. These writ petitions involve a common issue, which is: Is the provision in the Office Memorandums (OMs) issued by the respondents from time to time, requiring the petitioners (and those who are similarly placed), to achieve a minimum benchmark qua production of Single Super Sulphate Fertilizer (in short SSP) unreasonable and/or arbitrary?

2. The challenge is difficult, and is therefore decidedly, an uphill task for the petitioners, as it ventures into an area which relates to policy making. The grounds for challenge are usual, that is, the policy in vogue is arbitrary, unfair and unreasonable. Article 14 of the Constitution of India has therefore been invoked by the petitioner, while laying a challenge to the policy evolved by the respondents.

3. Therefore, while the issue is short, one would have to touch upon the OMs issued by the respondents from time to time in order to give a sense of how the policy has evolved, though the impugned clause which relates to the minimum bench mark for production by industrial units, such as those operated by the petitioners, has continued to be in existence to the detriment of the manufacturers.

4. Therefore, in sum and substance the reliefs are identical, which essentially seek from this court a writ, order or direction for striking down the impugned clause which fixed a minimum benchmark for production by units, with consequential relief, for release of funds in the form of subsidy with interest. There are four writ petitions pertaining to the aforesaid issues.

4.1 Since WP(C) 7384/2010 was being dealt with as a lead case, the respondents have filed their counter affidavit in the said case. The counter affidavit is followed by an additional affidavit dated 03.09.2012. The said additional affidavit is accompanied by the note dated 20.07.2009 placed before the Cabinet Committee on Economic Affairs. This note attains significance in view of the issue raised in the present writ petition.

5. With the aforesaid preface in place, let me advert briefly to the facts obtaining in the present writ petition:

5.1 The Government of India, apparently since 1992 has been

administering, what is ubiquitously known as the concession scheme, [which is presently known as the Nutrient Based Subsidy (NBS) policy] for decontrolling phosphatic and potassic fertilizers. Amongst the phosphatic fertilizers, SSP is apparently very popular with the farmers of the country. Besides being a good source for phosphate, it evidently provides sulphur and calcium as well. SSP contains 16% phospheric acid, 11% sulphur and 16% calcium. I am informed that SSP is agronomically suitable for dry land oil seeds crop. Overall, SSP is good for farm produce.

6. It is in this context that the Government of India (GOI) on 25.08.2008 revised the concession scheme for SSP for the year 2008-2009. By virtue of this scheme, the GOI revised the concession scheme inter alia by fixing a uniform all India Maximum Retail Price (in short MRP) qua SSP at the rate of Rs. 3400 per metric ton. This was in a sense a deviation from the earlier practice of having respective State Governments fix the MRP for SSP. The revised concession scheme provided for on account payment of 85% of claims (with which furnishing of the bank guarantee was scaled upto 90%) irrespective of their annual production, provided the manufacturers claim was certified by a statutory auditor and subject to the manufacturer filing the complete information in the manner prescribed. The balance claim for subsidy was dependent on due certification by the State Government with regard to the quantity as well as the quality of SSP sold in the State.

7. The aforementioned policy however underwent a change with the issuance of OM dated 13.08.2009. The said OM, which according to the petitioners is responsible for their woes, introduced for the first time the minimum benchmark for production. In addition, by virtue of the said OM of 13.08.2009, the selling price of SSP was left open and thus, replaced the provision in the preceding concession scheme which provided for an all India MRP of Rs.3400 per Metric Ton (MT) qua SSP. The said OM also introduced an ad hoc concession of Rs.2000 per MT qua SSP. The OM of 13.08.2009 was made effective from 01.10.2009.

7.1 As regards the minimum bench mark for production, the OM provided that concession for SSP would be extended only to those units which achieved an annual capacity utilization of at least 50% or annual production of 40,000 MT qua production of SSP. Though, the words 'whichever is lower' did not appear in the OM dated 13.08.2009, it is

the common stand of counsels for the both parties that, this was the purport of the said OM. As a matter of fact, not only does the underlying Cabinet Note pointedly refer to this aspect but also, the subsequent OMs have clarified this point; thus removing any scope for ambiguity. For the purpose of ascertaining minimum benchmark for production, capacity utilization as on 31.03.2009, of the concerned unit, was to be taken into account. The above provisions, as indicated above, came into effect from 01.10.2009. 8. On 04.03.2010, the GOI introduced the first phase of its NBS policy w.e.f. 01.04.2010. The said NBS policy was made, inter alia, applicable to SSP as well. The stress in the NBS policy was, apparently to pay subsidy, based on the presence of primary nutrients in the fertilizer, namely, Nitrogen (N), Phosphate (P), Potash (K) and Sulphur (S). The extent of subsidy was to be determined by the GOI. In so far as payments of NBS to the purchasers/marketers was concerned, it was provided that the same would be released as per the procedure laid down in OM dated 13.08.2009.

8.1 The aforesaid was followed by the OM dated 09.04.2010 which really related to the implementation of the NBS policy for decontrolling phosphatic and potassic fertilizers except SSP. This circular provided freight subsidy in respect of all decontrolled fertilizers except SSP. It may be recalled that price fixation with respect to SSP had been decontrolled pursuant to OM dated 13.08.2009. The OM dated 09.04.2010 thus provided for freight subsidy on decontrolled fertilizers which were moved by rail, based on actual claims.

9. The GOI, thereafter, issued a OM dated 21.04.2010, for implementation of NBS policy qua SSP. This policy was brought into effect from 01.05.2010. Accordingly, for production and sale of SSP, it provided as follows: Per metric ton nutrient based subsidy was provided for powdered and granulated SSP which met quality specifications as indicated in the fertilizer control order for the period 2010-2011 w.e.f. 01.05.2010 at the rate of Rs. 4400 per MT which notably was inclusive of cost of freight. This circular also provided additional per metric ton subsidy with fortified SSP which had Boron, at the rate of Rs.300.

9.1 However, clause 8 of this OM continued with the provision of minimum benchmark for production, which was pari materia with the provision in OM dated 13.08.2009. The said clause 8, provided that capacity utilization/production would be calculated as on 31.03.2010,

bearing in mind capacity utilization and production for the period 01.04.2009 to 31.03.2010. The manufacturing units were required to inform the concerned department their installed capacity/production, duly certified by a statutory auditor. The information in this behalf was required to be sent to the concerned inspection agency.

9.2 Clause 10 of this very OM, indicated that NBS policy for SSP was optional and was, therefore, available only to those manufacturers/ sellers of SSP who would adhere to prescribed quality standards and maintain the MRP printed on the bag. Thus, SSP producers/manufacturers, who were desirous of opting for the NBS policy qua SSP were required to enter into a Memorandum of Understanding (MOU) as per the enclosed proforma with the department of fertilizers, GOI to avail of NBS policy.

10. It appears that the fertilizer manufacturers generally were unhappy with the introduction of clause 8 in the circular dated 21.04.2010 (to which I have already made a reference above), which deals with minimum bench mark for production. Accordingly, the Fertilizers Association of India (in short FAI), addressed a communication dated 27.04.2010, to the respondents. FAI in its communication inter alia brought to fore, their grievance that minimum benchmark for production of SSP to claim NBS was a 'harsh step'. The reasons adverted to were as follows: the capacity utilization of the entire SSP industry in the year 2009-10 was only 40%; about 32 units had attained capacity utilization of more than 50% or, production of more than 40000 metric tons in the year 2009-10, and therefore, a large number of SSP manufacturers would be ineligible for subsidy under NBS policy, in the year 2010-11 if, the minimum production benchmark as provided in clause 8, was made applicable for the year 2009-2010. There were other difficulties also put forth, with which one is not presently concerned with. The sum and substance of the representation was that SSP had been marked out for alleged discrimination as manufacturers of other fertilizers, in respect of which subsidy was being extended, did not have the minimum benchmark for production clause being made applicable to them.

11. In view of the representation of FAI, the GOI issued yet another OM dated 13.07.2010, with respect to extension of subsidy under the NBS policy for the period 2010-2011. The GOI, while retaining the minimum production bench mark, relaxed the rigour of its earlier OM dated 21.04.2010, having regard to the difficulties faced by the

manufacturers due to purported uncertainity and change in the policy between 2009-2010, by indicating as follows in clause 4 (a), (b) and 5:

> ''...4. It is clarified that the following criteria for payment of subsidy will be applicable w.e.f. 1st may 2010:
>
> (a) Units which have achieved at least 50% capacity utilization or production of 40000 MTs of SSP on annual basis for 2009-10 and have fulfilled the requirement of the policy under NBS are eligible for claiming subsidy for sale of SSP under NBS directly or through marketing arrangement, as the case may be, w.e.f 1st May 2010 for the year 2010-11, subject to the stipulation in paragraph 5 of this OM.
>
> (b) In those cases where the requirement of stipulated capacity utilization/ production on annual basis has not been fulfilled, capacity utilization/ production criterion on a pro rata basis for the quarter 1st May 2010 to 31st July 2010 would be applied for payment w.e.f. 1st May 2010 for the year 2010-11, subject to the stipulation in paragraph 5 of this OM.
>
> 5. Payment of subsidy for the year 2010-2011 w.e.f 1st May 2010 will be provisional. Any SSP unit which fails to achieve the benchmark criteria of 40000 production or 50% capacity utilization on annual basis for 2010-2011 (w.e.f 1st May 2010 to 30th April 2011) would not be considered for subsidy under Nutrient Based Subsidy policy or otherwise, for next year, i.e., 2011-12 and recovery of the entire subsidy already paid under the NBS w.e.f 1st May 2010 would be made along with interest thereon. Each SSP unit is required to furnish an undertaking to this effect while making claims for subsidy under the NBS w.e.f. 1st May 2010...''

12. The GOI with respect to its earlier OM of 13.08.2009 vide its OM of 05.08.2010 inter alia extended the period of achieving the minimum production benchmark by indicating that any SSP unit which failed to achieve the bench mark criteria of 40000 MT or 50% capacity of utilization on pro rata basis from 01.10.2009 to 30.04.2010 or on an annual basis from 01.10.2009 to 30.09.2010, would not be eligible for ad hoc subsidy for sale of SSP for the period 01.10.2009 to 30.04.2010. Thus, in effect,

it indicated that anyone who had obtained a subsidy contrary to the provision of OM 05.08.2010, would have to refund the same alongwith penal interest.

13. The aforesaid narrative, broadly sketches out chronologically the recent twists and turns in the policy, which is encapsulated in the various OMs issued by the GOI from time to time. In so far the petitioners are concerned, they have, notwithstanding the provisions contained in the OMs qua minimum benchmark for production continued to lodge their claims for payment of subsidy at various stages with the respondents. Before I refer to those communications, it may be important to briefly advert to the relevant facts pertaining to each of the petitioners.

WP(C) 7384/2010 (Devyani Phosphate Private Ltd. & Anr.)

14. The aforementioned petitioner, i.e., Devyani Phosphate Private Ltd. (in short DPPL) apparently had set up a medium scale unit for manufacture of SSP which is located in RICO Industrial Area, Gugli, Rajasthan. The said unit apparently commenced its commercial production w.e.f. 03.07.2009. DPPL was inducted into the concession scheme for decontrolled phosphatic fertilizers vide notification bearing no. 19011/10/ 2009-MPR dated 16.02.2010 w.e.f the date of its commercial production, i.e., 03.07.2009.

14.1 It is the case of DPPL that, they had submitted their claim for receipt of subsidy in the prescribed forms. Evidently; on account payment, equivalent to 85% of the total subsidy claimed vis-a-vis supplies made for the months of August and September, 2009, was released to DPPL.

14.2 However, w.e.f. October, 2009, the DPPL has not received its share of the subsidy, on account of its failure to achieve the minimum benchmark for production, as stipulated in OM dated 13.08.2009. DPPL claims that, failure to achieve the minimum bench mark for production, was on account of factors such as: time lag, required for stabilization of production in market being a new unit; uncertainity in the market; and lack of demand on account of failure of monsoon.

14.3 From time to time the DPPL has made representations dated 17.08.2010 for release of subsidy for the period 01.10.2009 to 30.04.2010 followed by reminders dated 27.08.2010, 08.09.2010., 16.09.2010, 25.09.2010, 30.09.2010 and 20.10.2010.

14.4 DPPL claims subsidy in the sum of Rs. 233.31 lacs (approximately) for the period 01.10.2009 to 30.09.2010. During this period, DPPL claims it suffered business losses to the tune of Rs.121.31 lacs. The said business losses include a loss of Rs 63.35 lacs on account of interest on investment and other losses quantified at Rs.57.96 lacs on account of labour, power and other expenses. The subsidy for the aforementioned period is thus claimed with interest at the rate of 18% per annum.

WP(C) 6573/2011 (Narmada Agro Private Ltd.)

15. In the captioned petition there are two petitioners: Narmada Agro Chemical Private Ltd. (in short NACPL) and Krishna Industrial Corporation Ltd. (in short KICL). NACPL claims to be in the business of manufacturing SSP, since 1990. It claims to have annual installed capacity of 15000 metric tons. KICL on the other hand claims to be in the business of manufacturing SSP for the last 30 years. Admittedly, both NACPL and KICL have not been able to achieve the minimum bench mark for production.

15.1 While, KICL approached the respondents vide representation dated 24.04.2010 for waiver of the minimum bench mark for production due to its inability to achieve the same in the previous five (5) years; NACPL made its representations vide communications dated 16.05.2011 and 27.05.2011.

15.2 Both seek release of subsidy for the period 2009-2010. For this period NACPL has quantified the subsidy payable to it in the sum of Rs. 26,08,000/-.

WP(C) 8164/2011 (V.K. PHOSPHATES LTD.)

16. The petitioner in this case is: V.K. Phosphates Ltd. (in short VKPL). VKPL claims that, it is a small scale unit, engaged in the sale and manufacture of SSP, with an annual installed capacity of 30000 metric ton. Presently, the manufacturing unit of the petitioner is lying closed since, April, 2011.

16.1 VKPL avers that it lodged its claim for release of subsidy on 20.02.2011 vis-a-vis SSP, sold between the period October to December, 2009, in the State of Uttarakhand.

16.2 It is the case of VKPL that, a representation dated 30.05.2011

was made to the respondents, to withdraw the provisions and its policies issued from time to time which, incorporated the minimum benchmark for production.

16.3 It is averred by VKPL that, the State Government of U.P. had issued a certification on 04.07.2011, with regard to quality and quantity of SSP sold by it, for the period October to December, 2009 and February, 2010. Accordingly, VKPL made representations on 18.07.2011 to the respondents for release of subsidy for the period October to December, 2009 and February, 2010.

16.4 The aforesaid representation was followed by yet another representation dated 22.09.2011, wherein it was indicated that apart from the claim already lodged, it had a claim for subsidy against 145 metric tonnes of SSP sold in the state of Uttrakhand, which had been duly verified by the said State.

16.5 VKPL, apart from challenging the aforementioned OMs, which prescribed for a minimum benchmark for production, claimed subsidy to the tune of Rs. 8,97,500/- on account of sale of SSP, for the months of October to December, 2009 and February 2010, with interest at the rate of 24% per annum from 01.10.2009 till the date of realization.

WP(C) 700/2012 (Agri Green Fertilizers and Chemicals Pvt. Ltd.)

17. The petitioner in this case is Agri Green Fertilizers and Chemicals Pvt. Ltd. (in short AGFCPL). It appears AGFCPL had set up a manufacturing unit in Kudappa district in the State of Andhra Pradesh. AGFCPL also claims to be a small scale unit. Apart from anything else, it is also aggrieved by the minimum bench mark for production issued by the GOI. AGFCPL, as on 31.03.2009, has an industrial unit established with an annual installed capacity of 60000 metric tons. AGFCPL has lodged, a claim in the sum of Rs. 76,26,328/- towards subsidy for the year 2009-2010. Similarly, for the year 2009-2010, AGFCPL claims a sum of Rs. 27,94,000/- towards subsidy. Thus, in all the total sum claimed is a sum of Rs.104,20,328/-.

17.1 Like other petitioners, apart from laying a challenge to the minimum bench mark for production contained in the impugned OMs, it seeks release of subsidy in the sum of Rs. 104,20,328/- for the periods referred to above with interest at the rate of 24% per annum w.e.f. June, 2009 till the date of its actual realization.

SUBMISSIONS OF COUNSELS

18. In the background of the aforementioned facts, arguments were addressed on behalf of the petitioners by Mr P.K. Mullick, Mr Sanjay Katyal and Mr Kaushal Yadav, while the respondents were represented by Mr Rajiv Mehra, learned ASG alongwith Mr Jatan Singh, Mr Neeraj Chaudhary & Mr Sachin Dutta, CGSCs. The line of arguments which was put forth on behalf of the petitioners was common and thus can be summed up as follows:

(i) The OM dated 13.08.2009, read with the succeeding OMs, imposes an unreasonable and an arbitrary eligibility condition for grant of subsidy to SSP manufacturing units which is based on a minimum benchmark for production. The said benchmark for production is skewed in favour of manufacturing units which have large installed capacities as against smaller units. This has resulted in smaller units becoming sick and unviable. The unreasonableness and arbitrariness was demonstrated by adverting to the following hypothetical figures to show that higher the installed capacity the lower is the eligibility standard:-

Units	Installed capacity of unit (in MT)	Eligibility criteria to be achieved (MT) in order to secure subsidy
1	60000	30000 (50%)
2	80000	40000 (50% capacity = 40000 MT) (50%)
3	100000	40000 (50% capacity = 50000 MT) (40%)
4	120000	40000 (50% capacity = 60000 MT) (33%)
5	200000	40000 (50% capacity = 100000 MT) (20%)
6	300000	40000 (50% capacity = 150000 MT) (13%)

(ii) What was sought to be demonstrated is: the bigger the unit lower the benchmark which is required to be achieved in order to secure subsidy from GOI. As would be seen in the hypothetical examples cited before me, in case of Units 3 to 6, the eligibility criteria in percentage

terms drops from 40% to 13%. Therefore, while unit no. 6 would only have to manufacture SSP equivalent to 13% of its installed capacity to secure subsidy, unit no. 1 and 2 would have to manufacture SSP, equivalent to 50% of its installed capacity.

(iii) According to the petitioners the provision for minimum benchmark for production was thus unfair and unreasonable as it did not take into account the age of the unit, the demand for the product in as much as the latter depended on the buying power of the consumer, i.e., the farmer which changed dramatically if, drought was experienced or a natural calamity occurred such as floods etc.

(iv) The petitioners at the time of selling their product, an activity which went on throughout the year, were unable to predict as to whether or not at the end of the financial year they would be in a position to manufacture and sell SSP equivalent to the minimum benchmark fixed by the GOI. In other words, while the petitioners sold SSP to the farmer at the subsidized rate, which was well below their cost of production, they were unable to recover the same when, at the end of the financial year, they were not able to demonstrate that they had achieved the minimum benchmark fixed for production.

(v) If the objective of the respondent was to secure to the farmers adequate quantities of SSP at affordable prices, the said objective could only get impeded with the existence of the impugned provision for achieving minimum benchmark qua production by SSP manufacturers/sellers. In other words, it was submitted that even without the impugned provision of minimum benchmark for production, farmers were getting quality SSP fertilizer at subsidized rates.

(vi) The impugned provision has been made applicable only qua manufacturers of SSP, there is no such provision qua other fertilizer such as Di-ammonium Phosphate (in short DAP), NPK-complex etc. This situation has created a class-discrimination as there is no intelligible differentia between two classes of manufacturers of fertilizers. It is because the cost of raw materials for manufacture of SSP is high that, it is made subject to government control and therefore, necessarily survives on the subsidy extended by the government, which is, 60% of the actual cost of SSP.

(vii) The impugned provision demonstrably discriminates between

large and small manufacturers. The said provision, therefore, ignores ground realities which hamper production such as: non-availability of raw material, floods, strike and also delay in receipt of subsidy. It was submitted that the quality concerns of the GOI are adequately met as before commencing manufacture the concerned unit has to obtain recognition and get itself covered by the fertilizer subsidy scheme of the respondent. It is only those units which meet the stringent norms adopted in this behalf, receive recognition of the respondent. The final product is subjected to quality test periodically by a GOI agency, i.e., Projects and Development India Ltd., which is a public sector undertaking under the control of the respondents. Subsidy is received by the concerned unit only upon certification of quality and quantity of the concerned State Government where SSP is sold.

(viii) In the submissions made on behalf of VKPL, there was a specific reference to an entity by name of Suman Phosphate & Chemicals Ltd. which, against an installed annual capacity of 3,30,000 MTs of SSP had achieved production of only 40,246.383 MTs of SSP, during the period 01.05.2011 to 30.04.2012, and thus, in line with the extant provision for minimum benchmark for production, would be entitled to subsidy.

18.1 In support of their submissions the petitioners relied upon the following judgments: **V. Sivamurthy vs State of Andhra Pradesh & Ors.** (2008) 13 SCC 730; **UOI & Anr. vs International Trading Co & Anr.** (2003) 5 SCC 437 and **Council of Scientific and Industrial Research & Ors. vs Ramesh Chandra Agrawal & Anr.** (2009) 3 SCC 35.

19. On behalf of the respondents, the learned ASG argued that the entire thrust of the impugned provision was to encourage production of SSP in order to decrease the dependence on expensive substitute which went by the name of DAP. It was contended that apart from the above, SSP had great agronomic importance for crops, such as, oil seeds and, those crops, which were grown in water shed areas in addition to vegetable and fruits. Another reason put forth for encouraging production of SSP was that phospheric (P2O5) acid content in SSP was 16% as against 46% in DAP, in addition to, Sulphur and Calcium.

19.1 It was submitted that in the country and today, eighty seven (87) units were manufacturing SSP, which were located in various States, and had a combined installed capacity of approximately 85 lac MTs were

covered under the subsidy scheme of the GOI. The argument was made with the purpose that, despite the challenge made by the petitioners the subsidy scheme was working well. By way of example the respondents gave following statistics to show that with the advent of the scheme under the OMs mentioned above the production of SSP in the country has gone up. The figures put forth in that behalf were as follows:

Year	Production
2006-2007	28.06
2007-2008	22.46
2008-2009	25.34
2009-2010	30.93
2010-2011	37.13
2011-2012	43.25

19.2 It was contended that, production of SSP enabled the GOI to reduce its dependence on import of DAP. It was stated that despite DAP being produced in the country, it had to be imported and the only way in which the dependence on imported DAP could be reduced, was by increasing the production of SSP. The respondents thus submitted, that during the period 2006-2007 to 2008-2009 the average production of SSP was 25.28 lac MTs as against an installed capacity of 76 lac metric tonnes; a situation which necessitated introduction of the minimum benchmark of production.

19.3 It was submitted that during this period SSP was sold locally, in and around the area when the manufacturing unit was located, and therefore, had to be transported to distant places, where there was no manufacturing units, in the near vicinity. The sale of SSP was, therefore, almost negligible in the State, which did not have SSP units located within its territory. Some manufacturing units produced SSP as low as 5 to 10% of their capacity. It was also observed that many SSP units were not seeking to claim the balance 15% of the SSP sold by them, which raised concerns about the quality of SSP sold in the market. It was also noticed that even though the price of raw material used in SSP, i.e., rock, sulphate had fallen in the international market, the production

of SSP had not increased. Therefore, in the background of these experiences, the GOI took the step of introducing the impugned provision in the OM dated 13.08.2009, and simultaneously, gave the manufacturer the liberty to arrive at his own MRP as against the fixed MRP of Rs. 3400 per MT. Parallely, the manufacturer could claim an ad hoc concession of Rs.2000 per MT. The said concession at the relevant point of time was fixed keeping in mind the trend of cost of raw materials used in the manufacture of SSP.

19.4 In sum and substance it was contended that the policy contained in OM dated 13.08.2009 was framed keeping in mind the following objective:

(i) Open MRP will provide flexibility to the manufacturers/ marketers to move and sell SSP in those states where production units are not located.

(ii) The minimum benchmark condition for production will give wide option to farmers to choose the brand of SSP of their choice as the manufacturers shall be able to sell their products far and wide in the country.

(iii) The minimum benchmark/ eligibility condition is aimed at encouraging higher capacity utilization by the SSP units which will not only increase the production of SSP but also its availability of quality SSP in the country and commitment of the producers/ manufacturers.

(iv) Further the minimum benchmark/ eligibility condition will discourage non serious producers under the scheme to avail subsidy.

19.5 It was contended that, the impugned benchmark was introduced by the GOI after due deliberation. In this regard, the learned ASG relied upon the note placed before the Cabinet Committee on Economic Affairs.

19.6 Apart from the above, it is contended that, a similar challenge had been raised before the High Court of Bombay, Aurangabad Bench, in WP(C) Nos. 7165/2009, 7350/2009 titled Gajraj Fertilizers Pvt. Ltd. vs UOI and Balaji Fertilizers Pvt. Ltd. vs UOI. The said writ petitions, I was informed, were disposed of by a common judgment dated 30.03.2010 passed by the Division Bench of that court. The Division Bench of the Bombay High Court dismissed the challenged laid by two SSP manufacturers to the impugned provision.

19.7 It was also contended that the writ petition was not maintainable as it sought to challenge the policy decision of the GOI, the scope for interference qua which was narrow and could only be based on the grounds of malafide and extreme arbitrariness. Reliance in this regard was placed on the following judgments: **Duncan Industries Ltd. vs Union of India** (2006) 3 SCC 129; **Balco Employees' Union (Regd.) vs UOI & Ors.** (2002) 2 SCC 333; **P.T.R. Exports (Madras) Pvt. Ltd. vs UOI & Ors.** AIR 1996 SC 3461; **Neyelignite Corporation Ltd. vs Commercial Tax Officer, Cuddallore & Anr.** (2001) 9 SCC 648 and WP(C) 13091/2009 dated 04.03.2010 titled **Sophisticated Marbles & Granite Industries vs UOI & Anr.**

REASONS

20. Having heard the learned counsels for the parties and perused the record, the following aspects clearly emerge:

(i) The GOI, apparently since October, 1992 had been administering concession schemes vis-a-vis decontrolled phosphatic and potassic fertilizers. Evidently, prior to this, as per the stand of GOI, it used to administer what was known as the Retention Price Scheme which went back to the year 1977. With the issuance of OM dated 25.08.2008, GOI revised its concession scheme for the year 2008-2009. The main focus of the revision apparently was, fixation of a uniform all India MRP of Rs.3400 per MT vis-a-vis SSP. Pertinently, at this stage, GOI did not introduce a minimum benchmark for production. Manufacturers/ sellers of SSP were thus entitled to on account payment of 85% of the subsidy on sale of SSP. The balance 15%, was required to be paid, on due certification of quantity as well as quality of the SSP sold, in a particular State, by the concerned State Government.

(ii) This, however, underwent a change with the issuance of circular dated 13.08.2009. For the first time in clause 6 of the said circular, the following provision was made, introducing minimum benchmark for production:

> ''...6. Ad hoc concession for SSP w.e.f. 1st October 2009 will be provided to those eligible SSP units only, which have either annual capacity utilization of at least 50% or annual production of 40000 MT of SSP. For the purpose of recognizing capacity utilization/ production, capacity as on 31st March 2009 will be

taken into account. The SSP units are required to inform the Department their installed capacity as on 31st March 2009 certified by the statutory auditor with a copy to the PDIL. PDIL will also be required to submit a separate report on the installed capacity of the units as on 31st March 2009. Capacity utilization/ production for three months from the date of this notification on pro rata basis will be taken into account for the capacity utilization/ production benchmark as above for ad hoc subsidy for sales of SSP w.e.f. 1st October 2009...''

21. Undoubtedly, after the introduction of NBS policy with respect to SSP vide OM dated 04.03.2010, there has been no variation in the impugned clause, to the extent it relates to stipulation of a minimum benchmark for production of SSP by manufacturers in order to enable them to avail of the subsidy granted by the GOI. The only change was re-numbering of the impugned clause. This becomes quite clear on reading OMs dated 04.03.2010, 19.04.2010 and 21.04.2010. As a matter of fact the last of these three OMs, i.e., OM dated 21.04.2010 seeks to implement the NBS policy qua SSP. Resultantly, NBS policy was made effective qua manufacturers of SSP w.e.f. 01.05.2010. While under the OM dated 13.08.2009 ad hoc concession was receivable by an eligible SSP manufacturer at the rate of Rs.2000 per MT this was enhanced for the year 2010-2011 to Rs 4400 per MT w.e.f. 01.05.2010. The NBS under OM dated 21.04.2010, however, was extended to powdered granulated and fortified SSP with Boron. As a matter of fact, for the last category an additional subsidy for 300 MT was made available. In this OM dated 21.04.2010, the minimum benchmark for production was incorporated in clause 8, which in sum and substance was same as in clause 6 of circular dated 13.08.2009. Therefore, in order to avoid prolixity, I have not extracted the same.

21.1 What is, however, important to note is that with the introduction of NBS policy, SSP manufacturers were given an option to accept the regime stipulated in the said OM of 21.04.2010 subject to the said manufacturers entering into a MOU with the concerned department. This was clearly stipulated in clause 10 of OM dated 21.04.2010. for the sake of convenience the same is extracted hereinbelow

''...10. NBS policy for SSP is optional and available to only

those manufacturers/ marketers of SSP who will adhere to quality standards and maintain the Maximum Retail Price (MRP) printed in the bag. The SSP producers/manufacturers who wish to opt for the NBS policy for SSP would be required to enter into an MOU as per the enclosed proforma with the Department to avail NBS...''

21.2 There is no dispute, and I heard none of the counsels disputing this fact, that each one of them executed a MOU in that behalf to avail of the benefits of the subsidy under the NBS policy.

22. It is also not in doubt that because the FAI made a representation to the GOI that vide OM dated 13.07.2010 the rigour qua eligibility was relaxed, in as much as, where SSP manufacturers had failed to achieve the requirement of SSP capacity utilization/ production on annual basis, a pro rata basis was applied for the quarter 01.05.2010 to 31.07.2010 for payment of subsidy w.e.f. 01.05.2010 for the year 2010-2011 subject, however, to the condition stipulated in clause 5 of the said circular. I have already referred to the relaxation made in that behalf and therefore, need not advert to the same once again.

23. Similarly, a further relaxation was given by GOI vide OM dated 05.08.2010 by introducing a pro rata basis for achieving the minimum benchmark of production for the period 01.10.2009 to 30.04.2010 while retaining the annual basis for the period 01.10.2009 to 30.09.2010. Therefore, it cannot be said that the GOI had not calibrated its policy taking into account the difficulties faced by SSP manufacturers, in particular, the fact that the new units may have been set up in 2009 or existing units required time to adjust themselves to the change in policy, which required them to meet a minimum benchmark of production.

24. This apart the empirical data which the GOI has placed before me, seems to suggest that there has actually been a flip in the production and sale of SSP. I have no reason to doubt the figures given by GOI, as there was no challenge raised to the same before me by the petitioners. The figures put forth by the GOI suggest that between 2006-2007 to 2011-2012, while the production of SSP has increased from 28.06 lacs MTs to 43.25 lac MTs with a dip in 2007-2008, the consumption and sale has also gone up from 28.06 lac MTs to 43.01 lac MTs.

Year	Consumption
2006-07	28.06
2007-08	19.97
2008-09	30
2009-10	29.44
2010-11	31.46
2011-12	43.01

24.1 Like production, consumption and sale also dipped in 2007-08. If these figures are to be believed, qua which I have no doubt, almost the entire amount of SSP produced is consumed. There is obviously a great demand for SSP. This fact is also supported, if one were to have regard to the figures of DAP produced, imported and consumed in the country. The said figures for the sake of convenience are set out hereinbelow:

Year	Production	Import	Consumption
2006-07	48.52	28.76	69.24
2007-08	42.12	29.73	75.55
2008-09	29.93	66.31	99.04
2009-10	42.46	59.75	103.92
2010-11	35.37	74.09	112.46
2011-12	39.63	68.97	119.9

25. A perusal of the figures would show that the large quantity of the DAP was consumed in the country and over the year the trend has only increased. Therefore, the GOI in my opinion would be well within its right to formulate policies which would give flip to production of SSP in the country. By all accounts the policy appears to have worked, as the production has only increased. Though the concern remains, that the, import content has not been brought down to the extent perhaps expected

by the GOI. The figures also suggest that perhaps much has to be achieved in terms of policy to reduce the dependence on DAP, which is one of the reasons given for formulating the extant policy by the GOI.

26. The question which arises, therefore is, are the figures referred to above coincidently in favour of GOI or was the aspect pertaining to introduction of minimum benchmark for production thought out, and thereafter introduced after due care and caution. The note placed before the Cabinet Committee of Economic Affairs seems to suggest that the persons concerned with framing the policy had taken into account the then existing state of affairs, which was, the factum of abysmally low utilization of installed capacity by SSP manufacturers, while introducing the impugned provision. To give a synoptic account of the same, I may only refer to the following extract as set out in the note:

> ''...3.4 **Availability of quality SSP to the farmer continues to be a major concern. In view of production of small quantity of SSP annually by many units and their capacity utilization as low as 5% -10% of the installed capacity, there is concern about economic sustainability and seriousness of such units as producers.** Accordingly, benchmark of say 50% capacity utilization can be considered for payment of subsidy. However, there are certain large capacity units, which may find difficult to attain 50% capacity utilization as they may sometime find it difficult to procure rock either from indigenous or imported sources. Accordingly, **it is proposed that concession for SSP should be provided to those units only, which have annual capacity utilization of at least 5% OR annual production of 40000 MT of SSP, whichever lower. This is due the fact that while 50% capacity utilization is appropriate benchmark for those units having lower installed capacity of say 85 thousand MT and below, this may adversely affect SSP units with higher capacity of one lakh MT to four Lakh MT.** the proposed benchmark would cover majority of the SSP producing units. Initially, a three months time from the date of notification of the proposed policy would be provided to observe the capacity utilization on pro rata basis. After examination of three months data, the proposed change will be introduced. The installed capacity of the SSP units on 31st march, 2009 as determined by the PDIL will be considered for this purpose. This will ensure

production of quality SSP and commitment by SSP producers.

3.5 As mentioned at paragraph 2.2 above, with the approval of the competent authority in the Department, a revised notification modifying the provision relating to marketing arrangement was issued by the Department on 25th August 2008, whereby all SSP units were allowed to produce and market SSP irrespective of their production. This was in view of ensuring availability of SSP to the farmer and not to violate the equality of opportunity to the SSP units. This was in modification of the proposal approved by the CCEA that all SSP should be marketed by large producers, manufacturing more than one lakh MT of SSP per annum or through NPK/urea manufacturers who are already covered under the subsidy/ concession Scheme and who are having a wide marketing network in the country. The revision was notified on 25th August 2008 and was applicable from May 2008 to June 2009. It is proposed that the same may be considered and approved...''

26.1 In so far as financial implication of the policy was concerned, it was also examined. It appears that, the policy framers, were of the view that there was no substantial difference in the input cost qua both indigenous and imported rock route. As a matter of fact, the view taken was that there was a marginal saving of Rs. 4.67 crores annually.

27. As against this if, one were to look at the performance of each of the petitioners, it appears that they wish to survive only on subsidy and make no real attempt at increasing their productivity; when there is every evidence available to show that there is a huge market for sale of SSP. In this regard I may only refer to installed capacity of each of the petitioners and the quantum of production carried out by them between 2007-08 to 2011-12:

Name of the Unit	**Installed capacity (in MTs)**	**Production (in MTs)**				
	2009-10	2007-08	2008-09	2009-10	2010 -11	2011-12
Devyani Phosphate P. Ltd., Raj	60000	-	-	5903	3352	15282

Narmada Agro Chem P. Ltd., Guj.	15000 7700	1614	3600	4140	6300	
V.K. Phosphate U.P.	60000#	10079	5919	5498	5356	245
Agri Green Fert. & Chem. P. Ltd., Ktk	60000*	8408	6047	10241	584	7601
Krishna Industries	66000	42225	19500	18817	2756 7	23180

* 30000 MTs during the year 2011-12, # 33000 MTs during 2011-12

Total production of SSP over the last 5 years						
	Total Installed capacity as on year 2009-10	2007-08	2008-09	2009-10	2010-11	2011-12
All SSP covered under the subsidy policy	80.96	22.46	25.34	30.93	37.13	43.25

28. The above table would show an abysmally low capacity utilization by each of the three petitioners. As a matter of fact, the ratio of production to the installed capacity, if one were to take the most recent year, 2011-2012, ranges from 0.74% to 51%. The worst case of unutilized capacity is presented by VKPL. As a matter fact, VKPL and AGFCPL have reduced their installed capacity from 60000 MTs as obtaining 2009-2010 to 33000 and 30000 MTs respectively in the year 2011 and 2012.

28.1 As against this, the total production of SSP, as indicated above, has been on the increase from 22.46 lac MTs produced in 2007-2008, to 42.25 lac MTs in the year 2011-2012. There is, however, an unutilized capacity of nearly 35-37 lac MTs; if one were to take into account the total installed capacity in the country, which obtained in the year 2009-2010, as per the data provided by GOI. The total installed capacity in 2009-2010 was 80.96 lac MTs.

28.2 There is a case, therefore, rightly made out by the GOI that policy needed to be introduced to increase productivity. The fact that since the introduction of the policy in August, 2009, there has been an increase in the production, would show that perhaps the policy has worked.

28.3 The argument of the petitioners that the policy is skewed and tends to benefit the bigger players, i.e, larger manufacturers, may at first blush seem to be correct, but this argument ignores the fact that petitioners in reality do not want to take any steps for increasing their productivity and/or their efficiency. One could have understood an argument that policy over all had not resulted in increase in production of SSP; that, however, does not appear to be the case. Therefore, to suggest that the provision for minimum benchmark for production ought to be declared unreasonable and discriminatory, is without merit and hence rejected.

29. The contention of the petitioners that the cost of production for SSP is in the range of Rs.7000 per MT or more, and when, they sell SSP produced by them at the subsidized price, they suffer a loss, is an argument which cannot be accepted as, in a sense, the petitioners are responsible for what has befallen them, in view their abysmal performance in not being able to improve the level of their production. It is obvious that the cost of production of their product is high as the volumes that they produce are abysmally low. Larger the output, lower will be the cost of production. Therefore, to suggest that losses have been, incurred by the petitioners on account of a lopsided or skewed policy of the GOI, in my view, ignores the demonstrable inefficiency of the units run and managed by the petitioners.

30. The main thrust of the policy introduced by the GOI is to provide good quality SSP fertilizer in optimum quantities to the farmers. As long as the Government is able to achieve this objective, the incidental impact on inefficient manufacturers cannot render the policy in vogue illegal, on the grounds of arbitrariness or unreasonableness.

31. It is well settled in framing economic policies, the GOI needs a play in the joints. There is no perfect solution to every conceivable problem which may arise in the implementation of an economic policy. If by and large the policy is fair and achieves the object it seeks to achieve, the court is not called upon to iron out the creases or correct perceived defects in the policy just because there is another point of view available. Policies are forged based on past experience, collation of empirical data and an element of experimentation. Therefore, time and again courts have indicated that policies of the State, if assailed, can be set aside on very narrow grounds of malafides or extreme arbitrariness, or being unconstitutional or even violative of statutory or other provisions of law.

In this regard there are several decisions rendered by this court as well as by the Apex Court. I need not burden the judgment by replicating the principle enunciated in this behalf. Suffice it to say, whichever way the present case is examined, it does not fall within the realm of extreme arbitrariness or any other known ground of challenge which perhaps could have persuaded me to strike down the policy in issue.

32. Accordingly, the challenge to the impugned policy is repelled. In the result, the captioned writ petitions are without merit and hence dismissed. The parties will, however, bear their own costs.

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W.P. (C)

DELHI CHIT FUND ASSOCIATION ....PETITIONER

VERSUS

UOI & ANR. ....RESPONDENTS

(BADAR DURREZ AHMED & R.V. EASWAR, JJ.)

W.P.(C) NO. : 4512/2012 DATE OF DECISION: 23.04.2013

Finance Act, 1994—Section 65B (44)—Chit Fund Business—Petitioner, an Association of Chit Fund Companies challenged the notification that sought to subject the activities of business of chit fund companies to service tax to the extent of 70% of the consideration received for the services—Petitioner contended that as per law, such services are not taxable at all, therefore, there is no scope for exempting a part of consideration received for the services—Nature of chit fund activities explained in details—Held:- in chit business, the subscription is tendered in any one of the forms of money as defined under Section 65B(33), therefore, it would be a

transaction in money and accordingly would fall within the exclusionary part of the definition of the word "service" as being merely a transaction in money, as such there can be no levy of service tax on the footing that services of foreman of a chit business constitute a taxable service—The impugned notification quashed.

In a chit business, the subscription is tendered in any one of the forms of 'money' as defined in section 65B(33). It would, therefore, be a transaction in money. So considered, the transaction would fall within the exclusionary part of the definition of the word 'service' as being merely a transaction in money. This would be the result if the argument that the exclusionary part of the definition in clause (a) is considered to have been enacted ex abundant cautela; if the argument based on Explanation 2 read with the exclusionary part of the definition is accepted as correct, even then the services rendered by the foreman of the chit business for which a separate consideration is charged, not being an activity of the nature explained in the said Explanation, would be out of the clutches of the definition. Either way, there can be no levy of service tax on the footing that the services of a foreman of a chit business constitute a taxable service.

(Para 13)

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Venkatraman, Sr. Advocate with Mr. Ravi Sikri, Mr. Hari Shankar, Mr. Ayush Kumar, Advocates.

FOR THE RESPONDENT : Mr. Rajeeve Mehra, ASG with Mr. Mukesh Anand, Mr. Aditya Malhotra, Advocates for R-1. Mr. Kamal Nijhawan, Sr. Standing Counsel for R-2.

CASES REFERRED TO:

1. *Sriram Chits & Investment (P) Ltd.* vs. *Union of India* : AIR 1993 SC 2063.
2. *Dattatraya Govind Mahajan & Ors.* vs. *State of Maharashtra & Anr.* : (1977) 2 SCC 548.
3. *S. Sundaram Pillai, etc.* vs. *P. Lakshminarayana Charya and Ors.* : AIR 1985 SC 582.
4. *Canada Sugar Refining Company* vs. *R.* (1898) A.C. 375.

RESULT: Writ Petition Allowed.

R.V. EASWAR, J.

1. The short question which arises in this writ petition is whether the provision of services in relation to conducting a chit business is a taxable service for the purposes of section 65B(44) of the Finance Act, 1994 inserted w. e. f. 1st July, 2012.

2. The petitioner is an association of chit fund companies based in Delhi. By a notification No.26/2012 issued on 20th June, 2012, the Department of Revenue, Ministry of Finance of the Government of India exempted: - .the taxable service of the description specified in column (2) of the Table below, from so much of the service tax leviable thereon under section 66B of the said Act, as is in excess of the service tax calculated on a value which is equivalent to a percentage specified in the corresponding entry in column (3) of the said Table, of the amount charged by such service provider for providing the said taxable service, unless specified otherwise, subject to the relevant conditions specified in the corresponding entry in column (4) of the said Table, namely: -

Sl. No.	Description of taxable service	Percentage	Conditions
(1)	(2)	(3)	(4)
8	Services provided in relation to chit	70	CENVAT credit on inputs, capital goods and input services, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004.

3. The petitioner prays that the notification should be quashed in so far as it seeks to subject the activities of a business chit fund companies to service tax to the extent of 70% of the consideration received for the services. The contention of the petitioner is that there is no question of exempting a part of the consideration received for the services in chit fund business when the law provides that such services are not taxable at all in the first place.

3. In order to appreciate the contention a few provisions have to be noticed. The Finance Act, 1994 provided for the levy of service tax in India for the first time. It received several amendments in the course of the time. Originally service tax was levied on the basis of a selective approach; in other words certain taxable services were specified in section 65(105) of the said Act and it was those services that were chargeable to service tax. A drastic change was made w. e. f. 1st July, 2012 when the comprehensive approach was sought to be introduced by the Finance Act, 2012. The tax regime contemplated under the comprehensive approach was to treat all activities as services chargeable to service tax, except those placed in the negative list or specifically exempted. This fundamental change was brought about by defining 'service' in section 65B(44) in the following manner: -

> "(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-
>
> (a) an activity which constitutes merely,-
>
> (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
>
> (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or.
>
> (iii) a transaction in money or actionable claim;
>
> (b) a provision of service by an employee to the employer in the course of or in relation to his employment;
>
> (c) fees taken in any Court or tribunal established under any law for the time being in force.
>
> **Explanation 1.**- For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply

> to,-
>
> (A) the functions performed by the Members of Parliament, Members of State Legislature, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or
>
> (B) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or
>
> (C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.
>
> **Explanation 2.-**For the purposes of this clause, transaction in money shall not include any activity relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination to another form, currency or denomination for which a separate consideration is charged.
>
> **Explanation 3.-** For the purposes of this Chapter, -
>
> (a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;
>
> (b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.
>
> **Explanation 4.-** A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory;.

4. Section 66B provided for the charge of service tax on and after the Finance Act, 2012. That section is as follows: -

> **"66B. Charge of service tax on and after Finance Act, 2012 -** There shall be levied a tax (hereinafter referred to as the service

tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed..

5. A negative list of services which were not taxable was set out in section 66D. It is not necessary to reproduce the said list as it is not the petitioner's case that the services rendered by the chit companies are included in the negative list and hence not taxable. Section 66E contains a list of 'declared services' which are subjected to service tax by virtue of section 65B(44) which is quoted above. There are other provisions relating to valuation of the taxable services, registration, furnishing of returns, assessment and recovery, penalties, etc., which are not relevant for the purpose of the present writ petition.

6. It is necessary to give a brief account of the operations of a chit fund business. Supposing 50 persons come together to organise a chit. Let us further suppose that each of them undertake to contribute Rs. 1,000/-. The total chit amount would be Rs.50,000/-. Let us further suppose that the fund would operate for a period of 50 months. Thus the member subscribers and the number of months for which the chit would operate would be the same. In this example at the end of each month, an amount of Rs.50,000/- (Rs.1,000/- x 50) would be available in the kitty of the chit fund. The said amount would be put to auction and those subscribers who are interested in drawing the money early because of their needs may participate in the auction. The successful bidder who is normally the person who offers the highest discount is given the chit amount. For example if there are three bidders offering to take the chit of Rs.50,000/- for Rs.40,000/-, Rs.37,500/- and Rs.35,000/- respectively, the chit would be given to that subscriber who is willing to take it for Rs.35,000/- since he has offered a discount of Rs.15,000/-. This leave a balance of Rs.15,000/- (Rs.15,000 - Rs.50,000) in the kitty. The amount of Rs.15,000/- which represents the discount which the successful bidder has foregone becomes the dividend which is to be distributed to all the subscribers after deducting a fixed amount representing the commission payable to the .foreman.. A foreman is normally a person who organises the auction and conducts the proceedings. If in the example given above, the commission payable to the foreman is fixed at 5%, then after deducting Rs.2,500/- (5% of Rs.50,000/-, the chit amount) the balance of Rs.12,500/- would be distributed among all the 50 subscribers

so that each would get Rs.250/-. This amount of Rs.250/- can be set off by the subscribers against the second month's installment of Rs.1,000/- payable by him and he can give only Rs.750/-. The auction would be repeated in the subsequent months and the same procedure is followed. Any subscriber who delays the bidding or does not bid at all stands to gain the maximum discount. The chit is thus somewhat like a recurring deposit with the bank. There is no bar on the foreman of the chit fund also participating as a subscriber.

7. The business of chit funds is strictly regulated by the Chit Funds Act, 1982. It contains detailed provisions relating to registration of chits, commencement and conduct of chit business. Rights and duties of foreman, rights and duties of the subscribers, termination of chits, meetings of general body of subscribers, provisions relating to winding up, disputes and arbitration and other miscellaneous provisions. Suffice to note that section 11 recognises that a chit business can be known by several names such as chit, chit fund, chitty, kuri, etc. Dealing with the Chit Funds Act, the Supreme Court in **Sriram Chits & Investment (P) Ltd. vs. Union of India** : AIR 1993 SC 2063 has laid down the following propositions: -

(a) The Act, in pith and substance, deals with special contract and consequently falls within entry 7 of list III of the 7th Schedule to the constitution of India;

(b) A chit fund transaction is not a case of borrowing, nor is it a loan transaction. If a subscriber advances any amount, he does so only to one of the members;

(c) The funds of the chit fund belong to the entire lot of subscribers;

(d) The amounts are in deposit which the stake holder only holds a trust for the benefit of the members of the fund;

(e) The foreman acts only as a person to bring together the subscribers and he is subject to certain obligations with a view to protecting the subscribers from any mischief or fraud committed by him by using the position;

(f) Commission is payable to the foreman for the service rendered by him as he does not lend money belonging to him.

8. The precise question that arises for consideration in this writ petition is whether the services rendered in connection with a chit business are taxable services or not. The contention advanced on behalf of the petitioner is based on the definition of the word 'service. in section 65B(44). The contention is that the definition excludes an activity which constitutes 'merely a transaction in money or actionable claim'; a chit business is a transaction in money and it is obvious that a transaction in money by itself cannot be a service in the sense of being an activity carried out by any person for consideration. Therefore, there can be no question of excluding what is not a service from the definition and that being so, what stands excluded is a service rendered in relation to a transaction in money and chit business being a transaction in money, the services rendered in connection with the said business is excluded from the definition. This argument is sought to be supported by reference to Explanation 2 to Section 65B(44). According to the petitioner, this Explanation makes it clear that an activity relating to the use of money or its conversion from one form, currency or denomination to another form, currency or denomination shall not be treated as a transaction in money and, therefore, will be chargeable to service tax and by holding so it seeks to put at rest any ambiguity that may arise in the interpretation of the definition of 'service.. The only service in relation to a transaction in money or actionable claim, which is taxable, according to the Explanation, being the activity relating to the use of money or its conversion from one form, currency or denomination to another form currency or denomination for which a separate consideration is charged, it clearly implies that all other services rendered in connection with a transaction in money or actionable claim, including the services rendered by the foreman of a chit business, stand excluded from the definition. It is accordingly submitted that the commission received by the foreman or any other person conducting the chit business is not subject to service tax. These contentions are stoutly controverted on behalf of the respondents.

9. We shall first address the argument that what is excluded is only a service in relation to an activity which constitutes merely a transaction in money or actionable claim. The basis of this argument is the principle that a provision cannot exclude something from the definition, unless it is included in the definition. Section 65B(44) defines "service" as any activity carried out by a person for another for consideration. This implies,

as pointed out on behalf of the petitioner, that there are four elements therein: the person who provides the service, the person who receives the service, the actual rendering of the service and, lastly, the consideration for the service. The opening words of the definition consist of the above four aspects or characteristics and unless all the four are present, the activity cannot be charged with service tax. A mere transaction in money or actionable claim cannot under the ordinary notions of a service be considered as a service, neither can it be considered as falling within the first part of the definition because it lacks the four constituent elements which are required by the definition. In a mere transaction in money or actionable claim, no service is involved; there is just the payment and receipt of the money. The word "money" is defined in section 65B(33) in the following manner: -

> "(33) "money" means legal tender, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveler cheque, money order, postal or electronic remittance or any similar instrument but shall not include any currency that is held for its numismatic value;

10. A mere transaction in money represents the gross value of the transaction. But what is chargeable to service tax is not the transaction in money itself since it can by no means be considered as a service. The exclusionary part of the definition of the word "service" however refers to "an activity which constitutes merely a transaction in money or actionable claim". Since a mere transaction in money or actionable claim cannot under the common notions of a service be considered as a service by any stretch of imagination, it is necessary to examine what could have been the intention of the legislature in excluding it from the definition. The obvious answer is that it is not the mere transaction in money or actionable claim that is sought to be excluded from the definition but what is sought to be excluded is any service rendered in connection with a transaction in money or actionable claim. But the difficulty which could arise in this line of reasoning can be that the language of the exclusionary part of the definition in terms refers to the very activity which constitutes a transaction in money and contains no reference to any service rendered in connection therewith. The possible answer to this conundrum is that the legislature deemed it fit, ex abundanti cautela, to exclude an activity which constitutes merely a transaction in money, which even otherwise could not have been considered as a service in any sense of the word.

This however appears to us to be a far-fetched answer. A clue to a proper interpretation of the exclusionary part of the definition is embedded in Explanation 2. This Explanation carves out an exception to the exclusionary part of the definition by providing that any activity relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination to another form, currency or denomination for which a separate consideration is charged shall not be considered as a transaction in money. Therefore, if the only activity, for which a separate consideration is charged, and which cannot be considered as a transaction in money is the activity mentioned in the Explanation, and service tax would accordingly be charged on the consideration received in respect of such an activity, then it follows that all other cases of transaction in money shall stand excluded from the charge of service tax, including the consideration charged for the services of a foreman in a chit business. The Explanation, therefore, seems to offer a clue to the problem which appears to us to be a creation of the very confounding manner in which the definition is found to have been drafted. However, we have to make sense of what we have.

11. It is the function of an Explanation to explain the meaning and effect of the main provision to which it is an Explanation and to clear up any doubt or ambiguity in it. Ultimately, however, it is the intention of the legislature which is paramount and a mere use of a label cannot control or deflect such a function. This is the principle laid down by a Constitution Bench of the Supreme Court in **Dattatraya Govind Mahajan & Ors. vs. State of Maharashtra & Anr.** : (1977) 2 SCC 548. In **S. Sundaram Pillai, etc. v. P. Lakshminarayana Charya and Ors.** : AIR 1985 SC 582, a three-Judge Bench of the Supreme Court considered the object of an Explanation and observed as follows: -

> "52. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is -
>
> (a) to explain the meaning and intendment of the Act itself,
>
> (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,
>
> (c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,
>
> (d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and
>
> (e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same".

Moreover, "every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter", as held in **Canada Sugar Refining Company Vs. R.** (1898) A.C. 375, a principle that is frequently applied in case of difficulty in construing a statute. In **N.T. Veluswami's** case (AIR 1959 SC 422), a three-judge Bench of the Supreme Court speaking through T.L. Venkatarama Aiyar, J, held as follows :

> "....It is no doubt true that if on its true construction, a statute leads to anamolous result, the courts have no option but to give effect to it and leave it to the legislators to amend and alter the law. But when on a construction of a statute, two views are possible, one which results in an anamoly and the other, not, it is our duty to adopt the latter and not the former, seeking consolation in the thought that the law bristles with anamolies".

12. If these rules of interpretation are applied, it appears to us that even if it is assumed that there is an ambiguity or doubt in the interpretation of the exclusionary part of the definition of the word "service" and as to what types of activities in relation to a transaction or money or actionable claim are exempted from the levy of service tax, that doubt or ambiguity gets cleared up on a careful examination of the implications of the Explanation 2. The Explanation has been enacted only .for the purposes of this clause. and since it is placed below clause (c), strictly speaking it is relevant only for the purpose of the aforesaid clause. However, clause (c) refers to fees taken in any Court or Tribunal

established under any law for the time being in force. It is obvious that Explanation 2 can have no relevance to this clause. If we refer to clause (c) immediately below which the Explanation is placed, we find that the said clause refers to duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section. It is obvious that the Explanation can have no relevance to this clause also. In these circumstances we are constrained to hold that Explanation 2, when it says .for the purpose of this clause., the reference can only be to clause (a) and more precisely to sub-clause (iii) which refers to .a transaction in money or actionable claim.. Be that as it may, if the exclusionary part of the definition [i.e., clause (a)(iii)] is construed on its own terms there would be an anamoly in as much as what was not a "service" in the first place within the opening words of Section 65B (44) would fall to be excluded - a construction that would be aimless or futile; but if that part is construed in the light of or with the aid of Explanation 2 and what it signifies or implies, then the anamoly gets ironed out or removed, as we have explained earlier. Obviously, we have to prefer the latter interpretation and not the former.

13. In a chit business, the subscription is tendered in any one of the forms of "money" as defined in section 65B(33). It would, therefore, be a transaction in money. So considered, the transaction would fall within the exclusionary part of the definition of the word "service" as being merely a transaction in money. This would be the result if the argument that the exclusionary part of the definition in clause (a) is considered to have been enacted ex abundant cautela; if the argument based on Explanation 2 read with the exclusionary part of the definition is accepted as correct, even then the services rendered by the foreman of the chit business for which a separate consideration is charged, not being an activity of the nature explained in the said Explanation, would be out of the clutches of the definition. Either way, there can be no levy of service tax on the footing that the services of a foreman of a chit business constitute a taxable service.

14. Our attention was drawn on behalf of the petitioner to the Education Guide issued by the Central Board of Excise and Customs and particularly to paragraph 2.8 under the heading .transactions only in

money or actionable claims do not constitute service.. Paragraph 2.8.2 is in the following terms: -

> "2.8.2 Would a business chit fund comes under "transaction only in money"?
>
> In business chit fund since certain commission received from members is retained by the promoters as consideration for providing services in relation to the chit fund it is not a transaction only in money. The consideration received for such services is therefore chargeable to service tax..

15. The argument is that the answer given in the Education Guide is not correct having regard to the proper interpretation of the statutory provision. We have come to the conclusion that no service tax is chargeable on the services rendered by the foreman in a business chit fund on an interpretation of the statutory provisions. It is not necessary for us to therefore express any opinion as to the correctness of the views expressed in the aforesaid Education Guide issued by the Central Board of Excise and Customs.

16. In the result the writ petition succeeds and prayer (i) is granted. The notification No.26/2012-ST dated 20.06.2012 issued by the Government of India, Ministry of Finance (Department of Revenue) is quashed to the extent of the entry in serial No.8 thereof. The writ petition is allowed with no order as to costs.

ILR (2013) IV DELHI 2555
W.P.(C)

UOI & ORS. ....PETITIONERS

VERSUS

VIJENDER SINGH AND ORS. ....RESPONDENTS

(PRADEEP NANDRAJOG & V. KAMESWAR RAO, JJ.)

W.P. (C) NO. : 6176/2012 DATE OF DECISION: 26.04.2013
6194/2012, 7818/2012

Service Law—Respondents engaged on contract basis, while performing the duties of motor lowry driver (MLD) filed OAs before the Central Administrative Tribunal which were allowed on the basis of judgment in the case of *Lalji Ram* by the Tribunal holding that the respondents are entitled to consideration for temporary status—Order of the Tribunal challenged by the petitioners, which writ petitions were disposed of by the Delhi High Court observing that if the contract labour was employed after the date from which the private respondents were deployed and have been given permanent status, then on parity such benefits should also be made available to the private respondents—Held, the respondents working against group C are not entitled to the grant of temporary status under the provisions contained in the scheme and therefore, the department cannot absorb them on the post of MLD as no other contract labour was deployed after the date of deployment of the respondents.

Pursuant to the order of this Court dated 20.07.2010 in the four writ petitions, reference of which is given above, the petitioners herein considered the cases of the respondents and passed identical orders dated 14.06.2011 and

16.06.2011, 20.06.2011 and 21.06.2011 whereby they conveyed their decision that the respondents, working against Group C, are not entitled for grant of temporary status under the provisions contained in the Scheme for granting temporary status issued by DOP&T and therefore the department cannot absorb them on the post of MLD as no other contract labour was deployed after the date, from which the respondents have been deployed, in any department of CPWD. **(Para 5)**

We now consider the direction of the Tribunal to consider the case of the respondents for grant of temporary status under the Scheme of 1993 as has been granted/ to be granted to those belonging to Group 'C' category. Such a direction is contrary to the scheme of 1993 as the same is applicable to persons engaged for Group 'D' work. This aspect is clear from the following clauses in the grant of Temporary Status Scheme, 1993.

> Department of Personnel and Training, Casual Labourers (Grant of Temporary Status and Regularization) Scheme
>
> XXXXXXXXXXXX
>
> XXXXXXXXXXXX
>
> XXXXXXXXXXXX
>
> 4. (iv) Such casual labourers who acquire temporary status will not, however, be brought on to the permanent establishment unless they are selected through regular selection process for Group 'D' posts.
>
> 5. Temporary status would entitle the casual labourers to the following benefits
>
> (i) Wages at daily rates with reference to the minimum of the pay scale for a corresponding regular Group 'D' official including DA, HRA and CCA.

(ii) Benefits of increments at the same rate as applicable to a Group 'D' employee would be taken into account for calculating pro rata wages for every one year of service subject to performance of duty for at least 240 days (206 days in administrative offices observing 5 days week) in the year from the date of conferment of temporary status.

(iii) XXXXXXXXXX

(iv) Maternity leave to lady casual labourers as admissible to regular Group 'D' employees will be allowed.

(v) XXXXXXXXX

(vi) After rendering three years. continuous service after conferment of temporary status, the casual labourers would be treated on par with temporary Group 'D' employees for the purpose of contribution to the General Provident Fund, and would also further be eligible for the grant of Festival Advance, Flood Advance on the same conditions as are applicable to temporary Group 'D' employees, provided they furnish two sureties from permanent Government Servants of their Department. **(Para 15)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONERS : Mrs. Avnish Ahlawat, Advocate with Ms. Latika Chaudhary and Mr. Vaibhav Misra, Advocates.

FOR THE RESPONDENTS : Mr. K.S. Rana, Proxy Counsel.

CASES REFERRED TO:

1. *Secretary, State of Karnataka* vs. *Uma Devi* 2006 Vol.4 SCC 1.
2. *Union of India & Anr.* vs. *Mohan Pal etc.,* 2002 (4) SCALE 216.

3. *Lalji Ram* vs. *Union of India & Anr.,* SLP(C) No. 17385/1984.

RESULT: Writ petition allowed.

V. KAMESWAR RAO, J.

1. Since these Writ Petitions No. 6176/2012, 6194/2012 and 7818/2012 involves identical issues and two writ petitions 6176/2012 and 6194/2012 pertain to Original Applications which have been disposed of by the Central Administrative Tribunal, Principal Bench, New Delhi (the Tribunal) by common order dated 05.07.2012 (impugned before this court) in O.A 3951/2011 and O.A 3952/2011 and the third Writ Petition No. 7818/2012 pertains to another Original Application disposed of by the Tribunal on the basis of the order dated 05.07.2012, we are disposing of the three petitions by this common order.

2. The respondents, five in number, in the three writ petitions, were engaged on contract basis on 23.12.1991, 26.03.1993, 22.07.1992, 21.01.1991 & 02.01.1991 respectively, for performing the duties of Motor Lowry Drivers (MLD) under the Superintending Engineer, Planning Flyover, MSO Building, New Delhi. They had earlier filed O.A. No. 78/1998 (respondents in Writ Petition No. 6176/2012), O.A. No. 264/1998 (respondent in Writ Petition no. 6194/2012) and O.A No. 1443/1998 (respondent in Writ Petition No. 7818/2012). The said O. As were disposed of by the Tribunal along with fourth O.A 1354/1998, which was filed by similarly placed person, vide a common order dated 23.07.1999. While allowing the O.A's, the Tribunal had relied upon the judgment of Supreme Court in SLP(C) No. 17385/1984 **Lalji Ram vs. Union of India & Anr.,** decided on 28.02.1995. The Tribunal in the concluding para of its order 23.07.1999, had held as under:

> ''I have carefully considered the submissions of all the counsel present for both the sides. The nature of work performed was that of a Driver. There was no third party contractor. In all these cases the applicants are both the contractors and executors. They worked with the vehicle and they are paid their wages, euphemistically known as a contract amount. It is a clear camouflage for employing a daily rated worker as a daily mazdoor for driving a Car regularly year after year. In view of the Apex Court's decision in the case of Lalji Ram (supra) I hold that the

applicants are entitled to consideration for temporary status which orders shall be passed by the respondents within a period of four weeks from the date of receipt of a copy of this order in accordance with the Scheme. Thereafter, if there is any post vacant to be filled up the applicants shall be considered along with others. In considering the applicants; either or a Group 'D' post or for a Driver post, the earlier experience of the applicants shall be considered and given weightage. Age relaxation shall be fully provided.

All the OAs are disposed of. No order as to costs. Let a copy of this order be placed in all the above OAs.''

3. The petitioners herein filed Writ Petitions No. 436/2000, 437/2000, 568/2000 and 3369/2000 challenging the order dated 23.07.1979 in the aforementioned O.As. This court stayed the operation of the order on the assurance that the respondent shall be allowed to continue to work as drivers under their respective contract. The writ petitions were finally disposed off by this court on 20.07.2010. The relevant portion of this order is reproduced as under

''We are thus of the considered view that the case of the private respondents would have to be examined by the petitioner in terms of the said parameters to consider which of such persons are entitled to be given benefit of the scheme.

Learned counsel for the petitioner did contend that the private respondents are working in category 'C' posts as Drivers while the benefit of the OM of giving temporary status is available only to category 'D' employees.

We, however, find from the operative portion of the impugned order that the option has been given to the petitioner to give temporary status for a group 'D' post or for a Driver post and thus it is for the petitioner to consider as to whether the private respondents are to be absorbed or not in the Driver posts failing which they can be absorbed even on a temporary status in category 'D' post as per the OM.

Learned counsel for the private respondents urges before us that persons who were deployed much after the respondents have been permanently absorbed and in fact had not even been given

temporary status. This position is denied by learned counsel for the petitioner. Be that as it may, we make it clear that if contract labour employed after the date from which the private respondents were deployed and have been given permanent status in any department of the CPWD, then, on parity, such benefit should also be made available to the private respondents and this aspect also be examined by the petitioner.

We may note that two of the private respondents have passed away and thus the benefit cannot be made available to them.

We thus direct that the petitioners will carry out the necessary exercise sympathetically taking into consideration the long period of service of the respondents, within a maximum period of three months from today and communicate the reasoned decisions to the private respondents''.

4. During the arguments, before this court, it was contended by the learned counsel for the petitioners that consideration of grant of temporary status to the respondents is based on O.M. dated 10.09.1993, which was given effect to from 01.09.1993. Reliance was also placed on the judgment of the Supreme Court in the opinion reported as 2002 (4) SCALE 216 **Union of India & Anr. vs. Mohan Pal etc.,** as per which, the temporary status is to be given only to those of employees who were in place when the O.M. came into force and the conferment of temporary status is not an ongoing process. Relevant portion of the judgment is reproduced hereinunder :

"Clause 4 of this Scheme is very clear that the conferment of 'temporary' status is to be given to the casual labourers who were in employment as on the date of commencement of the Scheme. Some of the Central Administrative Tribunals took the view that this is an ongoing Scheme and as and when casual labourers complete 240 days of work in a year or 206 days (in case of offices observing 5 days a week), they are entitled to get 'temporary' status. We do not think that clause 4 of the Scheme envisages it as an ongoing Scheme. In order to acquire "'temporary' status, the casual labourer should have been in employment as on the date of commencement of the Scheme and he should have also rendered a continuous service of at least one year which means that he should have been engaged for a

period of at least 240 days in a year or 206 days in case of offices observing 5 days a week. From clause 4 of the Scheme, it does not appear to be a general guideline to be applied for the purpose of giving 'temporary'' status to all the casual workers, as and when they complete one year's continuous service. Of course, it is up to the Union Government to formulate any scheme as and when it is found necessary that the casual labourers are to be given 'temporary' status and later they are to be absorbed in Group 'D' posts.''

5. Pursuant to the order of this Court dated 20.07.2010 in the four writ petitions, reference of which is given above, the petitioners herein considered the cases of the respondents and passed identical orders dated 14.06.2011 and 16.06.2011, 20.06.2011 and 21.06.2011 whereby they conveyed their decision that the respondents, working against Group C, are not entitled for grant of temporary status under the provisions contained in the Scheme for granting temporary status issued by DOP&T and therefore the department cannot absorb them on the post of MLD as no other contract labour was deployed after the date, from which the respondents have been deployed, in any department of CPWD.

6. The aforesaid orders were challenged by the respondents herein, in three O.As Nos. 3951/2011, 3952/2011 and 3959/2011. The first two O.As were disposed of by a common order dated 05.07.2012 (impugned in writ petitions no.6176/2012 & 6194/2012) whereas the third O.A was disposed of by a separate order dated 31.07.2012 (impugned order in writ petition no. 7818/2012) by the Tribunal placing reliance on the order dated 05.07.2012 in O.A Nos.3951/2011 and 3952/2011.

7. In the impugned orders dated 05.07.2012 and 31.07.2012, the Tribunal has concluded as under:

''However, it is seen from the impugned orders passed by the respondents dated 14.06.2011, 16.06.2011 and 20.06.2011 are totally contradictory to the aforesaid order of this Tribunal as the Hon'ble High Court of Delhi. Even though the respondents have stated in their orders that they have considered the cases of the applicants sympathetically, the sympathy remained only in paper and not in action. In any case, the applicants on their merit are entitled to be considered for grant of temporary status and regularization in service in terms of the aforesaid Scheme as held

by this Tribunal and affirmed by the Hon'ble High Court.

In view of the above facts and circumstances, we allow these O.As. We reiterate that the initial engagements of the applicants on contract basis were nothing but a camouflage but they were daily rated workers/casual labourers and performing the duties of Car Drivers belonging to Group 'C' category. They should, therefore, be considered in terms of the Casual Labour (Grant of Temporary Status and Regularization) Scheme, 1993 and grant them the temporary status from the dates they became eligible for it. They shall also be considered for regularization in terms of the aforesaid Scheme and grant them from the respective due dates with all consequential benefits. They may also be given due weightage for appointment as Car Drivers against any existing or future vacancies with the respondents.''

8. Contempt petitions were filed by the respondents herein alleging non compliance of order dated 20.07.2010 passed by this court in the four writ petitions. The contempt petitions were disposed of on 27.04.2011, whereby this Court observed as under:

''After some hearing in the matter, it is agreed that the respondents will re-consider the case of the petitioners in the light of judgment of CAT and Division Bench within a period of eight weeks and thereafter passed a reason order in accordance with law.''

9. The petitioners passed orders dated 14.06.2011, 16.06.2011, 20.06.2011 & 21.06.2011. The same was challenged by the respondents herein by filing the O.A Nos. 3951/2011, 3952/2011 & 3959/2011 before the Tribunal, which culminated in the orders impugned in this writ petitions.

10. Mrs.Avnish Ahlawat, learned counsel for the petitioner submits that the Tribunal could not have given direction to consider the cases of the respondents for grant of temporary status by holding that the respondents belong to Group 'C' Category. According to her, the Temporary Status Scheme, 1993, is meant only for persons engaged for Group 'D' Work. She also submits that if the respondents are not eligible for temporary status under the Scheme of 1993, there is no question of regularizing them. As the Scheme stipulates such casual labourers will not be brought on the permanent establishment unless they are selected through regular selection procedure.

11. We have perused the record of the case including the order passed by this court on 20.07.2010 in the earlier writ petitions.

12. The mandate of the order of this court can be seen from the following paragraph:

> "Learned counsel for the private respondents urges before us that the persons who were deployed much after the respondents have been permanently absorbed and in fact had not even been given temporary status. This position is denied by learned counsel for the petitioner. Be that as it may, we make it clear that if contract labour employed after the date from which the private respondents were deployed and had been given permanent status in any department of CPWD then on parity such benefit should also be made available to the private respondents and this aspect also be examined by the petitioner".

13. It is seen while considering the case of the respondents through the office orders dated 14.06.2011,16.06.2011, 20.06.2011 & 21.06.2011, the petitioners have followed the mandate of the order of this court dated 20.07.2010.

14. The respondents have not named any person(s) who has/ have been deployed after the respondents herein and has/ have been given permanent status in any department of CPWD. In the absence of any name, it can be inferred that no person(s) has/ have been deployed after the respondents herein and granted the permanent status. We don't find any infirmity in so far as this aspect is concerned. In this regard, the following paragraph of the judgment of the Supreme Court reported as 2006 Vol.4 SCC 1, **Secretary, State of Karnataka vs. Uma Devi** is relevant to be reproduced:

> ''While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain — not at arms length — since he might have been searching for some employment so as to eke

> out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution of India.''

15. We now consider the direction of the Tribunal to consider the case of the respondents for grant of temporary status under the Scheme

of 1993 as has been granted/ to be granted to those belonging to Group 'C' category. Such a direction is contrary to the scheme of 1993 as the same is applicable to persons engaged for Group 'D' work. This aspect is clear from the following clauses in the grant of Temporary Status Scheme, 1993.

Department of Personnel and Training, Casual Labourers (Grant of Temporary Status and Regularization) Scheme

XXXXXXXXXXXXX

XXXXXXXXXXXXX

XXXXXXXXXXXXXX

4. (iv) Such casual labourers who acquire temporary status will not, however, be brought on to the permanent establishment unless they are selected through regular selection process for Group 'D' posts.

5. Temporary status would entitle the casual labourers to the following benefits

(i) Wages at daily rates with reference to the minimum of the pay scale for a corresponding regular Group 'D' official including DA, HRA and CCA.

(ii) Benefits of increments at the same rate as applicable to a Group 'D' employee would be taken into account for calculating pro rata wages for every one year of service subject to performance of duty for at least 240 days (206 days in administrative offices observing 5 days week) in the year from the date of conferment of temporary status.

(iii) XXXXXXXXXX

(iv) Maternity leave to lady casual labourers as admissible to regular Group 'D' employees will be allowed.

(v) XXXXXXXXX

(vi) After rendering three years' continuous service after conferment of temporary status, the casual labourers would be treated on par with temporary Group 'D' employees for the purpose of contribution to the General Provident Fund, and would also further be eligible for the grant of

Festival Advance, Flood Advance on the same conditions as are applicable to temporary Group 'D' employees, provided they furnish two sureties from permanent Government Servants of their Department.

16. The direction as such is contrary to the Scheme of 1993 itself. We agree with the submission of Ms.Ahlawat that this direction of the Tribunal needs to be set aside. We do so and hold that the direction of the Tribunal to the extent that the petitioner should consider the cases of respondent for grant of temporary status as belonging to Group 'C' category is not tenable being contrary to the Scheme of 1993. As the respondents are not entitled to temporary status as Group 'C' employees, no question arises for considering the respondents for regularization in terms of the said scheme. Even this direction is liable to be set aside and we do so accordingly.

17. The writ petitions are allowed. The O.As no. 3951/2011, 3952/2011 & 3959/2011 filed by the respondents before the Tribunal are dismissed.

18. No costs.

ILR (2013) IV DELHI 2566
W.P. (C)

UOI & ORS. ....PETITIONERS

VERSUS

DOLY LOYI ....RESPONDENT

(PRADEEP NANDRAJOG & V. KAMESWAR RAO, JJ.)

W.P. (C) NO. : 7960/2012 DATE OF DECISION: 26.04.2013

Service Law—Petitioners challenged the order of the Central Administrative Tribunal, New Delhi whereby the Tribunal allowed the OA and quashed the order of

the petitioners and directed the petitioners to open the sealed cover adopted in the case of the respondent in the matter of promotion to the post of Commissioner Income Tax—While the respondent was working as Additional Commissioner of Income Tax, CBI registered a case against her under Prevention of Corruption Act and sanction to prosecute was accorded and at that stage, the respondent was considered for promotion but recommendations of the DPC were kept in sealed cover—Held:- On mere issuance of sanction order, the DPC proceedings could not have been kept in sealed cover and since the charge sheet was filed later on, the procedure of sealed cover was wrongly adopted—No infirmity in the order of Tribunal.

In view of what has been held by this court in the aforesaid two writ petitions, it is clear that mere issuance of sanction order, the DPC proceedings could not have been put in sealed cover. Even, if the sanction order issued with the approval of the Finance Minister, Government of India, on 22.09.2008 is considered, it is seen that no sanction order was in place when the DPC had met. A further question that could arise is whether registering a regular case by the CBI would entail invocation of Clause 2 (iii) of the O.M dated 14.09.1992 and thereby putting the DPC proceedings in the sealed cover. Going by what has been held by this court in writ petitions no. 3793/2011 and 1470/2011, when the charge sheet is filed in the court of law, it should be treated that prosecution for a criminal charge against a such person is pending, and Clause 2 (iii) of O.M dated 14.09.1992 would get attracted. In the present case, the chargesheet was filed by the CBI before the Special Judge only on 25.10.2008, as per the statement of relevant facts filed by the respondent at the time of arguments and the cognizance of which was taken in the month of November, 2008. Hence, Clause 2 (iii) of the O.M dated 14.09.1992 would not be attracted. In fact a perusal of the O.M dated 02.11.2012 relied upon by Mr.S.K Gupta would show that the ground on

which the petitioners have invoked the sealed cover is unsustainable. Hence, we are of the view that apart from reasoning given by the Tribunal in allowing the O.A, what has been stated by us in para 10 as well as in this paragraph, would be an additional reason to grant relief to the respondent herein and the present petition filed by the petitioners have no merit and the same is dismissed.

(Para 11)

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. R.V. Sinha & Mr. R.N. Singh, Advocates.

FOR THE RESPONDENTS : Mr. S.K. Gupta, Advocate.

CASES REFERRED TO:

1. *Union of India & Ors.* vs. *Sangram Keshari Nayak* 2007 (2) SCC (L & S) 587.
2. *State, CBI* vs. *Sashi Balasubramanian and Another,* (2006) 13 SCC 2520.
3. *R.S Srivastava* vs. *Managing Director and Acting Chairman, GIC,* 1999(5) SLR 714.
4. *Union of India* vs. *K.V Janakiraman* 1991 (5) SLR 602 (SC).
5. *Union of India* vs. *K.V Jankiraman* AIR 1991 SC 1210.

RESULT: Writ Petition dismissed.

V. KAMESWAR RAO, J.

1. The challenge in this writ petition by the petitioners is to the order/ judgment dated 07.03.2012 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (the Tribunal) in O.A No. 3716/ 2011, whereby the Tribunal had allowed the O.A by quashing order dated 15.09.2011 and directed the petitioners to open the sealed cover adopted in the case of the respondent in the matter of promotion to the post of Commissioner, Income Tax and awarded back wages with costs quantified at Rs. 10,000/-.

2. Brief facts which are not disputed are that the respondent was appointed as Assistant Commissioner of Income Tax on 16.12.1987. Thereafter he was promoted as Deputy Commissioner of Income Tax, Joint Commissioner of Income Tax and Additional Commissioner of Income Tax in December, 1991, July, 2001 and November, 2001. That on 31.05.2001 the CBI registered an FIR no. RC-1(A)/2001/CBI/ACU-VI/New Delhi, dated 31.05.2001, under Section 120-B IPC read with Section 13(2) & 13(1) (d) of Prevention of Corruption Act, 1988. Sanction to prosecute the respondent was accorded twice, one on 02.06.2006 and the other one on 25.09.2008. It appears that the first one was accorded by the Government of Arunachal Pradesh, whereas the second one by and on behalf of the President of India. Since the respondent had attained eligibility for promotion to the post of Commissioner, Income Tax, his case was considered for promotion to the said grade. As the vigilance clearance was withheld in his case in view of para 2(iii) of DOP& T O.M dated 14.09.1992, the recommendations of the DTC were kept in sealed cover and he could not be promoted along with his batch mates.

3. The respondent filed O.A No. 08/2011 before the Tribunal, Gawahati Bench challenging the aforesaid actions of the petitioners. The Gawahati Bench disposed of the said O.A vide order dated 28.06.2011 and directed the petitioners herein, to consider the case of the respondent herein, in the light of the decision rendered by Supreme Court reported as 2007 (2) SCC (L & S) 587 **Union of India & Ors. Vs. Sangram Keshari Nayak** and directed the petitioners to pass a reasoned order within a period of two months. The petitioners accordingly considered the case of the respondent vide order dated 14.09.2011, in the light of the directions of the Gawahati Bench, of the Tribunal and by distinguishing the case of **Sangram Keshari Nayak** (supra) concluded that there is no case for opening the sealed cover.

4. This order dated 15.09.2011 was challenged by the respondent before the Tribunal by filing O.A no. 3716/2011. Based on the pleadings of the parties, the learned Tribunal was pleased to allow the O.A and passed orders which have been already referred above.

5. The Tribunal in its impugned order/ judgment dated 07.03.2012 had framed a question for its determination which was, whether sanction for prosecution against the respondent could be a good ground for putting his case in sealed cover. The Tribunal held that the issue is no more

resintegra. It relied upon its own judgment in O.A No. 1919/2008 in the matter of **B.S Bhola IPS vs. Union of India** decided on 11.08.2009 and also judgment in O.A No. 1185/2007 in the matter of **Om Prakash vs. Union of India** decided on 03.06.2008 which has since been affirmed by this court in Civil Writ Petition No. 7810/2008. In the judgment of the **Om Prakash** (supra), the relevant portion of which has been extracted by the Tribunal, this court has held as under:

> ''Even a casual perusal of the above two paragraphs of the Office Memorandum dated 14th September, 1992 shows that there is no provision made therein for adopting the sealed cover procedure or a deemed sealed cover procedure in cases in which only sanction is accorded for prosecution. This is in stark contrast to such a specific mention and provision made in the Office Memorandum dated 12th January, 1988.
>
> It appears to us that the Central Government, while framing the Office Memorandum dated 14th September, 1992 specifically and consciously deleted the requirement of a sealed cover procedure or a deemed cover procedure in respect of Government servants in respect of whom sanction for prosecution is granted. It is not clear why the Central Government has taken such a view, but it is not for us to comment on this or on the correctness of the view consciously taken by the Central Government.
>
> Under these circumstances, it appears to us quite clear that since there is no rule or Office Memorandum which entitles the petitioner to withhold the physical promotion of the respondent only because sanction for his prosecution has been granted, the Tribunal took the correct decision in allowing the OA filed by the respondent.
>
> We are in agreement with the view expressed by the Tribunal that in the absence of any rule permitting the withholding of the respondents promotion a direction should be issued to the petitioner to give effect to the recommendations of the DPC and to promote the respondent from the date his juniors were promoted with all consequential benefits as may be admissible under the Rules.

6. From the perusal of the conclusion arrived at by this Court in **Om Prakash** (supra), it is seen that there is no rule or office memorandum,

which entitles the petitioner in that case, to withhold the physical promotion of the respondent only because sanction for his prosecution has been granted.

7. We have heard learned counsel for the parties.

8. Mr. R.V. Sinha, learned counsel for the petitioners would submit that CBI has lodged an R.C No. 1(A)/2001/CBI/ACU-6, New Delhi dated 31.05.2001, under Section 120-B IPC read with Section 13(2) & 13 (1) (d) of the P.C Act, 1988 and the petitioners had rightly invoked Clause 2 (iii) of the O.M dated 14.01.1992. In support of his contention, he relies upon the judgment by this court on 07.02.2011 in Writ Petitions No. 6536/2010 & 2124/2010, titled as **R.R. Sahay vs. Union of India & Ors.** and **Mohd. Rafiq Hussain vs. Union of India & Ors.** He also makes a reference to another judgment of this court dated 02.02.2011 passed in Writ Petitions No. 3793/2011 and 1470/2011, titled as **Union of Inida vs. Inspector Jawahar Lal & Ors.** and **Union of India vs. Binod Shahi.**

9. On the other hand, Mr.S.K Gupta, learned counsel for the respondent would rely upon the instruction issued by DOP&T dated 02.11.2012 (Annexure P5), wherein DOP& T clarified O.M. dated 14.09.1992 in the following manner:

> As regards the stage when prosecution for a criminal charge can be stated to be pending, the said O.M. dated 14.09.1992 does not specify the same and hence the definition of pendency of judicial proceedings in criminal cases given in Rule 9 (6)(b)(i) of CCS (Pension) Rules, 1972 provides as under :-
>
> ''(b) judicial proceedings shall be deemed to be instituted -
>
> (i) in the case of criminal proceedings on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognizance, is made''.

