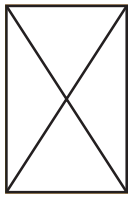

INDIAN LAW REPORTS
DELHI SERIES
2012

(Containing cases determined by the High Court of Delhi)

VOLUME-5, PART-II

(CONTAINS GENERAL INDEX)

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

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

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

for Subscription Please Contact :

Controller of Publications
Department of Publication, Govt. of India,
Civil Lines, Delhi-110054.
Website: www.deptpub.nic.in
Email:acop-dep@nic.in (&) pub.dep@nic.in
Tel.: 23817823/9689/3761/3762/3764/3765
Fax.: 23817876

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

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ARMS ACT, 1959—Section 27—As per prosecution on day of incident, PW1, father of deceased and his son PW9 were in his factory-A-1 went to first floor of factory removed iron rod and broke wires as a result machines in factory stopped functioning—PW9 objected on which A-1 abused and hit him on head with iron rod—Deceased on reaching there enquired about the cause of quarrel-A-2 caught hold of deceased on exhortation of A-1 who brought chhuri from his shop and stabbed him on his chest and abdomen—When PW1 rushed to save his son, both accused fled-A-2 was arrested wearing a blood stained shirt-A-1 on arrest got recovered chhuri—Trial court convicted accused persons u/s 302/34—Held, from evidence on record involvement of A-2 not clear—No witness assigned any role to A-2 in initial altercation—Contradictory and inconsistence version in evidence as to who exhorted whom—No knowledge could be imputed to A-2 that A-1 would rush to shop bring chhuri-Un-Natural that PW1, PW3, PW5 and PW9 who were present would not have intervened to get released the deceased from the clutches of A-2-Servants in factory also exhibited un-natural conduct in not intervening in incident-highly improbable that A-2 continued to hold deceased from behind for long time awaiting arrival of A-1 with chhuri—Mere presence of A-2 at spot not sufficient to conclude that he shared common intention with A-1 to murder deceased—The fact that accused were together at the time of the incident and ran away together is not conclusive evidence of common intention in the absence of any more positive evidence PW1 and PW9 (injured witness) in their evidence have proved that A-1 stabbed to death deceased-Ocular testimony of PW1 and PW9 corroborated by medical evidence and no conflict between the two-Defence version

accusing PW9 for murder of deceased not inspiring confidence—Initially A-1 was un-armed, when deceased on reaching the spot enquired cause of quarrel, A-1 rushed to his shop and brought the knife—This rules out that incident occurred suddenly in fit of rage A-1 acted in cruel manner and took undue advantage by inflicting repeated stab blows with force without any resistance from the deceased—Appeal of A-2 allowed—Appeal of A-1 dismissed.

Afsar and Anwar v. *State & Ors.*..... *469*

CODE OF CIVIL PROCEDURE, 1908—Section 47—Brief facts Plaintiff claimed to be the owner of property let out to the defendant in 2001 @ Rs. 10,000/- for running a Nursing Home—Defendant was making irregular payments; on certain occasions cheques issued by the defendant were bounced because of insufficient fund—Suit under section 37 of the Code for recovery filed on the basis of five cheques, all in the sum of Rs. 10,000/- except the last cheque which is in the sum of Rs. 16500/- Ex Parte judgment and decree passed in favour of the plaintiff in the sum of Rs.56,350/- alongwith interest @ 8% per annum from the date of the filing of suit till realization—Thereafter, an application under Order 37 Rule 4 of the Code filed by the defendant pleading special circumstances—Special circumstances being that the defendant had not been served with the summons of the suit and thus, ex parte judgment and decree dated 20.12.2004 is liable to be set aside—This application was dismissed by the court that by holding Special circumstances for setting aside the decree and judgment are not made out—Execution proceedings filed—In the course of execution proceedings, the application under Order 47 of the Code was filed where the first time the plea of fraud was set up—Executing court dismissed the objections—Hence present petition. Held:- Plea of fraud set up by the defendant for the first time before the executing court—No averment in his application under Order

37 Rule 4 of the Code wherein he detailed the 'special circumstances' for setting aside the ex parte judgment and decree—No doubt to the settled legal position that fraud vitiates all transactions and any decree which has been obtained by fraud is 'non-est', not legal and not binding—Averments made in the application under Order 47 of the Code do not in any manner detailed the fraud—Only a three line version application which makes a mention of the concealment of certain documents but how the concealment of these documents perpetuated a fraud, has not been explained—An admitted fact that in the application under Order 37 Rule 4 of the Code 'special circumstances' had been alleged but plea of fraud was never taken before that court—Objections under Section 47 of the Code have no force and were thus rightly dismissed.

Veena Tripathi v. *Hardayal* *514*

— Section 10—Brief facts—Punjab and Sind Bank filed suit for specific performance against a partnership firm comprising of two partners—During the pendency of this suit, partnership firm filed a suit against the Punjab and Sind Bank seeking a declaration, permanent injunction on the basis of the same documents i.e. the agreement, the subject matter of the suit for specific performance filed by the Punjab and Sind Bank—Prayer in the second suit was that the agreement to sell be declared null and void—Suit was registered—During the course of these proceedings, the present application under Section 10 of the Code was filed by the petitioner seeking stay of the later suit—Application however dismissed declining the prayer—Hence the present petition. Held:— Essential ingredients for the applicability of Section 10 of the Code are (a) There must be two pending suits on same matter, (b) These suits must be between same parties or parties under whom they or any of them claim to litigate under same title, (c) The matter in issue must be directly and substantially same in both the suits, (d) The suits must be pending before competent

Court or Courts, (e) The suit which shall be stayed is the subsequently instituted suit—Object of Section 10 is to prevent courts of current jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue—One of the test of the applicability of Section 10 is whether on the final decision being reached in the previous suit such a final decision will operate as res judicata in a subsequent suit—To decide whether the second suit is hit by Section 10, the test is to find out whether the plaint in one suit would be the written statement in the other suit or not—If this test is positive the decision in one suit will operate as res judicata in the other suit—This is the principal test on which Section 10 is applied—Applying this test to the instant case, it is clear that the decision in the first suit (as is evident from the prayers) will operate as res judicata in the second suit—Matter in issue being directly and substantially in the previous suit and subsequent suit being the same. The provisions of Section 10 are attracted—Trial Court has committed an error; impugned order is accordingly set aside—Petition disposed of accordingly.

Punjab & Sind Bank v. *Lalit Mohan Madan & Co.* . . *525*

— Order 12 Rule 6—Judgement on admission—Suit for possession and mesne profits/damages—Plaintiff, landlord/owner of flat inducted the defendant as a tenant at monthly rent was Rs. 3,575/— Lease reduced into writing was limited to three years—On the expiry of lease, the defendant continued to occupy the premises—Rate of rent in December, 2009 was Rs.8,429.63—Respondent alleged that the tenancy was terminated in December, 2009 vide notice dated 23.12.2009 effective from the midnight of 31.01.2010—Possession not delivered, the plaintiff filed the suit—Defendant had been paying rent to the plaintiff w.e.f August, 2009 and the rent was increased to Rs. 8,429.63 w.e.f.16.10.2006—Defendant had denied the receipt of notice of termination of

tenancy dated 23.12.2009.—Plaintiff moved an application under Order 12 Rule 6 read with Section 151 CPC stating therein that the defendant had admitted the relationship as lessor and lessee between the parties and had also admitted that last paid rent was Rs. 8,429.63 per month—Legal notice served upon defendant on 26.12.2009 and on 29.12.2009 respectively and the same had been confirmed by the postal authorities as having delivered vide their respective certificates dated 03.03.2007 and 04.03.2007—Defendant was month to month tenant and the relationship between the parties came to an end by virtue of notice dated 23.12.2009—In its reply, defendant stating therein that it continued to be a contractual tenant and there is no admission on their part—Defendant had denied having received any notice—At the same time, it had taken a stand that the notice was not valid and the same was without any basis and had no meaning in the eyes of law—However, the rate of rent was admitted—Suit was decreed as regards possession on the basis of admission under Order 12 Rule 6 Appeal filed before the learned Addl. District Judge was also dismissed—Hence present second appeal. Held—Relationship of lessor and lessee as well as last paid rent as Rs.8429.63 have been admitted—Lease agreement was never renewed in writing after its expiry—Lease deed was unregistered and the tenancy was month to month basis—Finding of both the courts below show that respondent/plaintiff had placed on record original UPC and registered A.D. receipt and also the original returned A.D. card showing the receipt of notice by the appellant/defendant—UPC receipt and A.D. card bear the addresses of the appellant/defendant—Rightly held that the notice is presumed to have been duly served upon appellant/defendant—Further, there is letter on record showing that Department of Posts has certified the delivery of notice sent through registered A.D. at the address of the appellant/defendant—On the one hand, the appellant/defendant is denying having received the notice of termination

dated 23.12.2009 and on the other hand, it is disputing the validity of notice of termination of the lease—Appellant/defendant failed to substantiate in what manner the notice was invalid—Even assuming the notice terminating tenancy was not served upon the appellant, as is contended, though it has been served as is noted above, the learned ADJ has rightly held that filing of eviction suit under general law itself is notice to quit on the tenant—No substantial question of law arises which requires consideration of this court—Appeal stands dismissed.

Cement Corporation of India Ltd. v. *Bharat Bhushan Sehgal* *589*

CODE OF CRIMINAL PROCEDURE, 1973—Sections 482, 205 (2) & 317 (1)—Negotiable Instruments Act, 1881—Section 138—Petition filed for quashing of order of MM directing accused to appear personally on next date of hearing for furnishing bail bonds and disclosing defence where accused has been exempted from appearance—Contention of petitioner that after grant of personal exemption from appearance of the accused Magistrate become *functus officio* and cannot withdraw, the exemption so granted and that requirement of bail does not from part of proceeding within ambit of Section 205 (2) or Section 317 (1)- Held, grant of permanent personal exemption by the Magistrate to accused, in bailable offence, does not dispense with requirement of accused obtaining bail from Court and exemption from appearance granted by Magistrate could be revoked by Magistrate where necessary at any time—Purpose for permanently dispensing with personal appearance of accused is to prevent accused from undue hardship and cost in attending trial—Sections 205 (2) and empower Magistrate to direct personal attendance at any stage if necessary-While granting permanent exemption, MM is deemed to have reserved his right to accused to appear in person at the trial at any stage of the proceedings if

necessary—Concept and purpose of bail mutually exclusive to the purpose of grant of personal exemption from appearance, they operate in different spheres of trial though are intrinsically connected—Permanent personal exemption cannot be understood as a blanket order dispensing with appearance and shall be subject to Sections 205 (2) and 317 (1)—Obtaining bail by the accused is an independent requirement and grant of permanent personal exemption form appearance in court cannot usurp the requirement of obtaining bail by the petitioner—Petition dismissed.

Kajal Sen Gupta v. *Ahlcon Ready Mix Concrete, Division of Ahluwalia Contract (India) Limited.* *498*

— Section 256—Negotiable Instrument Act—1981—Section 138—Petitioner assailed order of learned Metropolitan Magistrate (MM) dismissing his application under Section 256 of Code in a complaint filed under Section 138 of Act—According to petitioner, Respondent/complainant company due to non payment of cheque amounts preferred complaint under Section 138 of Act and trial was at stage of recording of statement of defence witnesses, but for six consecutive hearings, none had appeared on behalf of respondent/complainant before learned MM—Thus, petitioner preferred application under Section 256 of Code praying for acquittal of petitioner due to non appearance of complainant/Respondent which was dismissed by learned MM—Therefore, he preferred petition to assail said order—Held:— Section 256 Cr. P.C. has been incorporated keeping in mind the interest of both the complainant and the accused—To prevent any prejudice to complainant, Section 256 Cr. P.C. empowers Magistrate to adjourn hearing, for ensuring presence of complainant, if sufficient cause is shown with regard to his inability to appear at appointed date of appearance—However, failure of complainant to appear, without sufficient cause, empowers a Magistrate to dismiss complaint and to acquit accused—Objective of proviso to Section 256 Cr.P.C. is to

prevent any undue delay to trial or to prejudice rights of accused person facing trial as presence of complainant may be dispensed with through pleader or if his personal attendance is not necessary—Case being at stage of defence evidence, before which statement of petitioner under Section 313 Cr.P.C. was also recorded, absence of Respondent complainant has not prejudiced petitioner or hampered trial.

G. Karthik v. *Consortium Finance Ltd. Now Magma Leasing Ltd.* *507*

— Section 482, 125 Hindu Marriage Act, 1955—Section 24—Petitioner filed petition u/s 482 of the Code to assail order of Additional Sessions Judge (ASJ) passed in criminal revision against order of Metropolitan Magistrate (M.M)—Petitioner, wife of respondent no. 1 and mother of respondent no.2 and 3, had filed petition u/s 125 of the Code to seek maintenance and pressed for grant of interim maintenance which was declined by Ld. MM—In revision, interim maintenance at the rate of Rs. 2000/— granted—Aggrieved petitioner challenged the order and prayed for enhancement of maintenance against her husband and also for grant of maintenance from her sons i.e. respondent no. 2 and 3—Admittedly, petitioner was receiving maintenance at the rate of Rs. 3500/— per month u/s 24 of the Act from her husband.—Held:— The wife, who is unable to maintain herself is entitled to maintenance both u/s 125 Cr. P.C. and also u/s 24 Hindu Marriage Act but the maintenance claim under one provision is subject to adjustment under the other provisions.

Santosh Malhotra v. *Ved Prakash Malhotra and Others* *518*

— Section 205—Petitioner instituted complaint case before Metropolitan Magistrate (M.M) against respondent and two other accused persons for offences punishable u/s 147/201/327/352/388/392/411/452/120B/506 IPC—Respondent moved

application seeking exemption from personal appearance which was allowed unconditionally by M.M—Aggrieved, petitioner, challenged the order on ground that respondent had failed to respond summons issued to her twice by Ld. M.M and first application moved by her seeking exemption permanently was already rejected—Percontra, respondent urged that dispute between parties was of civil nature and criminal complaint was filed only to pressurize her to withdraw civil suit filed by her family members against petitioner. Held:— An accused at the first instance or at any stage can be granted exemption from appearing personally in Court where the learned Court deems it appropriate and the offences are not of serious nature. Secondly, while granting such exemption from personal appearance, the accused shall always be represented through an advocate who, on his behalf, will proceed in the trail matter. Thirdly, the statements made by the counsel for the accused person shall be deemed to be made with the consent of the accused and the accused shall have no objection in taking evidence in his absence. Lastly, there is a word of caution attached to the use of discretion that a Court while granting such applications, will not pass blanket order, and has to make sure that the accused will not dispute his/her identity or any other proceedings that take places in his absence and in presence of his counsel. The Court may impose conditions to secure the presence of the accused as and when required.

Harbeen Arora v. *Jatinder Kaur* *713*

— Section 311—Petitioner, witness in criminal trial, challenged order allowing request of respondent to recall prosecution witnesses for cross-examination including him—As per petitioner, he was examined as witness and was tendered for cross—examination but accused/respondent informed court that Legal Aid Counsel appointed for him, was not available and requested for adjournment—Request was declined and thus, petitioner was cross—examined at length by accused/

respondent himself—Also, application to recall witness moved after long gap of 7 years—Percontra, on behalf of respondent it was urged, counsel provided from Legal Aid did not appear, at most cost could be awarded to petitioner for inconvenience caused to him for appearing again for cross—examination. Held:— The Cr.P.C. provides that in all criminal prosecutions, the accused has a right to have the assistance of a counsel and the Cr.P.C also requires the court in all criminal cases, where the accused is unable to engage counsel, to appoint a counsel for him at the expenses of the State. The Legal Aid Counsel provided to accused did not appear and thus, discretion exercised by Ld. M.M in judicious manner by permitting him to recall persecution witnesses for cross-examination.

Ved Prakash Sharma v. *State & Anr.* *768*

COMPANIES ACT, 1956—Section 391 and Section 394—Sanction of the Court sought to the scheme of Amalgamation of Indrama Investment Pvt. Ltd. (transferor company) with select holiday Resorts Ltd (transferee company)—Second motion—earlier transferor company had filed application praying for directions regarding dispensing the requirement of convening of equity shareholders and creditors of the transferor company—further directions sought regarding convening and holding of meetings of the shareholders and unsecured and secured creditors of the transferee company for the purpose of convening and approving the scheme of arrangement—Said application disposed of dispensing with the meetings of shareholders and creditors of the transferor company and further directing convening of the equity shareholders, secured and unsecured creditors of the transferee company—No objection filed to the grant of sanction to the scheme of arrangement—scheme of amalgamation/ arrangement sanctioned—After lapse of six months C.A. No. 280/2005 filed under section 394(2) and Section 395(1) of

the Act by Capt. Swadesh Kumar, one of the shareholders—questioning the validity of the scheme—Within few days Shri Ram Kohli filed similar objections—Notices issued to the transferee company—Reply received stoutly contesting the objection—Amalgamation in consideration of transferee company issuing to equity shareholders of the transferor company shares in the transferee company—Reasons for amalgamation—Both transferor and transferee companies closely held unlisted companies with common lineage—transferee company incurring losses—Borrowings of transferee company guaranteed by corporate guarantee given by the transferor company—Cost and management of said companies shall be reduced by amalgamation-Grievances of individual shareholders-artificial exchange ratio stipulated which prejudicially affects the interest of the applicants—Alleged that valuation of the shares of the company was not as per the law—No separate meeting held for the applicants who constituted a separate class of shareholdings which was required under Section 391 of the Act—Respondents replied stating valuation was as per law and applicants could not be treated as a separate class for the purpose of Section 391 Held:— Shareholders pattern and the fact of applicants having small fractions of shares would not make them a separate class—the remain in the same category i.e. equity shareholders Objection of Applicants dismissed—Merely because the arrangement results in extinguishing of shares and results into 100% shareholdings in the hands of a particular group cannot be treated improper per se—Profit earning method adopted by the auditors held to be valid—Report filed by applicants not accepted as events and circumstances which have taken place after amalgamation under which the profitability has increased, cannot be relevant consideration for valuation of shares at the time when decision for amalgamation was taken Applicants unable to show ulterior motives—no merit in the applications—application dismissed.

Indrama Investment Pvt. Ltd. v. *Select Holiday Resorts Ltd.* *561*

CONSTITUTION OF INDIA, 1950— Article 226—Complaint made by HC Datta Ram that the Petitioner had abused him with filthy language under the influence of intoxication on the same day—Also cocked his rifle—damaged his weapon—Charges framed on account of misbehaviour—Tried by Summary Security Force Court (SSFC)—Petitioner plead guilty—Dismissed from service—Did not challenge the proceedings for 9 years—In Appeal Petitioner alleged that HC Datta Ram had used unparliamentarily language against him and had accused him of consuming liquor—Petitioner alleged that false report was prepared—Petitioner had pleaded "guilty" to all three charges before the SSFC—Opportunity was also given to the Petitioner to making statements in reference to the charge or for the mitigation of the punishment and call any witness—Past record had 2 awards but Petitioner had also been punished summarily four times during the service—Appellate Authority held that there was sufficient evidence in the ROE to support charges against Petitioner—Appellate Authority also noted that the allegations leveled by the petitioner are sustained by evidence on record—Petitioner preferred the above noted writ petition, on the grounds that the order of dismissal was biased and perverse—and alleged —that fair opportunity not given to present his defence—Held:— Decision of Summary Security Force Court can only be reviewed on grounds of “illegality”, “irrationality”, and “procedural impropriety”—If the power exercised on basis of facts which do not exist having are patent erroneous, such exercise of powers shall be vitiated—In judicial review the court will not take over the functions of the Summary Security Force Court—Writ Petition is not an appeal against the findings of the Summary Security force Court—Cannot interfere with findings of fact arrived at by SSFC except in the case of mala-fides or perversity—Petitioner not been able to substantiate any of his contentions—Friend of Accused

appointed and no allegation made against that person about his unsuitability—No cogent explanation provided for false implication—Writ Petition without merit—dismissed.

Rajinder Singh v. *Union of India & Ors.* *542*

— Article 226—Petitioner seeks writ of certiorari for quashing order dated 10th September, 2007 passed by the Ministry of Defence—rejecting statutory complaint of the petitioner in the light of his career profile, relevant records and analysis/ recommendations of the army headquarters, holding that the Petitioner had not been empanelled for promotion to the rank of Colonel on account of his overall profile and comparative merit—Aggrieved Petitioner filed a writ petition contending that Reviewing Officer reduced his grade to 7/9 due to animosity—Phrase "inadequate knowledge" made by the SRO as he had no opportunity to see the performance of the Petitioner—Undue Delay in filing petition before the court without giving in any justification—Held:—Petitioner unable to show any rule or regulation or precedent holding that repeated representations will extend the time for filing the complaint by the Petitioner—Petitioner unable to point any rule, regulation or precedent on the basis of which it can be inferred that an SRO, who is not conversant with the performance of the Petitioner, was obliged to give a grading instead of writing "Inadequate Knowledge" in accordance with rules and regulations—Unable to show any lacunae or procedural irregularity—No sufficient grounds for relief—Petition dismissed.

Lt. Col. Sanjay Kashyap v. *Union of India & Anr.* ... *583*

—Petitioner was appointed as Adhoc Medical Officer with DESU for period of 3 months, against permanent post in the year 1986—Thereafter his adhoc appointment was extend from time to time for six years—In year 1992, his case was referred to Union Public Service Commission for considering his appointment on regular basis, as special case-In year 1996,

Delhi Vidyut Board became successor of DESU-In meanwhile, no response was received from UPSC-Again request letter was sent to UPSC to expedite approval on proposal sent by DVB-Till January, 1998, no approval was received, thus petitioner filed OA before Central Administrative Tribunal for redressal of his grievance which was subsequently transferred to High Court of Delhi to be treated as Writ Petition—However, on assurance given by respondent to petitioner that he would be regularized, he withdrew writ petition in year 2000-But vide office order dated June 2010 his services were terminated abruptly and strangely, without prior notice or information to him-Petitioner filed petition seeking quashing of said order and prayed to be reinstated in service with all service benefits—On behalf of respondent, it was urged that petitioner was appointed purely on adhoc basis and subsequently his appointment as Medical Officer was required to be made through UPSC, therefore, he could not have a right to be treated at par with regularly recruited employee. Held—As per Recruitment & Promotion Rules, 1984 for making direct recruitment, the UPSC has to be consulted. However, in a situation of non-decision on behalf of UPSC a party should not suffer—Petitioner was qualified doctor and appointed through proper procedure—Termination was illegal and in violation of principles of natural justice—Petitioner directed to be reinstated without back wages.

UK Priyadarshi v. *NDPL* *788*

— Article 226—Petitioner joined navy as an MER on 10th July 1981—Signal received from INS Vikrant at Calcutta, dated 2nd August sending the petitioner for court martial or trial by the Commanding Officer for an incident that occurred on 29th October 1994—Has sought that punishment imposed on the Petitioner of demotion to the first rank be quashed and he be restored to the original rank with all consequential benefits—

Petitioner asked to accept or deny charge without being given a copy of the chargesheet—Charges only orally explained to him imputing allegations of negligence of duty—Asked to make a written statement—Petitioners stated that he had performed his duty under the supervision and guidance of his senior officer—Petitioner asserted that he was not informed by the Commanding Officer of any inquiry after the incident till he came to know about the chargesheet which was orally communicated to him After summary trial petitioner was awarded punishment of reduction in rank—Punishment challenged on the ground that no Court of Inquiry was instituted in his case—Statement of witnesses not recorded in presence of the petitioner—Not allowed to cross—examine the witness at any time—Petitioner contended that all superior officers were let off with a warning alone while he was given the strongest punishment which destroyed his creditable service of over 13 years—Petitioner contended that procedure contemplated under the Army Act or Navy Act was not followed—No evidence recorded before deciding whether the Petitioners is to be tried by the court martial or summary trial—Respondents contend that petition premature—Allege that remedies under Section 162 and Section 163 not availed of—Respondents further contend chargesheet was not provided as it was not asked for—Available to the division officer who represented him in the Summary Trial—Respondents contend that petitioner was given the harshest punishment as the responsibility of evolution had rested squarely on the petitioner and the accident was a result of his negligence—Fall claims of Respondents denied by the Petitioner—Document providing option of court martial or summary trail not signed by the petitioner—Consent given on 9th August 1995—Evidence take from 7th August to 9th August 1995—clearly shows denial of opportunity to cross examine. Held:—There are two exceptions to the doctrine of exhaustion of alternative remedy—One is when the

proceedings are under the provision of law which is ultra vires—The other exception is when an order is made in violation of the principles of natural justice and the proceedings itself are an abuse of process of law. The copy of the charge sheet was not given to the petitioner—whether the petitioner was given an appropriate option between Court Martial and Summary Trial has not been established satisfactorily—Statement of witnesses in Summary of evidence were not recorded in the presence of the petitioner—no opportunity of cross examination given to the Petitioner—Petitioner not given 24 hours to decide whether to be tried by Court Martial or Summary Trial—For the Aforementioned Reasons the entire trial and punishment awarded to the petitioner is vitiated—Writ petition allowed.

Raj Kumar M.E.-1 v. *Union of India & Ors.*..... *599*

— Service Law—Seniority—Petitioner challenged order passed by Central Administrative Tribunal, whereby his original application was rejected on the grounds of laches and non-joinder of affected persons, holding that the cause of action to challenge the seniority accrued to the petitioner on 01.04.02 when provisional seniority list was circulated showing him junior to respondent No. 3, as such original application brought in the year 2011 is barred by laches and since petitioner failed to implead 233 persons except respondent No. 3 who would be affected, the petition is bad for non-joinder—Held, the provisional seniority list dated 01.04.02 stood substituted by the final seniority list dated 01.08.11 and petitioner having approached the Tribunal in 2011 itself, it cannot be said that the petition is barred by latches and in view of settled legal position, all the affected persons need not be added as respondent as some of them could be impleaded in representative capacity, if number of such persons is too large or petitioner should be given opportunity to implead all the necessary parties and only on refusal, the petition could be

dismissed for non-joinder of parties, as such the Tribunal was in error in dismissing the original application.

Baljit Singh Bahmania v. *Union of India & Ors.* *817*

CONTRACT ACT, 1872—Section 8—Appellant is a Government company manufacturing paper from which respondent had been purchasing from time to time—Respondent deposited a sum of Rs. 1,00,000/- with the appellant as security deposit which was to carry interest @ 15% per annum—Plaintiff/ respondent was maintaining a current account of the defendant/appellant and there were occasions when it made excess/advance payment to the appellant/defendant, which was subject to adjustment for future purchases—A sum of Rs. 2,81.161.47 was alleged to be due to it from the appellant/ defendant, being the excess/advance payment made to it—Plaintiff/respondent filed the aforesaid suit for recovery of that amount with interest, amounting to Rs. 74,718.75/- and also claimed the security deposit of Rs.1,00,000/- which it deposited with the appellant/defendant, thereby raising a total claim of Rs.4,55,880.24.—The appellant/defendant filed the written statement contesting the suit and took a preliminary objection that the suit was barred by limitation—On merits, it was alleged that the entire amount due to the plaintiff/ respondent, including the amount of security deposit was paid by way of a cheque of Rs. 1,40,113.77 which was accepted by the plaintiff/respondent—Decree for recovery of Rs. 3,55,744.96 with proportionate costs and pendent elite and future interest @ 10% per annum was passed in favour of the respondent and against the appellant—Hence present appeal. Held:— Excess/advance payment by the plaintiff/ respondent to the appellant/defendant being towards purchase of the paper, cannot be said that the said payment was made towards an independent transaction, unconnected with the contract between the parties for purchase of paper—Of course, the appellant/defendant was under an obligation to either deliver the goods for which advance payment was

received by it or it was required to refund the advance/excess payment to the plaintiff/respondent—However, this liability of the appellant/defendant arose under the same contract under which it was supplying paper to the plaintiff/respondent and was not an obligation independent of the contract for sale of paper to the plaintiff/respondent—There was only one contract between the parties, and that was for the sale of paper by the appellant/defendant to the respondent/plaintiff—Suit filed by the plaintiff/respondent was barred by limitation—Section 8 of Contract Act provides that the performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal—By remitting payment of Rs. 1,40,113.77/- towards full and final settlement of the account, the defendant/appellant gave an offer to the plaintiff/respondent for setting the account on payment of that amount—The plaintiff/respondent accepted the offer by encashing the cheque sent by the defendant/appellant—This led to a contract between the parties for settling the account on payment of 1,40,113.77/- by the defendant/appellant to the plaintiff/respondent—Not open to the plaintiff/respondent to now say that since they had credited the said payment as part payment, they are entitled to recover the balance amount from the defendant/respondent—Having enchased a cheque of Rs.1,40,113.77/-, the plaintiff/respondent was not entitled to any further payment from the appellant/defendant—impugned judgment and decree set aside.

Hindustan Paper Corporation v. *Nav Shakti Industries P. Ltd.* *737*

DELHI LANDS (RESTRICTION OF TRANSFER) ACT, 1972—Suit for specific performance—Brief facts—Agreement to self entered into between the plaintiff as the prospective purchaser and the defendants as the prospective sellers—Total sale consideration was Rs.48,50,000/-—Defendants received

a sum of Rs. 4,50,000/— as advance—Award under Land Acquisition Act, 1894 passed acquiring the land about 9 months before the agreement to sell was entered into between the parties—Plaintiff pleads that the defendants were guilty of breach of contract inasmuch as they failed to obtain the permissions to sell the property from the Income Tax Authority and from the appropriate authority under the Delhi Lands (Restriction of Transfer) Act, 1972—Plaintiff pleads that the defendants failed to perform the contract because a Division Bench of this Court in a case quashed the acquisition proceedings and consequently the price of land increased, giving the reason for the defendants to back out from the contract—Plaintiff claims to have always been and continuing to be ready and willing to perform his part of contract—Written statements filed by the defendants contending inter alia that the agreement in question is barred by the Act of 1972 and Plaintiff failed to perform his part of the contract as the sale transaction had to be completed in 45 days—Also claimed that the plaintiff was not ready and willing to perform his part of the contract and that the discretionary relief for specific performance should not be granted in his favour—Issues framed—Evidence led. Section 3 of Delhi Lands (Restriction of Transfer) Act, 1972 places an absolute bar with respect to transferring those lands which have already been acquired by the Government i.e. with respect to which Award has been passed—Lands in the process of acquisition—transfer can take place with the permission of appropriate authority—Contracts entered into in violation of the 1972 Act are void and against public policy—In the present case, agreement to sell was entered into after the land was acquired i.e. after an Award was passed and therefore agreement to sell is void—Even presuming that the plaintiff or even both the parties were not aware of the Award having been passed with respect to the subject lands under the Lands Acquisition Act, 1894, that cannot take away the binding effect of Section 3 of the 1972

Act which provides that any purported transfer of the land which has already acquired is absolutely barred—Plaintiff miserably failed to prove his readiness and willingness i.e. his financial capacity with respect to making available the balance sale consideration of 44,00,000/— hence it cannot be said that the plaintiff was and continued to be ready and willing to perform his part of the obligation under the agreement to sell at all points of time i.e. for the periods of 45 days after entering into the agreement to sell, after the period of 45 days till the filing of the suit, and even thereafter when evidence was led—Plaintiff has failed to comply with the requirement of Section 16(c) of the Specific Relief Act, 1963, and therefore, the plaintiff is not entitled to the relief of specific performance—Sub—Section 3 of section 20 of Specific Relief Act, 1963 makes it clear that Courts decree specific performance where the plaintiff has done substantial acts in consequence of a contract/agreement to sell—Where the acts are not substantial i.e. merely 5% or 10% etc of the consideration is paid and/or plaintiff is not in possession of the subject land, plaintiff is not entitled to the discretionary relief of specific performance—Specific Relief Act dealing with specific performance is in the nature of exception to Section 73 of the Contract Act, 1872—Normal rule with respect to the breach of a contract under Section 73 of the Contract Act, 1872 is of damages, and, the Specific Relief Act, 1963 only provides the alternative discretionary remedy that instead of damages, the contract in fact should be specifically enforced—For breach of contract, the remedy of damages is always there and it is not that the buyer is remediless—However, for getting specific relief, while providing for provisions of specific performance of the agreement (i.e. performance instead of damages) for breach, requires discretion to be exercised by the Court as to whether specific performance should or should not be granted in the facts of each case or that the plaintiff should be held entitled to the

ordinary relief of damages or compensation—From the point of view of Section 20 sub—Section 3 of the Specific Relief Act, 1963 or the ratio of the judgment of the Supreme Court in the case of *Saradamani Kandappan* (supra) or even on first principle with respect to equity because 10% of the sale consideration alongwith the interest will not result in the defendants even remotely being able to purchase an equivalent property than the suit property specific performance cannot be granted—Subject suit is only a suit for specific performance in which there is no claim of the alternative relief of compensation/damages—No cases set out with respect to the claim of damages/compensation—Plaintiff has led no evidence as to difference in market price of the subject property and equivalent properties on the date of breach, so that the Court could have awarded appropriate damages to the plaintiff, in case, this Court came to the conclusion that though the plaintiff was not entitled to specific performance, but he was entitled to damages/compensation because it is the defendants who are guilty of breach of contract—However in exercise of power under Order 7 Rule 7 CPC, the Court can always grant a lesser relief or an appropriate relief as arising from the facts and circumstances of the case—Undisputed that the defendants have received a sum of 4,50,000/- under the agreement to sell—Considering all the facts of the present case, it is fit to hold that though an agreement itself was void under the 1972 Act, the plaintiff should be entitled to refund of the amount of 4,50,000/- alongwith the interest thereon at 18% per annum simple pendente life and future till realization—Suit of the plaintiff claiming the relief of specific performance is dismissed.

Jinesh Kumar Jain v. *Iris Paintal & Ors.* *678*

GUARDIANS AND WARDS ACT, 1890—Section 47—Adoption by foreign citizen—Appellant, a single lady aged 53 years and citizen of USA applied for adoption of a child from India After

conducting the proceedings under Section 7 and 26 of the Act, the learned District Judge dismissed the petition, citing para 4.1 of Chapter IV of Guidelines for Adoption from India, 2006 issued by Central Adoption Resource Authority to the effect that single person upto 45 years of age can adopt—Appeal—appellant conducted that next clause of the same para dealing with foreign proposed adoptive parent contemplated that age of parent should not be less than 30 years and more than 55 years so the appellant ought to have been allowed adoption—held, the clause relied upon by the appellant is applicable where adoption is sought by a married couple where the clause referred to by the learned District Judge pertains to single person seeking to adopt a child and the appellant being a single person, falls under clause 4.1 where persons upto 45 years of age are eligible while appellant is aged 53 years.

Stephanie Joan Becker v. *State & Anr.* *636*

HINDU MARRIAGE ACT, 1955—Section 13 (B); Delhi High Court Hindu Marriage Rules, 1979—Appeal against dismissal of petition u/s 13(B) on the ground that the parties have nowhere stated that there has been no cohabitation for one year. Petition categorically stated that since 30.03.2010 parties have been living separately under the same roof and they are not able to live together as husband and wife on account of temperamental differences since then. Along with the petition in separate affidavits both parties stated that they have been living separately and have not cohabited since 30.03.2010. Appellants contend that there is no requirement under Delhi High Court Hindu Marriage Rules, 1979 to state about non-cohabitation specifically in the petition—Held Even if parties are living under the same roof but are not living as husband and wife, they can be said to be living separately—Essence is the relationship of husband and wife and not the same roof. There is specific affidavit of not cohabitation and averments in the petition that parties are not living together as husband

and wife—Petition fulfills all the requirements u/s 13(B) Appeal allowed.

Pradeep Pant & Anr. v. *Govt of NCT of Delhi* *485*

— Section 13 (B), 14—Appeal against dismissal of application seeking waiver u/s 14 in a petition for divorce on consent. Whether petition for dissolution of marriage on mutual consent be filed before expiry of one year separation—Held:- The requirements u/s 13 (1) (B) are (i) parties are living separately for a period of on year (ii) they have not been able to live together and (iii) they have mutually agreed that marriage should be dissolved. S.14 bars the filing of the petition for dissolution of marriage unless on the date of presentation of the petition one year has elapsed from the date of marriage. Proviso that the court may on application made to it in accordance with such rules as may be made by the High Court in that behalf allow petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent. Period of one year for living separately under s. 13(B) is not directory but mandatory and the same cannot be condoned by the Court u/s 14. Appeal dismissed.

Sunny v. *Sujata* *491*

— Section 24—Petitioner filed petition u/s 482 of the Code to assail order of Additional Sessions Judge (ASJ) passed in criminal revision against order of Metropolitan Magistrate (M.M)—Petitioner, wife of respondent no. 1 and mother of respondent no.2 and 3, had filed petition u/s 125 of the Code to seek maintenance and pressed for grant of interim maintenance which was declined by Ld. MM—In revision, interim maintenance at the rate of Rs. 2000/— granted—Aggrieved petitioner challenged the order and prayed for enhancement of maintenance against her husband and also for

grant of maintenance from her sons i.e. respondent no. 2 and 3—Admittedly, petitioner was receiving maintenance at the rate of Rs. 3500/— per month u/s 24 of the Act from her husband.—Held:— The wife, who is unable to maintain herself is entitled to maintenance both u/s 125 Cr. P.C. and also u/s 24 Hindu Marriage Act but the maintenance claim under one provision is subject to adjustment under the other provisions.

Santosh Malhotra v. *Ved Prakash Malhotra and Others* *518*

HINDU SUCCESSION ACT, 1956—Brief Facts—One Prof. Parman Singh, a displaced person from Pakistan, had come to India leaving behind vast joint Hindu family immovable properties—He expired in Delhi leaving behind his legal heirs and the properties—Suit for partition and rendition of accounts filed by the plaintiff praying for partition of HUF immovable properties—Asserted in the plaint that late Prof. Parman Singh after coming from Pakistan had applied for the allotment of a house under the Scheme for displaced persons under the Displaced Persons Act, to the Ministry of Rehabilitation, Government of India—Ministry of Rehabilitation, Government of India informed late Prof. Parman Singh that one double room house in Nizamuddin Extension (now known as Nizamuddin East) had been decided to be allotted to him—Final figure of the actual cost of the house was 5,946/- According to the plaintiff, since Prof. Parman Singh had brought with him movable properties in the form of cash and jewellery from Pakistan, which belonged to the HUF and were given to him by his father etc., he paid 5,000/- to the Ministry of Rehabilitation by depositing the same in the Treasury and also and paid 946/- from the same—Hence, the property allotted to him at Nizamuddin was HUF property and continues to be so even today—Right from the beginning, he had been keeping tenants in the said property and had been receiving rent—Using this amount, he built extra and additional

structures on the property—After his death in 1975. his widow, Smt. Balwant Kaur continued to stay there and receive rents and had her bank account, including a joint account with the defendant No.1 used for depositing HUF rents and withdrawing the same—All HUF moneys were being handled by the defendant No. 1—Defendant No.2 Hari Singh (brother of the defendant No.1) had left India somewhere in the late sixties and never returned to India thereafter—Plaintiff further alleges that the defendant No.1 father of the plaintiff, making use of the HUF rents from the Nizamuddin property purchased a plot at B-22, East of Kailash, New Delhi and constructed a super-structure thereon—Nucleus of the said property came from HUF money and thus the said property is also HUF property—Plaintiff claims that being the son of the defendant Nos.1 and 5, he has 1/10th Share in both the aforesaid HUF properties—Plaintiff also claims rendition of accounts kept by the defendant No.1 assessed to be in the sum of 60,000/- on the date of the institution of the suit—In the written statement filed by the defendant No.1 the father of the plaintiff, it is categorically denied that late Prof. Parman Singh had left behind him HUF immovable and movable properties—Denied that the plaintiff has any right to seek partition of the aforesaid properties or any share in either of the aforesaid properties—He brought no cash and jewellery to India as alleged by the plaintiff—The property at B-13, Nizamuddin East was his self—acquired property and at B-22, East of Kailash, New Delhi was the self—acquired property of defendant No.1—As regards immovable property at B-22, East of Kailash, New Delhi, the defendant No.1 has stated that the land in respect thereof was purchased by him from the Delhi Development Authority in 1965 with his own resources including 7,000/- from his GPF account—He constructed the Held:— admitted documents clearly show that the said property was purchased by Prof. Parman Singh from his own resources and not out of the claims or compensation—Plaintiff, in his cross—

examination, has categorically admitted that Prof. Parman Singh was gainfully employed as soon as he came to India from West Pakistan in the year 1947 as a Lecturer in the Camp College and was subsequently appointed as a Special Magistrate—Clearly, therefore, the said property was purchased by Prof. Parman Singh from his own funds Plaintiff has failed to establish the existence of any HUF of which Prof. Parman Singh was the Karta, and in the course of his cross-examination candidly admitted that he was not aware whether any HUF had been legally created by Prof. Parman Singh—As regards the property at East of Kailash, there is ample documentary evidence on record to conclusively establish that the said property was the self-acquired property of the defendant No.1 Mahtab Singh—In view of the aforesaid overwhelming evidence on record, oral and documentary, the inevitable conclusion is that it must be held that neither Prof. Parman Sing nor the defendant No.1 Mahtab Singh had created any HUF and the properties acquired by them respectively cannot, therefore, partake of the nature of HUF properties. Plaintiff has failed to establish that either of the two properties mentioned hereinabove were HUF properties—Cause of action for the filing of the suit in respect of the property at East of Kailash has not yet arisen, the said property being the self—acquired property of the defendant No.1, who is still alive-son or daughter can ask for partition of HUF property from the father during his lifetime, but not of self acquired property—Plaintiff is not entitled to the partition of the suit properties and to the rendition of accounts in respect thereof—Suit fails and is accordingly, dismissed—The defendants having contested the case from the year 1993 onwards are held entitled to costs throughout.

Gajinder Pal Singh v. *Mahtab Singh & Ors.* *643*

INDIAN CONTRACT ACT, 1872—Section 74—Measure of damages—Brief Facts—Auction notice was inserted in the

newspaper by defendant for plot No. 8, Asaf Ali Road having an area of approximately 351 sq. mts—Plaintiff was the successful bidder quoting the price of 1.92 crores—At the fall of hammer, the plaintiff deposited 25% of the amount viz 48 lacs, as per the terms and conditions of the auction—Forfeiture has been affected by DDA on account of the plaintiff having committed default in having failed to deposit the balance amount—Case argued and predicated by the plaintiff on the ground that even if the plaintiff is guilty of breach of contract, yet, the defendant cannot forfeit the huge amount of 48 lacs, and, at best, can only forfeit a reasonable amount inasmuch as the liquidated damages amount of 48 lacs is only the upper limit of damages and the defendant having failed to plead and prove the loss caused to it, therefore, in terms of the law as laid down under Section 74 the plaintiff is entitled to refund of the amount of 48 lacs less a reasonable amount which can only be forfeited by the defendant—Defendant claims the entitlement to forfeit the amount of 48 lacs only on the ground that such a term of forfeiture exists in the terms and conditions of the auction—Issues framed and evidence led. Held:— Section 74 provides only the upper limit of damages/ amounts which are allowed to be forfeited by a proposed seller in case of breach of contract by the proposed buyer, and in case the seller wants to forfeit an unduly large amount which is paid by the proposed buyer to the proposed seller, it is necessary that the proposed seller pleads and proves the loss which is caused to him. Defendant having failed to plead and prove the loss on account of failure by the plaintiff to perform his part of the contract, it cannot be allowed to forfeit an amount except a reasonable amount of 5 lacs—Plaintiff will also be entitled to pendente lite and future interest @ 9% per annum simple till realization.

Pragati Construction Company (P) Ltd. v. *Delhi Development Authority* *723*

INDIAN PENAL CODE, 1860—Sections 302 and 34—Arms Act, 1959—Section 27—As per prosecution on day of incident, PW1, father of deceased and his son PW9 were in his factory-A-1 went to first floor of factory removed iron rod and broke wires as a result machines in factory stopped functioning—PW9 objected on which A-1 abused and hit him on head with iron rod—Deceased on reaching there enquired about the cause of quarrel-A-2 caught hold of deceased on exhortation of A-1 who brought chhuri from his shop and stabbed him on his chest and abdomen—When PW1 rushed to save his son, both accused fled-A-2 was arrested wearing a blood stained shirt-A-1 on arrest got recovered chhuri—Trial court convicted accused persons u/s 302/34—Held, from evidence on record involvement of A-2 not clear—No witness assigned any role to A-2 in initial altercation—Contradictory and inconsistence version in evidence as to who exhorted whom—No knowledge could be imputed to A-2 that A-1 would rush to shop bring chhuri-Un-Natural that PW1, PW3, PW5 and PW9 who were present would not have intervened to get released the deceased from the clutches of A-2-Servants in factory also exhibited un-natural conduct in not intervening in incident-highly improbable that A-2 continued to hold deceased from behind for long time awaiting arrival of A-1 with chhuri—Mere presence of A-2 at spot not sufficient to conclude that he shared common intention with A-1 to murder deceased—The fact that accused were together at the time of the incident and ran away together is not conclusive evidence of common intention in the absence of any more positive evidence PW1 and PW9 (injured witness) in their evidence have proved that A-1 stabbed to death deceased-Ocular testimony of PW1 and PW9 corroborated by medical evidence and no conflict between the two-Defence version accusing PW9 for murder of deceased not inspiring confidence—Initially A-1 was un-armed, when deceased on reaching the spot enquired cause of quarrel, A-1 rushed to

his shop and brought the knife—This rules out that incident occurred suddenly in fit of rage A-1 acted in cruel manner and took undue advantage by inflicting repeated stab blows with force without any resistance from the deceased—Appeal of A-2 allowed—Appeal of A-1 dismissed.

Afsar and Anwar v. *State & Ors.* *469*

— Section 302, 324 Appellant challenged his conviction u/s 302/324 urging various important witnesses like boys who had transported deceased to hospital and other important persons not produced or even named as witnesses, which made prosecution case doubtful. Held:— Once the prosecution evidence is reliable and trustworthy and proves the offence, Failure to examine other witnesses is not fatal. Non—examination of further witnesses does not affect the credibility of the witnesses relied upon. It is the quality of the evidence and not the number of witnesses that matter.

Narain Singh v. *State* *748*

— Section 397, 307, 458—Appellant challenged his conviction u/s 458/307/397/34 IPC on ground, recovery at his instance not proved. Held:— Recovery of stolen goods is one of the chain in the circumstances. When a person was duly identified as participant in the offence with specific role assigned to him, then absence of recovery will not discredit the otherwise credible testimony of witness.

Vikram @ Babloo v. *State*..... *762*

INDUSTRIAL DISPUTES ACT, 1947—Section 25-F by way of writ petition the company challenged the award dated 21.03.2002 in ID Case 241/1990 whereby the relief of reinstatement in service with 50% back wages had been granted to two respondent workmen—Petitioner contended that the Respondent workmen had not completed 240 days of service and hence, Section 25-F does not apply to the present case—

Tribunal had earlier accepted the claim of the Respondents relying on the evidence of witness of the management Sh. K.K. Pahuja who in his cross examination said that Respondent no.1 had been employed w.e.f. 10.06.86 and Respondent no.2 had been employed w.e.f. 26.3.88 respectively—thus as per the statement both employees had completed 240 days of service—Petitioner contended that the management's witness in his affidavit had clearly given the exact dates of appointment of the workmen and therefore his statement to the contrary in cross examination could not be given any weightage. Held—Cross—examination is as much a part of the evidence of a witness as the examination in chief—If any party is able to elicit any admission on some vital point of dispute from a witness that admission can certainly be used by the party who is benefited from that admission. Jurisdiction of the High court to interfere in the awards of labour courts is very limited it is not entitled to act as an appellate court findings of fact reached by inferior Court or Tribunal as result of appreciation of evidence cannot be reopened or questioned in writ proceedings—Only an error of law apparent on the face of record can be corrected by a writ.

Classic Bottle Caps (P) Ltd. v. *Usha Sinha & Ors.* .. *533*

LIMITATION ACT, 1963—Section 5—Motor Vehicles Act, 1988—Section 103—Appellant impugns judgment passed by Claims Tribunal—Along with appeal, application for condonation of delay filed—Plea taken, award came to appellant's knowledge only when execution proceedings were initiated against appellant—Held—Courts normally do not throw away meritorious lis on hypertechincal grounds—Primary function of court is to adjudicate dispute between parties and to advance substantial justice—Object of providing a legal remedy is to repair damage caused by reason of legal injury—Law of limitation fixes a lifespan for such legal remedy for redresss of legal injury so suffered—Condonation of delay

is a matter of discretion of Court—Section 5 of Limitation Act does not say that such discretion can be exercised only if delay is within a certain limit—Expression 'sufficient cause' should be given liberal interpretation so as to advance substantial justice between parties—It is not length of delay which is material for condonation of delay in filing Appeal but acceptability of explanation—Law that each day's delay must be explained has mellowed down yet it has to be shown by applicant that there was neither any gross negligence nor any inaction, nor want of bonafides—There is not even a whisper as to when appellant stopped appearing before Claims Tribunal and reasons for same—Delay of 308 days, of course, a long delay, can be condoned provided there is sufficient cause to explain same—Since appellant has failed to show sufficient cause for condonation of delay, application cannot be allowed—No sufficient ground to condone delay—Application and appeal are dismissed.

Uttarakhand Transport Corporation v. *Ram Sakal Mahto & Anr.* *555*

— Article 1—Contract Act, 1872—Section 8—Appellant is a Government company manufacturing paper from which respondent had been purchasing from time to time—Respondent deposited a sum of Rs. 1,00,000/- with the appellant as security deposit which was to carry interest @ 15% per annum—Plaintiff/respondent was maintaining a current account of the defendant/appellant and there were occasions when it made excess/advance payment to the appellant/defendant, which was subject to adjustment for future purchases—A sum of Rs. 2,81.161.47 was alleged to be due to it from the appellant/defendant, being the excess/advance payment made to it—Plaintiff/respondent filed the aforesaid suit for recovery of that amount with interest, amounting to Rs. 74,718.75/- and also claimed the security deposit of Rs.1,00,000/- which it deposited with the appellant/

defendant, thereby raising a total claim of Rs.4,55,880.24.—The appellant/defendant filed the written statement contesting the suit and took a preliminary objection that the suit was barred by limitation—On merits, it was alleged that the entire amount due to the plaintiff/respondent, including the amount of security deposit was paid by way of a cheque of Rs. 1,40,113.77 which was accepted by the plaintiff/respondent—Decree for recovery of Rs. 3,55,744.96 with proportionate costs and pendent elite and future interest @ 10% per annum was passed in favour of the respondent and against the appellant—Hence present appeal. Held:— Excess/advance payment by the plaintiff/respondent to the appellant/defendant being towards purchase of the paper, cannot be said that the said payment was made towards an independent transaction, unconnected with the contract between the parties for purchase of paper—Of course, the appellant/defendant was under an obligation to either deliver the goods for which advance payment was received by it or it was required to refund the advance/excess payment to the plaintiff/respondent—However, this liability of the appellant/defendant arose under the same contract under which it was supplying paper to the plaintiff/respondent and was not an obligation independent of the contract for sale of paper to the plaintiff/respondent—There was only one contract between the parties, and that was for the sale of paper by the appellant/defendant to the respondent/plaintiff—Suit filed by the plaintiff/respondent was barred by limitation—Section 8 of Contract Act provides that the performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal—By remitting payment of Rs. 1,40,113.77/- towards full and final settlement of the account, the defendant/appellant gave an offer to the plaintiff/respondent for setting the account on payment of that amount—The plaintiff/respondent accepted the offer by encashing the

cheque sent by the defendant/appellant—This led to a contract between the parties for settling the account on payment of 1,40,113.77/- by the defendant/appellant to the plaintiff/ respondent—Not open to the plaintiff/respondent to now say that since they had credited the said payment as part payment, they are entitled to recover the balance amount from the defendant/respondent—Having enchased a cheque of Rs.1,40,113.77/-, the plaintiff/respondent was not entitled to any further payment from the appellant/defendant—impugned judgment and decree set aside.

Hindustan Paper Corporation v. *Nav Shakti Industries P. Ltd.* *737*

MOTOR VEHICLES ACT, 1988—Section 103—Appellant impugns judgment passed by Claims Tribunal—Along with appeal, application for condonation of delay filed—Plea taken, award came to appellant's knowledge only when execution proceedings were initiated against appellant—Held—Courts normally do not throw away meritorious lis on hypertechincal grounds—Primary function of court is to adjudicate dispute between parties and to advance substantial justice—Object of providing a legal remedy is to repair damage caused by reason of legal injury—Law of limitation fixes a lifespan for such legal remedy for redresss of legal injury so suffered—Condonation of delay is a matter of discretion of Court—Section 5 of Limitation Act does not say that such discretion can be exercised only if delay is within a certain limit—Expression 'sufficient cause' should be given liberal interpretation so as to advance substantial justice between parties—It is not length of delay which is material for condonation of delay in filing Appeal but acceptability of explanation—Law that each day's delay must be explained has mellowed down yet it has to be shown by applicant that there was neither any gross negligence nor any inaction, nor want of bonafides—There is not even a whisper as to when appellant stopped appearing before Claims

Tribunal and reasons for same—Delay of 308 days, of course, a long delay, can be condoned provided there is sufficient cause to explain same—Since appellant has failed to show sufficient cause for condonation of delay, application cannot be allowed—No sufficient ground to condone delay—Application and appeal are dismissed.

Uttarakhand Transport Corporation v. *Ram Sakal Mahto & Anr.* *555*

— Section 149(2), 157 and 166—Code of Civil Procedure, 1908—Order XII Rule 8—Claims Tribunal awarded compensation in favour of appellants and Respondent No. 3 for death of Anupam Chaudhary, aged 28 years—Claimants and Insurer filed appeals against judgment passed by Claims Tribunal—Plea taken by claimants, compensation awarded is on lower side as claimants were entitled to addition of 50% towards future prospects as deceased was a meritorious boy in permanent employment and Claims Tribunal erred in applying multiplier of 8 which should have been 17 as per age of deceased—Per contra, plea of insurer that First Respondent committed willful breach of terms of policy as his driving license was proved to be forged—Thus, it was entitled to be exonerated or in any case was entitled to recovery rights—Held—Claimants undoubtedly are entitled to addition of 50% towards future prospects as deceased was in permanent employment—Claims petition was filed by deceased's parents—Deceased had suffered fatal injuries in accident just on 24th day after his marriage—Widow preferred not to join as a petitioner in Claim Petition—She preferred not to appear as a witness before Claims Tribunal—She preferred to be proceeded ex aprte—She did not file any appeal against impugned judgment—In circumstances, it would be reasonable to draw inference that she has remarried and has therefore not come forward either before Claims Tribunal or in this Appeal—Thus, she would not be considered as a dependent

after date of her remarriage—Appropriate multiplier—would be according to age of deceased's mother as widow had remarried—Appropriate multiplier would be 11 against 8 adopted by Claims Tribunal—Overall compensation enhanced—Notice was served upon First Respondent to produce driving license—First Respondent neither contested Claim Petition nor Appeal nor came forward with any driving license which was valid on date of accident—Driving license seized by Police was proved to be fake—Adverse inference has to be drawn against First Respondent that had he been in possession of a valid driving license, he would have produced same—Even in case of conscious and willful breach of terms of policy, Insurer has statutory liability of third party—Insurer entitled to recover amount of compensation paid from driver and owner in execution of this very judgment without recourse to independent civil proceedings.

Ajit Singh & Anr. v. *Paramjit Singh & Ors.* *776*

NEGOTIABLE INSTRUMENTS ACT, 1881—Section 138—Petition filed for quashing of order of MM directing accused to appear personally on next date of hearing for furnishing bail bonds and disclosing defence where accused has been exempted from appearance—Contention of petitioner that after grant of personal exemption from appearance of the accused Magistrate become *functus officio* and cannot withdraw, the exemption so granted and that requirement of bail does not from part of proceeding within ambit of Section 205 (2) or Section 317 (1)- Held, grant of permanent personal exemption by the Magistrate to accused, in bailable offence, does not dispense with requirement of accused obtaining bail from Court and exemption from appearance granted by Magistrate could be revoked by Magistrate where necessary at any time—Purpose for permanently dispensing with personal appearance of accused is to prevent accused from undue hardship and cost in attending trial—Sections 205 (2) and empower

Magistrate to direct personal attendance at any stage if necessary-While granting permanent exemption, MM is deemed to have reserved his right to accused to appear in person at the trial at any stage of the proceedings if necessary—Concept and purpose of bail mutually exclusive to the purpose of grant of personal exemption from appearance, they operate in different spheres of trial though are intrinsically connected—Permanent personal exemption cannot be understood as a blanket order dispensing with appearance and shall be subject to Sections 205 (2) and 317 (1)—Obtaining bail by the accused is an independent requirement and grant of permanent personal exemption form appearance in court cannot usurp the requirement of obtaining bail by the petitioner—Petition dismissed.

Kajal Sen Gupta v. *Ahlcon Ready Mix Concrete, Division of Ahluwalia Contract (India) Limited.* *498*

— Section 138—Petitioner assailed order of learned Metropolitan Magistrate (MM) dismissing his application under Section 256 of Code in a complaint filed under Section 138 of Act—According to petitioner, Respondent/complainant company due to non payment of cheque amounts preferred complaint under Section 138 of Act and trial was at stage of recording of statement of defence witnesses, but for six consecutive hearings, none had appeared on behalf of respondent/complainant before learned MM—Thus, petitioner preferred application under Section 256 of Code praying for acquittal of petitioner due to non appearance of complainant/Respondent which was dismissed by learned MM—Therefore, he preferred petition to assail said order—Held:— Section 256 Cr. P.C. has been incorporated keeping in mind the interest of both the complainant and the accused—To prevent any prejudice to complainant, Section 256 Cr. P.C. empowers Magistrate to adjourn hearing, for ensuring presence of complainant, if sufficient cause is shown with regard to his

inability to appear at appointed date of appearance—However, failure of complainant to appear, without sufficient cause, empowers a Magistrate to dismiss complaint and to acquit accused—Objective of proviso to Section 256 Cr.P.C. is to prevent any undue delay to trial or to prejudice rights of accused person facing trial as presence of complainant may be dispensed with through pleader or if his personal attendance is not necessary—Case being at stage of defence evidence, before which statement of petitioner under Section 313 Cr.P.C. was also recorded, absence of Respondent complainant has not prejudiced petitioner or hampered trial.

G. Karthik v. *Consortium Finance Ltd. Now Magma Leasing Ltd.* *507*

— Section 138, 141—Respondent filed complaint u/s 138 of Act against company in which petitioner was Managing Director—Ld. Metropolitan Magistrate (M.M), Delhi issued summons to Company—Thereafter, respondent moved application to include name of petitioner being the Company in the complaint, which was allowed by the Ld. M.M—Aggrieved, petitioner challenged the order—It was urged, petitioner could not have been impleaded in the complaint without making specific averments that offence was committed when he was incharge and responsible for conduct of business of the Company—In absence of such specific allegations, he could not be made accused in complaint as it violated provisions of section 141 of the Act—On the other hand, it was urged on behalf of respondent, there was sufficient material against petitioner; cheques were issued by him, same were drawn on the account maintained by accused persons and legal notice was duly served upon accused persons—An inadvertent mistake to mention the name of petitioner in complaint in no manner precluded him to be impleaded as accused. Held:—The principal offender in each cases is only the body corporate and it is a juristic person and when the Company is the drawer

of the cheque, such company is the principal offender and the remaining persons were made offenders by virtue of the legal fiction created by the legislature as per Section 141—Petitioner being the Managing Director of the company, was liable for the acts of the company.

Ranjit Tiwari v. *Narender Nayyar* *625*

SERVICE LAW—Seniority—Petitioner challenged order passed by Central Administrative Tribunal, whereby his original application was rejected on the grounds of laches and non-joinder of affected persons, holding that the cause of action to challenge the seniority accrued to the petitioner on 01.04.02 when provisional seniority list was circulated showing him junior to respondent No. 3, as such original application brought in the year 2011 is barred by laches and since petitioner failed to implead 233 persons except respondent No. 3 who would be affected, the petition is bad for non-joinder—Held, the provisional seniority list dated 01.04.02 stood substituted by the final seniority list dated 01.08.11 and petitioner having approached the Tribunal in 2011 itself, it cannot be said that the petition is barred by latches and in view of settled legal position, all the affected persons need not be added as respondent as some of them could be impleaded in representative capacity, if number of such persons is too large or petitioner should be given opportunity to implead all the necessary parties and only on refusal, the petition could be dismissed for non-joinder of parties, as such the Tribunal was in error in dismissing the original application.

Baljit Singh Bahmania v. *Union of India & Ors.* *817*

SPECIFIC RELIEF ACT, 1963—Sections 16 (c) & 20—Delhi Lands (Restriction of Transfer) Act, 1972—Suit for specific performance—Brief facts—Agreement to self entered into between the plaintiff as the prospective purchaser and the defendants as the prospective sellers—Total sale consideration

was Rs.48,50,000/-—Defendants received a sum of Rs. 4,50,000/— as advance—Award under Land Acquisition Act, 1894 passed acquiring the land about 9 months before the agreement to sell was entered into between the parties—Plaintiff pleads that the defendants were guilty of breach of contract inasmuch as they failed to obtain the permissions to sell the property from the Income Tax Authority and from the appropriate authority under the Delhi Lands (Restriction of Transfer) Act, 1972—Plaintiff pleads that the defendants failed to perform the contract because a Division Bench of this Court in a case quashed the acquisition proceedings and consequently the price of land increased, giving the reason for the defendants to back out from the contract—Plaintiff claims to have always been and continuing to be ready and willing to perform his part of contract—Written statements filed by the defendants contending inter alia that the agreement in question is barred by the Act of 1972 and Plaintiff failed to perform his part of the contract as the sale transaction had to be completed in 45 days—Also claimed that the plaintiff was not ready and willing to perform his part of the contract and that the discretionary relief for specific performance should not be granted in his favour—Issues framed—Evidence led. Section 3 of Delhi Lands (Restriction of Transfer) Act, 1972 places an absolute bar with respect to transferring those lands which have already been acquired by the Government i.e. with respect to which Award has been passed—Lands in the process of acquisition—transfer can take place with the permission of appropriate authority—Contracts entered into in violation of the 1972 Act are void and against public policy—In the present case, agreement to sell was entered into after the land was acquired i.e. after an Award was passed and therefore agreement to sell is void—Even presuming that the plaintiff or even both the parties were not aware of the Award having been passed with respect to the subject lands under the Lands Acquisition Act, 1894, that cannot take away the binding effect of Section 3 of the 1972 Act which provides

that any purported transfer of the land which has already acquired is absolutely barred—Plaintiff miserably failed to prove his readiness and willingness i.e. his financial capacity with respect to making available the balance sale consideration of 44,00,000/— hence it cannot be said that the plaintiff was and continued to be ready and willing to perform his part of the obligation under the agreement to sell at all points of time i.e. for the periods of 45 days after entering into the agreement to sell, after the period of 45 days till the filing of the suit, and even thereafter when evidence was led—Plaintiff has failed to comply with the requirement of Section 16(c) of the Specific Relief Act, 1963, and therefore, the plaintiff is not entitled to the relief of specific performance—Sub—Section 3 of section 20 of Specific Relief Act, 1963 makes it clear that Courts decree specific performance where the plaintiff has done substantial acts in consequence of a contract/ agreement to sell—Where the acts are not substantial i.e. merely 5% or 10% etc of the consideration is paid and/or plaintiff is not in possession of the subject land, plaintiff is not entitled to the discretionary relief of specific performance—Specific Relief Act dealing with specific performance is in the nature of exception to Section 73 of the Contract Act, 1872—Normal rule with respect to the breach of a contract under Section 73 of the Contract Act, 1872 is of damages, and, the Specific Relief Act, 1963 only provides the alternative discretionary remedy that instead of damages, the contract in fact should be specifically enforced—For breach of contract, the remedy of damages is always there and it is not that the buyer is remediless—However, for getting specific relief, while providing for provisions of specific performance of the agreement (i.e. performance instead of damages) for breach, requires discretion to be exercised by the Court as to whether specific performance should or should not be granted in the facts of each case or that the plaintiff should be held entitled to the

ordinary relief of damages or compensation—From the point of view of Section 20 sub—Section 3 of the Specific Relief Act, 1963 or the ratio of the judgment of the Supreme Court in the case of *Saradamani Kandappan* (supra) or even on first principle with respect to equity because 10% of the sale consideration alongwith the interest will not result in the defendants even remotely being able to purchase an equivalent property than the suit property specific performance cannot be granted—Subject suit is only a suit for specific performance in which there is no claim of the alternative relief of compensation/damages—No cases set out with respect to the claim of damages/compensation—Plaintiff has led no evidence as to difference in market price of the subject property and equivalent properties on the date of breach, so that the Court could have awarded appropriate damages to the plaintiff, in case, this Court came to the conclusion that though the plaintiff was not entitled to specific performance, but he was entitled to damages/compensation because it is the defendants who are guilty of breach of contract—However in exercise of power under Order 7 Rule 7 CPC, the Court can always grant a lesser relief or an appropriate relief as arising from the facts and circumstances of the case—Undisputed that the defendants have received a sum of 4,50,000/- under the agreement to sell—Considering all the facts of the present case, it is fit to hold that though an agreement itself was void under the 1972 Act, the plaintiff should be entitled to refund of the amount of 4,50,000/- alongwith the interest thereon at 18% per annum simple pendente life and future till realization—Suit of the plaintiff claiming the relief of specific performance is dismissed.

Jinesh Kumar Jain v. *Iris Paintal & Ors.* *678*

— Section 14(1) (b) and (d)—Brief facts case of the plaintiff is that vide agreement to sell dated 14.03.2011 and a Memorandum of Understanding of even date, defendants No.1

to 10, who are the owners of suit Property agreed that the ground floor of the aforesaid property would be sold by them to the plaintiff for a total sale consideration of Rs. 95 lakh—It was further agreed that on receiving possession of the ground floor of the aforesaid property, the plaintiff would demolish the same and construct a four—storey building on it—The ground floor and the third floor of that building were to come to the share of the plaintiff, whereas, the first and second floor were to come to the share of defendants No. 1 and 2. Defendants No.3 to 10 were to get the amount of Rs.95 lakh—Admittedly, a sum of Rs 66,16,666/- was paid by the plaintiff to defendants No. 1 to 10—However, neither defendants No.3 to 10 have surrendered their share in the suit property in favour of defendants No.1 and 2 nor has the possession of the property been given to the plaintiff—Hence, the present suit for specific performance of the agreement along with an application claiming interim relief for grant of injunction, restraining the defendants from creating third party interest in the suit property. Held:— Under the agreement, Plaintiff has to construct a four—storey building, after demolishing the existing construction and out of the four floors to be constructed by him, ground and third floor have to come to his share, whereas the first and the second floor have to go to defendants No. 1 and 2—There is no agreement between the parties as regards the specifications of the proposed construction on the suit property—The agreement does not say as to what would happen if the plan, agreed between the parties, is not sanctioned or in the event a plan for construction of floors on the suit property is not sanctioned by the Municipal Corporation/DDA—The agreement is silent as to what happens if the parties do not agree on the specifications of the proposed construction—No mechanism has been agreed between the parties for joint supervision and qualify control during construction—There is no agreement that the specifications of the construction will be unilaterally

decided by the plaintiff and/or that the quality of the construction will not be disputed by the defendants—There is no provision in the agreement with respect to supervision of the construction—The agreement does not provide for the eventuality, where the construction raised by the plaintiff is not found acceptable to the defendants—No time has been fixed in the agreement for completion of the proposed new construction—Agreement is silent as to what happens if the plaintiff does not complete the construction or even does not commence it at all after taking possession from the defendants—It is not possible for the Court or even a Court Commissioner to supervise the construction—In these circumstances, it is difficult to disputes that the agreement between the parties is an agreement of the nature envisaged in Section 14(1) (b) and (d) of Specific Relief Act and thus, is not specifically enforceable—Therefore, prima facie, the plaintiff has failed to make out a case with respect to enforceability of the agreements set up by him. Hence, he is not entitled to grant of any injunction, restraining the defendants from creating third party interest in the suit property or dealing with it in any manner they like.

Davender Kumar Sharma v. *Mohinder Singh & Ors.* . *710*

— Section 16—Plaintiff filed suit claiming specific performance of agreement executed between parties for sale of suit property to plaintiff—As averred by plaintiff, defendant being owner of suit property, had agreed to sell property to him for consideration of Rs. 69,50,000/- and received part consideration of Rs. 20 lac, on day of execution of agreement dated 17/11/08—Balance amount was agreed to be paid within two months at time of registration of sale deed and defendant was to handover possession of property to plaintiff—However, despite requests made by plaintiff from time to time, defendant refused to produce original documents of title of suit property for perusal of representatives of bank, from which plaintiff

intended to take loan—Plaintiff had further arranged entire balance payment required to complete transaction and vide notice called upon defendant to bring original paper and execute sale deed on or before expiry of date settled—But defendant did not turn up at Office of Sub—Registrar to execute document and subsequently also failed to keep his promise to execute sale deed; thus, plaintiff filed suit seeking specific performance of agreement and in alternative for recovery of Rs. 20 lacs. Held—A party seeking specific performance of contract must show and specify the court that he is ready and willing to perform the contract. By readiness it is meant his capacity to perform the contract including his financial position to pay the consideration for which he should not necessarily always carry the money with him from the date of the suit till date of decree. By willingness it is meant his intention and conduct to complete the transaction.

Navendu v. *Amarjit S. Bhatia* *801*

— Section 16—Plaintiff filed suit claiming specific performance of agreement vide which defendant had agreed to sell his property to him—Plaintiff also made part payment as per agreement—As averred by plaintiff, defendant failed to perform his part of contract, whereas plaintiff would be willing to pay the balance sale consideration along with interest @ 15% per annum and he be directed to execute the agreement. Held:- Escalation of price during the intervening period, may be relevant consideration under certain circumstances for either refusing to grant decree of specific performance or for decreeing the specific performance with a direction to the plaintiff to pay an additional amount to the defendant and to compensate him. It would depend upon facts and circumstances of each case. The court while directing specific performance of agreement to sell, may grant additional compensation to the vendor on account of appreciation in the prices of the property on the subject matter of the agreement.

Navendu v. *Amarjit S. Bhatia* *801*

ILR (2012) V DELHI 469
CRL. A.

AFSAR AND ANWAR ….APPELLANT

VERSUS

STATE & ORS. RESPONDENTS

(S. RAVINDRA BHAT AND S.P. GARG, JJ.)

CRL. A. NO. : 473/1997 DATE OF DECISION: 20.04.2012

Indian Penal Code, 1860—Sections 302 and 34—Arms Act, 1959—Section 27—As per prosecution on day of incident, PW1, father of deceased and his son PW9 were in his factory-A-1 went to first floor of factory removed iron rod and broke wires as a result machines in factory stopped functioning—PW9 objected on which A-1 abused and hit him on head with iron rod—Deceased on reaching there enquired about the cause of quarrel-A-2 caught hold of deceased on exhortation of A-1 who brought chhuri from his shop and stabbed him on his chest and abdomen—When PW1 rushed to save his son, both accused fled-A-2 was arrested wearing a blood stained shirt-A-1 on arrest got recovered chhuri—Trial court convicted accused persons u/s 302/34—Held, from evidence on record involvement of A-2 not clear—No witness assigned any role to A-2 in initial altercation—Contradictory and inconsistence version in evidence as to who exhorted whom—No knowledge could be imputed to A-2 that A-1 would rush to shop bring chhuri-Un-Natural that PW1, PW3, PW5 and PW9 who were present would not have intervened to get released the deceased from the clutches of A-2-Servants in factory also exhibited un-natural conduct in not intervening in incident-highly improbable that A-2 continued to hold deceased

from behind for long time awaiting arrival of A-1 with chhuri—Mere presence of A-2 at spot not sufficient to conclude that he shared common intention with A-1 to murder deceased—The fact that accused were together at the time of the incident and ran away together is not conclusive evidence of common intention in the absence of any more positive evidence PW1 and PW9 (injured witness) in their evidence have proved that A-1 stabbed to death deceased-Ocular testimony of PW1 and PW9 corroborated by medical evidence and no conflict between the two-Defence version accusing PW9 for murder of deceased not inspiring confidence—Initially A-1 was un-armed, when deceased on reaching the spot enquired cause of quarrel, A-1 rushed to his shop and brought the knife—This rules out that incident occurred suddenly in fit of rage A-1 acted in cruel manner and took undue advantage by inflicting repeated stab blows with force without any resistance from the deceased—Appeal of A-2 allowed—Appeal of A-1 dismissed.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Ms. Meena Choudhary Sharma, Advocate with Mr. Hirein Sharma, Advocate for Appellant Anwar and Amicus Curiae on behalf of Appellant Afsar.

FOR THE RESPONDENT : Ms. Richa Kapoor, APP.

CASES REFERRED TO:

1. *State of Uttar Pradesh* vs. *Naresh and ors.* (2011) 4 SCC 324.
2. *Abdul Sayed* vs. *State of Madhya Pradesh* (2010) 10 SCC 259.
3. *Nagaraja* vs. *State of Karnatka* (2008)17 SCC 277.

4. *Bhagwan Bahadure* vs. *State of Maharashtra* (2007) 14 SCC 728.
5. *State of Rajasthan* vs. *Dhool Singh* (2004) 12 SCC 546.
6. *'Suresh and another* vs. *State of UP'* (2001) 3 SCC 673.
7. *Anvaruddin* vs. *V. Shakur* 1990 (3) SCC 266.
8. *Guli Chand and others* vs. *State of Rajasthan* AIR 1974 SC 276.
9. *Dilip Singh and others* vs. *The State of Punjab* AIR 1953 SC 364.
10. *Rameshwar* vs. *State of Rajasthan* (AIR 1952 SC 54 at p. 59) (1952 Cri LJ 547).

RESULT: Appeal of A-2 allowed and Appeal of A-1 dismissed.

S.P. GARG, J.

1. In this appeal by Afsar (A-1) and Anwar (A-2), the judgment dated 19.09.1997 and order on sentence dated 22.09.1997 of Ld.ASJ in SC No. 73/1996 has been impugned. They were convicted in the said judgment for committing offences punishable under Section 302/34 IPC and were sentenced to undergo imprisonment for life with fine of Rs. 1,000/- each. A-1 was further convicted for committing the offence under Section 27 of the Arms Act and sentenced to undergo Rigorous Imprisonment for two years with fine of Rs. 500/-. Both sentences were to operate concurrently.