10. We are also faced with the same question in this case. It is not in dispute that the petitioners herein had kept the DPC proceedings with respect to the respondent in a sealed cover as the same falls within the scope of para 2(iii) of DOP&T dated 14.09.1992. This O.M dated 14.09.1992 was issued by the DOP& T pursuant to the judgment of the Supreme Court reported as AIR 1991 SC 1210 **Union of India vs. K.V Jankiraman**. It may be necessary to state here that the O.M dated 12.01.1998 stipulated that the sealed cover procedure could be adopted, with regard to a government servant in respect of whom prosecution for a criminal charge was pending, or sanction for prosecution has been issued, or a decision has been taken to accord sanction for prosecution. The O.M dated 14.09.1992 which superseded the O.M dated 12.01.1998 did not contain any stipulation where the sealed cover procedure could be adopted, when sanction for prosecution has been issued, or decision has been taken to accord sanction for prosecution. Clause 2 (iii) of O.M dated 14.09.1992 stipulated that sealed cover procedure can be adopted only if the prosecution for criminal charge is pending against government servant. The said Clause came up for interpretation before this court in W.P(C) no. 3793/2011 and W.P(C) 1470/2011 decided on 02.12.2011, wherein this court has held as under:

> 10. We have to interpret the expression ''prosecution for a criminal charge is pending''. The emphasis is on the word ''prosecution'' meaning thereby that the prosecution should be pending and it should be in respect of a criminal charge. To attract this Clause, a criminal charge is necessary framed by the concerned Court. The question is when the prosecution would be said to be pending. No doubt, by mere sanctioning of the prosecution, it would not be pending, at the same time once, the FIR is lodged and the matter is under investigation, the prosecution would be treated as pending. This is so held by the Supreme Court in **State, CBI vs. Sashi Balasubramanian and Another,** (2006) 13 SCC 2520 in the following words:-
>
> 29. It is in the aforementioned context, interpretation of the word prosecution assumes significance. The term prosecution would include institution or commencement of a criminal proceeding. It may include also an inquiry or investigation. The terms prosecution and cognizance are not interchangeable. They carry different meanings. Different statutes provide for grant of sanction at different stages.
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> 30. ''In initio'' means in the beginning. The dictionary meaning of ''initiation'' is cause to begin. Whereas some statutes provide for grant of sanction before a prosecution

is initiated, some others postulate grant of sanction before a cognizance is taken by Court. However, meaning of the word may vary from case to case. In its wider sense, the prosecution means a proceeding by way of indictment or information, and is not necessarily confined to prosecution for an offence.

11. The Court had drawn distinction between the terms "prosecution" and "tognizance". Cognizance comes even at a stage later than prosecution when after the challan/ charge sheet is filed and the court takes cognizance thereof and issues notice to the accused. Section 173 of the Code of Criminal Procedure deals with the report of the Police Officer on completion of investigation which has to be forwarded to a Magistrate empowered to take cognizance of the offence on the above police report. The format of the said police report is known as charge sheet which is filed before the Magistrate and it is only after going through the above charge sheet, the Magistrate takes cognizance and summons the accused. In the present case, even cognizance has been taken by the Court and the matter is at the stage of framing of the charge. Therefore, prosecution is definitely pending in respect of a criminal charge. It is thus clear that clause (iii) gets attracted.

12. The matter can be looked into from other angle namely the purpose behind such a clause. Obviously, the purpose behind inserting the aforesaid clause is that when the criminal proceedings have been initiated the result of DPC should be kept in a sealed cover as the investigation is complete and investigating agency has filed the charge-sheet in the court, obviously, as per the prosecution case against the delinquent for criminal trial has been made out. It is a matter of common knowledge that framing of charge by the court at times substantially delayed for one reason or the other. Had the matter been at an FIR stage and investigation in the process, situation perhaps may have been different but would not so when the investigation is complete and even the charge sheet is filed in the competent court. Obviously, the filing of the charge sheet,

it can safely be said that the officer has come under a cloud before promotion.

13. If one goes into the historical facts leading to the issuance of the aforesaid O.M, the original can be traced to the historic judgment of Apex Court in **Union of India vs. K.V Jankiraman,** AIR 1991 SC 2010. The Court in that case expressed its concern while take note of the O.M contained in 30.01.1982 as the situation was that Union of India could not denied the promotion or years together even on account preliminary investigation continuing endlessly and when no departmental action was initiated either or charge sheet before the competent court filed. In such a situation, the court find equities in favour of the government servant. This led to the amendment in the O.M dated 12.01.1988 was issued and this was also superseded by the O.M dated 14.09.1992. Once the equities are to be balanced and where situations are different denying promotion to the government servant without any reasons, at the same time, public interest is also to be kept in mind while balancing the equities. With the filing of the charge sheet, the task of the investigating agency had been completed. For framing of the charge, ball is in the court of law. If there is a delay happening there which could be for various reasons including the reason that can be attributed to the accused, public interest should not suffered as with the filing of charge sheet the government servant has come under cloud. If such a situation is allowed, any such government servant who is due for promotion can prolonged the framing of the charge by the court of law and in the mean time get his case considered by the DPC. It cannot be countenanced. A Single Bench of this Court had dealt with the similar issue in **R.S Srivastava vs. Managing Director and Acting Chairman, GIC,** 1999(5) SLR 714. In this case, this Court relying on **Union of India vs. K.V Janakiraman** 1991 (5) SLR 602 (SC), in para 5 of the judgment held that the designated court had not framed charge and in para 6, this Court held that there is a criminal case pending against the petitioner. It has

further been held that when the petitioner is acquitted by the criminal court, he will get all the benefits and till such time, the petitioner cannot be heard to say that the decision of the DPC in a sealed cover should be given effect to. We agree with this view.

14. We are, therefore, of the opinion that when the charge-sheet is filed, in the court of law, it should be treated that prosecution for a criminal charge against such a person is pending. Clause 2(iii) of O.M dated 14.09.1992 would thus get attracted.

11. In view of what has been held by this court in the aforesaid two writ petitions, it is clear that mere issuance of sanction order, the DPC proceedings could not have been put in sealed cover. Even, if the sanction order issued with the approval of the Finance Minister, Government of India, on 22.09.2008 is considered, it is seen that no sanction order was in place when the DPC had met. A further question that could arise is whether registering a regular case by the CBI would entail invocation of Clause 2 (iii) of the O.M dated 14.09.1992 and thereby putting the DPC proceedings in the sealed cover. Going by what has been held by this court in writ petitions no. 3793/2011 and 1470/2011, when the charge sheet is filed in the court of law, it should be treated that prosecution for a criminal charge against a such person is pending, and Clause 2 (iii) of O.M dated 14.09.1992 would get attracted. In the present case, the chargesheet was filed by the CBI before the Special Judge only on 25.10.2008, as per the statement of relevant facts filed by the respondent at the time of arguments and the cognizance of which was taken in the month of November, 2008. Hence, Clause 2 (iii) of the O.M dated 14.09.1992 would not be attracted. In fact a perusal of the O.M dated 02.11.2012 relied upon by Mr.S.K Gupta would show that the ground on which the petitioners have invoked the sealed cover is unsustainable. Hence, we are of the view that apart from reasoning given by the Tribunal in allowing the O.A, what has been stated by us in para 10 as well as in this paragraph, would be an additional reason to grant relief to the respondent herein and the present petition filed by the petitioners have no merit and the same is dismissed.

12. No costs.

ILR (2013) IV DELHI 2576
W.P.(C)

RAM PYARE ....PETITIONER

VERSUS

UOI & ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 2630/2013 & CM NO. : 4985/2013 **DATE OF DECISION: 29.4.2013**

Service Law—Petitioner, working as HC was recruited as constable in CRPF in 1983 and medically examined several times and was found in medical category of shape-I and promoted to the post of HC in 1989—After petitioner cleared promotion cadre course in 2012, he was recommended for promotion as ASI but in the medical examination, he was declared unfit for the reasons of colour blindness and was based in medical category of shape-III —The respondents cancelled the promotion order of the petitioner—Challenged in writ petition—Held, in view of the judicial precedents, cited, since the colour blindness of the petitioner also could not be detected at the time of original induction but was detected subsequently, petitioner also is entitled to the same benefits which were given in the cited judicial precedents.

A reading of these pronouncements would show that the matter of the force personnel who were not discovered as suffering from colour blindness at the time of original induction, but were detected as being colour blind at subsequent stages has agitated the respondents and several measures have been taken pursuant to issuance of circulars from time to time. The present case is similar to the case of the petitioners in the above writ petitions in as much as despite

the medical examination, at the time of his original induction, the colour blindness of the petitioner was also not detected then. The petitioner contends that in these circumstances, he is entitled to the same benefits which have been given to the force personnel whose cases have been considered in the aforenoted judicial pronouncements. **(Para 8)**

Having regard to the passage of time since the last medical board, if it is required, the petitioner may be required to undergo fresh medical examination. **(Para 11)**

The medical examination shall be conducted within a period of four weeks from today. Orders shall be passed immediately thereafter. **(Para 12)**

The petitioner will be entitled to the financial benefits accrued from the date of promotion, however, he will be deemed to have been promoted on the date on which his immediate juniors were promoted and his position shall be maintained at the appropriate place in seniority. **(Para 13)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. A.K. Mishra, Advocate.

FOR THE RESPONDENTS : Mr. Himanshu Bajaj, Advocate.

CASES REFERRED TO:

1. *Kunwar Pal Singh* vs. *Union of India & Ors.* Writ Petition (Civil) No. 2667/2012.
2. *Sh. P. Suresh Kumar* vs. *Union of India* Writ Petition (Civil) No. 356/2011.
3. *Mohan Lal Sharma* vs. *Union of India* Writ petition No. 11855/2009.
4. *Sudesh Kumar & Ors.* vs. *Union of India & Anr.* Writ Petition (Civil) No. 5077/2008.

RESULT: Petition allowed.

GITA MITTAL, J. (Oral)

1. Rule D.B. Mr. Himanshu Bajaj, counsel for the respondents accepts issuance of rule.

2. It is submitted that given the prior adjudication in similar matter, counter affidavit is not necessary. Counsel for the parties are accordingly heard.

3. Petitioner, who is serving as HC (AR/MR), was recruited in 1983 as Constable in CRPF. He contends that he was medically examined several times and was found in the medical category of SHAPE-1. The Petitioner was promoted to the post of HC (AR/MR) in the year 1989.

4. The Petitioner cleared his Promotion Cadre Course (PCC) on 24.02.2012 and subsequently the Respondents issued signal dated 21.01.2013 and recommended the name of the Petitioner for promotion as ASI (AR/MR) along with other eligible batch mates. The petitioner was medically examined by the Respondents on 26.12.2011 and was declared medically unfit for reasons of colour blindness and placed in the category of SHAPE-3. The review medical examination of the petitioner by the board of medical officers confirmed this finding on 14.08.2012 and placed the Petitioner in Colour Perception Category CP III.

5. In the meantime, the respondents appear to have proceeded further in the matter of promotion and also verified that no preliminary enquiry or disciplinary proceedings are pending or contemplated against the petitioner. Unfortunately, the medical status of the petitioner as being colour blind could not be ignored and has impacted the petitioner's promotion whereby the Respondents cancelled the earlier promotion order vide their signal / order 19.02.2013 and 07.03.2013 which action of the respondents has been challenged by way of present writ petition.

6. Arguing before us, learned counsel for petitioner has contended that the challenge of the petitioner is covered by several judicial pronouncements of this court. In this regard, our attention has been drawn inter alia to the following:-

(i) Judgment dated 23rd April, 2013 passed in Writ Petiton (Civil) No. 2667/2012 titled **Kunwar Pal Singh Vs Union of India & Ors.**

(ii) Judgment dated 22nd March, 2011 passed in Writ Petition (Civil) No. 5077/2008 titled as **Sudesh Kumar & Ors. V. Union of India &**

Anr. and other connected writ petitions.

(iii) Writ petition No. 11855/2009 titled as **Mohan Lal Sharma Vs. Union of India** decided on 16th March, 2011.

(iv) The recent pronouncement dated 28th February, 2013 in Writ Petition (Civil) No. 356/2011 titled as **Sh. P. Suresh Kumar Vs. Union of India**.

7. It is contended by the learned counsel for the petitioners that the petitioner is suffering from colour blindness which was undetected at the time of his induction and is therefore entitled to the benefit of the several judicial pronouncements.

8. A reading of these pronouncements would show that the matter of the force personnel who were not discovered as suffering from colour blindness at the time of original induction, but were detected as being colour blind at subsequent stages has agitated the respondents and several measures have been taken pursuant to issuance of circulars from time to time. The present case is similar to the case of the petitioners in the above writ petitions in as much as despite the medical examination, at the time of his original induction, the colour blindness of the petitioner was also not detected then. The petitioner contends that in these circumstances, he is entitled to the same benefits which have been given to the force personnel whose cases have been considered in the aforenoted judicial pronouncements.

9. There is no real contest to these submissions made on behalf of the petitioner. We find that so far as the issues raised by the petitioner are concerned, the same have been considered in paras 9 to 11 of the pronouncement in **Sh. P. Suresh Kumar Vs. Union of India** which read as follows:-

> ''9. It is, therefore, evident from the above extract that right from 2002 to 2008, the respondents were sensitive and alive to the fact that colour blind personnel recruited prior to 2002 could not be treated differently from their other colleagues who did not suffer from this disability as far as promotion and other conditions of the service were concerned. The doubts expressed from time to time, which were sought to be allayed in the form of Circular dated 29.10.2008 resulted in greater uncertainty and possibly some conflict. All these were given a quietus by the Circular

dated 11.3.2011 which reiterated that promotional prospectus of colour blind personnel recruited by any of the forces would not be prejudicially or adversely affected. One would have thought that in such state of affairs and with two adverse judgments by Division Bench, the matter would have ended. This Court is also conscious that the appeals by the respondents through special leave to the Supreme Court against the directions in **Sudesh Kumar's** case (supra) were unsuccessful; the SLPs were dismissed. It meant that not only did the petitioners in **Mohal Lal Sharma** and **Sudesh Kumar** cases acquire a right in the form of a declaration that they would not be treated differently from their other non-colour blind colleagues, such right also vested and inured in all similarly situated employees and personnel of all the forces. Such being the case, the respondents cannot now argue that in the form of the mere Circular - of 18.5.2012 or in that matter of 27.2.2012, the present petitioners, or those who had not approached the Court, but are found to have the same conditions as the petitioners in **Mohal Lal Sharma's** case, can be in any manner discriminated against. That some approached the Court whilst the others felt no compulsion to do so, can be no rationale for a valid classification. In fact, the entire class of colour blind personnel WP (C) 356/2013 with connected matters Page 12 under such circumstance is indistinguishable. The respondents cannot treat the equals unequally by separating those who approached the Court and continue to give them promotions and other such benefits while denying the same to those who had not approached the Court and perhaps had no occasion to approach the Court on account of the declaration given. That would be plainly violation of Article 14 of the Constitution of India.

10. As a consequence of the above discussion, it is held that though the respondents have to some extent stated that posts suitable for colour blind personnel have been identified and allocated to accommodate their claims for promotion; it is hereby declared and directed that the effect of the previous judgments of the Court based on the respondents' own thinking contained in the three Circulars dated 17.5.2002, 31.7.2002 and 11.3.2011 would continue to bind the parties. There is, in fact, no denial

in the facts situation warranting any different thinking. The petitioners and all others like them would be entitled to full benefits of promotions as is extended to those who do not suffer from colour blindness impugned in the previous directions of this Court in **Mohal Lal Sharma** and **Sudesh Kumar's** case.

11. In view of the above discussion, all the directions and orders impugned in the present case which denied or deprived the petitioners the chance or right to occupy the promotional posts are hereby quashed. The respondents are directed to issue consequential orders wherever the promotions have been actually effected with effect from the date the petitioners' juniors were promoted.''

10. These observations apply squarely to the case of the petitioner. Giving the nature of the adjudication by this court in all the aforenoted pronouncements, we are of the view that petitioner is also entitled to the reliefs which was given in the case of **Suresh Kumar** (supra).

In view of the above, we direct as follows:-

(i) The signal dated 19.02.2013 and 07.03.2013, cancelling the promotion of the petitioner is held to be illegal and is hereby set aside and quashed.

(ii) A writ of mandamus is issued hereby directing the respondents to pass appropriate orders promoting the petition to the post of ASI (AR/MR) subject to completion of all formalities.

11. Having regard to the passage of time since the last medical board, if it is required, the petitioner may be required to undergo fresh medical examination.

12. The medical examination shall be conducted within a period of four weeks from today. Orders shall be passed immediately thereafter.

13. The petitioner will be entitled to the financial benefits accrued from the date of promotion, however, he will be deemed to have been promoted on the date on which his immediate juniors were promoted and his position shall be maintained at the appropriate place in seniority.

14. This writ petition is allowed in the above terms.

ILR (2013) IV DELHI 2582
W.P.(C)

C.D. SHARMA ....PETITIONER

VERSUS

UNION OF INDIA AND ORS. ....RESPONDENTS

(PRADEEP NANDRAJOG & V. KAMESWAR RAO, JJ.)

W.P. (C) NO. : 2680/2012 DATE OF DECISION: 01.05.2013

Service Law—Departmental proceedings—Parity in punishment—The petitioner was chargesheeted by the respondents on several counts alleging that he acted in connivance with another employee Mr. S.C. Saxena enquiry officer held the charges proved—Disciplinary authority remitted the case to the enquiry officer for further examination of some witnesses—Enquiry officer held further enquiry and reported that all the charges against the petitioner were not proved—Disciplinary authority did not agree with the findings of the enquiry officer and issued a disagreement note thereby affording the petitioner an opportunity to submit representation—After considering the representation the disciplinary authority came to a conclusion which was challenged by the petitioner in the Allahabad Bench of Central Administrative Tribunal—The OA of petitioner was allowed but in the writ proceedings filed by the respondents, High Court of Allahabad remanded the case to the Tribunal for deciding afresh—The Tribunal decided that the OA being premature was not maintainable and dismissed—In the meanwhile, the petitioner retired from service—Finally, disciplinary authority in consultation with UPSC took a view that charges stood proved, so penalty of 20% cut in monthly pension of the petitioner for five years was imposed—

Punishment order challenged by the petitioner before the Tribunal mainly on the grounds that petitioner would be entitled to parity with co-accused Mr. S.C. Saxena, who was exonerated—Tribunal rejected the OA—Challenged in writ petition—Held, a comparison of charges framed against the petitioner and Mr. S.C. Saxena shows the commission of misconduct by them in connivance with each other, so what has been held in favour of Mr. S.C. Saxena on merits of charges must hold good in favour of the petitioner also, rather role of Mr. S.C. Saxena was deeper in as much as it is he who recorded false measurements in the measurement book and lapse of petitioner was only lack of proper supervision, so if Mr. S.C. Saxena was exonerated, the petitioner could not be treated differently—Penalty order liable to be set aside.

Having heard the learned counsel for the parties, we at the outset made a comparison between the charges framed against Mr. S.C. Saxena and the petitioner. As observed above, the Articles of alleged charge against the officers show that commission of misconduct is primarily in connivance with each other. Whatever has been held in favour of Mr. S.C. Saxena, in so far as merit of charges are concerned, must hold good in favour of the petitioner. In the case of petitioner the penalty imposed on the petitioner was 20% cut in his monthly pension for a period of five years. In a similar way petitioner faced the departmental enquiry for a period of ten years inasmuch as the proceedings were initiated in the year 1997. It assumes importance to note that, if at all, the role of Mr. S.C. Saxena was deeper. It was he who had allegedly recorded false measurements in the Measurement Book. He had got the measurement effected. If at all, petitioner's lapse was lack of proper supervision; or at best the two acting in concert. Thus if Mr. S.C. Saxena was exonerated, the petitioner could not be treated differently.

(Para 12)

In the case in hand the charges framed against the petitioner

and Mr. S.C. Saxena are based on same set of facts. The charges are that they in connivance with each other committed misconduct. If the connivance is not proved then the charges against both the persons must fall. We see there are no dissimilarity in the case of the petitioner as well as Mr. S.C. Saxena. Further what is important is that the factors which weighed with the competent authority in the case of Mr. S.C. Saxena should have also weighed with the competent authority qua the petitioner. The petitioner has raised the issue of parity qua Mr. S.C. Saxena before the authority, who in its order dated August 12, 2009 on the issue of parity has stated that the cases of Mr. S.C. Saxena and Mr. C.D. Sharma, petitioner herein, are different, dropping DAR proceedings against Mr. S.C. Saxena cannot be the adequate reason for exonerating Mr. Sharma. Surprisingly, the Appellate Authority considers the factors like long duration of DAR proceedings and exoneration of co-accused as a mitigating factor for imposing the penalty of 20% cut in monthly pension of the petitioner for a period of five years. This we fail to understand as to how there would be construed as mitigating factors for imposing penalty, and not for dropping the charges against the petitioner. The same factors were taken by the competent authority for dropping the charges against Mr. S.C. Saxena and the same should have also weighed with the competent authority to drop the charges against the petitioner as well. Since no other factors like responsibility, duties have been taken into consideration by the authorities while imposing the penalty against the petitioner we see that the penalty imposed against the petitioner is discriminatory and the petitioner is entitled to parity qua Mr. S.C. Saxena. For these reasons we hold that, on facts, the judgment of the Supreme Court in the case of **Raj Pal Singh's** case (supra) is applicable and as such the penalty order dated August 12, 2009 is liable to be set aside. We do so. We set aside the order of the Tribunal dated February 18, 2011 passed in OA No.242/2010. The petitioner shall be paid full pension on superannuation. The arrears of pension shall be paid to the

petitioner within a period of two months from the receipt of copy of this order. If the arrears are not paid within two months then the payment thereafter would entail interest at the rate of 9% per annum. **(Para 14)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Ms. Jyoti Singh, Senior Advocate with Mr. A.K. Trivedi, Mr. Tinu Bajwa and Ms. Sahilla Lamba, Advocates.

FOR THE RESPONDENTS : Mr. R.L. Dhawan, Advocate.

CASES REFERRED TO:

1. *Administrator, Union Territory of Dadra and Nagar Haveli* vs. *Gulabhia M.Lad,* (2010) 5 SCC 775.
2. *State of Uttar Pradesh and Ors.* vs. *Raj Pal Singh,* (2010) 5 SCC 783.

RESULT: Writ petition allowed.

V. KAMESWAR RAO, J. (Oral)

1. The challenge in the writ petition is to the order dated February 18, 2011 passed by the Central Administrative Tribunal, Principal Bench in OA No.242/2010, whereby the OA filed by the petitioner was dismissed by the Tribunal. The brief facts are, that the petitioner while working as AEN with the respondents was charge-sheeted on October 29, 1997. Four charges were framed as under:-

''Article 1

He knowingly and intentionally has got recorded the false measurements of supply of ballast by Shri S.C. Saxena, CPWI(S) in Measurement Book No.AGC/347 against 14th on account bill for stack No.93 for a total quantity of 158.999 cum of ballast and has done 100% test check of false measurements of this stack which has been shown as trained out although no permission was taken for training out the same from Sr.DEN/AEN. This amount of fictitious/false test check and as such excess payment

to contractor amount to '48,972 and corresponding loss to the Railways.

Article 2

He knowingly and intentionally has got recorded the false measurements of ballast for stack No.101 measuring 145.4 cum by CPWI(S) Shri S.C. Saxena/AGC and has done 100% test check of measurement of ballast of Jajau Yard for which no supply was taken at the time of recording measurements in Measurement Book No.AGC/347 in 15th on account Bill for stack No.101 but as the matter came to the notice of regular AEN and higher officers, the stack was reconstructed. Thus, he made efforts to defraud the Railways but on intervention of regular AEN, he could not succeed.

Article 3

He knowingly and intentionally has got measured the ballast of M/s S.P. Associates lying at Jajau Yard in the contract of M/s Mittal Associates even though the JJ Yard location was not covered in the scope of their work. This ballast supply was earlier rejected by the then AEN Shri B.K. Mishra as it was not conforming to the specification of that contract, subsequently a proposal was moved by CPWI for taking 800 cum ballast at JJ Yard in the contract of M/s. Mittal Associates based on filmsy grounds and this fact was not brought out in the proposal that this ballast has been earlier supplied by M/s S.P. Associates and was rejected.

Article 4

He knowingly and intentionally recorded 100% test check on measurements which was not recorded directly in the Measurement Book by CPWI(S) Shri S.C. Saxena for supply of ballast as stipulated in the Engineering Code para 1319, on 15.2.1996. In fact, the relevant Measurement Book was available at Jhansi on 15.2.1996 in connection with passing of the 14th on account bill and was brought to AGC at 23.55 hrs. on 15.2.96. The Statements given by S/Shri S.C.Saxena/CPWI(S), C.D. Sharma/AEN and J.P.Gupta/O.S. are confusing and incorrect. There was no other reason for the AEN Shri C.D.Sharma not to

test check the measurements directly in the Measurement Book as stipulated in the Engineering Code except for the reason that regular AEN was resuming on 17.2.1996 and CPWI(S) Shri Saxena and Shri Sharma, AEN would have not succeeded in their designs for accepting the rejected ballast in JJ Yard and also for accepting false measurements for stack No.101 which was not available at the time of recording measurements.''

2. The Inquiry Officer conducted the enquiry and submitted his enquiry report on October 16, 2000 by holding the charges as proved. The petitioner submitted his objection to the said report mainly on the ground of non-production and non-examination of the prosecution witnesses, and not affording a reasonable opportunity to the petitioner to cross-examine the PWs. The Disciplinary Authority after considering the enquiry report remitted the case to the Inquiry Officer for further enquiry by examination/cross-examination of some witnesses. Pursuant thereto, the Inquiry Officer after holding further enquiry submitted his report dated March 24, 2003, holding all the charges framed against the petitioner as not proved. The Disciplinary Authority did not agree with the findings of the Inquiry Officer and vide a Disagreement Note dated July 15, 2004, holding provisionally all the charges as proved, intimated the petitioner and afforded him an opportunity to submit a representation on the Disagreement Note dated July 15, 2004 which the petitioner did vide a reply dated August 03, 2004.

3. The Disciplinary Authority considered the representation of the writ petitioner, came to the conclusion on the said disagreement, which was challenged by the petitioner in the Allahabad Bench of the Tribunal in OA No.417/2005. The OA was allowed. The matter was taken in appeal by the respondents before the High Court at Allahabad in Civil Misc. Writ Petition No.57536/2005, which remanded the case back to the Tribunal for deciding the matter afresh. The Allahabad Bench of the Tribunal considered the matter afresh and decided on June 08, 2007, that the OA is not maintainable as being premature and dismissed the same.

4. In the meantime, the petitioner retired from service on June 30, 2007. As the proceedings have not culminated in a final order, the proceedings continued under Rule 9 of the Railway Services Pension Rules, 1993. On August 12, 2009 the case was finally decided by the Disciplinary Authority in consultation with UPSC, which was of the view

that the charges have been proved, and constituted a "grave misconduct" on the part of the petitioner and thereby imposed a penalty of 20% cut in monthly pension of the petitioner for a period of five years.

5. According to the order dated August 12, 2009, which was challenged by the petitioner before the Tribunal by filing OA No.242/2010, the petitioner primarily raised two issues. One: whether the penalty imposed on the petitioner is legally sustainable, and two: whether the petitioner would be entitled to parity claimed of exoneration of the co-accused Mr.S.C.Saxena. The Tribunal in so far as issue No.2 above is concerned was of the following view:-

''We may first consider the issue of similar treatment and parity claimed by the applicant with the co-delinquent (Shri S. C. Saxena). The applicant has sought exoneration of all charges on the basis of exoneration of Shri S. C. Saxena, ADEN/G/Jhansi (Retd.). This issue has been very comprehensively dealt by the Disciplinary Authority in the Penalty Order dated 12.8.2009. In case of Shri Saxena, he was issued major penalty Charge Memorandum in 1997, but after considering defence statement the Charge Memorandum was quashed and a fresh Charge Memorandum was issued on 05.02.1998. After considering representation of Shri Saxena on the findings of the IO who had held all the Charges as proved, the DA imposed a major Penalty on 26.7.2001. After consideration of his appeal, the Appellate Authority quashed the penalty imposed on him and remanded to the IO for further inquiry. The IO submitted his supplementary Inquiry Report and held all Charges as not proved which was not accepted by the Disciplinary Authority. A Memorandum of Disagreement was issued to Shri Saxena holding all the Articles of Charge as proved. After considering his representation penalty was imposed on him by the Disciplinary Authority on 20.10.2004. Shri Saxena preferred an appeal to Railway Board, which quashed the disciplinary proceedings from the stage of issue of Memorandum of Disagreement. On consideration of his representation against the Memorandum of Disagreement, the Disciplinary Authority imposed a major penalty on Shri Saxena. In his appeal to Railway Board, Shri Saxena again pointed out some procedural lapses against the said order. After considering the whole case, the Railway Board felt that Shri Saxena had

already faced enough mental agony during ten years of the proceedings and quashed the proceedings again from the stage of imposition of penalty due to procedural lapse. Therefore, the disciplinary proceedings against him were dropped by the competent authority. It is apt to note that the circumstances of Shri S. C. Saxena and those of the applicant are different. The Disciplinary Authority found that parity did not exist. The dropping of the disciplinary proceedings against Shri Saxena would not be the adequate reason for exonerating the Applicant. The Disciplinary Authority considered the mitigating factors such as (i) long duration of the departmental proceedings, (ii) exoneration of the co-accused, and (iii) the Applicant in his letter dated 17.07.2007 did not comment on the facts of the Memorandum of Disagreement issued by Railway Board and held all the four Charges as proved. As discussed above, we find that the magnitude of the mis-conduct in case of Shri S. C. Saxena being different from that of the applicant the claim for similar treatment for the Applicant would not be applicable. We find from the above that the competent authority has compared the Applicant and co-delinquent in so far as their culpability in the alleged misconduct is concerned and held the case of the Applicant as "grave misconduct" and imposed the penalty. We are in full agreement of the said findings."

6. In so far as the issue No.1 is concerned, the Tribunal had concluded that the prescribed procedure was followed while taking disciplinary action against the petitioner and rejected the said issue.

7. While arguing the case on behalf of the petitioner, Ms.Jyoti Singh, learned senior counsel for the petitioner would primarily reiterate the same contention which was contended on behalf of the petitioner before the Tribunal i.e. whether the petitioner would be entitled to parity claimed with respect to the exoneration of the co-accused Mr.S.C.Saxena. To understand and decide the issue it would be important for us to first see the charges which have been framed against Mr.S.C.Saxena which are as under:-

''Article 1

He knowingly and intentionally has recorded the false measurements of ballast for stack No. 93 in the MB No. AGC/

347 against 14th on account bill in connivance with looking after AEN and contractor, which was not actually stacked at the time of recording measurements and has been shown as trained out although no permission was taken for training out the same from Sr. DEN/AEN this amounts to fictitious/false measurements and as such excess payment to contractor amounting to Rs. 48,972/- and corresponding loss to the Rlys.

Article 2

He knowingly and intentionally has recorded the false measurements of ballast for stack No. 101 measuring 145.4 cum in MB no. AGC/347 at Jajau Yard for which no supply measurements against 15th on account but as the matter came to the notice of regular AEN and higher officers, the stack was reconstructed. Thus, he made efforts to defraud the Rlys but for intervention of regular AEN, he could not succeed.

Article 3

He knowingly and intentionally measured the ballast lying at Jajau Yard in the contract of M/s. Mittal Associates even though the JJ Yard location was not, covered in the scope of work. This ballast was supplied by M/s. S. P. Associates and was rejected by the then regular AEN Shri B K Misra as it was not conforming to the specification of that contract. He moved a proposal for taking 800 cum ballast at JJ Yard in the contract of M/s. Mittal Associates based on flimsy grounds.

Article 4

He knowingly and intentionally failed to record measurements for supply of ballast directly in the MB as stipulated in the Engineering Code para 1319, on 15.2.96. In fact, the relevant MB was available at Jhansi on 15.2.96 in connection with passing of the 14th on account bill and was brought to AGC at 2355 hrs. The statements given by S/Shri S C Saxena/CPWI(S), CD Sharma/AEN and J P Gupta/OS. Are confusing and incorrect. There was no other reason for the CPWI(S) not to record measurements directly in the MB as stipulated in the Engineering Code except for the reason that regular AEN resuming on 17.2.96 and CPWI(S) Shri Saxena would have not succeeded in his designs for accepting

the rejected ballasting in JJ Yard and also for recording false measurements for stack No. 101 which was not available at the time of recording measurements.

By the above act of omission and commission, Shri S. C. Saxena, CPWI/AGC has failed to maintain absolute integrity, devotion to duty and acted in a manner of unbecoming of a Railway servant contravening Rule 3 (1)(i),(ii) and (iii) of Railway Service (Conduct) Rules, 1966.''

8. The articles framed against Mr.S.C.Saxena would show that he was alleged to have committed the misconduct in connivance with the petitioner. It is noted by us that in so far as Mr.S.C.Saxena is concerned, all the charges against him stood proved and the Disciplinary Authority imposed a major penalty on July 26, 2001. Considering his appeal, the Appellate Authority quashed the penalty imposed upon Mr.S.C.Saxena and remanded the case to Inquiry Officer for further enquiry. The Inquiry Officer held as not proved the charges. The Disciplinary Authority did not agree with the Inquiry Officer. A Memorandum of Disagreement was issued to Mr.S.C.Saxena holding all the articles as proved. After considering his representation penalty was imposed on him by the Disciplinary Authority on October 20, 2004. This order was challenged by Mr.S.C.Saxena before the Appellate Authority which quashed the disciplinary proceedings from the stage of issue of Memorandum of Disagreement. On a fresh re-consideration, the Disciplinary Authority vide order dated August 22, 2006, again imposed a major penalty on Mr.S.C.Saxena of ''Reduction to two stages below in the time scale of pay in his present grade of '7500-12000 for a period of six months with further directions that after expiry of this period, the reduction will not have the effect of postponing the future increments of his pay.'' In his appeal Mr.S.C.Saxena had pointed out some procedural lapses against the said order. The appeal was considered by the Appellate Authority which quashed the proceedings again from the stage of imposition of penalty due to procedural lapse. Ultimately, the disciplinary proceedings against him were dropped by the Appellate Authority. The relevant order dated September 10, 2007 of the Appellate Authority in the case of Mr.S.C.Saxena reads as under:-

''In this case, the only Article of Charge held proved by the DA against the Appellant pertains to non-recording of measurement for 15th On Account Bill directly in MB on 15.2.96 violating

provisions of Para 1319 of Engineering Code. Though it is an irregularity, it does not warrant imposition of a major register and the MB have been brought out. Major penalty imposed on the appellant in this case would affect his pension for life, which is considered rather harsh.

In view of above, after considering the nature of irregularity committed by Shri Saxena, points raised by him in his appeal, mental sufferings endured by him during ten years of DAR proceedings and his superannuation on 31.7.2007, DAR proceedings against Shri S C Saxena, Retd. AXEN/Plg./Central Railway are dropped.''

9. Ms.Jyoti Singh, learned senior counsel for the petitioner would argue that the charges against both the officers i.e. petitioner and Mr.S.C.Saxena are identical and their acts of misconduct are in connivance with each other. Further she would submit that, the charges which have been proved against the petitioner would not stand as, identical charge(s) of connivance have not been proved against Mr.S.C.Saxena. She further states that if no variation between records on ballast passing register and the MB have been brought out against Mr.S.C.Saxena, the same would also hold in favour of the petitioner. She would further contend that the mental sufferings endured by Mr.S.C.Saxena during ten years of DAR proceedings would hold good in the case of petitioner as well and the petitioner had superannuated on June 30, 2007 one month before Mr.S.C.Saxena had retired i.e. on July 31, 2007. There is no reason why the petitioner should be treated differently from Mr.S.C.Saxena when the facts which are the subject matter of the article of charges against both of them are based on the same set of facts and no distinguishing features exist.

10. Ms. Jyoti Singh, learned senior counsel for the petitioner would rely upon the judgment of the Supreme Court in Man Singh v. State of Haryana, Civil Appeal No.3186/2008 decided on May 01, 2008, in support of her contention that there should be no distinction in the matter of penalty of similar nature, wherein the Supreme Court has held as under:-

''18. In view of the factual backdrop and the above-stated statement of HC Vijay Pal, we are of the opinion that the respondents cannot be permitted to resort to selective treatment to the appellant and HC Vijay Pal, who was involved in criminal

case besides departmental proceedings. HC Vijay Pal has been exonerated by the appellate authority mainly on the ground of his acquittal in the criminal case, whereas in departmental proceedings he has been found guilty by the disciplinary authority and was awarded punishment for serious misconduct committed by him as police personnel.

19. We may reiterate the settled position of law for the benefit of the administrative authorities that any act of the repository of power whether legislative or administrative or quasi-judicial is open to challenge if it is so arbitrary or unreasonable that no fair minded authority could ever have made it. The concept of equality as enshrined in Article 14 of the Constitution of India embraces the entire realm of State action. It would extend to an individual as well not only when he is discriminated against in the matter of exercise of right, but also in the matter of imposing liability upon him. Equal is to be treated equally even in the matter of executive or administrative action. As a matter of fact, the doctrine of equality is now turned as a synonym of fairness in the concept of justice and stands as the most accepted methodology of a governmental action. The administrative action is to be just on the test of 'fair play' and reasonableness. We have, therefore, examined the case of the appellant in the light of the established doctrine of equality and fair play. The principle is the same, namely, that there should be no discrimination between the appellant and HC Vijay Pal as regards the criteria of punishment of similar nature in departmental proceedings. The appellant and HC Vijay Pal were both similarly situated, in fact, HC Vijay Pal was the real culprit who, besides departmental proceedings, was an accused in the excise case filed against him by the Excise Staff of Andhra Pradesh for violating the Excise Prohibition Orders operating in the State. The appellate authority exonerated HC Vijay Pal mainly on the ground of his acquittal by the criminal court in the Excise case and after exoneration, he has been promoted to the higher post, whereas the appeal and the revision filed by the appellant against the order of punishment have been rejected on technical ground that he has not exercised proper and effective control over HC Vijay Pal at the time of commission of the Excise offence by him in the State of Andhra Pradesh.

The order of the disciplinary authority would reveal that for the last about three decades the appellant has served the Police Department of Haryana in different capacity with unblemished record of service''.

11. On the other hand, Mr. R.L.Dhawan, appearing for the respondents would submit that there is a clear distinction in the case of the petitioner and Mr.S.C.Saxena on facts.

12. Having heard the learned counsel for the parties, we at the outset made a comparison between the charges framed against Mr.S.C.Saxena and the petitioner. As observed above, the Articles of alleged charge against the officers show that commission of misconduct is primarily in connivance with each other. Whatever has been held in favour of Mr.S.C.Saxena, in so far as merit of charges are concerned, must hold good in favour of the petitioner. In the case of petitioner the penalty imposed on the petitioner was 20% cut in his monthly pension for a period of five years. In a similar way petitioner faced the departmental enquiry for a period of ten years inasmuch as the proceedings were initiated in the year 1997. It assumes importance to note that, if at all, the role of Mr.S.C.Saxena was deeper. It was he who had allegedly recorded false measurements in the Measurement Book. He had got the measurement effected. If at all, petitioner's lapse was lack of proper supervision; or at best the two acting in concert. Thus if Mr.S.C.Saxena was exonerated, the petitioner could not be treated differently.

13. On parity, in so far as penalty is concerned, the Supreme Court in the judgment reported as **State of Uttar Pradesh and Ors. V. Raj Pal Singh,** (2010) 5 SCC 783, dealing with identical facts where the charges levelled against the employees who were proceeded departmentally, as held, that it was not open for the Disciplinary Authority to impose different penalty for different delinquents. In para 5 of the said judgment the Supreme Court dealing with the submission that once the charges have been held to be established, it was not proper for the High Court to interfere with the quantum of penalty, has held as under:-

''Though, on principle the ratio in aforesaid cases would ordinarily apply, but in the case in hand, the High Court appears to have considered the nature of charges levelled against the five employees who stood charged on account of the incident that happened on the same day and then the High Court came to the conclusion

that since the gravity of charges was the same, it was not open for the disciplinary authority to impose different punishments for different delinquents. The reasoning given by the High court cannot be faulted with since the State is not able to indicate as to any difference in the delinquency of these employees.''

The judgment of Supreme Court in **Raj Pal Singh's** case (supra) was considered and distinguished by the Supreme Court in a later judgment which is reported as **Administrator, Union Territory of Dadra and Nagar Haveli v. Gulabhia M.Lad,** (2010) 5 SCC 775. In para 15 the Supreme Court has on facts has held as under:-

''15. In a matter of imposition of punishment where joint disciplinary enquiry is held against more than one delinquent, the same or similarity of charges is not decisive but many factors as noticed above may be vital in decision making. A single distinguishing feature in the nature of duties or degree of responsibility may make a difference insofar as award of punishment is concerned. To avoid multiplicity of proceedings and overlapping adducing of evidence, a joint enquiry may be conducted against all the delinquent officers but imposition of different punishment on proved charges may not be impermissible if the responsibilities and duties of the co-delinquents differ or where distinguishing features exist. In such a case, there would not be any question of selective or invidious discrimination.''

Further in para 21 the Supreme Court has by referring to and distinguishing **Raj Pal Singh's** case (supra) has opined as under:-

''21. Similarly, the decision of this Court in Raj Pal Singh has no application to the present case. It was found therein that the charges proved against the delinquents were same and identical. No dissimilarity was found and, therefore, it was held that it was not open for the disciplinary authority to impose different punishments for different delinquents.''

14. In the case in hand the charges framed against the petitioner and Mr.S.C.Saxena are based on same set of facts. The charges are that they in connivance with each other committed misconduct. If the connivance is not proved then the charges against both the persons must fall. We see there are no dissimilarity in the case of the petitioner as well

as Mr.S.C.Saxena. Further what is important is that the factors which weighed with the competent authority in the case of Mr.S.C.Saxena should have also weighed with the competent authority qua the petitioner. The petitioner has raised the issue of parity qua Mr.S.C.Saxena before the authority, who in its order dated August 12, 2009 on the issue of parity has stated that the cases of Mr.S.C.Saxena and Mr.C.D.Sharma, petitioner herein, are different, dropping DAR proceedings against Mr.S.C.Saxena cannot be the adequate reason for exonerating Mr.Sharma. Surprisingly, the Appellate Authority considers the factors like long duration of DAR proceedings and exoneration of co-accused as a mitigating factor for imposing the penalty of 20% cut in monthly pension of the petitioner for a period of five years. This we fail to understand as to how there would be construed as mitigating factors for imposing penalty, and not for dropping the charges against the petitioner. The same factors were taken by the competent authority for dropping the charges against Mr.S.C.Saxena and the same should have also weighed with the competent authority to drop the charges against the petitioner as well. Since no other factors like responsibility, duties have been taken into consideration by the authorities while imposing the penalty against the petitioner we see that the penalty imposed against the petitioner is discriminatory and the petitioner is entitled to parity qua Mr.S.C.Saxena. For these reasons we hold that, on facts, the judgment of the Supreme Court in the case of **Raj Pal Singh's** case (supra) is applicable and as such the penalty order dated August 12, 2009 is liable to be set aside. We do so. We set aside the order of the Tribunal dated February 18, 2011 passed in OA No.242/2010. The petitioner shall be paid full pension on superannuation. The arrears of pension shall be paid to the petitioner within a period of two months from the receipt of copy of this order. If the arrears are not paid within two months then the payment thereafter would entail interest at the rate of 9% per annum.

15. The writ petition is allowed.

16. No costs.

ILR (2013) IV DELHI 2597
CRL. A.

RAMESH ....APPELLANT

VERSUS

STATE (NCT) OF DELHI ....RESPONDENT

(REVA KHETRAPAL & SUNITA GUPTA, JJ.)

CRL. A. NO. : 555/2010 DATE OF DECISION: 09.05.2013

Indian Penal Code, 1860—Section 39, 302, 397, 307 and 304, Arms Act, 1959—Section 25—Appellant (accused) was convicted under Section 302 for death of the victim in the event of robbery—Appeal filed—Only motive was robbery and there was no ill-will between the accused and the victim—Whether conviction fell under Section 302 or 304, IPC—Held:- Accused was armed with dangerous weapon and victim was unarmed—Sufficient to indict the accused with the offence of murder—Accused may not have intention to kill but he voluntarily caused death—Appeal dismissed.

[As Ma]

APPEARANCES:

FOR THE APPELLANT : Mr. Sumit Verma, Advocate.

FOR THE RESPONDENT : Ms. Ritu Gauba, APP.

CASES REFERRED TO:

1. *Mohd. Aslam @ Aslam* vs. *State,* 186 (2012) DLT 481.
2. *Vijender Kumar alias Vijay* vs. *State of Delhi,* (2010) 12 SCC 381.
3. *Balkar Singh* vs. *State of Uttarakhand,* (2009) 15 SCC 366.

4. *Pappu alias Hari Om* vs. *State of Madhya Pradesh,* (2009) 11 SCC 472.
5. *Daya Nand* vs. *State of Haryana,* AIR 2008 SC 1823.
6. *Vishnu Mohan* vs. *State (NCT of Delhi),* (2001) 6 SCC 296.
7. *Bhagwan Munjaji Pawade* vs. *State of Maharashtra,* (1978) 3 SCC 330.
8. *Virsa Singh* vs. *State of Punjab,* AIR 1958 SC 465.

RESULT: Appeal Dismissed.

REVA KHETRAPAL, J.

1. The Appellant seeks to challenge the judgment dated 22.10.2009 vide which Appellant was held guilty of offences under Sections 302/397/307 IPC and under Section 25 Arms Act, 1959 and order of sentence dated 27.10.2009 vide which he was sentenced as under:-

(i) For the offence under Section 302 IPC, he was sentenced to RI for life and was also ordered to pay fine of Rs. 1,000/-. In default, to undergo SI for 2 months.

(ii) For the offence under Section 307 IPC, he was sentenced to undergo RI for 5 years and pay fine in the sum of Rs. 1,000/-. In default, to undergo SI for 2 months.

(iii) For the offence under Section 397 IPC, he was sentenced to undergo RI for 7 years and pay fine of Rs. 1,000/-. In default, to undergo SI for 2 months.

(iv) For the offence under Section 25 Arms Act, he was sentenced to undergo RI for 3 years and pay fine in the sum of Rs. 500/-. In default, to undergo SI for 1 month.

All the sentences were to run concurrently.

2. Shorn of unnecessary details, the prosecution case emerging from the record is that on 22.6.2003 at about 12.45 p.m. behind Subzi Mandi Ghazipur, Delhi, the Appellant snatched a bag from the possession of Sudhir Munim working at Aarat No.103, Subzi Mandi Ghazipur. When Sudhir objected, the accused took out a desi katta and fired at the deceased. The fire hit the deceased Sudhir Munim and he fell down on the ground. While Appellant was fleeing from the spot, the complainant

Ram Kishan who reached there along with his nephew Rajpal raised alarm. He along with public persons chased the Appellant Ramesh. The Appellant Ramesh again fired from his katta, which fire hit Rajpal on his left hand. PCR officials reached there and the Appellant was apprehended. From the possession of the Appellant, a katta and bag of Sudhir was recovered. SI Etender Swaroop, Investigating Officer reached at the spot on receiving DD No.15A and prepared rukka and got the FIR registered at P.S. Kalyan Puri. The injured Sudhir succumbed to injuries sustained by him on 24.6.2003. The learned Trial Judge in his judgment convicted the Appellant for offences under Sections 302/307/397 IPC and Section 25 Arms Act, 1959 on the basis of the following chain of events, which he concluded stand established beyond any reasonable doubt by the evidence led by the prosecution:-

(i) Accused with the motive to commit robbery armed with illegal desi katta fired a shot on the back of Sudhir who happened to cross from there containing a bag in his hand.

(ii) PW-3 and PW-6 both being related to each other happened to pass through the scene of crime as they were going to their house after purchasing vegetables. They both saw accused firing at Sudhir and snatching his bag.

(iii) Both PW-3 and PW-6 after seeing the incident alongwith other public persons chased the accused, who ran towards Gazipur Village. To deter the public and PW-3 and PW-6, the accused fired at PW-3 thereby injuring his left hand.

(iv) PW-11, PW-8 and PW-16 were posted in PCR van and were patrolling that area. They saw the accused being chased by the public. These police officials also joined the public in apprehending the accused.

(v) After accused was apprehended PW-9 and PW-10 who were on patrolling duty on their motorcycle and were posted in the local police station also reached there. They found the accused being apprehended by PW-16 and PCR officials.

(vi) IO PW-26 received information regarding this incident through DD No.15-A and alongwith PW-17 reached at

the spot. The countrymade pistol and the bag snatched from deceased Sudhir which were recovered from the possession of the accused were handed over to the IO. The bag was found containing a small account book, one register, one visiting card, one used calculator, a small note book, 20 receipts of M/s. Satnam Singh, 15 visiting cards and currency notes in the sum of Rs.4,810/-. The katta was measured after it was unloaded and one live cartridge recovered. Thereafter IO completed the other procedural formalities as per law.

3. At the outset, it may be recorded that Mr. Sumit Verma, learned counsel for the Appellant did not challenge the conviction of Appellant for the offences under Sections 307/397 IPC and Section 25 Arms Act on the ground that Appellant has already remained in jail for the punishment awarded to him for these offences. The sole submission of Mr. Verma was that the learned Trial Judge fell into error in convicting the Appellant for the offence under Section 302 IPC instead of Section 304, Part II IPC. The aforesaid submission was made on the strength of the following facts and circumstances:-

(i) The cause of death is a single injury on the back of the deceased pursuant to a scuffle between the Appellant and the deceased as is borne out from the medical evidence on record.

(ii) The Appellant and the deceased were not even known to each other and no ill-will or animosity has been alleged by the prosecution between the Appellant and the deceased. The only motive of the offence was, therefore, robbery.

(iii) The offence was not a pre-planned or pre-meditated one and took place in the heat of the moment during a scuffle between the Appellant and the deceased.

(iv) The Appellant and the deceased co-incidentally happened to pass each other. The Appellant snatched the bag of the deceased. The deceased resisted when the Appellant was trying to escape and tried to prevent the Appellant from escaping. The Appellant in a bid to escape fired a shot. It is not as if the Appellant snatched the bag of the deceased by pointing the katta at him. 4. On the basis of the aforesaid

facts and circumstances, counsel submitted that the proper conviction of the Appellant would be under Section 304, Part II IPC and not under Section 302 of the Penal Code. In order to substantiate his aforesaid contention, he placed reliance upon the judgment of the Supreme Court in **Pappu alias Hari Om vs. State of Madhya Pradesh,** (2009) 11 SCC 472. The prosecution version in the said case was that one Ramesh (deceased) and some others were playing cards near the house of Kishanlal under an electric pole. The Appellant Pappu @ Hari Om along with the co-accused Bal Kishan came there and asked the persons who were playing cards to permit them to play with them. Ramesh objected to it and this gave rise to a quarrel between him and the accused Pappu @ Hari Om and Bal Kishan. Both Bal Kishan and Pappu @ Hari Om went away after abusing Ramesh. After sometime, they returned back. Pappu @ Hari Om had a .2 bore gun in his hand. Both the accused abused Ramesh and Pappu @ Hari Om fired gunshots, which caused injuries on the right shoulder of Ramesh and he fell down. Since there was a wound on the chest of the deceased, he was taken to hospital where he succumbed to his injuries. The Supreme Court after considering the circumstances in their entirety including the part of the body where the bullet fire hit the deceased held that the appropriate conviction would be under Section 304, Part II IPC and that custodial sentence of 8 years would meet the ends of justice.

5. Reliance was also placed by learned counsel on the judgment of the Supreme Court rendered in **Balkar Singh vs. State of Uttarakhand,** (2009) 15 SCC 366. In the said case, there was old enmity between appellant-Accused and one of deceased (Deceased 1). The prosecution case was that the accused requested the Deceased 1 to have some wine with him, but the Deceased curtly turned down the request. The appellant felt insulted, went inside the house and came back with a gun. The Deceased and the witnesses in the meanwhile started travelling in their tractor and when the tractor was moving at a high speed, the appellant first fired in the air and thereafter indiscriminately fired shots resulting in the death of Deceased 1 and 2. Deceased 1 died on the spot in the

tractor. Injured Deceased 2 succumbed to the injuries in the hospital. The trial court convicted the accused under Section 302 IPC and the High Court upheld the conviction recorded by the trial court. On further appeal, the Supreme Court after examining and analyzing the provisions of Sections 299 and 300 in the backdrop of the celebrated judgment of Vivian Bose, J. in **Virsa Singh vs. State of Punjab,** AIR 1958 SC 465, held that the offence was not covered by Section 302 IPC and the proper conviction would be under Section 304, Part I IPC with custodial sentence of 8 years in the peculiar facts of the case.

6. The next judgment relied upon by the learned counsel was rendered in the case of **Daya Nand vs. State of Haryana,** AIR 2008 SC 1823. In the said case, an altercation took place between one Shankar (PW5) and the deceased on one side and the accused Amar Singh (since acquitted) and his son Daya Nand on the other with regard to the flow of irrigation water in their respective fields. Accused threatened that they will see them and both of them left towards the village. Shankar and the others went to supervise the flow of irrigation water through the water courses. In the meantime, both the accused came back. Accused Daya Nand was armed with a gun. Accused Amar Singh exhorted his son accused Daya Nand to fire a shot. Accused Daya Nand then fired a shot from his gun towards Chhajju Ram who took a turn but was hit on the right side of the waist and fell down. Chajju Ram succumbed to his injury. Considering the aforesaid facts, the Supreme Court opined that the appropriate conviction would be under Section 304, Part II and restricted the sentence to eight and a half years already undergone by the accused Daya Nand. The Court also highlighted the difference between 299 and 300 IPC. It was held that:-

> ''According to the rule laid down in Virsa Singh's case, even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would not be murder. Illustration (c) appended to Section 300 clearly brings out this point.
>
> 20. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be

sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.''

7. Reliance was also placed on behalf of the Appellant on a judgment of a Division Bench of this Court in **Vishnu Mohan vs. State (NCT of Delhi),** (2001) 6 SCC 296. In the said case, the accused who was a drug addict in order to snatch money and the gold ornaments of his mother manually strangulated her. The Court held that at best from the nature of the injuries that had been caused to the deceased, it could be said that the accused may have the knowledge that the injuries were likely to cause hurt to his mother but intention to kill as such could not be inferred from the evidence available on record. The accused in order to snatch money and the gold ornaments of his mother did the act. He had no intention that this act of his would in all probability caused the death of his mother. Therefore, the case at best was covered under Section 304, Part II IPC, instead of Section 302 IPC.

8. Ms. Ritu Gauba, the learned APP on behalf of the State sought to rebut the contention of learned counsel for the Appellant that a single gun shot injury on the back of the deceased was not sufficient to convict the Appellant under Section 302 IPC and the conviction deserved to be converted into one under Section 304, Part I. She relied upon the judgment of the Supreme Court in **Bhagwan Munjaji Pawade vs. State of Maharashtra,** (1978) 3 SCC 330 to contend that the case was not covered by Exception 4 to Section 300 of IPC as was sought to be made out by appellant's counsel. In the case of Bhagwan Munjaji, it was submitted on behalf of the Appellant that the circumstances disclosed that the quarrel had erupted suddenly and the injuries were inflicted by the Appellant in the heat of passion without pre-meditation during a sudden fight, and, as such, he was entitled to the benefit of Exception 4 to Section 300 of IPC and the offence committed by the Appellant was one under Section 304, Part I of IPC. Rebutting the aforesaid submission, the Supreme Court observed:-

''It is true that some of the conditions for the applicability of Exception 4 to Section 300 exist here, but not all. The quarrel had broken out suddenly, but there was no sudden fight between the deceased and the appellant. "Fight" postulates a bilateral transaction in which blows are exchanged. The deceased was unarmed. He did not cause any injury to the appellant or his companions. Furthermore, no less than three fatal injuries were inflicted by the appellant with an axe, which is a formidable weapon on the unarmed victim. Appellant, is therefore, not entitled to the benefit of Exception 4, either.''

9. Ms. Gauba also relied upon the case of **Vijender Kumar alias Vijay vs. State of Delhi,** (2010) 12 SCC 381 to contend that where it is a unilateral act on the part of the Appellant as in the instant case, it cannot be said to be a sudden quarrel and as such the case of the Appellant cannot fall under Exception 4 to Section 300. She further contended that the number of injuries caused in such a case is not conclusive in determining nature of offence, but what has to be primarily seen are the circumstances preceding the incident and not exclusively during the incident.

10. In the aforesaid context, learned APP heavily relied upon a Division Bench judgment of this Court in **Mohd. Aslam @ Aslam vs. State,** 186 (2012) DLT 481. In the said case, this Court relying upon the observations of the Supreme Court in the judgments reported as Bhagwan Munjaji Pawade vs. State of Maharashtra and Vijender Kumar alias **Vijay vs. State of Delhi** (supra) held that where the accused was armed with dangerous weapon and the deceased was unarmed conviction for the offence of murder deserved to be sustained.

11. We find that the facts in the case of **Mohd. Aslam @ Aslam vs. State** (supra) and the facts of the present case bear a degree of similarity. In the said case, the Appellant and his alleged accomplices had entered the premises of the family of the deceased with the intention to commit robbery and were armed with deadly weapons. Their entry was noted resulting in hue and cry being raised. The robbery got aborted. The accomplices of the Appellant managed to flee. The Appellant was apprehended at the spot by the crowd but before he could be finally pinned down, he fired at the deceased and his younger brother from a close range. The former died and the latter was injured. The Court held

that though the Appellant may have had no intention to kill but it could safely be said that he voluntarily caused the death. Dwelling upon and highlighting the definition of the word 'Voluntary' as per Section 39 of the Indian Penal Code and the illustration thereunder, the Court held that the fact that the accused was armed with dangerous weapon and the deceased was unarmed was sufficient to indict the accused with the offence of murder. For the sake of ready reference, Section 39 of the Indian Penal Code with the illustration are reproduced hereunder:-

> ''39. ''Voluntarily'' - A person is said to cause an effect ''voluntarily'' when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.
>
> Illustration
>
> A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery and thus causes the death of a person. Here, A may not have intended to cause death; and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily.''

12. Distinguishing the case of **Balkar Singh** (Supra), the Division Bench in **Mohd. Aslam @ Aslam Vs. State** (Supra) observed that:-

> ''12. Though not expressly said, the signature tune of the judgment guides us that the Court found probable intention was to fire out of anger and with no particular motive, that is, a mindless act and since the distance from where the shot was fired and the place where the deceased was hit was considerable, knowledge of a lower degree was attributed to the accused.''

13. In the instant case, the ocular evidence of the two eye witnesses PW3 and PW6, in our considered opinion, sufficiently shows that there was no sudden fight. The Appellant was armed with a katta for the purpose of robbery. There was a scuffle for the bag from the hand of the deceased and when deceased objected, the Appellant fired with the country made pistol which hit the deceased on the back side of the deceased. Thereafter, the deceased fell down and Appellant ran towards Ghazipur village after snatching his bag. When PW3 Rajpal alongwith

other persons tried to apprehend the Appellant, the Appellant made fire on him, which hit on his left hand in the wrist. The PCR officials reached the spot and the Appellant was overpowered by the public persons and the PCR officials. As reiterated by the Hon'ble Supreme Court from time to time, what has to be seen is the circumstances taken as a whole for the purpose of judging whether there was a sudden fight between the deceased and the accused. True, only a single gun shot was inflicted but there is no denying the fact that the wound was inflicted in the course of armed robbery. The autopsy report Ex.PW1/A showed a firearm entry wound .5 X .5 cm was present on the lower middle back over the second lumbar vertebra. The edges of the wound was showing blackening. The injury had gone to the underlying vertebra and entered the abdominal cavity. The cause of death was opined as ante-mortem injuries produced by a firearm projector and sufficient to cause death in the ordinary course of nature. The blackening of the wound clearly goes to show that the shot was fired from a short distance. The accused was armed with a dangerous weapon which he fired from close range resulting in the death of the deceased. Thus, it could safely be said that he voluntarily caused the death of the deceased, in as much as if his intention was only to run away with the booty, he could have fired the shot in the air to facilitate escape and if at all needed, to fire on a non-vital part of the body such as leg of the victim, but instead of doing so he fired from a close range on the lower middle back over the second lumbar vertebra, which proved fatal. As such, in our opinion, considering the evidence on record the appropriate conviction would be under Section 302 of the IPC. We are, therefore, not inclined to alter the order on conviction of the learned trial judge into one under Section 304, Part II IPC or Section 304 Part I.

14. The appeal is accordingly dismissed.

ILR (2013) IV DELHI 2607
CRL. A.

KRISHNA & ANR. ....APPELLANTS

VERSUS

STATE OF DELHI ....RESPONDENT

(S.P. GARG, J.)

CRL. A. NO. : 349/2000 & 396/2000 **DATE OF DECISION: 15.05.2013**

Indian Penal Code, 1860—Section 498A, 304B—Deceased expired after sustaining burn injuries—Appellants (accused) convicted under sections 498A/304B/34 IPC—Appeal—Appellant contended that no evidence to prove that 'soon before her death' any dowry demand was made—Perusal of Section 113B of Evidence Act and Section 304B shows that there must be material to show that the victim was subjected to cruelty and harassment by her husband or any relative—Cruelty and harassment should be for in connection with demand of dowry and is cause of death of the women—Held—Prosecution failed to establish that victim was subject to cruelty and harassment—No investigation and evidences of surrounding circumstances leading to the death of the victim—Appeal allowed.

[As Ma]

APPEARANCES:

FOR THE APPELLANTS : Mr. K.B. Andley, Sr. Advocate with Mr. M. Shamikh, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP for the State.

RESULT: Appeal Allowed.

S.P. GARG, J.

1. The appellants Ramesh (A-1), Krishna (A-2) and Sonia (A-3) impugn judgment in Sessions Case No.69/1998 arising out of FIR No.5/1998, PS Shahdara by which A-1 was convicted under Sections 498A/304B IPC and sentenced to undergo RI for 10 years with fine. A-2 and A-3 were convicted under Section 498A IPC and sentenced to undergo RI for 2 years with fine Rs. 1,000/- each.

2. Sheetal (since deceased) was married to Ramesh on 03.03.1995. She resided at her matrimonial home No.1/5102, Gali No.3, Balbir Nagar, Shahdara after her marriage. On 01.01.1998, she expired after sustaining cent-percent burn injuries. Daily Diary (DD) No.82B (Ex.PW-7/A) was recorded at PS Shahdara at 07.15 P.M. The investigation was assigned to SI Grudev Singh. He informed SDM (Sh.Vinay Bhushan), who recorded statement of the deceased's father and lodged First Information Report. Case under Sections 498A/304B/34 IPC was registered. The Investigating Officer recorded statements of witnesses conversant with facts. Post-mortem on the body of the deceased was conducted. After completion of investigation, a charge-sheet was filed against the appellants. They were duly charged and brought to trial. The prosecution examined ten witnesses to substantiate the charges. After appreciating the evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment, convicted the appellants as mentioned previously. It is relevant to note that the State did not prefer appeal against acquittal of A-2 and A-3 under Section 304B IPC.

3. Learned Senior Counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimonies of PW-2 and PW-3 who were interested witnesses. No independent public witness from the locality was associated. There was no demand of dowry. A-1 and Sheetal had gone to her parents' house and stayed there for 3 -4 days. A-1himself sustained injuries in an attempt to save Sheetal. There was no evidence to prove that 'soon before her death' any dowry demand was made by the appellants. Learned APP urged that A-1 had demanded Rs. 30,000/- but deceased's parents were able to give him Rs. 10,000/-. Soon after return from the parents' house, Sheetal died an unnatural death in the matrimonial home. PW-2 and PW-3 have no ulterior motive to falsely implicate the appellants and their relationship with the deceased is not a factor to

discard their truthful version.

4. I have considered the submissions of the parties and have examined the record. It is not disputed that Sheetal was married to A-1 on 03.03.1995 and she expired by sustaining burn injuries on her body on 01.01.1998 at her matrimonial home. A conjoint reading of Section 113 B of the Evidence Act and Section 304 B shows that there must be material to show that soon before her death, the victim was subjected to cruelty or harassment for or in connection with any demand of dowry. Consequences of cruelty which are likely to drive a woman to commit suicide or to cause grave injuries or danger to life, limb or health of the woman are required to be established to bring home the application of Section 498A IPC. It is a matter of record that at no stage prior to death, Sheetal or her parents ever lodged any complaint whatsoever against any of the appellants for harassment/ torture, physical or mental on account of dowry demands. No *'Panchayat'* was ever organised in this regard. Admittedly, there was no demand of dowry by the accused prior to the marriage. PW-2 (Harvinder Singh), Sheetal's father admitted that there was no talk of dowry when marriage was negotiated. PW-3 (Madhu Bala), Sheetal's mother also admitted that there was no dispute over dowry articles either at the time of engagement or marriage. The accused persons were old relatives of deceased's parents. The mediator in the marriage was Harvinder's mother-in-law (deceased's grand-mother). PW-2 & PW-3 never lodged complaint with her against the conduct and behaviour of the appellants towards the deceased for harassment on account of dowry demands. Her statement was not recorded and she was not examined as a witness. The Investigating Officer did not record statement of any neighbour to ascertain the conduct and behaviour of the accused persons towards the deceased during her stay in the matrimonial home. Nothing emerged on record if any quarrel had taken place with the deceased in the matrimonial home prior to the incident or she was subjected to any physical or mental torture. There are no allegations that any of the appellants abetted or instigated Sheetal to commit suicide. No overt act was attributed to them. The prosecution has to establish that there must be nexus between the cruelty and the suicide and the cruelty meted out have induced the victim to commit suicide. She herself did not inform police or any authority. She was not medically examined to find out if at any time she was physically beaten. PW-2 & PW-3 have admitted that they used to visit the matrimonial home at regular intervals. Sheetal and

A-1 also used to visit them regularly. They had gone at the house of Sheetal' parents on 26.12.1997 at Panipat and stayed there till 30.12.1997. They left on 31.12.1997 at noon hours. PW-2 (Harvinder Singh) admitted that no quarrel took place during their stay at Panipat. No altercation or difference of opinion occurred during that period. He sent them happily after two or three days. PW-2 and PW-3 apparently did not find anything suspicious/amiss.

5. Sheetal expired at 07.15 P.M. on 01.01.1998. Intimation was given to her parents. They did not lodge FIR with the police after coming to Delhi. The Investigating Officer took them next day on 02.01.1998 to SDM for recording their statements. Thereafter SDM directed the police to register the case as per provisions of law and take necessary action. It appears that the Investigating Officer did not conduct proper investigation. He did not investigate as to how and under what circumstances, Sheetal sustained burn injuries. There was no investigation if any quarrel had taken place in the family on any specific issue prompting the deceased to take extreme step. He did not examine any witness from the neighbourhood to ascertain whether the relationship of the deceased with her in-laws was cordial or there used to be frequent quarrels. The body was not taken to hospital from the spot. Specific plea has been taken by A-1 that he had intervened to save the deceased and had suffered injuries. He was medically examined but the MLC has not been placed on record. Investigating Officer even did not opt to record statement of mediator of marriage. There is no investigation if Sonia used to reside at her parents' house after marriage or on the day of incident, she was present in the house. The entire prosecution's case is based upon the testimony of PW-2 (Harvinder Singh) and PW-3 (Madhu Bala), deceased's parents.

6. PW-2 (Harvinder Singh), in the statement (Ex.PW-2/A) disclosed to the SDM that A-1 used to demand Rs. 20,000/- Rs. 30,000/ every time on his visits to them with Sheetal. He used to give Rs. 10,000/- Rs. 15,000/-to him to save her marriage. On 30.12.1997 also the accused had demanded Rs. 30,000/-from him and he had given Rs. 10,000/-after borrowing it. He also leveled allegations against Krishna and Sonia for harassing Sheetal on account of dowry demands. PW-2 (Harvinder Singh) on 28.09.1998 in his examination-in-chief, specifically stated that her daughter used to tell that her mother-in-law and sister-in-law used to quarrel with her. He further stated that her husband had not demanded

anything from her. Further examination of the witness was deferred at the request of the learned APP as he had not gone through the file. This witness was examined thereafter on 23.10.1998. He made improvements from his previous deposition and alleged that A-1 used to demand cash and he had paid Rs. 10,000/-to him on 30.12.1997. In the cross-examination, he stated that A-1 used to demand Rs. 20,000/- Rs. 30,000/-as he required the money for his business. He further admitted that he was not in a position to pay that amount to his son-in-law. He again changed his version and stated that Sheetal used to demand from him and not A-1. He further admitted that the accused persons had not demanded any money from him. PW-3 (Madhu Bala) gave inconsistent version that A-1 had demanded Rs. 10,000/-from her as well as from her husband for some work. Rs. 10,000/-were given to him for the first time after one year of the marriage. Second time Rs. 10,000/-paid on 30.12.1997. Apparently, PW-2 (Harvinder Singh) has made improvements in his deposition before the Court and there is inconsistencies in the statement of PW-2 (Harvinder Singh) and PW-3 (Madhu Bala) as to when any demand of money was made by the accused. No cogent evidence came on record to prove that Rs. 10,000/-were paid by PW-2 (Harvinder Singh) or PW-3 (Madhu Bala) to A-1 on 30.12.1997 and from whom the said amount was borrowed. In his 313 statement, A-1 categorically stated that he had opened an account bearing No.4421 at Vijaya Bank, Rathi Mill, Shahdara and another account at post office, Tehsil Camp, Ashok Nagar in the name of his wife Sheetal. PW-7 (Gurdev Singh) did not investigate this aspect. He admitted that he had collected A-1's MLC from the hospital but no MLC was placed on record.

7. Sonia was married to DW-2 (Raju) and lived at Uttam Nagar. DW-2 (Raju) deposed that at the time of incident he and his wife were present at their residence. They came to know about the incident next day. No evidence was collected as to when Sonia had visited the house and if there was any provocation to force the deceased to end her life. No findings were recorded against Krishna and Sonia for their involvement under Section 304B IPC.

8. In order to attract application of Section 304B IPC, it is one of the essential ingredients that the deceased must have been subjected to cruelty or harassment by her husband or any relative and such cruelty and harassment should be for in connection with the demand of dowry and it is shown to have meted out to the woman soon before her death.

In the instant case, the prosecution has miserably failed to establish that the victim was subjected to cruelty or harassment on account of dowry demands. The evidence adduced by the prosecution to establish the guilt of the accused under Section 498A/304B IPC is highly scanty. The investigation is defective and no attempt was made to find out the true reasons for the unfortunate death of deceased within three years of her marriage at the matrimonial home. The Investigating Officer did not investigate the surrounding circumstances leading to the death of the victim. The accused deserve benefit of doubt.

9. The appeals are allowed and the conviction and sentence of the appellants are set aside. Bail bonds and surety bonds of the appellants stand discharged. Trial Court record be sent back forthwith.

ILR (2013) IV DELHI 2612
CRL. A.

VIJAY KUMAR KAMAT ....APPELLANT

VERSUS

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

(S.P. GARG, J.)

CRL. A. NO. : 1181/2010 DATE OF DECISION: 17.05.2013

Indian Penal Code, 1860—Sections 300, 307 & 326—Criminal Procedure Code, 1973—Section 161 & 313—Factories Act—Section 31—Appellant (convict) argued that the Trial Court fell into grave error while relying upon testimonies of hostile witness—No due weightage was given to the testimonies of the defence witnesses—Vital discrepancies emerging in the statement of the witnesses were ignored—Held—The testimony of an illiterate and rustic witness is to be appreciated, ignoring minor discrepancies and

contradictions—Credibility of the testimony, oral or circumstantial depends considerably on the judicial evaluation of the totality, not isolated scrutiny—The Court has to appraise the evidence to see to what extent it is worthy of acceptance—For conviction under Section 307 IPC it is not essential that bodily injury capable of causing death should have been inflicted—It is not necessary that the injury actually caused to the victim should be sufficient under ordinary circumstances to cause death of the victim—The Court will be give regard to intention, knowledge and circumstance irrespective of the result of conviction under Section 307 IPC—It requires an enquiry into the intention and knowledge of the accused and whether or not by his act, he intended to cause death that would amount to murder under Section 300 IPC—The nature of weapon used, the intention expressed by the accused at the time of the act, the motive, the nature and size of injuries, the part of the body where injuries were caused and severity of the blows are the relevant factors to find out intention/knowledge—Appeal dismissed.

[As Ma]

APPEARANCES:

FOR THE APPELLANT : Mr. Chetan Lokur, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP. ASI Jai Prakash, PS S.P. Badli.

RESULT: Appeal Dismissed.

S.P. GARG, J.

1. The appellant- Vijay Kumar Kamat impugns judgment dated 12.07.2010 of learned Additional Sessions Judge in Sessions Case No.54/2009 arising out of FIR No.418/2008 PS S.P.Badli by which he was convicted for committing offence punishable under Section 307 IPC and sentenced to undergo RI for ten years with fine Rs. 5,000/-.

2. Vijay Kumar Kamat was employed with Ravinder Singh in his factory R.J.Industry situated at Gali No.8, Khasra No.22/9/3, Samay Pur Badli where door hinges / kabjas were manufactured and dust was removed with compressor. Vijay Kumar Kamat used to operate the compressor. Sadhu @ Chhotu was working at the nearby tea stall of his relative Shrawan Choudhary and used to deliver tea to the workers in the factory. On 30.09.2008, Sadhu, aged 11 years went to the factory to deliver tea to the workers. It is alleged that Vijay Kumar Kamat pumped air in his stomach by putting compressor pipe on his anus deliberately. It caused injuries to him and he was taken to hospital. Daily Diary (DD) No.15A (Ex.PW-10/A) was recorded at 12.55 A.M. at PS Samay Pur Badli. The investigation was assigned to SI Kuldeep Singh. Sadhu was not fit to make statement. SI Kuldeep Singh lodged First Information Report under Section 326 IPC. After discharge from the hospital, Sadhu's statement was recorded. The Investigating Officer also recorded statement of the witnesses conversant with the facts. Victim's MLC was collected. After completion of investigation, a charge-sheet was submitted against Vijay Kumar Kamat for committing offence under Section 307/326 IPC. He was duly charged under Section 307 IPC and brought to trial. The prosecution examined thirteen witnesses to bring home the charge. In his 313 Cr.P.C. statement, the appellant pleaded false implication. He examined three witnesses in defence. On appreciating the evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment, held the appellant guilty under Section 307 IPC. Being aggrieved, the appellant has preferred the present appeal.

3. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimonies of hostile witnesses. It did not appreciate the testimony of material witnesses present in the factory that the appellant was not at fault and Sadhu had sustained injuries due to fall on the compressor. No due weightage was given to the testimonies of the defence witnesses. Vital discrepancies emerging in the statement of the witnesses were ignored. The victim had not lodged any complaint and his statement was recorded after a considerable delay of ten days. The appellant was not a suspect and was not arrested for five days. The doctor, did not specify that the injuries were dangerous in nature and sufficient to cause death in the ordinary course of nature. Learned APP urged that First Information Report was lodged on Daily Diary (DD)

No.15A (Ex.PW-10/A) which recorded that the appellant inserted compressor pipe in the anus which resulted in causing injuries. The injuries were 'dangerous' in nature. The victim remained admitted in hospital for two months.

4. I have considered the submissions of the parties and have examined the record. The incident in which Sadhu aged 11 years sustained injuries is not in dispute. The appellant's contention is that he was not author of the injuries to the victim and he sustained it due to fall on the compressor. Appellant's presence at the time of occurrence performing duty on the compressor is not under challenge. Sadhu had admittedly gone to serve tea to the workers there. After the occurrence, he was taken to Raj Nursing Home, Main Road, Samay Pur Badli and after first aid, he was shifted to Pentamid Hospital. PW-1 (Dr.Sudhanshu Mishra) examined him at 01.30 P.M. vide MLC (Ex.PW-1/A). He was discharged vide discharge summery (Ex.PW-1/B) after ten days on 10.10.2008. The nature of injuries was 'dangerous'.

5. Daily Diary (DD) No.15A (Ex.PW-10/A) was recorded on at 12.55 A.M. on 30.09.2008 getting information that the air was filled thought compressor by the factory worker and the boy who used to deliver tea was admitted at Raj Nursing Home. The investigation was assigned to SI Kuldeep Singh who made endorsement (Ex.PW-13/A) and lodged First Information Report at 05.10 A.M. on 01.10.2008. In the rukka (Ex.PW-13/A), it is recorded that the victim was unfit for statement. The child was first taken to Raj Nursing Home and after first-aid, he was admitted at Pentamid Hospital. It does not record that the victim had sustained injuries due to fall on the compressor.

6. Crucial testimony is that of PW-3 (Sadhu), a child witness aged 11 years. The learned Trial Judge put number of preliminary questions to ascertain if he was a competent witness and able to give rational answers to the questions put to him. The learned Presiding Officer was satisfied that the PW-3 was able to understand the questions properly and to give rational answers. He also understood the sanctity of oath. He deposed that on the day of occurrence at about 11.00 A.M. he had gone to the factory of Sardar Ji at first floor at Gali No.8, Samay Pur Badli with four glasses of tea. The accused was working in the factory and when he took tea, he started talking to him loosely and called him 'Rani Darling'. When he took back empty glasses, his leg slipped and he fell

down on the compressor. He received injuries on his legs and air got filled up in his stomach. His pant was torn at that time from his back. When he raised alarm, his relative Shrawan reached there and he was taken to the hospital. He remained admitted for about two months. In the same breath, he further deposed without interruption that the accused was operating on compressor to remove dust from the 'kabzas' and the compress or was used by him on his anus whereby he pressed compressor and filled air into his stomach through anus. He screamed in pain due to filling of air in the stomach. Shrawan scolded ViJay Kumar Kamat for that and the accused told Shrawan that he had pressed air into his anus only 'jokingly'. He further deposed that Rustam, Alam and Rana Pratap had also taken tea from him. Learned APP cross-examined the witness after Court's permission. He stated that before he could say anything, the accused pumped air into his stomach through anus. He admitted that firstly he was taken to a nursing home and thereafter to a big hospital. He was unable to remember the date if it was 30.09.2008. However, he explained that it was neither winter nor summer. The appellant did not cross-examine the witness that day on 04.06.2009. Cross-examination was conducted on 06.10.2009 after a gap of about four months. He admitted that the accused had no enmity prior to the date of incident. He was unable to give the details about days, months and years being illiterate. He admitted the suggestion that on the day of incident he had slipped and fell down on the pipe of the compressor which was in the hand of the accused and the airgot pumped into his stomach through anus. In re-examination by Addl.P.P., Sadhu denied that Vijay Kumar Kamat had inserted the compressor pipe in his anus intentionally. Again, in the cross-examination by learned APP after seeking Court's permission, the witness admitted that he was wearing half pant at the time of incident. He denied the suggestions that the appellant was responsible for the injuries sustained by him.

7. It is true that PW-3 (Sadhu) has deviated from the statement recorded under Section 161 Cr.P.C. and has given conflicting versions in his deposition before the Court. Somewhere he specifically and unhesitantly indicted the appellant for the injuries caused to him and at other places, he completely exonerated him. Apparently, PW-3 (Sadhu) is a child witness. He is illiterate and hails from poor section of the society. The testimony of an illiterate and rustic witness is to be appreciated, ignoring minor discrepancies and contradictions. It appears that attempt

was made to win over the witness after his examination on 04.06.2009. Statement of a witness is to be read as a whole in the context in which it is made. Credibility of testimony, oral or circumstantial depends considerably on a judicial evaluation of the totality, not isolated scrutiny. In the instant case, the appellant's plea was that due to fall on the compressor, Sadhu sustained injuries. This has been completely ruled out by other witnesses. PW-6 (Harish Gandhi) Supervisor in the factory admitted in his deposition that pipe of the compressor would not insert in the stomach through anus on fall over it. He further admitted that the pipe would go inside stomach through anus if it was inserted with force. Similar is the testimony of PW-7 (Ravinder Singh), owner of the factory who deposed that pipe of the compressor installed in his factory could not automatically go in the stomach through anus on fall on it. Air would be filled in the stomach through anus if it was pumped. PW-8 (Bhupal Singh) authorized by Delhi Government under Section 31 of the Factories Act, 1958 to test pressure vessels/ plant deposed that on 07.10.2008, he visited the factory and tested the compressor and receiver for thickness and safety wall. After the evaluation for equipment to be safe, he issued certificate(Ex.PW-8/A). He was categorical that pipe of the compressor could not be automatically inserted into the anus and accordingly the air could not automatically filled in the stomach through anus. He further deposed that it was not possible that air would be filled automatically in the stomach through anus due to fall on the compressor or its pipe. Again, in the cross-examination, he opined that it was not possible that if a person falls on a pipe it would automatically insert in the anus. Statements of all these witnesses have remained unchallenged in the cross-examination. The theory propounded by the accused that the victim sustained injuries due to fall on the compressor/ pipe cannot be believed at all. PW-1 (Dr.Sudhanshu Mishra) examined the victim and opined the nature of injuries 'dangerous'. The accused did not opt to cross-examine him to ascertain if the injuries were possible due to fall on the compressor.

8. PW-3 (Sadhu) did not nurture grudge against the accused to falsely implicate him in the case. His statement that he was teased by the accused calling 'Rani Darling' has gone unchallenged. The accused had no occasion to tease a child calling him 'Rani Darling'. Soon thereafter, to have some fun with the child, it appears that the accused put the pipe of the compressor into his anus and filled air in the stomach. When Shrawan Kumar scolded him, he told him that he had pressed air into his

anus only 'jokingly'. There are thus no good reasons to discard the cogent testimony of the child witness on this aspect whereby he was specific that the appellant was responsible for the injuries caused to him. He cannot be branded as liar and his evidence cannot be rejected outright. The Court has to appraise the evidence to see to what extent it is worthy of acceptance. Statement a hostile witness can be believed for certain purposes. PW-3's testimony coupled with other circumstances referred above is sufficient to establish that the appellant was instrumental in causing the injuries to the victim.

9. To justify a conviction under Section 307 IPC, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be gathered from other circumstance and may even, be ascertained without any reference at all to actual wounds. It is not necessary that the injury actually caused to the victim should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in Section 307 IPC. An attempt in order to be criminal need not be the penultimate act. Section 307 IPC requires an enquiry into the intention and knowledge of the accused and whether or not by his act, he intended to cause death which would amount to murder as defined in Section 300 IPC. It depends upon the facts and circumstances of each case whether the accused had the intention to cause death or knew in the circumstances that his act was going to cause death. The nature of weapon used, the intention expressed by the accused at the time of the act, the motive, the nature and size of the injuries, the parts of the body of the victim where injuries were caused and the severity of the blow or blows are relevant factors to find out intention/ knowledge.

10. In the instant case, the appellant's relations with the victim were not strained. He did not nurture any grievance with the child and had no previous animosity. No quarrel had taken place with the child. There was no previous deliberation or determination to cause injuries. It appears that the appellant intended to have fun with the child and in the process put the compressor pipe on the anus. Earlier he had uttered lewd remarks and called him 'Rani Darling'. It seems that the situation went out the appellant's control and the air was pumped in the victim's stomach.

By no stretch of imagination, inference can be drawn that the appellant intended to cause child's death by his acts. He had no evil intention or knowledge. The injury inflicted was not with the avowed object or intention to cause death. Consequently, conviction under Section 307 IPC cannot be sustained. The injuries suffered by the victim were 'dangerous' in nature and were voluntarily caused by the appellant. The offence falls under Section 326 IPC. The appellant's conviction is altered to offence under Section 326 IPC.

11. The appellant was sentenced to undergo RI for ten years with fine Rs. 5,000/-. Nominal roll dated 16.01.2013 reveals that he has already undergone four years, three months and fifteen days incarceration as on 15.01.2013. He also earned remission for ten months and ten days. He is not a previous convict and is not involved in any other criminal case. Considering the facts and circumstances of the case, the order on sentence is modified and the appellant is sentenced to undergo RI for seven years with fine Rs. 5,000/- and failing to pay the fine to further undergo SI for one month.

12. The appeal is disposed of in the above terms. Trial Court record be sent back forthwith.

ILR (2013) IV DELHI 2619
W.P. (C)

PURKHA RAM **....PETITIONER**

VERSUS

UOI & ORS. **....RESPONDENT**

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 3322/2013 **DATE OF DECISION: 20.05.2013**

Service Law—Constitution of India, 1950—Article 226—Petitioner challenges action of the respondents in not considering him for award grace marks in the examination held for the post of SI/GD through limited departmental competitive examination (LDCE) 2011, in terms of standing order 01-2011—Held:- there is nothing in the standing order which stipulates that a candidate who has failed to obtained the prescribed marks in the examination shall be entitled to the award of grace marks and the standing order merely sets out the guidelines for conducting the LDCE—Petition found without merit.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. N.L. Bareja, Advocate.

FOR THE RESPONDENT : Mr. Ashish Nischal, Advocate.

RESULT: Writ petition dismissed.

GITA MITTAL, J. (Oral)

1. The instant writ petitioner had applied for the post of SI/GD through Limited Departmental Competitive Examination-2011(LDCE-2011). He had appeared for the selection process/ and tests at various stages under unreserved category viz. Written test/ physical standard test and medical examination etc. As per the applicable instructions, a candidate was required to secure 45% of qualifying marks in each part of the paper and 50% of marks in aggregate to qualify the written test. A relaxation by 5% in the minimum qualifying marks was admissible to candidates belonging to SC/ST categories.

2. It appears that upon failure of the respondent to recommend petitioner's name for selection and the respondents failure to disclose the reason stating the exclusion of petitioner's name from the list, the petitioner had got served upon them a legal notice dated 10th April, 2012.

3. The case of the petitioner was rejected by way of cryptic reply dated 16th August, 2012 without disclosing the reasons as to under what circumstances, the name of the petitioner was not included in the list of selected candidates.

4. The petitioner had earlier filed a writ petition bearing W.P.(C)

No. 5715/2012 which was disposed of by this court vide order dated 13th September, 2012 requiring the respondents to give a parawise reply to the petitioner's legal notice dated 10th April, 2012.

5. The respondents have, thereafter, sent a response dated 2nd November, 2012 disclosing therein the reasons and circumstances under which the petitioner was shown in the list of successful candidates in the written examination. It was stated that due to an inadvertent and technical error, the name of the petitioner was shown in the list of successful candidates in the written examination. It is stated that the fact that the petitioner was unable to score the minimum qualifying marks in the written examination had rendered him disqualified for the selection.

6. The present writ petition challenges the action of the respondents in not considering the petitioner for award of grace marks in terms of standing order 01-2011. It is urged that the respondents are adequately empowered to waive off the deficiency in petitioner's eligibility by awarding him the benefits of grace marks.

7. The respondents have submitted that to avoid malpractices and to ensure transparency and fairness in conducting the process of examination of SI/GD LDCE-2011, the result of the written examination was declared at each examination centre, however the marks were not mentioned.

8. The petitioner was inadvertently shown as passed in the written examination due to a technical error and was allowed to appear in subsequent tests. The respondents have pointed out that this fact was noticed by them only at the time of preparation of merit list.

9. It is stated by the respondents that the petitioner had got only 42% of marks in part -II of the paper instead of minimum required marks i.e. 45% marks. As such the petitioner was not recommended for selection and appointment.

10. Our attention has been drawn to para 11 of the Standing Order No. 01/2010, which only states that any departure from the instructions of the Standing Order shall be with the approval of the DG. There is nothing in the standing order which stipulates that a candidate who has failed to obtain the prescribed marks in the examination shall be entitled to the award of grace marks. The Standing Order merely sets out the guidelines for conducting the Limited Departmental Competitive

examination for the post of SI/GD. The contention of the petitioner is that he should be given the grace marks which would enable a non deserving candidate to steal a march over the deserving persons. This is devoid of merits.

11. The respondents have complied with the directions of this court made vide order dated 13th September, 2012.

12. We do not find any merit in the writ petition which is hereby dismissed.

ILR (2013) IV DELHI 2622
CRL. A.

NARESH & ANR. ....APPELLANTS

VERSUS

STATE OF DELHI ....RESPONDENT

(S.P. GARG, J.)

CRL. A. NO. : 75/1998 DATE OF DECISION: 20.05.2013

Indian Penal Code, 1860—Section 393/34 read with Section 398—Arms Act—Section 25—Appellant (convicts) argued that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error by relying into testimony of sole witness—Respondent argued that there are no valid reasons to discard the cogent testimony of the victim who had no prior animosity with the assailants. Held, it is settled legal proposition that while appreciating evidence of witness minor discrepancies on trivial matters, which do not affect prosecution's case may not prompt Court to reject the evidence its entirety. The Court can convict an

accused on the statement of the sole witness provided that the statement of such witness should satisfy legal parameters i.e. it is trustworthy, cogent and corroborated with the oral of documentary evidence. Only when single eye witness is found to be wholly unreliable by the Court, his testimony can be discarded in toto—Appeal dismissed due to lack merit of the case.

[As Ma]

APPEARANCES:

FOR THE APPELLANTS : Mr. K.B. Andley, Sr. Advocate with Mr. M.L. Yadav, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP. SI Manish Kumar, PS Seelampur.

RESULT: Appeal Dismissed.

S.P. GARG, J.

1. The appellants-Naresh (A-1) and Mukesh (A-2) challenge judgment dated 29.01.1998 in Sessions Case No. 21/1997 arising out of FIR No. 562/1996 PS Seelampur by which they were held guilty for committing offence punishable under Section 393/34 IPC read with Section 398 IPC. They were convicted under Section 25 Arms Act also. Vide order dated 29.01.1998, sentence to under RI for seven years was awarded.

2. Allegations against Naresh (A-1), Mukesh (A-2) and Rakesh were that on 20.09.1996 at about 04.10 A.M. G.T. Road, Near Hanuman Mandir, they attempted to rob complainant-Nandu Mehtu. They were armed with deadly weapons at that time. All the three assailants were apprehended and various weapons were recovered from their possession then and there. During investigation, statements of the witnesses conversant with the facts were recorded. All the three were duly charged and brought to Trial. The prosecution examined six witnesses. In their 313 statements, A-1, A-2 and Rakesh pleaded false implication. On appreciating the evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment, held all of them perpetrators of the crime and sentenced accordingly. Being aggrieved, A-1 and A-2 have preferred the appeal. It is relevant to note that Rakesh had also preferred

the appeal against the impugned judgment and it was dismissed.

3. Learned counsel for the appellants urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimony of sole witness PW-1 (Nandu Mehtu) without corroboration. The complainant was unable to specifically depose as to which of the assailants used which weapon. No independent public witness was associated at any stage of the investigation. The complainant was not medically examined. Counsel further prayed to modify sentence as the appellants were young boys at the time of incident. Learned APP for the State urged that there are no valid reasons to discard the cogent testimony of the victim who had no prior animosity with the assailants.

4. Star witness PW-1 (Nandu Mehtu) is the victim. He was driving TSR on 20.09.1996. First Information Report was lodged by him and in his statement (Ex.PW-1/A), he disclosed to the police that at about 04.00 A.M. when he was going on G.T. Road after dropping a passenger at Seelampur, the three assailants/ boys signalled him to stop. When he stopped the TSR, they sat in the TSR and directed him to take them to ISBT. On the way to ISBT, he was forced to take the route via Iron Bridge. After some time, the assailants who were armed with 'pharsa' and 'daggers' asked him to handover whatever he had. One of the assailants caught hold him by collar and other started searching his pocket. When he raised alarm, the police reached the spot and apprehended the assailants. The weapons were recovered from their possession. The incident took place at 04.00 A.M. The Investigating Officer sent rukka at 06.00 A.M. to lodge First Information Report. There was no delay in getting the case registered. While appearing as PW-1, the victim proved the version given to the police at the first instance (Ex.PW-1/A) without any variation. He identified the three assailants and attributed specific role to each of them. He elaborated that A-1 had caught hold of his shirt collar from behind and placed 'pharsa' on his neck, A-2 put a 'kulhari' under his right armpit and Rakesh had put a double edged 'dagger' on his abdomen. He lost control over TSR and it turned turtle. When he raised alarm, the police reached the spot and apprehended the assailants. He also proved memos by which weapons were recovered from the assailants' possession. In the cross-examination, he clarified that he had taken a passenger from Ajmeri Gate to Seelampur before the occurrence. He denied the suggestion that quarrel took place with the assailants over

charging Rs. 100 as fare. He further denied the suggestion that he hit Rakesh with a screw driver on his leg. He claimed that he had sustained injuries but was not medically examined. He fairly admitted that one Vijay, another TSR driver, had reached the Police Station. He stated that A-1 & A-2 were wearing lining blue shirts. Rakesh were wearing half T-shirt of white colour. Despite lengthy cross-examination, the appellants were not able to elicit any material discrepancies or contradictions to disbelieve him. No ulterior motive was attributed to the victim for falsely implicating them. Apparently, the victim was not acquainted with the assailants and did not nurture grudge against them to falsely name them as offenders. The assailants were apprehended at the spot. They did not deny their presence at the spot that time. Specific suggestion was put to the complainant that the assailants were to go to Vaishno Devi and had boarded TSR to go to ISBT. The accused persons however, did not lead any positive evidence to substantiate that on that day they intended to go to Vaishno Devi. They did not elaborate as to by which mode they were to go to Vaishno Devi or if they had reserved tickets for that. They did not examine any family member in their defence to establish that they intended to pay a visit to Vaishno Devi. A paltry sum/ cash was recovered from their possession which was not sufficient to meet their expenses to go to Vaishno Devi. Moreover, the accused persons had no reasons to have in their possession deadly weapons while going to a religious place. The defence deserves outright rejection. There is no justifiable explanation as to what the accused persons were doing at odd hours at the place of occurrence with weapons. PW-1 (Nandu Mehtu), a TSR driver had no axe to grind to falsely implicate the accused persons. In the absence of material discrepancies or ulterior motive, I find no reasons to disbelieve the victim's statement. PW-3 (HC Sunil Kumar) and PW-5 (SI Ram Avtar) have corroborated the complainant's version regarding recovery of the weapons from their possession. Again, their testimonies on material facts remained unchallenged. The lapses/ discrepancies highlighted by the counsel are not material. It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution's case, may not prompt the Court to reject the evidence in its entirety. Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions. An undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version

of the prosecution witnesses. Minor discrepancies are bound to occur in the statements of witnesses. Non-examination of independent public witness per-se is of no consequence. The Court can convict an accused on the statement of a sole witness. The condition precedent to such an order is that the statement of such witness should satisfy the legal parameters i.e. it is trustworthy, cogent and corroborated by other evidence produced by the prosecution, oral or documentary. It is only when the Court finds that single eyewitness is a wholly unreliable witness, his testimony can be discarded in toto. I find no valid reasons to deviate from the findings of conviction.

5. The appellants have been sentenced to undergo RI for seven years. It is the minimum sentence prescribed under Section 398 IPC. The appellants were armed with deadly weapons at the time of attempt to commit robbery. Not only they were armed with weapons, they used them to put fear in the mind of the complainant to part with the money. Similar prayer to reduce the sentence was made earlier. Order dated 16.07.2009 records appellants' submission that they would not press the appeal on merits and the quantum of sentence be reduced to the period already undergone. Vide order dated 09.11.2009, the prayer was declined in view of the language of the Section 398 of the IPC and it was not possible to reduce the sentence lesser than the minimum prescribed.

6. In the light of above discussion, the appeal filed by the appellants lacks merits and is dismissed. The sentence and conviction of the appellants are maintained.

7. The appellants are directed to surrender and serve the remainder of their sentence. For this purpose, they shall appear before the Trial Court on 27th May, 2013. The Registry shall transmit the Trial Court records forthwith to ensure compliance with the judgment.

ILR (2013) IV DELHI 2627
CRL.A.

COURT ON ITS OWN MOTION
IN RE:

STATE (GNCT OF DELHI) ....APPELLANT

VERSUS

SIDHARTHA VASHISHT @ MANU SHARMA & ORS. ....RESPONDENTS

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

CRL. A. NO. : 193/2006 CRL. M.A. NO. : 1898/2007, 1899/2007, 1900/2007, 1901/2007, 1902/2007, 1904/2007, 1906/2007, 1908/2007, 1909/2007, 1910/2007, 1912/2007, 1913/2007, 1914/2007, 1915/2007, 1916/2007, 1917/2007, 1919/2007 & 1925/2007

DATE OF DECISION: 22.05.2013

Code of Criminal Procedure, 1973—Section 340—Procedure for taking action by the Court—Section 195—Contempt of lawful authority of public servants for offences against public justice—Indian Penal Code—Section 193—Punishment for giving false evidence—FIR No. 287/99 under section 302 IPC and 27 Arms Act, P.S. Mehrauli—All nine accused persons acquitted—Acquittal challenged through appeal to the High Court—Acquittal of six accused persons upheld while three accused persons convicted—During trial 32 witnesses turned hostile initiated proceedings for perjury under section 340 suo motu called upon the 32 witnesses to show cause why proceedings be not initiated—Conviction challenged before the Supreme Court—Conviction upheld—Notices of 10 witnesses out of 32 discharged—Respondents moved individual applications for discharge—Contended—Action based on previous statements made to police during investigation not sustainable cannot be the basis of proposed action no adverse comments made against the respondents in the judgments court is to give fair and adequate opportunity whom it intends to refer for trial—Material inadmissible in evidence is to be eliminated—State contended—Role played by the Respondents were aimed at deliberately assisting the accused—Court is to satisfy whether it would expedient in the interest of the justice to make complaint—Merits of the case cannot be looked into only comparison of statements made is to be done—Held:- PW Shyam Munshi is the author of FIR duly signed by him—Admitted to have witnessed the entire episode yet declined to identify the offender—Attempted to mention two persons firing relied on accused's counsel prima facie indicative of attempt to not stating the facts suppressing it with a view to help the accused action prima facie warranted against him (PW2)—PW95 Prem Shanker Manocha—A ballistic expert—Discrepancy between the opinion and his deposition in Court—Testified correctness of his report—Expressed inability to give an opinion about the weapon during Court deposition stated cartridges appear to be fired by two separate weapons—helped the defence to urge two weapon theory—Theory accepted by trial Court—Failed in his duty as an expert—A case for further proceeding against him—Other witnesses resiled from their statements recorded under section 161—Unsigned—Not made under oath—No adverse comments by the Court—Notices discharged.

Important Issue Involved: Section 340 of the Code of Criminal Procedure mandates the procedure to be followed in respect of an application or action taken by the Court concerned under section 195.

Prejury was a common law offence. It was known as forswearing and has always been viewed as a serious challenge to the sanctity of judicial proceedings.

The importance given to a trial where witnesses depose truthfully and fearlessly, cannot be undermined. Where witnesses perjure-either out of lure or under fear, the result is a judgment not based on truth, no less no more.

If the presence of potential witnesses at the crime scene is known to the police, utmost dispatch and expedience has to be displayed in recording those versions. This is to avoid the danger of an accusation that he witnesses statements cannot be truthful, or even that fading memories and faulty recollection would impair the deposition of such witnesses.

An expert witness who depose in an area of professional expertise, be it medical, forensic, engineering, pharmaceutical or any other science, owes a duty to the Court to state an honest opinion. The effect of such expert testimony during criminal trials cannot be undermined; though not conclusive on matters that an expert deposes or gives an opinion, it can form a crucial component in Court's conclusion.

The expert, as a man of professional competence and ability has to be assured autonomy and independence, so as to ensure that he is able to fearlessly discuss and even change his opinion for a good reason.

The testimony of an expert in India is no different; it differs from deposition of other witnesses, only to the extent that others testimony is based on their observation and the first-hand experience they experience, whereas in the case of the expert, the testimony is based on the opinion he forms on the basis of the wealth of experience he gains, in the field. And yet, there is no difference in the character and content of the duty both kinds of witnesses, owe to the Court.

An expert witness deposes on the basis of his observations, and renders an opinion, there is no bright line which segregates his testimony from those of other witnesses. It cannot be vouchsafed definitively - as in most other matters - that expert opinion cannot ever be untrue, or dishonest. An expert may not be accurate or correct - expecting that of any human being, at all times, is to expect an impossibility. What the law expects from an expert is to give an honest opinion, based on the observation she or he makes, of the matters presented to her or him, and more crucially substantiate it in an objective manner.

Witnesses who need to be supported, and protected from threats of harm to themselves, their family members or even their business interest, should be given wholehearted and unconditional protection. Those who cynically abuse the system, by turning hostile, for monetary or other extraneous consideration, have to be dealt with severely, and made to stand trial for prejury and other such offences.

In matters relating to sexual offences there is a need to provide victim protection at the time of recording statement made before the Court.

The Court had to consider the confidentiality and protection of a witness's identity before or during trial and to safeguards necessary to ensure that the accused's right to a fair trial is not jeopardized.

The direction for witness protection are:

(1) The Govt. of NCT shall immediately and in any event within ten weeks from today, issue a Witness Protection Policy which shall provide the principles and guidelines that the Police, the prosecution and executive agencies shall follow. The guidelines shall incorporate the material elements indicated in the various reports of the Law Commission, court directions, and any other recommendations of any official committee in that regard.

(2) In any event, the law enforcement agencies (Police, Central Bureau of Investigation or the National Investigation Agency) shall conduct an assessment of the threat or potential for danger to any witness or witnesses, cited in criminal trials (this shall include the victim of a crime, as well as his or her family member or members, as well as family members of other witnesses). The assessment would include analysis of the extent the person or persons making the threats appear to have the resources, intent, and motive to implement threats; seriousness and credibility of the threats. If such threats are assessed to be sufficiently serious, and the witnesses request law enforcement assistance, witness protection funds can be used to provide assistance to witnesses which helps law enforcement keep witnesses safe and help ensure witnesses appear in court and provide testimony.

(3) For the purposes of direction (2) above, gradation of the risk or threat can be categorized. Threat perception would be highest and ranked A if the witness, victim, or his or her family members run the risk of danger to their lives or normal way of living for a substantial period, extending beyond the trial and its conclusion. The second category can be ranked B, where the risk extends to the witness and his or her family members only during the investigation process and/or trial. The third category, C can be where the risk is moderate, and extends to harassment or intimidation of the witness during the investigation process. These instances are merely illustrative and the executive agencies can formulate better approaches, having regard to the nature of the case and the kind of threat perceptions that are encountered.

(4) Depending on the categorization of threat perception, the agency concerned shall ensure that all appropriate security cover is extended to the witness, victim, or his or her family members for the appropriate duration, i.e. the investigation, trial and post-trial periods. Adequate measures to ensure that the lives of such individuals are free from

threat for sufficiently long period or periods, including but not limited to extending security cover to them, shall be taken. The agencies concerned shall also ensure that the witnesses or victims are transported to safety during investigation and trial, and proper security is given to them.

(5) The above security measures shall be independent of other action, such as granting funds and resources to the witnesses to relocate and start a new life, engage in new avocations or professions, as the case may be. These may be one time funds, or proper and full assistance for such relocation. The agencies concerned shall also factor in and include new identity for witnesses and victims.

(5) In the event of any change in witness identity, it shall be the responsibility of the state to ensure that the knowledge and details of such move is restricted to the barest minimum number of people, and such new identity is fully protected. Access to such information shall be limited, and all methods of securing it shall be deployed.

(6) As long as any individual is the subject of such program the agencies shall ensure that an officer or given set of officers is made available to each such individual, to cater to any emergent situation, including the eventuality of such cover or identity getting exposed.

(7) The above scheme or program shall be applicable in the first instance, to capital crimes or those punishable with life imprisonment, including the offence of rape. In any other case, depending on the gravity of the threat perception, the provisions of the program shall be made applicable.

(8) Adequate budgetary assessment to implement this programme shall be made and a separate fund, to implement the scheme, shall be created, within the said period of ten weeks by the Finance Department of the Govt. of Delhi, in consultation with all the stake holders, i.e. police agencies, Department of Home and the Law Department. The fund shall be operable in the manner prescribed by the said departments, through applicable guidelines, for the purpose of proper effectuation of this scheme.

(9) The programme shall include a provision whereby witnesses are informed of its existence, whenever their statements are to be recorded under the Code of Criminal Procedure, both during investigation or during trial, to enable them to seek protection. It is open to the court concerned also to entertain applications in that regard, and forthwith seek the response of the prosecuting agency. The latter shall conduct threat analysis with utmost expedition and in any event within three days of receiving it. Pending such analysis, the agency shall consider and grant minimum security cover as may be appropriate in the circumstances.

(10) The above directions shall bind and govern the Govt. of NCT of Delhi, till it is replaced by suitable legislation.

(11) The Govt. of Delhi shall prepare an Action Taken Report, and place it before the Court, at the end of ten weeks.

(12) The matter shall be placed before an appropriate Bench, to be nominated by the Hon'ble Chief Justice who may consider treating it as a public interest litigation, to be dealt with as such, regarding suitable monitoring of the scheme till it gets underway in an appropriate manner.

[Vi Ku]

APPEARANCES:

FOR THE APPELLANT : Sh. Pawan Sharma, Standing Counsel (Crl.) with Sh. Harsh Prabhakar, Ms. Laxmi Chauhan, Sh. Kushagra Arora, Advocates along with Inspector Keshav Mathur, Crime Branch.

FOR THE RESPONDENT : Sh. Sudharshan Rajan, Advocate for Sh. Ritesh Khatri, Advocate, Sh. H.J.S. Ahluwalia, Advocate, Sh. Amit Chadha, Advocate, Ms. Savita Prabhakar, Advocate.

CASES REFERRED TO:

1. *Jones* vs. *Kaney* 2011 (2) All.ER. 271 (SC).
2. *National Human Rights Commission* vs. *State of Gujarat and Ors.* 2009 (6) SCC 342.
3. *Mahila Vinod Kumari* vs. *State of Madhya Pradesh* 2008 (8) SCC 34.
4. *State* vs. *Sidhartha Vashisht & Ors.)* 135 (2006) DLT 465.
5. *Iqbal Singh Marwah and Anr.* vs. *Meenakshi Marwah and Anr.* (2005) 4 SCC 370.
6. *Singh* vs. *HM Advocate* 2005 SCCR 604.
7. *Sakshi* vs. *Union of India,* 2004 (5) SCC 518.
8. *Zahaira Habibulla H. Sheikh & Another* vs. *State of Gujarat and Others* AIR 2004 SC 346 (the Best Bakery Case).
9. *PUCL* vs. *Union of India,* 2003 (10) SCALE 967.
10. *National Human Rights Commission* vs. *State of Gujarat and Others,* 2003 (9) SCALE 329.
11. *Pritish* vs. *State of Maharashtra,* (2002) 1 SCC 253.
12. *Swaran Singh* vs. *State of Punjab,* (2000) 5 SCC 668.
13. *Mohan Singh* vs. *Late Amor Singh through LRs.* AIR 1999 SC 482.
14. *Vineet Narain* vs. *Union of India* 1998 (1) SCC 226.
15. *Vishaka* vs. *State of Rajasthan* (1997) 6 SCC 241.
16. *Omkar Namdev Jadhao* vs. *Second Additional Sessions Judge* 1996 (7) SCC 498.
17. *Common Cause* vs. *Union of India* (1996) 1 SCC 753.
18. *M.C. Mehta* vs. *State of Tamil Nadu* (1996) 6 SCC 756.
19. *Omkar Namdev Jadhao* vs. *Second Additional Sessions Judge* 1996 (7) SCC 498.
20. *Onkar Namdeo Jadhao and Ismail Khan* vs. *State* 1992 Crl. LJ 3566.

21. *Lakshmi Kant Pandey* vs. *Union of India* (1984) 2 SCC 244.

22. *Hazari Lal* vs. *State* 1980 (2) SCC 290.

23. *Budhu Ram* vs. *State of Rajasthan* [(1963) 3 SCR 376].

24. *M.S. Sheriff* vs. *State of Madras* AIR 1954 SC 397.

25. *States* vs. *Norris* 300 US 564 (1937).

RESULT: Crl. M.A. Nos. 1899-1902/2007, 1904/2007, 1906/2007, 1908-1910/2007, 1912-1917/2007, 1919/2007 and 1926/2007 dismissed. Crl. M.A. 1898/2007 and 1925/2007 disposed of.

S. RAVINDRA BHAT, J.

1. This common judgment will dispose of proceedings initiated on the Court's Motion, to examine whether the respondents had prima facie committed perjury and if the circumstances warrant their cases to be referred for consideration and further proceedings under Section 340 Cr.PC.

2. During the night intervening 29/30.04.1999 -which was a Thursday-a party was on at Qutub Colonnade, in the restaurant "Once upon a time". The open space of that restaurant was known as "Tamarind CafT". Liquor was served for coupons purchased; two of the bartenders serving there were Jessica Lal (since deceased; hereafter called ''Jessica'') and Shyan Munshi (PW-2). At around 02.00 AM, Sidhartha Vashisht @ Manu Sharma (the appellant in Crl. A. 179 of 2007 (Supreme Court) hereafter called ''Manu Sharma'') and his friends went to the cafT and asked for two drinks. The waiter did not serve him liquor since the party had ended. Jessica and Malini Ramani (PW-6), who were there, tried to make him understand that the party was over and no liquor was available. He took out a pistol and fired one shot at the roof and another at Jessica; it hit near her left eye. She fell down. Beena Ramani (PW-20), who was present, stopped Manu Sharma and questioned him why he had shot Jessica and demanded the weapon from him. He did not hand over the pistol and fled from the spot. Jessica was rushed to Ashlok Hospital; she was shifted to Apollo Hospital from there, where, in the early hours of the morning of 30.04.1999, she was declared ''brought dead''.

3. The crime was recorded as DD Entry No. 41-A (Ex. PW-13/A), Police Station Mehrauli, on the night intervening 29/30.04.1999 at 02.20

AM. It mentioned a shooting incident at H-5/6 Qutub Colonnade. The FIR (287/99) was later recorded at 4 AM, after PW100 met Beena Ramani (PW-20), owner of the cafT, and enquired about the incident. She, in turn asked him to talk to Shyan Munshi (PW-2) saying that he was inside and he knew everything. PW-100 then recorded the statement of PW-2 and made an endorsement on the same for the registration of the case under Section 307 IPC and handed it over to Ct. Subhash to be carried to the police station, Mehrauli. At about 4.00 AM, FIR No. 287/99 was registered at the police station Mehrauli. SI Sunil Kumar returned to the spot with PW2; PW-30 informed them about the seizure of one black Tata Safari CRL.M.A.1898/2007 and connected from the spot. On inspection of the site, two empty cartridges were seized and, later, a supplementary statement of PW-2 was recorded by PW-100. At 05.45 AM, PW-100 received information from Ct. Satyavan about death of Jessica at Apollo Hospital. The post mortem was conducted at about 11.30 AM at the All India Institute of Medical Sciences (AIIMS) on 30.04.1999. At about 11.00 AM, SI Pankaj Malik (PW-85) went to Chandigarh to secure the black Tata Safari and to arrest Manu Sharma. PW-100 recorded the statements of the witnesses. During the night intervening 30.04.1999/01.05.1999, at 2 AM, the police raided Manu Sharma's farm house and seized his photograph. On 02.05.1999, a list of invited guests was prepared by PW-24. That day, around 10.00 PM, PW-101 was informed that a black Tata Safari was found by the U.P. Police (Sector 24, Noida Police Station).The next day he went to Noida Police Station and seized that black Tata Safari. On 05.05.1999 at about 02.30 AM, Amardeep Singh Gill @ Tony Gill and Alok Khanna were arrested and from their alleged disclosure statements, Manu Sharma's involvement was confirmed. On 06.05.1999, Manu Sharma surrendered before PW-87 and was later arrested at about 02.20 PM, and brought to Delhi. On 07.05.1999, the police produced him before the Metropolitan Magistrate and sought police remand for effecting recovery of the alleged weapon of offence. An application for conducting Manu Sharma's Test Identification Parade (TIP) was also moved. Later, he was remanded to five days police custody till 12.05.1999 and thereafter on 12.05.1999 extended till 17.05.1999 on the application of the I.O., but on 15.05.1999, his remand was shortened till the next day, i.e. 16.05.1999, when he was sent to judicial custody. On 30.05.1999, Vikas Yadav was also arrested. After the completion of investigation, the other accused persons were also arrested.

4. On 03.08.1999, charge sheet was filed against ten accused persons. On 23.11.2000, the Additional Sessions Judge (ASJ) framed charges against the appellant/Manu Sharma under Sections 302, 201 read with 120B IPC and Section 27 of the Arms Act; accused Amardeep Singh Gill was charged under Section 120 read with Section 201 IPC; accused Vikas Yadav was charged under Section 120 read with 201 IPC as also Section 201 read with 34 IPC; accused Harvinder Chopra, Vikas Gill, Yograj Singh and Raja Chopra were charged under Section 212 IPC and accused Alok Khanna, Shyam Sunder Sharma and Amit Jhingan were discharged of all the offences. This order was attacked in revisional proceedings before this Court; the revisions were disposed of by a common order on 13.03.2001. On 12.04.2001, charges further to orders of this Court were framed and some of the charges framed earlier were maintained. Against the rest of the accused, the charges framed by the Trial Court were maintained.

5. During the trial - which began in May, 2001-in all 101 witnesses were examined by the prosecution and two court witnesses too were examined. On 21.02.2006, after completion of trial, the Additional Sessions Judge (ASJ) acquitted all the nine accused, including Manu Sharma.

6. The prosecution challenged the acquittal, through an appeal before this Court, being Crl. Appeal 193 of 2006. On 20.12.2006, the Court by its judgment convicted and sentenced the accused. The accused, including Manu Sharma, challenged the judgment and conviction recorded by this Court before the Supreme Court, which by its judgment dismissed their appeals. The acquittal of some of the accused, viz. Harvinder Chopra, Vikas Gill, Yograj Singh, Raja Chopra, Alok Khanna and Shyam Sunder Sharma were upheld.

7. The Court initiated the present proceedings suo motu by order dated 20.12.2006. At that stage, the Court was of the opinion that since 32 witnesses had not supported the initial case of the prosecution, at least for the purpose of notices, they ought to explain their conduct and accordingly they were called upon to show cause why proceedings be not initiated. The order initiating present proceedings reads as follows:

"COURT ON ITS OWN MOTION

Today we have disposed of Crl.A. No. 193/2006 (State vs. Siddharth Vashisht @ Manu Sharma etc. which was filed by the

State against the judgment dated 21.02.96 passed by learned Additional Sessions Judge, New Delhi in SC No. 45/2000 whereby all the accused tried of different offences including that of murder and causing of disappearance of evidence of the crime were acquitted. Vide our judgement dated 18.12.2006 we have reversed the acquittal of accused Siddharth Vashisht @ Manu Sharma, who was tried for the commission of offences punishable under Sections 302 IPC, 201/120-B IPC and Section 27 of the Arms Act. He has been held guilty in appeal for all these offences. The acquittal of accused Amardeep Singh Gill @ Tony Gill and Vikas Yadav, both of whom along with Siddharth Vashisht @ Manu Sharma were tried under Section 201/120-B IPC has also been set-aside by us and they stand convicted for this offence. They have been appropriately sentenced vide our separate order passed today in the appeal.

While hearing the appeal we had the occasion to examine the trial Court proceedings. The prosecution in support of its case had examined 101 witnesses in all which included eye witnesses of the murder of Jessica Lal. To our utter surprise we found that during the trial as many as 32 witnesses including three eye witnesses of the murder and one ballistic expert had to be got declared hostile by the prosecution. That is definitely a sad state of affairs. Witnesses turning hostile appears to be the order of the day. The Courts must put an end to this kind of attitude of witnesses turning hostile in order to thwart the course of justice. In the facts and circumstances of the present cases we are of the view that it is expedient in the interest of justice to take recourse to Section 340 of the Code of Criminal Procedure, which this Court as an Appellate Court can do in exercise of the powers under Section 340(2) Cr.PC since the trial Court has chosen not to invoke this provision of law despite taking note of the fact that a large number of witnesses had turned hostile. We, therefore, direct that a show cause notice be issued to the following witnesses who had appeared during the trial and had turned hostile to show cause as to why action be not taken against them as per the provisions of Section 340 Cr.PC:

1. PW-2 Shyan Munshi

2. PW-3 Shiv Das Yadav

3. PW-4 Karan Rajput

4. PW-5 Parikshat Sagar

5. PW-19 Andleep Sehgal

6. PW-25 Manoj Kumar

7. PW-26 Balbir Singh

8. PW-31 Narain

9. PW-34 Tarsem Lal Thhapar

10. PW-35 Birbal

11. PW-44 Shankar Mukhia

12. PW-50 Harpal Singh

13. PW-52 Chander Parkash Chabra

14. PW-53 Abhijeet Ghosal

15. PW-54 Barun Shah

16. PW-55 Mukesh Saini

17. PW-56 Chetan Nanda

18. PW-57 Ashok Dutt

19. PW-60 Baldev Singh

20. PW-61 Ishdeep Sharma

21. PW-62 Ali Mohammad

22. PW-64 Ravinder Singh Gill

23. PW-65 Kulvinder Singh

24. PW-67 Niranjan Ram

25. PW-68 Mangal Singh

26. PW-69 Rakesh Kumar Atri

27. PW-71 Harminder Singh

28. PW-72 Lal Singh

29. PW-77 Gajender Singh

30. PW-87 Jagan Nath Jha

31. PW-95 Prem Sagar Manocha

32. PW-98 Babu Lal

The show cause notices be served on these witnesses through the SHO concerned who will ensure that they are served before the next date of hearing. These persons are required to be present in Court in person on the next date of hearing.

List on 1st February, 2007."

8. During the pendency of the appeals before the Supreme Court, the Court after considering the cases of some of the noticee/respondents, i.e. PW-31 Narain, PW-35 Birbal, PW-50 Harpal Singh, PW-55 Mukesh Saini, PW-67 Niranjan Ram, PW-69 Rakesh Kumar Atri, PW-71 Harminder Singh, PW-72 Lal Singh, PW-77 Gajender Singh, PW-87 Jagan Nath Jha, directed that the notices issued against them be discharged. As a consequence, the applications, being Crl. (M) 1903/2007, 1905/2007, 1907/2007, 1911/2007, 1918/2007, 1920/2007, 1921/2007, 1923/2007 and 1924/2007 were disposed of by the said order dated 19.02.2007. This Court had in its judgment and order dated 18.12.2006 dealt with and disposed of the appeal preferred by Manu Sharma as well as the accused charged of having committing other offences. It would be material to extract some relevant parts of the said judgment which convicted Manu Sharma for the charge of having committed offences punishable under Section 302 IPC and also under Section 27 Arms Act in addition of convicting Vikas Yadav, Amardeep Singh Gill and Manu Sharma for the offences punishable under Sections 201/120-B IPC. The Court had by the same judgment upheld the acquittal of Shyam Sunder Sharma under Section 211/202 IPC as well as that of Harvinder Chopra under Section 212 IPC. The Court also upheld the acquittal of Yograj Singh, Vikas Gill and Raja Chopra for the offences charged against them under Section 212 IPC. The Court also upheld dismissal of the appeal in respect of Alok Khanna who had been charged with committing offences under Section 120B/201 IPC. The relevant extracts of judgments of this Court are as follows:

"56. In the totality of circumstances adduced from material on record, the judgment under challenge appears to us to be an immature assessment of material on record which is self-contradictory, based on misreading of material and unsustainable. We find that Beena Ramani has identified Sidhartha Vashisht@ Manu Sharma, Amardeep Singh Gill, Alok Khanna and Vikas Yadav to be the persons present at the Tamarind CafT at the time of the incidence. She also saw Manu Sharma firing the fatal shot which hit Jessica Lal. Her testimony finds corroboration from the testimony of Malini Ramani and George Mailhot. There is evidence on record to show that Manu Sharma had a licensed pistol of .22 bore which he has not produced to establish his innocence and on the contrary has taken false plea that the pistol, its ammunition and license had been removed by the Police on 30.04.1999. We also find from the material on record that Manu Sharma abandoned his vehicle while making good his escape. We also find that the ammunition used in the causing of the firearm injury to Jessica Lal was of .22 bore which Manu Sharma admittedly possessed and a similar live cartridge was recovered from the abandoned Tata Safari. From this, we have no hesitation in holding that Manu Sharma is guilty of an offence under Section 302, IPC for having committed the murder of Jessica Lal on 29/30.4.1999 at the Tamarind CafT as also under Section 27, Arms. Act.

57. Coming to the case put up by the prosecution as regards Vikas Yadav and Amardeep Singh Gill, we have noted above that both these accused were present at the Tamarind CafT when Manu Sharma caused firearm injuries to Jessica Lal. These two persons subsequently were seen by PW-30 Sharvan Kumar, coming in a while Tata Siera driven by Amardeep Singh Gill from which Vikas Yadav alighted and surreptitiously removed the Tata Safari which was being guarded by Sharvan Kumar. The very fact that Vikas Yadav removed the Tata Safari from Qutub Colonnade is sufficient to bring home his guilt under Section 201 IPC since he and Amardeep Singh Gill both knowing that an offence has been committed at the Tamarind CafT by Manu Sharma caused the Tata Safari, which is part of the evidence, to be removed with an intention to screening Manu Sharma. From

these circumstances, it is evident that the Tata Safari was removed from outside Qutub Colonnade pursuant to a conspiracy between Vikas Yadav, Amardeep Singh Gill and Manu Sharma. Therefore, these three accused are guilty of having conspired to remove the Tata Safari from Qutub Colonnade and are held guilty under Section 201 read with Section 120-B IPC. 58. As regards Shyam Sunder Sharma, he was charged for an offence under Section 212, IPC for harbouring Ravinder Krishan Sudan. We find there is no incriminating evidence to suggest that Shyam Sunder Sharma ever harboured Ravinder Krishan Sudan. Even otherwise, Ravinder Krishan Sudan has been declared a Proclaimed Offender and has not faced trial. This charge against Shyam Sunder Sharma cannot be sustained. Consequently, we uphold his acquittal under Section 212 IPC as also 201 IPC and dismiss the appeal qua Shyam Sunder Sharma due to lack of evidence.

59. The case against Harvinder Chopra is that he arranged for the stay of Sidhartha Vashisht @ Manu Sharma at the house of PW-52, Chander Prakash Chopra, thereby committing an offence under Section 212, IPC. From the material on record, we find there is no evidence to suggest that Harvinder Chopra arranged for stay of Manu Sharma at the house of PW-52, Chander Prakash Chopra. Chander Prakash Chopra himself has not supported the prosecution's case. We, therefore, find no evidence to convict Harvinder Chopra of the offence under Section 212, IPC. Consequently, we uphold his acquittal under Section 212 IPC and dismiss the appeal qua Harvinder Chopra.

60. The case against Yog Raj Singh is that he facilitated Sidhartha Vashisht @ Manu Sharma being taken to Khera, Muktsar in Punjab and harboured Sidhartha Vashisht @ Manu Sharma. To substantiate this case, the prosecution examined PW-53, PW-64 and PW65. We find that none of these witnesses have supported the prosecution's case and there is no other evidence on record which suggests that Yog Raj Singh is guilty of harbouring Sidhartha Vashisht @ Manu Sharma at Khera in Muktsar (Punjab). Consequently we uphold his acquittal under Section 212 IPC and dismiss the appeal qua Yog Raj Singh.

61. The case against Vikas Gill was that he was charged for

escorting Sidhartha Vashisht @ Manu Sharma to Panchkula between 30.04.1999 and 01.05.1999 and harboured him with the intention to screening him from legal punishment. We find from the record that there is no evidence to the effect that Vikas Gill took Sidhartha Vashisht @ Manu Sharma to Panchkula from Delhi and/or harboured him at any place. Consequently, we uphold his acquittal under Section 212 IPC, and dismiss the appeal qua Vikas Gill.

62. The case against Raja Chopra is that he provided a conveyance to Sidhartha Vashisht @ Manu Sharma within the meaning of Section 52A IPC in order to screen him from legal punishment. From the material on record we find no admissible evidence to substantiate the charge against this accused. Consequently we uphold his acquittal under Section 212 IPC and dismiss the appeal qua Raja Chopra.

63. As regards the case against Alok Khanna, he was charged under Section 120B read with Section 201, IPC for causing disappearance of Tata Safari from Qutub Colonnade. We find there is no evidence to link Alok Khanna with the conspiracy to remove or destroy evidence. No doubt, his car was used by Amardeep Singh Gill and Vikas Yadav to go to Qutub Colonnade to remove the Tata Safari, but this in itself is not sufficient to hold that Alok Khanna consented to or was a part of the conspiracy shared by Amardeep Singh Gill with Vikas Yadav to remove the Tata Safari from the Qutub Colonnade. In that view of the matter, we find that the prosecution has not been able to bring home its case against Alok Khanna. The appeal qua Alok Khanna is dismissed."

9. Counsel for the noticee/respondent - who had individually moved applications for discharge - urged that the action, to the extent it is based on previous statements made to the police during investigation, cannot be sustained. Elaborating on the submission, it was argued that the statements recorded by the police, or attributed to the witnesses, who were treated as hostile and cross examined by the prosecution cannot be made the basis of the proposed action under Section 340. It was submitted that this is on account of the bar imposed by Section 162 Cr. PC. Counsel relied on the decision reported as **Hazari Lal v. State** 1980 (2) SCC 290

where it was held that:

"The learned counsel was right in his submission about the free use made by the Courts below of statements of witnesses recorded during the course of investigation. Section 162 of the Code of Criminal Procedure imposes a bar on the use of any statement made by any person to a Police Officer in the course of investigation at any enquiry or trial in respect of any offence under investigation at the time when such statement was made, except for the purpose of contradicting the witness in the manner provided by Section 145 of the Indian Evidence Act. Where any part of such statement is so used any part thereof may also be used in the re-examination of the witness for the limited purpose of explaining any matter referred to in his cross-examination. The only other exceptions to this embargo on the use of statements made in the course of an investigation, relates to the statements falling within the provisions of Section 32(1) of the Indian Evidence Act or permitted to be proved under Section 27 of the Indian Evidence Act. Section 145 of the Evidence Act provides that a witness may be cross-examined as to previous statements made by him in writing and reduced into writing and relevant to matters in question, without such writing being shown to him or being proved but, that if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

The said Applicant/noticee also relied on the decision in **Omkar Namdev Jadhao v. Second Additional Sessions Judge** 1996 (7) SCC 498, where it was observed, in the context of an order made under Section 340, Cr.PC, that:

"It is seen that the observation made by the Sessions Judge, as confirmed by the Bombay High Court, Nagpur Bench in the impugned Judgment dated 10.3.1992 made in Criminal Application No. 20/91 is based on Section 161 statements recorded during the investigation. Admittedly, no evidence has been recorded. The court should not come to the conclusion on the basis of Section 161 statements which are not evidence. It can be used at the trial only for contradictions or omissions when the witness

was examined. Nor it could be contradicted by looking at the physical features of the accused even before they are examined. The Additional Sessions Judge and discharged them concluding that the police officers had fabricated the record. It would appear that the learned Sessions Judge had overstepped his jurisdiction in recording a finding, while looking at the physical features of the accused, that the police had fabricated the record. The High Court has also not properly considered the matter while going into the question regarding discharge of the accused for other offences. Under these circumstances, we hold that in view of the finding recorded by the Sessions Judge of fabrication of the record and that the case is false one, issuance of notice Under Section 340, Cr. P.C. is wholly unjustified. The said order of the Sessions Judge is accordingly quashed."

10. It was submitted that the Court, in a proceeding under Section 340 of the Cr. PC, has to give fair and adequate opportunity to those whom it intends to refer for trial. Counsel contended that since the noticee/ respondents can be adversely affected, and might have to face a long drawn out trial, the proceeding which is adopted should be fair and reasonable. Therefore, the Court should be circumspect in its approach, and should afford opportunity to answer all the material which may be considered to be adverse to the noticees. Counsel stressed upon the fact that the use of materials which are inadmissible in evidence, and cannot be looked into on account of a bar in law, should be altogether eliminated from consideration.

11. It was argued that the Court should be alive further to the fact that unlike other public offences, the law mandates a special procedural safeguard in the form of Section 195 Cr.PC, which requires sanction (of the Court) as a pre-condition before any prosecution in relation to public justice or proceedings in court. The object of this, submitted counsel, is to avoid frivolous and vengeful action by disgruntled complainants or informants.

12. Mr. Pawan Sharma, learned Standing counsel appearing for the State, argued that the Court should take cognizance of the fact that during the trial as many as 32 witnesses had turned hostile. Although the Court discharged notices issued in respect of some of such respondents/ noticees, the role played by some of the respondents - especially PW-2

and PW-86 were aimed at deliberately assisting the accused, who succeeded in his efforts, and secured an acquittal after trial, from the Additional Sessions Judge. However, this was reversed by this Court, and the appeals to the Supreme Court were dismissed.

13. The Standing Counsel contended that the Court's approach is only to be satisfied whether it would be .expedient in the interests of justice to make a complaint under Section 195(1)(b) Cr.PC. This cannot be confused with whether conviction under Section 193 IPC for tendering false evidence before the Court can be obtained. Therefore, stressed the learned Standing Counsel, the merits of the case cannot be looked into and the exercise of comparing statements made by witnesses under Section 161 Cr. PC, with their court depositions should be eschewed. In this regard, learned counsel relied on the decision of the Supreme Court reported as **M.S. Sheriff v State of Madras** AIR 1954 SC 397. Relying on the observations of the Supreme Court in **Swaran Singh v State of Punjab** 2000 (5) SCC 668 and **Mahila Vinod Kumari v State of Madhya Pradesh** 2008 (8) SCC 34, it was contended that in the present case innumerable witnesses were won over at the accused's behest and influenced to project a version, tactically designed by them to secure an acquittal, which requires to be dealt with stringently and with a heavy hand. Counsel submitted that preservation of purity of administration of criminal justice system is one of paramount public concern, and the Court should direct a complaint against the noticees, in accordance with law.

Legal provisions

14. The relevant provision which criminalizes perjury is Section 193 of the Indian Penal Code, 1860, which reads as follows:

> **"193. Punishment for false evidence.**-Whoever intentionally gives false evidence in any of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;
>
> and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and

shall also be liable to fine.

Explanation 1.-A trial before a Court-martial 1****is a judicial proceeding.

Explanation 2.-An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice."

15. Section 195 of the Code of Criminal Procedure, 1973, reads as follows:

"Section 195 -Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence

(1) No Court shall take cognizance

(a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, attempt to commit, such offence, or (iii) of any criminal conspiracy to commit, such offence,

except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

(b) (i) of any offence punishable under any of the following section of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both CRL.M.A.1898/2007 and connected Crl.M.A's in CRL.A.193/06 Page 20 inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii),

[except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate].

(2) Where a complaint has been made by a public servant under clause (a) of subsection (1) any authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the Court; and upon its receipt by the Court, no further proceedings shall be taken on the complaint:

Provided that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded.

(3) In clause (b) of sub-section (1), the term "Court" means a Civil, Revenue or Criminal Court, and includes a tribunal constituted by or under a Central, provincial or State Act if declared by that Act to be a Court for the purposes of this section.

(4) For the purposes of clause (b) of sub-section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from appealable decrees or sentences of such former Court, or in the case of a civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within whose local jurisdiction such Civil Court is situate:

Provided that

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(b) where appeals lie to a civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence

is alleged to have been committed.. 16. Section 340 of the Code of Criminal Procedure mandates the procedure to be followed in respect of an application or action taken by the Court concerned, under Section 195. It reads as follows:

"340.Procedure in cases mentioned in Section 195.

(1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of section 195.

(3) A complaint made under this section shall be signed,

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the

Court. (4) In this section, "Court" has the same meaning as in section 195."

Perjury was a common law offence; the first penal statute in England was enacted in the fifteenth century. It was known as ''forswearing'' and has always been viewed as a serious challenge to the sanctity of judicial proceedings. In **Mohan Singh v. Late Amor Singh through LRs.** AIR 1999 SC 482, the Supreme Court observed, while sending up a litigant before it, for trial for perjury, that:

> "Tampering with the record of judicial proceedings and filing of false affidavit in a court of law has the tendency of causing obstruction in the due course of justice. It undermines and obstructs free flow of the unsoiled stream of justice and aims at striking a blow at the rule of law. The stream of justice has to be kept clear and pure and no one can be permitted to take liberties with it by soiling its purity.."

Earlier, rejecting a plea that Courts should record admission of earlier false pleas, in the context of challenge to a conviction for perjury (since, according to the argument, it promoted justice, as the original felon would ultimately receive his just deserts), the US Supreme Court had observed, in the decision of Justice Robert Jackson, in United **States v Norris** 300 US 564 (1937), as follows:

> "Perjury is an obstruction of justice; its perpetration well may affect the dearest concerns of the parties before a tribunal. Deliberate material falsification under oath constitutes the crime of perjury and the crime is complete when a witness' statement has once been made. It is argued that to allow retraction of perjured testimony promotes the discovery of the truth and, if made before the proceeding is concluded, can do no harm to the parties. The argument overlooks the tendency of such a view to encourage false swearing in the belief that if the falsity be not discovered before the end of the hearing it will have its intended effect, but, if discovered, the witness may purge himself of crime by resuming his role as witness and substituting the truth for his previous falsehood. It ignores the fact that the oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hinderance, and delay of ultimately extracting

the truth by cross-examination, by extraneous investigation, or other collateral means."

Very recently, the Scottish Court of Appeals had, in **Singh v HM** Advocate 2005 SCCR 604 said that:

"Perjury must always be seen as a serious crime, since it strikes at the fundamental basis of our system of justice and at the integrity and accuracy of the decisions reached in courts. It follows that when perjury is established, it must be dealt with seriously for the benefit of the courts and the public generally. Everyone should be made fully aware that, when an oath is taken in a court of law to tell the truth, that is what must be done."

The importance given to a trial where witnesses depose truthfully, and fearlessly, cannot be undermined. Where witnesses perjure - either out of lure or under fear, the result is a judgment not based on truth, no less, no more. And yet, having said that, Courts have to be mindful of the complex and manifold reasons why witnesses are unwilling or unable to depose truthfully. The phenomenon of witnesses deposing falsely is not new; it was observed and commented upon in *'The Problem of Proof'* by Albert S. Osborn, (Published by New York, Methew Bender & Co. 1926 pp. 226. 393) nearly a century ago as follows:

"The astonishing amount of perjury in courts of law is a sad commentary on human veracity. In spite of the oath, more untruths are probably uttered in court than anywhere else. This deviation from veracity ranges from mere exaggeration all the way to vicious perjury. Much of this untrue testimony grows directly out of human nature under unusual stress and is not an accurate measure of truth speaking in general. In order to shield a friend, or help one to win in what is thought to be a just cause, or because of sympathy for one in trouble, many members of the frail human family are inclined to violate the truth in a court of law as they will not do elsewhere,."

17. Law makers were of the view that having due regard to the serious nature of the offence and the challenge it poses to the judicial system, the Courts should have a say in the prosecution of those suspected of perjury. Consequently, Section 195 was enacted. The rationale for this provision was explained by the Supreme Court, as follows, in **Budhu**

Ram v. State of Rajasthan [(1963) 3 SCR 376]:

"The underlying purpose of enacting Section 195(1)(b) and (c) and Section 476 seems to be to control the temptation on the part of the private parties considering themselves aggrieved by the offences mentioned in those sections to start criminal prosecutions on frivolous vexatious or insufficient grounds inspired by a revengeful desire to harass or spite their opponents These offences have been selected for the courts control because of their direct impact on the judicial process. It is the judicial process in other words the administration of public justice, which is the direct and immediate object or victim of these offences and it is only by misleading the courts and thereby perverting the due course of law and justice that the ultimate object of harming the private party is designed to be realized. As the party of the proceedings of the court is directly sullied by the crime the Court is considered to be the only party entitled to consider the desirability of complaining against the guilty party. The private party designed ultimately to be injured through the offence against the administration of public justice is undoubtedly entitled to move the court for persuading it to file the complaint. But such party is deprived of the general right recognised by Section 190 Cr. P.C. of the aggrieved parties directly initiating the criminal proceedings. The offences about which the court alone, to the exclusion of the aggrieved private parties, is clothed with the right to complain may, therefore, be appropriately considered to be only those offences committed by a party to a proceeding in that court, the commission of which has a reasonably close nexus with the proceedings in that court so that it can, without embarking upon a completely independent and fresh inquiry, satisfactorily consider by reference principally to its records the expediency of prosecuting the delinquent party. It, therefore, appears to us to be more appropriate to adopt the strict construction of confining the prohibition contained in Section 195(1)(c) only to those cases in which the offences specified therein were committed by a party to the proceeding in the character as such party."

18. The procedure to be adopted by the Court while deciding whether

to go ahead and accord approval to initiate proceedings for perjury, outlined in Section 340 of the Cr. PC, was discussed by the Supreme Court, in **Pritish v. State of Maharashtra,** (2002) 1 SCC 253, where the Court observed that:

> "9. Reading of the sub-section makes it clear that the hub of this provision is formation of an opinion by the court (before which proceedings were to be held) that it is expedient in the interests of justice that an inquiry should be made into an offence which appears to have been committed. In order to form such opinion the court is empowered to hold a preliminary inquiry. It is not peremptory that such preliminary inquiry should be held. Even without such preliminary inquiry the court can form such an opinion when it appears to the court that an offence has been committed in relation to a proceeding in that court. It is important to notice that even when the court forms such an opinion it is not mandatory that the court should make a complaint. This sub-section has conferred a power on the court to do so. It does not mean that the court should, as a matter of course, make a complaint. But once the court decides to do so, then the court should make a finding to the effect that on the fact situation it is expedient in the interests of justice that the offence should further be probed into. If the court finds it necessary to conduct a preliminary inquiry to reach such a finding it is always open to the court to do so, though absence of any such preliminary inquiry would not vitiate a finding reached by the court regarding its opinion. It should again be remembered that the preliminary inquiry contemplated in the sub-section is not for finding whether any particular person is guilty or not. Far from that, the purpose of preliminary inquiry, even if the court opts to conduct it, is only to decide whether it is expedient in the interests of justice to inquire into the offence which appears to have been committed
>
> 13... The scheme delineated above would clearly show that there is no statutory requirement to afford an opportunity of hearing to the persons against whom that court might file a complaint before the magistrate for initiating prosecution proceedings....
>
> 14. ...But the mere fact that such an appeal is provided, it is not a premise for concluding that the court is under a legal obligation

> to afford an opportunity (to the persons against whom the complaint would be made) to be heard prior to making the complaint....
>
> 15. Once the prosecution proceedings commence the person against whom the accusation is made has a legal right to be heard. Such a legal protection is incorporated in the scheme of the Code. Principles of natural justice would not be hampered by not hearing the person concerned at the stage of deciding whether such person should be proceeded against or not...

As to the nature of enquiry, which the court would undertake, under Section 340, was outlined by the Supreme Court, in **Iqbal Singh Marwah and Anr. v. Meenakshi Marwah and Anr.** (2005) 4 SCC 370:

> "23. In view of the language used in Section 340 CrPC the court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(b), as the section is conditioned by the words "court is of opinion that it is expedient in the interests of justice". This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195(1)(b). This expediency will normally be judged by the court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the court may not consider it expedient in the interest of justice to make a complaint..."

In the light of the above principles, the Court now would deal with the

cases of each individual notice respondent.

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19. The prosecution alleges that this witness recorded his statement on 30.04.1999 (Ex. PW-2/A) when he stated that he used to study at IIPM, and was residing at Hauz Khas. He stated that he knew Bina Ramani's family. On 29.04.99 he was attending a party at Qutub Colonnade, Mehrauli. At about 2 AM, when people were leaving, he was present near the counter in Tamarind CafT, situated in Qutub Colonnade. Five or six others, with a waiter were present there at that time. According to him, a stout, round faced, fair complexioned man, aged 30-32 years, dressed in jeans and a white T-shirt entered the bar from across the counter and demanded two drinks from the waiter, soon after he entered. The waiter did not serve him. Jessica Lal and Malini Ramani, d/o Bina Ramani who were there tried to persuade him stating that the party was over and there was no more liquor left. At this, that man said, that he would now tackle the matter on his own. Again Jessica tried to persuade him and asked him not to get annoyed. That man took out a pistol from his trouser and fired a shot at the ceiling and another shot at Jessica Lal. She was shot above the left eye; as a result, she fell down then and there. He also stated that Bina Ramani went to the spot and he immediately went out from the bar to call the police and ambulance. He said that Bina Ramani took Jessica to Ashlok Hospital, Safdarjung Enclave in her car. Later, he went to that hospital. He alleged that the man who fired at Jessica intended to kill her and that he could identify him.

20. Shyan Munshi's supplementary statement was recorded on 30.04.99 (Ex.PW2/B). In this, he corroborated his previous statement which had been incorporated in the F.I.R. He said that on his pointing out, a spot examination has been conducted in Tamarind CafT where Jessica Lal was shot.

21. He stated that a red turbaned 32/33 year old tall Sikh male, had stood in front of the bar counter with 2/3 of his friends at the time of occurrence and that he (the said Sikh gentleman) knew Jessica Lal and was talking to her. Malini Ramani was also there with her friend Sanjay Mehtani and both of them were holding liquor glasses in their hands. In this statement, it was recorded that at the same time, a boy dressed in a white T-Shirt asked for a drink. Malini Ramani responded that liquor had finished. The boy (in the white T-shirt) asked why he could not get

liquor, particularly when they (Malini and her friend) were drinking. Malini Ramani replied, *'You cannot even have a sip of my drink even if you pay 1000 Rupees'*. The boy then said, *'I can pay 1000 Rupees for a sip of you'*. Malini Ramani felt bad at this remark and left the place with her friend Sanjay Mehtani. The witness allegedly stated that after the shooting, the boy (in the white T-shirt), escaped from the spot with the red turbaned Sikh and his 2/3 friends. That boy (in white T-shirt) was leading them, others following him. Shyan claimed that he could identify all those individuals.

22. The prosecution stated that a second supplementary statement was made by Shyan Munshi on 19.05.99 (Ex.PW2/C) in which he admitted the correctness of his previous statement and also stated that the police had shown him 15 photographs and asked him to identify the individuals present at the time of the occurrence. He picked up one photograph from the 15 photographs given to him and it was of the boy who fired the shot at Jessica Lal on the fateful day at Tamarind CafT. He said that he was told that the said boy was Siddhartha Vashisht alias Manu Sharma. He stated that ''Mark A'' was written at the back of the said photograph and the police officer appended his signature on it. He said that thereafter, he identified one more person (i.e. the boy standing in front of the bar counter) from the aforesaid photographs. He was told that the said boy was Amit Jhingan. ''Mark B'' was written at the back of Amit Jhingan's photograph and the police officer signed on it. Likewise, he also picked up the photograph of a Sikh gentleman from the aforesaid photographs and identified him as being the gentleman who was standing at the front of the bar counter and wearing a red turban. ''Mark C'' was allotted on the back of the photograph and the police officer appended his signature thereon. He was told that the Sikh gentleman was Amardeep Gill alias Tony Gill. He identified one more person from the said photographs; that person was also standing at the front of the Tamarind CafT bar counter. He was told that the said boy was Alok Khanna. ''Mark D'' was written at the back of the photograph and the police officer appended his signature thereon. He said that all photographs identified by him were appended with the police officer's signature and the same were kept separately in a white envelope.

23. In his deposition, Shyan Munshi stated that in 1999, he was studying at IIPM, Delhi and was residing at Hauz Khas. He was an acquaintance of Malini Ramani, as a result of which he knew Bina

Ramani. He had visited Qutub Colonnade, at Tamarind CafT on the night of 29.04.99 and was attending a party there. Alcohol and food were sold through coupons. He was acquainted with Jessica Lal and met her that night at the party. He deposed that there was a miniature bar counter outside in the open space where liquor was served. He deposed that besides Jessica Lal and Malini Ramani, there were four others helping to serve liquor; he did not serve liquor to the gathering. He reached the party at around 12 or 12.15 at night and went there alone. He said that there was an indoor place also with a counter but that was not a working counter and nothing was happening there. He said that the liquor may have been served till 01.15 or 01.30 AM, but he was not certain about it. He deposed to going inside Tamarind CafT at around 2 AM when there were about 6-7 persons. He went inside the cafT to eat something as nothing was being served outside. There was a waiter behind the counter. He says no other woman except Jessica Lal was inside Tamarind CafT at that time. He went behind the bar counter to get something to eat and managed to get pastry lying in the freezer. When he was taking the pastry, a gentleman wearing a white t-shirt came there and asked the waiter to serve him two drinks. The waiter did not pay attention to him and was busy cleaning up. Jessica was there at the other side of the counter and she told the man that the party was over and no alcohol could be served. The man took out a pistol from his pant and shot in the air. Another man on the other side of the counter fired a shot at Jessica and she fell down. He said that the man who shot Jessica also wore light coloured clothes.

24. The prosecution sought liberty to cross examine the witness PW-2; during the cross examination, he said that Bina and Malini Ramani were not present inside the cafT while he was there. He encountered Bina Ramani when he was coming out of the cafT. He deposed that Bina Ramani and others lifted Jessica from the spot and carried her to Ashlok Hospital, Safdarjung Enclave. He went to the hospital a little later though. He said that the police contacted him in the hospital itself and recorded his statement. He also said that he narrated everything to the police, in English as he was not familiar with Hindi. He stated that the statement was prepared in Hindi and was signed by him. He reached the hospital at about 03.30 AM and the statement was recorded around 03.45 AM or 04.00 AM. He admitted to having been born in Kolkata and completed his schooling there. He had been in Delhi only for a year or so and says that

he could understand spoken Hindi. He deposed that the statement he signed had not been read out to him. He also deposed that Hindi was his third language when he was in 7th standard and he said that he was never good at it. He testified that he had told the police that at about 2AM in the night when the party was over and people were going back to their homes, he was present near the counter in Tamarind CafT. At that time 5/6 persons and a waiter were present. But he later changed his statement and said that he never told the police that people were going back to their homes but only said that a few people were going. He said that he told the police that at that time one person wearing a T-shirt aged 30/32 years, fair complexion, round face and hefty, came inside the bar and asked the waiter to serve two drinks. However, he said that he never told the police that the waiter did not serve liquor. He stated that he told the police about Jessica's presence there but denied telling the police about Malini Ramani's presence. He claimed that he did not know if the person in white T-shirt, to whom drinks were denied said that he would devise his own ways. He later deposed that the man in white T-shirt wearing who asked for the drinks was not present amongst the accused in the court. He also denied the suggestion that Manu Sharma was the individual wearing the white T-shirt, who had demanded liquor from Jessica. He stated that the man was much taller than the accused Manu Sharma.

25. It was argued on behalf of this respondent, PW-2, that there can be no scope for action under Section 340 Cr.PC, because he did not make any statement on oath, which he contradicted or resiled from. Counsel appearing for this respondent also was at pains to point out from the judgment of this Court, as well as the judgment of the Supreme Court, that no adverse comment was made against the respondent and directing him to face charges would be extremely unfair under the circumstances. Counsel underlined the fact that a contradiction between the statement made under Section 161 Cr. PC, and the deposition in court, cannot the basis of a prosecution for perjury, in the absence of any adverse comment or finding. Reliance was placed on the judgment in **Onkar Namdeo Jadhao and Ismail Khan v State** 1992 Crl. LJ 3566.

26. The learned Standing Counsel for the State, on the other hand, argued that PW-2's deposition of two shots by two different individuals transparently was meant to help the accused. Highlighting that this witness deposed that two shots were fired by different individuals, it was submitted

that this also coincided with the testimony of PW-95, the expert, whose deposition contradicted his written report. It was submitted that this kind of evidence was sought to be introduced in tandem, to help the accused. Counsel for the state also argued that the witness, PW-2 had been accompanied by Counsel for the accused, which established a prima facie nexus. It was submitted that the totality of evidence, of PW-1, PW-6, PW-20 and other witnesses clearly established that both the accused and PW-2 were present at the spot, along with several others. There was no avoiding the fact that the respondent PW-2 sought to aid the accused, and also introduced elements which he had never spoken about, which clearly amounted to perjury.

27. It would be relevant, at this stage itself, to extract the reasoning and analysis of the evidence of this witness, from the judgment of the Supreme Court, in this case, which is as follows:

> **''b) Shyan Munshi PW-2:**
>
> In the year 1999, he was studying in Indian Institute of Planning and Management at New Delhi doing his MBA Course. At that time, he was residing at 15/16 H, Hauz Khas, New Delhi. He informed the Court that he was acquainted to Malini Ramani through which he started knowing about Beena Ramani who is the mother of Malini Ramani. He had visited Tamarind Cafe on the night of 29th April, 1999. It was Thursday Night. He was attending the Party at that night. Alcohol and food were being served there on paying for coupons. In categorical terms he informed the Court that
>
> > "I was attending the party there on that night. Alcohol and food was being sold there on coupons. I had met Jessica Lal on that night in the party. I had acquaintance with her from before. The place where the party was going on was known as Qutub Colonnade Tamarind Court. There was miniature bar counter outside in the open space where liquor was being served. Besides Jessica Lal and Malini there were other few persons who were helping in serving liquor. On that night, I did go inside the Tamarind Cafe. It might be 2 - O clock at that time, I mean 2 a.m. There were about 6-7 persons inside the cafe at that time.

> I went inside the cafe primarily with a view to eat something as I was feeling hungry and also nothing was being served outside. I found that Jessica was inside. At that time, no other lady was there. I went behind the counter to get something to eat. I managed to get pastry lying in the freeze and when I was taking it, a gentleman with white tea-shirt came there. He asked the waiter to serve him two drinks. The waiter did not pay attention to that gentleman and became busy in cleaning up. Jessica was also there on the other side of the counter and she told the gentleman that the party was over and there was no alcohol to be served. At that time, that gentleman took out a pistol from the dub of the pant and fired a shot in the air. There was another gentleman on the other side of the counter, who fired a shot at Jessica Lal and she fell down. That gentleman was also wearing light coloured clothes.'
>
> Since the present statement about 'another gentleman' fired a shot at Jessica Lal and she fell down was not the one earlier made to the Police, after getting permission from the Court, the public prosecutor cross-examined him. He stated
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> > "It is correct that Beena Ramani and other lifted Jessica from the spot and carried her to the Hospital Ashlok. I went there later. In the Ashlok Hospital, police came there and contacted me and recorded my statement.' '....I reached the Hospital at about 3:30 a.m. and my statement was taken at about 3:45 a.m. or 4 a.m.'
>
> He also admitted that he was in Delhi for about a year or so and able to understand spoken Hindi. He is aware of Beena Ramani as the proprietor of Qutub Colonnade.
>
> The analysis of the evidence of PW-2 shows that though he turned hostile but his evidence shows that he had visited Tamarind Cafe on the night of 29.04.1999. He also mentioned the presence of Manu Sharma. His evidence further shows that immediately after the shot Beena Ramani and others were carrying Jessica Lal to the Ashlok Hospital. In other words, his evidence proves

the presence of accused-Manu Sharma at the scene of offence. To this extent, the prosecution relied upon his evidence and this was rightly accepted by the High Court. Though, Mr. Ram Jethmalani submitted that High Court ought to have accepted his entire evidence in toto, considering his earlier statement to the police and his evidence before the Court, we are satisfied that the High Court is justified in holding that even if his testimony is discarded, the case of the prosecution hardly gets affected. As observed earlier his evidence amply proves the presence of accused at the scene of occurrence at the time and date as pleaded by the prosecution."

28. The Court also observed that:

"(iv) Appearance of PW-2 Shyan Munshi accompanied by Shri Ashok Bansal, Advocate

By order dated 06.03.2000, Shri Ashok Bansal, advocate had appeared as proxy counsel for accused-Manu Sharma before the trial Court and on the same day also took copy of the report of FSL/Jaipur on behalf of accused-Manu Sharma. On 03.05.2001, PW-2, Shyan Munshi, was duly accompanied by Shri Ashok Bansal, advocate wherein he clearly says that he has come with a lawyer for his personal security. On behalf of the State, it was contended that an adverse inference against accused-Manu Sharma has to be drawn for influencing the witness. It may not be out of place to mention here that PW-2, Shyan Munshi, who is the maker of the FIR and complainant of the case, did not fully support the prosecution case though he admitted having made statement to the police and having signed the same. The stand of the State cannot be ignored, on the other hand, it is acceptable."

The witness had during his cross examination, denied familiarity with the Hindi language and that he had never visited Qutub Colonnade prior to that night and he denied as incorrect that he was a frequent visitor to that place and that he even used to serve liquor.

29. The evidence of PW-1 Deepak Bhojwani - who was found to be a reliable witness, was that PW-2 knew Jessica Lal and had in fact introduced him to her, a week before the incident. In this context, his

(PW-2's) assertion that he had not visited Qutab Colonade prior to the incident, somewhat rings hollow; his admitted conduct in entering the counter and trying to take something edible from the freezer when according to him the party was over, and the place was shutting down, betrays familiarity which cannot be acquired during the first outing. He admitted to witnessing the entire episode, and yet declined to identify the real offender. The witness had no explanation for this *volte face*. He did not qualify his witnessing the incident, by saying that the given time for observing the man was inadequate or anything of that sort. In these circumstances, his attempt to mention about two persons firing in the air, and his conduct in relying on the accused's counsel, in the initial stages, is *prima facie* indicative of his attempting to not stating all the facts, suppressing it, with a view to help the accused. For these reasons, the Court is of opinion that action under Section 340, Cr. PC, is *prima facie* warranted against this respondent, i.e. PW-2 Shyan Munshi. A direction is accordingly issued. Crl. M.A. No. 1898/2007 is accordingly disposed of in terms of the said direction.

Crl. M.A.1899/2007

30. The prosecution alleged that Shiv Dass, the electrician, (respondent/noticee under this application) whose statement was recorded on 29.05.1999, was on duty at Qutub Colonnade on 29.04.1999. It was alleged that he had installed a number of electric bulbs, and had to remove them. He said that on 29.04.1999 at about 02.00 AM, the party was over, people started moving towards their houses and only 70/80 persons were still present in Qutub Colonnade. At that point of time, on feeling hungry, he left for the kitchen. On entering the bar counter of Tamarind CafT for a cold drink, he saw a boy named Shyan, a model, standing at a counter and standing beside him was a fair complexioned stout boy aged 28/30 in a white t-shirt and blue jeans. He further said that the boy and Jessica Lal, who was standing in front of the Bar, were talking. He could not follow what they were talking and all of a sudden, the boy in the white t-shirt took out a pistol from his pant and fired a shot at the ceiling and another at Jessica Lal while targeting her, after which, she fell down on the floor after sustaining bullet injury. Thereafter he ran away towards the kitchen because of fear. A panic situation had arisen over there. Shiv Dass further said that when he came out of the kitchen, Bina Ramani, Jitender Raj etc. had already reached the place by that time. He then brought a bed sheet and he, Jitender Raj, Madan (the

waiter) and some other persons wrapped Jessica Lal in the bed sheet and took her to a Maruti Esteem Car parked outside Qutub Colonnade. She had sustained a bullet injury on the left side of the forehead. Jitender Raj, Bina Ramani, Madan (Waiter) and the Driver of the aforesaid car then took Jessica Lal to Ashlok Hospital, Safdarjung Enclave. The prosecution further alleged that in his statement he further said that *"Today you have kept 10 photographs in front of me at PS Mehrauli and have asked me to identify the photographs. Thereupon, I picked up a photograph and disclosed to you that this was the same boy who had shot at Jessica Lal on the night of 29.04.99 at about 2:00 AM, who was standing in front of the Bar Counter at Tamarind CafT. Before firing a shot at Jessica Lal, he had fired a shot at the ceiling. You have now told me that the name of the aforesaid person is Siddharth Vashishath alias Manu Sharma. You have appended your signature on the back side of the said photograph identified by me and have kept the same in an envelope.*

31. The witness in his deposition, during the trial, admitted to being electrician and was on duty on 29.04.1999 but denied that he went to Tamarind CafT to eat something after feeling hungry. He deposed that he did not enter Tamarind CafT before the incident in question. He also denied telling the police that at about 02.00 AM, he felt hungry. He further said in his deposition that on 29.04.1999 he was present at the terrace of Qutub Colonnade at about 02.00 AM and was disconnecting temporary lights after the party was about to be over. He further said that he had gone to the CafT only after hearing some noise like bursting of two crackers and saw Bina Ramani ahead of him, he followed her inside, and saw Jessica Lal lying injured on the floor. He denied having seen anybody firing a shot at Jessica Lal. He further denied seeing Jessica Lal conversing with a boy in a white t-shirt and telling police that hefty boy in a white T-shirt took out a pistol from his pant and fired one shot towards ceiling and another at Jessica Lal. He also denied having seen Jessica Lal falling on the floor after sustaining bullet injury and running away towards kitchen out of fear and panic. He had admitted presence of Bina Ramani and Jitender Raj there, bringing of bed sheet, wrapping Jessica Lal in it and taking her to the Ashlok Hospital, Safdarjung Enclave in an Esteem car parked outside the Qutub Colonnade. The driver of the said car also accompanied Jitender Raj, Bina Ramani and Madan (waiter) to the hospital. The witness further denied in its entirety the statement of keeping 10 photographs in front of him at PS Mehrauli, asking him

to identify the same, picking up the photograph of the boy who had shot at Jessica Lal at the night of 29.04.1999 at about 02.00 AM, the firing incident, telling him the name of the boy as Siddhartha Vashishath alias Manu Sharma, signing by anybody on the back of the photograph identified by him and keeping it in an envelope.

32. The learned Standing Counsel argued that PW-3 deserves to be sent up for further proceedings since he had deliberately resiled from his earlier statement. It was highlighted that there can be no denial of the fact that this witnesses, statement (Ex. PW-3/A) was recorded by PW-101, who deposed about it, and also deposed to what Shiv Dass had said. Furthermore, submitted the Standing Counsel, in the cross examination at the request of the prosecution, the respondent/noticee did not deny that he was present at the scene, and had assisted in wrapping Jessica's body. In these circumstances, stated counsel, this witness should be sent up for trial. Counsel for the noticee/respondent, on the other hand, submits that the witness did not make any statement on oath and the basis for a reference under Section 340 cannot be a statement attributed to him under Section 161 Cr. PC.

33. It is evident from the above discussion that the prosecution is banking heavily, if not almost entirely on the statement made by PW3 on 29th May, 1999. It is rather strange that the statement in the first place was allegedly recorded almost after a month of the commission of the crime. Courts have repeatedly emphasized that if the presence of potential witnesses at the crime scene is known to the police, utmost dispatch and expedience has to be displayed in recording those versions. This is to avoid the danger of an accusation that the witnesses, statement cannot be truthful, or even that fading memories and faulty recollection would impair the deposition of such witness. These apart, there is no doubt that the prosecution version was not supported at all by the witness, during his deposition at the trial. The prosecution is entirely relying on his statement made under Section 161 Cr.PC after a month of the incident. This Court, consistent with the approach adopted in the case of other applications, is of the opinion that despite the minor contradictions elicited during the prosecution's cross examination of the witness, no prima facie case has been made out for action under Section 340 Cr. PC. The notice to this respondent is accordingly discharged; Cr MA No. 1899/ 2007 is therefore dismissed.

Crl.M.P. No. 1900/2007 - Andaleeb Sehgal

34. This respondent/noticee had deposed during the trial as PW-19. The prosecution had alleged that in the statement recorded under Section 161 - on 14.05.1999, this witness mentioned about having gone on 29.04.1999, at about 11.00 PM, to Qutub Colonnade with his wife and further added that he had attended the Thursday parties earlier, on 2-3 occasions. He mentioned having met Mrs. and Mr. Amardeep Singh Gill, Parikshat Sagar, Manu Sharma, Amit Jhingan, Alok Khanna and Vikas Yadav. In the said statement, the witness mentioned about his acquaintance with Manu Sharma for 3-4 years and that on that day, he was wearing a white T-shirt and blue jeans. He further stated in the Section 161 statement that he saw Jessica Lal, whom he knew before, behind the bar counter. He also stated that he was introduced to Vikas Yadav by Amardeep Singh Gill and that he stayed there till 01.00 AM after which he went back home. At that time, Manu Sharma, Amardeep Singh Gill, Amit Jhingan, Alok Khanna and Vikas Yadav were still present at the party.

35. In his deposition in Court, while PW-19 confirmed certain particulars, such as the Thursday parties in Tamarind Court and that he attended the special party of last Thursday of April 1999 with his wife and that he knew Amardeep Singh Gill @ Tony Gill, Manu Sharma and others, i.e. Mrs. and Mr. Amardeep Singh Gill, Parikshat Sagar etc. He denied knowing Vikas Yadav and Alok Khanna. He also stated that he did not meet Manu Sharma and Tony Gill on that day. As a consequence, the witness was declared hostile and was permitted to be cross-examined. In the suggestions put forward by the prosecutor, he denied having stated earlier during investigation under Section 161 that he had met Manu Sharma and the others. He admitted to knowing Manu Sharma for the last 2-3 years and denied that he had described to the police the clothes worn by Manu Sharma on that night. He also admitted knowing Jessica Lal but had no personal acquaintance with her and added that he had seen her in the cafT on that day. He admitted that the police had contacted him 13-14 days after the incident. He denied having given the statement, Ex.PW19/ A.

36. Learned Standing Counsel had placed strong reliance on the statement of PW-92, Durga Prasad, an Inspector with Delhi Police who deposed that he had recorded the statement of PW-19 correctly. It was submitted that PW-19 deliberately omitted any mention of Manu Sharma

in order to assist him escape justice and that this hostility warranted prosecution for perjury. Learned counsel for the respondent PW-19, on the other hand, pointed-out that the statement recorded under Section 161 was not confirmed by the witness and that at the first available opportunity, PW-19 mentioned the true facts. It was argued that while the witness clearly stated about his having visited the Tamarind Court on the day of the incident and also mentioned the presence of some of the accused and his acquaintance with others; the evidence on oath in Court was not consistent and at no stage did he admit - even in the cross-examination by the Prosecutor -that Manu Sharma was present when he left the premises.

37. In the earlier part of this judgment, while considering the law relating to perjury and the standard to be adopted while pressing evidence under Section 195(1)(b) Cr.PC, the Court had noticed the decision in **Hazari Lal v. State** 1980 (2) SCC 290 and **Omkar Namdev Jadhao v. Second Additional Sessions Judge** 1996 (7) SCC 498. Clearly in case of PW-19, there was no inconsistency between his examination-in-chief and the cross-examination. The fact that PW-92 merely mentioned about having recorded accurately the prior statement of PW-19, i.e. Ex.PW-19/A would, in the opinion of the Court, fall grossly short of the governing standard. The earlier statement under Section 161 was not made under oath and is by the plain terms of that provision, inadmissible. That the person who recorded it deposed to its veracity would not add weight or establish the untruthfulness of PW-19's deposition in Court. Such being the position, proceedings under Section 340 Cr.PC against this witness are not warranted. The said respondent is hereby discharged.

Crl.M.A. 1901/2007 - Manoj Kumar (PW-25)

38. The prosecution had, during the trial alleged that Manoj Kumar had, during the investigation made a statement under Section 161, on 20.05.1999, that he was a driver employed by Piccadily Agro, Bhadro, Karnal for about 6 months and that the black Tata Safari with registration no. CH-01-W-6535 was in possession of Manu Sharma, the owner of the company, who used to drive it himself. In his deposition in Court dated 01.01.2001, PW-25 did not support his statement about knowledge of the said Tata Safari; he also stated that he had never seen Manu Sharma driving that vehicle. He further denied having made the statement, Ex.PW-25/A and also denied the suggestion that it was read over to him.

39. Learned Additional Standing Counsel relied upon the testimony of PW-76, SI Vijay Kumar. He deposed to having recorded the statement, Ex.PW-25/A, of PW-25 after finding that the Tata Safari belonged to Piccadily Agro. He also relied upon Ex.PW-18/A-2 to say that it was the original report of the registering authority at Chandigarh which established that the vehicle had been duly registered. Learned counsel highlighted that the false testimony by PW-25 was never with the intention of aiding the accused Manu Sharma. Learned counsel for the respondent submitted that the Division Bench of this Court in its judgment referred to the testimonies of PW-s 2, 3, 4, 5 and 86 as ''material witnesses'' and the others as ''formal witnesses''. It was also emphasized that the Division Bench did not make any adverse comments against the witnesses, who did not support the prosecution, except PW-86 about whom it was stated that he was thoroughly unreliable. Learned counsel submitted that the said statement made under Section 161 cannot be relied upon solely for the purpose of alleging perjury and referring the case for further proceeding to the competent court. It is evident from the previous narrative that the statement was attributed to PW-25 about his being employed with Piccadily Agro and that he had seen Manu Sharma driving it. However, in his deposition in Court the witness did not stand by this statement and even went to the extent of deposing that the statement was not recorded by the Delhi Police. After Ex.25/A was read-over during the trial, the witness nevertheless denied its contents. This Court is of the opinion that by applying the standards which govern initiation of proceedings for perjury, the witness cannot be said to have prima facie committed the offence. Notice in respect of this respondent/witness is hereby discharged.