2. The criminal law was set into motion at around 7.15 P.M. on 20.09.1994 when Daily Diary (DD) No.15-A (Ex.PW-6/C) was recorded by HC Nasruddin (PW-6) at PS Welcome on getting information from duty Constable Jitender posted at GTB Hospital that Zulfikar brought by his father Irshad in injured condition was declared 'dead'. The investigation was assigned to SI Rakesh Kumar who with Const.Shakil reached the hospital and collected the MLC (Ex.PW-4/B). Irshad, the deceased's father, met him at the hospital and both returned to the spot. Mohd.Irshad (PW-1) made statement to SI Rakesh Kumar and stated that on that day, at about 6.15 P.M. he and his son Askar were present at his factory. A-1 and A-2 who were running furniture shop in their neighbourhood were also present. A-1 after going to the first floor removed iron nails from

the wall and broke some wires as a result of which their machines (installed in the factory) stopped functioning. When his son Askar objected to that, A-1 started abusing him and hit him (Askar) with an iron rod (Saria) on his head as a result of which he (Askar) fell down. In the meantime, his other son Zulfikar (since deceased) reached there on a scooter and enquired the cause of quarrel. A-2 caught hold of Zulfikar on the exhortation of A-1, who brought a *churi* from his shop and stabbed him on the chest and abdomen. When he rushed to save his son, A-1 and A-2 fled the spot. He took his son to GTB Hospital where the doctor declared him 'dead'.

3. SI Rakesh Kumar made an endorsement on the statement and sent the rukka through Const.Shakil for registering a case under Section 302/34 IPC. Further investigation was taken over by Insp.Babu Singh, SHO, PS Welcome. He summoned the crime team and got the place of incident photographed; he seized blood stained earth, earth control, three small bottles and prepared a rough site plan. Since PW-1 (Mohd. Irshad) had indicted the accused, the police set out to apprehend them.

4. A-2 was arrested at about 10.30 P.M. from Kachi Colony, Kabir Nagar and the IO seized a blood stained shirt which he was wearing at that time. On 21.09.1994, the investigating officer (IO) conducted inquest proceedings; prepared brief facts and sent the dead body for post-mortem. Dr.A.K.Tyagi conducted the post-mortem on the dead body. On 22.09.1994, A-1 was arrested from Kachi Colony side. He was interrogated and pursuant to his disclosure statement A-1 lead the police to his shop No.17, Purani Kothi, Welcome and recovered *churi* (Ex.P-4) which was lying beneath the cash box. The IO prepared sketch of the *churi* and seized it by preparing a seizure memo. During the investigation, the IO sent exhibits to Forensic Laboratory (FSL) and collected its report subsequently. He recorded the statements of the witnesses conversant with the facts and after completion of the investigations, filed a charge-sheet against A-1 and A-2 for committing the aforesaid offence. Both the accused were duly charged and brought to trial.

5. To prove the charges, the prosecution examined seventeen witnesses. Statements of the accused were recorded under Section 313 Cr.P.C. to afford them an opportunity to explain the incriminating circumstance. They denied their complicity in the crime and pleaded that they were falsely implicated. They further stated that the real culprit was

Askar who committed murder of his brother Zulfikar who was a bad character and was in love with a girl Sitara @ Sattoo. His father and brothers opposed the relationship, and their relations were strained on that account. On the day of incident, there were exchange of hot words between Zulfikar and his brother Askar over payment of money and in the process Zulfikar snatched money from Askar and hit him with an iron rod on his head. When Zulfikar attempted to flee, Askar and his brother inflicted knife blows to him causing his death. The accused examined Sushil Kumar in their defence as DW-1. 6. After appreciating the evidence on record and considering the rival contentions of the parties, the Trial Court convicted both accused for the aforesaid offences.

7. Learned counsel for the Appellants assailed the findings of the Trial Court and urged that it did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the ocular testimonies of PW-1 (Mohd.Irshad) and PW-9 (Askar), who were related to the deceased and whose presence at the spot was highly doubtful; their chances of deposing falsely could not be ruled out. She further contended that all these witnesses were close relatives of the deceased and were interested witnesses and the Trial Court failed to examine their depositions with due care and caution, instead blindly placed reliance on it. PW-3 (Abdul Rehman) and PW-5 (Mohd.Farooq) were introduced subsequently to buttress the prosecution case. The Trial Court did not consider the cogent testimony of DW-1 (Sushil Kumar) and unduly preferred the depositions of prosecution witnesses. No overt act was attributed to A-2. The prosecution witnesses had given contradictory versions about exhortation catching hold of Zulfikar. The plausible defence version put forward by the accused in their statements under Section 313 Cr.P.C. was not considered at all. PW-9 left the hospital against medical advice and his conduct, urged the counsel, lends credence to the defence version that after committing the crime, he fled the spot and went to his village. In order to save his son (PW-9 Askar) PW-1 (Mohd.Irshad) falsely implicated the accused because they had objected to relations of his daughter with one 'pahari' boy who used to send love letters to her. The Trial Court, urged the counsel, ignored the vital discrepancies emerging from testimonies of the prosecution witnesses. The counsel further argued that even if the prosecution case is taken at its face value, Section 302 IPC was not attracted. The stabbing incident happened suddenly without premeditation and A-1 in a fit of rage allegedly inflicted the blows.

8. Ld.APP supported the findings of the Trial Court and urged that the testimonies of PW-1, 3, 5 and 9 were categorical and proved the accused's guilt and their evidence cannot be ignored merely because they were interested witnesses. Close relationship is not a factor to discard their otherwise credible version. The accused's name was reflected in the FIR lodged by PW-1 (Mohd. Irshad). He narrated the sequence of the events in detail at the earliest point of time. There was no possibility of fabrication of a false story during that short period. Ld. APP further urged that both accused shared common intention to cause fatal blow with *churi* on the vital parts of deceased's body. A-2 facilitated the crime and caught hold of the deceased while A-1 inflicted fatal blows. The recovery of the weapon of offence pursuant to A-1's disclosure statement is a material incriminating circumstance. PW-9 had to rush to the village after the incident to inform the relatives and his credible deposition cannot be disbelieved because he left the hospital on his own. The defence version accusing PW-9 of murder of his brother has no substance. 9. We have considered the submissions made by the learned counsel for the parties and perused the Trial Court records.

10. Before we enter into the merits of the case, it is desirable to highlight that the homicidal death of Zulfikar is not under challenge. The deposition of Dr.A.K.Tyagi (PW-8) who conducted the post-mortem of the dead body of the victim leaves no manner of doubt that he suffered a homicidal death.

(A) Involvement of A-2 :

11. Allegations against A-2 are that he caught hold of Zulfikar and A-1 stabbed him with a churi and shared common intention with A-1 to commit the crime. We find no cogent, clinching, trustworthy evidence on this score. Undoubtedly, it was A-1who had gone up-stairs to remove the nails from the wall causing disruption in the running of the machines. A-2 was not in picture at that time and was not instrumental in removing the nails from the wall. The initial altercation took place between A-1 and PW-9 (Askar) upon his objection to the removal of the nails. It was A-1 who started abusing PW-9 and hit an iron rod on his head. No witness assigned any role to A-2 in the initial altercation. A-2 did not intervene in that quarrel or exhort A-1 to inflict injuries to PW-9. Apparently, A-2 did not participate in the quarrel in any manner. When Zulfikar (since deceased) happened to reach the spot on scooter and enquired the cause

of quarrel, the prosecution alleged exhortation. However, contradictory and inconsistent versions have emerged as to who exhorted whom. In the statement Ex.PW-1/A (which formed the basis of rukka/FIR) PW-1 (Mohd. Irshad) stated that Afsar (A-1) exhorted A-2 to catch hold of Zulfikar, but he deviated from his earlier statement in the Court deposing that A-2 exhorted A-1 to catch hold of Zulfikar. The prosecution did not explain the variation and Ld.APP did not confront the witness with his statement Ex.PW-1/A. PW-9 Askar contradicted PW-1 and deposed that A-1 exhorted by saying *'pakar lo ise bhi'* and A-2 caught hold of Zulfikar from behind. PW-9 was confronted with his statement Ex.PW-9/DA recorded under Section 161 Cr.P.C. is silent about whether A-2 had caught hold of Zulfikar from behind. PW-9 did not explain the material improvements in his deposition before the Court.

12. The precise role attributed to A-2 is only of catching hold of Zulfikar and it is alleged that he continued to do so till A-1 brought the *churi* from his shop and stabbed him. Apparently, A-1 was unarmed when Zulfikar emerged on the scene. Even while leaving the spot, A-1 did not exhibit intention to procure the *churi* from the shop. Apparently there was no purpose of 'exhortation' on the mere making of inquiry about the cause of trouble especially when the deceased had not given any threat to retaliate. No knowledge can be imputed to A-2 that A-1 would rush to the shop to bring the *churi*. It seems highly improbable that A-2 continued to catch hold of Zulfikar from behind for such a long time awaiting arrival of A-1 with the churi, because the close relatives (PW-1, 3, 5 and 9), were present there. They would not have been mute spectators would have intervened to release him from the clutches of A-2. Curiously, the servants working in the factory also exhibited unnatural conduct and did not intervene in the incident. The mere presence of A-2 at the spot was not sufficient to conclude that he shared common intention with A-1 to murder Zulfikar. The prosecution has failed to prove the role assigned to A-2 in the incident.

13. It is well settled that although a man may be present when a crime is committed, if he takes no part in it and does not act in concert with those who commit it, he will not be held liable merely because he did not endeavour to prevent it, or to apprehend the offender. All those present do not necessarily assist or participate by their presence in every act which is done in their presence, nor are they consequently liable to

be punished as offenders. There must be community of design to make the person present liable. The facts that the accused were together at the time of the incident and ran away together is not conclusive evidence of common intention in the absence of any more positive evidence. The mere circumstance of a person being present on an unlawful occasion does not, therefore, raise a presumption of that person's complicity in an offence then committed.

14. Observations of the Supreme Court in **'Nagaraja vs. State of Karnatka'** (2008)17 SCC 277 reflected the law on this aspect as under :

> "18. For invoking the provisions of Section 34 IPC, at least two factors must be established; (1) common intention, and (2) participation of the accused in the commission of an offence. For the aforementioned purpose although no overt act is required to be attributed to the individual accused but then before a person is convicted by applying the doctrine of vicarious liability not only his participation in the crime must be proved but presence of common intention must be established. It is true that for proving formation of common intention, direct evidence may not be available but then there cannot be any doubt whatsoever that to attract the said provision, prosecution is under a bounden duty to prove that the participants had shared a common intention. It is also well settled that only the presence of the accused by itself would not attract the provisions of Section 34 IPC. Other factors should also be taken into consideration for arriving at the said conclusion. The accused persons were not related to each other; they did not have any family connection; they have different vocations. It has not been established that they held any common animosity towards the deceased."

15. Similarly in another case **'Suresh and another vs. State of UP'** (2001) 3 SCC 673 the Supreme Court laid down :

> "31. It is difficult to conclude that a person, merely because he was present at or near the scene, without doing anything more, without even carrying a weapon and without even marching along with the other assailants, could also be convicted with the aid of Section 34 IPC for the offence committed by the other

accused. In the present case, the FIR shows that A-3 Pavitri Devi was standing on the road when the incident happened. Either she would have reached on the road on hearing the sound of the commotion because her house is situated very close to the scene, or she would have merely followed her husband and brother out of curiously since they were going armed with axe and choppers during the wee hours of the night. It is not a necessary conclusion that she too would have accompanied the other accused in furtherance of the common intention of all the three."

(B) Involvement of A-1 :

16. Allegations against A-1 are that in the initial altercation, he injured PW-9 (Askar) and when Zulfikar reached the spot, he inflicted multiple stab injuries upon him. The accused did not challenge the injuries on PW-9 (Askar) and the deceased Zulfikar. He however, gave his own version in the statement under Section 313 Cr.P.C. stating that Askar was injured by the deceased Zulfikar and when he (Zulfikar) attempted to flee, PW-9 and his brother stabbed him on his chest and abdomen. He denied that he was the perpetrator of the crime.

17. To ascertain the culpability of A-1 the statement (Ex.PW-1/A) made by PW-1 (Mohd. Irshad) to the police soon after the occurrence is crucial. In his statement, PW-1 (Mohd. Irshad) gave graphic details and the sequence of events and named A-1 as having stabbed Zulfikar. PW-1 also disclosed the genesis of the quarrel i.e. removal of iron nails from the wall causing disruption in the running of the machines. The occurrence took place at 6.15 P.M; the Rukka Ex.PW-15/A was sent promptly without any delay at about 8.35 P.M. for registering the FIR. An FIR recorded without any loss of time is likely to be free from embroideries, exaggerations and without any body intermeddling with, to introduce a false story. Trustworthiness of the prosecution story can be judged from the FIR.

18. Appearing as PW-1 before the Court, PW-1 proved A-1's role narrated to the police at the first instance without variation. He categorically testified that A-1 caused injuries to his son Askar and stabbed Zulfikar on his chest and abdomen after bringing a *churi* from his shop. Despite searching cross-examination, A-1 failed to elicit any vital discrepancies to

discard his testimony. No suggestion was put to the witness denying his presence at the spot. MLC Ex.PW-4/B corroborates PW-1's version that he took Zulfikar to the GTB Hospital as his name finds mention in it ensuring his presence at the spot. PW-1 used to reside in the factory premises itself as disclosed in his cross-examination, on that count also, his presence at the shop/factory was quite reasonable and natural.

19. PW-9 (Askar) corroborated PW-1 in all material facts and was categorical that A-1 stabbed Zulfikar. He denied the suggestion that he and his brother had stabbed Zulfikar. No material inconsistency emerged in his cross-examination to impeach his credibility. PW-9 was also medically examined and MLC Ex.PW-4/A was prepared at GTB Hospital. He was taken to GTB Hospital at 7.15 P.M. and was declared fit to make statement. The injuries sustained by PW-9 in the occurrence ensure his presence at the spot.

20. PW-5 (Mohd. Farooq) claimed himself to be an eye witness. However, on scrutinizing his deposition thoroughly, we find him not to be trustworthy to place implicit reliance on his testimony. He is a chance witness who happened to reach at the shop of the injured (Askar). PW-1 (Mohd. Irshad) in the fag end of his statement Ex.PW-1/A spoke of his presence. The conduct of PW-5 (Mohd. Farooq) in not intervening to save the injured and the deceased; in not reporting the incident to the police and not removing the deceased to the hospital is unreasonable and casts serious doubt about his presence at the spot. Similarly, the presence of PW-3 (Abdul Rehman) as a witness to the incident seems doubtful. PW-1 in the statement (Ex.PW-1/A) did not depose about presence of PW-3. He claimed to have gone to answer the call of nature and on his return, he saw the incident from a distance. The witness made various improvements and was duly confronted with his statement Ex.PW-3/DA recorded under Section 161 Cr.P.C. His conduct at the time of incident is unnatural as he too did not intervene to save the deceased or take him to the hospital. Relationship of this witness with the deceased for the last 10/12 years puts the Court on guard to appreciate his evidence in its true perspective. We are not inclined to place reliance on his version.

21. Perusal of the clinching and convincing statements of PW-1 and PW-9 reveals that they are categorical about the role played by A-1 in the incident. Exclusion of depositions of PW-3 and PW-5 would not dilute the prosecution case. PW-9 (Askar) himself is an injured witness

and his testimony cannot be ignored without good reasons.

22. Mere contradictions/improvements on trivial matters cannot render an injured witness's deposition untrustworthy. The law on this aspect has been detailed in the latest judgment **State of Uttar Pradesh vs. Naresh and ors.** (2011) 4 SCC 324 as under :

> "27. The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. (Vide **Jarnail Singh v. State of Punjab, Balraje v. State of Maharashtra** and **Abdul Sayeed v. State of M.P.**)"

23. Similarly in another case **Abdul Sayed vs. State of Madhya Pradesh** (2010) 10 SCC 259, the Supreme Court observed that :

> "28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness." [Vide **Ramlagan Singh v. State of Bihar, Malkhan Singh v. State of U.P., Machhi Singh v. State of Punjab, Appabhai v. State of Gujarat, Bonkya v. State of Maharashtra, Bhag Singh, Mohar v. State of U.P.** (SCC p. 606b-c), **Dinesh Kumar v. State of Rajasthan, Vishnu v. State of Rajasthan, Annareddy Sambasiva Reddy v. State of A.P.** and **Balraje v. State of Maharashtra.**]

29. While deciding this issue, a similar view was taken in Jarnail Singh v. State of Punjab, where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)

"28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In **Shivalingappa Kallayanappa v. State of Karnataka** this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In **State of U.P. v. Kishan Chand** a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide **Krishan v. State of Haryana**). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below."

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party

for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

24. Undoubtedly, PW-1 and PW-9 are closely related to the deceased. Ordinarily a close relative would not intend to screen the real culprit as he would be interested to see that the real offender is brought to book. In this context, it was held, by the Supreme Court, in **Anvaruddin v V. Shakur** 1990 (3) SCC 266, that:

> "It is well settled law that evidence of witnesses to the occurrence cannot be thrown overboard merely because they are interested and partisan witnesses. All that the law demands is that their evidence should be scrutinised with great care and caution to safeguard against the normal temptation to falsely implicate others."

25. In a similar vein, the Supreme Court had ruled, in **Dilip Singh and others v. The State of Punjab** AIR 1953 SC 364 that:

> "A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

26. Vivien Bose, J, put the matter even more clearly, as follows:

> "We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hands on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in - **'Rameshwar v. State of Rajasthan'** (AIR 1952 SC 54 at p. 59) (1952 Cri LJ 547). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

27. The above decision was followed in **Guli Chand and others v. State of Rajasthan** AIR 1974 SC 276.

28. Ocular testimony of PW-1 and PW-9 has been corroborated by medical evidence and there is no conflict between the two. PW-4 (Dr.Kishan Kant) proved PW-9 (Askar)'s MLC i.e. Ex.PW-4/A and that of deceased Zulfikar (Ex.PW-4/B). The accused did not opt to cross-examine him. PW-8 (Dr.A.K.Tyagi) conducted the post-mortem on the body of the deceased Zulfikar and found six incised stab wounds of various dimensions on various body parts of the deceased including over lower front of chest, outer front of left-side abdomen. The cause of death was opined to be shock as a result of haemmohrage caused by injuries to internal organs (heart and lung). PW-1 and PW-9 spoke about the injuries mentioned in the post-mortem report. PW-9 sustained simple injuries and there was no history of unconsciousness, vomiting etc. The doctor concerned did not ask for admission in the hospital. He was merely referred to some other branch. PW-9 explained that he had to go to his village to inform the relations of Zulfikar's death. By no stretch of imagination, his departure to village can be considered 'incriminating'.

29. The defence version accusing PW-9 for Zulfikar's murder does not inspire confidence. There is no material on record to conclude that the relations between the family members of deceased were hostile or that PW-9 and his brother stabbed Zulfikar. DW-1 (Sushil Kumar) is a chance witness. No suggestion was put to PW-1 and PW-9 in their cross-examination that DW-1 was present at the time of occurrence. He neither intervened in the alleged quarrel nor reported the incident to the police. In the examination-in-chief itself he stated that he did not see

anyone inflicting any injury. DW-1 did not prove the defence pleaded by the accused in their statements recorded under Section 313 Cr.P.C.

30. In the light of above discussion, we are of the considered view that the prosecution has established beyond doubt that the injuries were inflicted by A-1 on the head of PW-9 (Askar) in the initial quarrel and subsequently he stabbed Zulfikar.

31. This takes us to the alternative plea taken by the counsel that even assuming the case to be true, the matter would still not fall within the definition of murder but would be culpable homicide not amounting to murder. The initial quarrel took place with A-1 on his removal of iron nails from the wall. When Zulfikar reached the spot and enquired from A-1 the cause of quarrel, he went to his shop, brought a *churi* and inflicted several stab blows on chest and abdomen of the deceased. The post-mortem report (Ex.PW-8/A) discloses six incised stab wounds of various dimensions on the vital organs of the body of the deceased. Injuries Nos.2 to 6 were caused by sharp single edged weapon. Injury Nos.2 and 3 were sufficient to cause death in the ordinary course of nature. The deceased died due to shock as a result of haemmohrage caused by injuries on two internal organs i.e. heart and lung. The deceased Zulfikar was unarmed at that time. There was no immediate provocation to force A-1 to brutally stab him repeatedly on vital parts of the body causing instant death of a 25 year old young man. After causing fatal blows, A-1 absconded from the spot. He had a motive to initiate the quarrel, because without the complainant's permission, he removed the iron nails causing disruption in the functioning of the machines in the factory. All these facts unmistakably prove A-1's intention to commit murder of the deceased by inflicting bodily injuries sufficient to cause death in the ordinary course of nature. Earlier A-1 was unarmed and when Zulfikar, on reaching the spot enquired the cause of quarrel, he rushed to his shop and brought the sharp edged weapon i.e. *churi*; it ruled out that the incident occurred 'suddenly' in a fit of rage. The accused acted in a cruel manner and took undue advantage by inflicting repeated stab blows with force without any resistance from the deceased.

32. The law on this aspect has been detailed by the Supreme Court in the judgment **'Bhagwan Bahadure vs. State of Maharashtra'** (2007) 14 SCC 728 where single blow was considered to prove intention to commit murder as under :

"XXXX XXXX XXXX

Keeping the aforesaid legal principles in view, the factual position is to be examined. It cannot be said as a rule of universal application that whenever one blow is given Section 302 IPC is ruled out. It would depend upon the facts of each case. The weapon used, size of weapon, place where the assault took place, background facts leading to the assault, part of the body where the blow was given are some of the factors to be considered."

33. In another case **'State of Rajasthan vs. Dhool Singh.** (2004) 12 SCC 546, Supreme Court observed :

"XXXX XXXX XXXX

13. In regard to the finding of the High Court that the prosecution has not even established that the respondent herein had acted with an intention of causing death of the deceased, we must note that the same is based on the fact that the respondent had dealt a single blow which according to the High Court took the act of the respondent totally outside the scope of Exception I to Section 300 IPC. Here again we cannot agree with the finding of the High Court. The number of injuries is irrelevant. It is not always the determining factor in ascertaining the intention. It is the nature of injury, the part of body where it is caused, the weapon used in causing such injury which are the indicators of the fact whether the respondent caused the death of the deceased with an intention of causing death or not. In the instant case it is true that the respondent had dealt one single blow with a sword which is a sharp-edged weapon measuring about 3 ft in length on a vital part of the body, namely, the neck. This act of the respondent though solitary in number had severed sternocleidal muscle, external jugular vein, internal jugular vein and common carotid artery completely leading to almost instantaneous death. Any reasonable person with any stretch of imagination can come to the conclusion that such injury on such a vital part of the body with a sharp-edged weapon would cause death. Such an injury in our opinion not only exhibits the intention of the attacker in causing the death of the victim but also the

knowledge of the attacker as to the likely consequence of such attack which could be none other than causing the death of the victim. The reasoning of the High Court as to the intention and knowledge of the respondent in attacking and causing death of the victim, therefore, is wholly erroneous and cannot be sustained."

(C) Conclusion :

34. In view of the above discussion, we are of the view that the impugned judgment convicting A-2 (Anwar) cannot be sustained and is set aside and his appeal is allowed.

35. Regarding A-1, we find no illegality or irregularity in the impugned judgment the appeal filed by A-1 (Afsar) lacks merit and is dismissed.

36. We are informed that A-1 (Afsar) is absconding and is untraceable. The Registry shall transmit the Trial Court records forthwith to issue coercive process to ensure A-1's arrest to serve the remainder of his sentence.

ILR (2012) V DELHI 485
MAT. APP.

PRADEEP PANT & ANR. ….APPELLANTS.

VERSUS

GOVT. OF NCT OF DELHI ….RESPONDENT

(VEENA BIRBAL, J.)

MAT. APP. NO. : 19/2012 DATE OF DECISION: 27.04.2012

Hindu Marriage Act, 1955—Section 13 (B); Delhi High Court Hindu Marriage Rules, 1979—Appeal against dismissal of petition u/s 13(B) on the ground that the parties have nowhere stated that there has been no cohabitation for one year. Petition categorically stated that since 30.03.2010 parties have been living separately under the same roof and they are not able to live together as husband and wife on account of temperamental differences since then. Along with the petition in separate affidavits both parties stated that they have been living separately and have not cohabited since 30.03.2010. Appellants contend that there is no requirement under Delhi High Court Hindu Marriage Rules, 1979 to state about non-cohabitation specifically in the petition—Held Even if parties are living under the same roof but are not living as husband and wife, they can be said to be living separately—Essence is the relationship of husband and wife and not the same roof. There is specific affidavit of not cohabitation and averments in the petition that parties are not living together as husband and wife—Petition fulfills all the requirements u/s 13(B) Appeal allowed.

The aforesaid observation leaves no manner of doubt that even if the parties are living separately under the same roof and are not cohabiting or are not living together as husband and wife, they can be stated to be living separately. The parties have also filed their separate specific affidavit explaining the reasons of their being under one roof.

(Para 9)

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Vaibhav Vats, Advocate.

FOR THE RESPONDENT : Mr. H.S. Sachdeva, Advocate.

RESULT: Appeal Allowed.

VEENA BIRBAL, J.

1. Admit.

2. With the consent of parties the matter is taken up for final

disposal.

3. The relevant facts for the disposal of present appeal are as under:-

A petition under Section 13-B(1) of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act') for a decree of divorce by mutual consent was filed by the appellants stating therein that their marriage was solemnized according to Hindu rites and ceremonies on 18.01.1993 at Anita Colony, Bajaj Nagar, Jaipur, Rajasthan. After marriage, they lived together as husband and wife at D2-2178, Vasant Kunj, New Delhi-110017. A daughter was born from their wedlock on 27.05.2000. Since 30.03.2010, they are living separately on account of temperamental differences. Despite their best efforts, they could not reconcile and there is no possibility of their living together as husband and wife in future. Accordingly, they have agreed to take divorce by way of mutual consent. They have arrived at an amicable settlement dated 13.12.2011. The terms of settlement are reproduced in the joint petition. A copy of the same is also annexed with the petition under Section 13-B(1). As per their settlement, appellant/husband has agreed to pay a sum of Rs. 30 lakhs to wife towards all her claims of maintenance, permanent alimony, etc. They have also entered into a settlement in respect of their properties. Appellant/husband has also agreed to bear the expenses of the child and has also agreed to take care of household expenses of his wife and daughter by paying 10% of his salary after tax deductions. It is also stated in the petition that respondent/wife shall take care of the minor daughter and appellant/husband shall have visitation rights of the child as per the convenience of the child keeping in view her education schedule. It is also stated that the settlement has been arrived at with their free consent, without any pressure or undue influence and there is no collusion between them in filing the present appeal. Their consent has also not been obtained by fraud or undue influence. They have prayed that their marriage be dissolved by a decree of divorce by mutual consent. Along with the appeal there is an affidavit of non-collusion as well as an affidavit of non-cohabitation wherein it is categorically stated that they are living separately since 30.03.2010 and there has been no cohabitation between them since then.

4. Without recording the statement of the parties, the learned Principal Judge, Family Court, New Delhi had taken up the petition and had

rejected the same on the ground that the parties have nowhere stated that there has been no cohabitation between them as husband and wife since 30.03.2010. They have not contended that they have not cohabited as husband and wife for last one year, as such, the court cannot presume that there has been cohabitation between them as husband and wife. Accordingly, the learned Principal Judge was of the view that parties have failed to show that there has been cessation of cohabitation between them since 30.03.2010. Further, the learned Principal Judge was of the view that husband is paying Rs. 30 lakhs to the wife as lumpsum payment for settlement of her claims of maintenance and permanent alimony and despite that he has also agreed to bear the household expenses of the respondent/wife and the child. Under these circumstances, they have not severed their relationship and it amounts to intention to perform marital obligations. Learned Principal Judge also observed that the parties are living under one roof as such it cannot be said that they are living separately and accordingly it is held that the parties have failed to prove that they are living separately since 30.03.2010 and as such vide impugned order the petition under Section 13-B(1) of the Act has been dismissed.

5. Aggrieved with the same, the present petition is filed.

6. Learned counsel for the appellants has contended that it has been categorically stated in the joint petition under Section 13-B(1) of the Act that since 30.03.2010 they are living separately under the same roof and they are not able to live together as husband and wife on account of temperamental differences since then. It is further contended that along with the petition there is a separate affidavit of both the parties wherein they have specifically stated that they are living separately since 30.03.2010 and have not cohabited since then. Learned counsel has further contended that there is no requirement under the Delhi High Court Hindu Marriage Rules, 1979 to state about non-cohabitation specifically in the petition under Section 13-B(1) of the Act. The only requirement under the aforesaid Rules is filing of an affidavit to this effect and the said affidavit was filed by the parties and learned ADJ has not considered the same. It is contended that there is no discussion in the impugned order about the affidavit of non-cohabitation filed by the parties. It is further stated that the husband has not agreed to give entire salary to the wife but has only agreed to give 10% of the same after tax deductions to the wife in the terms of settlement for running the household expenses to the wife and the child

and the lumpsum amount has been given towards her claim for permanent alimony and maintenance. It is contended that by doing so no presumption can be drawn that they have not severed their relationship as husband and wife. It is further contended that even if the parties are living under the same roof but in these circumstances are not cohabiting and have no intention to live as husband and wife as such their being under one roof does not amount to living as husband and wife. In support of the contention, learned counsel has referred to the judgment of **Smt. Sureshta Devi vs. Om Parkash;** (1991) 2 SCC 25.

7. In the present case, the parties have categorically stated in the petition under Section 13-B(1) of the Act that they are living separately since 30.03.2010 and have not been able to live together since then. The efforts of reconciliation have also failed and there is no possibility of their living together as husband and wife. The petition is duly verified and is supported with their affidavits in this regard. The petition is also supported with separate affidavit of both the parties to the effect that they have not cohabited since 30.03.2010. Perusal of impugned order shows that the learned Principal Judge has ignored the said affidavit. It is also stated in the petition that they have been living separately since 30.03.2010 and thereafter have not been able to live together on account of temperamental differences. Despite best efforts of common friends and relatives, the petitioners cannot reconcile. There is no possibility of their living together as husband and wife now or in future. The petition fulfils all the requirements as are laid down under the Rules. It also fulfils the requirements of Section 13-B(1) of the Act which are as under:-

> "(i) They have been living separately for a period of one year;
>
> (ii) They have not been able to live together, and
>
> (iii) They have mutually agreed that marriage should be dissolved."

8. As regards 'living separately' stated in Section 13-B(1) of the Act, it has been explained by the Supreme Court in **Smt. Sureshta Devi v. Om Prakash** (supra) as under:-

> "9. The 'living separately' for a period of one year should be immediately preceding the presentation of the petition. It is necessary that immediately preceding the presentation of petition, the parties must have been living separately. The expression 'living separately', connotes to our mind not living like husband and wife. It has no reference to the place of living. The parties may live under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. The second requirement that they 'have not been able to live together' seems to indicate the concept of broken down marriage and it would not be possible to reconcile themselves. The third requirement is that they have mutually agreed that the marriage should be dissolved."

9. The aforesaid observation leaves no manner of doubt that even if the parties are living separately under the same roof and are not cohabiting or are not living together as husband and wife, they can be stated to be living separately. The parties have also filed their separate specific affidavit explaining the reasons of their being under one roof.

10. The meaning of the expression 'living separately' under Section 13-B(1) of the Act has also been discussed by this court in **Meghna Deva vs. Siddharth Suryanarayan;** 131 (2006) Delhi Law Times 513 wherein after considering **Sureshta Devi's** case (supra) it has been held that the essence is the relationship of husband and wife and not the same roof. In the said case, it has been further observed as under:-

> "8. In my considered view in such a situation the Courts must encourage the amicable dissolution rather than compelling the parties to litigate or continue the relationship on paper which has actually broken down. The Trial Court fell into an error of law while solely relying on the presence of the wife and the husband under the same roof to reach a conclusion that they must be said to be not living separately."

11. As regards terms of settlement, learned counsel for the parties have submitted that the terms of settlement have been arrived at keeping in mind the welfare of the child as well as the monetary status of the husband.

12. Considering the material on record, no inference could have been drawn by the learned Principal Judge, Family Court that they have not severed their relationship of husband and wife as has been done in the present case. There is specific affidavit of non-cohabitation of the parties. There are averments in the petition that they are not living together as husband and wife which are duly verified. The petition fulfils all the requirements of Section 13-B(1) of the Act. They have also settled all their claims as is stated in the joint petition and as per terms of settlement annexed with the same.

13. In view of the above discussion, the impugned order cannot be legally sustained and accordingly the same is set aside. The learned Principal Judge, Family Court shall take up the petition of the parties and record their statement on oath and thereafter shall pass appropriate order on it in accordance with law. The parties to appear before the concerned Family Court on 08.05.2012. The record of Family Court be sent back forthwith.

The appeal is allowed. There is no order as to costs.

ILR (2012) V DELHI 491
MAT. APP.

SUNNY **….APPELLANT**

VERSUS

SUJATA **….RESPONDENT**

(VEENA BIRBAL, J.)

MAT. APP. NO. : 38/2012 **DATE OF DECISION: 27.04.2012**

Hindu Marriage Act, 1955—Section 13 (B), 14—Appeal against dismissal of application seeking waiver u/s 14 in a petition for divorce on consent. Whether petition for dissolution of marriage on mutual consent be filed

before expiry of one year separation—Held:- The requirements u/s 13 (1) (B) are (i) parties are living separately for a period of on year (ii) they have not been able to live together and (iii) they have mutually agreed that marriage should be dissolved. S.14 bars the filing of the petition for dissolution of marriage unless on the date of presentation of the petition one year has elapsed from the date of marriage. Proviso that the court may on application made to it in accordance with such rules as may be made by the High Court in that behalf allow petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent. Period of one year for living separately under s. 13(B) is not directory but mandatory and the same cannot be condoned by the Court u/s 14. Appeal dismissed.

Section 14 of the Act bars the filing of the petition for dissolution of marriage by a decree of divorce unless on the date of the presentation of the petition one year has elapsed from the date of marriage. The proviso to said section provides that the court may on application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent. The reading of the section makes it clear that it is applicable to the divorce proceedings referred under section 13 of the Act. **(Para 8)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER **:** Mr. Ashok Anand, Advocate.

FOR THE RESPONDENT **:** Mr. H.R. Gehlot, Advocate.

CASES REFERRED TO:

1. *Mohan Saili and Sonali Singh* vs. *Nil:* 2010(175) DLT 259.
2. *Ms. Urvashi Sibal and Anr* vs. *Govt. of NCT of Delhi:* AIR 2010Delhi 157.
3. *Anil Kumar Jain* vs. *Maya Jain:* II (2009) DMC 449 (SC).
4. *Miten S/o Shyamsunder Mohota (Goidani) and Anr.* vs. *Union of India (UOI):* 2008 (3) ALLMR 507.
5. *Vijayalakshmamma and Anr.* vs. *B.T. Shankar* MANU/SC/0200/2001 : [2001] 2 SCR 769.

RESULT: Appeal Dismissed.

VEENA BIRBAL, J. (ORAL)

CM No. 7545/2012 (exemption)

Exemption as prayed for is allowed subject to just exceptions. Application stands disposed of.

MAT.APP. 38/2012

1. Admit.

2. With the consent of parties the matter is taken up for final disposal.

3. Briefly, the facts are as under:-

The parties had filed a joint petition under Section 13(B)(1) of the Hindu Marriage Act (hereinafter referred to as 'the Act') for dissolution of their marriage and decree of divorce by mutual consent stating therein that their marriage was solemnized on 24.06.2011 at Arya Samaj Mandir, Jamuna Bazar, Delhi, according to Hindu rites and ceremonies. Since that day itself, they are living separately from each other. Efforts of reconciliation between them had also failed. Accordingly, they decided to dissolve their marriage u/s 13B(1) & (2) of the Act out of their free will and desire. They had also stated having settled all their claims. Along with the petition u/s 13B(1) of the Act, an application under Section 14 of the Act was filed. Almost the same averments were made in the said application

as were stated in the petition under Section 13B(1) of the Act. They had prayed that the separation period of one year as prescribed under Section 13B(1) of the Act had not elapsed, as such, the same be waived u/s 14 of the Act. The said application was dismissed by the learned ADJ, Delhi vide impugned order dated 15th March, 2012. The said order has been assailed by filing present appeal.

4. The learned counsel for appellant has argued that the parties have not lived together after their marriage and all the efforts of reconciliation between them have failed and there is no possibility of their living together, as such permission be granted to file petition under Section 13B(1) of the Act before expiry of one year of separation. It is contended that under Section 14(1) of the Act the court has power to waive the said period of one year.

5. Section 13B(1) of the Act reads as under:-

> "Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (amendment) Act, 1976 (68 of 1976) on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved."

6. The requirements under Section 13B(1) are as under:-

> "(i) They have been living separately for a period of one year;
>
> (ii) They have not been able to live together, and
>
> (iii) They have mutually agreed that marriage should be dissolved."

7. A plain reading of section 13B(1) of the Act makes it clear one of the conditions is living separately for a period of one year or more before the presentation of petition for divorce by mutual consent. The period of 'living separately' prescribed therein is a statutory period.