Crl.M.A. 1902/2007: PW-26 - Balbir Singh

40. Like in the case of PW-25, the police had alleged that Balbir Singh, PW-26 made a statement on 20.05.1999 about his being a security supervisor with Piccadily Agro Industries and that the Tata Safari bearing registration no. CH-01-W-6535 was in possession of the company's owner, Manu Sharma, who used to drive it. During the trial, this witness did not support the prosecution and denied the suggestion that he was deposing falsely; he also denied the exhibit PW-26/A-A, the statement attributed to him. Like in the case of PW25, learned standing counsel relied upon the testimony of PW-76. For the reasons given by the Court, in the case of PW-25, the notice in respect of this respondent, PW-26 too requires to be and is hereby discharged.

Crl. M.P. No. 1904/2007 -Tarsem Lal Thhapar

41. The prosecution had alleged that on 15.07.1999, this witness had stated under Section 161 that he had been working as a Private Secretary to Manu Sharma's father, Vinod Sharma, since 1995 and that on 30.04.1999, he had telephonically connected Vinod Sharma to Vikas Gill @ Ruby at the instance of the former. The statement recorded was that the telephone call at the other end was attended to by Vikas Gill's wife, Amrita. He further stated that after a short while, Vikas Gill arrived at the residence of Vinod Sharma, at 02.00 PM and thereafter they (Vinod Sharma and Vikas Gill) left in a Mercedez car, bearing no. CHK-2.

42. In the deposition in Court, PW-34 confirmed he was working as a Private Secretary to Vinod Sharma since 1995. He, however, denied knowledge of anyone calling Vikas Gill and stated that a police officer had only come to him and asked his residential address. He denied his statement, Ex.34/A or that it was recorded on 15.07.1999. He also denied about the visit of Vikas Gill to Vinod Sharma in Chandigarh. Learned standing counsel also relied upon the statement of PW-85, Pankaj Malik, who stated that he had recorded the statements of PWs-34 and 35, who had voluntarily mentioned about their relationship with the accused and how PW-34 - in the statement under Section 161 had mentioned about the telephonic conversation between Vinod Sharma and Vikas Gill and the latter's visit to his house.

43. This Court has considered the material evidence, i.e. the statement under Section 161 (Ex.PW-34/A) and the deposition of PW34 and his cross-examination after he was declared hostile as well as the deposition of PW-85. Apart from the fact that the Court cannot proceed merely on the basis of Section 161 statement, what is immediately striking is that the prosecution sought to establish a telephonic conversation between Vinod Sharma and Vikas Gill @ Rabbi. For that purpose, it was open to it to rely upon the objective findings in the nature of call particulars from concerned telecom service providers. It is unclear from the record whether any such evidence was marshalled at all much less presented to the Court. For these reasons, the Court is of the considered opinion that no case for proceeding further against PW-34 has been made-out. It is also worthwhile mentioning that similar facts were alleged in respect of another noticee/Applicant in Crl.M.A No. 1905/2007; the court had discharged

notice against him. Notice issued in respect of this respondent is therefore, discharged.

Cr. M.A No. 1906/2007-Shankar Mukhiya

44. The prosecution alleged that Shanker Mukiya, PW-44 a respondent/noticee (also applicant in Cr. MA. 1906/2007) was working as a cook for 5 years before the incident at Devi Kunj Farms, Samhalka, which was owned by Vinod Sharma and he used to reside in the servant quarters, with his children. His Section 161 statement (recorded on 14.07.1999) was that in the morning of 29th April, 1999, Manu Sharma reached the farm house in a black ''Tata Safari'' bearing Reg. No. CH-01-W-6535 and had left the farm house at about 08.00/08.30 PM in the same car. He said that thereafter neither Manu Sharma nor the vehicle came to the farm house. He said that he came to know about the murder, after 2 days. He said that after about 4-5 days, Vinod Sharma's brother, Shyam Sunder, went to the farm house at about 11.00AM in a Mercedes car (the registration of which he did not remember) and that Shyam Sunder, after taking a bath, had left the farm house at about 01.30 PM. The prosecution alleged that PW-44 also gave a supplementary statement, which was recorded 17.07.1999 in which he corroborated his earlier statement. He also said that Manu Sharma was the son of his employer Vinod Sharma and that Manu Sharma had a cell phone, with registration Number 9811096893. He said that on 29.04.1999, Manu Sharma was carrying his phone with him and that he spoke to him from the said mobile phone at about 05.30/06.00 PM. He also stated that on 29.04.1999, he had dialled the number and had spoken to Manu Sharma.

45. During the trial, PW-44 agreed that he used to work for Vinod Sharma for 6-7 years, and was working at the farmhouse of that employer for the last 2 + years. He deposed that Manu Sharma had a white Esteem car and that he did not have any black Tata Safari. He also deposed that he has not seen Manu Sharma with a mobile phone. This witness said that the police had questioned him after the incident but he had not given any statement to the police on 14.07.1999 or on any other date. He said that the police had interrogated him. He deposed that he was called to PS Mehrauli.

46. In cross-examination by the prosecutor, he denied having stated to the police that on 29.04.1999 morning, Manu Sharma s/o Vinod Sharma had arrived at the farm house in a black .Tata Safari. bearing Reg. No.

CH-01-W-6535 and had left the farm house at about 08.00/08.30 PM in the said black car and that he did not return to the farm house thereafter. He admitted to knowing accused Shyam Sunder Sharma (brother of Vinod Sharma) who was in Court. He denied having told the police that he learnt about the incident two days after the incident. He said that the police had told him about the incident. He denied having told the police that after 4-5 days of the murder, Shyam Sunder Sharma had gone to the farmhouse at about 11.00 AM in a Mercedes car and had left the place at about 01.30 PM and had returned there after a few days. He denied having been interrogated by the police on 17.07.1999 and having told the police that Manu Sharma had cell phone no. 9811096893 and that on 29.04.1999 he had spoken to him from his cell phone with Manu Sharma, on that cell number.

47. The learned Standing Counsel relied on the testimony of PW94, who deposed that Manu Sharma's call details had been procured. It was submitted that such evidence corroborated the truth of the statement recorded under Section 161 Cr. PC and that PW-44 should consequently be sent up for further proceedings and trial. This Court is of the opinion that the contention in this regard is meritless. The witness did not corroborate the statement attributed to him, under Section 161 Cr. PC in the entirety of the trial; the fact that some part of it was supported by external evidence does not in any manner establish that Section 161 Cr. PC statements are to be made the basis for perjury action or proceedings. The principles remain unchanged; that statement was not made by the noticee under oath. He cannot be said to have given false testimony. Nor can the deposition of PW-94 or anyone who claimed to have recorded the Section 161 Cr. PC statement, provide any comfort to the prosecution in this regard. Consequently, the notice as against PW-44, the applicant in Crl. MA 1906/2007 is hereby discharged.

Crl. M.A. No. 1926/2007-Babu Lal Yadav PW-98

48. The allegation against this notice/applicant is identical to what was alleged against PW-44. He too was the employee of a security agency and deployed in Vinod Sharma's farm house in Delhi, at Samhalka. It was alleged that in the statement recorded by this witness, under Section 161 he mentioned having seen Manu Sharma driving into the farmhouse in a black Tata Safari, bearing Reg. No. CH-01-W-6535 and saw him leave the farm house at about 08.00 PM in the same car on

29.04.1999 and that he had not returned since then. In his deposition during trial, he did not support the statement attributed to him, and stated that Manu Sharma used to drive a white Maruti car. In the cross examination, with permission of Court, he denied the material suggestions made to him pointedly with reference to the statement under Section 161 (Ex. PW-98/1). Like in the case of PW-44, the prosecution tried to rely on the deposition of other police witnesses. However, the fact remains that the witness/noticee did not contradict, or resile from a sworn testimony in respect to a material fact. Therefore, for the reasons mentioned in the case of the applicant in Crl. M.A No. 1906/2007, the notice in respect of Babu Lal has to be and is hereby discharged.

Cr M.A No. 1908/2007: Chander Prakash Chhabra PW-52

49. Chander Prakash Chhabra u/s 161 Cr.PC on 08.05.1999 recorded his statement, according to the prosecution, on 08.05.1999 and said that he resided at J-65, Saket, New Delhi and his son-in-law Harvinder Chopra was a Chartered Accountant in Picadilly Group of companies, Chandigarh. He said that on 30.04.1999 at about 04.00/04.30 PM, he received a phone call from Chandigarh from his son-in-law Harvinder Chopra saying that his boss, Vinod Sharma's (father of Manu Sharma) son would come to his house with some friends as some defect has occurred in their car. Harvinder Chopra told him to give them (Vinod Sharma's son and his friends) sufficient facilities in the house and said that somebody would come to take them once the car was repaired. According to the prosecution, he said that soon after the said call, Manu Sharma along with his friend Ravindra Sooden alias Tittoo, came to his residence and he served them food. Ravindra Sooden alias Tittoo was aged about 40 years, fair complexioned, his height was about 5.6'' and he was bald. In his statement under Section 161, Chhabra also mentioned that on the same night one Vikas Gill came in a white Ford car and soon after his arrival, took Manu Sharma and Ravinder Sooden alias Tittoo along with him in the Ford and left for Chandigarh. He is reported to have identified Manu Sharma as that person who had gone to his house on 30.04.1999 with Titoo, and that later both of them left with Vikas Gill.

50. In a supplementary statement, recorded on 15.05.1999, he confirmed his earlier statement, and said that upon entering the police station, where he had been called, two persons namely, Manu Sharma and Vikas Gill alias Rubby were present there and he identified Vikas Gill

and said that he was the same person, who on the intervening night of 30.04.1999 and 01.05.1999 had gone to his house in a Ford car and had taken Manu Sharma and Ravindra Sooden along with him to Chandigarh.

51. In the Court, during trial, this noticee/respondent confirmed details like his residence in Delhi, and that he was the father-in-law of Harvinder Chopra. He denied other facts, and was cross-examined by the prosecution with Court's permission when he denied receiving a phone call from his son-in-law on 30.04.1999 to the effect that he should make arrangements for the stay of his boss's son. He denied having given the statement Ex.PW52/A. He also denied all the statements attributed to him, when they were pointed out; he also denied having gone to the police station on 15.05.1999, or having identified Manu Sharma and Ravinder Sooden @ Titto.

52. The learned Standing counsel submitted that the respondent Chander Prakash Chhabra wilfully resiled from the truth of his statement, solely with the object of shielding his son-in-law Harinder Chopra and others, who had aided in the commission of the offence punishable under Section 212 IPC. It was submitted that the witness PW-52 deliberately denied his previous statements under Section 161, the accuracy and veracity of which were vouchsafed by PW-101, in his deposition. That testimony was not contradicted. Furthermore, the witness even sought to deny that he was served with notice under Section 160, Cr. PC, which was exhibited as Ex. PW-52/B. Counsel submitted that the main accused in the trial were able to thwart the logical outcome of the trial, in respect of charges levelled against some of the accused of shielding and aiding the escape of Manu Sharma, and ensuring he successfully evaded justice for some time, before his arrest.

53. Learned counsel for the noticee/ PW-52 argued, on the other hand, that the statement sought to be relied upon as the correct and true version, was not under oath. Moreover, this Court and the Supreme Court did not adversely comment on the testimony of PW52, whose son-in-law was acquitted of the charges levelled against him. It was argued that no role in respect of the main offence was even alleged against PW-52's son-in-law, and it would be futile to send him up for trial, now that he is over 74 years of age.

54. This Court has carefully considered the materials on record; it is quite evident that like in the other cases, the prosecution is, in the case

of this witness, seeking to rely on the previous testimony of the noticee under Section 161. It is an undeniable fact that the witness did not resile from any testimony made under oath. Furthermore, no objective material was put to him, to contradict his deposition in court, and establish that the statement recorded during investigation was true. Apart from the two statements - the first, and the supplementary statement, the prosecution did not produce anything to give a lie to the witnesses. testimony. Furthermore, that the witness did not support the police case about his deposing further to a summons under Section 160, Cr PC, is no doubt a matter of concern; however, considering that the testimony was recorded over three years after the alleged event, that it was overlooked by the witness, can be put to loss of recollection as a result of passage of time. For these reasons, the Court is of the opinion that no case has been made out to send PW-52 for further proceedings for perjury, under Section 340, Cr.PC. The notice regarding PW-52 is accordingly, discharged.

Cr. M.A No. 1909/2007-Abhijit Goshal PW-53

55. The allegation against PW-53, applicant, seeking discharge in Cr. MA. No. 1909/2007, is that in his statement under Section 161 (dated 15-07-1999) he mentioned that on 01.05.1999 at about 8 O'clock morning, Manu Sharma, along with someone, went in a Tata Sumo vehicle to his neighbour's (Yograj Sharma's) house. The man accompanying Manu Sharma was talking to Yograj Sharma. During trial, the witness did not support the prosecution case, except identifying Yograj Sharma correctly. He was declared hostile, and during his cross-examination, he denied the statements attributed to him. The learned Standing Counsel sought to rely on the testimony of PW-85 to say that he had truthfully recorded the statement of PW-53, and that the latter perjured himself in court. This Court is of the opinion that since the prosecution is relying essentially on a statement attributed to the witness, which was not made under oath, and is inadmissible, no case for initiation of proceedings is made out. The notice as against PW-53 Abhijit Goshal is hereby discharged.

Cr. M.A No. 1910/2007: Barun Shah, PW-54

56. The prosecution alleged that PW-54, Manager of a resort, Shakti Tourist Resorts Complex, Behror, (Raj), had, in his statement (Ex. PW-54/C) recorded under Section 161, on 10-5-1999, after joining the investigation, called one of the waiters (PW-55) in the proceedings. In his statement, PW-54 said that the waiter, Mukesh Saini, had served the

accused Vikas Yadav, who had stayed in the premises, calling himself Suresh Shekhar, a resident of Gwalior. The witness also stated under Section 161 that the Guest Register bore the signatures of that person. The guest register was seized by the police. In his court deposition, however, the witness did not support the prosecution story about being joined in the investigation in the manner suggested, or that Vikas Yadav had identified the room where he stayed. He also denied that Vikas Yadav had been identified by Mukesh Saini in the investigations. 57. Learned counsel submitted that the witness deposed falsely in court, because he did not deny having signed on the seizure memo and the statement under Section 161 Cr. PC. It was also submitted that PW-81 Inspector S.S. Gill vouchsafed the truthfulness of the statement recorded by PW-54, in his deposition. 58. This Court is of the opinion that the witness PW-54's evidence has to be read in totality. Even in the statement attributed under Section 161, Cr. PC, he did not mention having recognized Vikas Yadav as the one who called himself Suresh Shekhar or identified him as someone who stayed in the resort. While the witness no doubt agreed that the memo contained his signature, he also added that the contents of the document were unknown to him. Having regard to this conspectus of circumstances, it cannot be said that the witness ever claimed to have personal knowledge about Vikas Yadav, or having seen him earlier. This Court, as well as the Supreme Court did not adversely comment on the testimony of the witness, nor was any part of the statement under oath contradictory, or amount to a false statement, calling for action under Section 340. The notice as against Barun Shah, PW-54 is therefore discharged.

Cr. M.A No. 1912/2007: Chetan Nanda, PW-56

59. According to the prosecution, PW-56 stated, under Section 161, Cr.PC, that on 02.05.1999, his friend Ashok Dutt was staying with him, after coming from Gurgaon. He said that at about 6/7.00 PM in the evening, his friend Shyam Sunder Sharma who resided in Chandigarh, made a telephone call and asked to speak with Ashok Dutt whereupon he gave the phone to Ashok Dutt. Soon after the said phone call, Ashok Dutt left, saying that he was going to Shyam Sunder.

60. During the trial, PW-56 denied acquaintance with Ashok Dutt and Shyam Sunder Sharma. He further stated that the Delhi Police never interrogated him about this case and denied having made statement to

police at Ex.PW-56/A. He said he does not know any Vinod Sharma and further did not know if any son of Vinod Sharma is an accused, in this case. He said that his father name is not Chander Lal but is ''Chaman Lal''. He said it is correct that he is not Chetan Nanda s/o Chander Lal to whom the summons are issued, however the address on the summons was correctly mentioned.

61. This court has carefully considered the submissions. It can be seen from the preceding discussion in respect of PW-52 that he is supposed to have stated that on 02.05.1999, Ashok Dutt (who was charged with abetting the abscondance of Mannu Sharma) went to his place, and made a telephone call to Shyam Sunder Sharma; however, during trial, he resiled from that statement attributed to him, under Section 161 Cr. PC. That statement was unsigned and not made under oath. Therefore, it cannot be said that this noticee/respondent prima facie perjured himself. The notice as against PW-56, Chetan Nanda, is therefore discharged.

Cr. M.A No. 1913/2007: PW-57 Ashok Dutt

62. It was alleged that this noticee recorded a statement on 09.05.1999 under Section 161 to SI Brijender Singh in which he mentioned doing work of furnaces installation in factories and that he was friendly with Shyam Sunder Sharma (Chacha or paternal uncle of Manu Sharma); they had both studied together in DAV School, Chandigarh. He also stated that whenever he went to Chandigarh in connection with business he stayed in Hotel Samrat owned by Shyam Sunder Sharma; as a result the hotel staff and other people there knew him well and could identify him. In a statement he also said that on 02.05.1999 he went to Chandigarh for business and stayed in that hotel from where he placed a phone call to Shyam Sunder Sharma asking about his welfare and further mentioning to him that Manu Sharma's name was the topic of the day, on account of the killing of Jesicca Lal. Then Shyam Sunder Sharma called him home where he was given Rs.70,000/-(Rupees Seventy thousand) to be handed over to Ravinder Soodan @ Titoo in Mani Mazra. Shyam Sunder Sharma asked him to go to Hotel Samrat and from there along with Mangal, the Manager to hand over the amount to Titoo at Mani Mazra since Titoo had to be sent to America. PW-57 also stated that Shyam Sunder Sharma sent him in his elder brother Vinod Sharma's car from where he and Mangal rented a Tata Sumo car and reached Mani Mazra

where he asked the Titoo to take the amount. He thereupon told Titoo that he would be at Hotel Samrat till 10.00 AM and thereafter would go to Zeto factory. The next day, Titoo took the amount of Rs.70,000/-from Zeto factory.

63. PW-57 also mentioned in his Section-161 statement that whilst in Hotel Samrat, Shyam Sunder Sharma visited him and was annoyed as to why he did not go to Delhi with Titoo and see him boarding the flight. Shyam Sunder Sharma said that Titoo would be in India and asked him to accompany him to Delhi immediately. Shyam Sunder Sharma thereafter returned to Hotel Samrat from where both of them left in his (Shyam Sunder's) Mercedes car to Delhi. They stopped at Ambala at a restaurant for tea from where he spoke to Titoo's brother Bitoo from a STD booth and told him that Titoo had not reached America, after which, they reached Delhi, where Shyam Sunder Sharma again spoke to someone in America from STD booth in Nizamuddin mentioning that Titoo had not reached there. Shyam Sunder Sharma dropped him at Jivan Vihar and told him that he was going to his father-in-law Shri S.D. Sharma's place who was then the President. Shyam Sunder Sharma instructed him to enquire whether Titoo had reached America or not. PW-57 then stated that late that evening at 09.00-10.00 PM, Shyam Sunder Sharma telephoned him and scolded him that Titoo had not still reached America and asked him to make an enquiry from Chandigarh and inform him. The witness stated that he did not go to Chandigarh and instead went to his office. On 05.05.1999, he placed a telephone call to America whereupon Bitoo told him that Titoo had departed from Delhi to the US by Gulf Air. He also stated that Shyam Sunder Sharma did not give him any information regarding the murder of Jessica Lal and Manu Sharma's arrest and that he read Titoo's name in the newspaper and learnt that Manu Sharma had given the murder weapon to Titoo. He also said that it was then that he realized that Shyam Sunder Sharma had taken his undue advantage. He also claimed that he can identify Titoo very well.

64. In a supplementary statement said to have been recorded on 10.05.1999 upon being summoned by the police, he went there and went to the STD booth at Okhla and made a call from telephone no.6924575 to another number, i.e. 0017184768403. That number had been disconnected; he then placed another call to Titoo in New York on the telephone no.0015167751236, and spoke to him first at 09.15 in Punjabi,

again at 09.36 for 44 seconds and the last time at 09.38 for 178 seconds. He mentioned that the police officers had taped the conversation between him and Titoo in Punjabi in a tape recorder and they kept the taped cassette in their possession.

65. Deposing as PW-57 in Court, Ashok Dutt denied that he knew Vinod Sharma and that he had any knowledge about his being Manu Sharma's father. He also denied contacting Titoo at the instance of Shyam Sunder Sharma; he also denied his acquaintances with Shyam Sunder Sharma. In fact he denied the statement made on 09.05.1999 under Section 161 altogether. He said that whenever he visited Chandigarh on business he stayed with his sister and also denied that he had ever been to Samrat Hotel or that he knew Shyam Sunder Sharma. He also denied as incorrect that he stayed in Samrat Hotel on 02.05.1999 and that Shyam Sunder Sharma had given him Rs.70,000/-to be given to Titoo in Mani Mazra. He denied the entire statement attributed to him about his going to Mani Mazra, Titoo taking the money from him at Zeto factory, Shyam Sunder getting annoyed with him on 04.05.1999, their leaving for Delhi, etc.

66. During the cross-examination with the permission of the Court by the prosecution, he stated that he had telephoned from a PCO on 04.05.1999 and 05.05.1999 but could not remember to whom the calls were made and also does not remember the telephone numbers. He stated that he called to the USA and that the American number to which he placed a call was given by his Consultant Vinod Katyal. He agreed that he had made calls on 05.05.1999 to number 0017184768403 and added that he was enquiring about the equipment needed for his furnace manufacturing company. He denied having made any telephone calls thereafter. He denied the rest of the statements altogether. PW-57 also denied the supplementary statement attributed to him on 10.05.1999 and denied having signed any document that day or the previous day when the first Section 161 statement was recorded. He denied that the police ever met him on 09.05.1999 or 10.05.1999 and he stated that he was prepared to give voice sample for comparison. During cross-examination, however, he refused to give voice sample. He also refused the suggestion that if in fact he gives a voice sample that would tally with the conversation allegedly recorded by the police on 10.05.1999 between him and Titoo in America. The witness also claimed he could not recognize the voice

recording on the tape when played in Court and stated that it was not his voice.

67. It was argued on behalf of the State that the testimony of PW94 gives a complete life to the deposition of PW-57. Counsel submitted that PW-94 SI Brijender Singh met the witness on 09.05.1999 and 10.05.1999. Counsel relied upon the cross-examination of PW-57 during which he agreed that initially he had shown willingness to give his sample voice and went back upon it later upon legal advice. It was argued that the conduct of PW-57 in assisting Titoo to flee the country and also in assisting the other accused to abate the justice was apparent in the initial statement recorded to the police, which was proved through the testimony of PW-94. The accused did not cross-examine that witness. As a result, the truth relating to the facts narrated by PW-57 had been established. Consequently, his omission and failure to support the prosecution case during the trial was a deliberate one solely aimed at assisting the accused.

68. This Court is of the opinion that the arguments of the prosecution with regard to whether PW-57 should be sent up for trial for further proceedings are insubstantial. Both the statements were not made under oath or in judicial proceedings. They were recorded under Section 161. Undoubtedly, during the Court proceedings, the witness, attention was drawn to particular portions in his previous statements and he was confronted with them. However, he did not support the prosecution case at all. The only portion which he corroborated was with regard to placing certain telephone calls. Even if that were to be proved for that matter, the opinion of the expert with regard to his voice sample were to be accepted, the same would not amount to substantive or material evidence pointing to PW-57's complicity and his being an offender prima facie under Section 193 IPC. As a result of this discussion, it is held that no case is made out against PW-57 Ashok Dutt. The notice as against him is hereby discharged.

Crl. M.A.1914/2007: PW-60 Baldev Singh

69. The prosecution alleged that Baldev Singh made a statement to the police during investigation on 16.07.1999 saying that he owned a general store called M/s Manju General Store in the main market in Moonter. He said that his friend Ishdeep Sharma, S/o M.L. Sharma who belonged to the same village was involved in construction business and about 2+ months earlier, Ishdeep was given the work of renovation in

Piccadilly Resort; he used to go to meet him there. The owner of Piccadilly Resort Shyam Sunder Sharma used to reside in Chandigarh. He used to meet Shyam Sunder Sharma many times when he went to Manali to meet Ishdeep. When he went to Piccadilly Resort, Manali on 02.05.1999, about 9 o.clock in the morning to meet Ishdeep, he saw the said Shyam Sunder Sharma along with a semi-balding friend aged about 40 years. Shyam Sunder Sharma and his friend sat in a car and left. The witness was made to see ten photographs and asked to identify that of Shyam Sunder Sharma. He could identify Shyam Sunder Sharma and that of his friend whose name was disclosed to him by the police, i.e., Ravinder Krishan Soodan @ Titoo.

70. In their deposition in Court PW-60 Baldev Singh did not support the prosecution case at all apart from mentioning his business as owner of Manju General Store. With the permission of the Court he was cross-examined, during which he denied that the Delhi Police officials had ever met him in connection with the investigation or that on 16.07.1999. He also denied that his statement was recorded. He further denied that the police had shown the photographs of Shyam Sunder Sharma and ten others from which he could identify his photograph and also the photograph of Titoo. Upon being shown photographs Ex.16/B, he denied knowing that individual.

71. Having considered the totality of circumstances under which this noticee is alleged to have committed the offence of perjury, the Court is of the opinion that previous statements relied upon by the witnesses regarding his knowledge of Shyam Sunder Sharma or having seen Titoo with the former on 02.05.1999, were made only under Section 161 Cr.P.C. Apart from this important aspect, the witness would, even if he had supported the prosecution, have played an extremely peripheral role.

72. In view of this discussion, it is held that case alleged against PW-60 has not been prima facie established. The notice issued to him is accordingly discharged.

Cr. M.A No. 1915/2007: Ishdeep Sharma, PW-61

73. The prosecution alleged that Ishdeep Sharma, PW-61 made a statement under Section 161, Cr.PC on 16.07.1999, that he was engaged in construction work. In the month of April/May, renovation work was

going on in Piccaddily Resorts, Manali; the premises belonged to Shyam Sunder Sharma, a resident of Chandigarh. He says that from 26.04.1999 to 02.05.1999, Shyam Sunder Sharma, the owner of the resort was present there, in connection with renovation work. He also said that on 02.05.1999 at about 9:00 AM, Shyam Sunder Sharma left with his friend Titoo, whom he knew as he often used to visit Shyam Sunder Sharma. He said that at that time, his friend Baldev Singh was also with him as he had gone to visit the witness.

74. During the trial, PW-61 said that he was a shopkeeper and had never worked as a construction contractor. He deposed that he never did renovation work in Piccaddily Resort, Manali owned by Shyam Sunder Sharma and that the police never met him in connection with the case and had not interrogated him. He deposed that he did not make any statement to the police on 16.07.1999. He denies having made the statement on 16.07.1999 in its entirety.

75. The learned standing counsel submitted that the witness perjured himself, and relied on the testimony of PW-85, who deposed as to the truth of what was stated by PW-61, and also deposed that the latter had in fact recorded the statement under Section 161. Applying the ratio in Hazari Lal and Onkar Namdeo Jadav, this Court holds that the statements made under Section 161 cannot be pressed by the prosecution to allege that the witnesses lied in court. There is no external corroboration; also there is no finding. Consequently, the notice issued to this noticee/ respondent, i.e. Ishdeep Sharma, PW-61 (Applicant in Cr. M.A No. 1915/2007) is discharged.

Cr. M.A No. 1916/2007: Ali Mohammed, PW-62

76. This noticee/respondent, according to the prosecution, had narrated, in the statement recorded by the police on 14.07.1999, that he used to drive a Tata Sumo taxi, owned by Mohan Singh Juge, at Samalkha taxi stand. In the statement, he also said that on 02.05.1999, at 8 AM his taxi had been used by the Manager of Samrat Hotel, i.e. Mangal Singh, who was accompanied by someone else, to Mani Majra, from where they returned to the hotel after two hours.

77. During the trial, the witness resiled from his statement, and said that he never knew any Mohan Singh, nor had he ever worked as a taxi driver. All the statements attributed to him were denied.

78. This court is of the opinion that the prosecution has not been able to allege a *prima facie* case against PW-62; the previous statement relied on by it, was made under Section 161, and not on oath. Furthermore, no corroborative material in the form of identification of Mangal or someone else such as Titoo, was placed on the record. It is unclear if the witness was made to sign on the previous statement; it was not confronted to him, during the cross-examination by the prosecution, with permission of court. For these reasons, the notice issued to PW-62 Ali Mohammed, is hereby discharged.

Cr. M.A No. 1917/2007: Kulwinder Gill: PW-65

79. PW-65 reportedly stated, during the investigation under Section 161 Cr.PC, that he worked in Punjabi films and that Yograj, a popular cricketer in the past, also used to act in Punjabi films. Yograj was well known to him, and used to visit him in his village. He also stated that on 02.05.1999 Yograj brought a boy to his house and told him that his name was Harkeerat Singh and that he was from America. Yograj further told him that, the boy wanted to invest money in Punjabi films and would, therefore, stay with him for 3/4 days, to see the atmosphere of the place. The witness reportedly said that the police had visited him, with the boy Harkeerat Singh whose real identity Sidhartha Vashisht alias Manu Sharma was revealed by the police. He confirmed that the said boy had stayed in their farm house from 02.05.1999 till the early morning of 06.05.1999. He claimed to be unaware of Manu Sharma or his involvement in a murder case.

80. During deposition in court, PW-65 said that though Yograj Singh and he were professionally known to each other, they were not on visiting terms. In the prosecution's cross-examination, with permission of court, he said that they met each other when they were acting in the same Punjabi film. He denied having told the police that they were good friends and that Yograj had visited his farm several times. He deposed that Yograj Singh did not visit his house with anyone, in May 1999. He denied having made any statement to the police that on 02.05.1999 Yograj brought a boy to his house and told him that his name was Harkeerat Singh and that he was from America and that Yograj further told him that the boy wanted to invest money in Punjabi films and for this reason would stay with him for 3/4 days, to see the atmosphere of the place. He denied that any SHO from Mehrauli, Delhi had gone to his

house on 11.05.1999 with any Sidhartha Vashisht alias Manu Sharma. He further denied having stated to the police, that they brought along with them the same person who resided at his place from 02.05.1999 to 06.05.1999.

81. The learned standing counsel relied on the testimony of PW101 Surinder Kumar who said that on 11.05.1999 after affixing a notice on the house entrance of Vikas Gill's house at Mohali under Section 160 Cr.PC, for his appearance on 13.05.1999 at Delhi, they affixed another notice at the house of Yograj at Panchkula. Thereafter accused Manu Sharma led the police party to Mahani Khera, district Mukhtsar Punjab where he (Manu Sharma) had stayed when he was absconding. Manu Sharma himself led the police to that house and there the statement of Kulwinder Gill and Rupender Gill (owners of the farm house) was recorded. He says that Kulwinder and Rupender Gill knew Yograj Singh and states that Manu Sharma had been taken to the farm house by Yograj. He says he recorded their statements and the same are available at Ex.PW64/A and Ex.PW65/A. He says that they were correctly recorded by him and nothing was added or deleted by him.

82. As in the case of the previous noticee/ respondents, the court notices that the primary statement relied on to establish perjury, was made by the witness, under Section 161 Cr. PC. Moreover, the complicity of Yograj and Manu Sharma, and the latter's evading arrest was the charge for which the witness would at best have been able to depose. However, the prosecution was unable to prove that charge as against Yograj. Therefore, the notice as against PW-65 (Applicant in Crl. M.A No. 1917/2007) cannot be sustained; it is hereby discharged.

Crl. M.A.1919/2007 PW-68 Mangal Singh

83. The prosecution alleged that Mangal Singh was the Manager of Hotel Samrat owned by Shyam Sunder Sharma whose statement was recorded on 09.05.1999 in which he said that on 01.05.1999 in the evening at 07.00 PM Ravinder Krishan Soodan @ Titoo telephoned the hotel and asked him whether Shyam Ji (Shyam Sunder Sharma) was present there. Mangal Singh said that Shyam Ji is in Manali, after hearing which, Titoo disconnected the phone. On 02.05.1999 at 08.00 PM Ashok Dutt, a resident of Delhi and a good friend of Shyam Sunder Sharma, the hotel owner went there and asked him regarding the whereabouts of Shyam Sunder Sharma. He also asked the witness to take him to Titoo's

house in Mani Mazra. At the instance of Ashok Dutt, the witness called for a Tata Sumo car from the taxi stand opposite the hotel and both of them went to Mani Mazra Town where Ashok Dutt talked to Titoo for about half an hour. Mangal Singh was not privy to the conversation; he noticed that Ashok Dutt tried to give Titoo an envelope which the latter did not take. Thereafter Ashok Dutt and he returned to the hotel. Tata Sumo was hired for a rent of Rs.200/-. Ashok Dutt stayed in Samrat Hotel itself. On 04.05.1999 in the early morning around 07.30/08.00 AM, Shyam Sunder Sharma went to the hotel and met Ashok Dutt in his room. He left the hotel in an angry mood and returned there at 10.30 AM. Soon after, he left with Ashok Dutt in his Mercedes car. PW-68 was aware of Ashok Dutt's telephone number in Delhi, i.e., 3347484.

84. The witness in his deposition, during the trial, admitted to being Manager of Samrat Hotel for five years and also admitted to his acquaintance with Shyam Sunder Sharma, Managing Director of hotel. He, however, resiled from all other parts of his statement and also denied acquaintance with Ashok Dutt and Ravinder Krishan Soodan @ Titoo. In the cross-examination by the prosecution, the witness was confronted with the previous statement recorded by the police. He, however, denied it as incorrect and was consistent with what he mentioned in the examination-in-chief.

85. The learned Standing Counsel argued that PW-68 deserves to be sent up for further proceedings since he had deliberately resiled from earlier statement. Counsel relied upon the testimony of PW-101 who deposed that statement of Mangal Singh, PW-68/A, was recorded accurately and also that upon the identification of Titoo's photograph by Mangal Singh, it was seized. The photograph was produced as Ex.60/D. The witness also deposed that the telephone number of Ashok Dutt, i.e, 3347484 mentioned by Mangal Singh was correctly recorded.

86. In this case too, the prosecution has sought to place reliance exclusively on the previous statement of PW-68 Mangal Singh recorded under Section 161 Cr. P.C. Such statement not being on oath cannot be the basis for an allegation that the witness perjured himself in Court during trial. Furthermore, the Court notices that PW101 admitted in the cross-examination that Ex.PW-60/D, the photograph of Titoo seized from Ashok Dutt and identified by PW68, was not under a memo. The witness was unable to explain how he got hold of it. Also, there is nothing to

suggest that telephone number 3347484 was in fact that of Ashok Dutt and that the police had verified this fact from independent source. Having regard to these facts, this Court is of the opinion that the noticee Mangal Singh who deposed as PW-68 and who is applicant in Crl.M.A.1919/2007 has to be discharged. Consequently, notice in respect of PW-68 Mangal Singh is hereby discharged. Crl. M.A.1925/2007 PW-95 - Prem Shankar Manocha

87. PW-95 was a ballistic expert. He received a reference for his expert report through a letter by the Addl. DCP of Delhi Police (Ex.PW-95/1). Three queries were addressed to him (Ex.PW-95/1B). These were replied by him in the report (produced as Ex.PW-95/2) and proved by him in the Court after examination. The witness corroborated that he had in fact dictated the report which contained his signatures. The first query pertained to the bore of the two empty cartridges; the second query was whether the empty cartridges were fired from pistol or revolver and the third query was whether the empty cartridges had been fired from the same firearm or otherwise.

88. After confirming that he had prepared the signed report, the witness proceeded to depose in Court and answered the questions put to him. It would be relevant to extract his deposition made in examination-in-chief.

"XXXXXX XXXXXX XXXXXX

And after examination the report was prepared with reference to the queries. My report is Ex.PW-95/2 which was typed at my dictation and bears my sign, at point A. On examination I came to the conclusion as under:

(i) In answer to querry no.1, in Ex.PW-95/1B regarding the bore of two empty cartridges I came to the conclusion that the caliber of two cartridge cases (mark C1 and C2) by me is .22 Bore.

(ii) Regarding querry no.2 the two cartridge cases in question I came to the conclusion that these two cartridge cases appear to have been fired from pistol. The querry at no.2 was "please opine whether these two empty cartridges have been from pistol or revolver".

(iii) Querry No.3 was 'whether both the empty cartridges have

been fired from the same fire arim or otherwise'. In reply to the querry I came to the conclusion that as the suspected fire arm which had not been sent for examination in order to link the cartridge cases with that so my conclusion that no definite opinion could be given on two .22 bore cartridge cases (C/1 and C/2) in order to link with the firearm unless the suspected fire arm is available for examination.

Court question

Q. For reply to querry no.3 the presence of the fire arm was not necessary. The question was whether the two empty cartridges have been fired from one instrument or from different instruments?
Ans. The question is now clear to me. I can answer the querry here and now. These two cartridge cases were examined physically and under sterio and comparison microscope to study and observe and compare the evidence and the characteristic marks present on them which have been printed during firing. After comparison I am of the opinion that these two cartridge cases C/1 and C/2 appeared to have been fired from two different fire arms.

XXXXXX XXXXXX XXXXXX"

The witness was treated as hostile and permission was granted to cross-examine him, to the prosecution. The relevant portions of his cross-examination are as follows:

"XXXXXX XXXXXX XXXXXX

There is nothing in the record of the Court on my report on the basis of which I have given this finding that C1 and C2 were fired from two different fire arms. I had not sent the copy of the worksheet. I have given the opinion on the basis of the worksheet which I have brought today with me.

Q. Can you produce the photographs of the microscopic views of the two cartridges were fired from different firearms so that the same can be examined by the Court?

Ans. I have not taken any photographs. The opinion is formed on the basis of examination under stereo and comparison microscope which I have already stated.

Q. Can you produce any record to substantiate that you examined C1 and C2 under microscope or by any other instrument and to prove what you actually observed?

Ans. The worksheet on which the details of examination about two cartridge cases are observed and noted on the basis of which opinion has been formed can be produced in the Court.

Q. When there was no querry as to whether C1 and C2 have been fired from one instrument or from more than one instrument why did you examined that aspect at all?

Ans. Even if the querry was to link C1 and C2 with the firearm used on the offence, the marks on C1 and C2 had to be examined under sterio and comparison microscope to group them whether they appeared to be similar or different.

8. It is correct that in my report I have used the word pistol and not pistols because the querry was whether the firearm used was a revolver or a pistol.

The worksheet does not carry any date of examination as per practice. I can give the worksheet to the Court (worksheet be filed). The handwriting in portion A to A is in the handwriting of my Junior Mr. Satinder Singh Sr. Scientific Officer, the portion B to B is in my handwriting. On the reverse side also portion A to A is in the handwriting of Sr. Scientific Officer Mr. Satinder Singh and the portion C to C is in my handwriting. The figures in the worksheet are drawn by Mr. Satinder Singh.

Q. Is it correct that according to your own notings at pt. C to C on worksheet you were of the view that definite opinion as to whether the fired cases C1 and C2 have been fired from the same firearm i.e. one firearm or from two different weapons can be given only if the fire arm involved in the question is produced otherwise not.

Ans. I have already stated that these two cartridge cases appeared to have been fired from two different firearm definite opinion would have been given once the weapon is given to me for examination.

The worksheet is Ex.PW95/C-1.
Further cases deferred.
R.O. & A.C."

89. In the judgment of this Court, whereby the accused's acquittal was reversed, the Court importantly noticed the discrepancy between the opinion of the expert, Ex.PW-95/2 and his deposition in the Court. This is what the Division Bench had to say in its judgment dated 18.12.2006 (**State v. Sidhartha Vashisht & Ors.**) 135 (2006) DLT 465:

"XXXXXX XXXXXX XXXXXX

55. Much was sought to be made of the report of the ballistic expert, Roop singh, who opined that the empties recovered from the spot of the occurence appear to have been fired from two weapons. We find from the material on record that the empties from the spot recovered vide recovery Memo Ex.100/1 as also the live cartridge recovered from the Tata Safari, Ex.PW-74/A sent for examination in July, 1999. The report of Roop Singh Ex. PW-89/DB is not evidenced per se under Section 293 of the Criminal Procedure Code since it was a photo copy in which it was incumbent upon the defence to examine Roop Singh, if they wished to rely upon his opinion. This having not been done, document Ex.PW-89/DB cannot be pressed into service to put up a case that two weapons had been used in the commission of the crime. As regards the second opinion of PW-95, Prem Sagar Manocha, we find that the opinion categorically states that it is not possible to say whether the cartridges have been fired from two different weapons. However, following a Court question, the witness seems to have rattled out everything to the contrary to his own report to support the two weapon theory which was being pressed by the defence. This witness does not appear to be a trustworthy witness. Once having rendered an opinion that it was not possible to give a report regarding the empties being fired from two separate weapons, he could not have testified to the contrary without specifically carrying out tests for that purpose afresh. The sudden emergence of the worksheets in the Court raises grave doubts as to the trustworthiness of this witness and genuineness of the work sheets. We need hardly belabour over this so-called scientific evidence since its veracity is not beyond

doubt. The two weapon theory appears to be a concoction to the defence and a manipulation of evidence in particular that of Shyan Munshi, PW-2, who, for the first time in Court, introduced such a story. The very fact that the empties were sent for examination at such a belated stage, cannot rule out the possibility of foul play to destroy the Prosecution's case during trial. We, therefore, do not think it necessary to go into further analysis of the evidence of Prem Sagar Manocha.

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90. It was argued on behalf of the State by the learned Standing Counsel that the ballistic expert's deposition, Ex. PW-95 was calculated to let the accused Manu Sharma off the hooks. It was submitted that the witness had stated that no definite opinion could be given whether the two empty cartridges were fired from the same weapon. However, on the basis of the same material, he took a somersault and gave a completely contrary opinion in the Court saying that they appear to have been fired from different weapons. It was submitted that by the time this witness stepped on to the box, the defence had formed its definite plan about a "two-weapon theory". The deposition of this witness was sought to support the "two-weapon theory". That this Court and the Supreme Court rejected the theory did not in any way undermine the fact that Ex.PW-95 gave false evidence.

91. Learned counsel for the noticee, PW-95 argued that the deposition given by him was in the capacity as an expert and a professional. There was no material on record to suggest that it was for any other purpose or that the opinion in the form of his court deposition was not honest.

Position of expert witness

92. It would be instructive to notice that an expert witness who deposes in an area of professional expertise, be it medical, forensic, engineering, pharmaceutical, or any other science, owes a duty to the court to state an honest opinion. The effect of such expert testimony during criminal trials cannot be undermined; though not conclusive on matters that an expert deposes, or gives an opinion, it can form a crucial component in the Court's conclusions. The onerousness of the task thus, cannot be understated. At the same time, the expert, as a man of professional competence and ability has to be assured autonomy and

independence, so as to ensure that he is able to fearlessly discuss, and even change his opinion for a good reason. In the UK, for some time, there was a debate whether an expert had to be granted immunity in regard to matters on which he deposes. Departing from a century old established rule that experts are immune from liability for their opinions, in **Jones v Kaney** 2011 (2) All.ER. 271 (SC), speaking for a majority of five judges, the President of the UK Supreme Court, Lord Phillips, said:

> "48. In **Cala Homes (South) Ltd v. Alfred McAlpine Homes East Ltd.,** [1995] FSR 818 Laddie J, at p 841, quoted from an article, "The Expert Witness: Partisan with a Conscience", in the August 1990 Journal of the Chartered Institute of Arbitrators by a distinguished expert who suggested that it was appropriate for an expert to act as a "hired gun" unless and until he found himself in court where
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> > "the earlier pragmatic flexibility is brought under a sharp curb, whether of conscience, or fear of perjury, or fear of losing professional credibility. It is no longer enough for the expert like the "virtuous youth" in the Mikado to "tell the truth whenever he finds it pays": shades of moral and other constraints begin to close up on him..
>
> 49. Laddie J was rightly critical of the approach of this expert. There is no longer any scope, if indeed there ever was, for contrasting the duty owed by an expert to his client with a different duty to the court, which replaces the former, once the witness gets into court. In response to Lord Woolf's recommendations on access to justice the CPR now spell out in detail the duties to which expert witnesses are subject including, where so directed, a duty to meet and, where possible, reach agreement with the expert on the other side. At the end of every expert's report the writer has to state that he understands and has complied with his duty to the court.
>
> ....
>
> An expert's initial advice is likely to be for the benefit of his client alone. It is on the basis of that advice that the client is likely to decide whether to proceed with his claim, or the terms on which to settle it. The question then arises of the expert's attitude if he subsequently forms the view, or is persuaded by the witness on the other side, that his initial advice was over-optimistic, or that there is some weakness in his client's case which he had not appreciated. His duty to the court is frankly to concede his change of view. The witness of integrity will do so. I can readily appreciate the possibility that some experts may not have that integrity. They will be reluctant to admit to the weakness in their client's case. They may be reluctant because of loyalty to the client and his team, or because of a disinclination to admit to having erred in the initial opinion. I question, however, whether their reluctance will be because of a fear of being sued - at least a fear of being sued for the opinion given to the court. An expert will be well aware of his duty to the court and that if he frankly accepts that he has changed his view it will be apparent that he is performing that duty. I do not see why he should be concerned that this will result in his being sued for breach of duty. It is paradoxical to postulate that in order to persuade an expert to perform the duty that he has undertaken to his client it is necessary to give him immunity from liability for breach of that duty."

93. The testimony of an expert in India is no different; it differs from deposition of other witnesses, only to the extent that the others, testimony is based on their observation and the first-hand experience they experience, whereas in the case of the expert, the testimony is based on the opinion he forms on the basis of the wealth of experience he gains, in the field. And yet, there is no difference in the character and content of the duty both kinds of witnesses, owe to the Court.

94. In the present case, PW-95 Prem Sagar Minocha had clearly stated his inability to give an opinion about the weapon and if it had fired the two empty cartridges that had been examined by him. However, he said, during court deposition, that the cartridges appeared to have been fired from two separate weapons - a clear departure and contradictory to what he said in his report. He testified as to the correctness of his report in the earlier part of his deposition. On confrontation, the witness was unable to say how he could be definite that the cartridges were fired from two weapons. As this court noticed, in its judgment, this conduct helped the defence urge the two weapon theory which was accepted by

the Trial Court.

95. This court has considered the rival submissions. While undoubtedly an expert witness deposes on the basis of his observations, and renders an opinion, there is no bright line which segregates his testimony from those of other witnesses. It cannot be vouchsafed definitively - as in most other matters - that expert opinion cannot ever be untrue, or dishonest. An expert may not be accurate or correct - expecting that of any human being, at all times, is to expect an impossibility. What the law expects from an expert is to give an honest opinion, based on the observation she or he makes, of the matters presented to her or him, and more crucially substantiate it in an objective manner. This court is of the opinion that prima facie, PW-95 appears to have failed in that duty, and his action in resiling from the position he took in the report (Ex. PW-95/2) is suspect, and questionable. In the circumstances, a case for further proceedings against this witness (PW-95) has been made out. Crl. M.A No. 1925/2007 is accordingly dismissed.

The deleterious effect of perjury

96. In the earlier part of this judgment, this Court had dwelt upon the origins of the offence of perjury and its adverse impact on the criminal justice system. Forswearing, as perjury was once called, challenges the fairness of the judicial system, and undermines the credibility of the process. In **Swaran Singh v. State of Punjab,** (2000) 5 SCC 668, the Supreme Court lamented the practice of perjury and further observed that:

> "The Bar Council of India and the State Bar Councils must play their part and lend their support to put the criminal system back on its trail. Perjury has also become a way of life in the law courts. A trial Judge knows that the witness is telling a lie and is going back on his previous statement, yet he does not wish to punish him or even file a complaint against him. He is required to sign the complaint himself which deters him from filing the complaint. Perhaps law needs amendment to clause (b) of Section 340(3) of the Code of Criminal Procedure in this respect as the High Court can direct any officer to file a complaint. To get rid of the evil of perjury, the court should resort to the use of the provisions of law as contained in Chapter XXVI of the Code of Criminal Procedure."

97. Courts in India have noticed the reluctance of members of the public to report crimes, and volunteer to depose in trials. The reasons vary vastly; it can be the sheer uncertainty of conclusion of proceedings, the perception that one who is willing to depose in trials, is often unduly harassed by the police, and later, through systemic delays in Courts. This results in strange situations where the Courts of law have to, predominatingly rely on testimonies of police witnesses.

98. The more serious concern faced by courts is perjury. A trend observed is that in an alarmingly large number of criminal proceedings in the country public witnesses have turned hostile. These have led to contradictory testimonies resulting in acquittal of the offenders. The course of the present case itself has revealed that a large number of public witnesses turned hostile. Whilst the standards which courts apply for sending individuals for a prosecution under Section 340 Cr. PC are clear, it would be necessary to recount the reasons why public witnesses often do not support the prosecution. The first, and most obvious reason is that statements recorded under Section 161 Cr. PC are not deemed admissible; if the witness resiles from those statement it is open to the prosecution to have her (or him) declared hostile, and conduct cross-examination, including indicating the previous statements, in order to elicit what it considers true facts. In such a situation, if the witness still does not support the prosecution, undoubtedly he cannot be deemed to have even prima facie perjured himself. There are strong public policy considerations for this course; the statement under Section 161 is not under oath; nor is the witness expected to sign the statement. The second situation is where the witness states one thing during examination-in-chief and the other during cross-examination. Here, the court could possibly take a view - given the surrounding circumstances, that the witness prima facie perjured himself. However, beyond the bare fact of the hostility of the witness, and the application or administration of penal law (perjury) the legal regime in India does not recognize the underlying causes for this malaise, which has plagued criminal prosecutions.

99. There cannot be any doubt that in many criminal cases, the accused possess and wield considerable power and influence, be it in terms of office, or money. The perception of such power being wielded liberally and without compunction, to harass, intimidate, or oftentimes win over witnesses, is wide spread; there is no gainsaying that such perception is borne out in case after case, when witnesses who are

considered bulwarks of the prosecution version ''turn turtle'' and do not support the state. A case by case approach, to contain, prevent, and eliminate altogether, such events, has to be adopted. Witnesses who need to be supported, and protected from threats of harm to themselves, or their family members or even their business interests, should be given wholehearted and unconditional protection. Those who cynically abuse the system, by turning hostile, for monetary or other extraneous consideration, have to be dealt with severely, and made to stand trial for perjury and other such offences.

100. In the order of the Supreme Court reported as **National Human Rights Commission v. State of Gujarat and Others,** 2003 (9) SCALE 329, the referred to the need for legislation on the subject (of witness protection):

> "No law has yet been enacted, not even a scheme has been framed by the Union of India or by the State Government for giving protection to the witnesses. For successful prosecution of the criminal cases, protection to witnesses is necessary as the criminals have often access to the police and the influential people. We may also place on record that the conviction rate in the country has gone down to 39.6% and the trials in most of the sensational cases do not start till the witnesses are won over. In this view of the matter, we are of opinion that this petition (by NHRC) be treated to be one under Art. 32 of the Constitution of India as public interest litigation."

In **PUCL v. Union of India,** 2003 (10) SCALE 967 while dealing with the validity of Section 30 of the Prevention of Terrorism Act, 2002, the Supreme Court referred to in detail to witnesses protection and to the need to maintain a just balance between the rights of the accused for a fair trial (which includes the right to cross-examine the prosecution witnesses in open court) and to the need to enable (a) prosecution witnesses whose identity is known to the accused to give evidence freely without being overawed by the presence of the accused in the Court and (b) protection of the identity of witnesses who are not known to the accused, - by means of devices like video-screen which preclude the accused from seeing the witness even though the Court and defence counsel will be able to see and watch his demeanour. **Zahaira Habibulla H. Sheikh & Another v. State of Gujarat and Others** AIR 2004 SC

346 (the Best Bakery Case), dealt with an instance of 37 prosecution witnesses, including several eye witnesses-many relatives of the deceased - turning hostile during the trial. The 21 accused persons were all acquitted. The State's appeal was dismissed by the High Court. Reversing the acquittal and ordering a retrial outside Gujarat, in the State of Maharashtra, the Supreme Court made several observations on the question of protection of witnesses. There too, the Supreme Court observed that, *"Legislative measures to emphasise prohibition against tampering with witnesses, victim or informant, have become the imminent and inevitable need of the day"*. The Court also referred to ''Witness Protection Programmes'' formulated in various countries and observed: "The Witness Protection Programmes are imperative as well as imminent in the context of alarming rate of somersaults by witnesses.. These were again reiterated in **National Human Rights Commission v. State of Gujarat and Ors.** 2009 (6) SCC 342.

101. Sakshi v. Union of India, 2004 (5) SCC 518 underlined that in matters relating to such sexual offences there is need to provide victim protection at the time of recording statement made before the Court. On the need for legislation, the Supreme Court again observed: *"We hope and trust that Parliament will give serious attention to the points highlighted by the petitioner and make appropriate suggestions with all the promptness it deserves."*

102. In the judgment of this Court (dated 14th October 2003, in W.P (Crl).247 of 2002) in **Ms. Neelam Katara v. Union of India,** certain directions and guidelines on witness protection were been issued, pending the enactment of legislation. The guidelines suggested by the Court, are applicable to cases where an accused is punishable with death or life imprisonment. The significance of the guidelines is that they are not confined to cases of rape, or sexual offences or terrorism or organized crime. The Court suggested the following scheme:

> "Definitions:
>
> (1)
>
> (a) "Witness" means a person whose statement has been recorded by the Investigating Officer under section 161 of the Code of Criminal Procedure pertaining to a crime punishable with death or life imprisonment.

(b) "Accused' means a person charged with or suspected with the commission of a crime punishable with death or life imprisonment.

(c) "Competent Authority' means the Secretary, Delhi Legal Services Authority.

(d) Admission to protection: The Competent Authority, on receipt of a request from a witness shall determine whether the witness requires police protection, to what extent and for what duration.

(2) Factors to be considered: In determining whether or not a witness should be provided police protection, the Competent Authority shall take into account the following factors:

(i) The nature of the risk to the security of the witness which may emanate from the accused or his associates. (ii) The nature of the investigation in the criminal case.

(iii) The importance of the witness in the matter and the value of the information or evidence given or agreed to be given by the witness.

(iv) The cost of providing police protection to the witness.

(3) Obligation of the police:

(i) While recording statement of the witness under Sec. 161 of the Code of Criminal Procedure, it will be the duty of the Investigating Officer to make the witness aware of the "Witness Protection Guidelines" and also the fact that in case of any threat, he can approach the Competent Authority. This, the Investigating Officer will inform in writing duly acknowledged by the witness.

(ii) It shall be the duty of the Commissioner of Police to provide security to a witness in respect of whom an order has been passed by the Competent Authority directing police protection."

103. The above guidelines made by this Court are the first of their kind. They deal with one aspect of the matter, namely, protection of the witnesses, but the Court had no occasion to consider the confidentiality and protection of a witness's identity before or during trial or the safeguards

necessary to ensure that the accused's right to a fair trial is not jeopardized.

Law Commission Reports on Witness Protection: 14th Report of Law Commission (1958): =inadequate arrangements' for "witnesses":

104. In the 14th Report of the Law Commission (1958), 'witness protection' was considered from a different angle. The Report referred to inadequate arrangements for witnesses in the Courthouse, the scales of travelling allowance and daily batta (allowance) paid to a witness for attending the Court in response to summons from the Court. This aspect too is important if one has to keep in mind the enormous increase in the expense involved and the long hours of waiting in Court with tension and attending numerous adjournments. Here the question of giving due respect to the witness's convenience, comfort and compensation for his sparing valuable time is involved. If the witness is not taken care of, he or she is likely to develop an attitude of indifference to the question of bringing the offender to justice.

Fourth Report of the National Police Commission (1980): handicaps of witnesses:

105. In June 1980, in the Fourth Report of the National Police Commission, certain inconveniences and handicaps from which witnesses suffer have been referred to. The Commission again referred to the inconveniences and harassment caused to witnesses in attending courts. The Commission referred to the contents of a letter received from a senior District and Sessions Judge to the following effect:

> "A prisoner suffers from some act or omission but a witness suffers for no fault of his own. All his troubles arise because he is unfortunate enough to be on the spot when the crime is being committed and at the same time "foolish" enough to remain there till the arrival of the police."

The Police Commission also referred to the meagre daily allowance payable to witnesses for appearance in the Courts. It referred to a sample survey carried out in 18 Magistrates' Courts in one State, which revealed that out of 96,815 witnesses who attended the Courts during the particular period, only 6697 were paid some allowance and even for such payment, an elaborate procedure had to be gone through.

154th Report of the Law Commission (1996): Lack of facilities and wrath of accused referred:

106. In the 154th Report of the Commission (1996), in Chapter X, the Commission, while dealing with 'Protection and Facilities to Witnesses', referred to the 14th Report of the Law Commission and the Report of the National Police Commission and conceded that there was *"plenty of justification for the reluctance of witnesses to come forward to attend Court promptly in obedience to the summons"*. It was stated that the plight of witnesses appearing on behalf of the State was pitiable not only because of lack of proper facilities and conveniences but also because witnesses have to incur the wrath of the accused, particularly that of hardened criminals, which can result in their life falling into great peril. The Law Commission recommended, inter alia, as follows:

> (a) Realistic allowance should be paid to witnesses for their attendance in Courts and there should be simplification of the procedure for such payment.
>
> (b) Adequate facilities should be provided to witnesses for their stay in the Court premises. Witnesses must be given due respect and it is also necessary that efforts are made to remove all reasonable causes for their anguish.
>
> (c) Witnesses should be protected from the wrath of the accused in any eventuality.
>
> (d) Witnesses should be examined on the day they are summoned and the examination should proceed on a day-to-day basis.

172nd Report of the Law Commission (2000): Reference by Supreme Court to the Law Commission: screen technique:

107. In March 2000, the Law Commission submitted its 172nd Report on 'Review of Rape Laws'. The Law Commission took the subject on a request made by the Supreme Court of India (vide its order dated 9th August, 1999, passed in Criminal Writ Petition (No. 33 of 1997), **Sakshi vs. Union of India**. The Law Commission gave its 172nd Report on 25th March, 2000. In respect of the suggestion that a minor who has been assaulted sexually should not be required to give his/her evidence in the presence of the accused and he or she may be allowed to testify behind the screen, the Law Commission referred to Section 273

of the Cr.P.C., which requires that *"except as otherwise expressly provided, all evidence taken in the course of a trial or other proceeding, shall be taken in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader"*. The Law Commission took the view that his general principle, which is founded upon natural justice, should not be done away with altogether in trials and enquiries concerning sexual offence. However, in order to protect the child witness the Commission recommended that it may be open to the prosecution to request the Court to provide a screen in such a manner that the victim does not see the accused, while at the same time providing an opportunity to the accused to listen to the testimony of the victim and give appropriate instructions to his advocate for an effective cross-examination. Accordingly, the Law Commission in Para 6.1 of its 172nd Report recommended for insertion of a proviso to section 273 of the Cr.P.C. 1973 to the following effect:

> "Provided that where the evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the Court may, take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused".

108. In December, 2001, the Commission gave its 178th Report for amending various statutes, civil and criminal. That Report dealt with hostile witnesses and the precautions the Police should take at the stage of investigation to prevent prevarication by witnesses when they are examined later at the trial. The Commission recommended three alternatives, (in modification of the two alternatives suggested in the 154th Report). They are as follows:

> "1. The insertion of sub-section (1A) in Section 164 of the Code of Criminal Procedure (as suggested in the 154th Report) so that the statements of material witnesses are recorded in the presence of Magistrates. [This would require the recruitment of a large number of Magistrates].
>
> 2. Introducing certain checks so that witnesses do not turn hostile, such as taking the signature of a witness on his police statement and sending it to an appropriate Magistrate and a senior police officer.

3. In all serious offences, punishable with ten or more years of imprisonment, the statement of important witnesses should be recorded, at the earliest, by a Magistrate under Section 164 of the Code of Criminal Procedure, 1973. For less serious offences, the second alternative (with some modifications) was found viable."

The Law Commission, in the above Report, did not suggest any measures for the physical protection of witnesses from the *"wrath of the accused"* nor dealt with the question whether the identity of witnesses can be kept secret and if so, in what manner the Court could keep the identity secret and yet comply with the requirements of enabling the accused or his counsel to effectively cross-examine the witness so that the fairness of the judicial procedure is not sacrificed. *Witness protection laws and policies the world over*.

109. Under the English law, threatening a witness from giving evidence is contempt of court. So also any act of threat or revenge against a witness after he has given evidence in Court, is also considered as contempt. Recently the U.K. Government enacted a law known as Criminal Justice and Public Order Act, 1994 which provides for punishment for intimidation of witnesses. Section 51 of the Act not only protects a person who is actually going to give evidence at a trial, but also protects a person who is helping with or could help with the investigation of a crime. Under a similar law in Hong-Kong, Crimes Ord. (Cap 200) HK, if the threat or intimidation is directed even as against a friend or relative of the witness, that becomes a punishable offence. In the United States, the Organized Crime Control Act, 1970 and later the Comprehensive Crime Control Act, 1984 have authorized the Witness Security Program. The Witness Security Reform Act, 1984 provides for relocation and other protection of a witness or a potential witness in an official proceeding concerning an organized criminal activity or other serious offence. Protection may also be provided to the immediate family of, or a person closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding. The Attorney General takes the final decision whether a person is qualified for protection from bodily injury and otherwise to assure the health, safety and welfare of that person. In a large number of cases, witnesses have been protected, relocated and sometimes even given new identities. The Program assists in providing

housing, medical care, job training and assistance in obtaining employment and subsistence funding until the witness becomes self-sufficient. The Attorney General shall not provide protection to any person if the risk of danger to the public, including the potential harm to innocent victims, overweighs the need for that person's testimony. A similar program exists in Canada under the Witness Protection Act, 1996. The purpose of the Act is *"to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance in law enforcement matters"* [Section 3]. Protection given to a witness may include relocation, accommodation and change of identity as well as counselling and financial support to ensure the security of the protectee or to facilitate his becoming self-sufficient. Admission to the Program is determined by the Commissioner of Police on a recommendation by a law enforcement agency or an international criminal court or tribunal [Sections 5 and 6]. The extent of protection depends on the nature of the risk to the security of the witness, the value of the evidence and the importance in the matter. The Australian Witness Protection Act, 1994 establishes the National Witness Protection Program in which (amongst others) the Commissioner of the Australian Federal Police arranges or provides protection and other assistance for witnesses [Section 4]. The witness must disclose a wealth of information about himself before he is included in the Program. This includes his outstanding legal obligations, details of his criminal history, details of his financial liabilities and assets etc. [Section 7]. The Commissioner has the sole responsibility of deciding whether to include a witness in the Program.

110. The Witness Protection Act, 1998 of South Africa provides for the establishment of an office called the Office for Witness Protection within the Department of Justice. The Director of this office is responsible for the protection of witnesses and related persons and exercises control over Witness Protection Officers and Security Officers [Section 4]. Any witness who has reason to believe that his safety is threatened by any person or group or class of persons may report such belief to the Investigating Officer in a proceeding or any person in-charge of a police station or the Public Prosecutor etc. [Section 7] and apply for being placed under protection. The application is then considered by a Witness Protection Officer who prepares a report, which is then submitted to the Director [Section 9]. The Director, having due regard to the report and the recommendation of the Witness Protection Officer, takes into account

the following factors, inter alia, [Section 10] for deciding whether a person should be placed under protection or not, i.e. the nature and extent of the risk to the safety of the witness or related person; the nature of the proceedings in which the witness has given evidence or may be required to give evidence and the importance, relevance and nature of the evidence, etc. In European countries such as Italy, Germany and Netherlands, the Witness Protection Programme covers organised crimes, terrorism, and other violent crimes where the accused already know the witness/victim.

111. Apart from public interest considerations of ensuring a proper and fair trial, where witnesses can depose without fear of intimidation, or threat, the right of such witnesses, who do step forward and courageously depose, to a life free from harassment, during and after conclusion of trial, has to be considered in the backdrop of Article 21. Obviously, this right has to be appropriately balanced with other considerations. As discussed previously the subject of witness protection and its felt need has been commented widely in judgments of courts, including the Supreme Court. It has been the subject of comment, and recommendations of several law Commissions and other official bodies. The executive has not, however, evolved any policy nor has Parliament or any state legislature brought in any appropriate legislation. The continuation of such status quo has resulted in subversion of the judicial process in a large number of cases. Though this Court is conscious of its limitation, in that general directions which implicate with policy issues should be generally not issued, having regard to the limitation of the judicial process, yet, at the same time, the Court recollects that in such situations involving executive or legislative inaction or vaccum, the courts can, in matters of public importance, issue orders and directions which are appropriate to meet the challenges. Thus, in **Vishaka v. State of Rajasthan** (1997) 6 SCC 241 the Supreme Court prescribed guidelines for universal application, to deal with the menace of sexual harassment at the workplace, stating this was essential in the *absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places*.'' In **Vineet Narain v. Union of India** 1998 (1) SCC 226, again, the Court noticed that in the absence of enacted law or policies, guidelines and directions had been issued in a large number of cases; and that such practise had

taken root in our the country's Constitutional jurisprudence; it was essential to fill the void in the absence of suitable legislation to cover the field. The Court commented that:

> "As pointed out in **Vishakha** (supra), it is the duty of the executive to fill the vacuum by executive orders because its field is co-terminus with that the legislature, and where there is inaction even by the executive for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field."

The other instances where the Court issued directions to fill a legislative or policy void, are **Lakshmi Kant Pandey v. Union of India** (1984) 2 SCC 244 (regulating inter-country adoptions), **Common Cause v. Union of India** (1996) 1 SCC 753 (regulating collection, storage and supply of blood for blood transfusions), **M.C. Mehta v. State of Tamil Nadu** (1996) 6 SCC 756 (enforcing prohibition on child labour).

112. The Court is conscious that the Supreme Court issued directions in exercise of its powers under Article 32 and Article 142. In the present instance, the Court's perspective is its suo motu action in considering appropriate directions in regard to the large number of witnesses who turned hostile, and whether action under Section 340 Cr. PC is warranted. This Court cannot obviously issue directions for universal application; nor does it possess overarching power akin to the one under Article 142 of the Constitution. Yet, acting within the scope of its power, it is of the opinion that suitable directions to the executive, particularly the concerned officials and authorities of the NCT to evolve a witness protection program which would ensure fairness of the trial process, secure the public interest in protection of witnesses, and at the same time take care that none of the accused's rights to a fair trial are compromised, are evolved and implemented.

113. In view of the above discussion, the following directions are issued:

> (1) The Govt of NCT shall immediately and in any event within ten weeks from today, issue a Witness Protection Policy which shall provide the principles and guidelines that the Police, the

prosecution and executive agencies shall follow. The guidelines shall incorporate the material elements indicated in the various reports of the Law Commission, court directions, and any other recommendations of any official committee in that regard.

(2) In any event, the law enforcement agencies (Police, Central Bureau of Investigation or the National Investigation Agency) shall conduct an assessment of the threat or potential for danger to any witness or witnesses, cited in criminal trials (this shall include the victim of a crime, as well as his or her family member or members, as well as family members of other witnesses). The assessment would include analysis of the extent the person or persons making the threats appear to have the resources, intent, and motive to implement the threats; seriousness and credibility of the threats. If such threats are assessed to be sufficiently serious, and the witnesses request law enforcement assistance, witness protection funds can be used to provide assistance to witnesses which helps law enforcement keep witnesses safe and help ensure witnesses appear in court and provide testimony.

(3) For the purposes of direction (2) above, gradation of the risk or threat can be categorized. Threat perception would be highest and ranked A if the witness, victim, or his or her family members run the risk of danger to their lives or normal way of living for a substantial period, extending beyond the trial and its conclusion. The second category can be ranked B, where the risk extends to the witness and his or her family members only during the investigation process and/or trial. The third category, C can be where the risk is moderate, and extends to harassment or intimidation of the witness during the investigation process. These instances are merely illustrative and the executive agencies can formulate better approaches, having regard to the nature of the case and the kind of threat perceptions that are encountered.

(4) Depending on the categorization of threat perception, the agency concerned shall ensure that all appropriate security cover is extended to the witness, victim, or his or her family members for the appropriate duration, i.e. the investigation, trial and post-trial periods. Adequate measures to ensure that the lives of such

individuals are free from threat for sufficiently long period or periods, including but not limited to extending security cover to them, shall be taken. The agencies concerned shall also ensure that the witnesses or victims are transported to safety during investigation and trial, and proper security is given to them.

(5) The above security measures shall be independent of other action, such as granting funds and resources to the witnesses to relocate and start a new life, engage in new avocations or professions, as the case may be. These may be one time funds, or proper and full assistance for such relocation. The agencies concerned shall also factor in and include new identity for witnesses and victims.

(5) In the event of any change in witness identity, it shall be the responsibility of the state to ensure that the knowledge and details of such move is restricted to the barest minimum number of people, and such new identity is fully protected. Access to such information shall be limited, and all methods of securing it shall be deployed.

(6) As long as any individual is the subject of such program the agencies shall ensure that an officer or given set of officers is made available to each such individual, to cater to any emergent situation, including the eventuality of such cover or identity getting exposed.

(7) The above scheme or program shall be applicable in the first instance, to capital crimes or those punishable with life imprisonment, including the offence of rape. In any other case, depending on the gravity of the threat perception, the provisions of the program shall be made applicable.

(8) Adequate budgetary assessment to implement this programme shall be made and a separate fund, to implement the scheme, shall be created, within the said period of ten weeks by the Finance Department of the Govt. of Delhi, in consultation with all the stake holders, i.e. police agencies, Department of Home and the Law Department. The fund shall be operable in the manner prescribed by the said departments, through applicable guidelines, for the purpose of proper effectuation of this scheme.

(9) The programme shall include a provision whereby witnesses are informed of its existence, whenever their statements are to be recorded under the Code of Criminal Procedure, both during investigation or during trial, to enable them to seek protection. It is open to the court concerned also to entertain applications in that regard, and forthwith seek the response of the prosecuting agency. The latter shall conduct threat analysis with utmost expedition and in any event within three days of receiving it. Pending such analysis, the agency shall consider and grant minimum security cover as may be appropriate in the circumstances.

(10) The above directions shall bind and govern the Govt. of NCT of Delhi, till it is replaced by suitable legislation.

(11) The Govt of Delhi shall prepare an Action Taken Report, and place it before the Court, at the end of ten weeks.

(12) The matter shall be placed before an appropriate Bench, to be nominated by the Hon'ble Chief Justice who may consider treating it as a public interest litigation, to be dealt with as such, regarding suitable monitoring of the scheme till it gets underway in an appropriate manner.

114. In view of the above discussion, Crl. M.A.Nos.18991902/ 2007, 1904/2007, 1906/2007, 1908-1910/2007, 19121917/ 2007, 1919/ 2007 and 1926/2007 are hereby dismissed. Crl. M.A 1898/2007 and Crl. M.A 1925/2007 are hereby disposed of with a direction to the Registrar General of this Court to file a complaint before the competent court having jurisdiction to consider and take action under Section 340 Cr.PC against the respondents in the above applications. All rights and contentions of such individuals to defend themselves are expressly kept open; it is expressly stated that nothing mentioned in this judgment shall be reflective of the merits of the matter.

115. The Registry is directed to list the matter next on 8th July, 2013 before an appropriate Bench, after obtaining orders from the Hon'ble Chief Justice, and subject to his order, registering the present proceedings as a public interest litigation, for the purpose of monitoring implementation of the directions contained in Para 110 above.

ILR (2013) IV DELHI 2706
CRL. A.

MUMTAZ ....APPELLANT

VERSUS

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

(G.P. MITTAL, J.)

CRL. A. NO. : 214/2011 DATE OF DECISION: 22.05.2013

Indian Penal Code, 1860—Sections 363, 376(2), 323—Appellant was convicted under Sections 363/376/323 IPC—Whether improvements made by a witness during examination before the Court which has the effect of changing the entire case of the prosecution, can be made basis of conviction for an offence which was never complained of or revealed to have been committed?—Right to cross examine in criminal trial includes right to confront the witness against him not only on fact but by showing that examination-in-chief was untrue—Trial Court has to discern the truth after considering or evaluating testimony of material prosecution witnesses on the touchstone of basic human conduct, improbabilities and effect of disposition before the Court—Trial Court failed to protect the statutory right to have fair trial guaranteed under Article 21 of the Constitution—Impugned judgment is mere reproduction of testimony of witnesses citing judgments that uncorroborated testimony of victim can form basis of conviction but without addressing to (sic) to the second test i.e. sterling quality as well as effect of improvements and embellishments which changes the entire nature of the case—If conviction is based and punishment is awarded on farfetched conjectures and surmises, it

would amount to doing violence to the basic principles of criminal jurisprudence—Conviction of Appellant for offence punishable under Section 363, 37692 and 506 IPC set aside in the absence of creditworthy evidence—Appeal disposed of.

[As Ma]

APPEARANCES:

FOR THE APPELLANT : Ms. Charu Verma, Advocate.

FOR THE RESPONDENT : Ms. Rajdipa Behura, APP for the State.

CASES REFERRED TO:

1. *Rai Sandeep @ Deepu* vs. *State of NCT* 2012 (8) SCC 21).
2. *Narender Kumar* vs. *State (NCT of Delhi)* AIR 2012 SC 2281.
3. *Rupeshwar Tanti* vs. *State of Gujarat* 2012, Cri.L.J. 2549.
4. *Rai Sandeep @ Deepu* vs. *State of NCT of Delhi* 2012 (131) DRJ 3 (SC).
5. *Narender Kumar* vs. *State (NCT of Delhi)* AIR 2012 SC 2281.
6. *Alagarsmy & Ors.* vs. *State by Deputy Superintendent of Police* AIR 2010 SC 849.
7. *Rajoo & Ors.* vs. *State of Madhya Pradesh* AIR 2009 SC 858.
8. *Zahira Habibullah Sheikh* vs. *State of Gujarat* AIR 2006 SC 1367.
9. *Ratansinh Dalsukhbhai Nayak* vs. *State of Gujarat,* 2004 Cri.L.J. 19.
10. *Uday* vs. *State of Karnataka* MANU/SC/0162/2003 : AIR 2003 SC 1639).
11. *Shakila Abdul Gafar Khan* vs. *Vasant Raghunath Dhoble* (2003) 7 SCC 749.

12. *Ranjit Hazarika* vs. *State of Assam* (1998) 8 SCC 635.
13. *Dattu Ramrao Sakhare* vs. *State of Maharashtra* (1997)5SCC341.
14. *Bharwada Bhoginbhai Hirjibhai* vs. *State of Gujarat* AIR 1983 SC 753.
15. *Hussainara Khatoon & Ors.* vs. *Home Secry. State of Bihar* (1980) 1 SCC 98.
16. *Tukaram and Anr.* vs. *The State of Maharashtra* MANU/SC/0190/1978 : AIR 1979 SC 185.
17. *Maneka Gandhi* vs. *Union of India,* MANU/SC/0133/1978 : [1978]2SCR621.
18. *Gideon* vs. *Wainwright,* (1963) 372 US 335: 9 L Ed 799.

RESULT: Conviction set aside.

G.P. MITTAL, J.

1. In the recent past, Delhi - the Capital City of our Country has witnessed unprecedented protests by *'Aam Aadmi'* (common man) and there was public outcry to make the city safe for women who have been guaranteed equal rights to live with dignity. Delhi was referred to as 'Rape Capital' by every newspaper highlighting instances and plight of rape victims. People from all strata of society came on the street with the demand of 'Death Penalty for Rapists'. To address the concern of the citizens and to ensure speedy trial of rapists, Fast Track Courts were created to deal with the cases of sexual offences. Aim was to provide speedy justice and also send a strong message to the offenders as well the to the potential offenders that legal system is capable of tackling the problem and punishing the guilty without any delay thereby providing some solace to the victims of sexual assault that the guilty has been punished as per procedure established by law.

2. Being conscious of misuse of the provisions of rape and the effect it can have on the accused, in the context of evaluating the testimony of the rape victim, following observations were made by the Supreme Court in **Rajoo & Ors. v. State of Madhya Pradesh** AIR 2009 SC 858:

'....It cannot be lost sight of that rape causes the greatest distress

and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication.... there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.'

3. In this case registered under Sections 354/323 IPC, the Appellant has been convicted under Sections 363/376(2) (f)/323 IPC. This Appeal raises many issues leading to serious concern with reference to the duties of the Trial Court to ensure protection of statutory rights as well as right to have fair trial in criminal cases guaranteed under Article 21 of the Constitution of India. Further the purpose of providing legal aid and effectiveness of the existing legal aid system and whether it is able to achieve the desired purpose also comes to the fore. This Appeal is a glaring example as to how mountain can be made out of molehill by the victim and her mother.

4. How poverty leads to unending misery for an accused and how the concept of providing legal aid to those persons, who are not able to defend themselves by getting legal assistance at their own expenses, has failed to achieve the desired purpose, can be best answered by the Appellant who had been sentenced to undergo rigorous imprisonment for ten years with fine for rape which he did not commit. This case also brings in limelight the need to have an experienced counsel on the panel of legal aid especially for heinous crimes like the present one so that the legal aid provided to such an accused is not for 'namesake' or an 'eye wash' only.

5. Facts giving rise to the prosecution of the Appellant are narrated in the complaint Ex.PW1/A made by the child victim (name of the child victim withheld to conceal her identity and hereinafter referred to as 'J'). She made statement to the police that the Appellant came to her house to ask for a utensil to keep vegetables *(subzi ke liye bartan mangaa)*. Her father asked her to give the utensil. She gave the utensil to the Appellant and on the pretext of giving toffee to her, the Appellant took her to the gali and thereafter lifted her in his lap and started pressing her *(bheechnein laga)*. She raised alarm and many persons from *jhuggis* gathered there. At that time, the Appellant slapped on her face resulting into an injury on her lip. Thereafter the crowd brought the Appellant to her mother and

she ('J') narrated the incident to her mother. On the basis of the above statement made by 'J', case FIR No.299/2009 under Sections 354/323 IPC was registered at PS Seelampur. After completion of investigation, a chargesheet was filed against the Appellant for committing the offences punishable under Sections 354/323 IPC.

6. The Appellant was charged by learned MM for committing the offences punishable under Sections 323/354 IPC on 09.08.2009. When the child victim i.e. PW-1 'J', who was aged about nine years on the date of her examination, was examined by the Court of Magistrate, she gave a new twist to the case by stating before learned MM of she being repeatedly raped by the accused. On the basis of the statement made by the child victim, learned MM committed the case to the Court of Session. Another charge for committing the offences punishable under Sections 363/376/323 IPC was framed by learned Addl. Sessions Judge on 03.10.2009.

7. The prosecution examined seven witnesses to prove its case. Child victim 'J' was again examined as PW-1A. Statement of the Appellant was also recorded under Section 313 CrPC.

8. After considering the testimonies of material prosecution witnesses especially the child victim and her mother, believing the testimony of the child victim, observing that it was truthful and convincing requiring no further corroboration, the Appellant was convicted under Sections 363/376/323 IPC vide impugned judgment dated 23.07.2010.

9. It is pertinent to note here that though the Appellant was charged and also convicted for committing the offences punishable under Sections 363/376/323 IPC, while awarding sentence learned Addl. Sessions Judge lost sight of the charges for which the Appellant was tried and convicted. While passing the order dated 27.07.2010 on the point of sentence, the Appellant was sentenced under Section 376(2) (f) IPC to undergo rigorous imprisonment for ten years with fine of Rs.10,000/-, in default to undergo rigorous imprisonment for one year, further under Section 323 IPC to undergo simple imprisonment for six months with fine of Rs.500/-, and in default to undergo simple imprisonment for ten days. Further he was sentenced under Section 506 IPC to undergo rigorous imprisonment for two years with fine of Rs.1000/- and in default to undergo rigorous imprisonment for two months although the Appellant was neither charged nor convicted under Section 506 IPC.

10. On behalf of the Appellant, conviction and sentence under Sections 363/376(2) (f) IPC has been challenged mainly on the ground of improbabilities in the case of prosecution as also on total change of version by the child victim and her mother from what was initially given at the time of registration of the case which makes the entire case unbelievable. Learned counsel for the Appellant has submitted that when initially the case of the prosecution was that the child was lifted by the accused and she was pressed by him in his grip and also slapped, at the most, he could have been convicted under Sections 354/323 IPC for which he was initially charged and to that extent the Appellant does not dispute that he had lifted the girl in his lap and when she cried, he slapped her resulting into an injury on her lip.

11. Learned APP for the State has supported the version of the child victim and submitted that the explanation has been given by PW-2 and her mother that due to shame, they did not disclose about the rape at the time of medical examination of 'J'. It is urged that the Appellant has failed to make out any case to persuade this Court to take a different view in the matter than the view taken by the learned Trial Court. Learned APP tried to convince this Court that it is settled legal position that conviction can be based on the sole testimony of victim of rape and here the victim was a nine year old girl, who has been repeatedly raped by the Appellant, and her testimony does not suffer from any infirmity. Referring to the MLC, learned APP has submitted that absence of injury on private parts is no ground to disbelieve the version of PW-1 'J' as no animus has been suggested to PW-1A and PW-2 during cross examination which could be a reason to falsely implicate the Appellant in this case.

12. Since the Appellant has been convicted on the basis of testimony made by the child victim and her mother during their examination before the Court which is at total variance to the version given at the time of registration of FIR, a mammoth exercise is required to be undertaken to dig out the truth from the improved and embellished version of the prosecution witnesses.

13. To note the inconsistencies, embellishments and exaggeration, it is necessary to highlight the salient features of the statement of the child victim in the complaint Ex.PW1/A on the basis of which FIR was registered and thereafter during her examination before learned MM on

18.09.2009. Her third statement was recorded by learned Addl. Sessions Judge while conducting trial for the offences punishable under Sections 363/376/323 IPC. Careful scrutiny of the statement of the mother of the child victim recorded under Section 161 CrPC and her statement recorded before the Court is also necessary for the reason that not only she was present at the time when the Appellant allegedly took away her daughter but also at the time of his apprehension, medical examination of the child victim as well at the time of arrest of the Appellant. The different versions are extracted hereunder:-

In Complaint Ex.PW1/A:

(i) Child victim 'J' states she resides at the given address alongwith her family and stated to be a student of class IV.

(ii) On 07.08.2009 at about 8.00 pm, one boy came to her house and asked for a utensil to keep vegetables *(subzi ke liye bartan manga)*.

(iii) At the instance of her father, she gave the utensil to him.

(iv) On the pretext of giving her toffee, he took her to the gali and thereafter lifted her in his lap and started pressing her *(bheechnein laga)*.

(v) She raised alarm calling Mummy-Mummy.

(vi) On hearing the noise, many persons from the *jhuggi* gathered there and at that time that boy slapped on her face resulting into an injury on her lips.

(vii) The crowd which had gathered there brought that boy, whose name was revealed as Mumtaz, to her mother and she ('J') narrated the incident to her mother.

(viii) The public persons handed over Mumtaz to ASI Yamuna Prasad who as per the endorsement on Ex.PW1/A, ASI Yamuna Prasad was on patrolling duty alongwith Ct.Mobin Ali when at about 10.30 pm on seeing the crowd collected there, they stopped there. Accused Mumtaz was handed over to them and he recorded the statement of 'J' and sent rukka for registration of FIR.

Supplementary statement of 'J' recorded by police on 18.08.2009

The Accused was arrested in her presence, his personal search was conducted but nothing was recovered and his arrest memo was prepared which was signed by her.

It is strange that 'J' - a nine year old girl was cited as a witness to arrest memo and personal search memo.

Statement of PW-1 'J' recorded by learned MM on 18.09.2009

(i) Accused came to her to ask for a utensil which she handed over at the instance of her father.

(ii) Accused pressed her mouth and took her away.

(iii) Accused took her towards Shastri Park in a dark room where he laid down on her, opened the chain of his pant, removed his shirt and did *'galat kaam'*.

(iv) Accused had penetrated his 'susu karne wala'.

(v) She tried to raise alarm but he shut her mouth.

(vi) Then after wearing the clothes, he took her to a field (khet) where again he did the same act after making her lie down on the grass.

(vii) Accused took her to her house and left her outside her room where he was apprehended by her *'Ammi'* (mother) and brother.

(viii) Accused was beaten and taken to the police station and handed over to the police.

Statement of PW-1A 'J' recorded by learned ASJ on 16.01.2010

(i) 'J' was going to bring sweetmeats when accused met her near the stairs of her house and told her that her father was calling her.

(ii) He took her to Shastri Park at his *jhuggi* where he removed his clothes and her clothes, made her lie down and sat on her and put his private part into her private part. *(Apne pesab karne wale ko mere pesab karne wali jagah me lagaya aur mujhe dard hua)*.

(iii) When she cried, he gagged her mouth with a cloth, hit her on her face with *danda* and fist and also hit on her stomach with *danda*.

(iv) She started crying and when somebody asked as to why he was beating her, he replied that she was his niece.

(v) Thereafter he took her to Shastri Park and did the same act with her.

(vi) He again took her to a room and asked her to sleep there, instructed her not to go out as police was outside and again he did the same act with her.

(vii) At the time of doing the same act, he also said that her mother and father also do the same act which he was doing with her, on which she also said that his mother and father might be doing the same.

(viii) She asked him to leave her to her house.

(ix) He accompanied her, offered her water, dal khichri, and one ice-cream which she threw.

(x) On way back, he threatened to break the leg of her father if she disclosed the incident to anyone.

(xi) She was left near her house near a biryani shop and was abused by him.

(xii) He was caught by her brothers and other persons near the biryani shop.

(xiii) She narrated the incident to her brothers Ashif, Monu and Sonu and thereafter to her mother.

(xiv) She informed the police that the accused had done badtamizi with her.

(xv) She was taken to the hospital but she did not tell about rape to the doctor.

(xvi) She had pain in the stomach for which she was taken to a nearby doctor who gave her some medicine and thereafter her underwear was not getting dirty, earlier it was getting dirty.

Cross examination of PW-1A 'J'

(i) She narrated the entire incident to the police as well as to the Magistrate.

(ii) Accused did *galat kaam* with her on two occasions, once in a room and then on the grass in a park.

(iii) No blood came out after the wrong act.

Statement of Amina - mother of the child victim, recorded under Section 161 CrPC on 08.08.2009

(i) She was residing at the given address alongwith her family and 'J' her daughter, aged about nine years, was a student of class-IV.

(ii) On 07.08.2009 at about 8.00 am, one boy came to her house and asked for a utensil which was given by 'J' on instructions of her father.

(iii) After the utensil was given, he also took 'J' alongwith him on the pretext of giving toffee to her.

(iv) After sometime, she heard the cries of her daughter who was calling Mummy-Mummy and when she came out, she saw her daughter in the grip of the accused, whose name was revealed as Mumtaz.

(v) While 'J' was crying, she was slapped by him.

(vi) Public persons gathered there and police also reached afterwards.

(vii) Police made inquiries from her daughter and recorded her statement.

(viii) Her daughter was taken by the police to hospital and she accompanied her.

(ix) After registration of FIR, site plan was prepared at her instance, Mumtaz was arrested and memos were prepared.

Statement of PW-2 Amina - mother of the child victim recorded before the Court on 16.01.2010

(i) In the year 2009, at about 6.00/7.00 pm when she was present in her house alongwith her children, accused came to her house and asked for a utensil for which she refused but her husband asked her (PW-2 Amina) to give it to him.

(ii) She gave the utensil and asked 'J' to hand over the same to the accused on the ground floor as they were living on the first floor.

(iii) Thereafter 'J' went missing and they started searching her.

(iv) Accused brought 'J' near the biryani shop where he was apprehended by public persons as by that time everybody in the locality knew that 'J' was missing.

(v) She asked 'J' whether accused had done any *badtamizi* to which she said 'yes'.

(vi) 'J' was in bad shape and was not able to walk properly and informed that she was unable to urinate and defecate.

(vii) She tried to take her for urination but she could not urinate.

(viii) Accused was taken by them to the police station alongwith the child.

(ix) The SHO sent them to the IO and she was asked to check the private part of the child.

(x) She checked and found that there was swelling and thereafter the child was taken to GTB hospital where she was examined by the doctor.

(xi) In reply to Court questions put to her as to whether she disclosed the incident to the doctor, she denied saying that on account of shame, it was not disclosed.

Cross examination of PW-2 Amina - mother of the child victim

(i) She only asked 'J' whether he had done any badtamizi and 'J' did not say anything of her own.

(ii) The son of her landlord informed the police that 'J' was missing.

(iii) Police did not come to help to search the child.

(iv) Doctor tried to inquire from them repeatedly but they did not state the entire incident on account of shame.

(v) The police official knew that the child had been sexually assaulted as he had made inquiries in the police station in presence of SHO where the child had disclosed those facts.

(vi) Dr.Furkan (local doctor) had given some medicines.

(vii) She did not inform the police that she (PW-2) also sustained injuries when the accused was beaten by public persons.

14. As per statement of PW-3 Ct.Mobin Ali and PW-4 ASI Yamuna Prasad, during patrolling on 07.08.2009 when they reached near K-Block, Khatta, they saw a crowd gathered there. The child 'J' alongwith her mother met them and Mumtaz was produced before them stating that he had kidnapped her daughter. 'J' was got medically examined at GTB Hospital and after recording the statement of 'J', FIR was got registered. Accused Mumtaz was also arrested and got examined at Shashtri Park Hospital.

15. MLC of the child victim reveals that 'J' was medically examined on 08.08.2009 at 12.40 am and the history recorded on the MLC is as under :

'Alleged h/o assault at about 8.00 pm on 07.08.09
No h/o LOC, ENT, bleed, convulsion, vomiting
L/e swelling over upper lip
c/o pain over upper lip
O/E. pt. conscious, oriented
Pulse - 100/min
Chest]
CB] NAD
CNS]
P/A]
MI - Mole over Rt. Eyebrow
Adv. Syrup Ibugesic
5ml BD X 3 days'

16. Ex.PW2/9 is a small undated prescription slip by Dr. Furkan (local doctor), wherein Tab. Cifran and some antacid syrup has been

prescribed which cannot be connected with this incident.

17. MLC Ex.PW6/A of the accused shows the date and time of examination at Shastri Park Hospital as 08.08.2009 at 07.07 am. The history recorded in the MLC as under:

'Brought by ASI Yamuna Prasad 5128D, PS Seelampur for medical examination.

O/EConscious
Oriented Pulse 95/min
BP 116/74
Systemic examination - NAD

Injuries:

1. Abrasion lower lip
2. Abrasion left lumbar area
3. Abrasion over left scapular area'

18. Although it is prosecution's case that PW-3 Ct. Mobin Ali and PW-4 Yamuna Prasad stopped at K-Block Khatta on seeing the crowd, no public witness is associated with the investigation of this case. It is worth mentioning that at every stage different versions have been given by PW-1A 'J', the child victim and PW-2 Amina, mother of the child victim, as noted above in para 13 of this judgment.

19. In **Ratansinh Dalsukhbhai Nayak vs. State of Gujarat,** 2004 Cri.L.J. 19, the Apex Court while discussing its earlier decision in **Dattu Ramrao Sakhare v. State of Maharashtra,** observed as follows :

'In **Dattu Ramrao Sakhare v. State of Maharashtra** (1997)5SCC341 it was held as follows:

A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof

would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored".

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and Intelligence as well as his understanding of the obligation of an oath.

The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it; is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shake and moulded, but it is also an accepted norm that, if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.'

20. Who can be termed as a 'Sterling Witness' has been dealt with in the case of **Rai Sandeep @ Deepu vs. State of NCT of Delhi** 2012 (131) DRJ 3 (SC) wherein the quality of the testimony of the prosecutrix, which can be made as a basis to convict the Appellant, was considered in detail and it was so held :

'15. In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any

prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.'

21. On comparative analysis of the oral testimony of PW-1A 'J' and PW-2 Amina, it is seen that they have narrated entirely different versions from that which was narrated immediately after the occurrence to PW-3 Ct.Mobin Ali and PW-4 ASI Yamuna Prasad who, while on patrolling, happened to reach the spot. The act of the Appellant did not exceed the stage of lifting the child in his lap and holding her in his grip till she raised alarm due to which he slapped her which drew the attention of PW-2 Amina, after which he being apprehended there and then and handed over to PW-3 Ct.Mobin Ali and PW-4 ASI Yamuna Prasad at the spot, rules out the possibility of taking away the child from the lawful custody of her parents to three different places and commit rape on her repeatedly and again bring her back to her house.

22. The so called explanation given by PW-2 Amina i.e. due to shame rape was not reported, has to be disbelieved for the reason that the Appellant was a young man of 25 years on that date whereas the child 'J' was just nine years old, had she been raped two-three times by the Appellant at different locations within such a short span of time, her private part would have shown marks of violence, tear as well as severe bleeding. Her condition would have been such at the time of reporting the matter to the police as well as during her examination at GTB hospital that even without uttering a word tell tale signs on her body would have revealed the offence of being raped thus requiring urgent medical aid including surgery to repair the tear. But she did not even have any bleeding what to talk of any other injury on her private part or other part of the body. This belies the entire deposition of PW-1A 'J' and PW-2 Amina in the Court which is unacceptable so far as accusation of rape is concerned. The MLC of the victim also rules out any possibility of rape being committed on her. The deposition of PW-1A 'J' and PW-2 Amina before the Court is not of sterling quality. In the given facts, learned Addl. Sessions Judge erred in placing reliance on **Bharwada Bhoginbhai Hirjibhai v. State of Gujarat** and **Ranjit Hazarika v. State of Assam** (Supra) to convict the Appellant for committing the rape.

23. From the above, it can be noticed that initially the case projected in FIR was that when 'J' handed over the utensil to the Appellant, he lifted her and pressed her in his grip and slapped her when she cried Mummy-Mummy. Later on, while deposing before learned Magistrate, PW-1A 'J' stated that she was raped twice but at the time of her examination before learned ASJ, she claimed to have been raped thrice by the Appellant within that short duration. PW-2 Amina, mother of the child victim though, has stated in her statement recorded under Section 161 CrPC, that she heard the cries of her daughter immediately and the Appellant was apprehended there and then but while deposing before the Court, perhaps to make the allegations of rape believable, she talked of searching around after her daughter got missing and the police was informed by son of her landlord about her missing daughter, there is no material to support this version.

24. In the case **Alagarsmy & Ors. v. State by Deputy Superintendent of Police** AIR 2010 SC 849, the Supreme Court has highlighted the importance of FIR observing as under:

> 'The importance of FIR cannot be underestimated, as it is first version, on the basis of which the investigation proceeds. This Court, has from time to time, emphasized the importance of the FIR and as such, there can be no question about the necessity to examine the credibility of the FIR.'

25. Undisputedly, father of PW-1 who is husband of PW-2 was present in the house at that time but he has not been associated with the investigation for reasons not known. It does not Appeal to common sense that a stranger will ask for some utensil from the ground floor and the family i.e. the mother and father sitting inside would send 'J' downstairs to give the utensil.

26. On critical examination of the aforesaid evidence, I do not find it to be a case of rape as tried to be projected during examination of PW-1 'J' and her mother PW-2 Amina for more than one reason.

27. Statements of the child victim and her mother in the instant case require proper and deep scrutiny. Surprisingly, the father of the child victim, who was very much present at home when the Appellant came to their house asking for utensil to keep vegetables, has been kept behind the curtain for unknown reasons. Where evidence of victim in rape case does not inspire confidence when scrutinised viz-a-viz her conduct, conviction for rape cannot be sustained.

28. In the case of **Narender Kumar v. State (NCT of Delhi)** AIR 2012 SC 2281, it was observed as under:

> '23. The Courts, while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or significant discrepancies in the evidence of witnesses which are not of a substantial character.
>
> However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However, great the suspicion against the accused and however

strong the moral belief and conviction of the Court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (vide **Tukaram and Anr. v. The State of Maharashtra** MANU/SC/0190/1978 : AIR 1979 SC 185; and **Uday v. State of Karnataka** MANU/SC/0162/2003 : AIR 2003 SC 1639)'

29. It is trite that a victim of sexual assault is not an accomplice of the crime but a victim of another person's lust therefore her evidence need not be tested with the same amount of suspicion as that of an accomplice. The law that emerges on the issue is that if the evidence of victim is natural, convincing and found to be worthy of credence, conviction can be based without looking for corroboration.

30. It appears that only at the stage of 313 CrPC, the Appellant had occasion to open his lips and at that time, he has given the reason for his implication in this case that he had done labour work at the house of PW-2 Amina on fourth floor and balance payment of Rs.2000/- was due which when he had demanded he was given beating and falsely implicated in this case. No doubt, no such suggestion was given to any of the prosecution witnesses but it has already been recorded that legal aid counsel failed to effectively cross examine the witnesses.

31. Unfortunately, learned Addl. Sessions Judge, who is an experienced Judge, was swayed by the heinousness of the crime i.e. rape of a child, which was never committed by the Appellant or complained of by the victim or her family to the police or to the Doctor though the child was taken to GTB Hospital, which is a well equipped hospital, immediately for medical examination. The question that arises for determination in this Appeal is whether improvements made by a witness during examination before the Court which has the effect of changing the entire case of the prosecution, can be made basis of conviction for an offence which was never complained of or revealed to have been committed through medical examination or investigation so much so that till filing of the chargesheet, even the SHO/IO was never informed that child was raped.

32. On careful examination of entire evidence, I am of the view that learned Addl. Sessions Judge committed grave illegality in convicting the Appellant for committing the offences punishable under Sections 363/376(2)(f) IPC without any legal evidence worthy of credit available on record.

33. From the statement of PW-1A 'J',the child victim and PW-2 Amina, her mother, the prosecution has been able to prove its case only to the extent that the accused lifted the child in his lap when she was handing over the utensil to him and pressed her and when she cried, he slapped her. Thus, the offence that can be said to have been proved against the Appellant is of only under Section 354/323 IPC.

34. The Appellant Mumtaz appears to be a migrant labour from Bihar who came to Delhi to earn his livelihood. Learned Addl. Sessions Judge failed to take note of the fact that he was known to the family of the victim which can be inferred from the fact that as per complaint Ex.PW1/A lodged by the child victim 'J', he came to her house to take some utensil to keep vegetables and she gave the utensil to him as per directions of her father. Though the Appellant was residing in the same area, IO preferred to mention him as a vagabond without giving any place as to where he was spending his night i.e. footpath, rickshaw garage, night shelter or any other place. IO preferred to record his address as to that of his native place in Bihar and sent intimation of arrest by post to Bihar. Trial Court Record shows that even that envelope was received back undelivered. So from day one, the Appellant had no parokar or even legal aid to represent or defend him. The Appellant was arrested for committing the offence punishable under Sections 323/354 IPC and both the offences are bailable. He was produced before learned MM praying for judicial custody remand and learned MM remanded him to judicial custody for 14 days without passing any bail order in the case.

35. On the next date, on the expiry of judicial remand, he was again produced for extension of judicial remand and learned Link MM passed the bail order and in default, remanded him to judicial custody for another 14 days. Throughout trial and even during pendency of Appeal, he remained in custody as it appears that except the legal aid provided to him during trial there was none for him to bank upon.

36. A perusal of Trial Court Record shows that despite being booked for bailable offence, the Appellant throughout remained in custody for

obvious reason i.e. poverty and failure of state machinery to take effective steps to inform his family about his arrest in this case. This resulted into a situation that till he was under trial for a bailable offence, he had no surety and thereafter he was committed to the Court of Sessions for the offence of rape.

37. The prosecution has examined seven witnesses in this case and except namesake cross examination of PW-1A 'J' and PW-2 Amina i.e. the child victim and her mother, cross examination of remaining witnesses have been recorded as 'NIL'. A right to cross examination a witness apart from being a natural right is a statutory right under Sections 137 and 138 of Indian Evidence Act. The legal aid counsel provided to the Appellant during trial was rather proforma which can be gathered from the fact that there is no effective cross examination even of the material witnesses.

38. Right to cross examine in criminal trial includes right to confront the witnesses against him not only on fact but by showing that the examination-in-chief was untrue. The requirement of providing counsel to an accused at State expenses is not mere formality rather it refers to an experienced counsel who can defend the accused in the manner permissible under the law with his professional expertise.

39. In **Hussainara Khatoon & Ors. v. Home Secry. State of Bihar** (1980) 1 SCC 98, the Supreme Court has considered the plight of under trial prisoners languishing in Jail even in bailable offences merely for the reason that they are so poor that neither they can engage a good counsel nor the sureties as has happened to the Appellant before us. Explaining the need of country wide programme to provide effective professional help to the poor and needy undertrials, the Supreme Court expressed its concern to have a system that can protect their right guaranteed under Article 21 of the Constitution, it was observed:

> '6. Then there are several under-trial prisoners who are charged with offences which are bailable but who are still in jail presumably because no application for bail has been made on their behalf or being too poor they are unable to furnish bail. It is not uncommon to find that under-trial prisoners who are produced before the Magistrates are un-aware of their right to obtain release on bail and on account of their poverty, they are unable to engage a lawyer who would apprise them of their right to apply for bail

and help them to secure release on bail by making a proper application to the Magistrate in that be-half Sometimes the Magistrates also refuse to release the under-trial prisoners produced before them on their personal bond but insist on monetary bail with sureties, which by reason of their poverty the under-trial prisoners are unable to furnish and which, therefore, effectively-shuts out for them any possibility of Mease from pretrial detention. This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programme, but so far, these cries do not seem to have revoked any response. We do not think it is possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nationwide legal service programme to provide free legal services to them. It is now well settled, AS a result of the decision of this Court in **Maneka Gandhi v. Union of India,** MANU/SC/0133/1978 : [1978]2SCR621 that when Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be 'reasonable, fair sad 'Just', Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as 'reasonable, fair and just'. It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the courts process that he should have legal services available to him. This Court point-ed out in **M.H. Hoskot v. State of Maharashtra,** 1978 CriL J 1678 : "Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional experties, and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side, Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer—power for steering the wheels of equal justice under the law". Free legal services to the poor and the needy is an

essential element of any 'reasonable, fair and just' procedure. It is not necessary to quote authoritative pronouncements by judges and jurists in support of the view that without the service of a lawyer an accused person would be denied 'reasonable, fair and just' procedure. Black, J., observed in **Gideon v. Wainwright,** (1963) 372 US 335: 9 L Ed 799:

Not only these precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any perm held into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for Mm. This seems to us to be an obvious truth. Governments, both State and Federal quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed who fail to hire the beat lawyers they can get to prepare and present, their defences. That Government hires lawyers to procedure and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but is in ours. From the very beginning, our State and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him.'

40. The Appellant suffered not only on account of not being able to get services of an experienced counsel though he was tried for an offence for which minimum punishment prescribed is 10 years with fine but also for the reason that the Trial Court was not diligent enough to ensure that witnesses are effectively cross examined and that while deciding the case, the object is to discern the truth by relying only on sterling witnesses.

41. It is painful to note that while laying down guidelines for police and hospitals and sending the copies of the impugned judgment to Commissioner of Police and GTB Hospital. Learned ASJ has failed in discharge of his duties as the Trial Court has to discern the truth after considering or evaluating the testimony of material prosecution witnesses on the touchstone of basic human conduct, improbabilities and effect of deposition before the Court which was in total variance to the initial case of the prosecution i.e. case registered for committing the offence punishable under Sections 354/323 IPC, which was given the colour of committing the offence punishable under Sections 363/376(2)(f) IPC at the time of deposition before the Court. Learned Addl. Sessions Judge based conviction of the Appellant relying on the judgments **Bharwada Bhoginbhai Hirjibhai v. State of Gujarat** AIR 1983 SC 753 and **Ranjit Hazarika v. State of Assam** (1998) 8 SCC 635 that solitary statement of the victim is sufficient to base the conviction but failed to evaluate the same on the test of the well laid principles in this regard as laid down in a catena of judgments (**Rupeshwar Tanti vs. State of Gujarat** 2012, Cri.L.J. 2549, **Narender Kumar v. State (NCT of Delhi)** AIR 2012 SC 2281, **Rai Sandeep @ Deepu v. State of NCT** 2012 (8) SCC 21) and consider the effect of improvements and embellishments.

42. Learned Addl. Sessions Judge, while conducting the trial, failed to protect the statutory right to have a fair trial guaranteed under Article 21 of the Constitution. With cross examination of six out of eight witnesses have been recorded as 'NIL', other two material witnesses i.e. PW-1A 'J',the child victim and PW-2 Amina, mother of the child victim not being effectively cross examined by the legal aid counsel, should have put the learned Addl. Session Judge on alert to take corrective measures even by appointing another experienced counsel to defend the Appellant to achieve the desired purpose of providing legal aid to poor persons. More so, it became essential as the Appellant was being tried for an offence punishable under Section 376(2)(f) IPC wherein minimum sentence prescribed is ten years.

43. The impugned judgment is just reproduction of the testimony of witnesses citing judgments that uncorroborated testimony of victim can form basis of conviction but without addressing to the second test i.e. of sterling quality as well the effect of improvements and embellishments which changed the entire nature of the case.

44. While laying down guidelines for police and doctors, some introspection was required by learned Addl. Sessions Judge about his duties as Trial Court Judge. However, by writing perfunctory judgment, the Appellant/accused had been convicted for committing the offence of rape on a girl under 12 years of age. What should be the approach of Trial Court in a criminal trial was enumerated in **Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble** (2003) 7 SCC 749 and **Zahira Habibullah Sheikh v. State of Gujarat** AIR 2006 SC 1367.

45. In **Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble** (Supra), the Supreme Court observed that :

> 'The courts exist for doing justice to the persons who are affected. The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth, and oblivious to the active role to be played for which there is not only ample scope but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice in a case where the role of the prosecuting-agency itself is put in issue.'

46. In **Zahira Habibullah Sheikh v. State of Gujarat** (Supra), it was observed :

> 'This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society is not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an over-riding duty to maintain public confidence in the administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to

> determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.'

47. Before coming to the aspect as to whether for the offence under Sections 354/323 IPC the Appellant is liable to be convicted, it is necessary to record certain other facts to highlight the manner in which the concerned police official treated the Appellant after his apprehension in this case. In the entire chargesheet, local address of the Appellant has not been mentioned either by the complainant or by the police. The mere fact that father of 'J' asked her to give the utensil to the Appellant shows that he was known to the family of the child victim and he must be resident of that area. Despite the crowd being gathered at the time of apprehension of the Appellant/accused and he being handed over to the police at about 10.30 pm, there is no mention of the Appellant being given beating by the public which could result into the injuries recorded in his MLC Ex.PW6/A i.e. abrasion lower lip, abrasion left lumbar area and abrasion over left scapular area. He (the Appellant) has been got examined at another hospital in Shastri Park at 07.07 am, though the prosecutrix was got examined in the midnight and her condition was absolutely normal except minor injury on her lip. Therefore nothing prevented the police officer to get the Appellant examined at the same time in the same hospital and the injuries on the person of the Appellant remain unexplained.

48. The learned ASJ got carried away by the heinous nature of the crime and in that, lost sight of the basic principles underlying criminal jurisprudence that only legally admissible evidence can be made basis of

conviction. In the absence of any credible evidence to prove rape of the child victim by the Appellant, learned Addl. Sessions Judge should not have allowed himself to be swayed by the nature of offence which for the first time was disclosed by PW-1 'J' at the time of deposing as a witness to prove the allegations for the offence punishable under Sections 323/354 IPC. If conviction is based and punishment is awarded on farfetched conjectures and surmises, it would amount to doing violence to the basic principles of criminal jurisprudence. No doubt, an accused was involved in a heinous crime especially rape on a child of tender age, but he must be dealt with firmly and punished but only on the basis of creditworthy evidence.

49. The conviction of the Appellant for the offence punishable under Sections 363 and 376(2)(f) IPC and sentence awarded to him under Sections 363, 376(2) and 506 IPC are hereby set aside. The Appellant is convicted for the offence punishable under Sections 354/323 IPC. He is sentenced to undergo rigorous imprisonment for two years for the offence punishable under Section 354 IPC and further to undergo rigorous imprisonment for three months for the offence punishable under Section 323 IPC. Both the sentenced shall run concurrently. The period of detention has been already undergone by the convict in judicial custody in this case which shall be set off under Sec. 428 CrPC.

50. As per nominal roll of the Appellant, as on 21.02.20012, he has already undergone two years, six months and twelve days in judicial custody in this case.

51. Appeal stands disposed of in above terms. The Appellant be set at liberty forthwith if not wanted in any other case.

52. Copy of this judgment be sent to the concerned Jail Superintendent immediately for necessary compliance.

53. Copy of this judgment be transmitted to all the District & Session Judges as also to the Director, Delhi Judicial Academy to sensitize the Judicial Officers on the various aspects deliberated in the judgment.

54. LCR be returned alongwith copy of the judgment.

ILR (2013) IV DELHI 2732
CRL. A.

NARCOTICS CONTROL BUREAU ....APPELLANT

VERSUS

KULWANT SINGH ....RESPONDENT

(S.P. GARG, J.)

CRL. A. NO. : 470/1997 DATE OF DECISION: 23.05.2013

The Narcotics Drugs and Psychotropic Substances Act (NDPS Act)—Section 21, 29, 67, 42(1), 42(2), 43, 50 & 57—Appellant argued that Trial Court wrongly acquitted the respondents on technical grounds for non compliance of Sections 42(1), 42(2), 40 & 57 of NDPS Act—It was further argued that Section 41(1) was not attracted as secret information is required to be recorded in writing only if the information that narcotics drugs are kept or concealed in any building, conveyance or an enclosed place—Held, when there is specific information that narcotics drugs were concealed at a particular place, it is immaterial whether the said place is a public place or private place, provisions of Section 42 would apply—If the information is not reduced in writing, there is a violation of Section 42 (1)—The Court reiterated that if the search is to be conducted at a public place which is open to general public, Section 42 would not be applicable—But the same would not be the case if the search is being conducted on the basis of prior information and there is enough time to for compliance of reducing the information into writing—The language of Section 42 is the penal provision and prescribe very harsh punishment for the offender—It is settled principle that the penal provisions particularly with harsher punishment and with clear intendment of legislature

for definite compliance, ought to be construed strictly—The principle of substantial compliance would be applicable to cases where the language of the provisions strictly or by necessary implication admits such compliance—Non compliance of Section 50 amounts to denial of fair trial—If two views are possible on evidence adduced in the case, then one favorable to the accused should be adopted.

[As Ma]

APPEARANCES:

FOR THE APPELLANT : Mr. Satish Aggarwala, Spl. P.P. with Mr. Sushil Kaushik, Advocate.

FOR THE RESPONDENT : Mr. Sunil Mehta, Advocate.

CASES REFERRED TO:

1. *Kishan Chand* vs. *State of Haryana,* AIR 2013 SC 357.
2. *State of Uttar Pradesh* vs. *Nandu Vishwakarma,* (2009) 14 SCC 501.
3. *Directorate of Revenue and Anr.* vs. *Mohammed Nisar Holia,* 2008 (2) SCC 370.

RESULT: Appeal Dismissed.

S.P. GARG, J.

1. Present appeal has been preferred by Narcotics Control Bureau against judgment dated 17.05.1997 in Sessions Case No.12/1996 by which the respondents were acquitted. I have heard the learned Spl.P.P. for the appellant and learned counsel for the respondent-Kulwant Singh and have examined the record. It reveals that complaint for offences punishable under sections 21 and 29 NDPS Act was filed by Sh. S.K. Vadhera, Intellignce Officer, Narcotics Control Bureau on 10.09.1987 against Mkemaekolam Okorie Ugroyozer, Godfrey Kelochechi Anyonwre, Ajit Singh Bhatia, Kulwant Singh and James Litchfield (hereinafter referred as respondents No. 1, 2, 3, 4 & 5 respectively). It was alleged that on 15.06.1987, search was conducted at room No.10, Panchsheel Inn, situated at C-4, Panchsheel Enclave where respondents No. 1 to 4 were found present. During search of the room, 12 small boxes were found

which contained brown powder. The total weight of the brown powder was 2500 grams. It was further alleged that during the course of the proceedings, respondent No.2 sought permission to go to toilet. However, he escaped from the ventilator of the toilet and remained untraced. A white Maruti Car bearing No. DDC-7826 in which respondents No.3 and 4 had come to Panchsheel Inn was searched and 100 grams of narcotics drugs was recovered from a polythene bag concealed in between the front seat under the floor mat. Respondents No.1, 3 & 4 were examined under Section 67 of the NDPS Act and they admitted the recovery of the brown powder. They further confessed that 2500 grams of narcotics drugs recovered from room No.10 was delivered by respondents No.3 & 4. They also admitted to have delivered 10 grams of heroin to respondent No.5 on 15.06.1987. On the basis of voluntary statement of respondent No.3, room No.5 of Hotel Gautam located on D.B.Gupta Road was searched on 16.06.1987. Respondent No.5 was found present and he took out a small cardboard packet containing 10 grams white powder. In the statement under Section 67, he admitted the recovery and stated that the article was supplied by respondent No.3. The respondents were sent for trial after completion of the investigation.

2. It is relevant to note that respondent No.1 expired during the course of proceedings and the proceedings were dropped as abated vide order dated 11.01.1988. Respondent No.2 could not be found and was declared Proclaimed Offender. Respondent No.5 absconded during the trial and was declared Proclaimed Offender. Respondent No.3-Ajit Singh expired during the pendency of the present appeal and the proceedings against him were dropped. Only respondent No.4-Kulwant Singh has been left to face the proceedings.

3. The prosecution examined fifteen witnesses in all. In his 313 statement, Kulwant Singh pleaded false implication. Two witnesses in defence were also examined. On appreciating the evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment, acquitted both respondent No.3 (Ajit Singh) and respondent No.4 (Kulwant Singh). Being aggrieved, the Narcotics Control Bureau has preferred the present appeal.

4. Learned Spl.P.P. urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error in acquitting the respondents on technical grounds for non-compliance of

section 42 (1), 42 (2), Section 50 & 57 of NDPS Act. Learned Spl.P.P. vehemently contended that Section 41 (1) was not attracted as secret information is required to be recorded in writing only if the information is that narcotics drugs are kept or concealed in any building, conveyance or an enclosed place. In the instant case, the information was only to the effect that respondents-Ajit Singh and Kulwant Singh would deliver narcotics drugs. The information was not that the narcotics drugs was kept and concealed in Panchsheel Inn. He further contended that Panchsheel Inn was a public place and any recovery of drugs effected from there would be governed under Section 43 of NDPS Act. Information was not required to be recorded in writing. It was not secret information but was mere suspicion. Again, recovery from Hotel Gautam was effected from a public place and provision of Section 42 was not required to be complied with. The Section 42 (1) & (2) were not applicable as there was search from room No.10 Panchsheel Inn; of the car and room No.5 Hotel Gautam. Section 50 of NDPS Act is not attracted when there is a search other than 'person'. Section 57 of NDPS Act is not mandatory in nature and its non-compliance does not vitiate the trial. The prosecution had joined independent public witnesses and there were no good reasons to disbelieve the cogent testimonies of the official witnesses who had no prior animosity with the respondents.

5. Learned defence counsel for the respondent urged that there is no illegality in the impugned judgment. The prosecution was under legal obligation to comply with the mandatory provisions of Section 42 (1), (2), 50 & 57 of the Act. The public witnesses opted not to support the prosecution case and despite their lengthy cross-examination, nothing material could be extracted to point an accusing finger at the respondents.

6. Only allegations against the present respondent-Kulwant Singh are that he and Ajit Singh had gone in Maruti Car bearing No.DDC7826 to deliver narcotics and were found present in room No.10, Panchsheel Inn with respondents No.1 & 2. They had delivered the heroin wheighing 2500 grams to them. Again, from the car in question, 10 grams white powder was recovered at their instance. They also admitted that they had delivered 10 grams of brown powder to respondent No.5 and on search of room No.5, Gautam Hotel, it was produced by respondent No.5. The Trial Court, in the impugned judgment, appreciated the evidence minutely and concluded that the prosecution did not establish beyond doubt that they had complied the provisions of Section 42 (1) of NDPS Act. I find

no valid and sound reasons to deviate from that conclusion.

There is no substance in the plea that the secret information was not required to be recorded under Section 42 (1) of the Act as the information with the office of the NCB was mere 'suspicion' and no specific information. The Trial Court categorically referred to various documents including complaint (Ex.PW-1/A), Panchnama (Ex.PW-1/B), document (Ex.PW-2/E), statements of PW-1 and PW-2 to ascertain that it was a case of specific information with the officers of NCB. PW-1, in his examination-in-chief, categorically deposed that ''acting on an 'information' he along with other officers of NCB went to C-4, Panchsheel Inn where they conducted search of room No.10.'' In the cross-examination, he admitted that the information was to the effect that two persons would be going to deliver heroin to two Nigerians in room No.10 of Panchsheel Inn and the aforesaid information was disclosed to him by Deputy Director of NCB. PW-2 also in his examination-in-chief stated that they had information about two persons to come to Panchsheel Inn to deliver heroin to two persons in the room No.10 in the said Inn. In the cross-examination, he admitted that they had kept surveillance on Ajit Singh and Kulwant Singh for 10-15 days prior to the seizure of the aforesaid heroin. From the documents referred above and considering the testimonies of PW-1 and PW-2, it is crystal clear that the officers of the NCB had specific information that Ajit Singh and Kulwant Singh would go to Panchsheel Inn to deliver the narcotics to two Nigerians staying in room No.10 of Panchsheel Inn. The counsel's plea that it was a case of mere 'suspicion' cannot be accepted. There is no substance in the plea that secret information was not to the effect that narcotics drugs were kept or concealed in room No.10, Panchsheel Inn. The Trial Court considered document (Ex.D8), search authorization and Panchnama (Ex.PW-1/B). In Ex.D8, it was clearly mentioned that the information was to the effect that the narcotics drugs was concealed in the premises at room No.10, Panchsheel Inn situated at C-4, Panchsheel Enclave, New Delhi. In Panchnama (Ex.PW-1/B), the panch witnesses have stated that before the start of search, they had seen the search authorization issued by the then Deputy Director, NCB. This documentary evidence clearly showed that the information was that narcotics drugs were concealed at the aforesaid place. Inference can be drawn that it was a case of specific information with the officers of NCB with the narcotics drugs was kept in room No.10, Panchsheel Inn. Contention of the counsel

was rightly rejected by the Trial Court that provisions of Section 43 of the Act only were attracted and applicable. When there is specific information that narcotics drugs were concealed at a particular place, it is immaterial whether the said place is a public place or private place, provision of Section 42 of the NDPS Act would apply. Since the information was not recorded in writing, there was violation of Section 42 (1) of NDPS Act.

7. Regarding recovery from the car in question, again, the Trial Court was of the opinion that it violated Section 42 of the NDPS Act. It referred to Panchnama (Ex.PW-1/C), wherein it was mentioned ''before the start of search of the car, officers disclosed to S/Shri Ajit Singh and Kulwant Singh that they had reasons to believe that in the car narcotics drugs have been concealed and they want to search this car..... Inference can be drawn that officers of NCB had specific information about the concealment of the narcotics drugs in the car. Since the officer of NCB had reasons to believe that the respondents were in possession of narcotics drugs in the car, they were supposed to comply with the provision Section 42 (1) of the Act i.e. they should have recorded the information in writing. As the said information was not reduced into writing, there was violation of Section 42 (1) of the NDPS Act. In para No. (29) of the judgment, the Trial Court categorically recorded that learned PP for NCB had fairly and frankly conceded that there was violation of Section 42 (1) (2) of the NDPS Act so far as recovery of narcotics drugs from the car was concerned. Learned counsel for the appellant attempted to wriggle out of concession stating that the learned PP could not have given such concession on legal issue.

8. Again, regarding recovery of narcotics drugs from room No.5 of the Hotel Gautam conducted on 16.06.1987, the Trial Court referred to the statements of respondent No.3-Ajit Singh (PW-13/A and PW-13/B) recorded under Section 67 of the NDPS Act on 15.06.01987 and 16.06.1987 respectively as well as statement of PW-13 (B.C.Gogene). In the statement of Ajit Singh recorded on 15.06.1987, there was no whisper regarding recovery of heroin effected from Panchsheel Inn as well as from the car in question. In his statement recorded on 16.06.1987 (Ex.PW13/ B), it was mentioned that respondent No.3-Ajit Singh delivered 10 grams of heroin on 15.06.1987 to respondent No.5 in Hotel Gautam. This plea does not inspire confidence as both Kulwant Singh and Ajit Singh were under surveillance for the last 15-20 days. Had they gone to

Hotel Gautam on 15.06.1987 to deliver narcotics to him, the officers of NCB must have apprehended them then and there. There is no positive evidence as to when, at what time and by what mode Ajit Singh and Kulwant Singh had delivered 10 grams of heroin to respondent No.5 on 15.06.1987 at Hotel Gautam. The Trial Court rightly concluded that before conducting the search of the room at Hotel Gautam, Empowered Officer was under legal obligation to comply with the provision of Section 42 (1) as well as 42 (2). Since the said provisions were not complied with, there was a violation of the said Sections.

9. The findings of the Trial Court regarding violation of Section 50 of the NDPS Act do not suffer from any irregularity. The car in question was within the reach of the respondents. They had parked it within the area of Panchsheel Inn. Allegedly key of the car was made available by Ajit Singh before search of the car. Provision of Section 50 were applicable before search of the room No.10, Panchsheel Inn; search of Ajit Singh and Kulwant Singh; car and room No.5, Hotel Gautam. Similarly, findings of the Trial Court for violation of Section 57 are based on proper appraisal of the evidence. It was rightly held that the document (Ex.PW-2/A) was not a report under Section 57 of the NDPS Act. Davinder Dutt, author of the document was not examined. He was neither the seizing officer nor the officer who arrested the respondents. There is inconsistent version whether Davinder Dutt was present at the spot or not. PW-11 and PW-13 testified that Davinder Dutt was present at the spot but the prosecution case was that he was never present at the spot. Therefore, it was the duty of the seizing officer, PW-1 to send the report about seizure and arrest to his immediate officer superior to him. Since it was not done, there was non-compliance of the Section 57 of the NDPS Act.

10. In **'Directorate of Revenue and Anr. Vs. Mohammed Nisar Holia',** 2008 (2) SCC 370, the Supreme Court held :

> 14. ''.....
>
> If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely, compliance of Section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance of

the said provision would not render the search a nullity. A distinction therefore must be borne in mind that a search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance. It is also possible to hold that rigours of the law need not be complied with in a case where the purpose for making search and seizure would be defeated, if strict compliance thereof is insisted upon. It is also possible to contend that where a search is required to be made at a public place which is open to the general public, Section 42 would have no application but it may be another thing to contend that search is being made on prior information and there would be enough time for compliance of reducing the information to writing, informing the same to the superior officer and obtain his permission as also recording the reasons therefore coupled with the fact that the place which is required to be searched is not open to public although situated in a public place as, for example, room of a hotel, whereas hotel is a public place, a room occupied by a guest may not be. He is entitled to his right of privacy. Nobody, even the staff of the hotel, can walk into his room without his permission. Subject to the ordinary activities in regard to maintenance and/or house keeping of the room, the guest is entitled to maintain his privacy. The very fact that the Act contemplated different measures to be taken in respect of search to be conducted between sunrise and sunset, between sunset and sunrise as also the private place and public place is of some significance. An authority cannot be given an untrammeled power to infringe the right of privacy of any person. Even if a statute confers such power upon an authority to make search and seizure of a person at all hours and at all places, the same may be held to be ultra vires unless the restrictions imposed are reasonable ones. What would be reasonable restrictions would depend upon the nature of the statute and the extent of the right sought to be protected. Although a statutory power to make a search and seizure by itself may not offend the right of privacy but in a case of this nature, the least that a court can do is to see that such a right is not unnecessarily infringed. Right of privacy deals with persons and not places.

17. This Court times without number has laid great emphasis on recording of reasons before search is conducted on the premise that the same would the earliest version which would be available to a court of law and the accused while defending his prosecution. The provisions contained in Chapter IV of the Act are a group of sections providing for certain checks on exercise of the powers of the concerned authority which otherwise would have been arbitrarily or indiscriminately exercised. The statute mandates that the prosecution must prove compliance of the said provisions. If no evidence is led by the prosecution, the Court will be entitled to draw the presumption that the procedure had not been complied with. For the said purpose, we are of the opinion that there may not be any distinction between a person's place of ordinary residence and a room of a hotel.

19. In the instant case, the statutory requirements had not been complied with as the person who had received the first information did not reduce the same in writing. An officer who received such information was bound to reduce the same in writing and not for the person who hears thereabout.....

18. ''..... If the officer has reason to believe from personal knowledge or prior information received from any person that any narcotic drug or psychotropic substance (in respect of which an offence has been committed) is kept or concealed in any building, conveyance or enclosed place, it is imperative that the officer should take it down in writing and he shall forthwith send a copy thereof to his immediate official superior. The action of the officer, who claims to have exercised it on the strength of such unrecorded information, would become suspect, though the trial may not vitiate on that score alone. Nonetheless the resultant position would be one of causing prejudice to the accused.''

11. In **'Kishan Chand vs. State of Haryana',** AIR 2013 SC 357, the Supreme Court held :

''16. We are unable to contribute to this interpretation and approach of the Trial Court and the High Court in relation to the provisions of Sub-section (1) and (2) of Section 42 of the Act. The language of Section 42 does not admit any ambiguity. These

are penal provisions and prescribe very harsh punishments for the offender. The question of substantial compliance of these provisions would amount to misconstruction of these relevant provisions. It is a settled canon of interpretation that the penal provisions, particularly with harsher punishments and with clear intendment of the legislature for definite compliance, ought to be construed strictly. The doctrine of substantial compliance cannot be called in aid to answer such interpretations. The principle of substantial compliance would be applicable in the cases where the language of the provision strictly or by necessary implication admits of such compliance.

27. It is a settled canon of criminal jurisprudence that when a safeguard or a right is provided, favouring the accused, compliance therewith should be strictly construed. As already held by the Constitution Bench in Vijaysinh Chandubha Jadeja, the theory of "substantial compliance" would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudice against the suspect. The safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance therewith must be ensured. The law has provided a right to the accused, and makes it obligatory upon the officer concerned to make the suspect aware of such right. The officer had prior information of the raid; thus, he was expected to be prepared for carrying out his duties of investigation in accordance with the provisions of Section 50 of the Act. While discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act. Non-compliance with the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, amount to the denial of a fair trial.

21. When there is total and definite non-compliance of such statutory provisions, the question of prejudice loses its significance. It will per se amount to prejudice. These are indefeasible, protective rights vested in a suspect and are incapable of being shadowed on the strength of substantial compliance.

22. The purpose of these provisions is to provide due protection to a suspect against false implication and ensure that these provisions are strictly complied with to further the legislative mandate of fair investigation and trial. It will be opposed to the very essence of criminal jurisprudence, if upon apparent and admitted non-compliance of these provisions in their entirety, the Court has to examine the element of prejudice. The element of prejudice is of some significance where provisions are directory or are of the nature admitting substantial compliance. Where the duty is absolute, the element of prejudice would be of least relevancy. Absolute duty coupled with strict compliance would rule out the element of prejudice where there is total non-compliance of the provision.

23. Reverting to the facts of the present case, we have already noticed that both the Trial Court and the High Court have proceeded on the basis of substantial compliance and there being no prejudice to the accused, though clearly recording that it was an admitted case of total non-compliance. The statement of PW7 puts the matter beyond ambiguity that there was 'total non-compliance of the statutory provisions of Section 42 of the Act'. Once, there is total non-compliance and these provisions being mandatory in nature, the prosecution case must fail.

24. Reliance placed by the learned Counsel appearing for the State on the case of **Sajan Abraham** (supra) is entirely misplaced, firstly in view of the Constitution Bench judgment of this Court in the case of **Karnail Singh** (supra). Secondly, in that case the Court was also dealing with the application of the provisions of Section 57 of the Act which are worded differently and have different requirements, as opposed to Sections 42 and 50 of the Act. It is not a case where any reason has come in evidence as to why the secret information was not reduced to writing and sent to the higher officer, which is the requirement to be adhered to 'pre-search'. The question of sending it immediately thereafter does not arise in the present case, as it is an admitted position that there is total non-compliance of Section 42 of the Act. The sending of report as required Under Section 57 of the Act on 20th July, 2000 will be no compliance, factually and/or in the

eyes of law to the provisions of Section 42 of the Act. These are separate rights and protections available to an accused and their compliance has to be done in accordance with the provisions of Sections 42, 50 and 57 of the Act. They are neither inter-linked nor inter-dependent so as to dispense compliance of one with the compliance of another. In fact, they operate in different fields and at different stages. That distinction has to be kept in mind by the courts while deciding such cases.''

12. Besides above, it is significant to note that no independent public witness has supported the prosecution on material facts. Jai Parkash Saini and Uttam Singh, independent witnesses of recovery from room No.5, Hotel Gautam turned hostile. They were cross-examined after Court's permission but nothing material could be extracted to establish the guilt of the accused. PW-7 (Jug Lal Prashar) also resiled from his previous statement and did not support the case of the prosecution at all. In his cross-examination, after seeking permission of the Court, he revealed nothing to point an accusing finger against the accused. The prosecution did not examine independent witness PW-Vishan Dutt. The evidence of the official witnesses is to be perused with great care and caution. It is unbelievable that the NCB officers who were having surveillance over Ajit Singh and Kulwant Singh for the last 10-15 days would allow respondent No.1 to escape so easily from the toilet thorough ventilator. Room No.10 was situated on the first floor of the Inn and it was highly difficult for respondent No.1 to escape through the ventilator and disappear. Nothing has come on record if any attempt was made to find out his whereabouts thereafter. Even the ownership of the car in question has not been established. The vehicle was found registered in the name of S.K.Malhotra. He was not examined to depose as to whom he had sold the vehicle in question. Name of Ajit Singh and Kulwant Singh did not appear in the record of the Directorate of Transport as registered owners. There is not a whisper in the statements of PWs that when Ajit Singh and Kulwant Singh had entered the room No.10, they had any card board box with them. The PWs immediately went inside the room and during short interval, there was hardly any time to deliver the narcotics & also to conceal them.

13. Law relating to appeal against acquittal is very clear. The standards to be applied by the High Court while considering an appeal against acquittal is one where the prosecution establishes substantial and

compelling reasons, which by and large are confined to serious or grave mis-appreciation of evidence, wrong application of law and an approach which would lead to complete miscarriage of justice. In the present case, the Trial Court listed various grounds on which it acquitted the respondent/ accused. All of them, to my mind, are reasonable and none of them can be termed as misapplication of law or wrongful appreciation of the evidence placed before the Court by the prosecution.

14. Appeal against the acquittal is considered on slightly different parameters compared to an ordinary appeal preferred to this Court. When an accused is acquitted of a criminal charge, a right vests in him to be a free citizen and this Court is cautious in taking away that right. The presumption of innocence of the accused is further strengthened by his acquittal after a full trial, which assumes critical importance in our jurisprudence. The Courts have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, should be adopted. In **'State of Uttar Pradesh vs. Nandu Vishwakarma',** (2009) 14 SCC 501, Supreme Court held :

''23. It is a settled principle of law that when on the basis of the evidence on record two views could be taken-one in favour of the accused and the other against the accused-the one favouring the accused should always be accepted. This Court in **'Chandrappa vs. State of Karnataka',** SCC 432 observed as follows :

''42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong

circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) It two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court".

15. Considering all the facts and the circumstances of the case, I find no infirmity in the impugned judgment. The appeal is unmerited and is consequently dismissed. The Trial Court record be sent back forthwith.

ILR (2013) IV DELHI 2746
CRL. A.

ALBERT EZUNG ....APPELLANT

VERSUS

STATE GOVT. OF NCT OF DELHI ....RESPONDENT

(REVA KHETRAPAL & SUNITA GUPTA, JJ.)

CRL. A. NO. : 1462/2010 DATE OF DECISION: 29.05.2013

Indian Penal Code, 1860—Sections 302 and 300 [Exception 4]—The Accused was held guilty by the Trial Court for the offence punishable under Section 302—Appeal—Accused (appellant) argued that the occurrence had taken place without premeditation, in a sudden fight—Whether Accused can be held guilty of offence punishable under Section 302 or is entitled to benefit of Exception 4 of Section 300—Held—For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner—Conviction cannot be under Section 302 but under Section 304, Part I IPC—Appeal Partly allowed.

[As Ma]

APPEARANCES:

FOR THE APPELLANT : Mr. P.K. Singh, Advocate.

FOR THE RESPONDENT : Ms. Ritu Gauba, APP.

CASES REFERRED TO:

1. *Parkash Chand* vs. *State of H.P.,* (2004) 11 SCC 381.
2. *Sukhbir Singh* vs. *State of Haryana,* (2002) 3 SCC 327.

3. *S.D. Soni* vs. *State of Gujarat,* AIR 1991 SC 917.

4. *Sharad Birdhichand Sarda* vs. *State of Maharashtra,* AIR 1984 SC 1622.

5. *State of Himachal Pradesh* vs. *Wazir Chand and Others,* (1978) 1 SCC 130.

RESULT: Appeal partly allowed

REVA KHETRAPAL, J.

1. Challenge in the present appeal is to the judgment dated 23rd October, 2010 and the order on sentence dated 29th October, 2010 convicting the Appellant Albert Ezung for the offence punishable under Section 302 IPC and sentencing him to life imprisonment and fine of Rs. 3,000/- and in default of payment of fine to undergo RI for 3 months.

2. The brief facts of present case are as under:

The complainant Temjen Lungkumer (PW7), who was residing at E-114/115, Gandhi Nagar, Delhi with his friends Sedeivilie (PW10) and Ricky, had organized a party at his house on 9.9.2007 as he along with Sedeivilie and Ricky was leaving for his native place at Dimapur (Assam). The accused (Albert Ezung), his sister Lucy, Kezivilie (the deceased) and others were invited at the party. During the said party, Sedeivilie (PW10) was playing the guitar and others were dancing. The accused asked him to stop the guitar and to switch on the TV. Kezivilie objected to the same and a quarrel ensued between the two. This was at around 3.30 a.m. Both of them were pacified by other friends and shortly thereafter both went to the E-Block park, where Kezivilie told the accused that he would finish him. A scuffle ensued in the course of which the accused gave two blows with a knife on the chest of Kezivilie and ran away. Kezivilie was taken to Hindu Rao Hospital by the complainant Temjen (PW7) and his friends Seyievio (PW9), Sedeivillie (PW10) and Asakho (DW1) where he was declared brought dead. The duty constable Gobind Singh (PW11) present at the Hindu Rao Hospital corroborates that the deceased was brought by 2 to 3 boys. SI Ved Singh (PW6) at about 7:10 AM on receipt of DD No 5A (EX PW 6/B) along with Constable Ranvir reached Hindu Rao Hospital and obtained MLC of the deceased and met Temjen (PW7). A

complaint was lodged by the complainant Temjen (PW7) and on the complaint SI Ved Singh (PW 6) prepared the rukka and FIR (FIR No. 494/07) was registered thereon by Head constable Ranbir Singh at 9 AM. SI Ved Singh (PW6) then went to the place of occurrence i.e E-Block Park, GandhiVihar. The complainant Temjen (PW7) also accompanied SI Ved Singh. In the presence of the complainant Temjen (PW7) and SI Ved Singh (PW6), Investigating Officer, Inspector Sushil Kumar lifted the blood stained hawai chappal/slippers,blood stained earth , earth control and blood sample which were sealed and seized vide memo Ex PW 6/C, Ex PW 6/D, Ex. PW 6/E and Ex.PW 6/F. The accused Albert was arrested at the instance of the complainant Temjen (PW7). The accused got recovered the weapon of offence, viz., the knife (Ex PW 6/G) and after completion of investigation he was chargesheeted.

3. On 8.2.2008 the accused was charged for committing an offence punishable under Section 302 IPC to which he pleaded not guilty and claimed trial. The prosecution examined as many as 18 witnesses to bring home the guilt of the accused. The statement of the accused was recorded under Section 313 Cr.P.C. in which all the incriminating evidence was put to him wherein although he admitted that Temjen (PW7), Ricky and Sedeivilie (PW10) had organized a party in which Sedeivilie was playing the guitar, but denied that he had asked Sedeivilie(PW10) to stop the guitar and switch on the TV. The version of the incident given by the accused was that because he had called up Kelly, who was the girlfriend of PW7 Temjen (the complainant), Temjen got angry and came looking for him along with Kezivilie (the deceased). They attacked him and he tried to defend himself. He was not having any weapon; they were having knife. In the fight, Kezivilie received injuries. He had been falsely implicated because Kelly whom he had called was Temjen's girlfriend and Kezivilie was a friend of Temjen. He was not arrested at the instance of the complainant Temjen from near Samrat Hotel, Kingsway Camp as claimed by the prosecution nor he had made any disclosure statement, leading to the recovery of the knife; the police officer had asked him to sign one blank paper. Supplementary statement of the accused was recorded under Section 313 Cr.P.C on 7.1.2010 in order to put to him the report of the doctor (Ex.PW17/A).

4. The only evidence adduced by the accused in his support was the evidence of DW1 Asakho Chachei. According to this witness, there was a party in the house of Temjen (PW7). The third floor of that house was occupied by the accused and his sister. At about 1.00 a.m., he went to the third floor to sleep. Fifteen minutes later, he heard a lot of noise from the first floor and came rushing down. In one of the rooms, everybody was shouting at the accused but he (DW1 Asakho Chachei) was unable to get any reply from anyone as to what was wrong. When he asked the girlfriend of Temjen (PW7) (whose name the witness did not remember), she started crying. When he asked the accused, he told him that since he had called the girlfriend of Temjen (PW7) to the party, everybody was angry with him. At that time, Kezivilie told everybody to be quiet. Thereafter, Kezivilie asked the accused as to what was the problem. He (DW1 Asakho Chachei) tried to intervene but Kezivilie pushed him very hard due to which the accused got angry and ''must have punched Kezivilie''. Thereafter, the accused and Kezivilie got involved in a scuffle. Accused suffered injury on his head due to fall and Kezivilie started punching him. Thereafter Kezivilie ran away threatening to bring his friends. He (DW1) told the accused to hide himself in a park in order to avoid conflict. After sometime, Kezivilie returned with his friends and in the meanwhile Temjen (PW7) returned after dropping home his girlfriend. Temjen (PW7) took Kezivilie to the park where accused was present. After sometime when they went to the park, they saw the accused and Kezivilie in a scuffle with each other and oozing blood. When they were separated, Kezivilie told them that the accused had stabbed him but accused stated that he had stabbed Kezivilie in self-defence. After sometime, Kezivilie suddenly collapsed. 5. We have heard Mr. P.K. Singh, Advocate on behalf of the Appellant and Ms. Ritu Gauba, learned counsel for the State and perused the evidence on record. 6. Learned counsel for the Appellant contended that the judgment of the learned trial court was wholly unsustainable and suffered from serious infirmities. The evidence of the prosecution had failed to bring home the guilt of the accused. All that it showed was that there was a scuffle and during this scuffle the deceased received injuries. The learned trial court in its judgment failed to bear in mind the fact that the scuffle was between the deceased who was armed and the accused who was unarmed. It was the deceased who had come to attack the accused because he was a friend of the complainant Temjen Lungkumer (PW7) whose girlfriend the accused had telephoned

to invite her to the party. The learned trial court erred in placing implicit reliance upon the testimony of PW7 Temjen who was an interested witness and who had come to the spot i.e. the park with the deceased with the specific purpose of attacking the accused. On the plea of self-defence, however, learned counsel claimed that it is not the contention of the accused that he had done it in self-defence and this was purely the imagination of the learned trial court. He further contended that the burden was squarely upon the prosecution to establish the guilt of the accused. Reliance was placed by him in this regard on the judgment of the Supreme Court in **State of U.P. v. Ram Swarup and Anr.,** AIR 1974 SC 1570. In particular, reliance was placed on the following observations made by the Court: (SC, page 1572, para 9)

> ''9. The burden which rests on the prosecution to establish its case beyond a reasonable doubt is neither neutralised nor shifted because the accused pleads the right of private defence. The prosecution must discharge its initial traditional burden to establish the complicity of the accused and not until it does so can the question arise whether the accused has acted in self-defence. This position, though often overlooked, would be easy to understand if it is appreciated that the Civil Law Rule of pleadings does not govern the rights of an accused in a criminal trial. Unlike in a civil case, it is open to a criminal court to find in favour of an accused on a plea not taken up by him and by so doing the Court does not invite the charge that it has made out a new case for the accused. The accused may not plead that he acted in self-defence and yet the Court may find from the evidence of the witnesses examined by the prosecution and the circumstances of the case either that what would otherwise be an offence is not one because the accused has acted within the strict confines of his right of private defence or that the offence is mitigated because the right of private defence has been exceeded..''

7. Learned counsel contended that it is a well settled proposition of law that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. He referred in this regard to the decisions of the Supreme Court in **Sharad Birdhichand Sarda v. State of Maharashtra,** AIR 1984 SC 1622 and **S.D. Soni v. State of Gujarat,** AIR 1991 SC 917.

8. Per contra, learned counsel for the State contended that there was clear, cogent and convincing evidence on record to prove the guilt of the accused. She contended that three of the prosecution witnesses, namely, PW7 Temjen, PW9 Seyievio and PW10 Sedeivilie who were independent witnesses had supported the case of the prosecution in all material particulars. She sought to rebut the contention of the learned counsel for the Appellant that the plea of self-defence was purely a figment of imagination of the learned trial court by referring to certain suggestions put in this regard to PW7 Temjen Lungkumer by learned counsel of the accused in the course of his cross-examination, which needless to state were denied by the witness. Learned counsel for the State also invited the attention of this Court to the plea of self-defence taken by the Appellant in his statement recorded under Section 313 Cr.P.C to the following effect:

> ''Q.22: Why is this case against you?
>
> A: Because I called up Kelly the girlfriend of Temjen for that reason Temjen get (sic. got) angry and came looking for me along with Kezivilie. They attacked me and I tried to defend myself. I was not having any weapon. They were having knife. In the fight he received injuries.''

9. Learned counsel for the State further contended that the decisions relied upon by Mr. P.K. Singh, Advocate with regard to the burden of proof were of no avail in that it is beyond cavil that though the burden of proof does not shift, the onus most certainly does shift. The onus was upon the accused, though not as onerous, to prove by a preponderance of probabilities the defence taken by him, which he had squarely failed to discharge.

10. We first propose to deal with the contention of the Appellant's counsel that the testimony of PW7 Temjen, PW9 Seyievio and PW10 Sedeivilie who are the alleged eye-witnesses is wholly unreliable and that the said witnesses have virtually denied the version set forth in the First Information Report. A look first at the testimony of PW7 Temjen Lungkumar on whose complaint the First Information Report was lodged. In his testimony, PW7 Temjen identified his signatures on the complaint Ex.PW7/A which he stated was in his handwriting. He deposed that during investigation he had showed the spot to the police. The police had marked some places at his instance, taken blood samples and seized the

hawai chappals from the spot, i.e., the park. To be noted at this juncture that hereinafter in his testimony PW7 Temjen was hostile to the prosecution to the extent that he denied that he had in his supplementary statement (Ex.PW7/B) stated that he had joined the investigation, that he remained with the Investigating Officer for searching the accused who was eventually arrested from the bus stand Kingsway Camp at his instance and that he was present when the accused made his voluntary statement recorded by the Investigating Officer and got recovered the weapon of offence, i.e., the knife from the bushes in the park near NDPL office, E-Block, Gandhi Vihar, Delhi and his blood stained clothes which he had subsequently washed and the seizure of the aforesaid articles was effected in his presence. In his testimony in Court he stated that he saw the accused at the police station when he gave his complaint to the SHO, PS Timarpur, and that he had identified the knife and the clothes of the accused, which he was wearing at the time of the incident, when the same were shown to him by the police at the police station. Although declared hostile and extensively cross-examined by the learned Addl.P.P, he denied all the suggestions put to him with regard to his participation in the investigation. He however admitted that he had stated before the police that there was a lot of blood spread on the spot and volunteered to state that the accused had stabbed Kezivilie with knife in the right side upper abdomen, which may be near chest also. He also identified the knife Ex.P1 and accepted as correct the suggestion put to him that Kezivilie had died in the hospital due to the injuries caused by the accused person.

11. It may be noted at this juncture that learned counsel for the accused laid great stress on the fact that in the course of his cross-examination, the witness stated that he had given his complaint to the SHO in PS Timarpur in the evening time on 9.9.2007. The contention of the learned counsel for the Appellant in this regard was that it was incongruous that whereas the first information of the crime was recorded in the evening of 9.9.2007, the FIR had been registered in the morning at 9.00 a.m. Learned counsel for the Appellant also laid great stress on the fact that PW7 Temjen in his cross-examination admitted that the fact of plugging out of the TV and taking it to another room of the accused was not mentioned in his complaint Ex.PW7/A. We shall advert to these aspects of the matter a little later on, though at this stage we may note the answer to one of the suggestions put in the course of cross-examination

to this witness which shows that the accused had in fact taken the plea of self-defence before the trial court:

> ''It is wrong to suggest that the deceased casually came to the park with my kitchen knife and intended to stab the accused Albert.''

12. The version of the incident as given by PW9 Seyievio Sachu is as follows. He deposed that at the time of the incident he was residing at D-289, IInd Floor, Gandhi Vihar, Delhi. Kezivilie (deceased) was also residing with him at the said place. On 9.9.2007, Temjen (PW7) had organized a farewell party at his house and he along with Kezivilie reached the house of Temjen in the early morning to attend the farewell party. After attending the said party, he came back to his room and in the morning Kezivilie came to his room and informed him that some misunderstanding had taken place in the party and he again went to the place of the party. He along with Asakho Chachei, Sedeivilie and Ricky was coming down from the party place and they were on the stairs when they heard the noise of shouting from a nearby park. They ran towards the park and saw the accused and Kezivilie present there. Kezivilie was seen by him in a ''stabbed condition'' and blood was oozing out. Kezivilie informed him (PW9) that the accused had a knife in his hand and he had stabbed him. He further deposed that he caught hold of the accused by his hand. *The accused was having knife in his han*d. Someone came from behind at that time and pushed the accused. Thereafter, he took Kezivilie to one side, but Kezivilie collapsed and ultimately died on the way to Hindu Rao Hospital.

13. PW10 Sedeivilie gave a somewhat similar version of the incident as that given by PW7 Temjen. He stated that he was playing the guitar at the farewell party organized by Temjen and they were all singing and dancing when the accused asked him to stop the guitar and switch on the TV. This led to a verbal duel in which Kezivilie supported him (Sedeivilie) and thereafter the matter was sorted out. After sometime, he heard a shouting in the park and he alongwith Seyievio and Asakho Chachei rushed to the park. It was in the early morning but it was dark. He saw that the accused and Kezivilie were grappling with each other and Temjen (PW7) was trying to separate them. Seyievio (PW9) was also trying to separate them and when they were separated, he saw Kezivilie was already injured and blood was oozing out from his front side. They

took the injured to the Hindu Rao Hospital where he was declared brought dead. Nothing was elicited from this witness in his cross-examination to discredit his testimony in any manner.

14. From the aforesaid evidence on record, two things emerge quite clearly. The first is that there was a farewell party at the house of the complainant PW7 Temjen which was attended apart from others by the accused and the deceased. The second is that undoubtedly a quarrel took place between the accused and the deceased at the party. The prosecution would have us believe that the genesis of the quarrel was a dispute between the accused and the deceased as to whether Sedeivilie should continue to play the guitar or the TV should be switched on. It is the case of the defence on the other hand that the genesis of the dispute was that the accused had made a call to the girlfriend of the complainant (PW7 Temjen) in response to which she came to the party. This was not appreciated by the complainant leading to a dispute between the accused and Kezivilie who was a friend of the complainant Temjen (PW7). We are inclined to believe the latter version for the reason that PW7 Temjen himself in his testimony stated:

> ''At that time accused Albert came to me and asked me my reaction in case he call my girl friend next morning. The name of my girlfriend was Kelly and on the next moment I was shocked to see he opened the door and Kelly was inside. Objected to by Ld. Defence counsel. Thereafter I entered another room I saw Kezivilie, accused, Ricky and Asakho. I saw that Ricky and Asakho were separating Kezivilie and accused Albert as they had been fighting and had injury marks on them. I then requested both accused and Kezivilie to maintain calm or lest (sic. else) leave my place. I then left my flat and went outside to the house of Kelly but unable to contact her on phone, I went in a park nearby and sat there. In the meanwhile, Kezivilie was coming outside my house and he also came to park and sat besides me. Thereafter accused Albert came and started hurling abuses on Kezivilie. As I tried to intervene, accused Albert pushed me and took out a knife and stabbed Kezivilie.....''

15. Undeniably, PW7 Temjen was present at the time of the incident and also took the deceased to the hospital and, therefore, is the most material witness. We are however not inclined to believe the testimony

of this witness with regard to the real reason for the unfortunate incident for, in our opinion, even assuming there was a dispute about the playing of the TV or the guitar, it was too trivial a matter to lead to the commission of the offence. The real reason as is borne out by the testimony of PW7 Temjen himself appears to be the call given by the accused to the girlfriend of PW7 inviting her to the party and her acceptance of the said invitation. This must have irked and annoyed PW7 Temjen and his friends, one of whom was the deceased Kezivilie, resulting in an aftermath which possibly none of them had imagined. There is, however, no manner of doubt in our mind that Kezivilie met with an unfortunate end at the hands of the accused and this is also borne out by the testimonies of PW9 Seyievio and PW10 Sedeivillie who were natural witnesses to the occurrence and who tried to intervene in the scuffle which was taking place and who had seen Kezivilie in ''stabbed condition'' with blood oozing out. If the said witnesses are to be believed, they tried to intervene unsuccessfully while the accused and the deceased were grappling with each other and had subsequently taken the injured Kezivilie to the hospital where he was declared brought dead.

16. The medical evidence on record, in our opinion, also lends authenticity to the case of the prosecution. According to the postmortem report Ex.PW13/A, death of the deceased was due to haemorrhage and shock consequent to the injuries caused by a sharp-edged weapon. External injury No.1 and its corresponding internal injuries were found to be sufficient to cause death in the ordinary course of nature. The body of the deceased was having two stab wounds, one stab wound of 2.1 cm x 0.9 cm x 2 cm deep and another stab wound of 0.9 cm x 0.7 cm x 1.5 cm. It is also borne out by the report Ex.PW17/A that such injuries were possible by means of knife Ex.PW1 produced by the Investigating Officer for the examination of the expert. Thus, the medical evidence fully corroborates and confirms the testimony of the prosecution witnesses.

17. PW15 Ms. Anita Chahari examined 8 exhibits received by FSL Rohini and the FSL expert opinion (Ex.PW15/A and 15/B) further corroborates the case of the prosecution that blood was detected on the exhibits including knife and half pant of the accused along with other articles which were lifted from the spot, such as blood stained earth and chappals of the deceased. No explanation was given by the accused about the blood appearing on his half pants which were worn by him at the time of the occurrence or on the other articles. Thus, the learned trial

court rightly concluded that the ocular, medical and scientific evidence on record completely corroborates the case of the prosecution and establishes the guilt of the accused.

18. The basal question which arises in the present case is whether or not the Appellant can be held guilty of offence punishable under Section 302 IPC or whether keeping in view the fact that the occurrence had taken place without premeditation, in a sudden fight, in the heat of passion upon a sudden quarrel, the Appellant is entitled to the benefit of Exception 4 of Section 300 of the Indian Penal Code.

19. From the facts of the instant case, in our view, it cannot be said that the Appellant had the intention to inflict such injuries as would cause the death of Kezivilie. There was no previous enmity between the Appellant and Kezivilie and as a matter of fact they were good friends and Kezivilie was therefore an invitee to the party of the Appellant. Things turned sour for no rhyme or reason. Ostensibly, the cause of dispute was whether Sedeivilie (PW10) should continue to play the guitar or whether he should stop and the television installed in the room should be switched on. However, if PW7 Temjen Lungkumer is to be believed, an additional reason had arisen for quarrel at the party. The deceased had of his own accord invited the girlfriend of PW7 Temjen, namely, Kelly and this had irked and annoyed PW7 and his friends including Kezivilie. Be that as it may, there was a scuffle at the party. Stage two of the quarrel arose when the party came to an abrupt end. If PW7 is to be believed, the accused came to the park where he and Kezivilie were sitting and started hurling abuses on Kezivilie. As he (PW7) tried to intervene, the accused pushed him and took out a knife and stabbed Kezivilie on the right upper side of his abdomen. On the other hand, if the version of DW1 Asakho Chachei is to be believed, a dispute had broken out at the party with everybody shouting at the accused. He saw that the girlfriend of Temjen was weeping and the accused and Kezivilie had got involved in a scuffle. The accused hit Kezivilie on his head and on his falling started punching him. Thereafter, Kezivilie ran away threatening to bring his friends. The accused also left the place. After sometime, Kezivilie returned and PW7 Temjen took him to the park where the accused was present. A second scuffle took place between the accused and Kezivilie in the course of which the accused stabbed Kezivilie who suddenly collapsed.

20. It is apparent from the aforesaid that as per both versions, a quarrel had suddenly erupted between the accused and the deceased, who were young boys in the heat of passion. The quarrel had all the trappings of a ''sudden fight'' in which the accused who was armed with a knife caused injuries to the deceased. It was dark at that time and possibly on account of the darkness the injuries landed on a vital part of the body of the deceased. Two blows were inflicted by the accused only one of which viz., Injury No. 1 was opined to be sufficient in the ordinary course of nature to cause death. The manner of infliction of these injuries with all the attendant circumstances cannot be termed to be either cruel or unusual. The accused had not premeditated to cause the death of the deceased. His intention at best could be to teach him a lesson.

21. On an overall conspectus of the facts and circumstances, we are, therefore, of the opinion that all ingredients of Exception 4 to Section 300 are clearly attracted [See **Sukhbir Singh vs. State of Haryana,** (2002) 3 SCC 327, **State of Himachal Pradesh vs. Wazir Chand and Others,** (1978) 1 SCC 130 and **Parkash Chand vs. State of H.P.,** (2004) 11 SCC 381]. In the last case, the law with regard to Exception 4 to Section 300 was succinctly summed up as follows:

> ''6. For bringing in operation of Exception 4 to Section 300 IPC it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.''

22. The inevitable conclusion is that we hold that the offence is not covered by Section 302 IPC. We, therefore, alter the conviction of the Appellant to one under Section 304, Part I IPC. Custodial sentence of 8 years with fine of Rs. 3,000/- in default to undergo Rigorous Imprisonment for three months would, in our opinion, meet the ends of justice. The accused shall be entitled to benefit of period of remission and period undergone in accordance with law.

23. The appeal is partially allowed in the above terms.

ILR (2013) IV DELHI 2758
LPA

ZOOM-TOSHALI SANDS CONSORTIUM .....APPELLANT

VERSUS

INDIAN RAILWAY CATERING & TOURISM CORPORATION LTD. ....RESPONDENTS

(N.V. RAMANA, CJ. & JAYANT NATH, J.)

LPA NO. : 170/2012 DATE OF DECISION: 29.05.2013

Indian Contract Act, 1872—Sec. 62—Respondent invited bids—It contained a draft agreement which was to be executed between Respondent and the successful bidder—License awarded to Appellant—R Sent the final license agreement for signatures with material changes to the draft agreement, which formed part of the bid document—Held, it was impermissible for R to unilaterally changes terms and conditions.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Maninder Singh, Sr. Advocate along with Mr. Rajiv Kapur and Ms. Vatsala Rai, Adv.

FOR THE RESPONDENTS : Mr. Saurav Agarwal along with Mr. Vipul Sharde, Advs.

CASES REFERRED TO:

1. *Hind Broadcasting Company Pvt. Ltd. & Anr.* vs. *UOI* (LPA No.71/2000 decided on 14.9.2009).
2. *Delhi Development Authority & Anr.* vs. *Joint Action Committee, Allottee of SFS Flats & Anr.* (2008) 2 SCC 672.

RESULT: Appeal allowed.

JAYANT NATH, J.

1. In the present appeal, the appellant impugnes the order dated 15.11.2011.

2. The brief facts of the writ petition giving rise to the present appeal are that the respondents invited sealed bids from 14.2.2007 to 06.3.2007 for developing, operating and maintaining budget hotel at Bhubaneshwar through private participation. Annexure 7 to the bid document is stated to contain a draft agreement, which was to be executed by the parties.

3. The last date of submission of bids was 08.3.2007. After opening the technical bid and the financial bid, the respondent awarded the license to the appellant for developing, operating and maintaining of budget hotel at Bhubaneshwar. The license was granted for a period of 30 years. It is the contention of the appellant that on 20.8.2008, the respondent sent the final license agreement for signatures and in the said Draft Agreement, there were material changes as compared to the Draft Agreement, which formed part of the bid document. It is stated by the counsel for the appellant that Clauses 3.1 viii, 6, 16.2, 18.1 and 18.2 of the Agreement now sent were contrary to Clauses 7.3 and 7.4 of the Draft Agreement. The relevant clauses 7.3 and 7.4 are as follows:

> "7.3 The Licensed Asset will continue to be owned by the IRCTC and the Sub-Licensee shall have no rights in the Licensed Asset other than those explicitly stated in this Agreement. At the expiry of the licence period or earlier termination under any clause of the agreement, the ownership of the hotel building and all related assets will be transferred to IRCTC.
>
> 7.4 The Sub-Licensee shall have no right to give the licensed asset and/or the Licensed premises on rent, lease and/or license to any third party. **The Sub-Licensee cannot, without prior approval of IRCTC, assign its rights under this agreement.** Violation of this clause shall be a ground for immediate termination of this agreement. IRCTC on receiving written request for assignment of the rights of the sub-licensee may accept or reject at its own discretion without giving any reason whatsoever. The decision of IRCTC in this regard shall be final and binding on the Sub-Licensee. Whenever the right of the Sub-Licensee under this agreement is transferred or assigned in any manner whatsoever, the transferee shall be bound by all the covenants and conditions contained herein and be answerable in all respects thereof. Without prejudice to the foregoing and notwithstanding any consent granted by IRCTC, in case of any such transfer/assignment, the Sub-Licensee and the transferee shall both be jointly and severally liable to the IRCTC for compliance with the covenants and conditions, contained in this agreement and breach by the transferee shall be deemed to be a breach by the Sub-licensee.
>
> 7.31 Subject to the terms of the license agreement, both parties may modify/amend terms of this agreement in writing, whenever considered necessary, on mutually agreed terms."

4. The details of material variance as per the appellant with the Clauses of the Draft Agreement, which formed part of the Tender bid are as under:

> "A. Clause 3.1 (viii) The Licensee shall not part with or create any encumbrance or third party right on the whole or any part of the property. Without prior written approval/permission of IRCTC, the Licensee shall have no right to give the property (or any part thereof)on rnt, lease, license or part with possession in any manner in favour of any third party other than for purpose of room rental, Banquets, Party rooms/conference halls on daily tariff basis as part of normal hotel operations.
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> B. Clause 6 in the final license agreement has put the onus of the financing arrangement completely on the sub-licensee at their own cost.
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> C. Clause 16.2 In the eventuality of the licensee not complying with the terms and conditions of the agreement or the directions of IRCTC or the Project Manager, IRCTC can impose a penalty upto a maximum of 2% of Net Turnover of previous year in the given financial year. This imposition of penalty would be in addition to and without prejudice any other such action that IRCTC may take under this agreement.
>
> D. Clause 18.1 The Licensee will built, operate and maintain the budget hotel during the term of the license as a user and will have no interest in the premises, property, building and the fitting and fixtures attached to the building.

E. 18.2 The Licensee shall not assign in favour of any person this agreement or the benefits and obligations hereunder save and except with prior consent of IRCTC."

5. The material changes are made in the draft Agreement sent with letter dated 20.8.2008. That various correspondences took place between the parties on the subject, viz., variance in the terms and conditions of the proposed agreement as compared to the Draft Agreement, which was part of the tender documents. Finally, on 04.8.2009, the respondent issued a show cause notice to the appellant as to why the letter of award be not withdrawn and cancelled. A reply was sent by the appellant. Vide letter dated 10.12.2009, the respondent cancelled the award in favour of the appellant, forfeited the security deposit of RS.28,16,606/- and debarred the appellant for a period of one year. Hence, the present writ petition was filed, which was dismissed by the learned Single Judge vide orders dated 15.11.2011.

6. Learned Senior Counsel appearing for the appellant submits that pursuant to the tender made by the appellant, and award of licence to the appellant, a binding contract was formed between the parties. One of the conditions of the binding contract was that the formal agreement incorporated as part of the tender documents would be executed. It is further submitted that the respondent cannot make any modifications in the formal agreement unilaterally. The agreement, which was part of the tender documents, had to be executed by the parties without any modification or variance unless the appellant gives consent with the said modifications. The respondent could not unilaterally modify or vary the terms of the appellant which were binding on the parties. Hence, it is submitted by the learned Senior Counsel for the appellant that the entire basis for issuing show cause notice and termination of the license by the respondent is wholly illegal and arbitrary and liable to be quashed. The learned Senior Counsel relies upon the judgment of the Supreme Court in the case of **Delhi Development Authority & Anr. Vs. Joint Action Committee, Allottee of SFS Flats & Anr.** (2008) 2 SCC 672 where the Apex Court held that the terms and conditions of the contract can indisputably be altered or modified. This, however, cannot be done unilaterally unless there exists any provision either in the contract itself or in law. Novation of contract in terms of Section 60 of the Contract Act must precede the contract-making process. The parities thereto must be ad idem so far as the terms and conditions are concerned.

7. Learned Senior Counsel for the appellant also relied upon a judgment of the Division Bench of this Court in the case of **Hind Broadcasting Company Pvt. Ltd. & Anr. Vs. UOI** (LPA No.71/2000 decided on 14.9.2009), which related to a tender issued by the Union of India. NIT in that case specifically provided for furnishing of a certificate to the effect that the applicants had read the license conditions and undertake to fully comply with the terms and conditions therein. The draft license conditions were part of the NIT. It was also noted that the controversy that arose in that case was because the respondent introduced certain new terms and conditions and insisted that the contract should be preceded on such revised terms and conditions. The Court held that the respondent while exercising the powers of forfeiture is required to act within the four-corners of the contract. While doing so, the terms and conditions of the contract cannot be altered so as to include extraneous matters, which were not contemplated by the parties. The forfeiture in that case was struck down.

8. On the other hand, the learned counsel for the respondent contends that the submissions of the learned Senior Counsel for the appellant are erroneous. He relies on various communications sent by the respondent where he contends that the entire focus of the appellant was on bankable documents, whereas Clause 7.4 of the Draft Agreement does not permit the appellant to assign the assets. It is further contended that the expression 'bankable document' was only to create a charge on the land. It is submitted that the appellant was deliberately delaying the execution of the contract hoping to extract concessions from the respondent. It is further contended that apart from not signing the agreement, the appellant is also guilty of breach of other terms and conditions of the agreement. It is stated that the appellant has not cooperated in providing relevant necessary documents in respect of special purpose vehicle (SPV) created by the appellant for the consortium. It is further contended that SPV that was formed by the consortium members was formed by one Zoom Motels (A) Ltd. who was not a consortium member at all. Hence, it is the contention of the learned counsel for the respondent that the termination order passed by the respondent is justified and the present appeal is liable to be dismissed. It may, however, be noted that the respondent has not filed any counter-affidavit before the writ court. Similarly, no response was filed in the present proceedings.

9. In view of the submissions made by the counsel for the parties

above, it is quite apparent that there have been changes made by the respondent in the Draft Agreement, which was a part of the tender documents. Clause 3.17 of the Bid Document specifically states that on issue of letter of award, the successful bidder is required to sign the agreement within 15 days of issue of the letter of award. The Draft Agreement is part of Clause 7 of the Tender Document. It is obvious that if we compare the terms of the Draft Agreement, which is Clause 7 of the tender documents and the proposed license agreement now sent by the respondent, on 20.8.2008 there are some material changes in the terms and conditions. The said new terms and conditions are at variance with the terms and conditions stated in the Bid documents. Clearly, it was impermissible for the respondent to unilaterally change the terms and conditions. On issue of letter of Award, a binding contract came into being between the parties. Under Section 62 of the Indian Contract Act, 1872, it is only when the parties agree, a new contract can be substituted for the original. The said Section 62 of the Indian Contract Act reads as follows:

> **"62. Effect of novation, rescission, and alteration of contract.** – If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

10. The judgment relied upon by the learned Senior Counsel for the appellant in the case of **Delhi Development Authority & Anr. Vs. Joint Action Committee, Allottee of SFS Flats & Anr.** (supra) clearly holds that a party cannot unilaterally amend the contract. Hence, the action of the respondent in attempting to modify the proposed Draft Agreement between the parties was clearly a untenable act and the license could not be terminated on the said ground.

11. There is, however, some force in the contention of the respondent authority that most of the communications which were sent by the appellant sought additional concessions from the respondent. Reference may be had to communication dated 27.8.2008 sent by the appellant in response to letter dated 20.8.2008 of the respondent. In the said communication, the appellant stresses that the draft agreement now sent for signatures to the appellant does not address the issues/concerns of the lenders. Even a communication dated 23.9.2008 sent by the appellant stresses on the request that licensee should be entitled to assign all its rights and interest in the license assets in favour of the lenders/financial

institutions for securing financial assistance to execute the project. Similar is the stand of the appellant in the representation dated 04.11.2008. However, there can be no bar for a party to request for new terms to be negotiated in a contract. Such request would not imply that the respondent had a right to unilaterally change the terms of the contract which were provided for in the tender documents and which had been accepted by the parties. Hence, this contention of the respondent has no bearing on the issue at hand.