8. Section 14 of the Act bars the filing of the petition for dissolution of marriage by a decree of divorce unless on the date of the presentation

of the petition one year has elapsed from the date of marriage. The proviso to said section provides that the court may on application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent. The reading of the section makes it clear that it is applicable to the divorce proceedings referred under section 13 of the Act.

9. In **Anil Kumar Jain Vs. Maya Jain:** II (2009) DMC 449 (SC), the question involved was whether decree can be passed for mutual consent u/s 13B of the Act when one of the petitioners withdraws consent to such decree prior to passing of such decree. While dealing with the provisions of Section 13(B) of the Act, the Supreme Court has held that neither the civil courts nor the High Courts can pass orders before the period prescribed under the relevant provisions of the Act or on grounds not provided for in Section 13 and 13B of the Act.

10. In **Miten S/o Shyamsunder Mohota (Goidani) and Anr. Vs. Union of India** (UOI): 2008(3)ALLMR 507, the constitutional validity of provisions of Section 13B of the Act was challenged. In the said case, one of the contentions raised was that period of one year provided under section 13B(1) of the Act is merely directory and can be suitably waived or altered by the court depending upon the facts and circumstances of the case and compliance of the conditions u/s 13B(1) of the Act is not mandatory. While rejecting the contentions, the Bombay High Court has held as under:-

> "13.1. Provisions of Section 13B of the Act are mandatory and the condition precedent to the presentation of the petition set out therein had to be satisfied strictly. Further, Section 14 of the Act prior to 1976 amendment had put a further bar stating that notwithstanding anything contained in the Act, the Courts shall not be competent to entertain any petition for dissolution of marriage by a decree of divorce unless the petition had been presented after a lapse of three years since the date of marriage. However, proviso to Section 14(1) provided an exception to the effect that a petition could be presented even before the expiry of the said period of three years if circumstances of exceptional

> hardship to the petitioner or of exceptional depravity on the part of the respondent existed and in such cases the Courts may, after hearing, pronounce a decree subject to the condition that the decree shall not have effect until after the expiry of three years. In this backdrop and while amending the Act in the year 1976, the Legislature while keeping the three of its aforementioned objects in mind, reduced the period from three years to one year and maintained the language of Section 14 as well as its proviso otherwise intact. In other words, the Legislature did not alter or change the contents of ingredients of Section 14 except to the extent of reducing the period from three years to one year. This is despite the fact that the Law Commission in its recommendations relating to Section 14 of the Act in its 59th Report in March, 1974 had asked for deletion of Section 14 of the Act.
>
> 14. As already noticed, by the same Act 68 of 1976, Section 14 was amended and Section 13B was introduced in the Act. The language of Section 13B is clear and unambiguous. The Legislature in its wisdom did not introduce any relaxation in Section 13B of the Act. There is nothing in the language of section which can suggest that the provisions of Section 13B are simpliciter procedurally directed and can be moulded by the Court in exercise of its judicial discretion depending on the facts and circumstances of the case. This provision is intended to liberalise the provisions relating to divorce. Being aware of the existing provisions, report of the Law Commission and the need of the society still the Legislature chose not to add any proviso granting relaxation to the conditions imposed under Section 13B(1) and/or 13B(2). It would not be permissible for the Court to read the expression 'living separately for a period of one year or more' as by adding the word 'may' or for such period as the Court in its discretion may consider appropriate. We shall shortly proceed to discuss the purpose of introduction of Section 13B and its object. It is a settled rule of interpretation that Court while interpreting the statutory provisions would not add or subtract the words from the section nor would it give meaning to the language of the section other than what is intended on the plain reading of the provision. Reference can be made to the judgment of the Supreme

Court in **Vijayalakshmamma and Anr. v. B.T. Shankar** MANU/SC/0200/2001 : [2001] 2 SCR 769."

11. In **Ms. Urvashi Sibal and Anr Vs. Govt. of NCT of Delhi:** AIR 2010Delhi 157, while dealing with the same question as is raised in the present case, after discussing the relevant provisions of the Act and the relevant case law, this court has held as under:-

> "Thus, it is clear that the statutory period of one year required to be maintained by the parties for filing a petition under Section 13B of the Act are independent of the provisions contained in Section 14 of the Act. Section 13B when read is a complete Code in itself and, therefore, for filing a petition under Section 13B of the Act, the parties cannot be allowed to invoke Section 14 seeking waiver of the statutory period of one year from separation for filing a petition under Section 13B of the Act. "

12. Similar view has been taken in **Mohan Saili and Sonali Singh Vs Nil:** 2010(175) DLT 259 wherein it is held that period of one year for living separately under section 13B(1) of the Act is not directory and the same is mandatory and the same cannot be condoned by the Court under section 14 of the Act.

In view of the above discussion, no illegality is seen in the order of the trial court. Accordingly, appeal is dismissed.

ILR (2012) V DELHI 498
CRL. M.C.

KAJAL SEN GUPTA ….PETITIONER

VERSUS

AHLCON READY MIX CONCRETE, DIVISION OF AHLUWALIA CONTRACT (INDIA) LIMITED. ….RESPONDENT

(M.L. MEHTA, J.)

CRL. M.C. NO. : 1640/2011 DATE OF DECISION: 27.04.2012

Code of Criminal Procedure, 1973—Sections 482, 205 (2) & 317 (1)—Negotiable Instruments Act, 1881—Section 138—Petition filed for quashing of order of MM directing accused to appear personally on next date of hearing for furnishing bail bonds and disclosing defence where accused has been exempted from appearance—Contention of petitioner that after grant of personal exemption from appearance of the accused Magistrate become *functus officio* and cannot withdraw, the exemption so granted and that requirement of bail does not from part of proceeding within ambit of Section 205 (2) or Section 317 (1)- Held, grant of permanent personal exemption by the Magistrate to accused, in bailable offence, does not dispense with requirement of accused obtaining bail from Court and exemption from appearance granted by Magistrate could be revoked by Magistrate where necessary at any time—Purpose for permanently dispensing with personal appearance of accused is to prevent accused from undue hardship and cost in attending trial—Sections 205 (2) and empower Magistrate to direct personal attendance at any stage if necessary-While granting permanent exemption, MM is deemed to

have reserved his right to accused to appear in person at the trial at any stage of the proceedings if necessary—Concept and purpose of bail mutually exclusive to the purpose of grant of personal exemption from appearance, they operate in different spheres of trial though are intrinsically connected—Permanent personal exemption cannot be understood as a blanket order dispensing with appearance and shall be subject to Sections 205 (2) and 317 (1)—Obtaining bail by the accused is an independent requirement and grant of permanent personal exemption form appearance in court cannot usurp the requirement of obtaining bail by the petitioner—Petition dismissed.

The purpose for permanently dispensing with the personal appearance of the accused in a summons case, is to prevent the accused from undue hardship and cost in attending the trial. The Magistrate in his judicial discretion may, in a summons case, permanently exempt the accused from his personal appearance at the trial and to be duly represented by his pleader. However, such exemption is not absolute and is subject to certain conditions, as may be imposed by the Magistrate to ensure that the prosecution proceedings are not prejudiced. Further, sub-section (2) of Section 205 CrPC and also sub-section (1) of Section 317 CrPC, empower the Magistrate to direct the personal attendance of the accused, at any stage of the proceeding, if necessary. (**Para 9)**

The concept and purpose of securing bail by the accused person from the concerned Court is mutually exclusive to the purpose of grant of personal exemption from appearance. It is a part of court proceeding when a person is enlarged on bail by the Court, with an undertaking to the Court he, being an accused in the offence, shall attend the Court during trial. Furnishing of bail bonds and surety, by the accused, ensures that the accused shall abide by the conditions of bail and any subsequent order of the Court

requiring his attendance in Court. On the other hand, personal exemption from appearing can be requested by the accused to the Magistrate, either permanently or on a particular date. The Magistrate may, subject to certain conditions and directions, allow the personal exemption of the accused. However, such permanent personal exemption cannot be construed or understood to be a blanket order dispensing with the appearance of the accused and shall be subject to Section 205 (2) and Section 317 (1) of the CrPC. (**Para 11)**

Important Issue Involved: Grant of permanent personal exemption by the Magistrate to the accused, in a bailable offence, dose not dispense with requirement of accused of obtaining bail from Court and exemption from appearance granted by Magistrate can be revoked by Magistrate where necessary at any time as per Sections 205 (2) and 317 (1).

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. Viplav Sharma, Advocate with Ms. Nilanjana Banerjee, Advocate

FOR THE RESPONDENT : Mr. Rishi Kapoor, Advocate.

CASES REFERRED TO:

1. *V.S. Reddy* vs. *M/s Excel Glasses Ltd,*. 2010 CriLJ 4171.
2. *S.S. Mann* vs. *I.C.I.C.I Bank,* Crl M.C. No. 3538/ 2009.
3. *R.P. Gupta* vs. *State of M.P.,* 2007 CriLJ 205.
4. *S.V. Mazumdar & Ors.* vs. *Gujarat State Fertilizers & Anr,* (2005) 4 SCC 173.
5. *Sushil Kumar Gupta* vs. *State of Jharkhand,* 2005 CriLJ 440.
6. *M/s Chowriappa Construction* vs. *M/s Embassy Contructions & Development,* 2002 CriLJ 3863.
7. *Bhaskar Industries Ltd.* vs. *Bhiwani Denim & Apparels*

Ltd. & Ors, (2001) 7 SCC 401.

8. *VIshwa Nath Kiloka* vs. *1st Munsif Lower Criminal Court,* 1989 CriLJ 2082.

9. *Ajit Kr Chakraborty* vs. *Serampore Municipality,* 1989 CriLJ 523.

10. *Helen Rubber Industries Kottayam* vs. *State of Kerala,* 1973 CriLJ 262.

RESULT: Petition Dismissed.

M.L. MEHTA, J.

1. The petitioner seeks quashing of the order of the Ld. MM dated 11.02.2011, in CC No. 1448 of 2010 directing him to appear personally on the next date of hearing.

2. In the complaint filed by the respondent/complainant against the petitioner under Section 138, Negotiable Instruments Act (for short the 'Act'), summons were issued to the petitioner by the learned M.M. vide his order dated 29.8.2007. The accused person preferred a petition under Section 482 CrPC in this Court seeking quashing of the complaint which was dismissed vide its judgment dated 10.02.2009, with an observation that any request for exemption from personal appearance be made before the concerned Magistrate. The Ld. MM vide order dated 19.05.2009 exempted the petitioner from personal appearance with the direction that if at any stage of the proceeding, the petitioner is required, he shall have to appear in person. The complainant/ respondent company preferred a revision to this Court against the said order of the Ld. MM granting personal exemption to the petitioner, which was dismissed by this Court vide order dated 07.01.2010, with the liberty to move an appropriate application before the Ld. MM for revocation of personal exemption of the petitioner. Since the exemption from appearance of the petitioner was continuing, notice under Section 251 CrPC was framed against the petitioner through his counsel. Thereafter, the Ld. MM vide order dated 11.02.2011 directed the petitioner herein to personally appear before him for furnishing the bail bond and disclosing his defense. The petitioner being aggrieved by this order of the Ld. MM has approached this Court seeking quashing of this order and to continue to be represented through his counsel, at the trial.

3. The learned counsel for the petitioner submitted that the petitioner was granted permanent exemption from personal appearance by the Ld. MM vide order dated 19.05.2009, subject to the condition that the petitioner shall appear in person as required by the Court in "any proceeding" in the case. The requirement of "bail" do not form a part of the proceeding as contemplated by the Ld. MM. Drawing my attention to Form 45, it was submitted that the requirement of bail bonds is to ensure the presence of the accused in Court during trial, which in the present case, has already been dispensed by the Magistrate vide order dated 19.05.2009. In view of Section 205 CrPC, it is further submitted that, grant of bail or execution of bail bonds by the accused is not a sine qua non for the grant of personal exemption by the Magistrate. It was further submitted that, in view of the judgment of the Hon'ble Supreme Court in **Bhaskar Industries Ltd. v. Bhiwani Denim & Apparels Ltd. & Ors,** (2001) 7 SCC 401, the petitioner can be exempted from personal appearance even for the first appearance, if he is duly represented by his pleader. Further, even at the stage of the framing of notice under Section 251 CrPC, the Magistrate is empowered to record the plea of the accused when his counsel makes such plea on behalf of the accused in a case where the personal appearance of the accused has been dispensed with. In support of his contention, the learned counsel relies upon **M/s Chowriappa Construction v. M/s Embassy Contructions & Development,** 2002 CriLJ 3863, **V.S. Reddy v. M/s Excel Glasses Ltd,.** 2010 CriLJ 4171, **S.V. Mazumdar & Ors. v. Gujarat State Fertilizers & Anr,** (2005) 4 SCC 173, **Sushil Kumar Gupta v. State of Jharkhand,** 2005 CriLJ 440, **VIshwa Nath Kiloka v. 1st Munsif Lower Criminal Court,** 1989 CriLJ 2082, **R.P. Gupta v. State of M.P.,** 2007 CriLJ 205, **Ajit Kr Chakraborty v. Serampore Municipality,** 1989 CriLJ 523, **Helen Rubber Industries Kottayam v. State of Kerala,** 1973 CriLJ 262. The sum and substance of the contentions of the learned counsel for the petitioner is that after the grant of personal exemption from appearance of the accused, the Magistrate becomes functus officio and cannot withdraw the exemption so granted and that the requirement of bail does not form part of proceedings within the ambit of Section 205 (2) or 317 (1) CrPC.

4. Per Contra, it was submitted by the learned counsel for the respondent/complainant that the order of the Magistrate granting exemption from personal appearance or requiring the personal appearance during the

proceedings of trial was an interlocutory order and the same being a discretionary power, the grant of exemption could not be claimed as a matter of right. It was submitted that, FORM 47 warrants forfeiture of such amount in case of failure of the accused to appear in Court. However, this cannot be effected without the accused furnishing bail bonds. It is further submitted that, the obligation of furnishing bail bonds and surety at the time of granting of bail is to ensure that the accused remains present, if convicted, for the offence. It is further submitted that the petitioner is the managing director of the accused company, and the liberty granted to the petitioner by the Ld. MM has been misused by the petitioner by seeking repeated adjournments.

5. I have heard the learned counsel for the parties and perused the case laws cited by the parties.

6. In the present petition, a short question of law arises for adjudication being, "whether the grant of permanent personal exemption by the Magistrate to the accused, in a bailable offence, be understood and construed to having dispensed with the requirement of the accused to obtain bail from the Court and whether the exemption from appearance granted by the Magistrate could not be revoked by him?

7. There cannot be any dispute that the order granting exemption was nothing but an interlocutory one and so was the order of revocation of the exemption granted. Such orders do not determine the rights of the parties finally but are of interim nature passed during the proceedings of trial. However, having regard to the fact that an interesting question of law has been raised, I have chosen to examine the legal position in this regard.

8. The law regarding grant of personal exemption to an accused under Section 138 of the Act has been discussed by the Hon'ble Supreme Court in **Bhaskar Industries Ltd.** (Supra),

> "These are days when prosecutions for the offence under Section 138 are galloping up in criminal courts. Due to the increase of inter-State transactions through the facilities of the banks it is not uncommon that when prosecutions are instituted in one State the accused might belong to a different State, sometimes a far distant State. Not very rarely such accused would be ladies also. For prosecution under Section 138 of the NI Act the trial should

be that of summons case. When a magistrate feels that insistence of personal attendance of the accused in a summons case, in a particular situation, would inflict enormous hardship and cost to a particular accused, it is open to the magistrate to consider how he can relieve such an accused of the great hardships, without causing prejudice to the prosecution proceedings.

Section 251 is the commencing provision in Chapter XX of the Code which deals with trial of summons cases by magistrates. It enjoins on the court to ask the accused whether he pleads guilty when the accused appears or is brought before the magistrate. The appearance envisaged therein can either be by personal attendance of the accused or through his advocate. This can be understood from Section 205(1) of the Code which says that whenever a magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.

Thus, in appropriate cases the magistrate can allow an accused to make even the first appearance through a counsel. The magistrate is empowered to record the plea of the accused even when his counsel makes such plea on behalf of the accused in a case where the personal appearance of the accused is dispensed with. Section 317 of the Code has to be viewed in the above perspective as it empowers the court to dispense with the personal attendance of the accused (provided he is represented by a counsel in that case) even for proceeding with the further steps in the case. However, one precaution which the court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in court and that he has no objection in taking evidence in his absence. This precaution is necessary for the further progress of the proceedings including examination of the witnesses."

9. The purpose for permanently dispensing with the personal appearance of the accused in a summons case, is to prevent the accused from undue hardship and cost in attending the trial. The Magistrate in his

judicial discretion may, in a summons case, permanently exempt the accused from his personal appearance at the trial and to be duly represented by his pleader. However, such exemption is not absolute and is subject to certain conditions, as may be imposed by the Magistrate to ensure that the prosecution proceedings are not prejudiced. Further, sub-section (2) of Section 205 CrPC and also sub-section (1) of Section 317 CrPC, empower the Magistrate to direct the personal attendance of the accused, at any stage of the proceeding, if necessary.

10. The purpose of attendance of the accused at the trial is not merely a formality or compulsion, but for the reason that the trial be allowed to be conducted in an expedient manner and is not hampered or prejudiced in the absence of the accused. However, if the Magistrate in the facts and circumstances of the case, is of the view that great hardship and inconvenience shall be caused to the accused, he shall dispense with the personal attendance of the accused and allow him to be represented by a pleader. He shall, however, keep in mind, that such personal exemption from appearance shall not delay or hamper the trial. Therefore, while granting permanent exemption from appearance, he is deemed to have reserved his right to call the accused person to appear in person at the trial, at any stage of the proceeding, if necessary.

11. The concept and purpose of securing bail by the accused person from the concerned Court is mutually exclusive to the purpose of grant of personal exemption from appearance. It is a part of court proceeding when a person is enlarged on bail by the Court, with an undertaking to the Court he, being an accused in the offence, shall attend the Court during trial. Furnishing of bail bonds and surety, by the accused, ensures that the accused shall abide by the conditions of bail and any subsequent order of the Court requiring his attendance in Court. On the other hand, personal exemption from appearing can be requested by the accused to the Magistrate, either permanently or on a particular date. The Magistrate may, subject to certain conditions and directions, allow the personal exemption of the accused. However, such permanent personal exemption cannot be construed or understood to be a blanket order dispensing with the appearance of the accused and shall be subject to Section 205 (2) and Section 317 (1) of the CrPC.

12. Now, if at any subsequent stage, the Magistrate desires the presence of the accused person, he may summon him to appear in-

person, and in failure to do so, he may take coercive steps by forfeiting the bail bond or attach his movable property. This procedure, could only be effective if the accused had previously surrendered to the Court and obtained bail by furnishing bail bond and surety. The two proceedings, which are apparently independent, seem to converge at this juncture.

13. Therefore, the processes of bail and personal exemption from appearance, broadly operate in different spheres of the trial, though are intrinsically connected.

14. Further, this Court, in the case of **S.S. Mann v. I.C.I.C.I Bank,** Crl M.C. No. 3538/ 2009, while allowing permanent exemption to the accused person imposed the following conditions,

> "Since in the instant case, the petitioner is fairly advanced in age, I feel that this is a fit case where the petitioner ought to be granted permanent exemption from appearance in Court subject to the following conditions:-
>
> 1) That he shall put in appearance before the Court and get himself bailed out unless and until he has already done so earlier.
>
> 2) That the petitioner shall file an undertaking before the Court to the effect that he shall not dispute his identity before the Court and after such an undertaking is filed then the same has to be approved by the Court.
>
> 3) That he shall appear on each and every date of hearing as and when the trial Court directs him to do so."

15. Therefore, in view of the above observations and judicial pronouncements, it can be concluded that, obtaining bail by the accused person is an independent requirement and grant of permanent personal exemption from appearance in Court, cannot usurp the requirement of obtaining bail by the petitioner.

16. Reliance of the learned counsel for the petitioner on **Bhaskar Industries** (Supra), contending that the accused person may be exempted from personal appearance at the very first hearing, cannot be interpreted to be exempting the accused from obtaining bail from the Court. Further, all the cases relied upon by the petitioner's counsel are clearly distinguishable on facts and do not touch upon the requirement of obtaining

Court bail by the accused person, which is the question proposed to be dealt in the present petition.

17. In view of the above observations, I find no infirmity in the order of the Ld. MM.

18. The petitioner shall appear in person on the next date of hearing before the trial Court and obtain bail as per law.

19. The petition is dismissed.

20. Copy of this order be circulated amongst the Judicial Officers presiding Criminal Courts.

ILR (2012) V DELHI 507
CRL. M.C.

G. KARTHIK ….PETITIONER

VERSUS

CONSORTIUM FINANCE LTD. ….RESPONDENT
NOW MAGMA LEASING LTD.

(M.L. MEHTA, J.)

CRL. M.C. : 2749/2011 DATE OF DECISION: 04.05.2012

Code of Criminal Procedure, 1973—Section 256—Negotiable Instrument Act—1981—Section 138—Petitioner assailed order of learned Metropolitan Magistrate (MM) dismissing his application under Section 256 of Code in a complaint filed under Section 138 of Act—According to petitioner, Respondent/ complainant company due to non payment of cheque amounts preferred complaint under Section 138 of Act and trial was at stage of recording of statement of defence witnesses, but for six consecutive hearings,

none had appeared on behalf of respondent/ complainant before learned MM—Thus, petitioner preferred application under Section 256 of Code praying for acquittal of petitioner due to non appearance of complainant/ Respondent which was dismissed by learned MM—Therefore, he preferred petition to assail said order—Held:— Section 256 Cr. P.C. has been incorporated keeping in mind the interest of both the complainant and the accused—To prevent any prejudice to complainant, Section 256 Cr. P.C. empowers Magistrate to adjourn hearing, for ensuring presence of complainant, if sufficient cause is shown with regard to his inability to appear at appointed date of appearance—However, failure of complainant to appear, without sufficient cause, empowers a Magistrate to dismiss complaint and to acquit accused—Objective of proviso to Section 256 Cr.P.C. is to prevent any undue delay to trial or to prejudice rights of accused person facing trial as presence of complainant may be dispensed with through pleader or if his personal attendance is not necessary—Case being at stage of defence evidence, before which statement of petitioner under Section 313 Cr.P.C. was also recorded, absence of Respondent complainant has not prejudiced petitioner or hampered trial.

The legislature has incorporated Section 256 in the Criminal Procedure Code, with the purpose, that the criminal law machinery shall not be misused and abused by the complainant. In a dispute between two private parties, the participation of the complainant in pursuing the prosecution is of utmost importance for the efficient and speedy disposal of the case. In a summons case, it is the prerogative of the complainant to pursue the prosecution to attain speedy disposal of the case. **(Para 6)**

Important Issue Involved: Section 256 Cr. P. C. has been incorporated keeping in mind the interest of both the complainant and the accused—To prevent any prejudice to complainant, Section 256 Cr. P. C. empowers Magistrate to adjourn hearing, for ensuring presence of complainant, if sufficient cause is shown with regard to his inability to appear at appointed date of appearance—However, failure of complainant to appear, without sufficient cause, empowers a Magistrate to dismiss complaint and to acquit accused.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Anoop G. Chaudhari, Sr. Advocate with Mr. P. Vinay Kumar and Mr. A. P. Sinha, Advocate.

FOR THE RESPONDENT : Mr. Rajesh Mishra with Ms. Malti, Advocate.

CASE REFERRED TO:

1. *S. Rama Krishna* vs. *S. Rami Reddy & Ors,* (2008) 5 SCC 535.

RESULT: Petition dismissed.

M.L. MEHTA, J.

1. The petitioner assails the order of the learned MM dated 19.07.2011 dismissing his application under Section 256 CrPC, in complaint case bearing C.C No. 12040/2009 under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the "Act").

2. The brief facts necessitating the present petition are that between the period 06.10.1997 and 31.10.1997, the respondent/ complainant company had presented certain cheques issued by the petitioner, which were dishonored. The respondent/ complainant company, due to non-payment of the cheque amounts, preferred a complaint against the petitioner before the learned ACMM under Section 138 of the Act which was subsequently renumbered and marked as CC No. 12040/09. In the process, the respondent/ complainant's evidence was recorded and also

the petitioner's statement under Section 313 CrPC was recorded by the learned MM. Thereafter, between 23.08.2010 to 19.07.2011, for 6 consecutive hearings, none appeared for the respondent/ complainant before the learned MM. The petitioner preferred an application under Section 256 CrPC praying acquittal of the petitioner due to non-appearance of the complainant/ respondent, which was dismissed by the learned MM vide the impugned order dated 19.07.2011, citing that case is at the stage of defense evidence and is reaching finality. The present petition is filed by the petitioner assailing the said order.

3. The learned counsel for the petitioner contended that the complainant/ respondent has not appeared personally or through his pleader before the learned MM, consecutively on six occasions between 23.08.2010 and 19.07.2011, i.e. for almost one year. Drawing my attention to Section 256 CrPC, it is submitted that the petitioner ought to have been acquitted by the learned MM on the premise that the complainant is not interested to prosecute his complaint and that the repeated adjournments have caused undue harassment to the petitioner. Relying upon **S. Rama Krishna v. S. Rami Reddy & Ors,** (2008) 5 SCC 535, it is submitted that the mandate of law provides the accused is to be acquitted, if the complainant fails to be present at the hearing after the summons have been issued to the accused. It is further contended that the words used in Section 256 CrPC are, "the Magistrate Shall acquit the accused" on the failure of the complainant to appear and therefore, in view of mandate of Section 256 CrPC, the learned MM, ought to have acquitted the petitioner. It is further submitted, the complainant never obtained exemption for his personal appearance from the Court, and thus his presence could not be dispensed with at the trial.

4. I have heard the learned counsel for the petitioner and Respondent and perused the records.

5. Section 256 of the Criminal Procedure Code reads as hereunder:-

256. Non-appearance or death of complainant.

(1) If the summons has been issued on complaint and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall notwithstanding

anything hereinbefore contained, acquit the accused unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.

6. The legislature has incorporated Section 256 in the Criminal Procedure Code, with the purpose, that the criminal law machinery shall not be misused and abused by the complainant. In a dispute between two private parties, the participation of the complainant in pursuing the prosecution is of utmost importance for the efficient and speedy disposal of the case. In a summons case, it is the prerogative of the complainant to pursue the prosecution to attain speedy disposal of the case. Section 256 CrPC has been incorporated keeping in mind the interest of both the complainant and the accused. To prevent any prejudice to the complainant, Section 256 CrPC empowers the Magistrate to adjourn the hearing, for ensuring the presence of the complainant, if sufficient cause is shown with regard to his inability to appear at the appointed date of appearance. However, failure of the complainant to appear, without sufficient cause, empowers a Magistrate to dismiss the complaint and to acquit the accused.

7. Section 256 CrPC, further in the proviso states that the presence of the complainant may be dispensed with if he is represented by his pleader or if his personal attendance is not necessary. The objective of the said provision is to prevent any undue delay to the trial or prejudice to the rights of the accused person facing trial.

8. In the present case not only that the complainant has already led his evidence in 2007, but the statement of the petitioner under Section 313 CrPC has also been duly recorded on 4.3.2008. Since then the case is being adjourned for defence evidence of the petitioner and now was fixed for its evidence as last opportunity. It is a matter of fact that, the complainant has failed to appear before the learned Magistrate on six

occasions, but his absence has not prejudiced the petitioner. On the other hand, it is noticed that on five out of six occasions the case was adjourned at the instance of the petitioner on one or the other ground. Also, no delay in the trial, can be attributed to the respondent/ complainant as he has already led his evidence.

9. At the stage of defense evidence, the petitioner shall examine his defense witnesses, without any prejudice. Presence of the respondent/ complainant or his lawyer would have been necessary, only for the purpose of cross-examination of the witnesses examined on behalf of the defense. If he did not intend to do so, he would do so at his own peril, but it cannot be said that his presence was absolutely necessary.

10. In the case of **S. Anand v. Vasumathi Chandrasekar,** AIR 2008 SC 1296, the Hon'ble Supreme Court held that:-

"10. Section 256 of the Code provides for disposal of a complaint in default. It entails in acquittal. But, the question which arises for consideration is as to whether the said provision could have been resorted to in the facts of the case as the witnesses on behalf of complainant have already been examined.

11. The date was fixed for examining the defence witnesses. Appellant could have examined witnesses, if he wanted to do the same. In that case, the appearance of the complainant was not necessary. It was for her to cross-examine the witnesses examined on behalf of the defence.

13. Presence of the complainant or her lawyer would have been necessary, as indicated hereinbefore, only for the purpose of cross- examination of the witnesses examined on behalf of the defence. If she did not intend to do so, she would do so at her peril but it cannot be said that her presence was absolutely necessary. Furthermore, when the prosecution has closed its case and the accused has been examined under Section 311 of the Code of Criminal Procedure, the court was required to pass a judgment on merit of the matter.

16. However, keeping in view of the fact that the complaint petition was filed as far back on 10.01.2002, the learned Trial Judge should proceed with the matter in accordance with law

and dispose of the case as expeditiously as possible. On the date(s) on which the accused remains present, the complainant would not take any adjournment and in the event she does not choose to be represented in the court, the court shall proceed in the matter in accordance with law. Both the accused and complainant are directed to appear in the Trial Court within two weeks from date."

11. The judgment, **S. Rama Krishna** (Supra) relied upon by the petitioner is clearly distinguishable from the facts of the present case as the complaint in that case was at the initial stage of the trial, whereas in the present case, the trial has progressed to the stage of defense evidence.

12. In view of the fact that the trial is at its fag end, being fixed for the defence evidence as last opportunity, the absence of the respondent/ complainant shall not prejudice the petitioner or hamper the trial. I find no infirmity with the order of the learned MM. The trial has to proceed as per law. The learned Magistrate shall proceed to record the defence evidence if any, after issuing Court notice to the complainant through counsel.

13. The petition is dismissed.

ILR (2012) V DELHI 514
C.R.P

VEENA TRIPATHI ….PETITIONER

VERSUS

HARDAYAL ….RESPONDENT

(INDERMEET KAUR, J.)

C.R.P. : 64/2012 AND CM NOS. : 8751-8752/2011

DATE OF DECISION: 16.05.2012

Code of Civil Procedure, 1908—Section 47—Brief facts Plaintiff claimed to be the owner of property let out to the defendant in 2001 @ Rs. 10,000/- for running a Nursing Home—Defendant was making irregular payments; on certain occasions cheques issued by the defendant were bounced because of insufficient fund—Suit under section 37 of the Code for recovery filed on the basis of five cheques, all in the sum of Rs. 10,000/- except the last cheque which is in the sum of Rs. 16500/- Ex Parte judgment and decree passed in favour of the plaintiff in the sum of Rs.56,350/- alongwith interest @ 8% per annum from the date of the filing of suit till realization—Thereafter, an application under Order 37 Rule 4 of the Code filed by the defendant pleading special circumstances—Special circumstances being that the defendant had not been served with the summons of the suit and thus, ex parte judgment and decree dated 20.12.2004 is liable to be set aside—This application was dismissed by the court that by holding Special circumstances for setting aside the decree and judgment are not made out—Execution proceedings filed—In the course of execution proceedings, the application under Order 47 of the Code was filed where the first time the plea of fraud

was set up—Executing court dismissed the objections—Hence present petition. Held:- Plea of fraud set up by the defendant for the first time before the executing court—No averment in his application under Order 37 Rule 4 of the Code wherein he detailed the 'special circumstances' for setting aside the ex parte judgment and decree—No doubt to the settled legal position that fraud vitiates all transactions and any decree which has been obtained by fraud is 'non-est', not legal and not binding—Averments made in the application under Order 47 of the Code do not in any manner detailed the fraud—Only a three line version application which makes a mention of the concealment of certain documents but how the concealment of these documents perpetuated a fraud, has not been explained—An admitted fact that in the application under Order 37 Rule 4 of the Code 'special circumstances' had been alleged but plea of fraud was never taken before that court—Objections under Section 47 of the Code have no force and were thus rightly dismissed.

Important Issue Involved: Code of Civil Procedure, 1908—Section 47—No doubt to the settled legal position that fraud vitiates all transactions and any decree obtained by fraud is 'non—est', not legal and not binding—However, it is settled position that the so called fraud must be prima facie shown by the party alleging the fraud.

[Sh Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Mahipal Singh Dral, Advocate.

FOR THE RESPONDENT : Nemo.

CASES REFERRED TO :

1. *Union of India & Ors.* vs. *Ramesh Gandhi* (2011) SLT 452.

2. *M/s. Saraswat Trading Agency* vs. *Union of India & Ors.* AIR 2004 Cal. 267.

3. *S.P. Chengalvaraya Naid* vs. *Jagannath & Ors., VIII* (1994) 1 SCC 1.

RESULT : Petition dismissed.

INDERMEET KAUR, J. (Oral)

The order impugned is dated 03.05.2012; the executing court had dismissed the objections filed by the judgment debtor under Section 47 of the Code of Civil Procedure (hereinafter referred to as 'the Code'); these objections are dated 01.05.2012.

Record shows that a suit for recovery had been filed by the plaintiff-Hardyal against the petitioner/defendant-Dr. Veena Tripathi. This was a suit under Section 37 of the Code ; plaintiff claimed to be the owner of property bearing No. WZ-904, Nagal Raya, Main Pankha Road, New Delhi -46; the basement, second and third floor were stated to be in possession of the plaintiff; ground and first floor had been let out to the defendant in 2001 @ Rs. 10,000/- for running a Nursing Home where it was run under the name of Shubham. The defendant was making irregular payments; on certain occasions cheques issued by the defendant were bounced because of insufficient find. The present suit has been filed on the basis of five cheques details of which find mention in para 4 of the plaint. They are cheques dated 12.08.2001, 18.09.2002, 13.05.2003, 25.08.2001 and 18.09.2002; all in the sum of Rs. 10,000/- except the last cheque which is in the sum of Rs.16,500/-; principal figure of these cheques was Rs. 56,500/- and alongwith interest the said amount was Rs. 59,380/-. After service of summons, the memo of appearance was not filed by the defendant; she having failed to put in appearance, the ex parte judgment and decree had fallen in favour of the plaintiff on 20.12.2004; the suit was decreed in the sum of Rs. 56,350/- alongwith interest @ 8 % per annum from the date of the filing of suit till realization.

Thereafter an application under Order 37 Rule 4 of the Code had been filed by the defendant; that application is not on record. Learned counsel for the petitioner has fairly conceded that in the application under Order 37 Rule 4 of the Code, he had pleaded 'special circumstances'; the

'special circumstances' being that the defendant had not been served with the summons of the suit and thus ex parte judgment and decree dated 20.12.2004 is liable to be set aside; admittedly, the question of fraud had never been raised by the defendant; it was never his case that the decree has been obtained by fraud for one reason or the other.

This application under Order 37 Rule 4 of the Code which was filed on 17.04.2005 was finally dismissed on 28.07.2011; the court had rejected the plea set up by the defendant that she had not been served with the summons; court had returned a finding that 'special circumstances' for setting aside the decree and judgment dated 20.12.2004 are not made out; application was accordingly dismissed.

Execution proceedings were filed; in the course of the execution proceedings, the application under Order 47 of the Code was filed where the first time the plea of fraud was set up. Relevant would it be to state that the application under Section 47 of the Code only contains a three line version in the first paragraph wherein it has been stated that the decree holder has concealed a lease agreement dated 23.04.2008 and rent receipts dated 23.04.1998, 20.08.2001, 25.09.2002, 20.05.2003 and 30.08.2003 which had been duly executed by him; how and what circumstances these documents even presuming that they were created only to make out a case of fraud have nowhere been detailed. In fact specific queries have been put to the learned counsel for the petitioner on the interlinking of these documents with the lease agreement and rent receipts which was so alleged but he has no answer. As noted supra, the instant suit is based on five cheques dates of which are noted above and which in no manner connected with the rent receipts issued on the dates mentioned above. This is also not the case set up by the defendant; there is no such averment to the said effect. It is also not in dispute that the plea of fraud has been set up by the defendant for the first time before the executing court and never an averment in his application under Order 37 Rule 4 of the Code wherein he detailed the 'special circumstances' for setting aside the ex parte judgment and decree dated 20.12.2004. In these circumstances, the reliance by the learned counsel for the petitioner upon the judgment reported in (1994) 1 SCC 1 titled as **S.P. Chengalvaraya Naid vs. Jagannath & Ors., VIII** (2011) SLT 452 titled as **Union of India & Ors. vs. Ramesh Gandhi** and AIR 2004 Cal. 267 titled as **M/s. Saraswat Trading Agency vs. Union of India & Ors.** is misplaced.

There is no doubt to the settled legal position that fraud vitiates all transactions and any decree which has been obtained by fraud is 'non-est', not legal and not binding. However, it is settled position that the so called fraud must be prima facie shown by the party alleging the fraud; as the averments made in the application under Order 47 of the Code do not in any manner detailed the fraud; in fact there is only a three line version in the entire application which makes a mention of the concealment of certain documents but how the concealment of these documents perpetuates a fraud has neither been explained in the said application nor the counsel of petitioner has been able to answer to a specific query put to the learned counsel on this count. It is also an admitted fact that in the application under Order 37 Rule 4 of the Code 'special circumstances' had been alleged but plea of fraud was never taken before that court. The impugned judgment had thus rightly noted that in this factual scenario objections under Section 47 of the Code have no force and were thus rightly dismissed.