12. The other ground on which the respondent has contended that the licence awarded to the appellant has been terminated is that the SPV formed by the Consortium members of the appellant is not in accordance with the terms of the tender and the appellant has failed to provide the details as demanded by the appellant. In this context, reference may be had to the allegations made by the respondent in the show cause notice dated 04.8.2009. The relevant part of the show cause notice, viz., Para 10 reads as under:

> "10. Besides, you have caused substantial delay to the project on one pretext or the other although the Final Concession Agreement had been sent to you for execution long back. You have also not co-operated in providing all the relevant and necessary documentation in respect of the SPV created by your consortium for the purposes of the present project."

13. Hence, the only allegation in the show cause notice in this regard was that the appellant had not co-operated and provided relevant and necessary documentation in respect of the SPV created by the Consortium for the purpose of the present projection.

14. In contrast, the communication dated 10.12.2009 by which the award in favour of the appellant was withdrawn states on this issue as follows:

> "30. Another fact that cannot be ignored is that you have not provided the entire details as demanded by IRCTC in respect of the consortium SPV. Clauses 5.3, 5.4.3, 5.5, 5.6, 5.8, 5.9 and 5.13 of the tender document dealt with situation where a consortium is awarded the license. The MOU dated 26.03.2007 submitted by you between the Consortium members was required [see Clause 5.3 of the tender document]. However, as per Clause 7 of the MOU submitted by you, it was provided that the members

of the Consortium would enter into a Prime Consortium Agreement form of a special purpose vehicle fully defining and describing the respective duties and obligations. Your were called upon to produce this document vide letter dated 09.06.2009, but you have refused to provide this document in your response dated 16.06.2009 on the pretext that the Prime Consortium Agreement was to merely set out certain commercial understandings between the consortium members and has no bearing on the scope of work of each member. This plea of yours if completely contrary to clause 7 of the MOU dated 26.03.2007.

The SPV, M/s. Zoom Motels (Bhubaneshwar) (P) Ltd. was incorporated on 14.09.2007 and documents in that regard were forwarded to IRCTC on 11.02.2008. It was noticed that the Lead Members [M/s. T.K. International Limited] was not a founder member or even a shareholder in the new company and the Articles of Agreement had no reference to the MOU dated 26.03.2007 or to the terms. When this fact was brought to your notice by IRCTC letter dated 10.042008, you responded on 15.04.2008 by stating that you would adhere to the terms and conditions of the MOU. Subsequently, you forwarded a certificate of the Chartered Accountant dated 10.05.2009 that M/s. T.K. International Limited holds 33% share in the SPV. In its letter dated 09.06.2009, IRCTC has asked you to produce the proof of such shareholding on the basis of which the C.A. had issued the Certificate stating that 33% shares are held by M/s. T.K. International Ltd., but no such document has been forwarded till date. Online search by IRCTC has shown that there is no shareholding in favour of M/s. T.K. International Limited in the SPV. It has also been found that the share holding reported by you vide you letter 16.06.2009 does not match with the annual return filed with the Registrar of Company. There is no mention about the aforesaid transfer of shares in the Annual return of the Company for the year 2008, in respect of which the AGM was held on 11.08.2008.

M/s. T.K. International Limited did not have 33% shareholding since incorporation. It is clear that the SPV so constituted was not in accordance with Clauses 5.4.3 and 5.13 at the time of its incorporation and even later. The said clauses required that the

SPV had to be promoted and incorporated by the Consortium Members. The SPV was not formed by the Consortium Members, but was formed by one M/s. Zoom Motels (P) Ltd., when was not one of the Consortium members at all, and this Company held 9900 shares out of the 10000 issued shares. It has been later informed that the shares of this SPV were transferred on 20.04.2008 in the ratio of 67% [6700] shares] and 33% [3300 shares] in favour of the Consortium members, M/s. Zoom Developers (P) Ltd. and M/s. T.K. International Limited. When you were asked to produce the documents in support of the shareholding, the same was never forwarded to us.

It is also peculiar to note that M/s. T.K. International had no representative Director in the Board of Directors till recently. It has been informed to us that only recently one Mr. T.H. International Limited. Your conduct in the aforesaid regard shows that the SPV is a bogus entity and is not in accordance with the bid documents."

15. Clearly, the facts stated in the communication dated 10.12.2009 terminating the award are materially different from the allegations stated in the show cause notice. The only violation stated in the show cause notice is the non-supply of information of relevant documents. In fact, perusal of the correspondence between the parties before the show cause notice shows that the respondent was pressing the appellant to execute the modified agreement sent vide communication dated 20.8.2008. The request for details of SPV was only an additional request. Nowhere, it is stated that the execution of the agreement cannot be done until the said demand regarding details of SPV are not met. Reference may be had to letters dated 21.1.2004, 27.1.2009, 13.4.2009, 11.5.2009, 09.6.2009 written by the respondent to the appellant. Clearly, the perusal of these communications would show that the complaint of the respondent relates to non-supply of the documents and information by the appellant. In fact, various documents/clarifications were supplied by the appellant. This defect regarding document appears to be such that the appellant can cure on getting opportunity for doing the needful.

16. In view of the above, we quash the communication dated 10.12.2012 issued by the respondent. Other consequential action will be taken by the respondent in terms of terms and conditions of the tender documents.

17. Neither of the parties have brought on record, the present status of the project. In fact, before the learned Single Judge on 05.8.2010, the learned Additional Solicitor General while appearing for the respondent had made a statement that without prejudice to their rights and contentions, they are willing to consider the case of the appellant herein if a fresh bid is submitted by it pursuant to the tender now proposed to be floated by the Respondent. However, nothing is placed on record as to whether such a tender has been is being floated and if so, its results.

18. The present appeal is allowed as above.

ILR (2013) IV DELHI 2767
W.P. (C)

J.P. BHARDWAJ ....PETITIONER

VERSUS

UOI AND ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 348/2012 DATE OF DECISION: 29.05.2013

Armed Forces—Army Regulations—Rule 520—During operation Rakshak-III (so notified by Central Government) while petitioner was driving vehicle for returning after completion of certain local repair work of equipments and machinery, met with accident—Invalidating Medical Board evaluated 100 % disability and petitioner invalidated out of service—Respondent failed to treat petitioner's injury as a battle casualty and treated it as a physical casualty—Armed Forces Tribunal rejected petitioner's challenge to action of respondent—Order of Tribunal challenged before HC—Plea taken, case is squarely covered under Category E Sub Clause (i) of Circular issued by Ministry of Defence dated 31st January, 2001 in respect of war injury pension payable to armed forces personnel who are invalidated from service on account of disability sustained during circumstances due to attributable/aggravated causes—Held—Signatures on statement attributed to petitioner in Court of Inquiry do not even remotely resemble his admitted signatures or signatures on Court Record—Court of Inquiry has in fact proceeded to return findings which effect character and reputation of petitioner and hold that petitioner was responsible for injuries sustained—Such Court of Inquiry could not have been legally held in absence of petitioner who had to be given opportunity to challenge statement of witnesses, if any, against him as well as record of finding against him—Court of Inquiry conducted in this case, is contrary to provisions of Army Regulations Rule 520—Petitioner was discharging duty while participating in operation Rakshak in Kargil area which operation had been specially notified by GOI in terms of Clause (i) of Category E in para 4.1 of circular dated 31st January, 2001—This aspect has not been noted by Tribunal in its judgment—As a result, it has to held that petitioner is entitled to all benefits including monetary benefits.

Important Issue Involved: The Court of Inquiry returning findings which effect the character and reputation of the petitioner could not have been legally held in the absence of the petitioner who had to be given an opportunity to challenge the statements of witness, if any, against him as well as the record of the findings against him.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. S.S. Pandey, Advocate.

FOR THE RESPONDENTS : Mr. Ankur Chhibber, Advocate.

CASES REFERRED TO:

1. *Major Arvind Kumar Suhag* vs. *Union of India & Ors.* WP(C) No.4488/2012.
2. *Major Arvind Kumar Suhag* vs. *Union of India* 2005(3) SCT 458.
3. *Mrs. Manju Tewari* vs. *Union of India & Ors.* WP(C) No.5262/2003.

RESULT: Allowed.

GITA MITTAL, J. (Oral)

1. The petitioner has assailed the order dated 30th June, 2010 passed by the Armed Forces Tribunal rejecting the petitioner's challenge to the action of the respondents in treating the injuries suffered by the petitioner as physical casualty instead of battle casualty in an operational area which had caused 100% disability to the petitioner.

2. The facts giving rise to the present petition are briefly noted hereafter.

The petitioner was enrolled on 24th December, 1980 in the Indian Army in the Corps of EME as Vehicle Mechanic. It is not disputed that the petitioner served various units of the Army with dedication and devotion to duty between 1981 to 1986 and has an exemplary service record. The petitioner was also promoted from time to time till he reached the rank of Havaldar. With effect from 5th June, 1994 the petitioner was posted to 10, Rashtriya Rifles Battalion (Rajput) (hereinafter referred to as 10 RR Bn.) which was then deployed in the State of Jammu & Kashmir.

3. We are also informed that operation Rakshak-III (so notified by the Central Government) was in progress during which counter insurgency operations were carried out against active militant activities in area.

4. On 30th October, 1996, the petitioner was given the task by his Commanding Officer to go to Udhampur from Doda after taking adequate security protection as certain local repair work of equipments and machinery was required. While returning after completion of the work, the vehicle which the petitioner was driving met with an accident and fell into a deep ditch causing severe injuries to the petitioner. The petitioner

was immediately evacuated to the Command Hospital (Northern Command) Udhampur in an unconscious state and was later transferred to Command Hospital (Western Command), Chandimandir wherein he remained under treatment for more than 7 months and 10 days (between June, 1996 to February, 1997). As a result of the severe injuries, the petitioner was completely paralyzed from both his legs.

5. The respondents conducted a Court of Inquiry to ascertain the reasons of the accident. The petitioner denies presence in the Court of Inquiry. There is dispute as to whether the petitioner had actually made statement which has been attributed to him and the petitioner denies his signatures on the statement. However, the petitioner has also challenged the findings of the Court of Inquiry contending that the same was arbitrarily concluded finding the petitioner blameworthy in the said accident.

6. Finally, on account of his medical condition of permanent paralysis and his being confined to the bed, on the night of June 1997 the petitioner was invalidated out of service with 100% disability. The disability of the petitioner was duly evaluated by the Invalidating Medical Board. The respondents however failed to treat the petitioner's injury as a battle casualty even though the accident had occurred in an operational area so notified by the Central Government. The petitioner was aggrieved by the action of the respondents in treating the petitioner's injury as a physical casualty. The same impacts the financial benefits to which he was entitled due to injury having been suffered in an operational area.

7. In this regard the petitioner sent communication dated 24th July, 2000 to the respondents. It was only in the response dated 19th August, 2000 from the 10th, RR Battalion, the respondents first made mention of the Court of Inquiry proceedings.

8. In the meantime, the petitioner made a request dated 19th August, 2000 for the copy of the Court of Inquiry.

9. The petitioner has also submitted that an impression was given to him that his case for grant of war injury pension in terms of para 10 of the Government of India letter dated 31st January, 2001 [No.1(2)/97/I/D (Pen-C)] was under examination inasmuch as by communication dated 28th January, 2002, the petitioner's pension stood enhanced from Rs.450/- to Rs.1500/-. Despite repeated representations, no positive response was received by the petitioner. He was therefore constrained,

on 26th August, 2004 to address a communication to the Defence Minister seeking redressal of his grievance. Unfortunately, this communication also met the same fate.

10. Finally, on 19th October, 2004, the petitioner addressed the legal notice to the respondents seeking payment of his legitimate entitlement. By their letter dated 30th November, 2004, the respondents refused to accept such entitlement. Aggrieved by the actions of the respondents, the petitioner filed WP(C) No. 8007/2005 inter alia praying for quashing of the inquiry findings of the inquiry report and seeking a direction to the respondents to release the benefits of war injury pension as well as related benefits. The petitioner had also claimed the benefit of pay and allowances as well as pension as per his category in view of the recommendations of the 5th Pay Commission which have also been declined to him. Upon the constitution of the Armed Forces Tribunal, WP(C) No. 8007/2005 was transferred from this Court to the Armed Forces Tribunal and came up registered as TA No.376/2010.

11. The same was finally disposed of by a judgment passed on 30th June, 2010 whereby only the claim of the petitioner towards payment of pension as to the recommendations of the 5th Pay Commission was accepted. The Armed Forces Tribunal rejected the petitioner's claim of benefit of war injury or battle casualty which has been specifically claimed by the petitioner. Aggrieved thereby, the present writ petition has been filed by the petitioner assailing the rejection of his prayer for benefits of war injury or battle casualty by the Armed Forces Tribunal.

12. We have heard learned counsel for the parties and also perused the available records. Mr. S.S.Pandey, learned counsel for the petitioner has contended that the issue raised in the present petition is no longer res integra and has been earlier decided by this Court by a judgment dated 21st February, 2013 rendered in WP(C) No. 4488/2012 titled as **Major Arvind Kumar Suhag vs. Union of India** and the pronouncement reported as 2005(3) SCT 458, **Mrs. Manju Tewari vs. Union of India & Ors.** in WP(C) No.5262/2003.

13. So far as Mrs. Manju Tewari (petitioner in WP(C) No.5262/2003) was concerned, she was a widow of Lance Naik Urba Dutt who had been deployed in Operation Vijay in Kargil War. Thereafter he was deployed on Pakistan Border in Sriganganagar Sector of Rajasthan. During this posting he died a sudden death. The medical certificate had certified

that he had expired in action. The discussion of the Court in para 7, 8 and 9 of the pronouncement shall throw light on the issue before us and deserves to be extracted. The same read as follows:-

> "7. As noted above, the case of the petitioner is that the death of her husband having occurred as a result of war like situation as also in an operation specifically notified by the Government from time to time her case for liberalised family pension clearly fell within the ambit of category-E (f & i) whereas the stand of the respondents is that it was a case of death which is accepted as attributable to or aggravated by military service and, therefore, covered under Category-B of the said instructions.
>
> 8. Having heard learned counsel for the parties an perused the material on record, we are of the view that there is merit in the stand of the petitioner. The parties are at ad idem that deceased's unit was deployed in Operation Vijay as published in Western Command Order and petitioner's husband was posted strength of the unit. Thus, it is not in dispute that the death of petitioner's husband was on account of his participation in an operation in a war like situation, as enumerated in clause (f) of Category-E of the Instructions. The said operation was also notified in terms of Clause (i) in the said category. Thus, from a bare reading of the said instructions, which are binding on the respondents, have no hesitation in coming to the conclusions of the death of petitioner's husband was covered under Category-E of the Instructions and she is entitle liberalised family pension.
>
> 9. For the foregoing reasons, the writ petition followed and a mandamus is issued to the respondent to grant liberalised family pension to the petitioner in terms of the Instructions issued on 31st January 2001. The arrears of the pension shall be paid early as practicable and in any case not later four weeks from the date of this order."

After so observing the court had issued a writ of mandamus to the respondents to grant liberalized family pension to the petitioner in terms of the instructions issued on 31st January, 2001.

14. The petitioner before us has placed reliance on a circular issued by the Ministry of Central Government, Ministry of Defence vide letter

No.1(2)/97/I/D (Pen-C) dated 31st January, 2001 in respect of the war injury pension payable to armed forces personnel who are invalidated from service on account of disability sustained during the circumstances set out in para 4.1. We may usefully reproduce the relevant provisions of this letter dated 31st January, 2001 which reads as follows:

"PART II- PENSIONARY BENEFITS ON DEATH/DISABILITY IN ATTRIBUITABLE/AGGRAVATED CASES

4.1 For determining the pensionary benefits for death or disability under different circumstances due to attributable/aggravated causes, the cases will be broadly categorised as follows:

Category-A

Death or disability due to natural causes neither attributable to nor aggravated by military service a determined by the competent medical authorities. Examples would be ailments of nature of constitutional diseases as assessed by medical authorities, chronic ailments like heart and renal diseases, prolonged illness, accidents while not on duty.

Category-B

Death or disability due to causes which are accepted as attributable to or aggravated by military service as determined by the competent medical authorities. Disease contracted because of continued exposure to a hostile work environment, subject to extreme weather conditions or occupational hazards resulting in death or disability would be examples.

Category-C

Death or disability due to accidents in the performance of duties such as :-

(i) Accidents while travelling on duty in Government Vehicles or public/private transport.

(ii) Accidents during air journeys

(iii) Mishaps at sea while on duty.

(iv) Electrocution while on duty, etc.

(v) Accidents during participation in organised sports events/ adventure activities/expeditions/training.

Category-D

Death or disability due to acts of violence/attack by terrorist, anti social elements, etc. Whether on duty other than operational duty or even when not on duty. Bomb blasts in public places or transport, indiscriminate shooting incidents in public, etc. Would be covered under this category, besides death/disability occurring while employed in the aid of civil power in dealing with natural calamities.

Category-E

Death or disability arising as a result of:-

(a) Enemy action in international war.

(b) Action during deployment with a peace keeping mission abroad.

(c) Border skirmishes.

(d) During laying or clearance of mines including enemy mines as also minesweeping operations.

(e) On account of accidental explosions of mines while laying operationally oriented mine – filed or lifting or negotiating minefield laid by the enemy or own forces in operational areas near international borders or the line of control.

(f) war like situation, including cases which are attributable to/ aggravated by:-

(i) Extremist acts, exploding mines etc. while on way to on operational area.

(ii) Battle inoculation training exercises or demonstration with live ammunition.

(iii) Kidnapping by extremists while on operational duty.

(g) An act of violence/attack by extremists, anti-social elements, etc.

(h) Action against extremists, antisocial elements, etc.

Death/disability while employed in the aid of civil power in quelling agitation, riots or revolt by demonstrators will be covered under this category.

(j) **Operations specially notified by the Government from time to tie."** (Emphasis supplied)

15. The petitioner before us has contended that so far as his case is concerned, he is squarely covered under Category-E sub-Clause (i) especially notified by the Government from time to time which applies to injury suffered in operations resulting in death or disability.

16. The provisions of para 2 of the above instructions dated 31st January, 2001 issued by the Government of India, Ministry of Defence relating to liberalized family pension have also been death with in para 6 of the **Manju Tiwari's** (supra) case .

17. Our attention has also been drawn to the judgment rendered on 21st February, 2013 in WP(C) No.4488/2012 titled as **Major Arvind Kumar Suhag vs. Union of India & Ors.** In this case, Major Arvind Kumar Suhag was posted to 402 Lt. AD Regt, at Batalik sector during Operation Vijay at Kargil. After the Operation Vijay he was awarded Operation Vijay Medal and Operation Vijay Star. On the 23rd October, 2000, whilst on duty, during operational move from Batalik to Leh, his jeep met with an accident in which he was rendered unconscious and was moved to the military hospital. The Court of Inquiry instituted into the incident found that his injury was attributable to military service in Operational/high altitude area which had left him with 100% permanent disability. Major Arvind Kumar Suhag was discharged from service with effect from 19th March, 2005 and was given only terminal benefits and 100% disability pension apart from admissibility retiral benefits. The petitioner's claim for grant of war injury pension, though recommended by his unit, was rejected on the ground that he had not incurred disability during war or war like operations in terms of the afore-noted guidelines contained in the circular of 31st January, 2001 but that his disability was on account of an accident while on duty, for which disability pension stood granted to him. Major Arvind Kumar Suhag had also placed reliance on the afore-noted circular dated 31st January, 2001 in respect of claim for grant of war injury pension.

18. In this background, the court had held that so far as Major Arvind Kumar Suhag was concerned, he had also approached the Armed Forces Tribunal which had rejected his claim that it was covered under Para 4.1 Category-E (i) (wrongly typed as (j) in the judgment). The observations of this court while disagreeing with a view taken by the Armed Forces Tribunal and granting relief to the Major Arvind Kumar Suhag which would guide adjudication of the present case before us reads as under:-

"12. What persuaded the Tribunal to hold otherwise is that the petitioner's injuries were not incurred during actual operations. In doing so, the Tribunal restricted the eventualities in category-E(j) to actual operations, i.e. injuries incurred during military combat or such like situations or as a result of explosion of mines etc. This would appear from its observation that only if someone is victim to extremism or any other contingency as a result of injury, would it be attributable to operation. With great respect, such a narrow interpretation of what is otherwise a widely phrased condition, is unwarranted. This would necessarily imply that those who are on the way – like the petitioner, in an operation-notified area and are intrinsically connected with the success of such operations cannot ever receive war-injury pension even though their aid and assistance is essential and perhaps crucial for its success. The classification of the residual head, i.e. "operations specially notified by the government from time to time" has to be read along with the broad objective of the policy, i.e. - those who imperil themselves – either directly or indirectly – and are in the line of fire during the operations, would be covered if the injuries occur in that area or in the notified area of operation. This is also apparent from the situations covered in Clause(g) and (h) which nowhere deal with battle or war. In fact, clause (h) even covers injuries and death which occurs while personnel are "employed" in the aid of civil power in quelling agitation, riots or revolt by demonstrators" This means that if someone is travelling in the thick of such unrest and the accident results in death or injury, his next of kin would be entitled to war-pension whereas those who actually suffer similar injuries in an area where operations are notified, would not be entitled to such war injury pension.

13. The materials on record would demonstrate that when the reference – based on the petitioner's representations, (made in 2005), were received, the authorities enquired into the matter closely. During this enquiry, the views of the concerned Military Command HQs as well as the response of the petitioner's units were sought. Uniformly, all of them indicated that the injuries occurred in the area notified as "Operation Rakshak-III" in J&K. This was considered by the concerned Branch, i.e. Additional Directorate (Manpower) of the Adjutant General's Branch which accepted the classification as "Battle Injury" on 10.09.2007 and thereafter issued letter on 03.10.2007. The petitioner was even issued certificate on 01.10.2007 stating that his injuries were during a notified operation and that they were classifiable as "Battle injuries". That in fact was the end of the enquiry and nothing further should have happened except release of the amounts. Instead, the respondents, particularly the Pension Office, appears to have construed three requests made by the Pay and Accounts Office in October-November 2007 and 28.01.2008 requesting for sanction (for release of amounts) as a reason for entirely reviewing the matter. Even as on date, there is nothing forthcoming from the records or in the reply filed by the respondents before the Tribunal (which has been filed during the present proceedings) – to show what persuaded the respondents to reverse the Additional Directorate (Adjutant General's) determinations based upon actual assessment of the area of operation where the petitioner was deployed. It seems that the military bureaucracy in this case or someone within it felt that since injuries were described more specifically as "accidents while travelling on duty in government vehicles" – in category (C) of the letter/policy dated 31.01.2011, the petitioner was disentitled to war injury pension. The Tribunal's bland acceptance of these decisions has regrettably resulted in denial of justice to the petitioner. This Court is, therefore, of the opinion that the impugned order of the Tribunal cannot be sustained. The petitioner's claim for grant of war injury pension in terms of Clause 4.1(E)(j) has to succeed.

14. In parting, this Court cannot resist observing that when individuals place their lives on peril in the line of duty, the sacrifices

that they are called upon to make cannot ever be lost sight of through a process of abstract rationalisation as appears to have prevailed with the respondents and with the Tribunal. This case amply demonstrates how seven years after the conflict – in the thick of which the petitioner was deployed after having participated in the Kargil operation – his injuries were casually classified as those ordinarily suffered whilst proceeding on duty in a government vehicle. He, like any other personnel, operated under extremely trying circumstances unimaginable to those not acquainted with such situations. The cavalier manner in which his claim for war injury pension was rejected by the respondents, who failed to give any explanation except adopt a textual interpretation of Clauses (C) and (E), is deplorable. In these circumstances, the petitioner deserves to succeed."

19. In the case in hand as well, the writ petitioner J.P.Bhardwaj has been denied battle injury pension placing reliance on the proceedings of the Court of Inquiry wherein it was clearly stated that though the individual was responsible for the accident, no action need to be taken and the loss is to be borne by the State. The Armed Forces Tribunal placed reliance on Special Army Order 8/S/85 and the notes in Section 1 that the vehicle accident could not be termed as battle casualty since the accident took place in an operational area but did not occur in action; that it was not in close proximity to the enemy, or was not caused by the fixed apparatus for example Land mines, booby traps, barbed wire or any other obstacles led by the enemy nor was it caused by any national calamity.

20. As noted above, there is serious doubt with regard to the presence of the petitioner during the Court of Inquiry, the petitioner has stated on affidavit that he has not attended the Court of Inquiry.

21. A copy of the Court of Inquiry proceedings has been produced before us today which contains some signatures attributed by the respondents of the as being of the petitioner. We have carefully compared the same with the admitted signatures of the petitioner as well as his available signatures on the Court record, including the one on the affidavit and his Vakalatnama. The signatures on the statement attributed to the petitioner in the Court of Inquiry do not even remotely resemble his admitted signatures or the signatures on Court Record. In this background, we have serious doubts with regard to the presence of the petitioner

before the Court of Inquiry. The Court of Inquiry has in fact proceeded to return findings which effect the character and reputation of the petitioner and hold that the petitioner was responsible for the injuries sustained such court of Inquiry could not have been legally held in the absence of the petitioner who had to be given an opportunity to challenge the statements of witnesses, if any, against him as well as the record of the findings against him. Despite requests, the proceedings of the Court of Inquiry have not been made available to the petitioner. The Court of Inquiry conducted in the case is contrary to the provisions of Army Regulations Rule 520 and cannot be relied upon for any purpose.

22. So far as the findings that the injury did not occur in action is concerned, as has been held in the case of **Major Arvind Kumar Suhag** (supra), such finding is totally beyond the spirit, intendment and object of the policy declaration made by the respondents in the communication dated 31st January, 2001. The observations of the Court made in paras 12 to 14 of the pronouncement in **Major Suhag** (supra) squarely apply to the instant case.

23. As a result the observations of the Armed Forces Tribunal in para 9 of the order to the effect that the vehicle accident cannot be termed as battle casualty for the reasons noted above are legally untenable.

24. There is no dispute at all that the petitioner was discharging duty while participating in operation Rakshak in Kargil area which operation had been specially notified by the Government of India in terms of Clause (i) of Category E in para 4.1 of the circular dated 31st January, 2001. This aspect has not been noted by the Armed Forces Tribunal in its judgment dated 30th June, 2010 as a result it has to be held that the petitioner is entitled to all benefits including the monetary benefits.

25. It is also not disputed that the petitioner has suffered 100% disability which fact has been accepted by the Invalidating Medical Board while discharging the petitioner. There is no evidence at all that the condition of the petitioner has improved in any manner. Therefore petitioner's disability as on date continued to remain as 100%. 26. In view of the above, we hereby direct as follows:-

i) It is held that the order dated 30th June, 2010 of the Armed Forced Tribunal is contrary to the well settled principles in law and is hereby set aside and quashed.

ii) A writ of mandamus to the respondents to forthwith process the petitioner's case for war injury pension in terms of Clause 4.1 Category E (i) of the instructions/Circular dated 31st January, 2001 and pass appropriate orders in respect of consequential benefits to which the petitioner will be entitled in accordance with law. Such consideration shall be completed and orders passed within a period of 6 weeks from today. The order as and when passed shall be communicated to the petitioner as well as to learned counsel representing him in this court.

iii) The petitioner shall be entitled to interest at the rate of 12% per annum or the amounts found due and payable with effect from the date of entitlement of war injury pension.

iv) The petitioner shall be entitled to litigation costs which are assessed at Rs.50,000/-. The costs shall be paid within 4 weeks from today.

The writ petition is disposed of in terms of the above.

ILR (2013) IV DELHI 2780
W.P. (C)

ARIF **....PETITIONER**

VERSUS

UOI AND ANR. **....RESPONDENT**

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 3409/2013 **DATE OF DECISION: 30.05.2013**

Armed Forces—Denial of appointment to the post of Constable (GD) in the Central Armed Forces—Signatures in Capital letters in English—Petitioner's entire signatures consists of the four letters which constitute his name "ARIF". Petitioner writes the letter

'A' 'R' and 'F' in capital letters while the letter 'I' is in running hands—A short issue which arises in this case is as to whether the petitioner, whose signatures are entirely in capital letters in English can be denied appointment to the post of Constable (GD) in the Central Armed Forces i.e. BSF, CISF, CRPF, SSB etc. Held—This issue has been dealt with earlier vide a pronouncement dated 24th February, 2012 in W.P. (C) 1004/2012 titled as *Delhi Subordinate Services Selection Board and Another v. Neeraj Kumar and Another*—A similar issue thereafter was decided in favour of the writ petitioner in W.P. (C). 6959/2012 vide an order dated 5th November, 2012 titled as *Bittoo v. Union of India and Another*—The order dated 4th December, 2012 in W.P. (C) 7158/2012 titled *AS Pawan Kumar v. Union of India and Another* deals with the same issue and was also decided in favour of writ petitioner—It is well settled that there is no law which prohibits a person to sign in capital letters—It has been held in the judgment of this Court in *Pawan Kumar* (Supra) that a signature is a trait which a person develops over a period of time and these traits can develop even with reference to capital letters—Petitioner cannot be denied consideration for appointment if otherwise eligible for the appointment to the post of Constable in the CISF on the ground that the candidature of the petitioner was rejected mainly due to his signatures being done in English capital letters—Writ petition is allowed.

This issue has been dealt with earlier vide a pronouncement dated 24th February, 2012 in W.P.(C) 1004/2012 titled as **Delhi Subordinate Services Selection Board and Another v. Neeraj Kumar and Another.** **(Para 2)**

A similar issue thereafter was decided in favour of the writ petitioner in vide an order dated 5th November, 2012 titled as **Bittoo v. Union of India and another**. The order dated 4th December, 2012 in W.P.(C) 7158/2012 titled AS **Pawan Kumar v. Union of India and another** deals with the same issue and was also decided in favour of writ petitioner. **(Para 3)**

In this background, there is no dispute to the material facts with regard to this issue. The adjudication in the above noted judgments and orders would guide adjudication of the present matter as well. It is well settled that there is no law which prohibits a person to sign in capital letters. It has been held in the judgment of this court in **Pawan Kumar** (supra) that a signature is a trait which a person develops over a period of time and these traits can develop even with reference to capital letters. **(Para 4)**

So far as the present petitioner is concerned, his entire signatures consists of the four letters which constitute his name **"ARIF"**. The petitioner writes the letter **'A'**, **'R'** and **'F'** in capital letters while the letter 'I' is in running hands. **(Para 5)**

For the reasons recorded in the judgments and orders as mentioned the para Nos. 2 and 3 above, we are of the view that the writ petitioner cannot be denied consideration for appointment if otherwise eligible for the appointment to the post of Constable in the CISF on the ground that the candidature of the petitioner was rejected mainly due to his signatures being done in English capital letters as has been informed to him by the respondents vide communication dated 2nd May, 2013 in response to a query under Right to Information Act by the petitioner vide an RTI request dated 5th April, 2013. **(Para 6)**

Important Issue Involved: Denial of appointment—Signatures in capital letters in English—Railways Act—It is well settled that there is no law which prohibits a person to sign in capital letters—It has been held in the judgment of this Court in *Pawan Kumar* (Supra) that a signature is a trait which a person develops over a period of time and these traits can develop even with reference to capital letters.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Ms. Seema Sharma, Adv.

FOR THE RESPONDENT : Mr. Himanshu Bajaj, Advocate.

CASES REFERRED TO:

1. *Delhi Subordinate Services Selection Board and Another* vs. *Neeraj Kumar and Another* W.P.(C) 1004/2012.
2. *Pawan Kumar* vs. *Union of India and Another* W.P.(C) 7158/2012.

RESULT: Writ Petition Allowed.

GITA MITTAL, J. (Oral)

1. With the consent of both the sides, this writ petition is taken up for hearing. A short issue which arises in this case is as to whether the petitioner, whose signatures are entirely in capital letters in English can be denied appointment to the post of Constable(GD) in the Central Armed forces i.e BSF, CISF, CRPF, SSB etc.

2. This issue has been dealt with earlier vide a pronouncement dated 24th February, 2012 in W.P.(C) 1004/2012 titled as **Delhi Subordinate Services Selection Board and Another v. Neeraj Kumar and Another.**

3. A similar issue thereafter was decided in favour of the writ petitioner in vide an order dated 5th November, 2012 titled as **Bittoo v. Union of India and another**. The order dated 4th December, 2012 in W.P.(C) 7158/2012 titled AS **Pawan Kumar v. Union of India and another** deals with the same issue and was also decided in favour of writ petitioner.

4. In this background, there is no dispute to the material facts with regard to this issue. The adjudication in the above noted judgments and orders would guide adjudication of the present matter as well. It is well settled that there is no law which prohibits a person to sign in capital letters. It has been held in the judgment of this court in **Pawan Kumar** (supra) that a signature is a trait which a person develops over a period

of time and these traits can develop even with reference to capital letters.

5. So far as the present petitioner is concerned, his entire signatures consists of the four letters which constitute his name **"ARIF"**. The petitioner writes the letter **'A'**, **'R'** and **'F'** in capital letters while the letter 'I' is in running hands.

6. For the reasons recorded in the judgments and orders as mentioned the para Nos. 2 and 3 above, we are of the view that the writ petitioner cannot be denied consideration for appointment if otherwise eligible for the appointment to the post of Constable in the CISF on the ground that the candidature of the petitioner was rejected mainly due to his signatures being done in English capital letters as has been informed to him by the respondents vide communication dated 2nd May, 2013 in response to a query under Right to Information Act by the petitioner vide an RTI request dated 5th April, 2013.

7. In this background and light of facts as mentioned above, the writ petition is allowed with the following directions to the respondents :-

(i) The respondents shall treat the petitioner's application and shall consider the petitioner's entitlement to selection and appointment as a Constable (GD) in the Central Armed Police Force keeping in view his merit position in the Selection List and any other criteria as is applicable in the instant case; and

(ii) The respondents shall ensure that all necessary steps towards this purpose are completed within a period of six weeks from today and would be conveyed to the petitioner.

8. This writ petition is allowed in the above terms.

9. Dasti.

ILR (2013) IV DELHI 2785
CRL. (A)

BIMAL KISHORE PANDEY ....APPELLANT

VERSUS

C.B.I. ....RESPONDENT

(S.P. GARG, J.)

CRL. (A) NO. : 25/2006 & 36/2006 **DATE OF DECISION: 30.05.2013**

Indian Penal Code, 1860—Section 130-B—Prevention of Corruption Act, 1988—Sections 7, 13(1)(d) and 13(2)—Appellants (convicts) argued that offence under section 120-B IPC could not be established as the main culprit/ offender B.K. Ahluwalia expired during trial—Appellants never challenged the recovery of bribe money from their possession—Held, it is not essential that more than one person should be convicted for offence of criminal conspiracy—It is enough if the Court is in a position to find out that two or more persons were actually concerned in the criminal conspiracy—All conspirators are liable for the offences even if some of them have not actively participated—Merely because one offender died during trial, it does not absolve the appellants of the offence whereby they actively participated and assisted B.K. Ahluwalia for committing the crime—Prosecution of appellants upheld—Sentence reduced due to mitigating circumstances.

[As Ma]

APPEARANCES:

FOR THE APPELLANT : Mr. K.B. Andley, Sr. Advocate with Mr. M.L. Yadav, Advocate.

FOR THE RESPONDENT : Mr. Manoj Ohri, Spl. PP.

CASES REFERRED TO:

1. *Om Prakash* vs. *CBI* 2011 (3) JCC 2312.
2. *State of Himachal Pradesh* vs. *Krishan Lal Pardhan & Ors.* (1987) 2 SCC 17.
3. *Virender Nath* vs. *State of Maharashtra* : AIR 1996 SC 490.

RESULT: Appeal Disposed of

S.P. GARG, J.

1. The appellants Bimal Kishore Pandey (A-1) and Rakesh Sharma (A-2) challenge judgment dated 23.12.2005 in RC No.56(A) & 57 (A) of 1990/CBI/ACB/ND CC No.53 of 2004 by which they were held guilty for committing offences punishable under Section 120-B read with Section 7 & 13 (1) (d) and 13 (2) of the Prevention of Corruption Act 1988 and sentenced to undergo RI for one year with fine Rs. 10,000/-each in RC No.56 (A)/90 and RI for one and a half year with fine of Rs. 25,000 each in RC No.57(A)/90. Both the complaints cases 56 (A)/90 and 57 (A)/90 were clubbed and tried jointly as the evidence in both the cases was common. During trial, B.K.Ahluwalia expired and proceedings against him stood abated.

2. In RC No.56/A/90-DLI Arun Kaushik, Proprietor, Kaushik Orthopedics Corporation, Sameypur lodged complaint with CBI on 16.11.1990 alleging demand of Rs. 14,000/-as illegal gratification for issuance of licence/registration of his unit by Mr.B.K.Ahluwalia (since deceased), Inspector of Factories, Factory Licensing Department, MCD. He was directed to pay Rs. 2,500/-on 17.11.1990 at the office of Rural Area Manufacturers Association (RAMA for short), Sameypur, Delhi. Investigation reveals that Mr.B.K.Ahluwalia entered into criminal conspiracy with P.C. Rastogi, his colleague, A-1 and A-2 for obtaining illegal gratification of Rs.2,500/-from Arun Kaushik on 17.11.1990 and pursuant to the criminal conspiracy, they accepted Rs.2,500/-produced by Arun Kaushik at RAMA office, Delhi on 17.11.1990. They were held in a trap in which S.K.Sharma and B.K.Bhttacharji were associated as independent witnesses. Investigation further reveals that on demand of Rs. 2,500/-Sh. Arun Kaushik handed over the bribe amount of Rs. 2,500/-to B.K.Ahluwalia

who after counting the money with both hands passed it over to A-2. He counted the currency notes, recorded the amount in the diary and passed the currency notes to A-1. They were arrested by CBI team after getting pre-appointed signal. Rs. 2,500/-were recovered from A-1.

3. Investigation further reveals that B.K.Ahluwalia and P.C.Rastogi also demanded and accepted Rs. 500/-as part payment of bribe amount from PW-4 (Jagdish Lal), running business under the name and style of M/s Konark Auto Industries at the said office at about 01.00 P.M. on 17.11.1990. The tainted money was also recovered from A-1 in similar manner. After completion of investigation, B.K.Ahluwalia, P.C.Rastogi, A-1 and A-2 were sent up for trial for committing offences mentioned above. The prosecution examined 12 witnesses to prove the charges. In their 313 statements, the appellants pleaded false implication. On appreciating the evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment acquitted P.C.Rastogi and convicted A-1 and A-2 for the offences mentioned previously. Being aggrieved, they have filed the appeals.

4. Learned Senior Counsel for the appellants urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimonies of interested witnesses. He vehemently argued that offence under Section 120B IPC could not be established as the main culprit/offender B.K.Ahluwalia expired during trial. The appellants had not demanded and accepted any bribe amount from the complainants with whom they were not acquainted. The hand wash bottles when produced in the court were found empty. Panch witness S.K.Sharma did not support the prosecution. The judgment is based on conjectures and surmises. The explanation offered by the appellants in their 313 statements was not given due weightage. They specifically stated that the bribe money was thrusted in their hands when B.K.Ahluwalia refused to accept it from the complainants. The appellants had gone to meet B.K.Ahluwalia who was known to them. Learned Special Public Prosecutor for CBI urged that the appellants entered into conspiracy with B.K.Ahluwalia to demand and accept bribe amount from the complainants. The tainted money was recovered from their possession. B.K.Ahluwalia's death does not absolve the appellants of their guilt for the offence under Section 120B IPC.

5. I have considered the submissions of the parties and examined

the record. The appellants have not challenged the pre-trap and post-trap proceedings conducted by CBI on 17.11.1990. They have also not denied recovery of tainted money. In their 313 statements, their only plea is that they had gone to the office of B.K.Ahluwalia during lunch time. At that time some persons offered money to B.K.Ahluwalia who refused to accept it. Both the complainants tried to give money to A-2 and when he refused to accept, the complainants tried to hand it over to A-1 who also refused to accept it. The complainants then tried to put the money into A-1's pant pocket and in his right hand. In the meantime the CBI officials arrived and apprehended them. Their protest had no effect on them.

6. Apparently, the appellants have admitted their presence at the spot with B.K.Ahluwalia in the room where the transaction took place. They further admitted that money was offered to B.K.Ahluwalia by the complainants and on his refusal, it was put in the pocket and hands of A-1. Their plea that they had gone to meet B.K.Ahluwalia and the money was put in their pocket/hand cannot be believed and accepted. The appellants were not regular employees. They had no occasion to visit B.K.Ahluwalia during office hours. They did not divulge the urgency to visit B.K.Ahluwalia. They did not elaborate when they had gone to see B.K.Ahluwalia. Even after meeting B.K.Ahluwalia, they did not leave the office and remained present with him after the complainants were called in the office. Even after their arrival, the appellants did not opt to go out. PW-4 (Jagdish Lal) and PW-6 (Arun Kaushik) have categorically deposed that when they went to the office of B.K.Ahluwalia, an individual met them outside the office and told that B.K.Ahluwalia would meet at about 1.30 P.M. At 01.30 P.M. B.K.Ahluwalia was taking lunch and asked them to wait for an hour and to come back at 02.30 P.M. They again went to his office. Some persons were sitting and their files were with Mr.B.K.Ahluwalia. They also deposed that both the appellants were present in the room that time. It falsifies appellants' contention that they had gone to meet Mr.B.K.Ahluwalia during lunch hours. PW-12 elaborated that at around 03.05 P.M., the shadow witness gave pre-appointed signal and thereafter B.K.Ahluwalia and P.C. Rastogi and both the appellants were apprehended. The appellants did not offer reasonable and plausible explanation about their presence for long duration with B.K.Ahluwalia.

7. PW-4 and PW-6 not only claimed appellants' presence in the room but also deposed that they participated in the crime and attributed

specific role to each of them. PW-4 (Jagdish Lal) who had no prior animosity and was not acquainted with the appellants testified that in the room when he inquired from B.K.Ahluwalia about his file, another Inspector Rastogi, who was sitting there told him to put 'wheels' on the file. When he inquired meaning of 'wheels' B.K.Ahluwalia said 'give me the money'. Then he handed over Rs. 500/-to B.K.Ahluwalia. He further told him that his file would be cleared by next Friday and he should bring the balance amount. A-2 was also sitting there with him and told him not to worry as they had cleared 150 files on that table. He further deposed that B.K.Ahluwalia counted currency notes and handed over to A-2. A-2 entered it in a diary and handed over to his assistant Mr.Pandey. A-1 kept the said currency notes in the right side pocket of his pant. PW-6 (Arun Kaushik) also deposed on similar lines and stated that when he asked B.K.Ahluwalia to take up his file, he informed that the file was not available and demanded money stating that his file would be cleared. He then handed over money to B.K.Ahluwalia who counted the same and handed over to A-2 who entered the same in the diary and gave it to A-1 who was holding the money in his right hand. Both PW-4 and PW-6 have corroborated each other on all material facts and issues. In the cross-examination, no material discrepancies emerged to discard their version. The appellants did not attribute any motive to both PW-4 and PW-6 to falsely implicate them in the incident. Material facts deposed by them remained unchallenged and uncontroverted in the cross-examination. From the testimonies of PWs 4 and 6 it stands established that both the appellants shared common intention with B.K.Ahluwalia to demand and accept bribe from the complainants. Both the appellants actively assisted B.K.Ahluwalia in the demand of bribe. They also assisted him in handling the money collected that day by making entries in diary. The bribe amount was handed over and retained after acceptance by B.K.Ahluwalia by both these appellants turn by turn.

8. PW-4, PW-6, PW-7 and PW-11 and PW-12 all have deposed that the tainted money was recovered from the possession of A-1. The numbers of recovered currency notes tallied with the number of currency notes noted in the handing over memo. '2,500/-were recovered from A1' s pocket. Hand washes of both the appellants were taken. Both left and right hand washes gave positive tests for the presence of phenolphthalein. Wash of A-1's pant pocket also gave positive reaction for the presence of phenolphthalein. A-2's hand wash gave positive reaction for the presence

of phenolphthalein. The diary (Ex.PW-9/F) and files (Ex.4/E and Ex.6/E) were seized. The cogent testimony of all these witnesses is enough to discard the defence version that the complainant forcibly put currency notes in their hands on their refusal to accept it. The complainants had no occasion to forcibly give the currency notes to the appellants who were not capable to get their work done in individual capacity. A-1 did not explain as to how and under what circumstances the tainted bribe money of Rs. 500/-happened to be in the pocket of his pant.

9. Minor contradictions and discrepancies highlighted by the Senior counsel for the appellants are not material to reject the prosecution case in its entirety. The Trial Court categorically observed that it was of no consequence that the bottles when produced in the court did not contain any liquid. It further observed that the liquid was tested in CFSL by B.K.Bhattacharya (PW-9). These bottles were produced in court on several occasions earlier and it was never pointed out that there was no liquid in the bottles. Merely because the bottles were not preserved properly in the Malkhana, it could not demolish evidentiary value of the statements of Jagdish Lal, Arun Kaushik, B.K.Bhattacharya and S.K.Sharma. Moreover, recovery of bribe money from the possession of the appellant was not under challenge.

10. Learned counsel for the appellants emphasized that due to death of main offender B.K.Ahluwalia, the appellants could not be held guilty for hatching conspiracy with him under Section 120 B IPC. I find no substance in these submissions. In **State of Himachal Pradesh Vs. Krishan Lal Pardhan & Ors.** (1987) 2 SCC 17 the Supreme Court held:

> ''It is wrong to think that every one of the conspirators must have taken active part in the commission of each and every one of the conspiratorial acts and only then the offence of conspiracy will be made out. The offence of criminal conspiracy consists in a meeting of minds of two or more persons for agreeing to do or causing to be done an illegal act or an act by illegal means, and the performance of an act in terms thereof. If pursuant to the criminal conspiracy the conspirators commit several offences, then all of them will be liable for the offences even if some of them had not actively participated in the commission of the offences.

11. This Court in **Om Prakash Vs.CBI** 2011 (3) JCC 2312 held:

''It may be that there was no direct evidence on record to prove any prior consultation or discussion between the Appellant and the co-accused Manohar Lal regarding the demand and acceptance of bribe money from the complainant, but from the facts and circumstances coupled with the conduct and behaviors of Appellant, it stands established that it was in the knowledge of Appellant that the co-accused Manohar Lal had demanded money from the complainant for doing official work. Not only that, he actively aided and facilitated in commission of the offence by coming out of the office at the instance of co-accused and accepted the bribe money from the complainant. The Appellant has not come out with any believable explanation as to why he was present in the licensing office at the relevant time and sitting with co-accused Manohar Lal or as to why he had come out of the office at the saying of co-accused Manohar Lal and took money from PW2 and accepted the same and after counting, kept it in the pocket of his pant. He has also No. explanation as to how the file pertaining to the license of the father of PW2 was found in the dickey of his scooter. It thus stands established that the Appellant had not only conspired with co-accused Manohar Lal in the commission of offence, but had aided co-accused Manohar Lal in the commission of offence of accepting the bribe money. The authority titled as **Virender Nath v. State of Maharashtra** : AIR 1996 SC 490 which was relied upon by learned defence counsel is distinguishable from the facts of the present case. In the said case while maintaining the conviction of A1 at whose instance, the bribe money was accepted by A2, the Supreme Court, in the facts and circumstances, observed as under:

Insofar as A2 is concerned, we find considerable merit in the contention raised on his behalf that he could have received the money innocently from the complainant at the asking of A1, without realizing that it was bribe money. The argument prevails because the prosecution has nowhere led any other evidence of conduct or consistency of a behavior from which it could be spelled out that A2 was a habitual go-between in facilitating acceptance of bribe by A1. This single instance which has been brought forth does not reveal of any regularity of conduct of this

nature. There thus exists an area of doubt, the benefit of which shall go to A2.

12. It is not essential that more than one person should be convicted for the offence of criminal conspiracy. It is enough if the court is in a position to find out that two or more persons were actually concerned in the criminal conspiracy. In pursuant to the criminal conspiracy, the conspirators commit several offences, then all of them will be liable for the offences even if some of them have not actively participated. In the instant case, there were specific and categorical allegations that B.K.Ahluwalia demanded and accepted the bribe amount from the complainants and subsequently handed over the same to the appellants. Merely because B.K.Ahluwalia could not be convicted due to his death during trial, it does not absolve the offence of the appellants whereby they actively participated and assisted B.K.Ahluwalia for committing the crime.

13. In the light of the above discussion, I find no illegality in the impugned judgment whereby the appellants were convicted under Section 120B IPC.

14. Regarding sentence, vide order dated 24.05.2005 the appellants were sentenced to undergo RI for one year with fine Rs. 10,000/each in RC No.56 (A)/90 and RI for one and a half year with fine of Rs. 25,000 each in RC No.57(A)/90. The incident is dated 17.11.1990 and charge-sheet was filed in 1992. The appellants have suffered agony of investigation and trial for about 15 years. The appeal challenging the conviction is pending since January, 2006. Again they have suffered the agony for disposal of appeal for about seven years. They are not previous convicts. They are not involved in any other criminal case. The order on sentence recorded that the convicts have taken up regular jobs and left all such activities. Taking into consideration the mitigating circumstances, sentence awarded by the Trial Court requires modification. The appellants are sentenced to undergo RI for three months each instead of one year in RC No.56 (A)/90 and one and a half years each in RC No.57(A)/90. Both the substantive sentences shall run concurrently. Benefit of Section 428 Cr.P.C. will be given to the appellants. Other terms and conditions of the order on sentence regarding fine are left undisturbed.

15. The appellants are directed to surrender and serve the remainder of their sentence. For this purpose, they shall appear before the Trial

court on 24th June, 2013. The Registry shall transmit the Trial Court records forthwith to ensure compliance with the judgment.

16. The appeals are disposed of in the above terms.

ILR (2013) IV DELHI 2793
CRL.A.

MOHD. YUSUF **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

(R.V. EASWAR, J.)

CRL.A. NO. : 196/2001 **DATE OF DECISION: 31.05.2013**

Indian Penal Code, 1860—Section 307—Appeal against conviction U/s 307 of Code, it was argued as per medical evidence, nature of injuries simple and not very deep, thus, no intention to be attributed to appellant to cause death of injured person—Per contra on behalf of State, it was urged knife blow was aimed at chest of injured who tried to save himself from the blow which struck left side of his neck—Thus, intention was to cause death or at any rate appellant had knowledge that such an injury could cause death. Held:- Under Section 307, intention of accused is of material consideration; such intention should be to cause death under first part of section even if no injury caused, the offender shall be liable to punishment. However, under the second part of the section if hurt is caused the offender shall be liable to a higher punishment. Conviction altered from 307 to 323 IPC.

The main argument of the learned counsel for the appellant was that since the medical evidence showed that the wound was simple and not very deep, it cannot be said that the blow given by the weapon-whatever it was-used by the accused was given with substantial force and consequently it cannot be said that the intention of the accused was to cause death of Mohd. Aziz and Muzammil. In support of his submission he referred to the judgment of a single Judge of this Court (V K Jain, J) in **Rajpal and Anr. Vs. State** 2010 Cri.LJ 3683. He further contended that there were several witnesses to the scuffle but none of them was examined by the prosecution which was fatal to its case as held by the Himachal Pradesh High Court in **Omkar Singh Vs. State of HP** (2008) Cri.LJ 1880. It is submitted that at the time when the scuffle took place there were several eye witnesses and the prosecution did not examine any one of them to prove that the accused Yusuf intended to cause the murder of Mohd. Aziz and Muzammil. It is contended that therefore the case of the prosecution cannot be said to have been proved beyond reasonable doubt. It is further contended on the basis of the judgment of the Karnataka High Court in **Raghunath & Ors. Vs. State** (2011), Cri.LJ 549 that if the nature of injuries sustained is not sufficient to cause death and they were inflicted on non-vital parts of the body and though the injuries are severe but none of them independently or collectively could have caused death, it cannot be said that the ingredients of section 307 are satisfied. Reliance was also placed on the judgment of another single Judge of this Court (Sunil Gaur, J) in **Somesh Pal Vs. State** 157 (2009) DLT 133. It was further contended on behalf of the appellant that the incised wounds were not deep or wide nor were they on the vital parts of Mohd. Aziz and Muzammil and therefore it is not a case of hurt caused with intention to murder. It was suggested that the scuffle took place at the spur of the moment and during the scuffle some glasses (kept in the tea shop) were broken and the broken pieces could have caused the injuries to the complainants. It was the contention of the learned counsel

for the appellant that an intention to cause death can hardly be spelt out from the sequence of events leading to the scuffle and therefore the trial court erred in convicting the accused under section 307 of the IPC. **(Para 5)**

Important Issue Involved: Under section 307, intention of accused is of material consideration; such intention should be to cuase death under first part of section even if no injury caused, the offender shall be liable to punishment. However, under the second part of the section if hurt is caused the offender shall be liable to a higher punishment.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Harendra Singh, Adv. (Amicus curiae).

FOR THE RESPONDENT : Ms. Jasbir Kaur, APP with SI Hukam Singh, PS Seema Puri.

CASES REFERRED TO:

1. *Raghunath & Ors.* vs. *State* (2011), Cri.LJ 549.
2. *Rajpal and Anr.* vs. *State* 2010 Cri.LJ 3683.
3. *Somesh Pal* vs. *State* 157 (2009) DLT 133.
4. *Omkar Singh* vs. *State of HP* (2008) Cri.LJ 1880.

RESULT: Appeal disposed of.

R.V. EASWAR, J.

1. This is an appeal under section 374(2) of the Cr.P.C. against the judgment dated 19.12.2000 passed by the trial court convicting the appellant Mohd. Yusuf, S/o Mahmood Khan R/o 418, Juggi, New Seemapuri, Delhi under section 307 of the Indian Penal Code and the sentence dated 20.12.2000 awarding RI of 7 years and fine of Rs. 4,000/- and in default to undergo further RI of one year, with benefit under Section 428 of the Cr.P.C.

2. The appeal arises this way. On the night of 11.8.1999 one Mohd.

Aziz was returning home and near the police booth of New Seemapuri met his friend Muzammil. Both of them decided to have a cup of tea and went to the *khoka* in F block, New Seemapuri. After ordering for tea they sat on a bench in front of the *khoka* of the mother of the accused Yusuf. Apparently that shop was closed at the time. As they were waiting for the tea, at about 10.45 p.m. the accused Yusuf came there and questioned them why they were sitting in front of the *khoka*. He told them that they should not sit there without any purpose. Mohd. Aziz and Muzammil told him that they would go away after taking tea. Enraged at this Yusuf allegedly took out a knife and aimed at the chest of Mohd. Aziz. Aziz bent downwards in order to save himself from the blow but the knife hit on the left side of his neck. Yusuf also inflicted an injury on Muzammil with his knife and Muzammil was injured on his cheek. After this Yusuf ran away from the spot. Both the injured reached the GTB Hospital where they were examined, their wounds were treated. Thereafter, a case was registered against the accused who was arrested on the basis of the statements of the witnesses on 21.9.1999. The knife alleged to have been used by the accused could not however be recovered. The accused Yusuf pleaded not guilty and claimed trial.

3. The prosecution examined 11 witnesses including Mohd. Aziz (PW3) and Muzammil (PW4). Dr. Navneetan (PW6) and Dr. Satish Mishra (PW9) were also examined. The others appeared to be formal witnesses. In his statement under section 313 of the Cr.P.C., the accused stated that he was falsely implicated in the case and denied that he injured Mohd. Aziz and Muzammil. After examining the evidence and taking into account the material placed on record, the trial court held that the appellant was guilty of the offence under section 307 (attempt to murder) of the IPC. It held that the non-recovery of the weapon was not material as it was only corroborative and not substantive and that it was also immaterial that the injured did not see the weapon alleged to have been used. According to the trial court, the prime requirement of section 307 IPC is of intention that the act should cause death and since the appellant had used a sharp weapon and the injuries were also on the vital spots, he was guilty of attempt to murder. The trial court rejected the evidence of the defence witnesses on the ground that there were contradictions relating to the time at which the offence was said to have been committed. The theory that all the three i.e. Yusuf, the accused and Mohd. Aziz and Muzammil fell on broken glass during the scuffle and thereby injured

themselves put forward by the defence did not appeal to the trial court which held that the deposition of the defence witnesses that the scuffle took place at 6 to 7 p.m. or 8 to 8.30 p.m. was completely contradictory to the fact that it was proved to have taken place around 10.45 p.m. The trial court accordingly convicted the appellant under section 307 of the IPC and sentenced him.

4. I have heard the rival contentions and also perused the judgment of the trial court in the light of the evidence led in the case. I am of the view that the trial court erred in convicting the appellant under section 307 of the IPC. Under this section whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine. If hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life or to such punishment as is herein before mentioned. As rightly pointed out on behalf of the state by the learned Additional Public Prosecutor, under the section it is the intention of the accused which is the only material consideration; such intention should be to cause death and under the first part of the section even if no injury is caused the offender shall be liable to punishment. Under the second part of the section if hurt is caused the offender shall be liable to a higher punishment.

5. The main argument of the learned counsel for the appellant was that since the medical evidence showed that the wound was simple and not very deep, it cannot be said that the blow given by the weapon-whatever it was-used by the accused was given with substantial force and consequently it cannot be said that the intention of the accused was to cause death of Mohd. Aziz and Muzammil. In support of his submission he referred to the judgment of a single Judge of this Court (V K Jain, J) in **Rajpal and Anr. Vs. State** 2010 Cri.LJ 3683. He further contended that there were several witnesses to the scuffle but none of them was examined by the prosecution which was fatal to its case as held by the Himachal Pradesh High Court in **Omkar Singh Vs. State of HP** (2008) Cri.LJ 1880. It is submitted that at the time when the scuffle took place there were several eye witnesses and the prosecution did not examine any one of them to prove that the accused Yusuf intended to cause the murder of Mohd. Aziz and Muzammil. It is contended that therefore the case of the prosecution cannot be said to have been proved beyond

reasonable doubt. It is further contended on the basis of the judgment of the Karnataka High Court in **Raghunath & Ors. Vs. State** (2011), Cri.LJ 549 that if the nature of injuries sustained is not sufficient to cause death and they were inflicted on non-vital parts of the body and though the injuries are severe but none of them independently or collectively could have caused death, it cannot be said that the ingredients of section 307 are satisfied. Reliance was also placed on the judgment of another single Judge of this Court (Sunil Gaur, J) in **Somesh Pal Vs. State** 157 (2009) DLT 133. It was further contended on behalf of the appellant that the incised wounds were not deep or wide nor were they on the vital parts of Mohd. Aziz and Muzammil and therefore it is not a case of hurt caused with intention to murder. It was suggested that the scuffle took place at the spur of the moment and during the scuffle some glasses (kept in the tea shop) were broken and the broken pieces could have caused the injuries to the complainants. It was the contention of the learned counsel for the appellant that an intention to cause death can hardly be spelt out from the sequence of events leading to the scuffle and therefore the trial court erred in convicting the accused under section 307 of the IPC.

6. On the other hand the learned Additional Public Prosecutor submitted that this is a case where there was intention or knowledge on the part of the accused that death would be caused and therefore the provisions of section 307 of the IPC were attracted. Referring to the statement of Mohd. Aziz, one of the victims, she contended that this victim has clearly stated that he was to be given a knife blow on his chest but since he (the victim) tried to save himself the blow landed and struck his neck on the left side. The contention was that the accused aimed at the chest with the knife which proved his intention to cause death. According to the learned APP the intention of the accused was to cause death or at any rate he had knowledge that the knife can cause death of the injured if the victim is stabbed at his chest. She read out from the evidence of Dr Satish Mishra (PW9) where he stated that while examining the MLC and giving his first opinion on that basis, he missed that the external jugular vein of Mohd. Aziz was cut and therefore the injury was a grievous injury and not a simple one. This statement of Dr. Satish Mishra remains, according to the learned APP, uncontroverted since nothing was brought out in the course of cross-examination. The learned APP also relied on that part of the judgment of the trial court

where reasons have been given as to why the evidence of the defence witnesses cannot be relied upon. She further submitted that the non-recovery of the weapon was not material; it is only corroborative evidence and not substantial evidence.

7. In his rejoinder the learned counsel for the appellant reiterated his case that it was a case of a sudden quarrel after some arguments, that nobody saw the weapon and this coupled with the non-recovery of any weapon, pointed out to the absence of any intention to cause death, thus taking the case out of the clutches of section 307 IPC. Moreover, without prejudice it was submitted that the injuries were inflicted on non-vital parts of the injured and therefore at the most, it could be a case of section 323 IPC, but it certainly cannot be one of attempt to murder coming within section 307.

8. I am of the view that this is a case which arose out of a sudden quarrel between the accused Yusuf on the one hand and Mohd. Aziz and Muzammil on the other. Mohd. Aziz and Muzammil were friends having a cup of tea. At that time Yusuf, the accused, came there and objected to their sitting on the bench in front of his mother's tea shop. Mohd. Aziz and Muzammil said that they will go away after taking tea but for some reason this was not acceptable to the accused. He attacked both Mohd. Aziz and Muzammil. Mohd. Aziz has deposed that he was given a knife blow. This has not been disproved in the evidence. The non-recovery of the knife, to my mind, is not conclusive since it is only a corroborative evidence and not substantive evidence. The statement of the defence witnesses that the victims fell on the broken glass and thus sustained injuries is not acceptable to me since their evidence does not inspire confidence for the reason that both the defence witnesses have given the wrong timing of the scuffle. According to one of them, it took place between 6 p.m. and 7 p.m. and according to the other, it took place between 8 and 8.30 p.m. It is however, in evidence that the victims were taking tea around 10.30 p.m. The MLCs also show the hour of arrival of the victims at the hospital as 11.30 p.m./11.45 p.m. This is more in accord with the probability that the scuffle took place around 10.30 p.m. or a little later. The evidence of the defence witnesses was therefore rightly discarded by the trial court.

9. It is therefore, clear to me that the injury to Mohd. Aziz and Muzammil was not caused by any broken glass pieces but that they were

caused by the knife used by the accused for attacking the victims.

10. The next question is whether there was any intention to cause death, on the part of the accused. As far as this point is concerned, I am unable to accept the contention of the prosecution that the accused used the weapon with intention to cause death or knowledge that his act will cause death. The nature of the injuries as evident from the medical certificates, is that they were simple injuries caused by a sharp weapon. The evidence of Dr. T S Daral who examined Mohd. Aziz shows that there was one clean incised wound on the left neck which is 2 inches long, half inch wide and 1 cm deep. The other injury was just blow and 1+ inches long. I am not inclined to accept the evidence of Dr Satish Mishra inasmuch as he stated that he re-examined the case and found that he had missed that the external jugular vein of Mohd. Aziz was cut which was grievous. Jugular vein is a vital part of the body and if that had been cut, the blood flow would have been huge and I do not think that Dr T S Daral who examined Mohd. Aziz on the day of the occurrence would have missed it. It is also unlikely that Dr Satish Mishra to whom the matter was referred by Dr Daral on that date itself, would have missed it. In these circumstances, I am not prepared to accept the evidence of Dr Satish Mishra, given on 18.3.2000, that he looked at the whole case-sheet again and it came to light that he had missed, at the time of giving his first opinion, the fact that the external jugular vein was cut and therefore, he is changing his opinion that the injury was simple, to the opinion that it was grievous. He has even admitted during the cross-examination that the injured was not produced before him at the time of giving his opinion. In these circumstances his revised opinion that he missed the fact that the external jugular vein of Mohd. Aziz was cut does not appeal to me.

11. I am now left with the findings that the injuries were caused by a knife used by the accused Yusuf, and that those injuries were simple. In these circumstances, I am unable to uphold the view of the trial court that the case falls under section 307 of the IPC. I am of the view, agreeing with the learned counsel for the accused, that the case falls under section 321 read with section 323 of the IPC. Section 321 says that whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said to voluntarily cause hurt. Under section 323 whoever voluntarily causes

hurt shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to Rs. 1,000/- or with both. The trial court has sentenced the accused to 7 years' RI and fine of Rs.4,000/- under section 307 of the IPC; in case of default in the payment of fine, the accused was to undergo further RI of one year. The accused has undergone sentence of 2 years 10 months and 14 days as per the nominal roll dated 1.11.2003. He has thus served more than the sentence prescribed by section 323.

For the reasons stated above, I set aside the conviction u/s 307 of the IPC and allow the appeal. The personal bond and surety stand discharged.

ILR (2013) IV DELHI 2801
LPA

MOHD. ZULFIKAR ALI ....APPELLANT

VERSUS

(WAKF) HAMDARD LABORATORIES THR. ITS HEAD HR, P & A HAMDARD BUILDING ....RESPONDENT

(GITA MITTAL & DEEPA SHARMA, JJ.)

LPA NO. : 431/2013 DATE OF DECISION: 03.07.2013

Labour Law—Industrial Disputes Act, 1947—Section 25-B—Petitioner claimed he was a regular employee and had served continuously for 240 days—Onus to prove on him—Failed to prove—His contention that his statement in the affidavit to this effect was by itself sufficient proof—Not Correct.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. B.K. Pal, Advocate.

FOR THE RESPONDENT : Nemo.

CASES REFERRED TO:

1. *Director, Fisheries Terminal Department* vs. *Bhikubhai Meghajibhai Chavda* (2010) 1 SCC 47.
2. *Sub Divisional Engineer, Irrigation Project, Yavatmal* vs. *Sarang Marotrao Gurnule* 2008 III LLJ 737 (Bom).
3. *Director, Fisheries Terminal Department* vs. *Bhikubhai Meghajibhai Chavda* (2010) 1 SCC 47.
4. *Sarva Shramik Sanghatana (KV)* vs. *State of Maharashtra* (2008) 1 SCC 494.
5. *Sub-Divisional Engineer, Irrigation Project Yavatmal* vs. *Sarang Marotrao Gurnule* 2008 III LLJ 737 (Bom).
6. *R.M. Yellatti* vs. *Assistant Executive Engineer* (2006) 1 SCC 106.
7. *M/s. Automobile Association of Upper India* vs. *PO Labour Court-II & Anr.* 2006 (6) A.D. Delhi 180.
8. *Manager, Reserve Bank of India, Bangalore* vs. *S. Mani & Ors.* (2005) 5 SCC 100.
9. *Range Forest Officer* vs. *S.T. Hadimani* (2002) 3 SCC 25.

RESULT: Appeal Dismissed.

GITA MITTAL, J. (ORAL)

LPA No.431/2013

1. By a separate order passed today, we have dismissed the appeal and directed that we would separately record reasons for doing so. We, hereby, record reasons for which we have not found merit in the appeal.

2. The petitioner assails the order dated 21st March, 2013 passed in WP (C) No.1880/2013 whereby the writ petition was dismissed by the learned Single Judge. The petitioner had assailed an Industrial Award dated 28th March, 2012 by way of the said writ petition.

3. The challenge by the petitioner rests on his contention that he was appointed as Kushtasaz (medicine maker) on the 5th March, 1996 by the respondent without any appointment letter having been issued to him. The petitioner has complained that no pay slips were issued to him despite repeated oral demands. It is urged that on 19th May, 1997, the little finger of his left hand was cut while the petitioner was cutting white sandal wood for medicinal purposes resulting in 40% disability to the petitioner. As the respondents denied compensation to the petitioner, he filed an application under the Workmen's Compensation Act, 1923 which was rejected on the 9th August, 2000 by an order of the Commissioner. The petitioner's challenge by way of FAO No.36/2011 is pending before this court.

4. It is the petitioner's submission that by an oral intimation dated 1st January, 2001, the petitioner's services were illegally terminated without giving any notices or wages in lieu thereof. The petitioner issued a demand notice dated 3rd March, 2001 and raised an industrial dispute before the Assistant Labour Commissioner of Government of NCT of Delhi. Conciliation was unsuccessful and the appropriate Authority passed an order of reference dated 21st October, 2005 referring the following dispute for adjudication to the Industrial Tribunal:- "Whether the services of Shri Zulfikar Ali S/o Sh. Mohammd Yakub Ali have been terminated illegally and/or unjustifiably by the management, and if so, to what sum of money as monetary relief along with consequential benefits in terms of existing laws/Govt. Notifications and to what other relief is he entitled and what directions are necessary in this respect?"

5. This reference was registered as ID No.1118/06/05. The respondent contested the petitioner's claims contending that the petitioner had been engaged only by a daily wage rate basis as a helper to the Kushtasaz at their Lal Quan establishment intermittently as and when the need arose and that he had not put in 240 days of continuous work in any calendar year and that there was no relationship of employer and employee between the parties. It was specifically contended that the petitioner had not put in 240 days of continuous work in the year immediately preceding the alleged date of termination. The respondents also took the stand that the establishment of the management located at Lal Quan was shut down in December, 2000 and all the existing employees of the management stood transferred to its factory in Ghaziabad. All claims of the appellant stood denied.

6. The petitioner had examined himself as a sole witness. The Industrial Tribunal carefully considered the rival contentions. It was carefully concluded by the learned Tribunal that Section 25-B of the Industrial Disputes Act did not make a distinction between a permanent employee or an employee intermittently engaged on daily wage rate basis as and when the need arose. It was consequently held that there was a relationship of the employer and employee between the parties. However, on the question as to whether the workman had worked continuously for 240 days in the management and if so, its effect, the learned Tribunal has held against the petitioner. We find that the Industrial Tribunal carefully considered the matter and thereupon made an Award dated 28th March, 2012 rejecting the claim of the petitioner.

7. Aggrieved by above Award, the petitioner filed WP (C) No.1880/2013 which was rejected in limine by the order dated 21st March, 2012. The order of the learned Single Judge rests primarily on the consideration of the onus to prove the issue that the petitioner had served the respondents for 240 days in the year preceding his termination. The learned Single Judge has agreed with the above findings returned by the Tribunal and rejected the writ petition. Hence the present appeal.

8. It needs no elaboration that the issue as to whether the petitioner had served for 240 days in the year prior to his termination is an issue of fact. There must be specific pleading to this effect. It is trite that the petitioner having claimed so, onus to prove the same rested on the petitioner. The Industrial Tribunal has noted that the petitioner had failed to even make a pleading in this regard in his claim petition or the rejoinder. The petitioner had placed reliance on 24 gate passes to support this plea. These gate passes, however, were for a period spread over a period of four years which manifests that the petitioner was entering the premises of the respondents only against daily gate passes. If he had been a regular employee for four years, certainly he would have something other than a daily gate pass. Even if the petitioner could be believed, he would have more than 24 gate passes.

9. So far as the claim of the petitioner that he was a regular employee and had served for the 240 days in the year preceding his termination, the Industrial Tribunal has concluded that the petitioner had failed to either plead this fact or to lead any evidence on this issue.

10. Mr.B.K. Pal, learned counsel appearing before us has urged at

length that the petitioner having said that he was an employee for 240 days was sufficient and that by making such statement, the petitioner had adequately discharged the onus and burden of proof on him. In support of this submission, reliance has been placed on the pronouncement of the Supreme Court in a case reported at (2010) 1 SCC 47 **Director, Fisheries Terminal Department Vs. Bhikubhai Meghajibhai Chavda** and a judgment of the Bombay High Court reported at 2008 III LLJ 737 (Bom) **Sub Divisional Engineer, Irrigation Project, Yavatmal Vs. Sarang Marotrao Gurnule**.

11. Our attention has also been drawn by learned counsel for the petitioner to the cross-examination of the petitioner which has been placed on record. Unfortunately, the affidavit by way of examination-in-chief has not been placed on record. However, even the cross-examination of the petitioner would show that the petitioner makes no disclosure of the dates on which he was employed. There is also no reference to the wages at which he was engaged. The cross-examination does not dislodge the findings returned by the tribunal.

12. So far as the reliance on the pronouncement of the Supreme Court in (2010) 1 SCC 47 **Director, Fisheries Terminal Department Vs. Bhikubhai Meghajibhai Chavda** is concerned, it was held that the appellant had taken the plea that the work was not of seasonal nature and that it was in evidence that the workman had completed 240 days of service in the preceding year. Contradictory documentary evidence was produced by the appellant. Incomplete muster roll was produced in respect of the direction issued by the labour court. In these circumstance, the Industrial Award in favour of the workman was upheld by the High Court which order was challenged before the Supreme Court. In para 14, the court has noted that the evidence produced by the appellant (employer) had not been consistent. This coupled with the fact that the respondent, as a daily wager, would have difficulty in having access to the official documents, muster roll etc. in connection with his service weighed with the court, and it was for these reasons held that upon his coming forward and deposing, the burden of proof shifted the appellant (employer) to proof that he did not complete 240 days of service in the requisite period to constitute continuous service.

13. We may note the observations of the Supreme Court in (2006) 1 SCC 106 **R.M. Yellatti Vs. Assistant Executive Engineer**. In this

case the workman had also produced a certificate issued by the Executive Engineer to the effect that he had worked from 22nd November, 1988 to 20th June, 1994. The Supreme Court noted that though the workman had been cross-examined on behalf of the Management, there was no material to disbelieve the certificate and, therefore, the Labour Court had arrived at the conclusion in favour of the workman. The Award was sustained by the Supreme Court of India. It was in these circumstances that the Supreme Court observed as follows:-

> ".....However, applying general principles and on reading the (aforesaid) judgments, we find that this Court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on facts of each case."
>
> 17. Applying the principles laid down in the above case by this Court, the evidence produced by the appellant has not been consistent. The appellant claims that the respondent did not work for 240 days. The respondent was a workman hired on a daily wage basis. So it is obvious, as this Court pointed out in the above case that he would have difficulty in having access to all the official documents, muster rolls, etc. in connection with his service. He has come forward and deposed, so in our opinion the burden of proof shifts to the appellant employer to prove that he did not complete 240 days of service in the requisite period to constitute continuous service."

14. In So far as the pronouncement in 2008 III LLJ 737 (Bom) **Sub-Divisional Engineer, Irrigation Project Yavatmal Vs. Sarang Marotrao Gurnule** is concerned, the appellant claimed to have been

working as a daily wager w.e.f. 1st May, 1985 till 2nd February, 1991. The workman had claimed that he had worked for more than 240 days in a year and that the respondents were giving technical breaks in his service so as to debar him from the benefit of regularisation. The services of the workman were terminated by an order dated 3rd February, 1991 in respect of which he raised an industrial tribunal which was referred to the Labour Court and an award came to be passed in favour of the workman. The Labour Court had made an award concluding that the workman had worked for more than 240 days of the year as required under Section 25-B of the Industrial Disputes Act, 1947 and his termination was in violation of Section 25-F of the Industrial Disputes Act and, therefore, illegal. The order of the Labour Tribunal was upheld by the Division Bench of the Bombay Court.

15. It is trite that judgments of courts are to be construed with reference to the facts which they decide. [Ref.: (2008) 1 SCC 494 **Sarva Shramik Sanghatana (KV) v. State of Maharashtra** (Paras 14 to 17)]. This judgment of the Bombay High Court has been rendered in the facts and circumstances of the case and would not impact the adjudication in the present case.

16. The statement by the present petitioner that he was an employee for 240 days in a year has to be tested against the requirement of law. In the impugned Award dated 28th March, 2013, the Industrial Tribunal has made a detailed consideration and referred to binding judicial precedents of the Supreme Court of India. On the issue of burden of proof, we find that reference has been made to a judgment reported at 2006 (6) A.D. Delhi 180 **M/s. Automobile Association of Upper India Vs. PO Labour Court-II & Anr.**

17. The impugned Award has heavily relied on the pronouncement of the Supreme Court reported at (2005) 5 SCC 100 **Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors.** wherein it had been held that it is only if the initial burden of proof, which was on the workman, was discharged to some extent that a finding can be returned in respect of the defence of the management. Furthermore, the plea having been set up by the workman, the initial burden of proof was on the workman to show that he had been employed by the petitioner in the claimed capacity on the stated terms. The circumstances in which the court may draw an adverse inference against the management were also

succinctly set down.

18. We may also notice the following principles laid down by the Supreme Court in (2002) 3 SCC 25 **Range Forest Officer Vs. S.T. Hadimani**:-

> "3..... in our opinion the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but his claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filling of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that a workman had in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On the ground alone, the award is liable to be set aside."

Therefore, the petitioner's contention that his statement in the affidavit to the effect that he had worked continuously for 240 days was by itself sufficient proof, is not correct.

19. The consideration of the evidence led by the petitioner by the Tribunal in paras 13 to 17 is material and deserves to be considered in extenso. The same reads as follows:-

> "13. In his affidavit filed as examination-in-chief, the claimant specifically stated that he worked for more than 240 days with the management. Significantly, in the claim, rejoinder and even in the affidavit filed as examination-in-chief, it is nowhere the case of claimant that he worked at least 240 days with the management during the year immediately preceding the date of his termination.
>
> 14. In his affidavit, the claimant relied upon photocopies of certain gate passes as Mark A. In his cross-examination, it was suggested by the management that Mark A were issued to him

as and when he reported to the management only. This suggestion was denied by the claimant. Another suggestion was given to him in his cross-examination by the management that the gate passes were issued only for the specific duration of time. This suggestion was also denied by the claimant. These suggestions clearly show that the management admits the issuance of gate passes Mark A. A perusal of the gate passes Mark A shows that the gate passes bear different dates, meaning thereby the gate passes were issued for that date only and not for the month or week or even for more than one day at a time. The space after "care no.' is either blank or crossed. I am of the view that it shows that the claimant was not a permanent employee of the management. Further, the total gate passes Mark A filed by the claimant are only 24. They bear different dates starting from the year 1996 to year 2000. In other words, for the period of almost 4+ months, only 24 gate passes have placed on record by the claimant. Except for these gate passes, no other document has been placed on record by the claimant to show that he worked for 240 days with the management during the year immediately proceding the date of this alleged termination.

15. As noted above, in the rejoinder, it is claimed by the claimant that deductions towards provident Fund were made from his salary. Significantly, in the claim itself, it is the case of the claimant that he was not given any pay slip. Hence, the basis of this claim (i.e., deduction towards provident fund was made from his salary) has not been disclosed. No applicant was filed by the claimant seeking a direction to the management to produce any record in this regard. Hence, no adverse inference can be drawn against the management.

16. No co-employee was examined by the claimant to show/ prove that he worked for 240 days with the management during the period of one year immediately preceding the date of his termination.

17. In view of the above discussion, there cannot be any doubt that the claimant has failed to prove that he worked for at least 240 days with the management during the year immediately preceding the date of his alleged termination. The issue is,

accordingly, decided in favour of the management and against the claimant."

20. The findings of facts returned by the Industrial Tribunal have been upheld by the learned Single Judge. The same are, therefore, also unassailable. In any case, the petitioner has failed to make out any legally tenable ground to sustain a challenge to the findings returned by the Industrial Tribunal or the order of the learned Single Judge.

We find no merit in this appeal which is hereby dismissed.

ILR (2013) IV DELHI 2810
CRL. A.

MANOJ KUMAR ....APPELLANT

VERSUS

STATE (NCT) OF DELHI ....RESPONDENT

(REVA KHETRAPAL & SUNITA GUPTA, JJ.)

CRL. A. NO. : 217/2010, 297/2010 & 525/2010 **DATE OF DECISION: 08.07.2013**

(A) Indian Penal Code, 1860—Sections 302—Appellants convicted U/s 302 read with Section 34 of Code for causing death of one Ali Baksh @ Pappu—Prosecution case primarily rested on sole testimony of an eye witness—As per appellants, eye witness account of prosecution witness was neither credible nor corroborated by testimonies of remaining independent witnesses, motive for offence not established coupled with delay of 15 hours for reporting of incident to police made prosecution case incredible. Held:- Even in the case of a hostile witness, that part of his testimony which substantiates case of prosecution

can be extricated from his remaining deposition and utilized for the purpose of convicting accused.

It is a settled proposition of law that even in the case of a hostile witness, that part of his testimony which substantiates the case of the prosecution can be extricated from his remaining deposition and utilized for the purpose of convicting the accused. We, therefore, see no difficulty in accepting the testimony of PW1 Joginder Singh to the extent it supports the case of the prosecution. We find that the testimony of PW2 Pradeep Sharma also supports the case of the prosecution to the extent that he deposed that when he visited the site in his capacity as site in-charge on the morning of 17.11.2005, he came to know that a quarrel had taken place between the accused persons and Ali Baksh @ Pappu in which the accused persons who were known to him and were working as labour at the site had beaten Ali Baksh @ Pappu with dandas and stones. PW3 Ramesh Kumar testified that he was working as a driver of a tanker belonging to the contractors working at the site and on the fateful night when at about 11.00 p.m. he came back to the site after taking dinner he heard a noise of the guard Tehsildar (PW8) and saw Ali Baksh @ Pappu, driver of truck No.HR38-8404 lying unconscious in an injured condition. Tehsildar told him that the accused persons had come with dandas and beaten the driver Ali Baksh @ Pappu. He along with 3-4 boys removed Ali Baksh to Walia Nursing Home and thereafter to LNJP hospital. PW6 Sri Kumar working as a helper on the truck of the concerned company deposed on similar lines and stated that on the intervening night at about 11.00 p.m./12.00 a.m. he came to know from the guard that a quarrel had taken place between Ali Baksh who was working as a driver and the accused persons, in the course of which Ali Baksh sustained injuries. He along with two or three other persons had removed Ali Baksh to Walia Nursing Home and thereafter to LNJP hospital. PW7 Ram Babu also testified that he was working as a helper on the truck which was being driven by the deceased. The driver of

the said truck Ali Baksh @ Pappu was given beatings at about 11.00 p.m. about 5 or 6 months back by the accused persons. When he reached the spot, he saw Ali Baksh lying unconscious and the accused persons were running away from the spot. **(Para 6)**

(B) Indian Penal Code, 1860—Sections 302—Appellants convicted U/s 302 read with Section 34 of Code for causing death of one Ali Baksh @ Pappu—Prosecution case primarily rested on sole testimony of an eye witness—According to appellants, from injuries suffered by deceased it could only be inferred that he was indiscriminately beaten—Accordingly, there was no intention on part of appellants to cause specific injury which resulted in death of deaceased. Held:- Where incident takes place on a sudden quarrel between the assailants and deceased, and deceased suffers indiscriminate blows administered by assailants without any mens rea and without premeditation accused persons to be convicted U/s 304 Part 1 and not U/s 302 of IPC.

Before adverting to the aforesaid judgments relied upon by learned counsel for the Appellants, we may advert to the decision of the Supreme Court in **State of A.P. v. Rayavarapu Punnayya and Another,** (1976) 4 SCC 382, wherein the distinction between murder and culpable homicide not amounting to murder has been phrased in a very succinct manner as follows:

> "12. In the scheme of the Penal Code, 'culpable homicide' is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder', is 'culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called,

'culpable homicide of the first degree'. This is the greatest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

13. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

14. Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mensrea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood

of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by Illustration (b) appended to Section 300.