Petition is without any merit; it is dismissed.

ILR (2012) V DELHI 518
CRL.

SANTOSH MALHOTRA ….PETITIONER

VERSUS

VED PRAKASH MALHOTRA AND OTHERS ….RESPONDENTS

(M.L. MEHTA, J.)

CRL. M.C. : 3948/2008 DATE OF DECISION: 18.05.2012

Code of Criminal Procedure, 1973—Section 482, 125 Hindu Marriage Act, 1955—Section 24—Petitioner filed petition u/s 482 of the Code to assail order of Additional

Sessions Judge (ASJ) passed in criminal revision against order of Metropolitan Magistrate (M.M)— Petitioner, wife of respondent no. 1 and mother of respondent no.2 and 3, had filed petition u/s 125 of the Code to seek maintenance and pressed for grant of interim maintenance which was declined by Ld. MM—In revision, interim maintenance at the rate of Rs. 2000/— granted—Aggrieved petitioner challenged the order and prayed for enhancement of maintenance against her husband and also for grant of maintenance from her sons i.e. respondent no. 2 and 3—Admittedly, petitioner was receiving maintenance at the rate of Rs. 3500/— per month u/s 24 of the Act from her husband.—Held:— The wife, who is unable to maintain herself is entitled to maintenance both u/s 125 Cr. P.C. and also u/s 24 Hindu Marriage Act but the maintenance claim under one provision is subject to adjustment under the other provisions.

It is settled proposition of law that though the wife, who is unable to maintain herself is entitled to maintenance, both under Section 125 CrPC as also under Section 24, Hindu Marriage Act, but the maintenance claimed under one provision was subject to adjustment under the other provisions. Having regard to the fact that earlier, this court has assessed the entitlement of maintenance of the petitioner from her husband @ Rs. 4500/- per month under Section 24, Hindu Marriage Act, for the same reasons, I am also of the view that she would be entitled to interim maintenance under Section 125 Cr.P.C. at this rate from her husband (respondent No.1). **(Para 12)**

Important Issue Involved: The wife, who is unable to maintain herself is entitled to maintenance both u/s 125 Cr. P.C. and also u/s 24 Hindu Marriage Act but the maintenance claim under one provision is subject to adjustment under the other provisions.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Ms. Nandita Rao, Advocate.

FOR THE RESPONDENTS : Ms. Arati Mahajan, Advocate.

RESULT: Petition disposed of.

M.L. MEHTA, J.

1. This petition under Section 482 CrPC assails the order dated 23.8.2008 of ASJ passed in criminal revision filed by the petitioner against the order of the M.M. dated 8.3.2007.

2. The petitioner is the wife of the respondent No. 1 and the mother of the respondents No. 2 & 3. She filed a petition under Section 125 CrPC against them seeking maintenance. In the said case, the learned M.M. declined the request of the petitioner for grant of interim maintenance vide his order dated 8.3.2007. The said order was taken in revision by the petitioner in the court of Additional Sessions Judge, who vide the impugned order dated 23.8.2008 granted interim maintenance to the petitioner against her husband (respondent No. 1) at the rate of Rs. 2000/- per month from the date of the filing of the application. The petitioner has challenged the said order of the ASJ in the present petition and seeks enhancement of compensation against her husband (respondent No.1) as also compensation against her sons i.e. respondents No. 2 & 3.

3. It is noted that all the grounds which have been taken in the present petition under Section 482 CrPC are the same which were taken by the petitioner in the revision petition before the ASJ. Practically, the present petition though, filed under Section 482 CrPC is nothing, but a second revision petition against the order of the M.M. Though, the second revision petition was not maintainable, but having regard to the fact that no findings have been recorded by the ASJ qua the respondents No. 2 & 3 i.e. the sons of the petitioner and respondent No.1, I deem it a case warranting exercise of power of this court under Section 482 CrPC.

4. Before proceeding further, it may be noted that the petitioner and the respondent No. 1 are residing in the same house. This house is three storied comprising of ground, first and second floors. It is undisputed that both the parties are cooking and eating separately. Undisputedly, the

respondent No.1 is meeting all the household expenses such as water, electricity charges, maintenance of house, payment of house tax etc. It is also undisputed that respondent No.1 is a person retired from Air India and also that the petitioner owns a house at Mumbai. It is also admitted case that under Section 24 of Hindu Marriage Act, the petitioner was granted Rs. 3500/- per month maintenance from the respondent No. 1 vide order dated 25.11.2009 of ADJ. In CM (M) No. 357/2010, this court enhanced the maintenance to Rs. 4500/- per month and undisputedly, the same is being paid by the respondent No. 1 to the petitioner. It is further undisputed that both the respondents No. 2 & 3, who are the sons of the petitioner and the respondent No.1 are not residing with them in the said house. Respondent No. 2 Prem Prakash is residing at Australia, while respondent No.3 Anil is living sometimes with his sister at Mumbai and sometimes in rented premises.

5. Having noted above the undisputed and admitted facts, the petitioner's case as set out is that the maintenance of Rs. 4500/- per month is not sufficient and need to be enhanced. She has alleged her husband to be getting Rs. 10,000/- per month as pension and Rs. 15,000/- from the banks as interest on deposits and further, a sum of Rs. 3000/- per month from insurance. With regard to her son Prem Prakash (respondent No.2), who is residing at Australia, she alleged his income to be more than Rs. 2 lakhs per month. Regarding her son Anil (respondent No.3), she alleges him to be working at Mumbai and earning Rs. 30,000/- per month.

6. On the other hand, the respondents pleaded that the petitioner has F.D. to the tune of Rs. 10 lakhs from which, she was getting fixed interest @ Rs. 15,000/- per month. It is alleged that she owns a property at Mumbai, which is lying vacant and can be let out by her. The respondent No. 1 denied that he was earning Rs. 15,000/- per month as interest from bank. It is pleaded that he was getting only Rs. 5000/- per month on the investments made by him in addition to the sum of Rs. 3000/- which he was getting from LIC.

7. I have heard learned counsel for the parties and perused the impugned judgment and also the records.

8. This is a case of really one of the unfortunate family of scattered members. All the four members are living their independent lives. The

petitioner seems to be trying to abuse the benevolent provisions of Section 125 CrPC. This Section is designed to help the needy and not the greedy. It is not meant for settling the personal scores, but it is experienced that it is often being misused and the present case is an instance. Here is a lady who owns a house at Mumbai, but is neither prepared to let it out on rent nor give it to her son who is living at the mercy of his sister and sometimes, in some rented house at Mumbai. Though, the petitioner has denied to be having F.D. of Rs. 10 lakhs in the different banks, but she, in any case has admitted the F.D. of Rs. 2 lakhs. She knows that her husband is a retired and ailing person. The pleas that her husband (respondent No.1) is getting Rs. 10,000/- p.m. as pension and Rs. 15,000/- from investments is nothing but a bundle of lies. The respondent No.1 is a retired person and has placed documentary evidence on record to show that he is getting Rs. 3086/- per month as pension through Employee Contributory Scheme based on his own contribution made after his retirement. This fact has already been taken note of by this court in CM (M) No. 357/2010. In the said case, it was the petitioner's own submission that her husband was getting interest of Rs. 5000/- per month from deposits. Now, she has alleged that he was getting Rs. 15,000/- p.m. without there being any basis for the same. In fact, in the said petition, this court had enhanced the maintenance from Rs. 3500/- per month to Rs. 4500/- per month based on the material available on record to the effect that the income of the respondent No. 1 was Rs. 8000/- per month i.e. Rs. 5000/- as interest from deposits and Rs. 3086/- from Employee Contributory Pension Scheme. Neither before the courts below nor in the CM (M) No. 357/2010 nor in the present proceedings, the petitioner has been able to show her husband's income as alleged by her. All that she has alleged is vague and baseless.

9. Taking all these into consideration, the learned M.M. observed that she was capable of maintaining herself.

10. From the undisputed factual matrix, it comes out to be that the petitioner owns a house at Mumbai. She has some fixed deposits in the banks, which according to the respondents are worth Rs. 10 lakhs, which according to the petitioner, is only Rs. 2 lakhs. In any case, she is undisputedly getting some interests on these deposits, which has not been disclosed. No evidence has been adduced by either of the parties as regards to deposits amount or the interest therefrom. This emerges to

be a triable issue. Undisputedly, she was living in a house where she was not incurring any expenses on rent or other amenities such as water, electricity, cable, house tax etc. She is continuously getting Rs. 4500/- per month from her husband. She was also entitled to the medical facilities of her husband as per his service rules.

11. With regard to the respondent No. 2, who is residing at Australia, it was submitted by the respondents that he is working in a remote area and was the only bread earner of his family and was not in a regular permanent employment. His salary was stated to be about 800 Australian Dollars per week, which was stated to be insufficient for him and his family needs. With regard to the respondent No.3, it was stated that he is unemployed and even unable to maintain himself and is living at the mercy of his sister at Mumbai.

12. It is settled proposition of law that though the wife, who is unable to maintain herself is entitled to maintenance, both under Section 125 CrPC as also under Section 24, Hindu Marriage Act, but the maintenance claimed under one provision was subject to adjustment under the other provisions. Having regard to the fact that earlier, this court has assessed the entitlement of maintenance of the petitioner from her husband @ Rs. 4500/- per month under Section 24, Hindu Marriage Act, for the same reasons, I am also of the view that she would be entitled to interim maintenance under Section 125 Cr.P.C. at this rate from her husband (respondent No.1).

13. With regard to the claim of the petitioner from her sons (respondents No. 2 & 3), it was submitted on behalf of her son Prem Prakash that his weekly income was about 800 Australian Dollars. The details of the expenses of his family have also been submitted in writing. However, he has offered 100 Australian Dollars per month as maintenance to the petitioner, which according to me, at this stage, seems to be just and reasonable. The petitioner has claimed arrears of maintenance from him, but the same was outrightly refuted saying that this respondent was in a very bad financial condition to give any arrears. With regard to respondent No. 3 Anil also, there is nothing on record at this stage to see his income. But, since he is an able-bodied young boy, it is his moral as well as legal duty to give something to his mother. In the absence of there being any material available on record, he would be liable to pay maintenance to his mother (petitioner) @ Rs. 1500/- per month.

14. The matter does not end here. During the proceedings conducted on 26.3.2012, the respondent No. 1 had stated that he had let out the second floor of the premises to a tenant @ Rs. 10,000/- per month. He offered 50% of the rent i.e. Rs. 5000/- per month to be given to the petitioner w.e.f. 22.4.2012. The petitioner and her counsel agreed to this offer but later, she demanded the whole of the rent and also alleged the rent to be more than Rs. 10,000/- per month. In the proceedings conducted on 26.3.2012, the offer as given by her son Prem Prakash of 100 Australian Dollars per month as also of her husband of Rs. 5000/- per month out of the rent and to continue pay Rs. 4500/- per month as before, was outrightly declined by the petitioner in the subsequent proceedings. This shows the conduct of the petitioner, who seem to be not only greedy and trying to settle the scores, but was extremely aggressive also. However, irrespective of all that, I think that the offers given by the respondents No. 1 & 2 are quite just and reasonable given the facts and circumstances of the case.

15. In view of the above discussion, it comes out to be that the petitioner would be entitled to maintenance @ Rs. 4500/- per month from the date of this order from her husband (respondent No.1) under Section 125 CrPC. In addition, she would be entitled to maintenance of 100 Australian Dollars from her son Prem Prakash (respondent No.2) and Rs. 1500/- per month from her son Anil (respondent No.3). Having regard to the peculiar circumstances of the respondents No.2 and 3, they are directed to pay these amounts of maintenance to petitioner from the date of this order. The issues regarding claims of maintenance from them from the date of application, shall be determined at time of final disposal of the petition by the Trial Court. She would be also entitled to Rs. 5000/- per month w.e.f. 22.4.2012 being half of the rent of the premises of second floor let out by the respondent No. 1. It is clarified that in the event of any increase in the rent amount of the said premises at any point of time, half of the rent whatever may be, shall be continued to be paid to the petitioner by her husband (respondent No.1). Consequently, the impugned order stands modified in the manner as indicated above.

16. Petition along with miscellaneous applications stand disposed of.

ILR (2012) V DELHI 525
C.R.P

PUNJAB & SIND BANK ….PETITIONER

VERSUS

LALIT MOHAN MADAN & CO. ….RESPONDENT

(INDERMEET KAUR, J.)

C.R.P. NO. : 155/2008 DATE OF DECISION: 23.05.2012.

Code of Civil Procedure, 1908—Section 10—Brief facts—Punjab and Sind Bank filed suit for specific performance against a partnership firm comprising of two partners—During the pendency of this suit, partnership firm filed a suit against the Punjab and Sind Bank seeking a declaration, permanent injunction on the basis of the same documents i.e. the agreement, the subject matter of the suit for specific performance filed by the Punjab and Sind Bank—Prayer in the second suit was that the agreement to sell be declared null and void—Suit was registered—During the course of these proceedings, the present application under Section 10 of the Code was filed by the petitioner seeking stay of the later suit—Application however dismissed declining the prayer—Hence the present petition. Held:— Essential ingredients for the applicability of Section 10 of the Code are (a) There must be two pending suits on same matter, (b) These suits must be between same parties or parties under whom they or any of them claim to litigate under same title, (c) The matter in issue must be directly and substantially same in both the suits, (d) The suits must be pending before competent Court or Courts, (e) The suit which shall be stayed is the subsequently instituted suit—Object of Section 10 is to prevent courts of

current jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue—One of the test of the applicability of Section 10 is whether on the final decision being reached in the previous suit such a final decision will operate as res judicata in a subsequent suit—To decide whether the second suit is hit by Section 10, the test is to find out whether the plaint in one suit would be the written statement in the other suit or not—If this test is positive the decision in one suit will operate as res judicata in the other suit—This is the principal test on which Section 10 is applied—Applying this test to the instant case, it is clear that the decision in the first suit (as is evident from the prayers) will operate as res judicata in the second suit—Matter in issue being directly and substantially in the previous suit and subsequent suit being the same. The provisions of Section 10 are attracted—Trial Court has committed an error; impugned order is accordingly set aside—Petition disposed of accordingly.

The essential ingredients for the applicability of Section 10 of the Code are that if the matter in issue between the parties is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title and both the proceedings are pending before the competent courts of law the second suit shall be stayed. This provision is mandatory. The object of Section 10 is to prevent courts of current jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The following essential conditions for the application of Section 10 of the Code can be broadly enumerated as under:

(a) There must be two pending suits on same matter,

(b) These suits must be between same parties or

parties under whom they or any of them claim to litigate under same title,

(c) The matter in issue must be directly and substantially same in both the suits,

(d) The suits must be pending before competent Court or Courts,

(e) The suit which shall be stayed is the subsequently instituted suit. **(Para 10)**

One of the test of the applicability of Section 10 is whether on the final decision being reached in the previous suit such a final decision will operate as res judicata in a subsequent suit; to decide whether the second suit is hit by Section 10, the test is to find out whether the plaint in one suit would be the written statement in the other suit or not. If this test is positive the decision in one suit will operate as res judicata in the other suit. This is the principal test on which Section 10 is applied. **(Para 11)**

Applying this test to the instant case, it is clear that the decision in the first suit (as is evident from the prayers) will operate as res judicata in the second suit. Section 10 is clearly applicable. **(Para 12)**

Important Issue Involved: One of the test of the applicability of Section 10 is whether on the final decision being reached in the previous suit such a final decision will operate as res judicata in a subsequent suit to decide whether the second suit is hit by Section 10, the test is to find out whether the plaint in one suit would be the written statement in the other suit or not—If this test is positive the decision in one suit will operate as res judicata in the other suit.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Harish Katyal, Advocate.

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

RESULT: Petition disposed.

INDERMEET KAUR, J. (Oral)

1. The impugned order is dated 30.07.2008; the application filed by the petitioner i.e. Punjab and Sind Bank under Section 10 of the Code of Civil Procedure (hereinafter referred to as 'the Code') seeking stay of the present suit had been declined.

2. Record shows that the Punjab and Sind Bank had filed a suit for specific performance on 30.12.1987; this suit was directed against M/s. Madhan & Co. a partnership firm comprising of two partners. It was registered as Suit No. 78/1988. It was filed in the High Court but thereafter due to the change in the pecuniary jurisdiction, it was transferred to the district court; during the pendency of this suit Lalit Mohan Madhan/M/s. Madhan & Co.(the said partnership firm) filed a suit against the Punjab and Sind Bank seeking a declaration, permanent injunction on the basis of the same documents i.e. the agreement which was the subject matter of the suit for specific performance which had been filed by the Punjab and Sind Bank; the prayer in this second suit was that the aforenoted agreement to sell dated 15.3.1977 and 5.4.1977 be declared null and void. This suit was registered as Suit No. 2074/1998. During the course of these proceedings the present application under Section 10 of the Code was filed by the petitioner seeking stay of this later suit. Impugned order had however declined the prayer.

3. Vehement contention of the learned counsel for the petitioner is that all the ingredients of Section 10 of the Code stood met and the first suit which was a suit for specific performance was qua the same agreement dated 15.3.1977 and 5.4.1977.

4. Record shows that M/s Madhan & Co. had purchased a plot of land measuring 344.65 sq. mt. in an open auction from the DDA; it was thereafter offered for sale to the Punjab and Sind Bank by a aforenoted communication dated 08.01.1977 it was followed up by another communication dated 15.3.1977; letter of acceptance of the Punjab and Sind Bank is dated 30.3.1977. This agreement was for a total sale consideration of Rs.12.50 lacs out of which Rs. 12.25 lacs was paid by

Punjab and Sind Bank to Madan & Co. A joint application was also made by the parties before the DDA seeking transfer of the plot in favour of the Punjab and Sind Bank; possession of the land was also handed over to the Punjab and Sind Bank. However on 31.08.1985, M/s. Madan & Co. wrote a letter to Punjab and Sind Bank to treat the agreement as cancelled as on 23.09.1986 DDA had also threatened to make re-entry into the property.

5. Record further shows that the second suit was filed on 21.09.1998 which was during the pendency of the first suit. This suit was filed by Sh. Lalit Mohan Madhan/Ms.Madan & Co. against the Punjab and Sind Bank; it was a suit for declaration and possession; contention was that the agreement entered between the Punjab and Sind Bank and Ms/ Madan & Co. be declared null and void; further contention being that it was only on 31.09.1986 that Madan Co. was informed by the DDA about the refusal of the permission to transfer the plot and their proposal to re-enter the property; contention being that this whole transaction was subject to the permission of transfer of property by the DDA in favour of the Punjab and Sind Bank which permission was refused; this being a contingent contract, the said agreement and sale letters dated 15.03.1977 and 05.04.1977 be declared null and void.

6. Admittedly, two suits are between the same parties. The first suit is a suit for specific performance qua the agreement/sale letters dated 15.03.1977 and 05.04.1977. Prayers made in the first suit read as under:

(a) A decree for specific performance of the agreement to sell building constructed on plot B Safdarjang Community Centre, New Delhi alongwith leasehold rights in the site of the said property leased in favour of defendant no. 1 by the President of India be passed in favour of the plaintiff and against the defendants and the defendant No. 1 be directed to obtain requisite permission from the Delhi Development Authority and in case the said permission is not forthcoming at the instance of defendant No. 1, the permission for sale be applied for afresh through the Registrar of this Hon'ble Court and upon receipt of such permission the property be conveyed to the plaintiff through a registered sale deed that be directed to be executed by the Registrar of this Hon'ble Court in favour of the plaintiff.

(b) That in case specific performance be not allowed, the plaintiff prays for a decree in its favour in the amount equivalent to the market value of the property prevailing on the date of the decree. The plaintiff also prays that interest be awarded on the market value of the property determined on the date of the decree till the date of realization at the bank rates prevailing at the relevant time.

(c) The plaintiff prays for a decree for permanent injunction restraining defendant No. 1 from in any manner negotiating for sale or assigning the property in favour of any body else other than the plaintiff bank or from applying for permission to sell in favour of any body other than the plaintiff, to the defendant NO. 4, Delhi Development Authority.

(d) The plaintiff also prays for a mandatory injunction directing Delhi Development Authority not to grant permission for sale of the suit property in favour of anybody other than the plaintiff as also a direction be issued to the Delhi Development Authority to finally dispose of the application for grant of permission pending with them ever since 9.2.79.

(e) Cost of the suit be awarded and

(f) Such other or other relief be granted as this Hon'ble Court deems fit and proper in the circumstance of the case.

7. The second suit which is a suit for declaration has been filed by Sh. Lalit Mohan Madhan/Ms.Madhan & Co. seeking a declaration to the effect that the aforenoted letters dated 15.03.1977 and 05.04.1977 be declared null and void as the contract was a contingent contract and DDA not having accorded permission to transfer the property, this contract had come to an end. The prayers made in the second suit read as under:

(i) Pass a decree of declaration in favour of the plaintiffs and against the defendants, declaring the agreement for sale dated 15.3.77/5.4.77 as void ab-initio and otherwise frustrated and that the plaintiffs continued to be the owner of the property bearing plot No. B, Community Centre,

Safdarjung Enclave, New Delhi with the constructed area comprising of ground floor measuring 1298 sq. ft. first floor measuring 1298 sq. ft. second floor measuring 1166 sq. ft. basement floor measuring 1298 sq. ft. and mezzanine floor measuring 534 sq. ft. and defendants have no right, title or interest in the same.

(ii) Pass a decree or possession in favour of the plaintiffs and against the defendants in respect of plot No. B, Community Centre, Safdarjung Enclave, New Delhi, admeasuring 344.65 sq. ft. with the constructed area of the ground floor measuring 1298 sq. ft. first floor measuring 1298 sq. ft. second floor measuring 1166 sq. ft. basement floor measuring 1298 sq. ft. and mezzanine floor measuring 534 sq. ft. and defendants may be directed to be ejected from the same and plaintiffs put in possession thereof.

(iii) Cost of the suit may also be awarded in favour of the plaintiffs and against the defendants.

(iv) Any other order or further orders as this Hon'ble court may just deem fit and proper in the facts and circumstances of the case, be passed.

8. The Trial Court has noted all these facts in the correct perspective but illegally failed to apply the requisite tests to deal with an application under Section 10 of the Code.

9. Relevant would it be to extract the provisions of Section 10 of the Code hereinbelow:-

10. Stay of suit.-No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in 1[India] having jurisdiction to grant the relief claimed, or in any Court beyond the limits of 1[India] established or continued by 2[the Central Government] 3[***] and having like jurisdiction, or before 4[the Supreme Court].

10. The essential ingredients for the applicability of Section 10 of

the Code are that if the matter in issue between the parties is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title and both the proceedings are pending before the competent courts of law the second suit shall be stayed. This provision is mandatory. The object of Section 10 is to prevent courts of current jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The following essential conditions for the application of Section 10 of the Code can be broadly enumerated as under:

(a) There must be two pending suits on same matter,

(b) These suits must be between same parties or parties under whom they or any of them claim to litigate under same title,

(c) The matter in issue must be directly and substantially same in both the suits,

(d) The suits must be pending before competent Court or Courts,

(e) The suit which shall be stayed is the subsequently instituted suit.

11. One of the test of the applicability of Section 10 is whether on the final decision being reached in the previous suit such a final decision will operate as res judicata in a subsequent suit; to decide whether the second suit is hit by Section 10, the test is to find out whether the plaint in one suit would be the written statement in the other suit or not. If this test is positive the decision in one suit will operate as res judicata in the other suit. This is the principal test on which Section 10 is applied.

12. Applying this test to the instant case, it is clear that the decision in the first suit (as is evident from the prayers) will operate as res judicata in the second suit. Section 10 is clearly applicable.

13. The matter in issue being directly and substantially in the previous suit and subsequent suit being the same, the provisions of Section 10 are attracted. In this background, the Trial Court has committed an error; impugned order is accordingly set aside.

14. Petition disposed of accordingly.

ILR (2012) V DELHI 533
WRIT PETITION (C)

CLASSIC BOTTLE CAPS (P) LTD. ….PETITIONER

VERSUS

USHA SINHA & ORS. ….RESPONDENTS

(P.K. BHASIN, J.)

WRIT PETITION NO. : 6860/2002 **DATE OF DECISION: 29.05.2012**

Industrial Disputes Act, 1947—Section 25-F by way of writ petition the company challenged the award dated 21.03.2002 in ID Case 241/1990 whereby the relief of reinstatement in service with 50% back wages had been granted to two respondent workmen—Petitioner contended that the Respondent workmen had not completed 240 days of service and hence, Section 25-F does not apply to the present case—Tribunal had earlier accepted the claim of the Respondents relying on the evidence of witness of the management Sh. K.K. Pahuja who in his cross examination said that Respondent no.1 had been employed w.e.f. 10.06.86 and Respondent no.2 had been employed w.e.f. 26.3.88 respectively—thus as per the statement both employees had completed 240 days of service—Petitioner contended that the management's witness in his affidavit had clearly given the exact dates of appointment of the workmen and therefore his statement to the contrary in cross examination could not be given any weightage. Held—Cross—examination is as much a part of the evidence of a witness as the examination in chief—If any party is able to elicit any admission on some vital point of dispute from a witness that admission can certainly be used by the party who is benefited from that admission. Jurisdiction of the High court to interfere in the awards of labour courts is very limited it is not entitled to act as an appellate court findings of fact reached by inferior Court or Tribunal as result of appreciation of evidence cannot be reopened or questioned in writ proceedings—Only an error of law apparent on the face of record can be corrected by a writ.

Learned counsel for the petitioner had contended that the management's witness had in his affidavit clearly given the exact dates of appointment of the workmen and, therefore, his statement to the contrary in cross-examination could not be given any weightage. However, this Court is not inclined to accept this argument. Cross-examination is as much a part of evidence of a witness as the examination-in-chief. If any party is able to elicit any admission on some vital point of dispute from a witness that admission can certainly be used by the party who is benefitted by that admission. So, there is no illegality committed by the Tribunal in using the admission made by management's own witness. Similarly, no fault can be found with the finding of the Tribunal that services of the workmen had been terminated by the petitioner since it cannot be believed that if workmen were actually absenting no action would have been taken against them and their names would have continued to remain on its rolls.

(Para 8)

Important Issue Involved: Cross examination is as much a part of evidence as examination in chief—if any party is able to elicit any vital point of dispute from a witness—admission can be used by party who benefited from it—Jurisdiction of High Court to interfere with decisions of labour courts is very limited—findings of fact reached by inferior Court or Tribunal after appreciating evidence cannot be reopened or questioned—only an error of law apparent on the face of record can be corrected by writ.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Amit Mahajan & Mr. Shashi Shekhar, Advocate.

FOR THE RESPONDENTS : Mr. Ankur Bansal, Advocate for R-1 & 2.

CASES REFERRED TO:

1. *"Harjinder Singh* vs. *Punjab State Warehousing Corporation",* (2010) 3 Supreme Court Cases 192.
2. *Surya Dev Rai* vs. *Ram Chander Rai and Ors.:* 2003 (6) SCC 675.
3. *Constitution Syed Yakoob* vs. *K.S. Radhakrishnan and Ors. :* AIR 1964 SC 477.

RESULT: Appeal dismissed.

P.K. BHASIN, J.

1. By way of this writ petition the petitioner-Company had challenged the award dated 21-03-2002 in ID Case No. 241/1990 whereby the relief of re-instatement in service with 50% back wages was granted to the two respondents-workmen by the Industrial Tribunal.

2. The respondents-workmen were admittedly employed with the petitioner-management. They had approached the labour authorities with the grievance that their services had been terminated illegally by the petitioner herein. Since they could not get any relief against the petitioner there the dispute between the petitioner was referred for adjudication to the Industrial Tribunal vide Reference order dated 23rd March, 1990 with the following term of reference:-

> "Whether the services of Ms. Usha Sinha and Sh. Kamal Kumar Bhandari have been terminated illegally and/or unjustifiably by the management, and if so, to what relief are they entitled and what directions are necessary in this respect?"

3. The respondents-workmen had filed their separate statements of claim whereby they claimed that the termination of their services to be illegal. The petitioner-management had also filed its separate written statements denying the allegations of illegal termination of the services of

the respondents. It was pleaded that the respondent no. 1 was employed w.e.f. 2nd May, 1988 while respondent no. 2 was employed w.e.f. 1st April, 1989 and that they were remaining absent w.e.f. 10.9.89 and 20.9.89 respectively and further that they had not completed 240 days of service and that the management was ready to take them back on duty without any back wages.

4. After examining the evidence adduced before it by both the sides the Industrial Tribunal vide its award under challenge came to the conclusion that the services of the respondents-workmen were illegally terminated by the petitioner and after holding so relief of reinstatement in service with 50% back wages was granted to both of them.

5. The petitioner–management felt aggrieved by the award of the Industrial Tribunal and thus filed this writ petition.

6. Learned counsel for the petitioner-management's main argument was that since the respondents-workmen had not completed 240 days of service before the alleged termination of their services Section 25-F of the Industrial Disputes Act, 1947 was not attracted and so there is a justified reason for this Court to interfere with the award of the Industrial Tribunal which has allowed the claim of the workman because of non-compliance of Section 25-F by the petitioner.

7. The Tribunal has accepted the case of the respondents-workmen relying upon the admission of the witness of the management, Sh. K.K. Pahuja, in his cross-examination that the respondent no. 1 had been employed w.e.f. 10.6.86 and respondent no. 2 w.e.f. 26.3.88 respectively with the petitioner-management and as per that statement both the workmen had completed 240 days service.

8. Learned counsel for the petitioner had contended that the management's witness had in his affidavit clearly given the exact dates of appointment of the workmen and, therefore, his statement to the contrary in cross-examination could not be given any weightage. However, this Court is not inclined to accept this argument. Cross-examination is as much a part of evidence of a witness as the examination-in-chief. If any party is able to elicit any admission on some vital point of dispute from a witness that admission can certainly be used by the party who is benefitted by that admission. So, there is no illegality committed by the Tribunal in using the admission made by management's own witness.

Similarly, no fault can be found with the finding of the Tribunal that services of the workmen had been terminated by the petitioner since it cannot be believed that if workmen were actually absenting no action would have been taken against them and their names would have continued to remain on its rolls.

9. This Court in any case is not sitting in appeal over the findings of fact given by the Tribunal and jurisdiction of the High Court to interfere in the awards of labour Courts is very limited. The Supreme Court in the case of **"Harjinder Singh vs Punjab State Warehousing Corporation",** (2010) 3 Supreme Court Cases 192 had observed as follows about the jurisdiction of High Court to interfere with awards of labour Courts:-

> "10. We have considered the respective submissions. In our opinion, the impugned order is liable to be set aside only on the ground that while interfering with the award of the Labour Court, the learned Single Judge did not keep in view the parameters laid down by this Court for exercise of jurisdiction by the High Court under Articles 226 and/or 227 of the **Constitution Syed Yakoob v. K.S. Radhakrishnan and Ors.** : AIR 1964 SC 477 and **Surya Dev Rai v. Ram Chander Rai and Ors.:** 2003 (6) SCC 675. In **Syed Yakoob's** case, this Court delineated the scope of the writ of certiorari in the following words:
>
> The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or iS in excess of it, or as a result of failure to exercise jurisdiction, A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or properly, as for instance, it decides a question without giving an opportunity, be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising

it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised..... ....

It is, of course, not easy to define or adequately describe what an error of law apparent on the face of the record means. What can be corrected by a writ has to be an error of law; hut it must be such an error of law as can be regarded as one which is apparent on the face of the record. Where it is manifest or clear that the conclusion of law recorded by an inferior Court or Tribunal is based on an obvious mis-interpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be, even in disregard of it, of is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory" provision that no difficulty is experienced by the High Court in holding that

the said error of law is apparent on the face of the record. It may also be that in some cases, the impugned error of law may, not be obvious or patent on the face of the record as such and the Court may need an argument to discover the said error; but there can be no doubt that what can be corrected by a writ of certiorari is an error of law and the said error must, on the whole, be of such a character as would satisfy the test that it is an error of law apparent on the face of the record. If a statutory provision is reasonably capable of two constructions and one construction has been adopted by the inferior Court or Tribunal, its conclusion may not necessarily or always be open to correction by a writ of certiorari. In our opinion, it is neither possible nor desirable to attempt either to define or to describe adequately all cases of errors which can be appropriately described as errors of law apparent on the face of the record. Whether or not an impugned error is an error of law and an error of law which is apparent on the face of the record, must always depend upon the facts and circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconstrued or contravened.

11. In **Surya Dev Rai's** case, a two-Judge Bench, after threadbare analysis of Articles 226 and 227 of the Constitution and considering large number of judicial precedents, recorded the following conclusions:

(1) Amendment by Act 46 of 1999 with effect from 1-7-2002 in Section 115 of the Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by CPC Amendment Act 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction — by assuming

jurisdiction where there exists none, or (ii) in excess of its jurisdiction — by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process' of reasoning, Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory/ jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings

in an appeal or revision preferred thereagainst and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case."

10. A reading of the impugned award in the present case shows that it does not suffer from any jurisdictional error and is also not vitiated by any error of law apparent on the face of the record. So, there is no scope for any interference by this Court and this writ petition being devoid of any merit is liable to be dismissed.

11. This writ petition is, accordingly, dismissed.

ILR (2012) V DELHI 542
W.P.

RAJINDER SINGH ….PETITIONER

VERSUS

UNION OF INDIA & ORS. ….RESPONDENTS

(ANIL KUMAR & SUDERSHAN KUMAR MISRA, JJ.)

W.P. NO. : 3169/2012 & CM NO. : 6785-6786/2012 **DATE OF DECISION: 30.05.2012**

Constitution of India, 1950—Article 226—Complaint made by HC Datta Ram that the Petitioner had abused him with filthy language under the influence of intoxication on the same day—Also cocked his rifle—damaged his weapon—Charges framed on account of misbehaviour—Tried by Summary Security Force Court (SSFC)—Petitioner plead guilty—Dismissed from service—Did not challenge the proceedings for 9 years—In Appeal Petitioner alleged that HC Datta Ram had used unparliamentarily language against him and had accused him of consuming liquor—Petitioner alleged that false report was prepared—Petitioner had pleaded "guilty" to all three charges before the SSFC—Opportunity was also given to the Petitioner to making statements in reference to the charge or for the mitigation of the punishment and call any witness—Past record had 2 awards but Petitioner had also been punished summarily four times during the service—Appellate Authority held that there was sufficient evidence in the ROE to support charges against Petitioner—Appellate Authority also noted that the allegations leveled by the petitioner are sustained by evidence on record—Petitioner preferred the above noted writ petition, on the grounds that the order of

dismissal was biased and perverse—and alleged — that fair opportunity not given to present his defence—Held:— Decision of Summary Security Force Court can only be reviewed on grounds of "illegality", "irrationality", and "procedural impropriety"—If the power exercised on basis of facts which do not exist having are patent erroneous, such exercise of powers shall be vitiated—In judicial review the court will not take over the functions of the Summary Security Force Court—Writ Petition is not an appeal against the findings of the Summary Security force Court—Cannot interfere with findings of fact arrived at by SSFC except in the case of mala-fides or perversity—Petitioner not been able to substantiate any of his contentions—Friend of Accused appointed and no allegation made against that person about his unsuitability—No cogent explanation provided for false implication—Writ Petition without merit—dismissed.