Section 299		Section 300	
A person commits culpable homicide if the act by which the death is caused is done -			Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done
INTENTION			
(a)	With the intention of causing death; or	(1)	With the intention of causing death; or
(b)	With the intention of causing such bodily injury as is likely to cause death; or	(2)	With the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or
		(3)	With the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
KNOWLEDGE			
(c)	With the knowledge that the act is likely to cause death	(4)	With the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

15. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given.

16. In clause (3) of Section 300, instead of the words 'likely to cause death' occurring in the corresponding clause (b) of Section 299, the words 'sufficient in the ordinary course of nature' have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real, and, if overlooked, may result in miscarriage of justice. The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of Section 299 conveys the sense of .probable. as distinguished from a mere possibility. The words 'bodily injury ... sufficient in the ordinary course of nature to cause death' mean that death will be the 'most probable' result of the injury, having regard to the ordinary course of nature.

17. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. **Rajwant v. State of Kerala** [AIR 1966 SC 1874 : I966 Supp SCR 230 : 1966 Cri LJ 1509.] is an apt illustration of this point.

18. In **Virsa Singh v. State of Punjab** [AIR 1958 SC 465 : 1958 SCR 1495 : 1958 Cri LJ 818.] Vivian Bose, J. speaking for this Court, explained the meaning and scope of clause (3), thus (at p. 1500):

"The prosecution must prove the following facts before it can bring a case under Section 300, 'thirdly'. First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

19. Thus according to the rule laid down in Virsa Singh case of even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be 'murder'. Illustration (c) appended to Section 300 clearly brings out this point.

20. Clause (c) of Section 299 and clause (4) of

Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general - as distinguished from a particular person or persons - being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder., on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to 'culpable homicide' as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of .murder. contained in Section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or

the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be .culpable homicide not amounting to murder., punishable under the first part of Section 304, of the Penal Code.

22. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages."

(Para 10)

Important Issue Involved: (A) Even in the case of a hostile witness, that part of his testimony which substantiates case of prosecution can be extricated from his remaining deposition and utilized for the purpose of convicting accused.

(B) Where incident takes place on a sudden quarrel between the assailants and deceased, and deceased suffers indiscriminate blows administered by assailants without any mens rea and without premeditation accused persons to be convicted U/s 304 Part 1 and not U/s 302 of IPC.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANTS : Mr. Vivek Sood, Advocate.

FOR THE RESPONDENT : Ms. Ritu Gauba, APP.

CASES REFERRED TO:

1. *Daya Nand* vs. *State of Haryana,* (2008) 15 SCC 717.

2. *Mahindra Mulji Kerai Patel* vs. *State of Gujarat,* (2008) 14 SCC 690.
3. *Kandaswamy* vs. *State of Tamil Nadu,* (2008) 11 SCC 97.
4. *Kalegura Padma Rao and Anr.* vs. *State of Andhra Pradesh represented by the Public Prosecutor,* (2007) 12 SCC 48.
5. *Sunder Lal* vs. *State of Rajasthan,* (2007) 10 SCC 371
6. *Sunder Lal* vs. *State of Rajasthan,* 2007 (10) SCC 371.
7. *Thangaiya* vs. *State of Tamil Nadu,* 2005 (9) SCC 650.
8. *Adu Ram* vs. *Mukna and Ors.,* (2005) 10 SCC 597.
9. *Jalaram* vs. *State of Rajasthan,* (2005) 13 SCC 347.
10. *Augustine Saldanha* vs. *State of Karnataka,* 2003 (10) SCC 472.
11. *Abdul Waheed Khan @ Waheed and Ors.* vs. *State of Andhra Pradesh,* (2002) 7 SCC 175.
12. *Rakesh Singha* vs. *State of H.P.,* (1996) 9 SCC 89.
13. *State of A.P.* vs. *Rayavarapu Punnayya and Another,* (1976) 4 SCC 382.
14. *Rajwant* vs. *State of Kerala* [AIR 1966 SC 1874 : I966 Supp SCR 230 : 1966 Cri LJ 1509.
15. *Virsa Singh* vs. *State of Punjab* [AIR 1958 SC 465 : 1958 SCR 1495 : 1958 Cri LJ 818.

RESULT: Appeal disposed of.

REVA KHETRAPAL, J.

1. Challenge in the present appeals is to the judgment dated 22.8.2009 convicting the Appellants for the offence punishable under Section 302 read with Section 34 IPC and the order dated 31.8.2009 sentencing them to undergo rigorous imprisonment for life and to pay a fine of Rs. 2,000/- each, in default of payment of fine to further undergo simple imprisonment for a period of one year.

2. The prosecution's case is that in the night intervening 16.11.2005 and 17.11.2005, at about 11.00 p.m. at the Pushta Road, Thokhar No.12, near the site office of K.R. Anand Engineers and Contractors where work of road-widening was going on, the Appellants, namely, Manoj,

Arvind and Ranjit, who were working as labourers at the site attacked Ali Baksh @ Pappu, driver of truck No.HR38-8404, with dandas. One Tehsildar who was posted as a security guard at the construction site raised an alarm, whereupon the Appellants ran away from the site leaving Ali Baksh @ Pappu in an injured condition. The injured was taken to Walia Nursing Home from where he was referred to the LNJP Hospital where he succumbed to the injuries sustained by him.

3. The criminal law machinery was set in motion on receipt of DD No.9A by PW14 Sub Inspector Ram Bhool at about 8.15 a.m. On receipt of the said DD, SI Ram Bhool along with PW13 Constable Akhilesh Kumar went to LNJP Hospital where he met the eye witness Tehsildar (PW8) and recorded his statement (Ex.PW8/A), made endorsement on the same vide Ex.PW14/A and sent the rukka for registration of FIR through Constable Akhilesh (PW13) to P.S. Shakar Pur. At the police station, the duty officer HCW Panwati (PW12) recorded FIR No.990/05 under Sections 302/34 IPC (Ex.PW12/A) and sent copy of the FIR to the senior officer through Constable Chander Prakash (PW15). The investigation of the case after recording of the FIR was carried out by Inspector K.C. Negi (PW17) who reached at the spot at Pushta Road where SI Ram Bhool (PW14) was also present and prepared site plan at the instance of PW8 Tehsildar. From the spot, PW17 (I.O.) lifted blood stained soil, earth control, some concrete and two other stones and one brick, which were taken into possession vide seizure memos Ex.PW8/B and PW8/C after sealing the same in separate pulandas. At the spot, PW17 (I.O) received secret information pursuant to which he alongwith the Tehsildar reached near Shiv Mandir at Pushta Road. All the three accused persons were apprehended from the said place at the instance of PW8 Tehsildar. Their arrest memos Ex.PW14/B, PW14/C and PW14/D and their personal search memos Ex.PW14/E, PW14/F and PW14/G were prepared. All the three accused persons were interrogated and their disclosure statements recorded as Ex.PW14/H, PW14/J and PW14/K. At the instance of accused Ranjit, one saria was recovered from his jhuggi and the same was taken into possession vide seizure memo Ex.PW14/L. Accused Manoj and Arvind got recovered dandas from their respective jhuggis and the same were taken into possession vide memos Ex.PW14/M and Ex.PW14/N. Case property was deposited in the malkhana and the statements of prosecution witnesses recorded. On completion of investigation, the accused were chargesheeted, tried and indicted of the

offence punishable under Section 302 read with Section 34 of the IPC.

4. It is urged by the Appellants' counsel Mr. Vivek Sood that viewed from any angle the impugned judgment is not sustainable in law. He submitted that the accused persons have been convicted on the sole testimony of PW8 Tehsildar and that the testimony of PW8 Tehsildar is neither credible nor corroborated by the testimonies of the remaining independent witnesses, namely, PW1 Joginder Singh, PW2 Pradeep Sharma, PW3 Ramesh Kumar, PW6 Sri Kumar and PW7 Ram Babu. The versions of each one of the aforesaid prosecution witnesses with regard to the incident contains material contradictions and discrepancies. The prosecution has also failed to establish any motive for the offence allegedly committed by the accused persons. It was urged that it was not even the case of prosecution that there was any enmity between the Appellants and the deceased person. The deceased was working as a driver whereas the accused persons were working as labourers at the site in question. On the admission of the deceased at Walia Nursing Home where the deceased was first got admitted by one Kallu, alleged history given was of fall from height in the admission card. The same was reiterated by the relatives who brought the deceased to the LNJP hospital. Further, even PW5 Dr. Chander Shekhar, who had examined the patient, admitted in the course of his cross-examination that the injuries as mentioned in OPD card (Ex.PW5/A) could be caused by fall. Therefore, the story as projected by the prosecution cannot be relied upon that it is the accused persons who had killed the deceased. The fact that there was a long gap of 15 hours between the incident and the reporting of the FIR and during those 15 hours nobody had complained that the accused persons had beaten the deceased also undermined the case of the prosecution. It was next urged that the alleged recovery of the saria and the two dandas at the instance of the accused persons is also of no avail to the prosecution as no public witness was joined in the recovery proceedings or even at the time of the arrest of the accused persons. Though the accused persons are stated to have been arrested at the instance of PW8 Tehsildar, even PW8 was not made a witness to the recovery. Alternatively, it is urged by learned counsel that without prejudice to his contention that the prosecution has failed to bring home the guilt of the accused even if the trial court's findings on the facts are sustained, the conviction under Section 302 IPC in the present case was not justified. It was urged that the evidence on record, including the testimony of PW19 Dr. Deepak

Sharma, who proved on record the postmortem report, revealed that even though there were nine injuries on the person of the deceased, the cause of death was haemorrhage and shock consequent upon the solitary injury inflicted on the chest, which quite obviously could not have been inflicted by all the Appellants. Counsel urged that for all the aforesaid reasons even assuming the prosecution story is believed by this Court, the Court ought to take recourse to the exceptions carved out in Section 300 and hold the Appellants guilty for the offence punishable under Section 304, Part I IPC.

5. *Per contra*, learned APP argued that the appeal was without merit and deserved outright rejection. It was submitted that the testimony of the eye-witness PW8 to the effect that he had seen the accused persons present in the Court coming with dandas and giving beatings to Ali Baksh @ Pappu cannot be disbelieved, more so for the reason that the said witness was a natural witness being a security guard posted at the site by the company concerned. He also bore no enmity to the accused persons and, therefore, had no motive for falsely implicating them. The further submission of the learned APP is that the testimony of PW8 was substantiated by the testimony of PW1 Joginder Singh, who though hostile to the prosecution on certain aspects of the case nevertheless clearly stated that he had seen the three accused persons coming to the site with dandas in their hands and Ali Baksh @ Pappu was standing with them. Subsequently, on Tehsildar (PW8) raising an alarm and calling him, he reached the spot where he saw that Ali Baksh @ Pappu was lying in an injured condition. He, however, categorically denied that he had witnessed the accused persons catching hold of Ali Baksh and giving beatings to him with dandas and stones. Apart from the testimony of PW8 and PW1, learned APP submitted that there are on record the testimonies of PW2 Pradeep Sharma, PW3 Ramesh Kumar, PW6 Sri Kumar and PW7 Ram Babu to substantiate the version of the prosecution.

FINDINGS

6. It is a settled proposition of law that even in the case of a hostile witness, that part of his testimony which substantiates the case of the prosecution can be extricated from his remaining deposition and utilized for the purpose of convicting the accused. We, therefore, see no difficulty in accepting the testimony of PW1 Joginder Singh to the extent it supports the case of the prosecution. We find that the testimony of PW2 Pradeep

Sharma also supports the case of the prosecution to the extent that he deposed that when he visited the site in his capacity as site in-charge on the morning of 17.11.2005, he came to know that a quarrel had taken place between the accused persons and Ali Baksh @ Pappu in which the accused persons who were known to him and were working as labour at the site had beaten Ali Baksh @ Pappu with dandas and stones. PW3 Ramesh Kumar testified that he was working as a driver of a tanker belonging to the contractors working at the site and on the fateful night when at about 11.00 p.m. he came back to the site after taking dinner he heard a noise of the guard Tehsildar (PW8) and saw Ali Baksh @ Pappu, driver of truck No.HR38-8404 lying unconscious in an injured condition. Tehsildar told him that the accused persons had come with dandas and beaten the driver Ali Baksh @ Pappu. He along with 3-4 boys removed Ali Baksh to Walia Nursing Home and thereafter to LNJP hospital. PW6 Sri Kumar working as a helper on the truck of the concerned company deposed on similar lines and stated that on the intervening night at about 11.00 p.m./12.00 a.m. he came to know from the guard that a quarrel had taken place between Ali Baksh who was working as a driver and the accused persons, in the course of which Ali Baksh sustained injuries. He along with two or three other persons had removed Ali Baksh to Walia Nursing Home and thereafter to LNJP hospital. PW7 Ram Babu also testified that he was working as a helper on the truck which was being driven by the deceased. The driver of the said truck Ali Baksh @ Pappu was given beatings at about 11.00 p.m. about 5 or 6 months back by the accused persons. When he reached the spot, he saw Ali Baksh lying unconscious and the accused persons were running away from the spot.

7. PW8 Tehsildar as well as PW1 Joginder Singh, PW2 Pradeep Sharma, PW3 Ramesh Kumar, PW6 Sri Kumar and PW7 Ram Babu though subjected to extensive cross-examination, their testimonies emerged unscathed after cross-examination. There does not appear to us to be any ostensible reason for all these persons, who were co-workers at the same site at which the accused persons were deployed, to have deposed against the accused persons. There is not even a suggestion given to any of these witnesses that they were on inimical terms with the accused persons. This being so and the deceased having died a homicidal death as is established by the medical evidence on record, we see no reason to interfere with the findings of the learned trial court with regard to the

accused persons having inflicted the injuries mentioned in the postmortem report of the deceased. PW3 has explained the circumstances in which he gave false information to both the medical institutes under the fear that the treatment of the deceased may not be started. The deceased was taken to LNJP hospital at about 12.20 a.m. in the night intervening 16/17.11.2005. The MLC was prepared at 5.10 a.m. on 17.11.2005 after the death of the patient and when the relatives present there informed the doctors about alleged history of the case. The delay in lodging FIR is also not, in our opinion, sufficient to discard the testimonies of PW8 as well as PW1, PW2, PW3, PW6 and PW7. The oral testimony of these witnesses has been fully corroborated with the recovery of the blood stained weapons of offence. The chemical examiner has also corroborated the fact that on examination of the dandas, iron rod and other material sent for chemical analysis, human blood was found to be present on all the eight exhibits, including control earth, gauze piece, concrete, brick stones etc. There is thus overwhelming evidence on record to prove that the accused persons have not been falsely implicated for the homicidal death of Ali Baksh. Even if the recoveries are taken to be doubtful, the deposition of the eye-witnesses are sufficient to incriminate the accused.

8. Adverting to the alternative submission of learned counsel for the Appellants, we find from the postmortem report (Ex.PW19/A) that the cause of death was opined to be haemorrhage and shock consequent upon blunt force impact to the chest via injury No.1. It was further opined that all injuries were ante-mortem, recent in duration. Injury No.1 is sufficient to cause death in ordinary course of nature. The following injuries were found:

> "Injury No.1 – Contusion 8.0 cmsx 4.0 cms present over lower front of right side of chest and upper front of abdomen.
>
> 2. Stitched wound 5.0 cms present ovr left side of forehead 1.0 cms above the left eyebrow.
>
> 3. Stitched wound 2.0 cms over back of left side of head.
>
> 4. Abrasion, reddeish, 2.2 cms x 1.3 cms over top of left shoulder.
>
> 5. Lacerated wound 2.0 cms x 1.2 cms x bone deep present over middle front of right leg.

6. Abrasion, reddish, 3.2 cms x 2.0 cms present over front of left knee.

7. Lacerated wound 2.0 cms x 1.2 cms x bone deep present over middle front of left leg.

8. Abrasion, reddish, 1.0 cms x 0.5 cms, present over back of left elbow.

9. Lacerated wound 1.0 cms x 0.5 cms x muscle deep present over middle back of left forearm."

9. Learned counsel contended that the only inference which can be drawn from the aforesaid injuries is that the deceased was indiscriminately beaten. The crucial question which arises for our consideration is whether on the facts proved and the medical evidence on record pointing to the existence of a single fatal blow on the chest of the deceased, the alternative submission made on behalf of the Appellants merits our consideration. Learned counsel for the Appellants has pressed into service the decisions of the Supreme Court rendered in **Kalegura Padma Rao and Anr. vs. State of Andhra Pradesh represented by the Public Prosecutor,** (2007) 12 SCC 48, **Kandaswamy vs. State of Tamil Nadu,** (2008) 11 SCC 97, **Rakesh Singha vs. State of H.P.,** (1996) 9 SCC 89 and **Sunder Lal vs. State of Rajasthan,** (2007) 10 SCC 371. He submitted that in all these cases the injuries inflicted by the accused were far graver in nature as compared to the injuries inflicted by the accused in the present case. Notwithstanding, the Supreme Court altered the conviction from one under Section 302 IPC to Section 304, Part I IPC.

10. Before adverting to the aforesaid judgments relied upon by learned counsel for the Appellants, we may advert to the decision of the Supreme Court in **State of A.P. v. Rayavarapu Punnayya and Another,** (1976) 4 SCC 382, wherein the distinction between murder and culpable homicide not amounting to murder has been phrased in a very succinct manner as follows:

"12. In the scheme of the Penal Code, 'culpable homicide' is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder', is 'culpable homicide not amounting to murder'. For the purpose of fixing punishment,

proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the greatest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

13. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minutae abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

14. Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mensrea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the .intention to cause death. is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by Illustration (b) appended to Section 300.

Section 299		Section 300	
A person commits culpable homicide if the act by which the death is caused is done -		Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done	
INTENTION			
(a) With the intention of causing death; or	(1)	With the intention of causing death; or	
(b) With the intention of causing such bodily injury as is likely to cause death; or	(2)	With the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or	
	(3)	With the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or	
KNOWLEDGE			
(c) With the knowledge that the act is likely to cause death	(4)	With the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.	

15. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the

victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given.

16. In clause (3) of Section 300, instead of the words 'likely to cause death' occurring in the corresponding clause (b) of Section 299, the words 'sufficient in the ordinary course of nature' have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real, and, if overlooked, may result in miscarriage of justice. The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of Section 299 conveys the sense of 'probable' as distinguished from a mere possibility. The words 'bodily injury ... sufficient in the ordinary course of nature to cause death' mean that death will be'the most probable' result of the injury, having regard to the ordinary course of nature.

17. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. **Rajwant v. State of Kerala** [AIR 1966 SC 1874 : I966 Supp SCR 230 : 1966 Cri LJ 1509.] is an apt illustration of this point.

18. In **Virsa Singh v. State of Punjab** [AIR 1958 SC 465 : 1958 SCR 1495 : 1958 Cri LJ 818.] Vivian Bose, J. speaking for this Court, explained the meaning and scope of clause (3), thus (at p. 1500):

"The prosecution must prove the following facts before

it can bring a case under Section 300, 'thirdly'. First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

19. Thus according to the rule laid down in Virsa Singh case of even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be 'murder'. Illustration (c) appended to Section 300 clearly brings out this point.

20. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general - as distinguished from a particular person or persons - being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is 'murder' or .culpable homicide not amounting to murder., on the facts of a case, it will be convenient for it to approach the

problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to 'culpable homicide' as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in Section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be .culpable homicide not amounting to murder., punishable under the first part of Section 304, of the Penal Code.

22. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages."

11. The guidelines laid down in the above decision were followed in a number of subsequent decisions of the Supreme Court, including those rendered in **Abdul Waheed Khan @ Waheed and Ors. vs. State of Andhra Pradesh,** (2002) 7 SCC 175, **Augustine Saldanha vs. State of Karnataka,** 2003 (10) SCC 472, **Thangaiya vs. State of Tamil Nadu,** 2005 (9) SCC 650, **Sunder Lal vs. State of Rajasthan,** 2007 (10) SCC 371, Kandaswamy vs. State rep. by the Inspector of Police (SLP (Crl.) No.5134/2006 disposed of on 17.7.2008), **Daya Nand vs. State of Haryana,** (2008) 15 SCC 717, **Adu Ram vs. Mukna and Ors.,** (2005) 10 SCC 597, **Mahindra Mulji Kerai Patel vs. State of Gujarat,** (2008) 14 SCC 690 and **Jalaram vs. State of Rajasthan,**

(2005) 13 SCC 347.

12. In the case of **Kalegura Padma Rao and Anr. vs. State of Andhra Pradesh** (supra), the assault had its genesis in a quarrel which had taken place between the deceased and the accused persons on the preceding evening. On the following morning, 16 accused persons armed with iron rods and axes attacked the victim by entering his house and bolting the door from inside. The beatings were indiscriminately administered. The victim ran out of the house. The accused chased and beat him indiscriminately till finally he fell down near the gram panchayat office. Though taken to a hospital, he succumbed to the injuries sustained by him. On the touchstone of the principles set out in its earlier decisions rendered in **State of A.P. v. Rayavarapu Punnayya** and **Abdul Waheed Khan @ Waheed and Ors. vs. State of Andhra Pradesh** (supra), the conviction of the Appellants was altered from Section 302 read with Section 149 to Section 304, Part I read with Section 149.

13. In the case of **Kandaswamy vs. State of Tamil Nadu** (supra) where the accused was alleged to have indiscriminately cut the deceased with an Aruval (sharp sickle like weapon) resulting in his instantaneous death, the conviction under Section 302 was altered to one under Section 304, Part I IPC in the background of the legal principles enunciated by the Supreme Court in its earlier decisions.

14. The next decision relied upon by the Appellants' counsel is **Rakesh Singha vs. State of H.P.** (supra), wherein the Appellants who were a group of students armed with hockey sticks, iron rods, etc. indiscriminately attacked the victims who had gathered there in connection with a marriage ceremony turning the marriage to one of mourning, the Supreme Court held that the High Court had justifiably convicted the Appellants under Section 304, Part II read with Section 149 IPC.

15. In **Sunder Lal vs. State of Rajasthan** (supra) where one of the accused was alleged to have inflicted a blow on the head of the deceased with a gandasi with the intention to kill him and also inflicted injuries on his hand while the co-accused inflicted injuries on his leg with lathi in the night at about 2.00 a.m. while he was sleeping, considering the fact that the occurrence took place in the night in almost dark conditions with feeble light and attack was made indiscriminately, the Supreme Court held that the appropriate conviction would be under Section 304, Part I IPC.

16. In the light of the aforesaid decisions and keeping in mind the fact of existence of a single fatal blow on the chest of the deceased and the further fact that there was darkness when the occurrence took place, we are of the view that the conviction of the Appellants for the offence punishable under Section 302 IPC is required to be modified and the Appellants are liable to be convicted for an offence punishable under Section 304, Part I IPC. We say so for the reason that where an occurrence takes place in the darkness or in feeble light there is a strong possibility of the blow being intended to be directed on some other part of the body of the victim, accidentally striking the victim on a vital part of the body. These factors have weighed with the Supreme Court in all the decisions noted by us hereinabove including the decisions reported as **Thangaiya vs. State of Tamil Nadu** and **Sunder Lal vs. State of Rajasthan** (supra). The deceased in the instant case had received only one injury sufficient to cause death in the ordinary of nature being one danda blow in the region of his chest. The remaining blows were indiscriminate blows administered by the accused persons without any mens rea and without premeditation. The incident took place on a sudden quarrel between the deceased who was a driver and the accused persons who were labourers at the same site. Having regard to these facts, we modify the conviction of the Appellants from the offence punishable under Section 302 IPC to the one under Section 304 Part I IPC. The Appellants have already undergone about 7 years imprisonment. We are of the opinion that the ends of justice would be met if they are sentenced to undergo 8 years rigorous imprisonment. The Appellants shall be entitled to the benefit of remission as well as the period already undergone by them in accordance with law.

17. CRL.A. 217/2010, CRL.A. 297/2010 and CRL.A. 525/2010 stand disposed of accordingly.

ILR (2013) IV DELHI 2833
CRL. A.

MUSA SINGH ....APPELLANT

VERSUS

STATE ....RESPONDENT

(REVA KHETRAPAL & SUNITA GUPTA, JJ.)

CRL. A. NO. : 1053/2010 DATE OF DECISION: 08.07.2013

Indian Penal Code, 1860—Sections 302, 377, 363 & 411—Aggrieved appellant challenged his conviction U/s 302, 377, 363 & 411 of Code—Prosecution case rested on circumstantial evidence—Trial Court concluded, circumstantial evidence clinching and prosecution discharged burden casted upon it beyond shadow of doubt—Whereas, according to appellant circumstantial evidence adduced by prosecution did not formulate composite chain of evidence unerringly pointing towards accusation leveled against appellant. Held:- 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, by fully established. Each fact must be proved individually and only thereafter the Court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the 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/ themselves, is/are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved.

On behalf of the Appellant, it was contended that the

aforesaid chain of circumstantial evidence relied upon by the prosecution to bring home the guilt of the accused was not a complete one and several links were missing from the said chain, necessitating the setting aside of the judgment of the learned trial court. It was urged that there can be no manner of doubt that where a case under Section 302 IPC is entirely based upon circumstantial evidence, an onerous burden is cast upon the prosecution to prove beyond a shadow of doubt that a composite chain of evidence regarding the causes and the circumstances relating to the death of the accused is formed, which unerringly points the finger of accusation at the accused and is consistent with no other hypothesis except that of the guilt of the accused. The learned counsel for the accused in support of this contention relied upon the case of **Sharad Birdhichand Sarda vs. State of Maharashtra,** (1984) 4 SCC 116. In the said judgment, which is locus classicus on the law relating to circumstantial evidence, the following dicta was laid down, which is heavily relied upon:

> "153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in **Shivaji Sahabrao Bobade v. State of Maharashtra** (1973) 2 SCC 793: 1973 Cri LJ 1783 where the observations were made:
>
> Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be'

and 'must be' is long and divides vague conjectures from sure conclusions,

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a 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.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence." **(Para 6)**

Important Issue Involved: 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, by fully established. Each fact must be proved individually and only thereafter the Court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the facts taken together is conclusive in establising the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts, by itself/ themselves, is/are not decisive. The circumstances proved should be such as to exclude hypothesis except the one sought to be proved.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. S.K. Sethi, Advocate.

FOR THE RESPONDENT : Ms. Ritu Gauba, APP.

CASES REFERRED TO:

1. *Shyamal Ghosh* vs. *State of West Bengal* (2012) 7 SCC 646.
2. *Amitava Banerjee* vs. *State of West Bengal* (2011) 12 SCC 554.
3. *Vikram Singh* vs. *State of Punjab* (2010) 3 SCC 56.
4. *Aftab Ahmad Ansari* vs. *State of Uttaranchal* (2010) 2 SCC 583.
5. *State (NCT of Delhi)* vs. *Navjot Sandhu* (2003) 6 SCC 641.
6. *Gura Singh* vs. *State of Rajasthan* (2001) 2 SCC 205.
7. *State of Rajasthan* vs. *Teja Ram and Others* (1999) 3 SCC 507.
8. *Tanviben Pankajkumar Divetia* vs. *State of Gujarat* (1997) 7 SCC 156.
9. *Sharad Birdhichand Sarda* vs. *State of Maharashtra,* (1984) 4 SCC 116.
10. *Dudh Nath Pandey* vs. *State of Uttar Pradesh,* (1981) 2 SCC 166.
11. *Bakhshish Singh* vs. *State of Punjab,* (1971) 3 SCC 182.
12. *Raghav Prapanna Tripathi* vs. *State of U.P.* AIR 1963 SC 74.
13. *Prabhu Babaji Navle* vs. *State of Bombay,* AIR 1956 SC 51.

RESULT: Appeal dismissed.

REVA KHETRAPAL, J.

1. Challenge in the present appeal is to the sentence of life imprisonment for the offences punishable under Sections 302 and 377 IPC, the sentence of 5 years rigorous imprisonment for the offence

punishable under Section 363 IPC and 3 years rigorous imprisonment for the offence punishable under Section 411 IPC and varying amounts of fine for the aforesaid offences, in default the Appellant to undergo further imprisonment.

2. The prosecution case in a nutshell is that on 19.04.2006, the Appellant/accused Musa Singh abducted and sodomised a boy named Vishal aged 5-6 years and caused his death by hitting him with a brick on his head. PW1 Seema in this regard lodged a complaint at Police Station Shalimar Bagh on the basis of which ASI Urmilla (PW15) registered FIR (FIR No.280/06) Ex.PW1/A. A day later, that is, on 20.04.2006, PW18 Constable Babita received a call informing that a dead body of a male child aged about 5-6 years is lying in the room under water tank in front of Railway Track, Gali No.2, Rajasthani Udyog Nagar, Jahangir Puri. PW18 Constable Babita recorded this information in the PCR Form Ex.PW18/A. The information was further passed to Police Station Jahangir Puri where HC Raj Rani (PW9) recorded this information vide DD No.17 (Ex.PW9/A). PW23 SI Rajesh Kumar posted at Police Station Jahangir Puri and PW17 HC Suraj Bhan on receipt of DD No.17 at about 10:15 A.M. went to the spot. PW23 SI Rajesh Kumar flashed this message to various Police Stations. The message was also sent to Police Station Shalimar Bagh where missing report had been lodged by the mother of the child, on the basis of which FIR Ex.PW1/A was registered on 19.04.2006. SI Ravinder Singh (PW22) was informed by the duty officer P.S. Shalimar Bagh that a message has been received from PS Jahangir Puri that a dead body of a male child aged about 5 to 6 years has been found. On receipt of this information, SI Ravinder (PW22) along with Seema (PW1), Raj Kumar (PW2) and Kamlesh (PW4) reached the spot, that is, Gali No.2, Rajasthani Udyog Nagar, near water tank, Railway line, Jahangir Puri and identified the dead body as that of Vishal. At the spot, SI Rajesh Kumar (PW23) was already present. SI Rajesh Kumar called the crime team and after inspection by the crime team, he lifted sealed and seized cement brick with blood stains (Ex.PW17/A), earth control (Ex.PW17/B), blood sample from spot (Ex.PW17/C) and chappals of the deceased (Ex.PW17/D). Postmortem on the dead body was got conducted (Ex.PW19/A). In the postmortem, the doctor opined that there was forceful penetration of anal canal by a fully erected penis and the cause of death was cranio-cerebral damage resulting from blunt force. Time since death was approximately 24 hours. Three days later, on 23.04.2006

the accused was arrested at the instance of Seema (PW1) vide arrest memo Ex.PW1/C and his personal search was conducted vide memo Ex.PW1/D. From his formal search, a mobile phone belonging to the mother of the deceased boy was also recovered from the possession of the accused. The phone was seized vide seizure memo Ex.PW1/B. Thereafter Constable Naresh PW28 brought accused Musa Singh to the Babu Jagjivan Ram Memorial Hospital for his examination. On completion of investigation, the charge sheet was filed.

3. The accused was charged for the offences punishable under Sections 363/377/302/411 IPC. Prosecution in order to bring home the guilt of the accused examined 29 witnesses. The statement of the accused was recorded under Section 313 Cr.P.C. in which the accused admitted that PW1 Seema with her son was residing at the house of Om Parkash in Gali No.9, Shalimar Bagh, Delhi along with her husband Rajkumar (PW2), but denied having committed the offences aforesaid and stated that he had been falsely implicated at the instance of the complainant due to enmity. He stated that he wanted to lead evidence in his defence, but subsequently defence evidence was closed without examining any witness.

4. The learned trial court on the basis of the circumstantial evidence adduced by the prosecution witnesses held that the prosecution had established the guilt of the accused for the offences punishable under Sections 363, 377, 302 and 411 IPC and convicted him accordingly.

5. The learned trial court based the conviction of the accused on the following circumstances:

(i) Evidence of last seen;

(ii) Recovery of mobile phone from the possession of the accused immediately after the commission of offence;

(iii) Recovery of blood stained brick used as weapon of offence at the instance of the accused;

(iv) Detection of blood on the clothes of the accused. (v) Detection of human semen on the clothes of the deceased child.

6. On behalf of the Appellant, it was contended that the aforesaid chain of circumstantial evidence relied upon by the prosecution to bring home the guilt of the accused was not a complete one and several links

were missing from the said chain, necessitating the setting aside of the judgment of the learned trial court. It was urged that there can be no manner of doubt that where a case under Section 302 IPC is entirely based upon circumstantial evidence, an onerous burden is cast upon the prosecution to prove beyond a shadow of doubt that a composite chain of evidence regarding the causes and the circumstances relating to the death of the accused is formed, which unerringly points the finger of accusation at the accused and is consistent with no other hypothesis except that of the guilt of the accused. The learned counsel for the accused in support of this contention relied upon the case of **Sharad Birdhichand Sarda vs. State of Maharashtra,** (1984) 4 SCC 116. In the said judgment, which is locus classicus on the law relating to circumstantial evidence, the following dicta was laid down, which is heavily relied upon:

> "153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in **Shivaji Sahabrao Bobade v. State of Maharashtra** (1973) 2 SCC 793: 1973 Cri LJ 1783 where the observations were made:
>
> Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions,
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
>
> (3) the circumstances should be of a conclusive nature and tendency,
>
> (4) they should exclude every possible hypothesis except the one to be proved, and
>
> (5) there must be a 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.
>
> 154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

7. To the same effect are the decisions of this Court in **Tanviben Pankajkumar Divetia Vs. State of Gujarat** (1997) 7 SCC 156; **State (NCT of Delhi) Vs. Navjot Sandhu** (2003) 6 SCC 641; **Vikram Singh Vs. State of Punjab** (2010) 3 SCC 56 and **Aftab Ahmad Ansari Vs. State of Uttaranchal** (2010) 2 SCC 583.

8. In **Aftab Ahmad Ansari** (Supra), the Supreme Court observed as under:- (SCC, Page 7)

> "13. 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 must be proved individually and only thereafter the court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the 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/themselves, is/are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution case succeeds in a case of circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever extravagant and fanciful it might be."

9. Since there can be no dispute with this proposition of law, we proceed to examine the circumstances relied upon by the prosecution seriatim on the aforesaid premise, dealing with each circumstance and

testing the same on the touchstone of the 'panchsheel' formulated in the case of **Sharad Birdhichand Sarda** (supra).

CIRCUMSTANCE OF LAST SEEN

10. The last seen evidence in the present case is that of PW4 Kamlesh, the brother of PW2 Rajkumar, father of the deceased. PW4 has deposed:

> ".....On 19.4.06 at about 6.30/7.00 a.m. I saw accused present in the court taking away Vishal aged 5/6 years who was son of my brother Raj Kumar. I saw the accused taking away Vishal outside Gali No.9, Shalimar Village. I asked the accused where he was going at such early hours. He laughing replied that they were going for morning walk. The accused and Vishal went towards phatak side."

11. PW4 Kamlesh in his subsequent testimony, inter alia, stated that when he saw the accused taking away the child, the accused was wearing the same red pyjama and light yellow check shirt which he was wearing at the time of his arrest and which were seized by the police vide memo Exhibit PW4/A. As regards the clothes of the child, on being asked PW4 stated that the child had worn an underwear and a shirt but he did not remember the colour of the underwear. The child was in the lap of the accused and was happy.

12. Learned counsel for the Appellant has assailed the aforesaid testimony of PW4 Kamlesh on the following grounds:

(i) The name of PW4 does not figure in the First Information Report lodged with the police;

(ii) None has been produced from the neighbourhood or that gali to corroborate the testimony of PW4 that the deceased was last seen in the company of the accused though PW1 Seema, mother of the deceased, in her complaint to the police had clearly stated that the neighbours had informed her that the accused had taken away the child;

(iii) It is improbable that after so many days the accused would be wearing the same clothes which he was wearing on the day of the incident; and

(iv) The witness (PW4) was not able to properly describe the clothes worn by the deceased child and the colour thereof in that he stated that the child was wearing shirt and underwear when he was last seen with the accused whereas he was actually wearing a shirt and knicker.

13. In order to properly appreciate the last seen evidence of PW4 Kamlesh, it is proposed to first examine the testimony of PW1 Seema, mother of the deceased and PW2 Rajkumar, father of the deceased, before dealing elaborately with the testimony of PW4 Kamlesh. PW1 Seema testified that on 19.4.2006, she got up at about 6.30 a.m. and found that her son Vishal, aged about 4 years who had slept with her in the night was not present in the house. She searched for him in the neighbourhood and the neighbours told her that they had seen accused Musa Singh taking away her son. She checked her mobile phone and the same was also missing. At about 7.00 a.m., she talked to the accused from the nearby PCO booth and he told her that her son was with him. She along with her husband went to the police station and lodged a report. To be noted at this juncture that the aforesaid testimony of PW1 Seema is on the same lines as her initial statement recorded by the police on the basis of which First Information Report (Ex.PW1/A) was lodged. In her further testimony, she added that on the same day her husband also talked with the accused and requested him to return his son but the accused refused to do so. In her cross-examination, she stated that she could not give the names of the neighbours who had told her that the accused had taken away her son. On being asked, she stated that her husband had telephoned the accused from the STD booth in Gali No.9 at 7.30 a.m. and she had telephoned the accused from the STD booth in Gali No.7 at 8.00 a.m. and she had lodged report regarding the taking away of her son by the accused in Police Station Shalimar Bagh at about 2.00 p.m. Her husband (PW2 Rajkumar) and her sister Sheela had accompanied her at that time.

14. Adverting to the testimony of PW2 Rajkumar, which corroborates the testimony of PW1 Seema, he stated that on 19th April, 2006 at about 7.00 a.m. his wife Seema woke him up and told him that his son Vishal, aged about 4 years and her mobile phone make Nokia were missing from the house. He along with his wife started searching for his son. Someone from the locality told them that their son had been abducted by accused Musa Singh, who is brother-in-law (jija) of his wife. At about 7.30 a.m., he made a telephone call to the accused from the STD booth of Naveen

Verma (PW3) and accused told him that his son and mobile phone were with him. In the course of his cross-examination, the witness stated that his wife (PW1) and Kamlesh (PW4) had accompanied him at the time of lodging report with the police regarding taking away of his son. Much has been said by learned counsel for the accused with regard to this statement made by PW2 Rajkumar. The contention of counsel is that while PW2 says that PW1 Seema and PW4 Kamlesh had gone with him to lodge First Information Report, PW1 Seema stated that PW2 Rajkumar and Sheela (wife of the accused) had gone with her to the police station. The inference sought to be drawn is that PW4 Kamlesh was nowhere in the picture when the police report was lodged and his evidence that he had last seen the deceased boy being taken away by the accused person was, therefore, wholly unbelievable. It is also contended that the fact that no neighbour of PW1 and PW2 has been examined by the prosecution to corroborate the testimony of PW4 Kamlesh with regard to the deceased having been last seen in the company of the accused, nor in fact any of the neighbours could be named by PW1 and PW2, throws further doubt on the veracity of the prosecution version. PW4 Kamlesh is the real brother of PW2 Rajkumar and hence planted by the prosecution to buttress the case of the prosecution for dearth of any other evidence to substantiate the "Last Seen Theory" of the prosecution.

15. At the outset, we note that though undeniably PW4 Kamlesh is the real brother of PW2 Rajkumar and brother-in-law of PW1 Seema and thus a close relative of the deceased, this cannot be construed in our opinion as taking away from the credibility of his deposition. There is no such law that the deposition of a close relative even if otherwise found to be credible is to be discarded and cannot be relied upon. In the instant case, in the backdrop of the testimonies of PW1 Seema and PW2 Rajkumar, the last seen evidence of PW4 Kamlesh must be viewed as a vital link in the chain of circumstances explainable only on one hypothesis: that the Appellant was guilty of killing the deceased. PW4 Kamlesh has given a graphic description of the manner in which the accused was taking away the child in his lap and has also stated that he asked the accused as to where they were going and the accused replied that they were going for a morning walk. The deposition of PW4 has also withstood the test of cross-examination and there has emerged nothing on record to discredit his testimony in any manner. A mere bald suggestion was put to him that he had not seen the accused taking away the child, which

needless to state was denied by the witness.

16. With regard to the emphasis placed by learned counsel for the accused on the fact that PW4 Kamlesh is not named in the First Information Report, which finds no mention of the child having been last seen in his company, we are not inclined to attach undue importance to this fact for it is trite that a First Information Report is not to be treated as an encyclopedia with regard to the crime committed by the offender but merely as a piece of information to the police regarding the commission of a crime.

17. As regards the contention that none has been produced from the neighbourhood or gali to corroborate the testimony of PW4, it is noteworthy that no neighbour has been named in the First Information Report and it is possible that the witness was referring to the general buzz in the neighbourhood. Even otherwise, no adverse inference can be drawn from the fact that no neighbour has stepped into the witness box to depose against the accused since it emerges from the record that the accused happens to be residing in the same neighbourhood. The growing tendency of those who reside in the neighbourhood to distance themselves from the problems of a neighbour and in particular those relating to crime and law enforcement is well known and Courts while noticing that this is possibly on account of an instinct for self-preservation from time to time have rued the fact that members of the general public are not forthcoming qua criminal offences and offenders.

18. With regard to the contention of the Appellant's counsel that it is improbable that the accused was still wearing the same blood stained clothes which he was wearing on the day when he abducted the child, we find no merit in this as well. The accused was well aware of the fact that he had committed a heinous crime and was on the run from the police. In such circumstances, he could hardly have been expected to go back to his house for a change of clothes. Concealment of his person from the eyes of the police officials must have been predominant in his mind. As a matter of fact, his whereabouts were informed by the secret informer to the police on his venturing out to the 'theka' to consume liquor, resulting in his apprehension.

19. A lot of emphasis has also been placed by learned counsel for the accused on the fact that as per PW4 Kamlesh, the child was wearing a shirt and underwear when he was last seen by PW4 with the accused,

whereas in fact he was wearing knickers and a shirt and that PW4 was also not able to give the colour of the clothes of the child. In this context, the learned trial Judge has in our opinion pertinently noted that PW4 when he had seen the accused with the child never knew that he was seeing the child for the last time and might have to depose about the clothes of the child. Hence the discrepancy in telling whether the deceased was wearing knickers or underwear, which is not, in any manner, a major discrepancy.

20. Thus, on an overall conspectus, in our opinion, the testimony of PW4 Kamlesh with regard to "last seen" cannot be discarded for any of the reasons aforementioned, more so as it has emerged unscathed after cross-examination and is cogent and credible and there is nothing on record to suggest that he was in any manner inimical to the accused. We however note the fact that a rather extraordinary suggestion was given to this witness to the effect that he was falsely implicating the accused so that he could conveniently live with the wife of the accused. Given the fact that it is nobody's case that there was any illicit connection between the witness and the wife of the accused, the suggestion to our mind was quite off the mark and to no end. We are thus unable to discern any cogent reason for interfering with the finding of the trial court that it stands proved that PW4 Kamlesh had seen the accused taking away the child in the early hours of the morning, and this circumstance forms a vital link in the chain of circumstances sought to be established by the prosecution to bring home the guilt of the accused.

21. The reliance placed by the learned Additional Public Prosecutor in this regard upon the judgments rendered in **Amitava Banerjee vs. State of West Bengal** (2011) 12 SCC 554 and **Shyamal Ghosh Vs. State of West Bengal** (2012) 7 SCC 646 is apposite. In **Amitava Banerjee** (Supra), the deceased Babusona was last seen by witnesses in the park talking to the appellant and shortly thereafter going with the appellant on his bicycle in the same direction, that is, the direction of the jungle. The Court after analyzing the testimonies of the "last seen" witnesses and finding that there was nothing to discredit their version or render them unreliable, held that the deceased having been last seen with the appellant around the time he was killed is a circumstance which together with other circumstances proved in the case was explainable only on one hypothesis that the appellant was guilty of killing the deceased. In the case of **Shyamal Ghosh** (supra), it was laid down that once the

last seen theory comes into play, the onus is on the accused to explain as to what happened to the deceased after they were together seen alive and if the accused fails to render any reasonable/plausible explanation in this regard then the court can rely upon the "Last Seen Theory".

RECOVERY OF MOBILE PHONE

22. The second circumstance in the chain of circumstances sought to be established by the prosecution to prove the guilt of accused is the recovery of the mobile phone of PW1 Seema from the person of the accused at the time of his arrest. As already stated above, PW1 Seema in her complaint, on the basis of which FIR was recorded as Ex.PW1/A, had clearly stated that her mobile phone was missing from the house. She reiterated this in her testimony in Court and stated that she had made a call on her mobile phone to the accused from the PCO booth and was told by the accused that her son was with him. PW2 Rajkumar in his testimony also stated that he had spoken with the accused on the mobile phone of his wife by making a call from the nearby STD booth of Naveen Verma. The latter was examined as PW3, who however stated that though he had been running STD booth for the last 6 to 7 years in Gali No.9, Shalimar Village and the number of the local phone at his shop is 27492353, he did not remember as to whether anyone had come to his shop for making a telephone call on 19.4.2006. He was declared hostile and cross-examined by the learned APP but to no avail. PW6 Rajinder Pal from whose STD booth PW1 Seema had made a call also did not support the case of the prosecution except to the extent that he stated that he had a STD booth near his vegetable shop and that his children were running the said STD booth, who had told him that on 19th April, 2006 Seema (PW1) had come to the STD booth to make a call.

23. Notwithstanding the testimonies of PW3 Naveen Verma and PW6 Rajinder Pal, in our opinion, the prosecution has successfully established on record through the testimony of PW8 Davinder Kumar that mobile phone bearing No.9350431941 was the mobile phone of PW1 Seema, which was purchased by her second hand from the shop of PW8. The latter categorically stated in the witness box that in the month of March, 2006 he had sold one Nokia mobile Model 2280 having connection of Reliance network to one Seema, wife of Rajkumar for a consideration of Rs. 100/-, and the number of the said mobile phone

which he had purchased from another lady for ' 700/-, was 9350431941. He also proved on record the receipt with regard to the sale of the said mobile phone (wrongly numbered as Ex.PW1/A) and identified the mobile phone as Ex.P1.

24. The factum of PW2 Rajkumar having called from the STD Booth of PW3 Naveen Verma also stands established from the testimony of PW20 Vishvabendhu Govil from Reliance Infocom Ltd. who proved on record the call details from Mobile No. 9350431941 from 17.4.2006 to 19.4.2006 as Ex. PW20/B, apart from proving on record the information provided by him to the Investigating Officer regarding the name and particulars of MDN (Mobile Directory Number) 9350431941 as Ex.PW20/A. The call details proved on record by the witness clearly show that a call was made from telephone No.27492353 at 7:38:43 hours to mobile phone No.9350431941. PW3 Naveen Kumar though hostile to the prosecution has specifically stated that the number of the telephone installed at his telephone booth is 27492353. Thus, this call was presumably made by PW2 Rajkumar as testified by the witness. So far as the owner of the other STD booth, namely, PW6 Rajinder Pal is concerned, though hostile, he admitted that his children had told him that Seema (PW1) had come to make a telephone call. The call details further establish that on the same day at 8:6:12 hours and 8:8:38 hours respectively two calls were made to mobile phone No. 9350431941 which presumably were the calls of PW1 Seema.

25. Then again, PW1 Seema in her testimony has clearly deposed about the recovery of the mobile phone from the pocket of the shirt of the accused in her presence in the evening of 24.4.2006 when the accused was arrested. The accused also does not deny the recovery of the mobile phone of PW1 Seema from his possession as is evident from a suggestion given by counsel for the accused to PW1 Seema, reply to which is as follows:

> "It is wrong to suggest that my mobile phone was not stolen or that I gave the same to the accused or that I took some money from him for my needs."

26. PW4 Kamlesh also bore testimony to the recovery of the mobile phone Ex.P1 from the pocket of the shirt of the accused and identified the same as the mobile phone belonging to his bhabhi/PW1 Seema. SI Rakesh Kumar (PW24), Constable Naresh (PW28) and Inspector Satvir

Singh (PW29) [IO] are the police officials who corroborated the testimonies of PW1 and PW4 in this regard. Per contra, there is nothing on record to substantiate the version of the accused that the complainant had given his mobile phone to him. In the circumstances, we are of the considered opinion that the recovery of the mobile phone Ex.P1 belonging to the mother of the deceased from the possession of the accused immediately after the commission of the offence establishes yet another vital link in the chain of circumstances pointing to the guilt of the accused.

RECOVERY OF BLOOD STAINED BRICK AT THE INSTANCE OF THE ACCUSED

27. The case of the prosecution in this regard is that the accused upon his arrest made a disclosure statement (Ex.PW24/B) and got recovered the brick with which he had hit on the head of the boy which was seized vide memo Ex.PW24/D. Recovery of the brick has been established by the prosecution by examining PW1 Seema, PW4 Kamlesh, PW24 SI Rakesh Kumar, PW28 Constable Naresh and PW29 Inspector Satvir Singh. This brick was also sent to the FSL for analysis and the FSL result (Ex.PW11/A) shows that blood of human origin was found on the brick. Some confusion is sought to be created by the Appellant's counsel by contending that brick (Ex.P8) was planted upon the accused to implicate him as is evident from the fact that it was a half brick whereas the brick produced in Court was found to be 2/3rds of the brick and not half. This, to our mind, is not of much importance as it is no one's case that the dimensions of the brick were measured. The fact that this brick was recovered at the instance of the accused from the bushes outside the room from which the dead body was recovered coupled with the fact that PW24, PW28 and PW29 whose testimonies we find to be reliable and trustworthy have deposed about the recovery of the brick at the instance of the accused, conclusively proves that the brick was recovered pursuant to the disclosure made by the accused.

28. An argument was sought to be raised on behalf of the Appellant that the blood group could not be ascertained and, therefore, the recovery of the blood stained brick cannot be taken to be a circumstance against the accused. Relying upon the judgments of the Supreme Court in **State of Rajasthan Vs. Teja Ram and Others** (1999) 3 SCC 507 and **Gura Singh Vs. State of Rajasthan** (2001) 2 SCC 205, the learned Additional Public Prosecutor contended to the contrary. In **Teja Ram's** case (Supra),

one of the circumstances which the trial court relied on as incriminating against the accused was the recovery of two axes (kulhadis). On the strength of the statements of two of the accused persons, the said axes (kulhadis) were subjected to chemical examination and the result was that both the axes (kulhadis) were found stained with blood. However, when they were further subjected to test by the serologist, the blood on one axe was found to be of human origin while the blood stain on the other axe was found to be so disintegrated that its origin became undetectable. A Division Bench of the High Court of Rajasthan declined to act on the evidence relating to the recovery of axes for the reason that human blood could be detected only on one of them while the origin of the blood on the other was not established, there was room of entertaining doubt as to the real person whose blow with the axe would have caused the injury. The Supreme Court finding the reasoning of the High Court unsustainable, opined as under:-

> "25. Failure of the serologist to detect the origin of the blood due to disintegration of the serum in the meanwhile does not mean that blood stuck on the axe would not have been human blood at all. Sometimes it happens, either because the stain is too insufficient or due to haematological changes and plasmatic coagulation that a serologist might fail to detect the origin of the blood. Will it then mean that the blood would be of some other origin? Such guesswork that blood on the other axe would have been animal blood is unrealistic and far-fetched in the broad spectrum of this case. The effort of the criminal court should not be to prowl for imaginative doubts. Unless the doubt is of a reasonable dimension which a judicially conscientious mind entertains with some objectivity, no benefit can be claimed by the accused."

29. In the case of **Gura Singh** (supra), the prosecution proved beyond doubt the recovery of the blood stained 'chadar' (sheet) belonging to the Appellant and kassi, the weapon of offence on the basis of the voluntary disclosure statement made by the accused, who was charged with the offence of patricide and had allegedly smashed the skull of the deceased with the kassi. Both the trial court as well as the High Court held that the prosecution had successfully established the making of the disclosure statements by the Appellant and the consequent recovery of the weapon of offence and 'chadar' at his instance. The serologist and

chemical examiner found the 'chadar' (sheet) and other items to be stained with human blood. However, the origin of blood stains on the kassi and other items like the shoes of the accused could not be determined on account of disintegration with the lapse of time. The contention was sought to be raised on behalf of the Appellant that the prosecution had failed to connect the accused with the commission of crime and the judgments of the Supreme Court in **Prabhu Babaji Navle Vs. State of Bombay,** AIR 1956 SC 51 and **Raghav Prapanna Tripathi Vs. State of U.P,** AIR 1963 SC 74 pressed into service. Rejecting the aforesaid contention, the Supreme Court held that the effect of the failure of the serologist to detect the origin of blood due to disintegration in the light of the aforesaid cases was considered by this court in **Teja Ram's** case (supra) and in view of the authoritative pronouncement of this court in the said case, there was no substance in the submission of the learned counsel for the Appellant that in the absence of the report regarding the origin of the blood, the trial court could not have convicted the accused.

30. In the instant case, the FSL report Exhibit PW11/A establishes the existence of blood on the brick, which was used as the weapon of offence and the report of the serologist Ex. PW11/B shows that the blood was of human origin and this clinches the issue. The failure of the serologist to detect the classification/grouping of the blood cannot go to the benefit of the accused.

31. We may add that the medical evidence on record further corroborates the fact that the cause of death in the instant case was cranio-cerebral damage resulting from blunt force impact. Not even a suggestion was put to the doctor who proved on record the postmortem report, namely, PW19 Dr. Kulbhushan Goel that cranio-cerebral damage which resulted in the death of the deceased could not have been caused by the brick Ex.P8. Before parting with this aspect, however, we may note that reliance was placed on behalf of the Appellant on the judgments of the Supreme Court rendered in **Dudh Nath Pandey vs. State of Uttar Pradesh,** (1981) 2 SCC 166 and **Bakhshish Singh vs. State of Punjab,** (1971) 3 SCC 182. We are unable to appreciate as to how the said judgments can afford any benefit to the accused. In the case of **Dudh Nath Pandey** (supra), the Supreme Court while affirming the conviction of the Appellant merely noted that evidence of the recovery of the weapon of offence, i.e., pistol at the instance of the Appellant could not by itself prove that he who pointed out the weapon wielded it

in offence. In the case of **Bakhshish Singh** (supra), the only incriminating evidence against the Appellant was that he had pointed to the place where the dead body of the deceased had been thrown and in the circumstances the Supreme Court rightly concluded that even if he was not a party to the murder the Appellant could have come to know the place where the dead body of the deceased had been thrown and accordingly proceeded to set aside the conviction. These cases can have no application to the facts of the present case where the prosecution does not seek to inculpate the Appellant solely on the basis of recovery of the weapon of offence or for that matter the dead body which in the present case in any event was not recovered at the instance of the Appellant, but on the basis of a chain of incriminating circumstances. The recovery of the blood stained brick at the instance of the accused is but a link albeit an important one in the chain of circumstances put together by the prosecution for the purpose of eliminating the hypothesis of innocence of the accused and in our opinion this link stands conclusively proved through the testimonies of the prosecution witnesses noted above.

DETECTION OF BLOOD ON THE CLOTHES OF THE ACCUSED

32. The next link in the chain of circumstances sought to be proved by the prosecution to bring home the guilt of the accused is the detection of blood on the clothes of the accused. The aforesaid circumstance is duly proved by the testimony of PW4 Kamlesh, who categorically stated that the accused was wearing red pyjama and a yellow check shirt at the time of his apprehension, which were the very same clothes worn by the accused while taking away the child on the morning of 19.4.2006. PW24 SI Rakesh Kumar, PW28 Constable Naresh and PW29 Inspector Satvir Singh (apart from PW4 Kamlesh) are witnesses to the recovery of the said clothes from the person of the accused and their seizure. The clothes of the accused along with other incriminating material containing blood, semen, etc. were sent to the FSL and as per FSL report (Ex.PW11/A) blood was detected on Ex. 7b, viz., the shirt of the accused, which on serological examination was found to be blood of human origin as set out in FSL report Ex.PW11/B.

33. On behalf of the accused, the recovery of the blood stained shirt, stained with human blood, is sought to be assailed on two grounds. The first is that it is highly improbable that the accused was still wearing the same blood stained shirt and pyjamas on 24th April, 2006 when he

was arrested which he was wearing on the morning of 19th April, 2006. We have already dwelt at length on this aspect and it need not detain us any further. The second is that PW1 Seema though she stated that she was a witness to the arrest and personal search of the accused, nowhere in her testimony stated that she was witness to the seizure of the blood stained clothes of the accused. As regards the second contention, suffice it to state that PW1 Seema though has stated in her testimony that she had signed the arrest and personal search memos (Ex.PW1/C and 1/D) never ever claimed to be a witness to the seizure of the clothes of the accused or to have signed the seizure memo pertaining thereto (Ex.PW4/A). The contention that PW1 Seema was required to be a witness to the seizure of the clothes of the accused is equally meaningless. At this juncture, it may be noted that the police had seized the clothes, viz. pyjama and shirt of the accused only for the reason that according to PW4 these were the same clothes which the accused was wearing when he saw him taking away the child Vishal. Though found to be dirty by the police, no blood stains could be detected by the police on the clothes. It was only in the FSL that blood was detected on the shirt of the accused. The grouping of the blood could not be done possibly on account of putrification of the sample, but according to the FSL result blood of human origin was found on the shirt. On medical examination of the accused vide MLC Ex.PW12/A, there was no injury found on the person of the accused and no explanation has been given by the accused as to how his shirt came to be blood-stained. We may also profitably venture to add that the accused in his statement under Section 313 Cr.P.C. did not deny that the clothes belonged to him nor denied that he was not wearing the said clothes at the time of commission of the offence, though stated that the clothes had been recovered from his house and not from his person. Thus, we affirm the findings of the learned trial court that the detection of human blood on the clothes of the deceased is yet another vital link in the chain of circumstances to inculpate the accused. The fact that no explanation was offered by the accused when this incriminating evidence was put to him clearly points towards his guilt and is inconsistent with the hypothesis of his innocence.

DETECTION OF HUMAN SEMEN ON THE CLOTHES OF THE DECEASED CHILD

34. According to the case of the prosecution, the child was subjected to sodomy before death. The postmortem report (Ex.PW19/A) affirms

the fact that the minor child was sodomised in a brutal manner, which is proved on record by PW19 Dr. Kulbhushan Goel. As per him, postmortem findings are consistent with forceful penetration of anal canal by a fully erected penis. The factum of carnal intercourse is further affirmed by the report of the FSL (Ex.PW11/A), as per which human semen was detected on Ex.3a being the knickers of the child which however yielded no reaction as to grouping [as per FSL report (Ex.PW11/B)] possibly on account of putrification of sample with the passage of time. Suffice it to say that the detection of human semen on the clothes of the deceased child is yet another circumstance linking the accused with the commission of the crime.

MOTIVE

35. A very intriguing argument was put forth before us with regard to motive for the commission of the crime by the accused. Learned counsel for the Appellant with all the force at his command contended that no motive has been established by the prosecution to nail the accused. He contended that there was no need for the accused to commit such an act, he being a married man with two children. PW1 Seema and PW2 Rajkumar, on the other hand, categorically deposed that when they called the accused and requested him to return their son, he told them that he had abducted their son Vishal because of their giving shelter in their house to his wife and children. Accused also threatened on the telephone that he would teach such a lesson to them that they would not forget the same throughout their lives. No suggestion was put to these witnesses to falsify their stand with regard to the motive attributed by them to the accused, though a number of suggestions were put to them with the object of proving that the wife of the accused, namely, Sheela was having illicit relations with PW2 Rajkumar amongst several other persons. If this be so, presumably this would have been motive enough for the commission of the crime. However, the accused in his statement under Section 313 Cr.P.C., as to why prosecution witnesses had deposed against him stated that they were having enmity towards him, that complainant was having quarrel with her husband and she used to drop her children to his house and he had refused to keep them as he was not having ample source of income. If this be so, it surpasses imagination as to why suggestion after suggestion was put to PW1 and PW2 with regard to the illicit relations of the wife of the accused with all and sundry including PW2 and her misdemeanors. Be that as it may, there

is no denying the fact that whatever be the cause there was enmity between the accused on the one hand and the parents of child on the other, which impelled the accused to commit the dastardly act. The real reason for the enmity seems to us to be the one testified to by PW1 and PW2 and we accordingly accept the explanation of these witnesses with regard to the motive for the commission of the offence.

CONCLUSION

36. A number of other contentions were sought to be raised by Appellant's counsel in a last ditch effort to demolish the case of the prosecution to the effect that no independent or public witness was joined in the investigation, no DNA test was conducted, no dog squad was called, no finger prints were found at any of the places, no liquor bottle had been recovered by the investigating agency, etc. We do not propose to dwell on these aspects for the reason that it needs no reiteration that any defects or lacunae left in the investigation cannot work to the benefit of the accused. Time and again, it has been emphasized by the Apex Court that if investigation is tardy or replete with loopholes the sins of the investigating agency cannot be visited upon the victims or complainants, as the case may be. To allow this to happen would be to subvert the judicial process and to shower reward on the wrong doer and heap abuse on the head of the victim/s for no fault of theirs.

37. Before parting with the case, we note that PW13 Ms. Swati Suri, Finger Print Expert, Finger Print Bureau, Malviya Nagar, Delhi, who examined the finger print of Musa Singh testified that he was a previous convict in four cases, two cases of which were of PS Jahangir Puri, one under Section 25 Arms Act and the other under Section 397 IPC, one case of PS Vikas Puri under Section 380 IPC and one case of PS Badli under Section 25 Arms Act. The report of the witness to this effect was placed on record as Ex.PW13/A. Thus, quite clearly, the accused is of a criminal bent of mind who on account of the ill-will borne by him against PW1 and PW2 wrought vengeance against their five years old son.

38. In the aforesaid factual scenario, we have no hesitation in concluding that the circumstances established by the prosecution, dealt with hereinabove, are wholly inconsistent with the hypothesis of innocence of the accused, who kidnapped a very small child, had carnal intercourse with him and thereafter did away with him. We therefore see no reason

to interfere with the impugned judgment and order.

39. Resultantly, the appeal fails and is dismissed.

ILR (2013) IV DELHI 2855
CRL. A.

RAJESH @ RAJU **....APPELLANT**

VERSUS

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

(G.P. MITTAL, J.)

CRL. A. NO. : 517/2010 **DATE OF DECISION: 09.07.2013**

Code of Criminal Procedure, 1973—Section 427 & 428—Appellant was convicted on 04/11/09 for offences punishable U/s 397/394/392/34 IPC in FIR No. 346/05—He was also sentenced on 02/11/09 for offences punishable U/s 392/397 IPC in case FIR No. 877/05 and convicted on 15/09/09 in case FIR No. 375/05—His sentence for offences emerging in FIR No. 375/05 & 877/05 were already over—Appellant filed appeal against his conviction for FIR No. 346/05 but he did not contest appeal on merits and only prayed for his sentence to run concurrently to enable him to come out of jail earlier. Held:- A person already undergoing sentence of imprisonment in one case and is further sentenced in a second case, the second sentence shall commence at the expiry of the imprisonment to which he had been previously sentenced, unless the Court directs the subsequent sentence to run currently. The power of the Court U/s 482 of the Code to direct sentences to run concurrently is unquestioned yet to be decided on the facts and circumstances of each case.

The powers of the Court under Section 482 of the Code to direct the sentences to run concurrently is unquestioned. In **Jadu @ Jadua Bhoi v. State of Orissa** 1992 Crl.L.J. 2117 the Orissa High Court held that although the Court has power under Section 482 of the Code to direct the sentences to run concurrently, yet, it will be decided on the facts and circumstances of each case whether such a power should be exercised or not. **(Para 6)**

Important Issue Involved: A person already undergoing sentence of imprisonment in one case and is further sentenced in a second case, the second sentence shall commence at the expiry of the imprisonment to which he had been previously sentenced, unless the Court directs the subsequent sentence to run currently. The power of the Court U/s 482 of the Code to direct sentences to run concurrently is unquestioned yet to be decided on the facts and circumstances of each case.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Gautam Khazanchi, Advocate.

FOR THE RESPONDENT : Ms. Rajdipa Behura, APP for the State.

CASE REFERRED TO:

1. *Jadu @ Jadua Bhoi* vs. *State of Orissa* 1992 Crl.L.J. 2117.

RESULT: Appeal disposed of.

G.P. MITTAL, J.

1. The Appellant impugns a judgment dated 28.10.2009 and order on sentence dated 05.11.2009 passed by the learned Additional Sessions Judge (ASJ) in Sessions Case No.102/2008 arising out of the case FIR

No.346/2005 whereby he was convicted for the offence punishable under Sections 397/394/392/34 IPC and was sentenced to undergo RI for seven years and to pay a fine of Rs. 3,000/- and in default of payment of fine to undergo SI for three months for the offence punishable under Section 397 IPC and to undergo RI for five years and to pay a fine of Rs. 3,000/- and in default of payment of fine to undergo SI for three months for the offence punishable under Section 392/34 IPC and to further undergo RI for five years and to pay fine of Rs. 3,000/- for the offence punishable under Section 394/34 IPC.

2. Apart from the conviction in the above stated case, the Appellant faced trial in case FIR No.375/2005 registered at Police Station Naraina and was sentenced to undergo rigorous imprisonment for seven years. He also faced trial in case FIR No.877/2005 registered under Sections 392/397 IPC at Police Station Uttam Nagar where he faced a sentence to undergo rigorous imprisonment for four years apart from some fine.

3. As per Section 427 of the Cr.P.C., when a person is already undergoing a sentence of imprisonment in one case and is further sentenced in a second case, the second sentence shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs the subsequent sentence to run concurrently. In case FIR No.375/2005 the Appellant was convicted on 15.09.2009, whereas in case FIR No.877/2005 the Appellant was sentenced on 02.11.2009. In the instant case he was sentenced on 04.11.2009. The Appellant's sentence in the two case FIR Nos.375/2005 and 877/2005 are already over. If the benefit of concurrent sentence is not given the Appellant's sentence in this case would get over in another one year and six months.

4. It is urged by the learned counsel for the Appellant on his (Appellant's) instruction that he does not contest the Appeal on merits. His only prayer is for an order holding that the sentence in this case will run concurrently so as to enable the Appellant to come out of the jail earlier.

5. The Appellant along with two others had robbed a passenger Gulshan Lal of Rs. 7,000/-, two rings and a Nokia mobile phone on knife point. The Appellant was subsequently arrested on 17.01.2006 in another case wherein he made a disclosure statement about the commission of the offence in the instant case. Recovery of a diamond ring and a mobile phone was also affected in the instant case. Certain contradictions and

discrepancies were pointed out in the testimony of the TSR driver PW-8 and complainant Gulshal Lal, the same were found to be insignificant by the Trial Court so as to affect the substratum of the prosecution version. The Appellant was convicted under Sections 397/394/392/34 IPC and was sentenced to undergo imprisonment as stated earlier. I affirm the findings of the Appellant being guilty and the sentence imposed by the learned ASJ.

6. The powers of the Court under Section 482 of the Code to direct the sentences to run concurrently is unquestioned. In **Jadu @ Jadua Bhoi v. State of Orissa** 1992 Crl.L.J. 2117 the Orissa High Court held that although the Court has power under Section 482 of the Code to direct the sentences to run concurrently, yet, it will be decided on the facts and circumstances of each case whether such a power should be exercised or not.

7. The learned counsel for the Appellant urges that the offences were committed on account of the bad company in which he (the Appellant) had fallen. It is urged that the Appellant was a young boy of 21 years at the time of the commission of the all the three offences which were committed almost at the same time one after the other. He is in custody since December, 2005, when he was arrested, and he has already undergone a sentence of more than seven years. It is only on account of the fact that if the date of the conviction, the sentences in all three cases were to run one by one that his sentences would be over in one year and six months (from the date of this order).

8. It is urged that the Appellant deserves an opportunity to reform himself. It is not in dispute that the Appellant was aged about 21 years on the date of commission of the offence. All the three offences were committed towards the end of the year 2005. I would refrain myself from going into the aspect as to why the Appellant fell in bad company and committed three robberies one after the other.

9. In the facts and circumstances of the case, I would exercise power under Section 482 of the Code to order the sentences in this case to run concurrently with the sentences in the other cases, that is, in case FIR No. 375/2005 registered at Police Station Naraina and in case FIR No.877/2005 registered at Police Station Uttam Nagar.

10. The Appellant is directed to be released forthwith, if not wanted

in any other case.

11. The Appeal is disposed of accordingly.

12. The copy of the order be sent to the Superintendent Jail concerned for information and compliance.

ILR (2013) IV DELHI 2859
W.P. (C)

C.P. GUPTA ....PETITIONER

VERSUS

UNION OF INDIA AND ORS. ....RESPONDENTS

(GITA MITTAL & J.R. MIDHA, JJ.)

W.P. (C) NO. : 7288/2012 DATE OF DECISION: 12.07.2013
& CM NO. : 6053/2013

Service Law—Constitution of India, 1950—Petitioner assailed findings of disciplinary proceedings conducted against him, accepting recommendations and findings of Inquiry Officer and imposing punishment of dismissal from service—It was urged, disciplinary authority had sought advice of Union Public Service Commission (UPSC) which recommended imposition of penalty of dismissal from service upon petitioner—But petitioner was not given copy of advice of UPSC so that he could make representation against advice and submit his point of view. Held:- It is settled principle of natural justice that if any material is to be relied upon in departmental proceedings, a copy of the same must be supplied in advance to the charge-sheeted employee so that he may have a chance to rebut the same.

So far as the legal position is concerned, the same is crystalised by the observations of the Supreme Court in the judgment in **Union of India & Ors. Vs. S.K. Kapoor** (supra) wherein in paras 5 & 8, the Supreme Court has reiterated the settled position thus:-

> "5. It is settled principle of natural justice that if any material is to be relied upon in departmental proceedings, a copy of the same must be supplied in advance to the charge-sheeted employee so that he may have a chance to rebut the same.
>
> xxx xxx xxx
>
> 8. There may be a case where the report of the Union Public Service Commission is not relied upon by the disciplinary authority and in that case it is certainly not necessary to supply a copy of the same to the employee concerned. However, if it is relied upon, then a copy of the same must be supplied in advance to the employee concerned, otherwise, there will be violation of the principles of natural justice. This is also the view taken by this Court in **S.N. Narula v. Union of India**."

The other judicial pronouncements placed before us reiterate or rely upon the above legal position. **(Para 4)**

Important Issue Involved: It is settled principle of natural justice that if any material is to be relied upon in departmental proceedings, a copy of the same must be supplied in advance to the charge-sheeted employee so that he may have a chance to rebut the same.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Ms. Jyoti Singh, Sr. Advocate with Ms. Tina Bajwa, Advocate.

FOR THE RESPONDENTS : Mr. Sachin Dutta, Advocate.

CASES REFERRED TO:

1. *Union of India & Ors.* vs. *S.K. Kapoor &* (2011) 4 SCC 589.
2. *S.N. Narula* vs. *Union of India & Ors.* (2011) 4 SCC 591.
3. *Union of India* vs. *Yogita Swaroop & Anr.* WP (C) No.265/2012.
4. *Union of India & Anr.* vs. *R.K. Sareen* 2012 in WP (C) No.476/2012.

RESULT: Writ petition disposed of.

GITA MITTAL, J. (Oral)

1. By way of the present writ petition, the petitioner has assailed the disciplinary proceedings conducted against him pursuant to a memorandum of charges issued on 7th December, 2005; the findings of the inquiry officer dated 29th January, 2009; the order dated 26th August, 2010 issued by the disciplinary authority accepting the recommendations and findings of the inquiry officer and imposing the punishment of dismissal of service which shall ordinarily be a disqualification for future Government employment.

2. It is contended by the petitioner that the order of penalty upon the petitioner is not sustainable for the reason that as per the impugned order dated 26th August, 2010, the disciplinary authority had sought the advise of the Union Public Service Commission (UPSC) which recommended the imposition of the penalty of ''Dismissal from Service'' upon the petitioner. It is urged that the advise of the UPSC was served upon the petitioner along with the order dated 26th August, 2010 passed by the disciplinary authority which accepted and acted upon the advise of the commission. Reliance is placed on the judicial pronouncements of the Supreme Court reported at (2011) 4 SCC 589 **Union of India & Ors. Vs. S.K. Kapoor &** (2011) 4 SCC 591 **S.N. Narula Vs. Union of India & Ors.** and two pronouncements of this court being the decision dated 13th January, 2012 in WP (C) No.265/2012 **Union of India Vs. Yogita Swaroop & Anr.** and the decision dated 24th January, 2012 in WP (C) No.476/2012 **Union of India & Anr. Vs. R.K. Sareen**.

3. It is urged that in the light of these precedents, the petitioner was legally entitled to a copy of the advice of the UPSC and was required to be given an opportunity to make a representation against the advise and to submit his point of view. The submission is that such representation of the petitioner was required to be considered by the disciplinary authority before accepting the recommendations of the inquiry officer and imposing the punishment upon him.

4. So far as the legal position is concerned, the same is crystalised by the observations of the Supreme Court in the judgment in **Union of India & Ors. Vs. S.K. Kapoor** (supra) wherein in paras 5 & 8, the Supreme Court has reiterated the settled position thus:-

> ''5. It is settled principle of natural justice that if any material is to be relied upon in departmental proceedings, a copy of the same must be supplied in advance to the charge-sheeted employee so that he may have a chance to rebut the same.
>
> xxx xxx xxx
>
> 8. There may be a case where the report of the Union Public Service Commission is not relied upon by the disciplinary authority and in that case it is certainly not necessary to supply a copy of the same to the employee concerned. However, if it is relied upon, then a copy of the same must be supplied in advance to the employee concerned, otherwise, there will be violation of the principles of natural justice. This is also the view taken by this Court in **S.N. Narula v. Union of India**.''

The other judicial pronouncements placed before us reiterate or rely upon the above legal position.

5. It is, therefore, well settled that in case a disciplinary authority was to seek the advice of the UPSC and rely upon the same, it is incumbent upon it to make available a copy thereof to the delinquent employee and afford an opportunity for representation against the same.

6. Our attention is drawn to Page 304 of writ petition which is the penalty order. Para 7 shows that UPSC advice was enclosed with penalty order. Para 8 of the order dated 26th August, 2010 shows that the Disciplinary Authority before imposing the penalty considered the representation of the petitioner dated 8th June, 2009 and relied upon the

advice of the UPSC and held that the charges against him are conclusively proved. The same has admittedly not been done in the instant case rendering the order dated 26th August, 2010 contrary to law.

7. In view of the above, we direct as follows:-

(i) The order dated 26th August, 2010 is hereby set aside and quashed.

(ii) The petitioner shall be reinstated into service for the purposes of completing the disciplinary proceedings without any back wages and other service benefits. His entitlements, if any, would be adjudicated by the authorities depending upon the result of the disciplinary proceedings.

(iii) So far as the disciplinary proceedings against the petitioner are concerned, the matter shall proceed from the stage of service of the UPSC's advise on the petitioner.

(iv) Inasmuch as the petitioner has been served a copy of the advise of the UPSC along with the order dated 26th August, 2010, therefore, no further copy thereof is required to be furnished to the petitioner.

(v) The petitioner shall make a representation, if any, to the disciplinary authority with regard to the UPSC advise within a period of six weeks from today.

(vi) It shall be open to the disciplinary authority to proceed in the matter and take a fresh view thereon. The order of the disciplinary authority shall be communicated to the petitioner who shall be free to proceed in the matter in accordance with law.

(vii) We make it clear that we have not expressed any opinion on the merits of the case.

8. This writ petition is disposed of in the above terms. C.M. No.6053/2013 In view of the orders passed in the writ petition, these applications do not survive for adjudication and are accordingly dismissed.

ILR (2013) IV DELHI 2864

W.P. (C)

BHUPINDER KUMAR & ORS. ....PETITIONERS

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 3711/2013 DATE OF DECISION: 12.07.2013

Constitution of India, 1950—Petitioners held posts of Charge Electrician, Charge Mechanic, Superintendent (E&M), Overseers, Superintendent (B&R) in GREF—Aggrieved with pay fixation w.e.f 01/01/1996 and its consequential impact, they filed writ petition claiming similar rights and privileges as made available to other employees holding similar positions as that of petitioners—Also said issue was adjudicated in other writ petition which had attained finality as even SLP was dismissed. Held:- When a principle of law pertaining to payment on fixation is decided by a Court on a writ petition filed by an individual but decision relates to a matter of principle of law to be applied, the said decision has to be implemented in rem, i.e. with respect to all such persons who hold similar posts and not qua the persons who approach the Court.

It is therefore trite that when a principle of law pertaining to payment on pay fixation is decided by a Court in a writ petition filed by an individual but the decision relates to a matter of principle of law to be applied, such a decision has to be implemented with respect to all such persons who hold similar posts. It is not disputed before us that the above directions squarely apply to the present case and the petitioners are entitled to the relief which stands granted in the above judicial precedents. **(Para 7)**

It is made clear that in case of failure to follow the law laid

down by the court and if the directions of the court are not strictly being adhered to, the same would render the respondents liable for appropriate action under the Contempt of court Act. Further it is made clear that in case the respondents do not comply with the directions made by this court vide order dated 6th September, 2012, we would not hesitate to proceed against them as per law. **(Para 9)**

Important Issue Involved: When a principle of law pertaining to payment on fixation is decided by a Court on a writ petition filed by an individual but decision relates to a matter of principle of law to be applied, the said decision has to be implemented in rem.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONERS : Mr. Ombir Singh and Mr. Anuj Saini, Advocates.

FOR THE RESPONDENTS : Mr. Ravinder Aggarwal, CGSC.

CASES REFERRED TO:

1. *Vijay Kumar Singh & Anr.* vs. *Union of India and Ors.* W.P.(C)5383/2012.
2. *Kapil Muni Pandey and Ors.* vs. *Union of India and Ors.* W.P.(C) 7130/2012.
3. *Penubolu Jagdish and Ors.* vs. *Union of India and Ors.* WP(C) 2972/2012 on 30.10.2012.
4. *Ghan Shyam Vishwarkarma* vs. *The Director General, BRO & Ors.* W.P.(C)51/2009.

RESULT: Writ petition allowed.

GITA MITTAL, J. (Oral)

CM No. 6943/2013 (Exemption)

Allowed subject to all just exceptions.

The application is disposed of.

W.P.(C) 3711/2013

1. With the consent of both the parties, this writ petition is taken up for consideration and the matter is being heard finally.

2. The facts giving rise to the petition are within a narrow compass and are mainly undisputed. To the extent necessary the same are briefly noted hereinafter.

3. The petitioners joined the GREF on various dates and are holding the posts of Charge Electrician, Charge Mechanic, Superintendent (E&M), Overseers, Superintendent (B&R). The petitioners are posted in various projects and they have claimed in the writ petition that they are entitled to all the rights and privileges as have been made available to other personnel in the posts, who are similarly posted as the petitioners.

4. It is undisputed that the petitioners were appointed in accordance with Recruitment Rules at different points of time. The writ petition pertains to the subject of pay fixation with effect from 1st January, 1996 and its consequential impact with effect from 1st January, 1996 .

5. It is stated that the issue raised for decision in this writ petition had been finally adjudicated. In this regard our attention is drawn to the following decisions:-

(i) Decision dated 10th September, 2010 passed by learned Single Judge of Guwahati High Court in W.P.(C)51/2009 titled as **Ghan Shyam Vishwarkarma v. The Director General, BRO & Ors.**

(ii) Decision mentioned above was upheld by a Division Bench of the Guwahati High Court vide its decision dated 18th March, 2011.

(iii) SLP CC 14236/2011 dismissed by the Hon'ble Supreme court on 1.11.2011.

(iv) Decision dated 6th September, 2012 passed by learned Single Judge of this court in W.P.(C)5383/2012 titled as **Vijay Kumar Singh & Anr. V. Union of India and Ors.**

(v) Order passed by a coordinate bench of this court in WP(C) 2972/2012 on 30.10.2012, titled as **Penubolu Jagdish and Ors. v. Union of India and Ors.**

(vi) Decision dated 9th November, 2012 passed by a Division Bench of this court in W.P.(C) 7130/2012 titled as **Kapil Muni Pandey and Ors. v. Union of India and Ors.**

6. In view of the law laid down and adjudication by the Guwahati High Court, which had attained finality in W.P.(C) No.5583/2012, wherein a similar claim was raised on 6th September, 2012, this court has issued the following directions :-

> ''3 Suffice would it be to state that when a principle of law pertaining to payment on fixation is decided by a Court on a writ petition filed by an individual but decision relates to a matter of principle of law to be applied, the said decision has to be implemented in rem, i.e. with respect to all such persons who hold similar posts and not qua the persons who approach the Court.
>
> 4 Accordingly we disposed of the writ petition directed the respondents that whatever decision would be taken by the respondents with respect to the decision of the Guahati High Court pertaining to the writ petition filed by Ghan Shyam Vishwakarma would be made applicable to all persons holding posts of Overseers and Superintendent Gr.II. in BRO''.

7. It is therefore trite that when a principle of law pertaining to payment on pay fixation is decided by a Court in a writ petition filed by an individual but the decision relates to a matter of principle of law to be applied, such a decision has to be implemented with respect to all such persons who hold similar posts. It is not disputed before us that the above directions squarely apply to the present case and the petitioners are entitled to the relief which stands granted in the above judicial precedents.

8. Inasmuch as the petitioners have been compelled to approach this court and judicial time has been wasted in having to consider the adjudication of the subject matter, the respondents are liable to pay costs.

9. It is made clear that in case of failure to follow the law laid down by the court and if the directions of the court are not strictly being adhered to, the same would render the respondents liable for appropriate action under the Contempt of court Act. Further it is made clear that in case the respondents do not comply with the directions made by this court vide order dated 6th September, 2012, we would not hesitate to proceed against them as per law.

10. Having regard to the above, a direction is issued to the respondent to consider the petitioners' case with respect to all such persons who hold the similar posts. We reiterate the directions made by this court specifically directing that the decision taken by the respondents with respect to the adjudication by the Guwahati High Court in W.P.(C) No. 51/2009 filed by **Ghanshyam** (supra) would be applicable to all persons holding the posts of Overseers and Superintendent Grade II in BRO.

11. In view thereof, the respondents are additionally directed to pay the costs which are quantified as follows :-

(i) the respondents shall pay an amount of Rs.500/- to each petitioner which shall be paid additionally along with next month's salary and other allowances.

(ii) The respondent shall deposit an amount of Rs.15,000/- with the Delhi High Court Mediation and Conciliation centre within two weeks from today.

12. The writ petition is allowed in the above terms.

ILR (2013) IV DELHI 2868
W.P. (C)

GULBIR SINGH ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 9077/2011 DATE OF DECISION: 16.07.2013

Service Law—Constitution of India, 1950—Petitioner held posts of Charge Electrician, Charge Mechanic, Superintendent (E&M), Overseers, Superintendent (B&R) in GREF—Aggrieved with pay fixation w.e.f 01/01/1996 and its consequential impact, he filed writ petition claiming similar rights and privileges as made

available to other employees holding similar positions as that of petitioner—Also, said issue was adjudicated in other writ petition which had attained finality as even SLP was dismissed. Held:- When a principle of law pertaining to payment on fixation is decided by a Court on a writ petition filed by an individual but decision relates to a matter of principle of law to be applied, the said decision has to be implemented in rem, i.e. with respect to all such persons who hold similar posts and not qua the persons who approach the Court.