It cannot be disputed that the grounds on which decision of Summary Security Force Court can be interfered by judicial review are, "illegality"; "irrationality" and "procedural impropriety". The Court will not interfere in such matters unless the decision is tainted by any vulnerability like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories is to be established and mere assertion in that regard may not be sufficient. To be "irrational" it has to be held that on material, it is a decision "so outrageous" as to be in total defiance of logic or moral standards. If the power is exercised on the basis of facts which do not exist having which are patently erroneous, such exercise of power shall be vitiated. Exercise of power will be set aside if there is manifest error in the exercise of such power or the exercise of power is manifestly arbitrary. To arrive at a decision on "reasonableness" the Court has to find out if the respondents have left out a relevant factors or taken into account irrelevant factors. It was held in (2006) 5 SCC 88, **M.V.Bijlani Vs Union of India & Ors.** that the Judicial review is of decision making process and not of re-

appreciation of evidence. The Supreme Court in para 25 at page 96 had held as under:

> '25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analyzing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with'. **(Para 12)**

In Judicial review of the decision of Summary Security Force Court this Court will not take over the functions of the Summary Security Force Court. The writ petition is not an appeal against the findings of Summary Security Force Court nor this court is exercising or assuming the role of the Appellate Authority. It cannot interfere with the findings of the fact arrived at by the Summary Court except in the case of mala-fides or perversity i.e. where there is no evidence to support a finding or where the finding is such that no one acting reasonably or with objectivity could have arrived at or where a reasonable opportunity has not been given to the accused to defend himself or if it is a case where there has been non application of mind on the part of the Summary Court or if the charges are vague or if the punishment imposed is shocking to the conscience of the Court. Reliance for the scope of Judicial Review can be

placed on **State of U.P & Ors. Vs Raj Kishore Yadav & Anr.,** (2006) 5 SCC 673; **V.Ramana Vs A.P. SRTC & Ors.,** (2005) 7 SCC 338; **R.S.Saini Vs State of Punjab & Ors.,** JT 1999 (6) SC 507; **Kuldeep Singh Vs The Commissioner of Police,** JT 1998 (8) SC 603; **B.C.Chaturvedi Vs Union of India & Ors,** AIR 1996 SC 484; **Transport Commissioner, Madras-5 Vs A.Radha Krishna Moorthy,** (1995) 1 SCC 332; **Government of Tamil Nadu & Anr. Vs A. Rajapandia,** AIR 1995 SC 561; **Union of India & Ors. Vs Upendra Singh,** (1994) 3 SCC 357. **(Para 13)**

Learned counsel for the petitioner has contended that a fair trial was not conducted and that all the concerned persons have conspired to falsely implicate the petitioner. However, the learned counsel for the petitioner has not been able to substantiate any of his contentions. **(Para 15)**

This has not been disputed by the learned counsel for the petitioner that the petitioner had pleaded guilty before the SSFC and that Rules 142 and 143 of the BSF Rules had been complied with by the respondents. From the perusal of the record of evidence, it is apparent that there is sufficient evidence which inculpates the guilt of the petitioner. The learned counsel for the petitioner has also not been able to make out any plea or ground on the basis of which this Court may infer that there has not been an application of mind on the part of the Disciplinary Authority or the Appellate Authority. No illegality, irrationally or any procedural impropriety has been pointed out in the facts and circumstances, nor can it be held that the finding of the respondents is so outrageous so as to be in utter defiance of logic or that the power has been exercised by the respondents on the basis of alleged facts which do not exist or which are patently erroneous. The learned counsel for the petitioner has failed to give any satisfactory explanation that if the petitioner was indeed falsely implicated then why this plea was not put to any of the witnesses who were examined. The plea of the learned counsel for the petitioner

that the petitioner was not allowed to cross-examine is also negated by the fact that the petitioner did cross-examine some of the witnesses and declined to cross-examine the other witnesses. A friend of the accused was also appointed and no allegation was made against that person about his unsuitability. No cogent explanation has also been given that if the petitioner was indeed falsely implicated then why he did not give any statement in the ROE and SSFC stating that he had not done any of the thing which were alleged against him and that the medical personnel had falsely given the report against him that he had badly smelling of liquor. The petitioner has also not denied the earlier punishments awarded to him. **(Para 16)**

Important Issue Involved: Court shall not interfere in the decision of the inferior court-unless such decision is tainted with illegality, irrationality or procedural impropriety—Cannot interfere with findings of fact except in case of malafides or perversity.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. A.K. Mishra & Mr. Ajay Tiwari Advocate.

FOR THE RESPONDENT : Mr. Ravinder Agarwal & Mr. Amit Yadav, Advocate Mr. Bhupender Sharma, DC/BSF.

CASES REFERRED TO:

1. *State of U.P & Ors.* vs. *Raj Kishore Yadav & Anr.*, (2006) 5 SCC 673.
2. *M.V.Bijlani* vs. *Union of India & Ors.* (2006) 5 SCC 88.
3. *V.Ramana* vs. *A.P. SRTC & Ors.*, (2005) 7 SCC 338.
4. *R.S.Saini* vs. *State of Punjab & Ors.*, JT 1999 (6) SC 507.

5. *Kuldeep Singh* vs. *The Commissioner of Police,* JT 1998 (8) SC 603.

6. *B.C.Chaturvedi* vs. *Union of India & Ors,* AIR 1996 SC 484.

7. *Transport Commissioner, Madras-5* vs. *A.Radha Krishna Moorthy,* (1995) 1 SCC 332.

8. *Government of Tamil Nadu & Anr.* vs. *A. Rajapandia,* AIR 1995 SC 561.

9. *B.C.Chaturvedi* vs.*Union of India & Ors.* 1995) 6 SCC 749.

10. *Union of India & Ors.* vs. *Upendra Singh,* (1994) 3 SCC 357.

RESULT: Appeal dismissed.

ANIL KUMAR, J.

CM No.6786/2012

Allowed subject to all just exceptions.

The application is disposed of.

CM No.6785/2012

This is an application by the petitioner/applicant seeking quashing/ set aside the order dated 15th May, 2000 and 18th January, 2010 by which the respondents had dismissed the petitioner from service. The petitioner/applicant has contended that he is a poor person and did not have sufficient means even for the survival of his family which led to delay in filing the writ petition.

For the reasons stated in the application, it is allowed and the delay in filing the writ petition is condoned and the writ petition is to be considered on merit.

The application is disposed of.

WP(C) No.3169/2012

1. The petitioner has challenged the order dated 15th May, 2000 passed by the Disciplinary Authority, dismissing the petitioner from the

service w.e.f. 15th May, 2000 and the order dated 18th January, 2010 passed by the Appellate Authority dismissing the appeal of the petitioner. The petitioner has also sought directions to the respondents to reinstate him with full back wages.

2. Brief relevant facts are that the petitioner was recruited in the Border Security Force (BSF) in the year 1996 as a Constable (GD). After completion of his training, he was posted at 22 BN BSF, Srinagar (Jammu & Kashmir). On 15th March, 2000 a complaint was made by HC Datta Ram that the petitioner had abused him with filthy language under the influence of intoxication on the same day. In his complaint dated 15th March, 2000, HC Datta Ram had also stipulated that the petitioner was on duty of General Branch after which he along with Constable Vijay Kumar had come to the Headquarter to take food and after bringing their food they had reached the guarding of DIG at 18.45 PM and told his Guard Commander that he had some necessary work. Thereafter, the Guard Commandant had found the petitioner to be drunk at 0700 hours and abusing the Commander by name, and saying that he will become a militant and will shoot everyone. He had also cocked his Rifle and damaged his weapon and ammunition. Around 2110 hours the petitioner was taken by the Constable Vijay Kumar, Const R.P. Singh, Constable Naresh Kumar, and Constable Sube Singh in unconscious state and had reported the incident to the GD line officer SI Surender Jha and had thereafter left him at BN Hospital.

3. On account of the misbehaviour on the part of the petitioner three charges were framed against him and he was tried by the Summary Security Force Court (SSFC) on 15th May, 2000 under the BSF Act, i.e. under Section 20 (a) for assaulting his superior Officer, under Section 26 for intoxication and under Section 33(a) for willfully damaging the property of the Government. Charges which were framed against the petitioner categorically stated that while deployed on guard duty on 15th May, 2000 at about 2030 hours at the office of Additional DIG (G), Ftr HQ BSF, Srinagar he pointed his Rifle towards the HC Datta Ram of the same unit and said "Main Tuje Goli Mar Doonga. (I will shoot you); that he was found in the state of intoxication on the same day and time and that he had willfully damaged three magazines of 7.62 mm SLR and four rounds of 7.62 mm ammunition by hitting the same against the wall and thus, damaged the property of the Govt.

4. During the SSFC proceedings, the petitioner pleaded guilty of all the three charges, and therefore, the petitioner was sentenced "to be dismissed from service" by order dated 15th May, 2000. The findings and sentence were promulgated to the petitioner on the same day and the trial proceedings were counter signed by the DIG SHQ BSF ISD II Srinagar on 27th May, 2000.

5. The petitioner did not challenge his dismissal by the SSFC for 9 years and thereafter, he filed a petition dated 11th August, 2009 against his dismissal addressed to the DIG, BSF Ftr HQ Tripura. Under the relevant rules i.e. Section 117 of the BSF Act read with 167 & 168 of the BSF Rules, the petitioner was to submit an appeal against the order of his dismissal within three months from the date of promulgation of sentence excluding the time taken to obtain the copy of the proceedings. The petitioner in his appeal raised the grounds, inter-alia, that on 15th March, 2000 at about 1900 hours the Guard Commander HC Datta Ram had used unparliamentary language against him and had accused him of consuming liquor and at his instance he was taken to the unit MI Room and that on the recommendation of the adjutant a false report was prepared stipulating that the petitioner had consumed excessive liquor and thereafter, disciplinary action was initiated against him at the instance of HC Datta Ram; the allegation against him of breaking the rifle and rounds is false as HC Datta Ram himself had stated that he had taken away the rifle from the petitioner; the petitioner had also pointed out the variations in the statement of Constable Vijay Kumar and HC Datta Ram; that the statement of ASI/PH OP Kutty reveals that he was beaten by HC Datta Ram and others and, therefore, in order to save themselves he had been falsely implicated in the matter and that the Commandant without giving opportunity of a personal hearing had ordered the SSFC and thereafter, dismissed him from service without giving him any opportunity to prefer an appeal and that he had not even been paid arrears due to him at the time of his dismissal. The Appellate Authority duly noted all the grounds pleaded by the petitioner and observed that during the SSFC trial Subedar Rameshwar was appointed as the "friend of accused" to assist the petitioner and on arraignment, the petitioner had pleaded "guilty" to all the three charges and, therefore, the Court complied with the provisions of BSF Rule 142(2). Opportunity was also given to the petitioner for making statements in reference to the charge or for the mitigation of the punishment and call any witness, as to his character to which the petitioner had

declined to do the same. The Appellate Authority also noted that before awarding the punishment the SSFC had also taken into consideration his past record, according to which he had received two awards but he was also punished summarily four times during his service of 9 years and two months and consequently, he was awarded the punishment of dismissal from service.

6. The Appellate Authority took into consideration the evidence before the SSFC and held that there was sufficient evidence in the ROE to support the charges against the petitioner. The Appellate Authority also noted that if the petitioner's plea that he was falsely implicated in the matter is to be believed, then he should have stated so during the record of evidence or before the SSFC instead of pleading guilty to the said charges. The Appellate Authority also noted that the allegations leveled by the petitioner are not substantiated by the evidence on record.

7. Regarding the allegations of the petitioner that at the time of dismissal he was not paid the arrears, the Appellate Authority noted that the arrears of pay and allowances including for the period 1st May, 2000 to 15th May, 2000 were paid by DVR No.20 dated 1st July, 2000 and DVR No.63 dated 17th July, 2000 and thus, repelled all the pleas and contentions raised by the petitioner and dismissed his appeal against the order of his dismissal dated 15th May, 2000.

8. Aggrieved by the order of dismissal dated 15th May, 2000 and dismissal of his appeal by order dated 18th January, 2010, the petitioner has preferred the above noted writ petition, inter-alia, on the grounds that the order of dismissal is biased and perverse; that he was not given a fair opportunity to produce evidence in his defence; that the actions of the respondents are contrary to their existing rules and regulation; that the respondents failed to appreciate the real fact about the allegation leveled by HC Datta Ram; that the trial was not conducted in a judicious manner; and that the order of dismissal has been passed in a whimsical manner.

9. Along with the writ petition, the petitioner has also filed the copies of the statements recorded during the proceedings. Perusal of the statement of the witnesses had revealed that a medical report stipulating the level of alcohol in the petitioner's body was also produced during the proceedings. However, the copy of the medical record produced during the proceedings was not produced by the petitioner and, therefore, the

learned counsel for the petitioner had taken time to produce the copy of the medical papers on 23rd May, 2012 pursuant to which the petitioner has produced the copy of the medical report dated 15th March, 2000 which clearly shows that the concerned medical personnel who had examined the petitioner on 15th March, 2000 had categorically stated that the petitioner was badly smelling of alcohol. The witness, HC Datta Ram, PW-1 who had appeared during the proceedings had also categorically stated that on 15th March, 2000 when the petitioner had come back in the room he was smelling very badly of liquor. When it was enquired from him, from where he had consumed the liquor, he did not answer the same and rather started abusing HC Datta Ram and took his rifle and cocked it towards the said HC Datta Ram and said "Main Tuje Goli Mar Doonga. (I will shoot you) and thereafter, he damaged his rifle, magazines and ammunition. After which the rifle was taken from the petitioner and he was taken to the MI Room of the unit. The statement of the HC Datta Ram is also corroborated by HC Ram Prakash, PW-2 who was however, not cross-examined by the petitioner even though he was given the opportunity. The charges against the petitioner were also established from the statement of the Constable Vijay Kumar, PW-3 who too was not cross-examined by the petitioner even though opportunity was given to him. Constable Surender Jha, PW-4 had also categorically stated that the petitioner had stated that he would become militant and he will shoot other persons. The said witness was however, cross-examined by the petitioner and it was put to him as to when the petitioner had stated that he would become a militant and will kill all of them. In answer to the question put to the said witness in the cross-examination, the witness had replied that the petitioner had stated so in the unit MI Room when he had become conscious. However, even to the said witness it was not suggested on behalf of the petitioner that the witnesses were deposing falsely or that the petitioner had been falsely implicated in the matter.

10. Perusal of the statement of Sh.O.P.Kutty also corroborates the charges made against the petitioner and the said witness too was not even cross-examined by the petitioner, even though he was given the opportunity.

11. Thereafter, the petitioner was given the opportunity to make a statement in support of his allegation, however, the petitioner declined to make any statement or even give any statement in writing, despite the

opportunity having been given to him, nor did he examine any of the witnesses in support of his plea, that he was falsely implicated in the matter.

12. It cannot be disputed that the grounds on which decision of Summary Security Force Court can be interfered by judicial review are, "illegality"; "irrationality" and "procedural impropriety". The Court will not interfere in such matters unless the decision is tainted by any vulnerability like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories is to be established and mere assertion in that regard may not be sufficient. To be "irrational" it has to be held that on material, it is a decision "so outrageous" as to be in total defiance of logic or moral standards. If the power is exercised on the basis of facts which do not exist having which are patently erroneous, such exercise of power shall be vitiated. Exercise of power will be set aside if there is manifest error in the exercise of such power or the exercise of power is manifestly arbitrary. To arrive at a decision on "reasonableness" the Court has to find out if the respondents have left out a relevant factors or taken into account irrelevant factors. It was held in (2006) 5 SCC 88, **M.V.Bijlani Vs Union of India & Ors.** that the Judicial review is of decision making process and not of re-appreciation of evidence. The Supreme Court in para 25 at page 96 had held as under:

> '25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analyzing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with'.

13. In Judicial review of the decision of Summary Security Force

Court this Court will not take over the functions of the Summary Security Force Court. The writ petition is not an appeal against the findings of Summary Security Force Court nor this court is exercising or assuming the role of the Appellate Authority. It cannot interfere with the findings of the fact arrived at by the Summary Court except in the case of mala-fides or perversity i.e where there is no evidence to support a finding or where the finding is such that no one acting reasonably or with objectivity could have arrived at or where a reasonable opportunity has not been given to the accused to defend himself or if it is a case where there has been non application of mind on the part of the Summary Court or if the charges are vague or if the punishment imposed is shocking to the conscience of the Court. Reliance for the scope of Judicial Review can be placed on **State of U.P & Ors. Vs Raj Kishore Yadav & Anr.,** (2006) 5 SCC 673; **V.Ramana Vs A.P. SRTC & Ors.,** (2005) 7 SCC 338; **R.S.Saini Vs State of Punjab & Ors.,** JT 1999 (6) SC 507; **Kuldeep Singh Vs The Commissioner of Police,** JT 1998 (8) SC 603; **B.C.Chaturvedi Vs Union of India & Ors,** AIR 1996 SC 484; **Transport Commissioner, Madras-5 Vs A.Radha Krishna Moorthy,** (1995) 1 SCC 332; **Government of Tamil Nadu & Anr. Vs A. Rajapandia,** AIR 1995 SC 561; **Union of India & Ors. Vs Upendra Singh,** (1994) 3 SCC 357.

14. In (1995) 6 SCC 749, **B.C.Chaturvedi v. Union of India & Ors.** Supreme Court at page 759 has held as under:-

> '12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to

> disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to reappreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case'.

15. Learned counsel for the petitioner has contended that a fair trial was not conducted and that all the concerned persons have conspired to falsely implicate the petitioner. However, the learned counsel for the petitioner has not been able to substantiate any of his contentions.

16. This has not been disputed by the learned counsel for the petitioner that the petitioner had pleaded guilty before the SSFC and that Rules 142 and 143 of the BSF Rules had been complied with by the respondents. From the perusal of the record of evidence, it is apparent that there is sufficient evidence which inculpates the guilt of the petitioner. The learned counsel for the petitioner has also not been able to make out any plea or ground on the basis of which this Court may infer that there has not been an application of mind on the part of the Disciplinary Authority or the Appellate Authority. No illegality, irrationally or any procedural impropriety has been pointed out in the facts and circumstances, nor can it be held that the finding of the respondents is so outrageous so as to be in utter defiance of logic or that the power has been exercised by the respondents on the basis of alleged facts which do not exist or which are patently erroneous. The learned counsel for the petitioner has failed to give any satisfactory explanation that if the petitioner was indeed falsely implicated then why this plea was not put to any of the witnesses who were examined. The plea of the learned counsel for the petitioner that the petitioner was not allowed to cross-examine is also negated by

the fact that the petitioner did cross-examine some of the witnesses and declined to cross-examine the other witnesses. A friend of the accused was also appointed and no allegation was made against that person about his unsuitability. No cogent explanation has also been given that if the petitioner was indeed falsely implicated then why he did not give any statement in the ROE and SSFC stating that he had not done any of the thing which were alleged against him and that the medical personnel had falsely given the report against him that he had badly smelling of liquor. The petitioner has also not denied the earlier punishments awarded to him.

17. None of the grounds and conditions have been made out by the petitioner which will entail any interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. There are no ground to justify any interference with the orders of the respondents dated 15th May, 2000 and 18th January, 2010 dismissing the petitioner. The writ petition is, without any merit, and it is, therefore, dismissed.

ILR (2012) V DELHI 555
MAC. APP.

UTTARAKHAND TRANSPORT CORPORATION ….APPELLANT

VERSUS

RAM SAKAL MAHTO & ANR. ….RESPONDENTS

(G.P. MITTAL, J.)

MAC APP. NO. : 649/2012 DATE OF DECISION: 01.06.2012.

Limitation Act, 1963—Section 5—Motor Vehicles Act, 1988—Section 103—Appellant impugns judgment passed by Claims Tribunal—Along with appeal, application for condonation of delay filed—Plea taken, award came to appellant's knowledge only when

execution proceedings were initiated against appellant—Held—Courts normally do not throw away meritorious lis on hypertechincal grounds—Primary function of court is to adjudicate dispute between parties and to advance substantial justice—Object of providing a legal remedy is to repair damage caused by reason of legal injury—Law of limitation fixes a lifespan for such legal remedy for redresss of legal injury so suffered—Condonation of delay is a matter of discretion of Court—Section 5 of Limitation Act does not say that such discretion can be exercised only if delay is within a certain limit—Expression 'sufficient cause' should be given liberal interpretation so as to advance substantial justice between parties—It is not length of delay which is material for condonation of delay in filing Appeal but acceptability of explanation—Law that each day's delay must be explained has mellowed down yet it has to be shown by applicant that there was neither any gross negligence nor any inaction, nor want of bonafides—There is not even a whisper as to when appellant stopped appearing before Claims Tribunal and reasons for same—Delay of 308 days, of course, a long delay, can be condoned provided there is sufficient cause to explain same—Since appellant has failed to show sufficient cause for condonation of delay, application cannot be allowed—No sufficient ground to condone delay—Application and appeal are dismissed.

Principles enunciated for condonation of delay are well settled. Expression 'sufficient cause' should be given liberal interpretation so as to advance substantial justice between the parties (**Balwant Singh v. Jagdish Singh** (2010) 8 SCC 685; **State of Karnataka v. Y. Moideen Kunhi (Dead) By LRs and Others** (2009) 13 SCC 192; **Ram Nath Sao v. Gobardhan Sao** (2002) 3 SCC 195; **N. Balakrishnan v. M. Krishnamurthy** (1998) 7 SCC 123; **G.Ramegowda, Major and Others v. Special Land Acquisition Officer, Bangalore and Basavalingappa v. Special Land**

Acquisition Officer, Bangalore, (1988) 2 SCC 142). It is not the length of delay which is material for condonation of delay in filing an Appeal but the acceptability of the explanation. There may be cases where a few months' delay may not be condoned as an applicant has no reasonable explanation to offer for the same, yet there are cases where delay of several years has been condoned (**State of Nagaland v. Lipok Ao and Others** (2005) 3 SCC 752; **Ramnath Sao v. Gobardhan Sao** (2002) 3 SCC 195; **M.K.Prasad v. P. Arumugam** 2001 (6) SCC 176; **State of Bihar v. Kameshwar Prasad Singh and Another** 2000 (9) SCC 94; **N.Balakrishnan v. M.Krishnamurthy** (1998) 7 SCC 123). The law that each day's delay must be explained has mellowed down yet it has to be shown by the applicant that there was neither any gross negligence nor any inaction, nor want of bonafides. **(Para 6)**

Important Issue Involved: The law of limitation is founded on public policy. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANT : Ms. Garima Prashad, Advocate.

FOR THE RESPONDENTS : Ms. Manju Wadhwa with Ms. Arpan Wadhwa, Advocate for the Respondent no. 7 Insurance Company.

CASES REFERRED TO :

1. *Balwant Singh* vs. *Jagdish Singh* (2010) 8 SCC 685.
2. *State of Karnataka* vs. *Y. Moideen Kunhi (Dead) By LRs and Others* (2009) 13 SCC 192.
3. *State of Nagaland* vs. *Lipok Ao and Others* (2005) 3 SCC 752.
4. *Ramnath Sao* vs. *Gobardhan Sao* (2002) 3 SCC 195.

5. *M.K.Prasad* vs. *P. Arumugam* 2001 (6) SCC 176.
6. *State of Bihar* vs. *Kameshwar Prasad Singh and Another* 2000 (9) SCC 94.
7. *N.Balakrishnan* vs. *M.Krishnamurthy* (1998) 7 SCC 123.
8. *G.Ramegowda, Major and Others* vs. *Special Land Acquisition Officer, Bangalore and Basavalingappa* vs. *Special Land Acquisition Officer, Bangalore,* (1988) 2 SCC 142).

RESULT : Application and appeal are dismissed.

G.P. MITTAL, J. (ORAL)

C.M. APPL Nos.10521/2012 & 10522/2012 (Exemption)

Exemption allowed, subject to all just exceptions.

The applications stand disposed of.

MAC. APP. No.649/2012 & CM. APPL No.10523/2012

1. The Appellant Uttarakhand Transport Corporation impugns a judgment dated 27.04.2011 passed by the Motor Accident Claims Tribunal(the Claims Tribunal) whereby while awarding a compensation of Rs. 4,00,000/- in favour of the Respondents No.1 to 6, the Respondent No.7 was given right to recover the compensation from the Appellant (the insured) because of the willful breach of the terms of the insurance policy by the insured.

2. Along with the Appeal, an Application under Section 5 of the Limitation Act has been filed for condonation of delay.

3. It is admitted case of the parties that this accident occurred on 18.02.2007 wherein deceased Ashok Kumar suffered fatal injuries. The Claim Petition was filed on 30.04.2007. The Appellant filed a written statement contesting the claim of the Respondents No.1 to 6. On appreciation of the evidence, the Claims Tribunal found that the accident was caused because of the rash and negligent driving of Balam Singh (the First Respondent before the Claims Tribunal), who was the driver of bus No.UA-07M-7760 owned by the Appellant. The compensation was computed taking the deceased's income to be Rs. 3,470/- per month. The grounds set up for condonation of delay in the Application are

extracted hereunder:

> "3. That the said Award has come to the knowledge of the Appellant Corporation, only when the execution filed by the Insurance Company, then the copy of the impugned judgment along with the legal opinion was sent to the Dehradun Regional office of the Corporation and thereafter it was sent to the Head office of the Corporation wherein after obtaining requisite clearance from the concerned legal department, the file has been received by the Regional office for filing the present appeal. The Regional office has thereafter given the file to its counsel for filing the appeal.
>
> 4. That the delay is neither intentional nor caused by any default on the part of the Appellant but has been occasioned by reasons beyond the control of the Appellant Corporation."

4. The Appellant is completely silent as to why the award came to its knowledge only when the execution proceedings were initiated by the Seventh Respondent against the Appellant particularly when the Appellant was contesting the Claim Petition. There is a delay of 308 days in filing the Appeal.

5. The courts normally do not throw away the meritorious lis on hypertechnical grounds. The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. The law of limitation is thus founded on public policy. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time. Condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit.

6. Principles enunciated for condonation of delay are well settled. Expression 'sufficient cause' should be given liberal interpretation so as to advance substantial justice between the parties (**Balwant Singh v. Jagdish Singh** (2010) 8 SCC 685; **State of Karnataka v. Y. Moideen Kunhi (Dead) By LRs and Others** (2009) 13 SCC 192; **Ram Nath Sao v. Gobardhan Sao** (2002) 3 SCC 195; **N. Balakrishnan v. M. Krishnamurthy** (1998) 7 SCC 123; **G.Ramegowda, Major and Others v. Special Land Acquisition Officer, Bangalore and Basavalingappa v. Special Land Acquisition Officer, Bangalore,** (1988) 2 SCC 142). It is not the length of delay which is material for condonation of delay in filing an Appeal but the acceptability of the explanation. There may be cases where a few months' delay may not be condoned as an applicant has no reasonable explanation to offer for the same, yet there are cases where delay of several years has been condoned (**State of Nagaland v. Lipok Ao and Others** (2005) 3 SCC 752; **Ramnath Sao v. Gobardhan Sao** (2002) 3 SCC 195; **M.K.Prasad v. P. Arumugam** 2001 (6) SCC 176; **State of Bihar v. Kameshwar Prasad Singh and Another** 2000 (9) SCC 94; **N.Balakrishnan v. M.Krishnamurthy** (1998) 7 SCC 123). The law that each day's delay must be explained has mellowed down yet it has to be shown by the applicant that there was neither any gross negligence nor any inaction, nor want of bonafides.

7. I have already extracted above the grounds set up by the Appellant for condonation of delay. There is not even a whisper as to when the Appellant stopped appearing before the Claims Tribunal and the reasons for the same. The delay of 308 days, of course, a long delay can be condoned provided there is sufficient cause to explain the same. Since the Appellant has failed to show sufficient cause for condonation of delay, the Application cannot be allowed.

8. Otherwise also, the Appellant's case is that it had been issued a permit under Section 103 of the Motor Vehicles Act (the Act). This fact was required to be established by the Appellant during inquiry before the Claims Tribunal which the Appellant failed to do so even in spite of service of the notice under Order XII Rule 8 CPC upon it and which was proved by R3W1 Vikram Singh, who was examined by the Seventh Respondent.

9. In the circumstances, I do not find sufficient ground to condone the delay. Consequently, the Application and the Appeal are dismissed.

10. Pending Applications stand disposed of.

ILR (2012) V DELHI 561
CA

INDRAMA INVESTMENT PVT. LTD. ….APPLICANT

VERSUS

SELECT HOLIDAY RESORTS LTD. ….RESPONDENT

(A.K. SIKRI, ACJ.)

CA NO. : 280/2005 & CA NO. : 331/2005
IN CO. PET. NO. : 95/2004

DATE OF DECISION: 01.06.2012

The Companies Act, 1956—Section 391 and Section 394—Sanction of the Court sought to the scheme of Amalgamation of Indrama Investment Pvt. Ltd. (transferor company) with select holiday Resorts Ltd (transferee company)—Second motion—earlier transferor company had filed application praying for directions regarding dispensing the requirement of convening of equity shareholders and creditors of the transferor company—further directions sought regarding convening and holding of meetings of the shareholders and unsecured and secured creditors of the transferee company for the purpose of convening and approving the scheme of arrangement—Said application disposed of dispensing with the meetings of shareholders and creditors of the transferor company and further directing convening of the equity shareholders, secured and unsecured creditors of the transferee company—No objection filed to the grant of sanction to the scheme

of arrangement—scheme of amalgamation/arrangement sanctioned—After lapse of six months C.A. No. 280/2005 filed under section 394(2) and Section 395(1) of the Act by Capt. Swadesh Kumar, one of the shareholders—questioning the validity of the scheme—Within few days Shri Ram Kohli filed similar objections—Notices issued to the transferee company—Reply received stoutly contesting the objection—Amalgamation in consideration of transferee company issuing to equity shareholders of the transferor company shares in the transferee company—Reasons for amalgamation—Both transferor and transferee companies closely held unlisted companies with common lineage—transferee company incurring losses—Borrowings of transferee company guaranteed by corporate guarantee given by the transferor company—Cost and management of said companies shall be reduced by amalgamation-Grievances of individual shareholders-artificial exchange ratio stipulated which prejudicially affects the interest of the applicants—Alleged that valuation of the shares of the company was not as per the law—No separate meeting held for the applicants who constituted a separate class of shareholdings which was required under Section 391 of the Act—Respondents replied stating valuation was as per law and applicants could not be treated as a separate class for the purpose of Section 391 Held:— Shareholders pattern and the fact of applicants having small fractions of shares would not make them a separate class—the remain in the same category i.e. equity shareholders Objection of Applicants dismissed—Merely because the arrangement results in extinguishing of shares and results into 100% shareholdings in the hands of a particular group cannot be treated improper per se—Profit earning method adopted by the auditors held to be valid—Report filed by applicants not accepted as events and circumstances which have taken place

after amalgamation under which the profitability has increased, cannot be relevant consideration for valuation of shares at the time when decision for amalgamation was taken Applicants unable to show ulterior motives—no merit in the applications—application dismissed.

I have considered the submissions of counsel for the parties. It is not in dispute that the procedure as laid down in Section 391 of the Act was followed both at the stage of first motion and at the second motion before approving the scheme. We cannot merely go by the shareholding pattern and because the applicants are having small fractions of shares would not make them a separate class. They remained in the same category as other shareholders, i.e., equity shareholders. If the contention is accepted, then there would be different categories of shareholdings within the same class and no such position is postulated in Section 391 of the Act. **(Para 15)**

Mr. Vohra may be right in his submission that the events had taken place after the amalgamation and the circumstances under which profitability of the company has increased cannot be relevant consideration for valuation of the shares or to judge the profitability of the company at the time when the decision for amalgamation was taken for the stake holders. Therefore, the report filed by the applicants also cannot be accepted. **(Para 23)**

Important Issue Involved: Mere fact that shall fractions of shares are held by certain people does not make them a separate class of shareholders-events which have taken place after amalgamation-not relevant consideration for valuation at the time of amalgamation.

[Sa Gh]

APPEARANCES:

FOR THE APPLICANT : Mr. Anish Upadhyay, Adv.

FOR THE RESPONDENT : Mr. Ahay Vohra with Mr. Satwinder Singh, Ms. Divya Suman & Ms. Sushma Mathur, Adv.

CASES REFERRED TO:

1. *Sandvik Asia Ltd.* vs. *Bharat Kumar Padamsi* [2009] 91 CLA 247 [2009] 111 (4) Bom. LR 1421.
2. *Ramesh B Desai* vs. *Bipin Vadilal Mehta* [2006] 73 CLA 357/[2006] 5 SCC 638 (SC).
3. *Reckitt Benckiser (India) Ltd.* [122 (2005) DLT 612].
4. *Hindustan Lever Employees Union* vs. *Hindustan Lever Limited* [1995] (Suppl.) (1) SCC 499.
5. *Poole* vs. *National Bank of China Ltd.* [1907] AC 229 (HL).
6. *Commissioner of Wealth Tax, Assam* vs. *Mahedeo Jalan & Ors.* [86 ITR 621].
7. *Commissioner of Gift Tax, Bombay* vs. *Ebrahim Haji Usuf Botwala,* [122 ITR 38].
8. *Commissioner of Income Tax* vs. *Sain Processing and Weaving Mills P. Ltd.,* [325 ITR 565].

RESULT: Appeal dismissed.

A.K. SIKRI (Acting Chief Justice)

1. Company Petition No.95 of 2004 was a petition under Sections 391 and 394 of the Companies Act, 1956 (hereinafter referred to as 'the Act') vide which sanction of this Court to the scheme of Amalgamation of Indrama Investment Private Limited (transferor company) with Select Holiday Resorts Ltd. (transferee company) was sought. This was the second motion. Earlier, the transferor company had filed Company Application, which was registered as CA (M) No.14 of 2004 under Sections 391(1) and 394 of the Act praying for directions regarding dispensing with the requirement of convening of the meetings of the equity shareholders and creditors of the transferor company and further directions regarding convening and holding of meetings of the shareholders and unsecured and secured creditors of the transferee company for the purpose of considering and approving the scheme of arrangement. The

said application was disposed of by this Court vide orders dated 10th February, 2004 dispensing with the meetings of the shareholders and creditors of the transferor company and further directing convening of separate meetings of the equity shareholders, secured and unsecured creditors of the transferee company. However, meetings of the equity shareholders, secured and unsecured of the transferee company were held in terms of the orders of this Court and the reports of the Chairperson were placed on record. Thereafter, the said petition, viz., Co. Pet. 95/2004 was filed for sanction of the scheme of arrangement under Section 391(2) read with Section 394 of the Act. It was also stated that no proceedings under Sections 235 to 251 of the Act are pending against any of the petitioner companies. Notices of this petition was issued and was duly served on the Regional Director, Department of Company Affairs, Kanpur. Notice was also advertised in the newspapers in compliance with this Court's order dated 21st April, 2004. The Regional Director filed his report in this Court. As per the said report, he had no objection to the grant of sanction to the scheme of arrangement. In spite of the advertisement of the notice of this petition in the newspapers, none had filed any objection to the grant of sanction to the scheme of arrangement.

2. Taking note of the aforesaid facts, vide orders dated 24th August, 2004 scheme of amalgamation/arrangements was sanctioned in the following manner:

> "In the aforesaid circumstances and having regard to the averments made in this petition and the materials placed on record and the affidavits filed by the Regional Director, Department of Company Affairs, Kanpur, I am satisfied that the prayers made in the petition deserve to be allowed. I also do not find any legal impediment to the grant of sanction to the Scheme of Arrangement.
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> Hence, sanction is hereby granted to the above-mentioned Scheme of Arrangement under Section 391(2) read with Section 394 of the Companies Act, 1956.
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> Consequent upon the amalgamation of the companies, the Transferor company shall stand dissolved without going through the process of winding up."

3. After a lapse of about six months, C.A. No.280/2005 was filed under Section 394 (2) and Section 395 (1) of the Act by Capt. Swadesh Kumar, one of the shareholders questioning the validity of the scheme with prayer for modification/recall of the aforesaid order dated 24th August, 2004 by withdrawing sanction granted to the said scheme. Within few days thereafter, another shareholder, viz., Shri Ram Kohli came forward and filed C.A. No.331/2005 with almost similar prayers.

4. It is these two applications which are the subject matter of present order. Notices in both the applications were issued to the transferee company and has filed replies to both these applications stoutly contesting the same. Before I indicate the nature of challenge laid to the validity or approval of the said scheme and the defence of the transferor company thereto, it is deemed proper to state some of the salient aspects of the scheme of amalgamation which was sanctioned vide orders dated 24th August, 2004, as the narration thereof would facilitate better understanding of the bone of contention.

5. As pointed out M/s. Indrama Investment Pvt. Ltd. has transferred and amalgamated to M/s. Select Holiday Resorts Ltd. It is, inter alia, in consideration of transferee company issuing to the equity shareholders of the transferor company shares in the transferee company as provided in the scheme of amalgamation that the authorized capital of the transferor company as made out in the scheme is Rs. 20,00,000/- divided into 20,000 shares of Rs. 100/- each. The issued, subscribed and paid-up capital of the transferor company is Rs. 18,18,000/- divided into 18,18,000 equity shares of Rs. 100/- each. Similarly, the authorized capital of the transferee company as made out in the scheme is Rs. 30,00,00,000/- divided into 1,50,00,000 equity shares of Rs. 10/- each being the issued, subscribed and paid up share capital of the company. Apart from the above, the issued, subscribed and paid-up share capital Rs.1,50,00,000/- being the 6% redeemable cumulative preference shares of Rs. 10/- each.

6. In the scheme presented before this Court seeking sanction, it had been claimed/made out therein the circumstances made out which have necessitated and/or justify the proposed scheme of amalgamation and objects sought amongst others are, inter alia, as follows:

(i) Both the transferor company as well as the transferee

company are closely held unlisted companies with a common lineage. The transferor company is holding approximately 98% shareholding in the transferee company and the balance is held by the individual shareholders, including family members of Ms. Inder Sharma, the promoter of both the companies whose holding constitutes approximately 1% in the transferee company.

(ii) The transferee company has been incurring losses in its operations and had borrowed high cost funds over a period from the banks and financial institutions and continues to borrow funds from banks, which are secured by corporate guarantees given by the transferor company.

(iii) Under the scheme, the entire assets and liability of the transferor company will vest in the transferee company with effect from 31st March, 2003 or such other date or dates as this Court shall direct in consideration of the transferee company allotting shares to the shareholders of the transferor company in the manner indicated in the scheme. It has been provided in Part-II of the scheme in Para Nos. 6.1 to 6.4 thereof that as a consequence of the sanctioning of the present scheme the value of shares carrying face value of Rs.10/- each of the transferee company shall be reduced to Rs.0.20/- and the remaining to the extent of Rs. 9.80/- shall be cancelled/extinguished. The exchange ratio, it is claimed, has been arrived at after due consideration of the financial position, profitability and effect of amalgamation in respect of the transferor company and the transferee company and is considered to the fair and reasonable taking all the circumstances into consideration.

(iv) It is further claimed that by amalgamating the said two companies, the cost and management of the said companies will considerably be reduced and will result in carrying on the business more economically and efficiently and also in obtaining their main purpose by new and improved means and enlarging their areas of operation.

(v) As a result of the amalgamation, the business of the two

companies can be combined conveniently and advantageously.