It is therefore trite that when a principle of law pertaining to payment on pay fixation is decided by a Court in a writ petition filed by an individual but the decision relates to a matter of principle of law to be applied, such a decision has to be implemented with respect to all such persons who hold similar posts. It is not disputed before us that the above directions squarely apply to the present case and the petitioners are entitled to the relief which stands granted in the above judicial precedents. **(Para 7)**

It is made clear that in case of failure to follow the law laid down by the court and if the directions of the court are not strictly being adhered to, the same would render the respondents liable for appropriate action under the Contempt of Court Act. Further it is made clear that in case the respondents do not comply with the directions made by this court vide order dated 6th September, 2012, we would not hesitate to proceed against them as per law. **(Para 9)**

Important Issue Involved: When a principle of law pertaining to payment on fixation is decided by a Court on a writ petition filed by an individual but decision relates to a matter of principle of law to be applied, the said decision has to be implemented in rem.

[Sh Ka]

APPEARANCES:

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

FOR THE RESPONDENT : Dr. Ashwani Bhardwaj, CGSC.

CASES REFERRED TO:

1. *Kapil Muni Pandey and Ors.* vs. *Union of India and Ors.* W.P.(C) 7130/2012.
2. *Vijay Kumar Singh & Anr.* vs. *Union of India and Ors.* W.P.(C)5383/2012.
3. *Penubolu Jagdish and Ors.* vs. *Union of India and Ors.* WP(C) 2972/2012 on 30.10.2012.
4. *Ghan Shyam Vishwarkarma* vs. *The Director General, BRO & Ors.* W.P.(C)51/2009.

RESULT: Writ petition allowed.

GITA MITTAL, J. (Oral)

1. With the consent of both the parties, this writ petition is taken up for consideration and the matter is being heard finally.

2. The facts giving rise to the petition are within a narrow compass and are mainly undisputed. To the extent necessary the same are briefly noted hereinafter.

3. The petitioners joined the GREF on various dates and are holding the posts of Charge Electrician, Charge Mechanic, Superintendent (E&M), Overseers, Superintendent (B&R). The petitioners are posted in various projects and they have claimed in the writ petition that they are entitled to all the rights and privileges as have been made available to other personnel in the posts, who are similarly posted as the petitioner.

4. It is undisputed that the petitioner was appointed on 23.06.1977 in accordance with Recruitment Rules at different points of time. The writ petition pertains to the subject of pay fixation with effect from 1st January, 1996 and its consequential impact with effect from 1st January, 1996.

5. It is stated that the issue raised for decision in this writ petition had been finally adjudicated. In this regard our attention is drawn to the following decisions:-

(i) Decision dated 10th September, 2010 passed by learned Single Judge of Guwahati High Court in W.P.(C)51/2009 titled as **Ghan Shyam Vishwarkarma v. The Director General, BRO & Ors.**

(ii) Decision mentioned above was upheld by a Division Bench of the Guwahati High Court vide its decision dated 18th March, 2011.

(iii) SLP CC 14236/2011 dismissed by the Hon'ble Supreme court on 1.11.2011.

(iv) Decision dated 6th September, 2012 passed by learned Single Judge of this court in W.P.(C)5383/2012 titled as **Vijay Kumar Singh & Anr. V. Union of India and Ors.**

(v) Order passed by a coordinate bench of this court in WP(C) 2972/2012 on 30.10.2012, titled as **Penubolu Jagdish and Ors. v. Union of India and Ors.**

(vi) Decision dated 9th November, 2012 passed by a Division Bench of this court in W.P.(C) 7130/2012 titled as **Kapil Muni Pandey and Ors. v. Union of India and Ors.**

6. In view of the law laid down and adjudication by the Guwahati High Court, which had attained finality in W.P.(C) No.5583/2012, wherein a similar claim was raised on 6th September, 2012, this court has issued the following directions :-

> ''3 Suffice would it be to state that when a principle of law pertaining to payment on fixation is decided by a Court on a writ petition filed by an individual but decision relates to a matter of principle of law to be applied, the said decision has to be implemented in rem, i.e. with respect to all such persons who hold similar posts and not qua the persons who approach the Court.
>
> 4 Accordingly we disposed of the writ petition directed the respondents that whatever decision would be taken by the respondents with respect to the decision of the Guahati High Court pertaining to the writ petition filed by Ghan Shyam Vishwakarma would be made applicable to all persons holding posts of Overseers and Superintendent Gr.II. in BRO''.

7. It is therefore trite that when a principle of law pertaining to payment on pay fixation is decided by a Court in a writ petition filed by an individual but the decision relates to a matter of principle of law to be applied, such a decision has to be implemented with respect to all such persons who hold similar posts. It is not disputed before us that the above directions squarely apply to the present case and the petitioners are entitled to the relief which stands granted in the above judicial precedents.

8. Inasmuch as the petitioner has been compelled to approach this court and judicial time has been wasted in having to consider the adjudication of the subject matter, the respondents are liable to pay costs.

9. It is made clear that in case of failure to follow the law laid down by the court and if the directions of the court are not strictly being adhered to, the same would render the respondents liable for appropriate action under the Contempt of Court Act. Further it is made clear that in case the respondents do not comply with the directions made by this court vide order dated 6th September, 2012, we would not hesitate to proceed against them as per law.

10. Having regard to the above, a direction is issued to the respondent to consider the petitioners' case with respect to all such persons who hold the similar posts. We reiterate the directions made by this court specifically directing that the decision taken by the respondents with respect to the adjudication by the Guwahati High Court in W.P.(C) No. 51/2009 filed by **Ghanshyam** (supra) would be applicable to all persons holding the posts of Overseers and Superintendent Grade II in BRO.

11. In view thereof, the respondents are additionally directed to pay the costs which are quantified as follows :-

(i) The respondents shall pay an amount of Rs.500/- to the petitioner which shall be paid additionally along with next month's salary and other allowances.

(ii) The respondent shall deposit an amount of Rs.15,000/- with the Delhi High Court Mediation and Conciliation centre within two weeks from today.

12. The writ petition is allowed in the above terms.

ILR (2013) IV DELHI 2873
W.P. (C)

KUNDAN GHOSH ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 4364/2013 DATE OF DECISION: 17.07.2013

Constitution of India, 1950—Petitioner preferred writ petition praying for staying of his movement order whereby he stood posted to Barrackpore w.e.f. 24/06/13—Petitioner alleged he had to contest Transfer Petition filed by his wife in Hon'ble Supreme Court of India listed for 22/07/13—Also, he was entitled to normal tenure of five years at Barrackpore instead of three years restricted tenure posting for which petitioner had made representation before competent authority and was pending disposal. Held:- Respondents to consider the representation made by petitioner with applicable statutory provisions and policies, pass an order thereon and communicate the same to petitioner forthwith thereafter.

In the above circumstance, the petitioner's presence in Delhi only to contest the transfer petition may certainly not be essential. Even if it was, the petitioner can seek leave to attend the court hearing. **(Para 4)**

Important Issue Involved: Respondents to consider the representation made by petitioner with applicable statutory provisions and policies, pass an order thereon and communicate the same to petitioner forthwith thereafter.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Md. Azam Ansari, Advocate.

FOR THE RESPONDENTS : Ms. Barkha Babbar, Advocate Mr. Subhasish Bhowmick, Advocate for Ms. Aliva Ghosh (wife of Petitioner).

RESULT: Writ petition disposed of.

GITA MITTAL, J. (Oral)

1. By way of this writ petition, the petitioner prays for stay of the movement order dated 12th March, 2013 whereby he stands posted to Barrackpore with effect from 24th June, 2013. The primary ground urged by the petitioner in support of his writ petition is that he has to attend the case which has been filed by his wife Smt. Aliva Ghosh in the Supreme Court of India which he states is listed on 22nd July, 2013.

2. In the hearing before us today, Mr. Subhasish Bhowmick, Advocate has appeared and informed that he represents the wife of the petitioner -Smt. Aliva Ghosh, in T.P.(Civil)No.236/2013 in the Supreme Court of India. He submits that the petitioner's wife is a resident of Bharatpur and has been compelled to initiate the following cases against the petitioner.

(i) Maintenance case under Section 125 Cr.P.C.

(ii) Criminal case under Section 498A/325 IPC

3. It is contended that in retaliation, the petitioner has filed a divorce petition and another petition seeking custody of the only son of the party in Delhi. It has been contended that petitioner's wife is not employed and is a home maker and in these circumstances was compelled to file the above cases against the petitioner. In the above circumstances, she has also been compelled to defend the litigation in Delhi. He submits that given her circumstances, Ms.Aliva Ghosh has been constrained to seek transfer of the two cases filed by the petitioner at Delhi to Bhartpur by the transfer petition filed by her in the Supreme Court of India.

4. In the above circumstance, the petitioner's presence in Delhi only to contest the transfer petition may certainly not be essential. Even if it was, the petitioner can seek leave to attend the court hearing.

5. Learned counsel for the petitioner submits that his client is going to make a prayer for mediation. As and when such prayer is made and the same is considered favourably, the parties can undoubtedly take steps and appear before the learned mediator as may be directed by the court.

6. The writ petitioner has also assailed the transfer order dated 12th March, 2013 on the ground that he is entitled to normal tenure of five years at Barrackpore instead of three years restricted tenure posting. We are informed that the petitioner has made a representation dated 3rd May, 2013 to the respondents in this regard which is still pending.

7. In view of the above, a direction is issued to the respondents to consider the representation dated 3rd May, 2013 of the petitioner in accordance with the applicable statutory provisions and policies and pass orders thereon with eight weeks and communicate the same to the petitioner forthwith thereafter.

8. This writ petition is disposed of in the above terms.

9. Copy of this order be given dasti under the signatures of the court master of this court.

ILR (2013) IV DELHI 2875
W.P.(C)

VIJAY KUMAR **....PETITIONER**

VERSUS

UOI AND ORS **RESPONDENTS**

(GITA MITTAL & DEEPA SHARMA, JJ)

W.P.(C) NO. 17/2012 **DATE OF DECISION: 29.07.2013**

Border Security Force Act, 1968—Section 19(a), 40, 46, 74(2) and 117—Border Security Force Rules, 1969—Rule 45 and 51—CCS (Pension) Rules—Rule 41—Indian Penal Code, 1860—Section 354—Petitioner assailed finding and sentence of Summary Security Force Court

(SSFC) and order passed by DG, BSF rejecting statutory appeal against same—Plea taken, petitioner was denied opportunity to effectively defend himself for reason that proceedings were conducted in Bengali, a language he was not conversant with—Second ground of challenge is that conviction and sentence of SSFC are based on no evidence at all for reason that complainant has failed to identify him and also her testimony renders occurrence of incident impossible in given circumstances—Held—Respondents had appointed two interpreters—One interpreter was conversant with Hindi and English language and second with Bengali and other languages—During trial, petitioner made no objection at all to proceedings of SSFC or that he was unable to understand proceedings—There is no merit in Petitioner's plea that he was prejudiced in any manner for reason that some of witnesses were local civilians or he was not able to understand their deposition—There is ample evidence which establishes that petitioner entered house of PW6 without authority and with intention to outrage her modesty for which he was accosted by civilians—Challenge by way of instant writ petition has to be rejected.

Important Issue Involved: When two interpreters were appointed during Summary Security Force Court (SSFC) and when Petitioner made no objection at all to the proceedings of the SSFC, Petitioner's plea that he was prejudiced in any manner for the reason that some of the witnesses were local civilians or that he was not able to understand their deposition is without merits.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Ram Naresh Yadav, Adv.

FOR THE RESPONDENTS : Dr. Ashwani Bhardwaj, Adv.

RESULT: Dismissed

GITA MITTAL, J. (Oral)

1. The petitioner has by way of the present writ petition assailed the finding and sentence dated 24th June, 2008 of the Summary Security Force Court (SSFC) and the order dated 26th March, 2009 passed by the Director General, Border Security Force (BSF) rejecting his statutory appeal against the same.

2. The petitioner was enrolled as a Follower (Water Carrier) with the respondents on 13th May, 1989. With regard to an incident dated 28th May, 2008, he was subjected to SSFC on the following charges:-

"i) FIRST CHARGE – BSF ACT – 1968 U/s-46	COMMITTING A CIVIL OFFENCE THAT IS TO SAY USING CRIMINAL FORCE TO A WOMAN INTENDING TO OUTRAGE HER MODESTY PUNISHABLE U/S 354 IPC In that he, At BOP Baramadhusudan on 28/05/08 at about 0100 hrs used criminal force to Smt. Nilima Begum W/o Sh. Ajijul Miah of Vill – Baramadhusudan, PS – Sital Kuchi, Distt – Cooch Behar (WB) intending to outrage her modesty by such criminal force, for which he was caught by above civilian.
ii) SECOND CHARGE – BSF ACT – 1968 U/S -40	AN ACT PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OF THE FORCE In that he, At BOP – Baramadhusudan, on 28/05/08 at about 0100 hrs No.891320139 W/C Vijay Kumar improperly and without authority entered the house of a one civilian namely Ajijul Miah S/O Lt Barkat Miah, R/O – Baramadhusudan, P S Sital Kuchi, Cooch Behar (WB) located in nearby vicinity while he was sleeping with his wife and children in his house.
iii) THIRD CHARGE BSF ACT – 1968 U/S 19(a)	ABSENTING HIMSELF WITHOUT LEAVE In that he, At BOP – Baramudhusudan, on 28/05/2008 at about 0100 Hrs absented himself without leave from BOP Baramadhusudan till 0630 Hrs on 28/05/08."

3. The challenge by the petitioner to the proceedings conducted by the SSFC rests primarily on two grounds. The first, ground of challenge is that the petitioner was denied an opportunity to effectively defend himself for the reason that the proceedings were conducted in Bengali a language which claims he was not conversant with. The second ground of challenge by the petitioner is on the plea that the conviction and sentence of the SSFC are based on no evidence at all for the reason that the complainant has failed to identify him and also her testimony renders the occurrence of the incident impossible in the given circumstances.

4. We have heard learned counsel for the parties. The proceedings against the petitioner commenced on a telephonic message being received by Subedar Puran Singh who was Officiating Company Commander of "C" Company of 13 Battalion BSF in the night intervening 27th/28th May, 2008. The SHO PS Sitalkuchi, District Cooch Behar (West Bengal) informed Subedar Puran Singh on his mobile that the petitioner had left the Border Out Post, Bara Madhusudan without permission; gone to Village Bara Madhusudan and entered into a civilian's house. He was caught red handed by the civilian and handed over to PS Sitalkuchi. After reporting to the officers, Subedar Puran Singh, the Officiating Company Commander along with another Sub-Inspector Dharambir Singh, the Post Commander of the Border Out Post went to PS Sitalkuchi wherein the petitioner was in police lockup in half dressed condition and was brought back to the Border Out Post.

5. Disciplinary action under the provisions of BSF Act and Rules

was initiated against the petitioner thereafter. On 28th May, 2008, he was heard by the then Officiating Commandant as per the provisions of the BSF Rule 45 for committing offences under Sections 46, 40 and 19(a) of the BSF Act, 1968. The record of the evidence was ordered and prepared against the petitioner in which he was given opportunity to cross-examine all prosecution witnesses and to produce witnesses in defence but the petitioner denied the opportunity. After completion of the record of the evidence, the Commandant of the Battalion applied his mind thereto in accordance with the Rule 51 of the BSF and thereafter referred the matter to the Deputy Inspector General who in accordance with the provision of Section 74(2) of the BSF Act, 1968 permitted the Commandant to try petitioner summarily by the SSFC. It was in this background that the petitioner was tried by the SSFC on the 24th of June, 2008 for the above offences.

6. Given the narrow area of challenge, we may examine the first contention of the petitioner that he was denied an effective opportunity to defend himself in the SSFC proceedings for the reason that the proceedings were conducted in Bengali which was a language which he did not understand. In this regard, Dr. Ashwani Bhardwaj, learned counsel appearing for the respondents has drawn our attention to the proceedings of the SSFC which have been placed before us.

7. We find that the respondents appointed two interpreters in this proceeding. Shri K.S. Rathore, Commandant, of the 13 Battalion of the BSF who was conversant with the Hindi and English language was appointed as the first interpreter. Additionally, the respondents had assigned ASI/Radio Operator Mridul Ghosh of the BSF as interpreter who was a personnel of the BSF and conversant with Bengali and other languages.

8. We find that eight prosecution witnesses were examined during the trial. The petitioner selectively cross-examined the witnesses. He has made no objection at all to the proceedings of the SSFC. He at no time stated that he was unable to understand the proceedings or that he was denied an opportunity to defend himself or that he was prejudiced in any manner by the procedure followed by the SSFC.

Given the fact that two interpreters had been appointed and were available during the course of the proceedings, we find no merit in the petitioner's plea that he was prejudiced in any manner for the reason that some of the witnesses were local civilians or that he was not able to

understand their deposition. In fact the petitioner has cross-examined the lady complainant who he claims to have given testimony in Bengali which has been transcribed in the English language.

9. We may also note that the petitioner was given an option of engaging friend of the accused and that he had selected Shri D.S. Tomar, Assistant Commandant who was present with him throughout the SSFC proceedings. In any case, nothing precluded the petitioner from seeking an appropriate clarification from the interpreters who were available, in case he was finding difficulty in understanding anything. This plea is clearly an afterthought. We find that the plea of the petitioner being without substance and reject the same.

10. We may also examine the second plea raised by the petitioner to the effect that the finding and sentence against him is based on no evidence at all. We find that complainant -Smt. Nilima Begum has been examined as sixth witness in support of the prosecution. This witness has categorically stated that she was awakened at about 0100 hrs on the night intervening 27th/28th May, 2008, while she was sleeping with her husband and two children in their room because some person touched her on her legs. She had raised an alarm, and as a result, her husband woke up and caught the intruder. PW-6 further explained that she had come out of the room and shouted for help from her two brother-in-laws who were living near her house. She further states that her children had also woken up due to her shouting and started weeping. As she got involved in consoling them, and due to the darkness of the night, she did not see the face of the intruder who had been intercepted by her husband.

11. Learned counsel for the petitioner has submitted that in the cross-examination, the complainant who was examined as PW-6 deposed that door of the house was locked and bolted and there was only one window which had rods of 6 inches between them and, therefore, it is not possible to believe that any incident as alleged could have occurred.

This submission however is to be noted only for the sake of rejection.

12. The prosecution has also examined the complainant's husband – Ajijul Miah as PW-3. He has supported the complainant in all material respects. This witness has categorically stated that he was woken up by the shout of his wife at 0100 hrs on 28th May, 2008. When he had woken up, he had seen somebody moving from his wife's bed side. He

tried to catch hold the intruder and had scuffled with him. The intruder managed to overpower him and ran into the kitchen. However his brothers, Agul Miah, the elder brother and Ajijul Miah, his younger brother had also arrived. Along with his younger brother, PW-3 had overpowered the intruder and taken him into the room from the kitchen. They had lit the kerosene lamp to identify the intruder and saw that it was a BSF Jawan. A neighbour was called who telephonically informed PS Sitalkuchi. The police arrived at about 0200 hrs and took the intruder along with civilian witnesses to PS Sitalkuchi.

PW-3 has categorically identified the petitioner who was present in the SSFC proceedings as the intruder who had entered his house on the stated night.

13. Corroborating the testimony of the husband of the complainant, the prosecution has examined PW-4 Azizual Miah, the younger brother of her husband. He has deposed with regard to the incident from the stage of having been woken up in the night intervening 27/28th May, 2008 on account of the shouts of Smt. Nilima Begum and her husband. He has supported the testimony of PW-3 in all material particulars and has also unequivocally identified the petitioner as the intruder who is stated to have entered the house of the complainant with the intention to rape her.

14. The prosecution has additionally examined PW-5 – Mr. Bidyut Kumar Roy, the neighbour of the complainant who was also woken up by cries on the night intervening 27/28th May, 2008 and identified the petitioner as the person who had intruded into the house of the complainant with mala fide intention.

15. We may note that the petitioner was given due opportunity to cross-examine PW–3, PW-4 and PW-5 but has refused to do so. As such their testimonies remain unchallenged.

16. In view of the above, there is ample evidence which establishes that the petitioner entered the house of PW-6 Smt. Nilima Begum without authority and with the intention to outrage her modesty for which he was accosted by the civilians.

17. No contradiction in the material particulars are pointed out in the submissions before us. There is no reason to disbelieve the testimony of the witnesses. In this background, the contention of the petitioner that

the finding of guilt on the charge nos.1 and 2 against the petitioner is misconceived and contrary to record.

18. We may note that other witnesses have also supported the surrounding circumstances including the factum of the petitioner's absence from the Border Out Post. PW-7 HC Dilbagh Singh and PW-8 Constable Om Prakash have deposed about the petitioner's absence from the barrack without any information at the time of incident. An entry was recorded in the general diary register as well with regard to his unauthorized absence from the barrack.

19. PW-1 Subedar Puran Singh and PW-2 Sub Inspector Dharambir Singh have deposed about the receipt of the information of the PS Sitalkuchi about the petitioner's having been intercepted by the civilians in the above circumstances in the night intervening 27/28th May, 2008 and the circumstances with regard thereto. These two witnesses had taken custody of the petitioner from the civilian police station and brought him back to the Border Out Post, Palkarhat.

20. It is therefore established on record that on the night intervening 27/28th May, 2008, at about 0100 hours, the petitioner had absented himself without leave from the Border Out Post, Baramadhusuan till 0630 hours on the 28th May, 2008 with which he was charged.

21. In view of the above, the second contention of learned counsel for the petitioner that findings of guilt returned on the 24th June, 2008 of the SSFC were based on no evidence is also devoid of any merit and is hereby rejected. After consideration of the material before the court, the petitioner was sentenced to dismissal from service.

22. The petitioner's statutory appeal under Section 117 was rejected in these circumstances by an order dated 26th March, 2009 by the Director General of the BSF.

23. Learned counsel for the petitioner has alternatively urged before us that the sentence of dismissal imposed upon the petitioner was disproportionate to the seriousness of the charges levied against him. It is urged that the petitioner had completed 19 years, 1 month and 10 days of unblemished service at the time of his sentencing and that the same ought to have been considered inasmuch as this entire family has been rendered destitute because of his dismissal. In this background, the challenge by way of the instant writ petition has to be rejected.

24. At this stage, learned counsel for the petitioner submits that in terms of Rule 41 of the CCS (Pension) Rules, the petitioner has option of seeking compassionate allowance from the respondents given the length of his service. This aspect of the matter has to be considered by the respondents in accordance with the applicable principles of law and considered view has to be taken by them.

25. We accordingly dismiss the present writ petition with the observation that it shall be open for the petitioner to make an appropriate representation to respondent No.4/competent authority seeking grant of compassionate allowance under Rule 41 of the CCS (Pension) Rules which may be considered and decided by the respondents within six weeks of the receipt of the representation from the petitioner.

ILR (2013) IV DELHI 2833
EFA (OS)

DELHI DEVELOPMENT AUTHORITY ....APPELLANT

VERSUS

JAGDISH CHANDER KHANNA & SONS ....RESPONDENTS

(REVA KHETRAPAL & PRATIBHA RANI, JJ.)

EFA (OS) 14/2013 DATE OF DECISION: 29.07.2013

Arbitration & Conciliation Act, 1996—Section 31, Sub-Section (7)(b)—Arbitrator awarded interest upto the date of Award only—In Execution proceedings, future interest also allowed in favour of the respondent—Held, in terms of Clause (b) of Section 31 of the Act, if the Award is silent in regard to the interest from the date of Award, or does not specify the rate of interest from the date of Award, then the party in whose favour Award is made, will be entitled to interest @ 18% per annum from the date of Award and such party can claim the said amount in execution proceedings also even though there is no reference to any post Award interest in the Award.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Ms. Amita Singh, Advocate.

FOR THE RESPONDENTS : None.

CASE REFERRED TO:

1. *State of Haryana and Others vs. S.L. Arora and Company,* (2010) 3 SCC 690.

RESULT: Appeal dismissed.

ORDER (ORAL)

REVA KHETRAPAL, J.

1. This appeal is directed against the order of the learned Single Judge dated 22nd April, 2013 awarding future interest at the rate of 18% in terms of Sub-Section (7)(b) of Section 31 of the Arbitration and Conciliation Act, 1996.

2. The sole submission of learned counsel for the Appellant is that the grant of future interest by the learned Single Judge in execution proceedings is not in consonance with the award dated 31.10.2008, the Arbitrator having rejected the claim for present and future interest.

3. By his award dated 31.10.2008, the sole Arbitrator pursuant to Claim No.8 claiming interest at the rate of 18% pre-suit, pendente lite and future passed the following awards:-

> "I deem it appropriate to award a simple interest @ 12% per annum with effect from 16.05.1996 to the date of award."

4. The learned Single Judge vide the impugned order dated 22nd April, 2013 after recording the submission of counsel for the Decree Holder, being that in terms of Section 31(7)(b) of the Arbitration and Conciliation Act, 1996, the Decree Holder is entitled to interest at the rate of 18% per annum on the principal amount, i.e., about ` 6 Lakhs, granted the prayer of the Decree Holder for interest at the statutory rate of 18%.

It may be noted at this juncture that before the learned Single Judge counsel for the Judgment Debtor made a statement that his client was agreeable to pay interest at the rate of 18% per annum as simple interest from the date of the award to the date of payment.

5. We have heard learned counsel for the parties. We do not find any infirmity or perversity in the order of the learned Single Judge. The Arbitration and Conciliation Act, 1996 contains a specific provision dealing with the power of the Arbitral Tribunal to award interest. The said provision as incorporated in Sub-Section (7) of Section 31 is, for the sake of ready reference, extracted below:-

> "31. (7)(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.
>
> (b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment."

6. Thus, while Clause (a) of Section 31(7) of the Act relates to the pre-award period, Clause (b) relates to the post award period. It is settled law that the Arbitral Tribunal though has discretion under this clause with regard to the rate, the period and the quantum of interest, such discretion is always subject to the contract between the parties and the parties may even opt to contract out of interest. Insofar as Clause (b) is concerned, though this clause too gives discretion to the Arbitral Tribunal to award interest for the post award period, but that discretion is not relatable to the contract between the parties. If, however, the discretion to award interest is not exercised by the Arbitral Tribunal, the Act mandates the payment of interest at the statutory rate of 18% per annum for the post award period unless the same is specifically refused by the Arbitrator or unless the Arbitrator chooses to award interest at a lower rate than that mandated.

7. The summation of the law with regard to Section 31(7)(a) and

(b) is lucidly contained in the judgment of the Hon'ble Supreme Court rendered in **State of Haryana and Others vs. S.L. Arora and Company,** (2010) 3 SCC 690. Since the present case relates only to post award interest, the relevant portion of the judgment is extracted hereinbelow:-

> "24.6 Clause (b) of Section 31(7) is intended to ensure prompt payment by the award-debtor once the award is made. The said clause provides that the "sum directed to be paid by an arbitral award" shall carry interest at the rate of 18% per annum from the date of award to the date of payment if the award does not provide otherwise in regard to the interest from the date of the award. This makes it clear that if the award grants interest at a specified rate up to the date of payment, or specifies the rate of interest payable from the date of award till the date of payment, or if the award specifically refused interest, clause (b) of Section 31 will not come into play. But if the award is silent in regard to the interest from the date of award, or does not specify the rate of interest from the date of award, then the party in whose favour an award for money has been made, will be entitled to interest at 18% per annum from the date of award. He may claim the said amount in execution even though there is no reference to any post-award interest in the award. Even if the pre-award interest is at much lower rate, if the award is silent in regard to post-award interest, the claimant will be entitled to post-award interest at the higher rate of 18% per annum. The higher rate of interest is provided in clause (b) with the deliberate intent of discouraging award-debtors from adopting dilatory tactics and to persuade them to comply with the award.
>
> 34. Thus it is clear that Section 31(7) merely authorises the Arbitral Tribunal to award interest in accordance with the contract and in the absence of any prohibition in the contract and in the absence of specific provision relating to interest in the contract, to award simple interest at such rates as it deems fit from the date on which the cause of action arose till the date of payment. It also provides that if the award is silent about interest from the date of award till the date of payment, the person in whose favour the award is made will be entitled to interest at 18% per annum on the principal amount awarded, from the date of award till the date of payment."

8. In view of the above, enunciation of the law, we do not find any merit in the present appeal, which is accordingly dismissed.

ILR (2013) IV DELHI 2887
W.P.(C)

ANIL KUMAR RAI **....PETITIONER**

VERSUS

UNION OF INDIA AND ORS. **....RESPONDENTS**

(GITA MITTAL & DEEPA SHARMA, JJ)

W.P.(C) NO. 3765/2013 **DATE OF DECISION: 30.07.2013**

Border Security Force Act, 1968—Section 20(a) and 22(a)—Border Security Force Rules, 1969—Rule, 45, 99 and 149—Petitioner found guilty of both charges framed against him by Summary Security Force Court (SSFC)—Statutory appeal filed by Petitioner rejected by Director General (DG), Border Security Force (BSF)—Order challenged before High Court of Judicature at Allahabad who directed DG, BSF to decide statutory petition of petitioner by passing a speaking order—DG, BSF altered finding of guilt in respect of two charges substituting same by a finding of not guilty—DG as appellate authority, did not vary finding of guilty so far as first charge is concerned and also held that punishment which was imposed on petitioner, was commensurate with gravity of offence committed by him—Order challenged before HC—Plea taken, DG, BSF had no jurisdiction to pass impugned order—Matter should have been remanded to SSFC for consideration afresh which alone had authority to consider same—Further contended, SSFC ought to have complied with requirement of Rule 99 of BSF Rules which required SSFC to record reasons for its findings—Held—DG, BSF has considered matter in compliance with directions passed by HC and has passed a reasoned and speaking order which has been duly communicated to petitioner–It is not open to petitioner to now contend that DG could have only remanded matter and could not have considered matter afresh—So far as challenge to order passed by SSFC is concerned, same rests on sole ground that impugned order is not a reasoned or speaking orders—This challenge is premised on petitioner's reading of Rule, 99—Rule 99 of BSF Rules does not relate to a trial by SSFC but applies to record and announcement of finding by General Security Force Court and Petty Security Force Court—Challenge by Petitioner to findings of SSFC relying on Rule 99 of BSF Rules is wholly misconceived—Writ petition is wholly misconceived and legally untenable.

Important Issue Involved: An order passed by the Director General of Border Security Force on the directions of the High Court to decide statutory appeal filed against the findings of the Summary Security Force Court by reasoned and speaking order cannot be challenged for the reason that the Director General could have only remanded the matter and could not have considered the matter afresh.

Rule 99 of the BSF Rules, 1969 does not relate to trial by a Summary Security Force Court but applies to the record and announcement of finding by the General Security Force Court and the Petty Security Force Court.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Sanjay Sharma, Adv. with Mr. R.D. Upadhyay, Adv.

FOR THE RESPONDENTS : Mr. Anuj Aggarwal, Adv.

CASES REFERRED TO:

1. *Union of India & Anr.* vs. *Dinesh Kumar.* AIR 2010 SC 1551.
2. *Nirmal Lakra* vs. *Union of India and Ors.* [2003 DLT (102) 415].
3. *S.N. Mukherjee* vs. *Union of India* (AIR 1990 SC 1984).

RESULT: Dismissed

GITA MITTAL, J (ORAL)

1. The petitioner in the instant case was tried by a Summary Security Force Court in respect of an alleged incident dated 1st January, 1999. By a charge-sheet dated 12th October, 1999, the following charges were issued against the petitioner:-

> "First Charge BSF Act 1968 Sec.20(a)
>
> Using Criminal Force to his Superior Officer
>
> In that he, at BOP Ranian on 4.1.99 at about 2100 hrs struck with their fist on the body of No.66577167 Subedar Harbhajan Singh of the same Coy and dragged him out side from the room by pulling his hair.
>
> First Charge BSF Act 1968 Sec.22(a)
>
> Neglecting to Obey local order
>
> In that he, at BOP Ranian on 4.1.99 at about 2100 hrs found consumed Contravention of Bn Hq Order No.Estt/841/99/1338-43 dated 01 Jan 99 which directs that all ranks deployed on border are forbidden to drink liquor."

2. The hearing of the charges against the petitioner under Rule 45 of the Border Security Force Rule was conducted by the Commandant 128 Battalion, BSF on 7th January, 1999. During this hearing, six prosecution witnesses were examined in addition to examination of documents. The record of evidence was directed to be prepared by Shri Rajendra Singh 2 1/C after completion of the hearing. During the recording of evidence, again 11 prosecution witnesses were examined in the presence

and hearing of the petitioner and he was given opportunity to cross-examine these witnesses. The petitioner duly availed of such opportunity.

3. The petitioner was also given an opportunity to make a statement in his defence and to produce defence witnesses.

4. There is no challenge to the legality and validity of any of these proceedings by the petitioner.

5. The petitioner was tried by a Summary Security Force Court (hereinafter referred to as `SSFC?) on 15th October, 1999. It is on record before us that the petitioner had nominated Shri Prem Pal, Assistant Commandant as "friend of the accused" and who was so detailed after the written request in this behalf as per his choice.

6. The petitioner set up a plea of not guilty whereupon the trial proceeded on such plea and 11 prosecution witnesses were examined. The petitioner was again given full opportunity to cross-examine all witnesses. The petitioner chose not to lead any defence though opportunity was given to him at the trial. He, however, made a statement in his defence.

7. In this background, so far as the procedural aspect is concerned, no violation is pointed out to us by the petitioner so far as the conduct of the pre-trial proceedings as well as the trial by the Summary Security Force Court is concerned.

8. The petitioner was found guilty of both charges by the SSFC and by an order dated 20th November, 1999, the sentence of dismissal from service was imposed upon him.

9. A statutory appeal assailing the above proceedings and the order was filed by the petitioner to the Office of the Directorate General of the Border Security Force which came to be rejected by an order dated 22nd November, 2000.

10. The petitioner assailed these orders against him, by way of Civil Miscellaneous Writ Petition No.51172 of 2000 before the High Court of Judicature at Allahabad. This writ petition came to be dismissed by the High Court of Judicature at Allahabad by an order passed on 27th August, 2012. The material extract thereof deserves to be considered in extenso and reads as follows:-

"It appears that the statutory petition filed by the petitioner has been rejected mechanically without giving any reason and therefore, it is not sustainable. While deciding the statutory petition/ appeal, the Director General, Border Security Force acts as a quasi judicial authority, therefore, it is incumbent upon him to consider the case and pass a reasoned order, giving reason for acceptance or rejection of the pleas of the appellant, but no such order has been passed. In view of the above, the order dated 22.11.2000 and any other order passed in the file by the Director General, Border Security Force are quashed. The Director General Border Security Force is directed to decide the statutory petition/ appeal dated 23.12.1999, filed by the petitioner, afresh, after giving opportunity of hearing to the petitioner, by passing a reasoned order as stated above. The petitioner shall file the certified copy of this order before the Director General, Border Security Force, within two weeks and the Director General, Border Security Force is directed to decide the statutory petition/ appeal dated 23.12.1999 within another period of two months.

With the aforesaid observations and directions, the writ petition stands allowed."

11. In compliance of the directions of the Allahabad High Court, the Director General, BSF considered the statutory petition of the petitioner afresh and has passed a reasoned and speaking order dated 12th November, 2012 altering the finding of guilt of the petitioner in respect of the two charges and substituting the same by a finding of not guilty. The Director General as appellate authority, did not vary the finding of guilty so far as the first charge is concerned and also held that the punishment which was imposed on the petitioner, was commensurate with the gravity of the offence committed by him.

12. Before us, the petitioner has assailed the order dated 12th November, 2012 on the ground that the Director General, BSF had no jurisdiction to pass the impugned order. It is contended that the matter should have remanded to the Summary Security Force Court for consideration afresh which alone had the authority to consider the matter. It is further contended that the Summary Security Force Court ought to have complied with the requirement of Rule 99 of the BSF Rules which required the SSFC to record reasons for its findings.

13. We have heard learned counsel for parties at this stage itself, given the narrow area of consideration which is pressed before us. So far as the challenge to the findings of the Summary Security Force Court is concerned and the orders passed by it, the petitioner appears to have assailed them in the first writ petition being Writ Appeal No.51172/2007 before the High Court of Judicature at Allahabad which conclusively passed the judgment dated 27th August, 2012 issuing the above directions. The petitioner accepted the adjudication in his first writ petition and did not assail the same by way of any appeal or petition any.

14. The Director General, BSF has considered the matter in compliance with the directions passed by the High Court in the order dated 22nd August, 2012 and has passed a reasoned and speaking order which has been duly communicated to the petitioner. In this background, it is not open to the petitioner to now contend that the Director General could have only remanded the matter and could not have considered the matter afresh.

15. So far as the challenge to the order passed by the SSFC is concerned, the same rests on the sole ground that the order dated 15th October, 1999 is not a reasoned or speaking order. This challenge is premised on the petitioner's reading of Rule 99 of the BSF Rules. Even if this challenge is maintainable, which we have held is not, we find that Rule 99 of the BSF Rules does not relate to a trial by a Summary Security Force Court but applies to the record and announcement of finding by the General Security Force Court and the Petty Security Force Court. As per the scheme of the Border Security Force Act, 1908 & Rules thereunder, Rule 99 is mentioned in Chapter 9 which relates to "Procedure for Security Force Courts".

16. So far as the Summary Security Force Court is concerned, there is a separate chapter assigned to the proceedings and the procedure which has to be followed. The legislature has prescribed the procedure to be followed for conduct of a Summary Security Force Court in Chapter 11 of the Rules. Our attention has been drawn to Rule 149 in Chapter 11 which requires the Summary Security Force Court to record its findings in the following manner:-

"149. Finding.- (1) The finding on every charge upon which the accused is arraigned shall be recorded and except as mentioned in these rules shall be recorded simply as a finding of 'Guilty'

or of 'Not Guilty'.

(2) When the Court is of opinion as regards any charge that the facts proved do not disclose the offence charged or any offence of which he might under the Act legally be found guilty on the charge as laid, the Court shall find the accused "Not Guilty? of that charge.

(3) When the Court is of opinion as regards any charge that the facts found to be proved in evidence differ materially from the facts alleged in the statement of particulars in the charge, but are nevertheless sufficient to prove the offence stated in the charge, and that the difference is not so material as to have prejudiced the accused in his defence, it may, instead of a finding of 'Not Guilty' record a special finding.

(4) The special finding may find the accused guilty on a charge subject to the statement of exceptions or variations specified therein.

(5) The Court shall not find the accused guilty on more than one of two or more charges laid in the alternative, even if conviction upon one charge necessarily connotes guilty upon the alternative charge or charges."

17. Mr.Anuj Aggarwal, learned counsel for the respondents has submitted that the issue raised by the petitioner is not res integra and stands finally settled by the judicial pronouncement reported at AIR 2010 SC 1551 **Union of India & Anr. Vs. Dinesh Kumar**. Placing reliance on Rule 149, in this pronouncement, it was held as follows:-

"12. On this backdrop, it is clear that the provisions for the SSFC and the appellate authority are para meteria, more particularly in case of Rule 149 and Section 117 (2) of the Act, with the provisions which were considered in both the above authorities. Therefore, there cannot be any escape from the conclusion that as held by the Constitution Bench, the reasons would not be required to be given by the SSFC under Rule 149 or by the appellate authority under Section 117(2) of the Act. This position is all the more obtained in case of SSFC, particularly, as the Legislature has chosen not to amend Rule 149, though it has specifically amended Rule 99 w.e.f. 9.7.2003. It was pointed out that in spite of this, some other view was taken by the Delhi

High Court in the decision in **Nirmal Lakra v. Union of India and Ors.** [2003 DLT (102) 415]. However, it need not detain us, since Rule 149 did not fall for consideration in that case. Even otherwise, we would be bound by law declared by the Constitution Bench in the decision in **S.N. Mukherjee v. Union of India** (AIR 1990 SC 1984)."

18. In view of the above, the challenge by the petitioner to the findings of the Summary Security Force Court in the instant case, relying on Rule 99 of the BSF Rules, is wholly misconceived. We have noted above the compliance of the statutory requirements and the rules framed thereunder by the respondents. The findings against the petitioner rests on a consideration of eleven witnesses and ample evidence in support of the charges.

19. In this view of the matter, the challenge in the instant writ petition to the order dated 12th November, 2012 of the Director General of the BSF as well is wholly misconceived and legally untenable.

We find no merit in this writ petition which is hereby dismissed.

ILR (2013) IV DELHI 2894
CRL. A.

SANT RAM @ SADHU RAM ....APPELLANT

VERSUS

THE STATE ....RESPONDENT

(G.S. SISTANI & G.P. MITTAL, JJ.)

CRL. A. NO. : 877/2010 DATE OF DECISION: 31.07.2013

Indian Penal Code, 1860—Section 375—Rape—Section 376—Punishment for rape—Section 506—Threat to kill—Code of Criminal Procedure, 1973—Section 313—

Statement of the accused—Section 357—Compensation to victim appellant father of the prosecutrix charge sheeted for offences under section 376 and 506—Male child born after registration of FIR—Charges framed—Pleaded not guilty—Prosecution examined 14 witnesses—Statement of accused recorded denied committing rape—Convicted—Sentenced to imprisonment for life with rider and fine—Compensation awarded to the victim—Preferred appeal—Contended—DNA test not properly conducted—Falsely implicated by the wife and daughter for money—Taken possession of his assets including land—Victim of conspiracy—Sexual act was consensual—Held:- Prosecutrix and her mother are the material witnesses baby delivered after registration of FIR—Blood samples of the baby, prosecutrix and appellant collected under the order of the Court—Appellant voluntarily agreed sample drawn by an expert—No fault with drawl of blood sample—No suggestion given to expert as to non conduct of DNA test properly during cross examination—No such plea can be permitted—Expert opined the appellant and the prosecutrix to be the biological parents of the child—Appellant had sexual intercourse with the prosecutrix established was aged about 17 years on the date of commission of offence tenor of cross examination implies plea of informed consent to the sexual act—Prosecutrix testified the act committed by keeping her at knife point and under threat—No reason to disbelieve dependent on appellant for shelter, bread and butter did not have the choice to resist appellant's act—Consent under threat is no consent—There cannot be voluntary participation in the act—Conviction proper—Case did not fall in any clause under sub section (2) of section 376—Not liable to be punished with imprisonment for life with rider—Sentence maintained but without the rider—Appeal disposed of.

Important Issue Involved: Section 53-A of the Code requires examination of accused by a registered medical practitioner to collect evidence of the commission of the offence. The use of the term 'registered medical practitioner' in Section 53-A of the Code has been done only with the purpose that the examination is carried out by a competent person.

If the blood sample is drawn by an expert who is also to carry out the analysis and even if the expert is not a registered medical practitioner, the same is not in violation of Section 53-A of the Code.

Submission of the body under the fear of terror cannot be construed as a consented sexual act.

Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent.

For award of sentenced which could extend to imprisonment for ten years or imprisonment for life, the case must fall in any of clauses of sub-section (2) of section 376.

[Vi Ku]

APPEARANCES:

FOR THE APPELLANT : Ms. Saahila Lamba, Advocate.

FOR THE RESPONDENT : Ms. Richa Kapoor, Additional Public Prosecutor.

CASES REFERRED TO:

1. *State of Uttar Pradesh* vs. *Chhotey Lal* (2011) 2 SCC 550.
2. *Swamy Shraddananda @ Murali Manohar Mishra* vs. *State*

of Karnataka AIR 2008 SC 3040

3. *State of Himachal Pradesh* vs. *Asha Ram,* AIR 2006 SC 381.

4. *H.P.* vs. *Mango Ram* (2000) 7 SCC 224.

5. *People* vs. *Pelvino* [(1926) 214 NYS 577].

6. *Hallmark* vs. *State* [22 Okl Cr 422].

RESULT: Appeal disposed of.

G.P. MITTAL, J.

1. The appellant (Sant Ram) impugns judgment dated 03.04.2010 and order on sentence dated 24.04.2010 in Sessions Case No.1026/2009 whereby the appellant was convicted for an offence punishable under Section 376 and Section 506 IPC and was sentenced to undergo imprisonment for life for the offence punishable under Section 376 IPC and RI for two years for the offence punishable under Section 506 IPC. A fine of Rs.2 lakh for the offence punishable under Section 376 IPC and Rs.1,000/- for the offence punishable under Section 506 IPC was also imposed on the appellant. In default of payment of fine, the appellant was sentenced to further undergo SI for a period of two years for the offence under Section 376 IPC and SI for a period of one week for the offence under Section 506 IPC. Out of the total fine of Rs. 2,00,000/-, if recovered, a sum of Rs. 1 lakh was ordered to be paid to the prosecutrix and another sum of Rs. 1 lakh was ordered to be paid to the child under Section 357 Cr.P.C.

2. It was directed that the appellant shall not be considered for grant of remission till he undergoes an actual sentence of 20 years.

3. The appellant was accused of and convicted for raping his own daughter who, according to the prosecution, was 16/17 years of age. The prosecution version can be extracted from the impugned judgment as under:

> ''The case of the prosecution is that on 25.4.2006 Smt. Atri Devi had come to the police station alongwith her daughter and lodged DD no.27A stating that her husband Sant Ram had committed rape with her daughter i.e. the prosecutrix 'N' on which she got recorded the statement of the prosecutrix. In her statement to the police the prosecutrix has stated that the behaviour of her father towards her was not good in the absence of her

mother and he never kept her like his own daughter and used to kept her as his wife. She has told the police that after 3-4 days of Diwali in the year 2005, in the morning hours when her mother had gone outside to ease herself, the accused committed rape upon her and when she tried to raise an alarm he gagged her mouth. She further stated that at that time his father was also having a knife in his hand and threatened her that she will kill her as well as her mother in case she disclose to anyone. According to the complainant/prosecutrix due to fear she did not disclose the fact of rape upon her to anybody even after the lapse of one and half months. After 8-10 days of Holi her mother inquired from her regarding the enlargement of abdomen but the prosecutrix again did not tell anything to her mother due to fear after which she was got medically examined by her mother and the doctors told her that the prosecutrix was pregnant for about 5 months. It is only thereafter that the prosecutrix disclosed the whole of the incident to her mother.

On the basis of the said complaint of the prosecutrix 'N' the present FIR was registered and the prosecutrix was medically examined. On the pointing of Smt. Atri Devi the accused was arrested and medically examined. The statement of the prosecutrix was also got recorded before the Ld. MM on 6.6.2006. Thereafter on 30.7.2006 the prosecutrix delivered a male child at SGM Hospital and since the prosecutrix was not intending to keep the baby with her, the custody of the male child was handed over to Child Welfare Committee. In order to get the DNA comparison, the blood samples of the baby, accused and prosecutrix were collected by the doctors at SGM Hospital and their DNA sample were also drawn in the FSL Rohini. During the course of investigations the bone x-ray examination of the prosecutrix was also got conducted and after completion of the investigations the charge sheet was filed in the court.''

4. On appellant's pleading not guilty to the charge, the prosecution examined 14 witnesses. PW1, the prosecutrix 'N' and PW6 Smt. Arti Devi her mother are the material witnesses; rest of the witnesses have provided various links in the case. They lose significance in view of the prosecution case and the defence taken by the appellant to which we shall advert to a little later.

5. In his statement under Section 313 Cr.P.C., the appellant, who as stated above, is father of the prosecutrix, denied that he committed rape on the prosecutrix. With regard to matching of DNA profile of the appellant, the prosecutrix and the male child born to the prosecutrix, the appellant took the plea that the DNA test had not been properly conducted and the genotype similarity in result may have come because he was admittedly father of prosecutrix. When the appellant was given an opportunity to explain the reason for his false implication, he stated that his wife (PW6) and her daughter (PW-1) had implicated him falsely for money. They had taken possession of his assets including his plot of land at C-157, Shiv Vihar, Karala, Delhi. He stated that he was victim of a conspiracy.

6. In order to decide the instant appeal, the following questions needs to be answered: (i) whether there was sexual intercourse between the appellant and the prosecutrix; (ii) whether the age of the prosecutrix was less than 16 years and thus she was incapable of giving any consent; and (iii) if she was not less than 16 years, whether she had given consent to sexual intercourse so as to take it out of the definition of rape under Section 375 IPC. There was a long delay in lodging the FIR. The appellant challenges the credibility of the two star witnesses of the prosecution. These factors have also to be considered to find out if the prosecutrix was really raped by her own father.

RE: SEXUAL INTERCOURSE:

7. As stated earlier, PW1, the prosecutrix 'N' and PW6, her own mother are the material witnesses on this aspect. Their testimonies were discussed by the learned Trial Court under the heading Eye witnesses/ public witnesses. The relevant portion is extracted hereunder:

> ''...PW1 has deposed that after Diwali, she was in periods and in the morning hours her father committed rape upon her when her mother went outside after crossing the railway track to ease herself. She has testified that when she tried to raise alarm her father gagged her mouth and at that time her father was also having a knife in his hand and committed rape upon her. She has further stated that her father threatened her that in case she disclosed this fact of rape to her mother then he will kill her mother. According to the witness, due to fear she did not disclose anything to anybody even after the lapse of one and half month. She has deposed that after one and half months, one day

her father came to the house in drunken condition and started beating her as well as her mother and wounded the head of her mother and thereafter in the morning she alongwith her mother went to the house of her Nana at Meerut without informing her father. The witness has further deposed her mother left her there and went Shamli where her mother lived about two months and came back after two months.

According to PW1, there was an occasion of marriage of her Bua's daughter on account of which her father came at Meerut at her Nana's house and took them to Bhajanpura where the marriage was going to take place. I was there that her mother raised question about the enlargement of her abdomen on which she informed her mother about the rape committed by her father. She has deposed that her ultrasound was got conducted and doctors stated that she is already pregnant and a 5+ months issue is in her abdomen and delivery is the only alternative. She has also deposed that her mother collected her Chacha and her dadi and informed them about the problem asking them to resolve the problem on which they suggested to them to go to some unknown place. It was then that they all including three brothers, mother and her father came to Bijwasan where they remained for about a month and from Bijwasan they shifted to Trilokpuri. According to PW1, near the festival of Rakhi she gave birth to a male baby. She has testified that when the doctor informed them that the issue was of 5+ months old then they reported the matter to the police when her statement was recorded which statement is Ex.PW1/A. The witness has also identified the thumb impression of her mother on the said statement. She has deposed that her medical examination was got conducted by the police at Sanjay Gandhi Hospital and her undergarments also might have been taken by the doctor and her statement under Section 164 Cr.P.C. was also recorded by the Ld. Metropolitan Magistrate which statement is Ex.PW1/B. The witness is unable to tell her age at the time of incident and has deposed that he had not attended any school. She has further deposed that the DNA test of the male child was also conducted. PW1 has identified the accused Sant Ram in the court and also the undergarment which is Ex.P-1.

The witness PW1 was subjected to a lengthy cross-examination

wherein she has denied the various suggestions put by the counsel for the accused particularly on the aspect of being a consenting party to the act which she has specifically denied and nothing much has come out from the cross-examination of the prosecutrix.

PW6 Smt. Atri Devi is the mother of the prosecutrix 'N' and wife of the accused Sant Ram. She has corroborated the testimony of PW1 to the extent that in the year 2006 in the summer season she noticed some enlargement of abdomen of her daughter and made inquiries from her daughter who did not tell her anything about it. She thereafter took her daughter to a private clinic at Bhajanpura where her daughter was medically examined and doctor told her that her daughter is having pregnancy of about 5-6 months. She has deposed that it was only thereafter that her daughter told her of being raped by her father the accused Sant Ram forcibly against her wishes near the festival of Diwali in the year 2006, but she did not tell her the exact date of the incident. According to the witness, her daughter also told her that the accused had threatened to kill her if she disclose this fact of rape to her or anyone, due to which reason, her daughter did not disclose this fact to her...''

8. As stated hereinabove, the factum of the sexual intercourse with the prosecutrix came to light when there was an enlargement of abdomen of the prosecutrix. The prosecutrix underwent an ultrasound on 21.03.2006 which disclosed that the prosecutrix was carrying a pregnancy of 20 weeks. After the FIR was registered, a male child was delivered on 29.07.2006. The blood sample of the prosecutrix 'N', the male child 'S' and the appellant were collected in DNA Unit, FSL Rohini. The blood samples were isolated for the purpose of DNA fingerprint profile. It was found that the paternal and maternal alleles from Exs.1 and 2 accounted in Ex.3, that is, the child and, therefore, the Senior Scientific Officer and the Director, In-charge of FSL opined that the appellant and the prosecutrix were the biological parents of the child.

9. The DNA test is challenged by the learned counsel for the appellant on the ground that as per Section 53-A of the Code of Criminal Procedure, 1973 (Code), examination of any person accused of rape has to be done by a registered medical practitioner. No evidence was led by the prosecution with regard to the taking of the sample by a registered

medical practitioner. It is urged that no witness was produced to prove that the blood samples of the appellant, the prosecutrix and the male child remained intact till they were deposited with FSL.

10. In this regard, it would be relevant to refer to the testimony of PW14, Inspector Sanjita. She deposed that a male baby was delivered by the prosecutrix 'N' on 29.07.2006. In order to get the DNA comparison the blood samples of the baby of prosecutrix, the prosecutrix and the appellant were collected by the doctor at SGM hospital and the same were seized by memo Ex.PW-6/A. A perusal of the report dated 03.01.2007 shows that the blood was putrefied and the desired tests could not be carried out. Thereafter, an application was moved before the learned ASJ by the IO on 07.12.2006. On 03.01.2007 after recording appellant's 'No Objection Certificate', for taking his blood sample for carrying out DNA test, the application was allowed and the jail authorities were directed to produce the appellant in the FSL for the purpose of taking his sample. A perusal of the identification form (Ex.PW-12/C collectively) reveals that the blood samples of the prosecutrix 'N', her baby child Suraj and appellant Sant Ram were obtained on 22.01.2007 by Dr. A.K. Srivastava. Said Dr. A.K. Srivastava was examined by the prosecution as PW-12 who testified about taking of the three blood samples on 22.01.2007. He further proved his report Exs.PW-12/A and PW-12/B. He concluded that the DNA profiling (STR analysis) performed on the exhibits provide is sufficient to conclude that the Exhibits '1' and '2' are the biological parents of the Exhibit '3' (i.e. Baby male Child Suraj).''

11. It is true that Section 53-A of the Code requires examination of an accused by a registered medical practitioner in order to collect the evidence of the commission of the offence. In the instant case the blood samples were initially taken in SGM hospital by the concerned doctor. The sample got putrefied and in order to avoid any delay in examination of the sample after its drawl, the appellant was produced before Dr. A.K. Srivastava, Senior Scientific Officer for this purpose. The use of the term 'registered medical practitioner' in Section 53-A of the Code has been done only with the purpose that the examination is carried out by a competent person. Thus, if the blood sample is drawn by an expert who is also to carry out the analysis and even if the expert is not a registered medical practitioner, the same is not in violation of Section 53-A of the Code. Moreover, in the instant case the appellant himself voluntarily agreed to give the blood samples as is evident from the order dated

03.01.2007 passed by the learned ASJ. Thus, it cannot be said that he was compelled to be a witness against himself. Moreover, taking blood sample of the accused or his medical examination would not mean that the appellant was compelled to be witness against himself. In the circumstances, no fault can be found with the drawl of the sample by PW-12 Dr. A.K. Srivastava, Senior Scientific Officer in FSL, Rohini.

12. In reply to question No.28 put in his examination under Section 313 of the Code the appellant stated that DNA test had not been properly conducted and that the genotype similarities in the results have come only because he was father of the prosecutrix. However, no such suggestion was given to PW-12 Dr. A.K. Srivastava in spite of the fact that he was ordered to be recalled for cross-examination on a request made by the appellant and the appellant had an opportunity to cross-examine PW-12 not only on 04.12.2009 but also on 26.12.2010. In the absence of any suggestion to PW-12, the appellant cannot be permitted to take a plea that genotype similarities were found because he was father of the prosecutrix.

13. Moreover, the DNA result holding that the appellant fathered the child delivered by the prosecutrix loses significance in view of the specific suggestions put in the cross-examination of PW1(the prosecutrix). A specific suggestion was given to the prosecutrix that the appellant used to have sexual intercourse with the prosecutrix with her consent. The relevant portion of the cross-examination is extracted hereunder:

> ''It is correct that at the time of incident above persons were present at their houses but those were sleeping. My father used to tease me and threat me as his wife from the age of 10 years. It is correct that when my father was treating me as his wife I did not brought this fact in the knowledge of police or anyone. My father used to tease me at the bed and when we used to go to temple and other places. It is wrong to suggest that I used to tease my father in the period stated above. It is wrong to suggest that I liked the teasing of my father. I do not remember the date, month and year of the incident of rape but it was few days earlier to the Diwali festival. It is wrong to suggest that I used to do sexual intercourse with my father prior to the incident of rape...''

14. Thus, in view of the fact that the prosecturix's testimony with regard to allegation of sexual intercourse committed by the appellant was not seriously challenged; rather, a suggestion was given to her that all

this was with her consent and to her liking, it is established that the appellant committed sexual intercourse with the prosecutrix.

15. Moreover, it is difficult for a young girl of 16-17 years to level the allegation of rape against her own father, particularly, when she alleges her pregnancy was owing to the sexual intercourse by her father. We do not find any reason to disbelieve PW1's testimony with regard to the sexual intercourse by her father with her which is fortified by appellant's own defence as also DNA report Ex.PW12/A. According to the prosecutrix, her father committed sexual intercourse with her after Diwali which coincides with the ultrasound report Ex.PW4/A and the delivery of the child on 29.07.2006. Thus, it is proved that the appellant had sexual intercourse with the prosecutrix near Diwali in the year 2005 as is the case of the prosecution.

RE: AGE OF THE PROSECUTRIX:

16. In her statement under Section 161 Cr.P.C.(Ex.PW1/A) recorded on 24.05.2006, the prosecutrix gave her age as 16 years. After registration of the case, prosecutrix's statement under Section 164 Cr.P.C. was recorded by the learned Metropolitan Magistrate on 06.06.2006 wherein again she gave her age as 16 years. The prosecutrix was examined in the Court on 25.09.2007. Here again, she gave her age as 16 years although it was after one year and four months of registration of the case. No authentic evidence either in the shape of the school first attended or any certificate from the panchayat or municipality was produced. The prosecution, therefore, being aware of its obligation to prove the prosecutrix's age obtained medical opinion with regard to her age. As per report of the Medical Board, her dental examination revealed her age to be less than 18 years and as per X-ray examination, the bone age was found to be between 16-17 years. The medical examination was conducted on 14.07.2006. Thus, giving benefit of doubt and taking the maximum age as per the medical opinion, the prosecutrix was less than 18 years on 14.07.2006. Consequently, on the date of alleged rape, that is, in November, 2005, the prosecutrix was about 17 years of age. The learned Trial Court considered the ossification test and in spite of lack of any reliable oral or documentary evidence with regard to her age held that the prosecutrix at the time of the incident was between 15 to 16 years and was, thus, incapable of giving the consent. This finding reached by the learned Additional Sessions Judge (ASJ) cannot be sustained as the oral evidence produced by the prosecution with regard to the age was merely

a rough estimate and, in the circumstances, the ossification test was the only evidence which ought to have been considered to return a finding on the prosecutrix's age. Since she was less than 18 years on 14.07.2006; she was, therefore, about 17 years on the date of the commission of the offence.

RE: CONSENT:

17. Taking into consideration the relationship between the prosecutrix and the appellant, consent to sexual intercourse is the most crucial question to be determined in the instant case. It is urged by the learned counsel for the appellant that the factum of the sexual intercourse was not disclosed by the prosecutrix to her mother either immediately after the incident or even thereafter till prosecutrix's abdomen was found to be exceptionally large raising suspicion in her mother's mind. It is urged that as per the prosecutrix she (PW-1) along with her mother (PW-6) had gone to her nana's (maternal grandfather) place at Meerut after 1+ months of the incident. There could not have been any fear or pressure upon the prosecutrix once she was at her maternal grandfather's place. Thus, the fact that she did not make any complaint about the appellant's act will clearly indicate that there was consent to the sexual act committed by the appellant. It is urged that the prosecutrix and her mother wanted to grab the appellant's property and thus the act of consensual sex was converted into rape by the prosecutrix in collusion with her mother.

18. We have already extracted PW1's (prosecutrix's) and PW6's testimonies earlier. We have also held that commission of the sexual intercourse with the prosecutrix is established not only by DNA profiling but also by oral evidence of the prosecutrix which is duly supported by her mother PW-6. As stated earlier, the age of the prosecutrix at the time of the commission of the offence has been found by us to be about 17 years even after giving benefit of doubt in appellant's favour. Since it is established that the appellant had committed sexual intercourse with the prosecutrix, who is his own daughter, and it is not the appellant's case that the sexual intercourse was being committed with the prosecutrix by him with his wife's (PW-6's) consent, the appellant's plea that he was falsely implicated because his wife and the prosecutrix wanted money from him or that they had taken possession of his assets including plot No.C-157, Shiv Vihar, Karala cannot be believed. The tanner of the cross-examination, while suggestion was being put to PW-1 (the prosecutrix) that she had physical relations with the appellant at her will,

implies appellant's plea of informed consent to the sexual act by the prosecutrix.

19. It has to be borne in mind that on the date of incident the prosecutrix was aged 16-17 years. She testified that the act of sexual intercourse was committed by the appellant by keeping her at knife point and under the threat that if the fact is disclosed to any person she (the prosecutrix) and her mother will be killed. There is strong possibility that the appellant was armed with a knife while the prosecutrix was made a prey to the act. We find no reason to disbelieve PW-1's testimony. We are not inclined to believe that the consensual sexual act with a daughter aged 16-17 years would be converted into rape by her mother when she came to know of it after 3-4 months of the incident.

20. It may be noted that the prosecutrix, her mother and other siblings were dependent on the appellant for their shelter as also for their bread and butter. Keeping in view the economic and social background the prosecutrix did not have the choice to resist the appellant's act and thereafter she wanted to hide the same not only from her mother but also from her maternal grandmother. Thus, the delay in lodging the FIR even after the ultrasound was carried out on 21.03.2006 is of no consequence. In this regard it will be appropriate to refer to PW-1's testimony. She deposed that her mother called her *dadi* and *chacha* for resolution of the problem. It was suggested by them to go to some unknown place (to deliver the child and save the family's honour). In **State of Uttar Pradesh v. Chhotey Lal** (2011) 2 SCC 550 the Supreme Court considered its various earlier decisions and analysed the term consent in the context of the offence of rape. The Supreme Court thus held:-

> ''15. Be that as it may, in our view, clause Sixthly of Section 375 IPC is not attracted since the prosecutrix has been found to be above 16 years (although below 18 years). In the facts of the case what is crucial to be considered is whether clause Firstly or clause Secondly of Section 375 IPC is attracted. The expressions ''against her will'' and ''without her consent'' may overlap sometimes but surely the two expressions in clause Firstly and clause Secondly have different connotation and dimension. The expression ''against her will'' would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. On the other hand, the expression ''without her consent'' would comprehend an act of reason

accompanied by deliberation. 16. The concept of ''consent'' in the context of Section 375 IPC has come up for consideration before this Court on more than one occasion. Before we deal with some of these decisions, reference to Section 90 IPC may be relevant which reads as under:

> **''90. Consent known to be given under fear or misconception.-**A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or
>
> [Consent of insane person] if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or
>
> [Consent of child] unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.''

17. This Court in a long line of cases has given wider meaning to the word ''consent'' in the context of sexual offences as explained in various judicial dictionaries. In Jowitt's Dictionary of English Law (2nd Edn.), Vol. 1 (1977) at p. 422 the word ''consent'' has been explained as an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side. It is further stated that consent supposes three things-a physical power, a mental power, and a free and serious use of them and if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind.

18. Stroud's Judicial Dictionary (4th Edn.), Vol. 1 (1971) at p. 555 explains the expression ''consent'', inter alia, as under:

> ''Every ''consent'' to an act, involves a submission; but it by no means follows that a mere submission involves consent., e.g. the mere submission of a girl to a carnal assault, she being in the power of a strong man, is not consent (per **Coleridge, J.,R. v. Day** (1841) 9 C&P 722''

> Stroud's Judicial Dictionary also refers to the decision in Holman v. R. [1970 WAR 2] wherein it was stated:
>
> ''But there does not necessarily have to be complete willingness to constitute consent. A woman's consent to intercourse may be hesitant, reluctant or grudging, but if she consciously permits it there is 'consent'.''

19. In Words and Phrases, Permanent Edition (Vol. 8A) at pp. 205-206, few American decisions wherein the word ''consent'' has been considered and explained with regard to the law of rape have been referred. These are as follows:-

> ''In order to constitute 'rape', there need not be resistance to the utmost, and a woman who is assaulted need not resist to the point of risking being beaten into insensibility, and, if she resists to the point where further resistance would be useless or until her resistance is overcome by force or violence, submission thereafter is not 'consent'. **People v. Mcilvain** [55 Cal App 2d 322] *** 'Consent', within Penal Law, Section 2010, defining rape, requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent. **People v. Pelvino** [(1926) 214 NYS 577]
>
> *** 'Consenting' as used in the law of rape means consent of the will and submission under the influence of fear or terror cannot amount to real consent. **Hallmark v. State** [22 Okl Cr 422]....''

21. In **H.P. v. Mango Ram** (2000) 7 SCC 224, a three Judge Bench of the Supreme Court held that submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent.''

22. Keeping in view the evidence produced coupled with the prosecutrix's age of 16-17 years her mere submission of body to the barbaric lust of her father cannot be said to be voluntary participation in the act and consensual in nature as envisaged under Section 375 IPC.

RE : SENTENCE

23. Coming to the sentence to be awarded to the appellant the trial court found that the appellant who was prosecutrix's father and was expected to take care and protect the prosecutrix himself, betrayed the trust reposed in him and committed the most barbaric act. After referring to various judgments of this Court and the Supreme Court the learned ASJ found that the instant case fell in the category of rarest of the rare cases and thus not only awarded maximum punishment of rigorous imprisonment for life as provided for the offence punishable under Section 376 IPC but also directed that in view of the appellant's act his case for grant of remission should not be considered till he underwent the actual sentence of 20 years.

24. The trial court found the appellant guilty of the offence punishable under Section 376 sub-Section (2) which provides for punishment with minimum imprisonment for a term which shall not be less than 10 years but which may be for life in addition to fine.

25. It is urged by the learned counsel for the appellant that the trial court erred in holding the appellant guilty for the offence punishable under Section 376 sub-Section (2) IPC. It is argued that from the evidence adduced it was proved that the prosecutrix was above 16 years of age and even if it is assumed that she was less than 16 years of age the case did not fall under any of the Clauses (a) to (g) of sub-Section (2) of Section 376 and thus the appellant could have been awarded imprisonment which may extend to 10 years or imprisonment for life. The only rider was that he could not have been awarded a sentence of less than seven years except on the ground of special reasons. It is urged that even if there were no special reasons the appellant ought to have been awarded a sentence of seven years of imprisonment as there was neither any violence nor any circumstance which ought to have prevailed upon the court to award sentence of imprisonment for life that too with a rider that the appellant's case for remission will not be considered unless he serves the actual imprisonment of atleast 20 years.

26. Relying on a three Judge Bench decision of the Supreme Court in **Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka** AIR 2008 SC 3040, the learned counsel for the appellant urges that sentence of imprisonment with minimum period of actual imprisonment can be quantified only in cases where the offence for which an accused is held guilty is punishable with a sentence of death also, as one of the possible sentences. It is urged that in the instant case

punishment of death is not one of the possible punishments and thus, the learned ASJ was not justified in qualifying the imprisonment for life with an embargo that his case for commutation shall not be considered before he serves an actual sentence of 20 years.

27. There is no dispute that the instant case did not fall under any of the clauses as laid down in sub-Section (2) of Section 376 and thus the appellant could not be awarded any sentence which could extend to imprisonment for ten years or imprisonment for life. The appellant shall be liable to be punished with minimum imprisonment for seven years unless there were special reasons to take a lenient view. In the instant case, no such circumstance has been pointed out by the learned counsel for the appellant on the other hand, it is established that the appellant, who is father of the prosecutrix and the protector of the daughter himself betrayed her trust. The act committed by the appellant shakes the faith of the children in their own parents. We need not go into the question whether the case would be covered by Swamy Shraddananda @ Murali Manohar Mishra or not in view of the fact that even if we do accept that the act committed by the appellant was ghastly, abominable and barbaric; the appellant was not liable to be punished with imprisonment of life with the rider that his case of commutation ought not to be considered unless he serves the actual sentence of 20 years.

28. In **State of Himachal Pradesh v. Asha Ram,** AIR 2006 SC 381 which related to the rape of his own daughter by the convict Asha Ram, the Supreme Court enhanced the sentence of rigorous imprisonment of five years to imprisonment for life.

29. In our considered view, the interest of justice requires that the appellant should also be sentenced to undergo imprisonment for life in addition to the fine as imposed by the trial court without any rider as to the consideration of the commutation of the sentence awarded to him by the learned ASJ.

30. Thus, while maintaining the conviction for the offence punishable under Section 376(1) IPC and Section 506 IPC, and also maintaining the sentence under Section 506 IPC, it is clarified that the appellant shall suffer rigorous imprisonment for life (without any rider) for the offence punishable under Section 376 IPC. The sentence of fine and the order of payment of compensation is also maintained.

31. The Appeal is disposed of in above terms.

ILR (2013) IV DELHI 2911
W.P.(C)

KAMLESH DEVI .....PETITIONER

VERSUS

UNION OF INDIA AND ORS. .....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO.4774/2012 DATE OF DECISION: 31.07.2013

Pension Regulation for the Army 1961 (Part-II)—Regulation 12—Petitioner's husband, a Sepoy in Indian Army was detected as suffering from Cancer—Release Medical Board assessed his percentage of disability at 90% and invalidated him out of service in medical category EEE-Claim of disability pension of jawan was rejected—Appeal and second appeal of widow of deceased jawan against rejection of her husband's disability pension were rejected by Government of India (GOI)—Writ petition challenging all those orders was rejected by Armed Forces Tribunal (AFT) it holding that prayer cannot be granted under any applicable rules and regulations—Order challenged before HC—Plea taken, there is no record with regard to any ailment or disease which affected Petitioner at time of his initial recruitment—Deceased husband of Petitioner was diagnosed as suffering from Cancer which he acquired only after he joined service—Per contra plea taken, ailment of diseased was not connected with exigencies of service—Held—A presumption is required to be drawn with regard to fitness of jawan at time of his original enrolment and consequential benefits to petitioner upon presumption in his favour—There is no record to show petitioner had any kind of medical ailment at time of entering into service—It has to be held that service conditions would have aggravated his condition and disease, its progression—Petitioner would be entitled to relief prayed—Rejection of claim of jawan for award of disability pension and petitioner's claim for special family pension by respondents as well as order of AFT are contrary of law—Late Sepoy entitled to disability pension based on 90% disability from date of invalidation from service till his death and Petitioner entitled to award of special family pension w.e.f. death of her husband during her life time.

Important Issue Involved: When a jawan enrolled in Indian Army is detected to be suffering from any disease, a presumption is required to be drawn with regard to his fitness at the time of his original enrolment and consequential benefits to him and his widow upon the presumption in his favour.

[Ar Bh]

APPEARANCE:

FOR THE PETITIONER : Mr. S.M. Hooda and Mr. S.S. Pandey, Advs.

FOR THE RESPONDENTS : Dr. Ashwani Bhardwaj, Adv.

CASES REFERRED TO:

1. Civil Appeal No.4949/2013 (arising out of SLP(C)No.6940/2010) *Dharamvir Singh v. Union of India & Ors.*

RESULT: Allowed

GITA MITTAL, J. (Oral)

1. The petitioner before this court has assailed the order dated 21st October, 1997 passed by the Armed Forces Tribunal rejecting the petitioner's prayer for grant of disability pension and special family pension with regard to unfortunate death of her husband late Sepoy Bijender Singh.

2. The facts giving rise to the present petitioner to the extent necessary are set down hereafter. Sepoy Bijender Singh was enrolled with the Indian Army on 8th August, 1990 after completing medical examination without any disease at the time of enrolment. Sepoy Bijender

Singh was posted in Jammu and Kashmir area where he was detected as suffering from Cancer. Treatment for this disease was administered by the army medical authorities. The Cancer kept on spreading and, in the year 1995 his right leg had to be amputated. It is noteworthy that the jawan continued to serve the Indian Army over this entire period even after his amputation. The family of late Sepoy Bijender Singh was finally called to Jammu and Kashmir in September, 1995 to take the jawan home with them.

3. Our attention has been drawn to the Summary and Opinion of the Classified Specialist in Medicine, Medical Oncology dated 16th July, 1995 who has made the following observations with regard to the medical condition of the jawan:

> "Last review in May 95 did not reveal any abnormality. Presently admitted with h/o a mass in the left clevicular region. FNAC confirmed the recurrence clinically the individual is a cachectic and was recurrence.
>
> Further therapy is unlikely to be of any benefit as recurrence has occurred after extensive therapy all modalities have been exhausted.
>
> Recommended to be invalidated in MED Cat "EEE" out of service."

4. Based on this opinion, the petitioner was brought before the Release Medical Board which conducted its proceedings on 2nd September, 1995. Pursuant to these Medical Board proceedings, the petitioner's husband was invalidated out of service in medical category EEE. He unfortunately succumbed to the disease on the 28th of September, 1995. We may note that the Release Medical Board of the jawan assessed the percentage of disability at 90%. The record of the Medical Board proceedings has been placed before this court. The medical board returned the following findings:

> "The board is agree with the opinion of specialist and fit to be Invalidated out from military service in low medical category 'EEE'."

5. The petitioner has contended that the claim of disability pension of the jawan was sanctioned by his commanding officer and forwarded to the Pension Controller of Defence Account (PCDA) (Pension), Allahabad

for making payment in terms of Regular 12 of the Pension Regulation for the Army 1961 (Part II). The PCDA, Allahabad rejected the disability pension claim made by the petitioner vide their letter dated 29th January, 1997 for the reason that jawan had expired about 5 days after the date of his invalidation from the service.

6. The petitioner, as the widow of the deceased jawan, submitted an appeal against the rejection of her husband's disability pension. This appeal was rejected by order dated 9th December, 1999 by the Ministry of Defence, Government of India. The petitioner's second appeal for grant of disability pension of her husband and consequently family pension to her was rejected by an order dated 29th October, 2001, again by the Government of India, Ministry of Defence.

7. The petitioner challenged all these orders rejecting the claim of the deceased jawan for disability pension vide WP(C)No.2647/2003 before this court which was transferred to Armed Forces Tribunal (Principal Bench) and registered as T.A.No.47/2010. This petition was rejected by the Armed Forces Tribunal by a judgment dated 13th January, 2012 holding that the petitioner could not be granted the prayer under any applicable existing rules and regulations.

8. As noted above, the petitioner has challenged the judgment dated 13th January, 2012 of the Armed Forces Tribunal; the orders of the PCDA(P) Allahabad as well as the Government of India rejecting her appeals denying disability pension of her deceased husband and the family pension to her by way of the present writ petition. The challenge rests primarily on the ground that the PCDA(P) Allahabad had no jurisdiction whatsoever to reject the claim of the petitioner in the given circumstances. It is contended that there is no record with regard to any ailment or disease which affected the petitioner at the time of his initial recruitment. He was healthy and able bodied when he joined the Army, served in hard areas. The deceased husband of the petitioner was diagnosed as suffering from Cancer which he acquired only after he joined services. It is contended in any case, given the nature of duties which the petitioner's husband was required to perform in the area of Jammu and Kashmir, the condition of the deceased would have been aggravated.

9. The respondents in their several communications as well as medical examination of the husband of the petitioner have held that the ailment of late Sepoy Bijender Singh was neither attributable nor aggravated by the exigency of service. It has been endorsed that the same was not connected with the exigencies of service.

10. Learned counsel for the parties have drawn our attention to the pronouncement dated 2nd July, 2013 of the Supreme Court of India in Civil Appeal No.4949/2013 (arising out of SLP(C)No.6940/2010) **Dharamvir Singh v. Union of India & Ors.** wherein also no record was found of the petitioner suffering from any disease at the time of initial enrolment. The Supreme Court has clearly laid down the principles which would apply to a case as the present one for award of disability pension to an army personnel in the following terms:

> "28. A conjoint reading of various provisions, reproduced above, makes it clear that:
>
> (i) Disability pension to be granted to an individual who is invalidated from service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20% or over. The question whether a disability is attributable or aggravated by military service to be determined under "Entitlement Rules for Casualty Pensionary Awards, 1982" of Appendix-II (Regulation 173).
>
> (ii) A member is to be presumed in sound physical and mental condition upon entering service if there is no note or record at the time of entrance. In the event of his subsequently being discharged from service on medical grounds any deterioration in his health is to be presumed due to service. [Rule 5 r/w Rule 14(b)].
>
> (iii) Onus of proof is not on the claimant (employee), the corollary is that onus of proof that the condition for non-entitlement is with the employer. A claimant has a right to derive benefit of any reasonable doubt and is entitled for pensionary benefit more liberally. (Rule 9).
>
> (iv) If a disease is accepted to have been as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and that the conditions were due to the circumstances of duty in military service. [Rule 14(c)].
>
> (v) If no note of any disability or disease was made at the time of individual's acceptance for military service, a disease which has led to an individual's discharge or death will be deemed to have arisen in service. [14(b)].
>
> (vi) If medical opinion holds that the disease could not have been detected on medical examination prior to the acceptance for service and that disease will not be deemed to have arisen during service, the Medical Board is required to state the reasons. [14(b)]; and
>
> (vii) It is mandatory for the Medical Board to follow the guidelines laid down in Chapter-II of the "Guide to Medical (Military Pension), 2002 - "Entitledment : General Principles", including paragraph 7,8 and 9 as referred to above."

11. We may note that the facts and circumstances of **Dharamvir Singh** (Supra) were similar to the present case inasmuch as even in Dharamvir's case no disease recorded in his service record at the time of his acceptance for military service. There was no record of any treatment being administered to Dharamvir Singh or any heredity ailment was found.

12. So far as responsibility of the Medical Board while considering the attributability of the disease or its aggravation to service condition was concerned, in **Dharamvir Singh** (Supra), the Supreme Court has laid down the following requirements:-

> "30. In the present case it is undisputed that no note of any disease has been recorded at the time of appellant's acceptance for military service. The respondents have failed to bring on record any document to suggest that the appellant was under treatment for such a disease or by hereditary he is suffering from such disease. In absence of any note in the service record at the time of acceptance of joining of appellant it was incumbent on the part of the Medical Board to call for records and look into the same before coming to an opinion that the disease could not have been detected on medical examination prior to the acceptance for military service, but nothing is on the record to suggest that any such record was called for by the Medical Board or looked into it and no reasons have been recorded in writing to come to the conclusion that the disability is not due to military service. In fact, non-application of mind of Medical Board is apparent from Clause (d) of paragraph 2 of the opinion of the Medical Board, which is as follows:
>
> "(d) In the case of a disability under C the board should state what exactly in their opinion is the cause thereof. **YES Disability is not related to mil service"**
>
> 31. Paragraph 1 of 'Chapter II' - "Entitlement : General Principles" specifically stipulates that certificate of a constituted medical

authority vis-a-vis invalidating disability, or death, forms the basis of compensation payable by the Government, the decision to admit or refuse entitlement is not solely a matter which can be determined finally by the medical authorities alone. It may require also the consideration of other circumstances e.g. service conditions, pre-and post-service history, verification of wound or injury, corroboration of statements, collecting and weighing the value of evidence, and in some instances, matters of military law and dispute. For the said reasons the Medical Board was required to examine the cases in the light of etiology of the particular disease and after considering all the relevant particulars of a case, it was required to record its conclusion with reasons in support, in clear terms and language which the Pension Sanctioning Authority would be able to appreciate.

32. In spite of the aforesaid provisions, the Pension Sanctioning Authority failed to notice that the Medical Board had not given any reason in support of its opinion, particularly when there is no note of such disease or disability available in the service record of the appellant at the time of acceptance for military service. Without going through the aforesaid facts the Pension Sanctioning Authority mechanically passed the impugned order of rejection based on the report of the Medical Board. As per Rules 5 and 9 of 'Entitlement Rules for Casualty Pensionary Awards, 1982', the appellant is entitled for presumption and benefit of presumption in his favour. In absence of any evidence on record to show that the appellant was suffering from "Genrealised seizure (Epilepsy)" at the time of acceptance of his service, it will be presumed that the appellant was in sound physical and mental condition at the time of entering the service and deterioration in his health has taken place due to service."

(emphasis by us)

The above principle squarely applies to the instant case.

13. The present case also requires a presumption to be drawn with regard to fitness of the jawan at the time of his original enrolment and the consequential benefits to the petitioner upon the presumption in his favour. There is no record at all to show that the petitioner had any kind of medical ailment at the time of entering into the service.

14. Deterioration of his health and the aggravation of the disease after it was detected while he continued to remain in the field area where he was posted would also weigh in favour of the petitioner and against the respondents. Looked at from any angle, it has to be held that the service conditions would have aggravated his condition and disease, its progression. The Medical Boards do not refer to availability or nature of treatment for the disease at the place of the jawan posting.

15. In this background, the petitioner would be entitled to the relief prayed for in the present petition based on the principles laid down by the Supreme Court in **Dharamvir Singh's** case (Supra). As a result, we hold that the rejection of claim of the jawan for award of disability pension and the petitioner's claim for special family pension by the respondents as well as the orders dated 13th January, 2012 of the AFT are contrary to law and the principles laid down by the Supreme Court and are therefore unsustainable.

16. We accordingly direct as follows:

(i) the impugned order dated 13th January, 2012 of the Armed Forces Tribunal and the orders dated 29th January, 1997 and 29th October, 2001 passed by the respondents are set aside and quashed.

(ii) Late Sepoy Bijender Singh shall be entitled to disability pension which has to be computed based on 90% disability with effect from 23rd September, 1995 till 28th September, 1999 in view of the assessment by the concerned medical authorities.

(iii) The petitioner shall be entitled to award of special family pension with effect from 29th September, 1995 during her life time in accordance with the applicable rules.

(iv) The respondents shall effect computation of the amount admissible to late Sepoy Bijender Singh as well as petitioner in terms of the above directions within three months from today and communicate the same forthwith to the petitioner as well as learned counsel representing the petitioner.

(v) The petitioner shall be entitled to interest @ 6% per annum on the amount of arrears for the period of three years prior to today.

Dasti to parties.