(vi) As a result of the amalgamation, the resources of the two companies will be pooled and the transferee company will be able to retionalize and strengthen its management, finance and it will be able to conduct its business efficiently.

(vii) The amalgamation will result in usual benefits and economies of scale, pooling and consolidation of resources and reduction in the cost of management and overhead expense and administration.

(viii) The amalgamation will have beneficial results for both the companies concerned, their shareholders, employees, creditors and all concerned.

7. It was stated in the petition that pursuant to orders dated 10th February, 2004 passed in CA (M) No.14/2004, meeting of its secured/unsecured shareholders and equity shareholders were convened which had approved the proposed scheme without any modification. It was also stated that notices of the said meetings were sent individually to the equity shareholders of the transferee company together with copy of the scheme of arrangement as well as the statement required by Section 393 of the Act and form of proxy. The notices of the meetings were also advertised in the two newspapers, i.e., "The Statesman" (English) and "The Dainik Jagaran" (Hindi) as directed vide orders dated 10th February, 2004. Both applicants claimed that they never received any notice of the meetings. Mr. Ram Kohli stated that he was, in fact, abroad at the time of publication of the notice in the newspapers. He came to know about the sanction of the scheme only when communication dated 14th December, 2004 was received in connection with the disposal of the odd lots shares held by the members/shareholders of the company. Almost similar kind of averments are made by the other applicant showing ignorance about holding of the meetings and coming to know of the sanction accorded by this Court only after receipt of the notice from lawyer in connection with the disposal of the odd lots shares held by him.

8. Mr. Ram Kohli was holding 15,000 equity shares in transferee

company for a face value of Rs.1,50,000/-. As per the scheme, since the share carrying face value of Rs.10/-, each of the transferee company was to be reduced to Rs.0.20/-, he was to get one share for each 500 shares and in this manner, his 15,000 shares were converted only into 300 shares in the new company. However, he was not allotted even these 300 shares because of the reason that the scheme further provided that if a person is holding less than 500 shares in the new company, he would no longer remain a shareholder. His share would be forfeited and he would be paid a value of the share as per the valuation arrived at and shown in the scheme. The other applicant also met with the same fate. His shareholding in the transferee company before amalgamation was 10,000 equity shares which became only 200 in the new company. He was also, thus, shown the door by forfeiting shares and paying him value of the said shares as per the valuation arrived at by the transferee company.

9. Mr. V.N. Kaura, learned Senior Counsel, argued for the applicant in C.A. No.331/2005 and these arguments were adopted by Ms. Anisha Upadhyay, learned counsel who appeared for the applicant in CA No.280/2005. Mr. Kaura submitted that the applicants have primarily the two following grievances:

(i) In the scheme of arrangement, the transferor company had stipulated artificial exchange ratio which prejudicially affected the interest of the applicants.

10. A clever and shrewd device was adopted to oust the individual shareholders except those who wee the family members of Shri Inder Sharma and this family controlled 99% shares of both the companies. This resulted into the forfeiture of the shares of the persons like applicants exiting them form the new company after the merger of transferor company with the transferee company.

11. It was highlighted that 99% shares in the transferee company belonged to Mr. Inder Sharma and his family and only 1% shareholding was with the outsiders who were all individuals. Since all these outsiders are exited from the company, full control of the same now vests with Mr. Inder Sharma family. Thus, by device of the aforesaid scheme of amalgamation, Mr. Inder Sharma family has gained not only 100% control over the transferee company, those individuals whose shares are forfeited are not even enumerated properly by dubious methodology of the evaluation

of the shares. In the case of applicant in CA No.331/2005, he was having 15,000 shares of face value of Rs.1.5 lacs, which he purchased 20 years ago after holding investment for such a long period. He was not shown the door making paltry payment of Rs.60,000/-. Same treatment was meted out to the other applicant.

12. The aforesaid two grievances were sought to be built on the following legal foundation:

(i) Valuation of the shares of the transferee company was not as per the law. Along with the scheme, valuation report of the Chartered Accountant was filed which reflected Net Asset Valuation basis, as well as profit generating basis.

(ii) The entire exercise was fraudulent and not justifiable. It was argued that in the scheme, it was projected that it is a loss making company and had borrowed high cost of funds. However, both these premises were wrong which shows that the only fraudulent motive was to gain 100% control over the company. It was argued that the fraud vitiates everything and thus, the entire process stood nullified.

(iii) Mr. Kaura also argued that the applicants constituted separate class of shareholdings, but no separate meeting was held for them which was contrary to the procedure provided under Section 391 of the Act. The contention that the applicants constituted a separate class was founded on the submission that where 99% shares were held by Inder Sharma and family, other shareholders including the applicants could not huddle along with that class. Being outsiders and in minority, they should be treated as separate class. Even there were two categories:

(a) Persons with 25,000 or more shares; and

(b) Those who are having less than 25% shares and whose shares were forfeited.

It was submitted that once the intention was forfeiture with less than 25% shareholders, they should also have been treated as separate class and shareholders for the purpose of holding the

meeting under Section 391 of the Act. Mr. Kaura, thus, concluded his arguments by mooting a proposal that these applicants be allowed to continue to hold shares 15,000 and 10,000 respectively and as per the arrangement, it would only be 1500 and 1000 in the amalgamated company.

13. Mr. Ajay Vohra, learned counsel appearing for the respondent company countered the aforesaid submissions. He opened his argument by submitting that the valuation and the shares done by the company was proper and this exercise was undertaken by the Chartered Accountants of repute who had followed the norms prescribed by the Supreme Court in various judgments for valuing such shares. In this behalf, his submission was that since it was an on-going concern, "profit earning method" was best situated as held by the Supreme Court in **Commissioner of Wealth Tax, Assam Vs. Mahedeo Jalan & Ors.** [86 ITR 621] and the judgment of Bombay High Court in **Commissioner of Gift Tax, Bombay Vs. Ebrahim Haji Usuf Botwala,** [122 ITR 38]. He also submitted that the Chartered Accountants had given rationale for following this system in their letter dated 04.12.2003.

14. His further submission was that the company was not debt free as alleged by the applicants and there were various loans to be repaid. He referred to the balance-sheet and also the material to show that these loans were waived off after raising preferential share capital. He submitted, in this behalf, that the entire arguments of the counsel for the applicants that the amalgamated company was a profit earning company was wrong as that argument was based on exclusion of depreciation. He submitted that it could not be done in view of law laid down by this Court in **Commissioner of Income Tax Vs. Sain Processing and Weaving Mills P. Ltd.,** [325 ITR 565]. The reasons for profitability thereafter was based on subsequent events, viz., write off debt of Rs.17 Crore by the parent company and addition of new rooms in the hotel/resort resulting into additional income. According to him, these subsequent events resulting in profitability of the company after the amalgamation, could not be transported back in time to hold that at the time of propounding the scheme, the company had profitability. He also pointed out that the secured loan of Rs.40 Crores had become possible because of M/s. Indrama Limited coming in, thereby adding to the brand value and goodwill of the company. Mr. Vohra also submitted that the valuation of the

shares which was got done by the applicants and file was based on inappropriate method as the valuation report not only ignored the relevant factors which are to be taken into consideration, but also done taking into consideration general circumstances which was not permissible as the circumstances prevailing on the date of amalgamation were only to be considered. He also submitted that the valuation of the shares if taken on yield basis would reflect negative value and if it is taken on average basis it was coming to only Rs.2.3 paise per share. However, the shareholders were paid Rs.4.6 paise per share and thus, they were more than adequately compensative. He also submitted that both the applicants had shareholding of 0.010% and 0.67% respectively and persons with such mini-school share holdings could not undue of the majority wanted. He also argued that they could not be treated as separate class for the purpose of Section 391 of the Act.

15. I have considered the submissions of counsel for the parties. It is not in dispute that the procedure as laid down in Section 391 of the Act was followed both at the stage of first motion and at the second motion before approving the scheme. We cannot merely go by the shareholding pattern and because the applicants are having small fractions of shares would not make them a separate class. They remained in the same category as other shareholders, i.e., equity shareholders. If the contention is accepted, then there would be different categories of shareholdings within the same class and no such position is postulated in Section 391 of the Act.

16. No doubt, even if it is shown that the procedure prescribed under Section 391 is followed, it is still for the Court to see that the said scheme is not unfair or enquitable before giving its imprimatur thereto. The general rule is that the prescribed majority of the shareholders is entitled to take decision on scheme of reconstruction/amalgamation, etc. the manner in which it should be carried into effect. It is a matter of domestic concern, one for the decision of the shareholders of the company, which should be not less than 75%.

17. Sub-section (2) of Section 391 of the Act provides that such a decision of majority, viz., 3/4th in value of creditors or class of creditors or class of members as the case may be, shall be binding on all the creditors and share holders of that class as well as on the company. As per proviso to sub-Section (3) of Section 391 of the Act, the Court,

before sanctioning such scheme, has to satisfy that the company or any other person by whom application is made under Section 391(1) has disclosed to the Court all material facts relating to company, such as the latest financial position of the company, latest auditor's reports on account of company, the pendency of any investigation proceedings in relation to the company under Section 235 to 351, and the like. On the other hand, requirement was also made when the scheme was sanctioned. In such a scenario, before scheme is to be sanctioned, in what manner the interest of the minority shareholders is to be looked into, is the question.

18. This aspect came up for consideration before this Court in **Reckitt Benckiser (India) Ltd.** [122 (2005) DLT 612], albeit, in context of reduction of share capital. In that case also, the scheme of the reduction was such that many shareholders like the applicants in the instant case were deprivation of their shareholdings on payment of certain price. The Court took note of the general rule that it was the prescribed majority of the shareholders which is entitled to decide whether there should be a reduction in capital or not. After taking note of various judgments, the Court has culled out the following principles:

> "20. The principles, which can be distilled from the aforesaid judicial dicta, are summarised as under:
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> (i) The question of reduction of share capital is treated as matter of domestic concern, i.e. it is the decision of the majority which prevails.
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> (ii) If majority by special resolution decides to reduce share capital of the company, it has also right to decide as to how this reduction should be carried into effect.
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> (iii) While reducing the share capital company can decide to extinguish some of its shares without dealing in the same manner as with all other shares of the same class. Consequently, it is purely a domestic matter and is to be decided as to whether each member shall have his share proportionately reduced, or whether some members shall retain their shares unreduced, the shares of others being extinguished totally, receiving a just equivalent.
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> (iv) The company limited by shares is permitted to reduce its

> share capital in any manner, meaning thereby a selective reduction is permissible within the framework of law (see Re. Denver Hotel Co.1893 (1) Ch D 495.
>
> (v) When the matter comes to the Court, before confirming the proposed reduction the Court has to be satisfied that (i) there is no unfair or inequitable transaction and (ii) all the creditors entitled to object to the reduction have either consented or been paid or secured."

19. It would also be advisable to refer to few cases which were dealt with in the said judgment and may guide this Court how to proceed in the instant case:

> "21. At this stage, let me deal with the two judgments cited by the objector to state some further principles culled out therein. These cases are : (i) Trevor v. Whitworth 12 AC 409 and (ii) Re. Denver Hotel Co. 1893 (1) Ch.D 495 (both these judgments were considered by the House of Lords in British and American Trustee and Finance Corporation v. Couper (supra). Trevor v. Whitworth (supra) was a case where a limited company was incorporated under the Joint-Stock Companies Act with the object (as stated in its memorandum) of acquiring and carrying on a manufacturing business and any other business and transaction which the company might consider to be in any way conducive or auxiliary thereto or in any way connected therewith. The articles authorise the company to purchase its own shares. The company having gone into liquidation, a former shareholder made a claim against the company for the balance of the price of his shares sold by him to the company before the liquidation and no wholly paid for. The House of Lords held that such a company had no power under the Companies Act to purchase its own shares and, thus, the purchase in question was ultra vires. Claim of the petitioner was, Therefore, rejected. In the process the Court made following observations which were relied upon by the learned Counsel for the respondent:
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> " Your Lordships then asked in what case, and under what circumstances, such a purchase could be said to be incidental to the objects of a limited company. In answer to that question the

learned Counsel not unnaturally turned to in re. Downfield Stinkstone Coal Company 17 Ch. D. 76, and suggested that at any rate it might be so when the power was used as an incident of domestic management to buy out share holders whose continuance in the company was undesirable.

That was the way in which the proposition was put in in re. Dronfield, and Co., where matters had come to a deadlock. But I would ask, is it possible to suggest anything more dangerous to the welfare of companies and to the security of their creditors than such a doctrine? Who are the share holders whose continuance in a company the company or its executive consider undesirable? Why, share holders who quarrel with the policy of the Board, and wish to turn the directors out; to answer; share holders who want information which the directors think it prudent to withhold. Can it be contended that capital of the company in keeping themselves in power, or in purchasing the retirement of inquisitive and troublesome critics? xxxx After all, the inconvenience sought to be avoided arises either from restrictions which Parliament has thought right to impose, or from the common misfortune of having to pay for what one wants out of one's own purse, when there is no other way of getting it. If the capital proposed to be expanded in the purchase of its shares is in excess of the wants of the company, the transaction must be carried out under the provisions of the Acts to which I shall have presently to refer. If the capital of the company is not in excess of the company's wants, it certainly ought not to be diverted from its proper objects. But even then there is no reason why there should be a deadlock. The end in view may still be attained by means to which no exception can be taken. If share holders think it worthwhile to spend money for the purpose of getting rid of a troublesome partner who is willing to sell, they may put their hands in their own pockets and buy him out, though they cannot draw on fund in which others as well as themselves are interested. That, I think is the law, and that is good sense of the matter."

It is clear from the above that the observations were made in the context of deciding as to whether there was power with the

company to purchase its own shares. No doubt, if there is a ploy to oust inconvenience share holders in a scheme for reduction, the Court can treat the same, in a particular case as unfair or inequitable and reject the proposed reduction.

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23. Facts of **British and American Trustees** (supra), were as under:

> "A company carried on business in the United Kingdom and in America, and a portion of its investments and some of its share holders were in that country. Differences having arisen between the directors in England and the American committee, it was agreed that the American share holders should take over the American investments upon the terms that the company should cease to carry business in America and that the capital of the company should be reduced by the amount of the shares held in America. A special resolution for carrying out this agreement was passed and confirmed. All the creditors of the company had either been paid or had assented to the arrangement."

24. Holding that the arrangement was not ultra virus the company and should be sanctioned by the Court, the House of Lords observed that it was not beyond the statutory jurisdiction of the Court under the Companies Act to sanction a scheme for reduction of capital of a company which does not deal in the same way with all shares of the same class. In the process the Court distinguished **Denvor Hotel** (supra), adn explained the ratio of **Trevor v. Whitworth** (supra).

25. Lord Herschell, LC, after quoting **Re. Denvor Hotel Co.** (supra), made following significant observations:

> "If all the share holders of a company were of opinion that its capital should be reduced, and that this reduction would best be effected by paying off one shareholder and cancelling the shares held by him, I cannot see anything in the Acts of 1867 and 1877, which would render it incumbent on the Court to refuse to confirm such a

resolution, or which shows that it would be ultra virus to do so. I do not see any danger in the conclusion that the Court has power to confirm such a scheme as that now in question, or, any reason to doubt that this was the intention of the Legislature. The interests of creditors are not involved, and I think it was the policy of the Legislature to entrust the prescribed majority of the share holders with the decision whether there should be a reduction of capital, and if so, how it should be carried into effect. The interests of the dissenting minority of the share holders (if there be such) are properly protected by this: that the decision of the majority can only prevail upon it be confirmed by the Court. This is a complete answer to the argument ably urged by Counsel for the respondent that if all the share holders of the same class were not dealt with in precisely the same fashion, the interests of the minority might be unjustly scarified to those of the majority. There can be no doubt that any scheme which does not provide for uniform treatment of share holders whose rights are similar, would be most narrowly scrutinised by the Court, and that no such scheme ought to be confirmed unless the Court be satisfied that it will not work unjustly or inequitably. But this is quite a different thing from saying that the Court has no power to sanction it."

26. One will find, on going through this judgment, that one of the arguments raised was that reduction of the capital was not proportionate but aimed at a particular class. Lord Watson in his judgment specifically dealt with this aspect and negatived the contention. He relied solely upon the plea that it is beyond the statutory jurisdiction of the Courts to sanction any scheme for the reduction of capital which does not deal in precisely the same way with each and every share belonging the same class. If that be the law it is manifest that in some cases the result might be unfortunate. Apart from the interest of creditors, the question whether each member shall have his share proportionately reduced, or whether some members shall retain the shares unreduced, the shares of others being extinguished upon their receiving a just equivalent, is purely domestic matter, and it may

be greatly for the advantage of the company that the latter alternative should be adopted. Lord Macnaghten described that the provisions of the Companies Act, 1867, while permitting a company to reduce its share capital provided sufficient safeguards to ensure that all categories were duly protected. His Lordships observed:

"The exercise of the power is fenced round by safeguards which are calculated to protect the interests of creditors, the interests of share holders, and the interests of the public. Creditors are protected by express provisions. Their consent must be procured, or their claims must be satisfied. The public, the share holders, and every class of share holders, individually and collectively, are protected by the necessary publicity of the proceedings, and by the discretion which is entrusted to the Court until confirmed by the Court the proposed reduction is not to take effect, though all the creditors have been satisfied. When it is confirmed the memorandum is to be altered in the prescribed manner, and the company, as it were, makes a new departure.

With these safeguards, which are certainly not inconsiderable, the Act apparently leaves the company to determine the extent, the mode, and the incidence of the reduction, and the application or disposition of any capital moneys which the proposed reduction may set free."

20. No doubt, in that case since the company had given option to such shareholders to continue to hold shares. However, it would be of interest to note that M/s. Reckitt Benckiser (India) Ltd. passed special resolution proposing the reduction of equity capital which resulted in depriving those shareholders also from holding the shares any longer. Scheme for this purpose was filed for approval and by means of Co. Pet. No.228 of 2010 which has been approved by the Company Judge vide orders dated 03.10.2011 dismissing the objections of those minority shareholders. The same very contentions were advanced which was raised before us by the application. Following discussion from the said judgment is also worth to reproduce:

"41. In **Organon (India) Ltd.** (supra) another Single Judge of

Bombay High Court specifically rejected the argument of forcible acquisition of public shareholders in context of a Scheme of Reduction. In the said judgment, it held as under:-

> "13. Mr. Lakhani has first submitted that such reduction of the share capital proposed by the petitionercompany, by paying off the public holders of equity shares, other than the promoter shareholders and given them certain compensation, amounts to a forceful acquisition of the shares held by them. He states that such action on the part of the petitioner-company is against the principles of natural justice, corporate democracy and corporate governance. He states that such reduction tantamount to a sophisticated corporate mafiaism.
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19. This Court is, however, bound by the decision of the Division Bench of this Court, reported in **Sandvik Asia Ltd. v. Bharat Kumar Padamsi** [2009] 91 CLA 247 [2009] 111 (4) Bom. LR 1421, concerning the reduction of capital of Sandvik Asia Ltd. The learned Single Judge of this court, had refused confirmation of the proposal for reduction of Sandvik Asia Ltd. on the ground that the promoters group could virtually bulldoze the minority shareholders and purchase their shares at the price dictated by them. The learned Single Judge found that the minority shareholders were not given any option under the proposal. Hence, the learned Single Judge concluded that such schemes for reduction of capital were totally unfair and unjust. In appeal, the Hon'ble Division Bench held that they were bound by the law laid down by the Hon'ble Apex Court in **Ramesh B Desai v. Bipin Vadilal Mehta** [2006] 73 CLA 357/[2006] 5 SCC 638 (SC) where the Apex Court recognised the judgment of the House of Lords in the case of **British & American Trustee & Finance Corporation** (supra). The Learned Bench also referred to the judgment in **Poole v. National Bank of China Ltd.** [1907] AC 229 (HL), the relevant portion of which is as follows:

"19.The dissenting shareholders do not demand, and never have demanded, better pecuniary terms, but they insist on retaining their holdings which in all reasonable probability can never bring

profit to any of them and may be detrimental to the company."

20. The learned Bench granted sanction to the reduction of capital, overruling the order of the learned Single Judge in **Sandvik Asia Ltd.** (supra), and posited as follows:

> "Once it is established that non-promoter shareholders are being paid the fair value of their shares, at no point of time it is even suggested by them that the amount that is being paid is way less and even the overwhelming majority of nonpromoter shareholders having voted in favour of the resolution shows that the court will not be justified in withholding its sanction to the resolution." [para 9]

21. An SLP [Petition for Special Leave to Appeal (Civil) No. 12418/2009] filed therefrom, was dismissed by the Hon'ble Apex Court, by its order dated 13th July, 2009. Thus, this Court is bound by the decision of the learned Division Bench and cannot withhold sanction to the special resolution for reduction of capital, unless there is some patent unfairness regarding the fair value of the shares or there is lack of an overwhelming majority of non-promoter shareholders who vote in favour of the resolution."

(emphasis supplied)

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44. It is also settled law that a valuer's report is not to be interfered with by a Court in the absence of any fraud or illegality – which allegation is missing in the present petition. In fact, Supreme Court in Hindustan Lever Employees' Union v. Hindustan Lever Ltd., 1995 Supp (1) SCC 499 has held "Mr. Ashok Desai, appearing on behalf of TOMCO, has argued that the valuation of shares had to be done according to well-known methods of accounting principles. The valuation of shares is a technical matter. It requires considerable skill and experience. There are bound to be differences of opinion among accountants as to what is the correct value of the shares of a company.

It was emphasised that more than 99% of the shareholders had approved the valuation. The test of fairness of this valuation is not whether the offer is fair to a particular shareholder. Mr

Jajoo may have reasons of his own for not agreeing to the valuation of the shares, but the overwhelming majority of the shareholders have approved of the valuation. The Court should not interfere with such valuation." (emphasis supplied)."

20. This answers most of the arguments of the applicants.

21. One other aspect remains to be considered, viz., arguments of the applicants that the entire this is designed in such a way to control 100% equity by Sharma Family and to eliminate minority shareholders like applicants and this motive in extinguishing the entire class of outside shareholders was improper and Court could look into this aspect. The question is as to whether it was an unfair or inequitable arrangement. As pointed out above, it has been held by the Court that merely because the arrangement results in extinguishing some shares and resulting into 100% shareholdings in the hands of a particular group cannot be treated improper per se.

22. Coming to the valuation, I find that the auditors adopted profit earning method, which is held to be a valid method for on-going concern. In its letter dated 04.12.2003, the Chartered Accounts gave their justification in the following manner:

"In our opinion, CCI Valuation seems to be most appropriate as both companies are unlisted companies, no realistic future cash flows can be projected for either of the companies as the tourism trade as well as investment business at stock exchanges are of highly volatile nature and data available for hotel companies pertain to either hotel chains or those owing five star properties.

We enclose herewith the calculation sheets for the valuation of the shares of the respective companies on the basis of CCI guidelines which give the respective valuations as under:

"Company 'HPL' – Rs.38,028 per share (share of Rs.100 each) Company 'SHRL' – Rs.2.30 per share (share of Rs.10 each)"

On the aforesaid basis, the share exchange ratio in reverse merger of 'HPL' into 'SHRL' translates into 16533 shares of 'SHRL' of Rs.10 each being issued for each share held in 'HPL'.

The present share capital of 'HPL' is 18,180 shares of Rs.100 each aggregating to Rs.18,18,000. If the above share exchange ratio is maintained, it would mean issue by 'SHRL' 30,05,69,940 shares of Rs.10 each to the shareholders of 'HPL' in lieu of the shares held in 'HPL'. The aggregate share capital of 'SHRL' in such a case would exceed Rs.300 crores, post amalgamation and the expanded equity share capital of 'SHRL' after allotment of shares to the shareholders of 'HPL' would make it extremely difficult for the company to service its shareholders."

23. Mr. Vohra may be right in his submission that the events had taken place after the amalgamation and the circumstances under which profitability of the company has increased cannot be relevant consideration for valuation of the shares or to judge the profitability of the company at the time when the decision for amalgamation was taken for the stake holders. Therefore, the report filed by the applicants also cannot be accepted.

35. We may also refer to the following observations of the Supreme Court in the case of **Hindustan Lever Employees Union v. Hindustan Lever Limited** [1995] (Suppl.) (1) SCC 499:

"The Court's obligation is to be satisfied that the valuation was in accordance with law and it was carried out by an independent body.... The valuation of shares is a technical matter. It requires considerable skill and experience. There are bound to be differences of opinion among accountants as to what is the correct value of the shares of a company. It was emphasised that more than 99% of the share holders had approved the valuation. The test of fairness of this valuation is not whether the offer is fair to a particular shareholder.... Mr. Jajoo may have reasons of his own for not agreeing to the valuation of the shares, but the overwhelming majority of the share holders have approved of the valuation. The Court should not interfere with such valuation."

24. Apart from showing the effect of this amalgamation, the applicants have not been able to show ulterior motives. We, thus, do not find any merit in these applications, which are accordingly dismissed.

ILR (2012) V DELHI 583
W.P. (C)

LT. COL. SANJAY KASHYAP ….PETITIONER

VERSUS

UNION OF INDIA & ANR. ….RESPONDENTS

(ANIL KUMAR & SUDERSHAN KUMAR MISRA, JJ.)

W.P. (C) NO. : 3649/2012 DATE OF DECISION: 01.06.2012

Constitution of India, 1950—Article 226—Petitioner seeks writ of certiorari for quashing order dated 10th September, 2007 passed by the Ministry of Defence—rejecting statutory complaint of the petitioner in the light of his career profile, relevant records and analysis/recommendations of the army headquarters, holding that the Petitioner had not been empanelled for promotion to the rank of Colonel on account of his overall profile and comparative merit—Aggrieved Petitioner filed a writ petition contending that Reviewing Officer reduced his grade to 7/9 due to animosity—Phrase "inadequate knowledge" made by the SRO as he had no opportunity to see the performance of the Petitioner—Undue Delay in filing petition before the court without giving in any justification—Held:—Petitioner unable to show any rule or regulation or precedent holding that repeated representations will extend the time for filing the complaint by the Petitioner—Petitioner unable to point any rule, regulation or precedent on the basis of which it can be inferred that an SRO, who is not conversant with the performance of the Petitioner, was obliged to give a grading instead of writing "Inadequate Knowledge" in accordance with rules and regulations—Unable to show any lacunae or procedural irregularity—No sufficient grounds for relief—Petition dismissed.

Learned counsel for the petitioner is unable to show any rule or regulation or precedent holding that repeated representations will extend the time for filing the complaint by the petitioner or that after rejection of first complaint, the petitioner could file another complaint without challenging the order passed on his first complaint. Though the Tribunal has noted this, however, the petition was not dismissed merely on account of delay. The merits of the pleas raised by the petitioner have also been considered. Learned counsel for the petitioner, Major K.Ramesh, is also unable to point any rule or regulation or precedent on the basis of which it can be inferred that an SRO, who is not conversant with the performance of the petitioner, was obliged to give a grading to the petitioner instead of writing "Inadequate Knowledge" in accordance with rules and regulations.

(Para 11)

Important Issue Involved: No rule, regulation or precedent to show that repeated representations will extend the time of filing of complaint by the petitioner—no rule, regulation or precedent from which it can be inferred that an SRO not conversant with performance of person, obliged to give grading instead of writing "inadequate knowledge".

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Major K. Ramesh, Advocate.

FOR THE RESPONDENTS : Ms. Barkha Babbar, Advocate.

CASE REFERRED TO:

1. *Lt.Col. Sanjay Kashyap,* vs. *Union of India & Ors.* T.A.No.122/2009.

RESULT: Appeal dismissed.

ANIL KUMAR, J.

1. The petitioner has sought a writ of certiorari for the quashing of order dated 10th September, 2007 passed by the Ministry of Defence rejecting the statutory complaint of the petitioner in the light of his career profile, relevant records and analysis/recommendations of the Army Headquarters and holding that the petitioner had not been empanelled for promotion to the rank of Colonel on account of his overall profile and comparative merit, and also the order dated 20th October, 2009 passed by the Principal Bench, Armed Force Tribunal in T.A.No.122/2009, titled as **"Lt.Col. Sanjay Kashyap, v. Union of India & Ors.**" dismissing his original petition seeking the setting aside of the order of the Ministry of Defence dated 10th September, 2007 holding that it was for the Selection Committee to assess and give the appropriate weightage to the conflicting ACRs of the petitioner given by the Initiating Officer and another by the Reviewing Officer and the remarks given by SRO and also rejecting the petition on the ground of delay.

2. The relevant facts in brief are that the petitioner had made a statutory complaint dated 13th May, 2007 against his non-empanelled for promotion to the rank of Colonel by No.3 Selection Board held in April, 2005, wherein the petitioner was considered as a fresh case. This complaint was filed after his earlier complaint was dismissed which dismissal was not challenged by the petitioner. The grievance of the petitioner was that he was awarded outstanding ACR with grading of 9/9 by the Initiating Officer for June, 2000 and May, 2001, whereas the Reviewing Officer had awarded him 7/9. Since there was a difference of two points between the Initiating Officer and the Reviewing Officer, it was mandatory for the SRO (Senior Reviewing Officer) as a balancer to endorse the petitioner's report objectively. The petitioner contended that his one Annual Confidential Report was required to be quashed and set aside on technical grounds of being contrary to the Special Army Order on the subject. The complaint of the petitioner was, however, dismissed by order dated 10th September 2007 whereby the petitioner had sought that all the assessments done by the Reviewing Officer be examined and in those case where the Reviewing Officer had given him "7" points or below, such assessment be set aside being subjective and inconsistent and his case for promotion be reviewed de novo.

3. Ministry of Defence examined the grievance of the petitioner in the light of his career profile, relevant records and analysis/ recommendation of Army Headquarter and inferred that all confidential reports impugned by the petitioner in the reckonable profile including confidential report impugned by the petitioner are fair, objective, performance based, well corroborated and devoid of any bias/inconstancy. The confidential report 01/02-05/02 was also found to be technically valid and it was held that the petitioner had not been empanelled for promotion to the rank of Colonel on account of his overall profile and comparative merit and, therefore, the statutory complaint of the petitioner dated 13th May, 2007 was also rejected.

4. Aggrieved by the rejection of his statutory complaint by order dated 10th September, 2007, the petitioner had filed a writ petition in the High Court of Delhi at New Delhi contending, inter-alia, that in his ACRs of June, 2000 to May, 2001 the Reviewing Officer might have due to his animosity with the petitioner diluted his report from 9/9 awarded by the Initiating Officer to 7/9 and this is evident from endorsement made by the SRO on the matter as a balancer as he did not comment about it and only wrote "Inadequate Knowledge". The petitioner also relied on the instructions regarding the aspect of "Inadequate Knowledge" and, therefore, contended that the said comment has seriously affected his ACRs and consequently, his promotion to the post of Colonel.

5. The writ petition was contested by the respondents contending, inter-alia, that the SRO (Senior Review Officer) had returned "Inadequate Knowledge" (IK) because he had no opportunity to see the performance of the petitioner, and, therefore, the SRO was justified in writing IK.

6. The writ petition filed by the petitioner was thereafter, transferred to the Armed Forces Tribunal, Principal Bench and was registered as T.A.No.122/2009. The Tribunal while hearing and deciding the petition noticed Clause 86 and 87 relied on by the petitioner. However, relying on Clause 148 held that if the SRO did not have sufficient opportunity to see the performance of a candidate and assess him meaningfully then it was fair on the part of such SRO to have said that he is unable to comment due to Inadequate Knowledge. The Tribunal noted that the instructions to the SRO are very clear, and where the officer has not worked under the SRO, then in such cases the SRO should be fair to make his comment and to give his reasons that he did not have the opportunity to see the

performance of the concerned officer and in the circumstances, the plea of the petitioner that the SRO should not have been given remarks "IK. (Inadequate Knowledge) was returned.

7. The Tribunal also noted that the complaint of the petitioner was rejected on 13th June, 2006 and the petitioner had kept quiet and did not challenge the same. Thereafter, the petitioner made another representation on 13th May, 2007 which was rejected on 10th September, 2007. The Tribunal noticed that by merely filing a statutory complaint in May, 2007 will not extend the limitation for challenging the rejection of the first complaint on 13th June, 2006, which the petitioner had failed to disclose and had also failed to give adequate reasons for the delay in filing the writ petition. The Tribunal thus, while dismissed the petition of the petitioner took delay also in consideration.

8. The petitioner has challenged the order of the Tribunal reiterating the pleas and contentions raised by the petitioner before the Tribunal and he has also tried to distinguish para 141 of the Instruction to the SRO. The petitioner has reiterated that if the difference in points between the Initiating Officer and the Reviewing Officer was of only two marks, then the Senior Reviewing Officer ought not to have given "IK" to the petitioner.

9. Learned counsel for the respondents who appears on advance notice, Ms.Barkha Babbar, has raised preliminary objection that though the petition of the petitioner was dismissed by the Tribunal by order dated 20th October, 2009 and the present petition has been filed on 30th May, 2012 without giving any justification or reasons for this undue delay. Even on the merits, it is contended that in terms of the Instructions regarding the ACR, the SRO, if was not aware about the performance of the petitioner, was justified in giving the remarks "IK" in the facts and circumstances. Learned counsel has contended that the Tribunal has considered these pleas and contentions and that there are no grounds to interfere by the High Court with the order of the Tribunal in exercise of its jurisdiction under Article 226 of the Constitution of India.

10. This Court has heard the learned counsel for the parties. This cannot be disputed that the petition of the petitioner was rejected by the Tribunal by order dated 20th October, 2009, and that the present writ petition has been filed after almost two years on 30th May, 2012. Perusal of the writ petition discloses that there is no reason given for explaining

this delay in filing the present writ petition. Learned counsel for the petitioner is also unable to explain as to how the original complaint filed by the petitioner which was dismissed by the respondents by order dated 13th June, 2006 was not challenged by the petitioner. After the rejection of the first statutory complaint on 13th June, 2006, instead of challenging that order, the petitioner rather filed another statutory complaint on 13th May, 2007, which was also dismissed on 10th September, 2007. In the circumstances, the observations of the Tribunal that the fate of the petitioner was sealed on 13th June, 2006 when his statutory complaint was first dismissed, and that it could not be re-agitated by filing another statutory petition in May, 2007 cannot be faulted. The observations of the Tribunal in this regard in para 6 of the impugned order are as under;-

> "6. Learned counsel for the respondents has seriously contested the petition that this very statutory complaint for said ACR was considered by the Government and same was rejected on 13th June, 2006. This order of rejection of his ACR is not subject matter of this writ petition. It is pointed out that after the rejection of the statutory complaint, petitioner kept quite and did not challenge for the period two years. It is true that incumbent had made a statutory complaint and it was rejected way back on 13th June, 2006 that sealed his fate. Though it is submitted that he had made another representation and it was rejected in the year 2007 but that would not extend time for him so as to come within the period of limitation. Without going in the question of limitation the facts remains in situation like present case where SRO had no opportunity to assess the performance of the petitioner, it is well within his right to write "Inadequate Knowledge."

11. Learned counsel for the petitioner is unable to show any rule or regulation or precedent holding that repeated representations will extend the time for filing the complaint by the petitioner or that after rejection of first complaint, the petitioner could file another complaint without challenging the order passed on his first complaint. Though the Tribunal has noted this, however, the petition was not dismissed merely on account of delay. The merits of the pleas raised by the petitioner have also been considered. Learned counsel for the petitioner, Major K.Ramesh, is also unable to point any rule or regulation or precedent on the basis of which

it can be inferred that an SRO, who is not conversant with the performance of the petitioner, was obliged to give a grading to the petitioner instead of writing "Inadequate Knowledge" in accordance with rules and regulations.

12. In the circumstances, the petitioner has not been able to make out any sufficient ground against the SRO's remark of "Inadequate Knowledge" for the conflicting ACRs of June, 2000 to May, 2001 in respect of the petitioner. The learned counsel for the petitioner is also unable to show that the said records of the petitioner are relevant for the promotion to the post of Col. The counsel has failed to show any lacunae or procedural irregularity committed by the respondents.

13. In the above facts and circumstances and for the foregoing reasons, there is no illegality, irregularity or perversity pointed out by the learned counsel for the petitioner which would entail any interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. The writ petition in the facts and circumstances, is without any merit and it is, therefore, dismissed.

ILR (2012) V DELHI 589
RSA

CEMENT CORPORATION OF INDIA LTD. ….APPELLANT

VERSUS

BHARAT BHUSHAN SEHGAL ….RESPONDENT

(VEENA BIRBAL, J.)

RSA NO. : 46/2012 DATE OF DECISION: 01.06.2012

Code of Civil Procedure, 1908—Order 12 Rule 6—Judgement on admission—Suit for possession and mesne profits/damages—Plaintiff, landlord/owner of flat inducted the defendant as a tenant at monthly rent

was Rs. 3,575/— Lease reduced into writing was limited to three years—On the expiry of lease, the defendant continued to occupy the premises—Rate of rent in December, 2009 was Rs.8,429.63—Respondent alleged that the tenancy was terminated in December, 2009 vide notice dated 23.12.2009 effective from the midnight of 31.01.2010—Possession not delivered, the plaintiff filed the suit—Defendant had been paying rent to the plaintiff w.e.f August, 2009 and the rent was increased to Rs. 8,429.63 w.e.f.16.10.2006—Defendant had denied the receipt of notice of termination of tenancy dated 23.12.2009.—Plaintiff moved an application under Order 12 Rule 6 read with Section 151 CPC stating therein that the defendant had admitted the relationship as lessor and lessee between the parties and had also admitted that last paid rent was Rs. 8,429.63 per month—Legal notice served upon defendant on 26.12.2009 and on 29.12.2009 respectively and the same had been confirmed by the postal authorities as having delivered vide their respective certificates dated 03.03.2007 and 04.03.2007—Defendant was month to month tenant and the relationship between the parties came to an end by virtue of notice dated 23.12.2009—In its reply, defendant stating therein that it continued to be a contractual tenant and there is no admission on their part—Defendant had denied having received any notice—At the same time, it had taken a stand that the notice was not valid and the same was without any basis and had no meaning in the eyes of law—However, the rate of rent was admitted—Suit was decreed as regards possession on the basis of admission under Order 12 Rule 6 Appeal filed before the learned Addl. District Judge was also dismissed—Hence present second appeal. Held—Relationship of lessor and lessee as well as last paid rent as Rs.8429.63 have been admitted—Lease agreement was never renewed in writing after its expiry—Lease deed was

unregistered and the tenancy was month to month basis—Finding of both the courts below show that respondent/plaintiff had placed on record original UPC and registered A.D. receipt and also the original returned A.D. card showing the receipt of notice by the appellant/defendant—UPC receipt and A.D. card bear the addresses of the appellant/defendant—Rightly held that the notice is presumed to have been duly served upon appellant/defendant—Further, there is letter on record showing that Department of Posts has certified the delivery of notice sent through registered A.D. at the address of the appellant/defendant—On the one hand, the appellant/defendant is denying having received the notice of termination dated 23.12.2009 and on the other hand, it is disputing the validity of notice of termination of the lease—Appellant/ defendant failed to substantiate in what manner the notice was invalid—Even assuming the notice terminating tenancy was not served upon the appellant, as is contended, though it has been served as is noted above, the learned ADJ has rightly held that filing of eviction suit under general law itself is notice to quit on the tenant—No substantial question of law arises which requires consideration of this court—Appeal stands dismissed.

In the present case, the appellant/defendant has admitted the relationship of lessor and lessee between respondent/ plaintiff and itself and has also admitted the last paid rent as Rs.8429.63. It is also admitted position that lease agreement dated 01.02.1980 was never renewed in writing after 1982. It is also admitted position that the lease deed was unregistered and the tenancy was month to month basis. It has come on record that notice under Section 106 of Transfer of Property Act, 1882 was sent by the respondent/ plaintiff by UPC as well as by regd. A.D post. The finding of both the courts below show that respondent/plaintiff had placed on record original UPC and registered A.D. receipt and also the original returned A.D. card showing the receipt

of notice by the appellant/defendant. It has also been noted that the UPC receipt and A.D. card bear the addresses of the appellant/defendant. It is not the stand of appellant/ defendant that the addresses mentioned therein are incorrect addresses. Under these circumstances, it has been rightly held that the notice is presumed to have been duly served upon appellant/defendant. The A.D. card bears a stamp in acknowledgment of receipt of notice. Further, there is letter on record showing that Department of Posts has certified the delivery of notice sent through registered A.D. at the address of the appellant/defendant. It may also be noticed that in reply to application under Order 12 Rule 6, on the one hand, the appellant/defendant is denying having received the notice of termination dated 23.12.2009 and on the other hand, it is disputing the validity of notice of termination of the lease. However, during arguments learned counsel for appellant/defendant failed to substantiate in what manner the notice was invalid. **(Para 10)**

In **Nopany Investments (P) Ltd. v. Santokh Singh (HUF);** 2008 (II) SCC 728, the Supreme Court has held that the tenancy would stand terminated under general law on filing of a suit for eviction. Even assuming the notice terminating tenancy was not served upon the appellant, as is contended, though it has been served as is noted above, the learned ADJ has rightly held that filing of eviction suit under general law itself is notice to quit on the tenant. The learned ADJ has also placed reliance on **M/s Jeevan Diesels & Electricals Ltd. v. M/s Jasbir Singh Chaddha (HUF) & Anr.;** 2011 (182) DLT 402 in coming to aforesaid conclusion. The relevant finding of Ld.ADJ is as under:-

> "Ld. Trial Court has relied upon a case decided by Hon'ble Supreme Court titled as **Nopany Investment (P) Ltd. vs. Santokh Singh (HUF),** 2008 (II) SCC 728, wherein Hon'ble Supreme Court has held that filing of an eviction suit under the general law itself is a notice to quit on the tenant. Respondent is also relying upon the said case. On behalf of the

respondent, reliance has also been placed on a case decided by the Hon'ble Delhi High Court in **M/s Jeevan Diesels & Electricals Ltd. vs. M/s Jasbir Singh Chadha (HUF) & Anr.** dated 25.03.2011 in RFA 179/2011, wherein it was held by the Hon'ble Delhi High Court that service of the summons in a suit, with a copy of the notice terminating the tenancy itself is a notice under Section 106 of the Transfer of Property Act. The suit was filed by the plaintiff on 04.02.2010, and summons were served alongwith a copy of the notice dated 23.12.2009 terminating the lease, and that in itself is a sufficient notice terminating the lease, as required under Section 106 of the Transfer of the Property Act. Relationship of landlord and tenant between the parties was admitted and rent payable was admitted to be more than Rs. 3,500/- per month. Notice as required under Section 106 of the Transfer of the Property Act for terminating the service has been given, be it the notice dated 23.12.2009 was received by the appellant or same was to be treated as a notice, when copy of the same was sent alongwith the summons of the suit. There was no error in decreeing the suit of the respondent against the appellant as regards the possession of the suit property under order XII rule 6 CPC." **(Para 11)**

Important Issue Involved: Transfer of Property Act, 1882—Section 112—Service of notice—Even assuming the notice terminating tenancy was not served, tenancy would stand terminated under general law on filing of a suit for eviction.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Rakesh Tiku, Sr. Adv. with Mr. Amit Panigrahi and Ms. Tanupriya, Adv.

FOR THE RESPONDENT : Mr. G.D. Goel, Sr. Adv. Mr. Chetan Sharma, Sr. Adv. with Mr. Vikas Chopra Adv.

CASES REFERRED TO:

1. *M/s Jeevan Diesels & Electricals Ltd.* vs. *M/s Jasbir Singh Chaddha (HUF) & Anr.;* 2011 (182) DLT 402.
2. *Nopany Investments (P) Ltd.* vs. *Santokh Singh (HUF);* 2008 (II) SCC 728.

RESULT: Appeal dismissed.

VEENA BIRBAL, J.

RSA No. 46/2012

1. By way of this second appeal under Section 100 and Order XLII Rule 1 read with Section 151 of the Civil Procedure Code, 1908, the appellant has challenged two concurrent judgments i.e. one dated 01.03.2012 passed by the learned Addl. District Judge in RCA No. 16/2011 and the other dated 15.11.2011 passed by the learned Civil Judge, Delhi in C.S. No. 185/2010.

2. The facts leading to the filing of present appeal are as under:-

The respondent herein i.e. plaintiff before the learned Civil Judge, Delhi had filed a suit for possession and mesne profits/damages stating therein that he was the landlord/owner of flat No. G-1 on the ground floor of multi storey building known as CCI House, 87, Nehru Place, Delhi wherein the appellant i.e. defendant before the learned trial court was inducted as a tenant w.e.f. 15.10.1979 by Ms.Janamjeet Kaur. The total monthly rent was Rs. 3,575/-. The period of lease was limited to three years. The terms of lease were reduced into writing on 1.2.1980. On the expiry of the period of lease, the appellant continued to occupy the premises. The suit property was purchased by the appellant from the previous owner i.e. Smt. Janamjeet Kaur, late Sardar Amarjeet Singh and Smt. Depender Kaur. The appellant had attorned respondent/plaintiffs as its landlord. The appellant/defendant continued to occupy the premises even after the expiry of lease. The rate of rent in December, 2009 was Rs. 8,429.63. Respondent had alleged that the tenancy was terminated in December, 2009 vide notice dated 23.12.2009 effective from the midnight

of 31.01.2010. As the possession was not delivered, the respondent/plaintiff had filed the aforesaid suit.

3. The appellant/defendant contested the suit by filing written statement wherein the appellant did not dispute the rent agreement dated 1.2.1980. It also did not deny that the respondent had stepped into the shoes of erstwhile owners upon purchase of the suit property by the respondent/plaintiff and that the appellant had been paying rent to the respondent/plaintiff w.e.f. August, 2009 and the rent was increased to Rs. 8,429.63 w.e.f. 16.10.2006. Appellant/defendant in the written statement had denied the receipt of notice of termination of tenancy dated 23.12.2009.

4. Thereupon, the respondent/plaintiff had moved an application under Order 12 Rule 6 read with Section 151 CPC stating therein that the appellant/defendant had admitted the relationship as lessor and lessee between the parties and had also admitted that last paid rent was Rs. 8,429.63 per month. It was further stated in the application that the legal notice dated 23.12.2009 sent by registered A.D. post and under certificate of posting was duly served upon appellant and the appellant had deliberately denied the receipt of same in the written statement. It was alleged that the legal notice was served upon appellant/defendant on 26.12.2009 and on 29.12.2009 respectively and the same had been confirmed by the postal authorities as having delivered vide their respective certificates dated 03.03.2007 and 04.03.2007. The copies of certificates issued by the postal department had been annexed with the application. It was further alleged that the appellant was month to month tenant and the relationship between the parties came to an end by virtue of notice dated 23.12.2009 as well as by afflux of time as such the decree of possession be passed.

5. The reply to said application was filed by appellant/defendant stating therein that it continued to be a contractual tenant and there is no admission on their part as such the suit could not be disposed of under Order 12 Rule 6 of CPC. Appellant/defendant had denied having received any notice. However, the rate of rent was admitted. The receipt of notice was denied. At the same time, it had taken a stand that the notice was not valid and the same was without any basis and had no meaning in the eyes of law.

6. The suit of the respondent/plaintiff was decreed by Ld. Civil Judge vide judgment/decree dated 15.11.2011 as regards possession of the suit property on the basis of admission by the appellant/defendant under Order 12 Rule 6 of CPC on the ground that existence of relationship of landlord and tenant is admitted and the rent was more than Rs. 3,500/- per month and the tenancy has been duly terminated.

7. The aforesaid judgment/decree of possession was challenged by the appellant/defendant before the learned Addl. District Judge, Delhi by filing an appeal. The appeal was also dismissed vide impugned judgment/decree dated 01.03.2012 which is challenged by filing the second appeal.

8. It is contended by learned senior counsel appearing for the appellant/defendant that there is no admission on the part of appellant/defendant of having received the notice of termination of tenancy dated 23.12.2009, as such there is no clear admission on the part of the respondent/plaintiff as regards termination of tenancy and as such decree of possession could not have been passed in respect of the suit property in favour of respondent/plaintiff. It is contended that even site plan of suit property is not correct and the impugned decree is liable to be set aside.

9. The learned senior counsel for the respondent/plaintiff has contended that relationship between the parties as lessor and lessee came to an end vide notice dated 23.12.2009 which was sent by registered A.D. post/UPC and the same was duly served upon appellant/defendant and same had been confirmed by Postal Department as such mere denial by appellant/defendant has no meaning. It is further contended that the lease agreement dated 01.02.1980 was an unregistered document and the same was never renewed in writing after 1982. It is contended that both the courts below have rightly passed the decree of possession in favour of respondent/plaintiff. It is contended that no substantial question of law arises in the present appeal.

10. In the present case, the appellant/defendant has admitted the relationship of lessor and lessee between respondent/plaintiff and itself and has also admitted the last paid rent as Rs.8429.63. It is also admitted position that lease agreement dated 01.02.1980 was never renewed in writing after 1982. It is also admitted position that the lease deed was unregistered and the tenancy was month to month basis. It has come on

record that notice under Section 106 of Transfer of Property Act, 1882 was sent by the respondent/plaintiff by UPC as well as by regd. A.D post. The finding of both the courts below show that respondent/plaintiff had placed on record original UPC and registered A.D. receipt and also the original returned A.D. card showing the receipt of notice by the appellant/defendant. It has also been noted that the UPC receipt and A.D. card bear the addresses of the appellant/defendant. It is not the stand of appellant/defendant that the addresses mentioned therein are incorrect addresses. Under these circumstances, it has been rightly held that the notice is presumed to have been duly served upon appellant/defendant. The A.D. card bears a stamp in acknowledgment of receipt of notice. Further, there is letter on record showing that Department of Posts has certified the delivery of notice sent through registered A.D. at the address of the appellant/defendant. It may also be noticed that in reply to application under Order 12 Rule 6, on the one hand, the appellant/defendant is denying having received the notice of termination dated 23.12.2009 and on the other hand, it is disputing the validity of notice of termination of the lease. However, during arguments learned counsel for appellant/defendant failed to substantiate in what manner the notice was invalid.

11. In **Nopany Investments (P) Ltd. v. Santokh Singh (HUF);** 2008 (II) SCC 728, the Supreme Court has held that the tenancy would stand terminated under general law on filing of a suit for eviction. Even assuming the notice terminating tenancy was not served upon the appellant, as is contended, though it has been served as is noted above, the learned ADJ has rightly held that filing of eviction suit under general law itself is notice to quit on the tenant. The learned ADJ has also placed reliance on **M/s Jeevan Diesels & Electricals Ltd. v. M/s Jasbir Singh Chaddha (HUF) & Anr.;** 2011 (182) DLT 402 in coming to aforesaid conclusion. The relevant finding of Ld.ADJ is as under:-

> "Ld. Trial Court has relied upon a case decided by Hon'ble Supreme Court titled as **Nopany Investment (P) Ltd. vs. Santokh Singh (HUF),** 2008 (II) SCC 728, wherein Hon'ble Supreme Court has held that filing of an eviction suit under the general law itself is a notice to quit on the tenant. Respondent is also relying upon the said case. On behalf of the respondent, reliance has also been placed on a case decided by the Hon'ble

> Delhi High Court in **M/s Jeevan Diesels & Electricals Ltd. vs. M/s Jasbir Singh Chadha (HUF) & Anr.** dated 25.03.2011 in RFA 179/2011, wherein it was held by the Hon'ble Delhi High Court that service of the summons in a suit, with a copy of the notice terminating the tenancy itself is a notice under Section 106 of the Transfer of Property Act. The suit was filed by the plaintiff on 04.02.2010, and summons were served alongwith a copy of the notice dated 23.12.2009 terminating the lease, and that in itself is a sufficient notice terminating the lease, as required under Section 106 of the Transfer of the Property Act. Relationship of landlord and tenant between the parties was admitted and rent payable was admitted to be more than Rs. 3,500/- per month. Notice as required under Section 106 of the Transfer of the Property Act for terminating the service has been given, be it the notice dated 23.12.2009 was received by the appellant or same was to be treated as a notice, when copy of the same was sent alongwith the summons of the suit. There was no error in decreeing the suit of the respondent against the appellant as regards the possession of the suit property under order XII rule 6 CPC."

12. The learned counsel for appellant/defendant has relied upon **M/s Jeevan Diesels & Electricals Ltd. v. M/s Jasbir Singh Chaddha (HUF) & Anr.** : 2010(6) SCC 601 to contend that the court can act under Order 12 Rule 6 of CPC only when admission is clear and unambiguous. It is contended that there was no clear admission of termination of tenancy, as such, impugned judgment cannot be upheld. However, the facts of the said case are different and the same has no applicability to the facts and circumstances of the present case. As is noted above, there is clear admission on the part of appellant/defendant as is discussed in preceding paras, the contention raised has no force and is rejected.

13. The other contention raised is that the site plan is not correct and the tenanted premises have been wrongly described. No such objection is taken in the written statement. The possession is sought by the respondent/plaintiff in respect of flat No. G-1, CCI, House No. 87 and the property has been correctly described in the plaint.

In view of the above discussion, no substantial question of law

arises which requires consideration of this court.

The appeal stands dismissed. The appellant is given six weeks time to vacate the premises.

CM No. 4879/2012 (stay)

In view of the order on the main appeal, no further orders are required on this application.

The same stands disposed of.

ILR (2012) V DELHI 599
W.P.

RAJ KUMAR M.E.-1 **….PETITIONER**

VERSUS

UNION OF INDIA & ORS. **….RESPONDENTS**

(ANIL KUMAR & SUDERSHAN KUMAR MISHRA, JJ..)

W.P. NO. : 1681/1996 **DATE OF DECISION: 01.06.2012**

Constitution of India, 1950—Article 226—Petitioner joined navy as an MER on 10th July 1981—Signal received from INS Vikrant at Calcutta, dated 2nd August sending the petitioner for court martial or trial by the Commanding Officer for an incident that occurred on 29th October 1994—Has sought that punishment imposed on the Petitioner of demotion to the first rank be quashed and he be restored to the original rank with all consequential benefits—Petitioner asked to accept or deny charge without being given a copy of the chargesheet—Charges only orally explained to him imputing allegations of negligence of duty—Asked to make a written statement—Petitioners stated that

he had performed his duty under the supervision and guidance of his senior officer—Petitioner asserted that he was not informed by the Commanding Officer of any inquiry after the incident till he came to know about the chargesheet which was orally communicated to him After summary trial petitioner was awarded punishment of reduction in rank—Punishment challenged on the ground that no Court of Inquiry was instituted in his case—Statement of witnesses not recorded in presence of the petitioner—Not allowed to cross—examine the witness at any time—Petitioner contended that all superior officers were let off with a warning alone while he was given the strongest punishment which destroyed his creditable service of over 13 years—Petitioner contended that procedure contemplated under the Army Act or Navy Act was not followed—No evidence recorded before deciding whether the Petitioners is to be tried by the court martial or summary trial—Respondents contend that petition premature—Allege that remedies under Section 162 and Section 163 not availed of—Respondents further contend chargesheet was not provided as it was not asked for—Available to the division officer who represented him in the Summary Trial—Respondents contend that petitioner was given the harshest punishment as the responsibility of evolution had rested squarely on the petitioner and the accident was a result of his negligence—Fall claims of Respondents denied by the Petitioner—Document providing option of court martial or summary trail not signed by the petitioner—Consent given on 9th August 1995—Evidence take from 7th August to 9th August 1995—clearly shows denial of opportunity to cross examine. Held:—There are two exceptions to the doctrine of exhaustion of alternative remedy—One is when the proceedings are under the provision of law which is ultra vires—The other exception is when an order is made in violation of the principles of natural

justice and the proceedings itself are an abuse of process of law. The copy of the charge sheet was not given to the petitioner—whether the petitioner was given an appropriate option between Court Martial and Summary Trial has not been established satisfactorily—Statement of witnesses in Summary of evidence were not recorded in the presence of the petitioner—no opportunity of cross examination given to the Petitioner—Petitioner not given 24 hours to decide whether to be tried by Court Martial or Summary Trial—For the Aforementioned Reasons the entire trial and punishment awarded to the petitioner is vitiated—Writ petition allowed.

There cannot be any doubt whatsoever that the question as to when a discretionary jurisdiction is to be exercised or refused to be exercised by the High Court has to be determined having regard to the facts and circumstances of each case for which no hard-and-fast rule can be laid down. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. To the doctrine of exhaustion of alternative remedy, there are two exceptions. One is when the proceedings are under a provision of law which is ultra vires which will entail quashing of the same on the ground that the proceedings are incompetent without a party being obliged to wait until those proceedings run their full course. The other exception is when an order is made in violation of the principles of natural justice and the proceedings itself are an abuse of process of law. The Supreme Court in **ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.** ((2004) 3 SCC 553 : JT (2003) 10 SC 300 [12]) observed that the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition and it is the Court that has imposed upon itself certain restrictions in the

exercise of this power. The Supreme Court had held on page 572 in para 28 as under:

> "28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. **The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. v. Registrar of Trade Marks13.)** And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction." **(Para 50)**

The copy of the charge sheet was not given to the petitioner, whether the petitioner was given an appropriate option between the Court Martial and Summary Trial has not be established satisfactorily. Statements of witnesses in summary of evidence were not recorded in the presence of the petitioner nor he was given an opportunity to cross examine them. No rule or regulation has been shown which permits or allows the respondents not to give the copy of the charge sheet on the premise that the accused is aware of the charges and the defending officer had not asked for the same. The respondents cannot take shelter under the plea that the petitioner's Divisional officer had access to the charge sheet and therefore, there was no necessity to supply the copy of the charge sheet. The learned counsel for the respondents failed to show any regulation or rule

which allow the respondents to record the statement of witnesses even prior to commencement of summary trial. Such evidence could not be used by the respondents to hold that the petitioner was guilty of charges made against him. The learned counsel for the respondents has utterly failed in these circumstances to show as to how the relevant regulations had been complied with. The witnesses who were examined in absence of the petitioner were not produced for the cross examination by the petitioner and in the circumstances it could not be even contended that the petitioner declined to cross examine the witnesses. From the record it also does not appear that the petitioner was given 24 hours to decide the alleged option given to him whether to be tried by Court Martial or by Summary Trial. In the circumstances, the evidence which had not been led before the Summary Court could not be considered and evidence which was recorded before the trial started in which also the petitioner was not given the right to cross examine the witnesses, also cannot be considered. Thus there is no evidence against the petitioner in the facts and circumstances. For these reasons as detailed hereinbefore the entire trial and punishment awarded to the petitioner is vitiated.

(Para 51)

Important Issue Involved: Denial of opportunity to cross examine and non communication of statement of witnesses amounts to a violation of principles of natural justice-two exceptions to doctrine of exhaustion of alternative remedy-one when proceedings are under provision of law which is ultra vires-second when it violates principles of natural justice and proceedings itself are an abuse of the process of law.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. D.J. Singh & Ms. Gyan Mitra, Advocate.

FOR THE RESPONDENTS : Mr. Himanshu Bajaj, Advocate.

CASES REFERRED TO:

1. *Raj Kumar* vs. *Union of India & Ors.* T.A.No.252/2009.
2. *ABL International Ltd.* vs. *Export Credit Guarantee Corpn. of India Ltd.* ((2004) 3 SCC 553 : JT (2003) 10 SC 300 [12])
3. *Sri Narayan Rajput* vs. *Union of India & Ors.* Cr.W.P 277 of 2005.
4. *The State of Punjab* vs. *Dewan Chuni Lal* [1970] 3 SCR 694,
5. *Union of India* vs. *T. R. Varma* (1958) IILLJ 259 SC.

RESULT: Appeal dismissed.

ANIL KUMAR, J.

1. The petitioner has sought in the present writ petition records of the Summary Court Proceedings conducted by the Commanding Officer on 16th September, 1995. He has also sought that the punishment imposed on the petitioner of demotion to the first rank be quashed and he be restored to his original rank with all consequential benefits such as payment of entire difference of salary, emoluments, etc. and to restore his rank to the other time scale promotion which the petitioner would have earned in the absence of the Court of Inquiry being initiated against him. The petitioner has also claimed all the salaries of his eligible rank and emolument be paid to him in the facts and circumstances.

2. Brief relevant facts to comprehend the controversies are that the petitioner joined the Navy on 10th July, 1981 as a Metric Entry Recruit (MER). He was posted on various ships on various dates. For an incident that occurred on 29th October, 1994, a signal dated 2nd August, 1995 was received from INS Vikrant at Calcutta for sending the petitioner for Court Martial or trial by the Commanding Officer at Bombay for the trial commencing on 6th August, 1995.

3. The petitioner disclosed that on 2nd August, 1995 another signal was received from FOC-in-C (West) to FOC-in-C (East) for providing the petitioner for summary trial. Another signal was received on 4th August, 1995 from FOC-in-C (East) for requiring the presence of the petitioner at Bombay at INS Vikrant.

4. The petitioner stated that he reached Bombay on 5th August, 1995 and was sent to INS Vikrant for appearing in the Court Martial. On 7th August, 1995, the petitioner was present for the court martial proceeding in the evening and he was, thereafter, produced before the Commanding Officer, Commander Lalit Kapoor on 8th August, 1995. According to him, the charge sheet was already typed and ready and he was asked by the Officiating Commander, Sh. Lalit Kapoor, whether the petitioner accepted the charges or denied the same, though the copy of the charge sheet was not given to him.

5. The petitioner asserted that he was orally explained the charges against him imputing allegations of negligence on duty and thereafter he was asked to make a written statement. The petitioner averred that the written statement was recorded in English whereby the petitioner had categorically stated that he had performed the duty under the supervision and guidance of his senior officer, Duty Chief Mr. S. Raju POME for the wash through of the A-I boiler along with Mr. B.A. Kumar- LME, Mr. P.K. Dey-LME and Mr. M. Baig-ME-II. He stated that Lieutenant Panicker was also present and that the petitioner had checked the steam pressure in the boiler by pressure gauge and found that the pressure was nil. He found that the air locks were open and he had told Mr. B.A. Kumar, LME, to open the run down valves of both the water drums. Then the petitioner personally checked the left side water drum's run down valve, which was fully open and the right hand side valve rod gearing was disconnected. The petitioner revealed that he told Mr. B.A. Kumar, LME to bring the spanner while he opened the run down valve and when the spanner was brought, he opened the valve after which he came in front of the steam drum and found that there was no water in it. At 0130 hours in the presence of Lt. Panickar and Mr. N. Singh, MCME-II, the petitioner and Mr. P.K. Dey, LME, opened the steam drum and brought another hose. The petitioner disclosed that he had sent Mr. P.K. Dey, LME, to wake SR Gole ME-I because he was in charge and he did not come with the petitioner and others. It was further revealed by the petitioner that at about 0200 hours he along with Mr. Baig ME-II went down to open the left side water drum door of the boiler in the presence of Lt. Panickar and he found that there was no water coming from the run down valve, and therefore, he along with Mr. M. Baig ME-II started opening the water drum door. Mr. M. Baig, ME-II was holding the spanner while the petitioner was hammering the spanner

for loosening the bolts of the water drum door. Mr. M. Baig, ME-II, gave the petitioner the dog shoe of water drum door to keep outside of casing and the petitioner kept the second dog shoe outside and he asked Mr. M. Baig to hold the stud of the drum tightly.

6. The petitioner contended that he suddenly heard the sound of crying and the sound of someone falling behind the door inside the water drum and he tried to take Mr. Baig out from the air casing, but he could not do so because the hot water had fallen on the hands of the petitioner as well and he had sustained burn injuries. He, therefore, asked Mr. Baig to come out from the other door, and when he came out, then the petitioner, Lt. Panickar, Mr. P.K. Dey poured cold water on his body till medical assistance was provided. Thereafter, Mr. Baig was taken to the hospital.

7. The petitioner asserted that he was not informed by the Commanding Officer of any inquiry after the incident till he came to know about the charge sheet which was orally communicated to him when he was called by the Officiating Commanding Officer, Commander Sh.Lalit Kapoor, on 8th August, 1995. The petitioner contended that his statement was not recorded in the summary trial, nor was he asked to opt to be tried either by summary trial or court martial and thereafter the summary trial was conducted on 9th August, 1995.

8. After conducting the summary trial on 9th August, 1995, the petitioner was awarded the punishment of reduction in rank to Engineering Mechanic First Class (No.4), deprivation of third, second and first good conduct badges (No. 9) and stoppage of leave for a period of sixty days (No. 12) by punishment warrant form No.6/95 dated 16th September, 1995. The petitioner has asserted that thereafter he was transferred to INS Netaji Subhash/MTU (Cal) and on the completion of his Ty. duties, he was awarded sixty days No.12 punishment w.e.f. 16th September, 1995. The petitioner contended that the punishment awarded to him not only caused monetary loss but demotion by two ranks and he was relegated back to his service of August, 1982, because of which he was deprived of 13 years of credited service.

9. The petitioner challenged the punishment imposed on him on the ground that no Court of Inquiry was instituted in his case, which is the first stage of investigation. On the date of the incident, the statements of

the other witnesses were not recorded in the presence of the petitioner, nor was he allowed to cross-examine the witness at any time subsequently. The petitioner contended that he had carried out the lawful order of the superior officer present there, namely Lt. Panickar, who was the officer-in-charge along with two senior sailors POME- S. Raju who was the Duty Chief M.E. and Mr. N. Singh MCME-II (Master Chief Engineering Mechanic-IInd Class). He contended that Mr. M. Baig got burnt on account of a lawful command obeyed by him which was given by the superior officer. The petitioner also contended that all the superior officers who were actually responsible for the incident were let off with warning alone, whereas the petitioner had been given the strongest punishment which destroyed his entire creditable service of over 13 years.

10. The petitioner also contended that after the Court of Inquiry, summary of evidence was to be recorded before deciding whether the petitioner is to be tried by the court martial or summary trial by the Commanding Officer.

11. According to the petitioner, the procedure as contemplated under the Army Act or the Navy Act was not followed and he was instead directly sent for trial by the Commanding Officer. The petitioner has challenged the punishment imposed upon him also on the ground that it was for the Commanding Officer to explain the case to the petitioner and after satisfying himself that the petitioner has understood the implications, the Commanding Officer then had to decide as to whether the petitioner was to be tried by the court martial or summary trial by the Commanding Officer.

12. Relying on AIR 1982 SC 35, the petitioner contended that the Commanding Officer is not to take the case in a informal way and has to decide in accordance with the provisions of the Act regarding the mode of the trial. The petitioner alleged that he was the junior most officer and no legal trial worth its name had taken place before punishing him.

13. The petitioner also divulged that he had made a statutory representation on 8th November, 1995 to the Chief of Naval Staff and requested the concerned authorities to forward the same. However, the authorities refused to do so, on the ground that the representation made by the petitioner cannot be forwarded unless approval is obtained from

the legal department. The petitioner, therefore, sent the representation by registered post. The petitioner contended that he did not receive any reply to his representation, and therefore, he even sent a reminder dated 15th December, 1995. The petitioner disclosed that thereafter on 4th January, 1996, he received a letter from the Chief of Naval Staff informing him that his statutory representation has been forwarded to the Flag Officer and Commander in Chief, Eastern Naval Company, Vishakapatnam and he was also advised to correspond directly with him.

14. The petitioner averred that on 22nd January, 1996 he was again advised by respondent No.2 to send his reminder to the Flag Officer Commanding in Chief, Eastern Naval Company, Vishakpatnam seeking the quashing of the punishment order and the restoration of his emoluments and consequential monetary benefits. According to the petitioner, his reminder dated 22nd January, 1996 had not been acted upon, nor replied to by the respondents. The petitioner, therefore, filed the present writ petition contending that his tenure on the demoted rank is finishing in the year 1997, and in the circumstances, he does not have any efficacious remedy available to him and thus he had no other option but to file the above noted writ petition on the grounds enumerated hereinabove.

15. The writ petition filed by the petitioner came up for hearing on 30th April, 1996, and thereafter the matter was adjourned from time to time at the instance of the learned counsel for the respondents who wanted to take instructions. This Court on 13th January, 1997 imposed a cost of Rs.2,000/- on the respondents and granted them one more opportunity to file the reply to the show cause notice. It was also held that the copy of the order dated 13th January, 1997 be sent to the Chief of Naval Staff who was expected to give appropriate instructions to the legal department in order to avoid the delay. Subsequently, the counter affidavit was filed on behalf of the respondents dated 17th February, 1997. Though the petitioner has contended that the cost of Rs.2,000/- awarded by order dated 13th January, 1997 had not been paid, however, the order dated 10th March, 1997 reveals that the cost had been paid. This Court, thereafter, issued "Rule" on 5th March, 1999.

16. On 2nd September, 2009, in view of the Armed Forces Tribunal Act which came into force, the writ petition was transferred under Section 34 of the Armed Forces Tribunal Act, 2007 to its Principal Bench and it was registered in the Armed Force Tribunal as T.A.No.252/

2009, titled as **'Raj Kumar v. Union of India & Ors.'**

17. The Armed Forces Tribunal by order dated 16th November, 2009, held that since the punishment awarded to the petitioner was reduction in rank, therefore, under Section 3 (o)(iii), the Armed Forces Tribunal does not have the statutory jurisdiction to hear the matter where the punishment awarded is other than dismissal and therefore, it directed the parties to appear before the Registrar General on 30th November, 2009.

18. On the transfer of the case, the writ petition was sent back to this Court, by order dated 3rd February, 2010 whereby the respondents were directed to place the record pertaining to the petitioner's representation dated 15th December, 1995. The writ petition was, thereafter, dismissed in default on 29th March, 2011, however, the order of dismissal in default of appearance of the petitioner and his counsel was recalled by order dated 10th August, 2011. Adjournments were sought on behalf of the petitioner thereafter, and the petitioner was granted the last opportunity to argue the matter on 9th February, 2012. Thereafter, the matter was argued by the parties on 23rd February, 2012, 7th March, 2012, 20th March, 2012 and on 21st March, 2012.

19. The respondents in their counter affidavit had contested the writ petition contending, inter-alia, that the petition is premature and that the petitioner did not avail the remedy in terms of Section 162 and 163 of the Navy Act by filing an appeal to the Chief of Naval Staff. The respondents contended that the petitioner has tried to mislead the Court by alleging that he has been made a scapegoat. According to the respondents, the petitioner was a Petty Officer Mechanical Engineering in charge, and therefore, directly responsible for the evolution and was found to be negligent in performing his duty which led to the death of Mr. M. Baig, Mechanical Engineer-II, who was working directly under him. Regarding Lt. Panickar, it was alleged that he was an under trainee officer, detailed to see and understand the evolution for the first time.

20. Regarding the infraction of the provisions of the Navy Act in conducting the summary trial and punishing the petitioner, it has been alleged that the decision for the summary trial by court martial was taken after preliminary investigation was over and the other two sailors had also been tried summarily by the Commanding Officer. It has been

contended that the petitioner opted for summary trial by the Commanding Officer, and therefore, he was tried accordingly. The respondents further disclosed that the petitioner was defended by his divisional officer.

21. Regarding not supplying the copies of the charge sheet, the respondents contended that the petitioner was aware of the charges against him, and therefore, the copy was not supplied to him as neither the petitioner, nor the defending officer had asked for the copy of the charge sheet. The respondents contended that in any case the petitioner's divisional officer had access to the charge sheet as the documents were available with the regulating officer of the ships. As a precaution, the charges were allegedly read to the petitioner in front of his defending officer again and thus it is urged that the plea raised by the petitioner of not replying to the charge sheet is an afterthought.

22. The respondents also contended that the trial of S.Raju, POME No.147442 Y and Mr.N.Singh, MCME-II No.094464 T had already been completed by the earlier Commanding Officer, Capt. Mohanan, and that the trial of the petitioner could not be completed as the petitioner had reported after Capt. Mohanan formally had handed over command to Commander Mr.Lalit Kapoor on 8th August, 1995.

23. Regarding two other sailors, it was contended that their trial was already over and that they were tried under Section 93 (2) of the Navy Act, 1957 and the case against them was also established.

24. The respondents further contended that the petitioner was given opportunity for trial by court martial under the Regulation 30 of the Navy Act Part-II (Statutory), however, he himself opted for summary trial by the Commanding Officer.

25. During the summary trial, the charge sheet was read over to the petitioner and he was asked whether he pleaded guilty and whether he wanted to make a written statement. Regarding the written statement given by the petitioner, it was stated that the written statement given by the petitioner was correct except for the averments made that "I found there is no water coming from run down valve, then I and Mr.M.Baig started opening the water drum door" which according to the respondents is incorrect. The respondents contended that in fact water was flowing from the run down valve and Lt.Panickar, under trainee officer on the ship who was seeing this evolution for the first time, pointed out the

same to the petitioner to which the petitioner replied that it was safe to open the water drum door as the pressure was less and that he had done it frequently before as well.

26. The respondents further submitted that after the completion of the trial the petitioner was remanded on 8th August, 1995 and was publicly awarded the punishment in front of the full ship's company on 16th September, 1995 as per the statutory regulations. It is also urged that the trial had been conducted in terms of Chapter II of the Regulations for the Navy Part II (Statutory). It is also pointed out that at no stage he or his defending officer had made an issue about not being given the copies of the charge-sheet, statements of witnesses etc. According to the respondents, the petitioner can't even take the plea that they did not have access to these documents in question, since all these documents are readily available on board the ship with the regulating officer and both the prosecutor and the defending officer have access to the same. Thus, as per the respondents the plea that the charge-sheet was not given to the petitioner and that the statements of the witnesses were not provided to him is an after-thought. In any case, the learned counsel for the respondents assures that the charges were read over to the petitioner as per Chapter II of the Regulations for the Navy Part II (Statutory) and he was asked not to make any statement or give any evidence until after all the evidence against him had been heard by him.

27. The learned counsel for the respondents has further contended that the Board of Inquiry was instituted by the Flag Officer Commanding-in-Chief, West under Chapter VII of the Regulations for the Navy Part II (Statutory) and that all the provisions of this regulation were complied with. Therefore, the respondents submit that there was no requirement to record the statement of the petitioner on the day of the incident. In any case, as per the respondents, the petitioner was allowed to sit through the Board of Inquiry proceedings in terms of Regulation 205, Regulation for the Navy Part II (Statutory), where he had all the opportunity to cross-examine the witnesses amongst other rights, however, he himself had declined to avail the same.

28. With regard to the plea that the petitioner alone has been made responsible for the unfortunate incident, while the superior officers involved in the matter have escaped any consequences, the learned counsel for the respondents has contended that the petitioner was the only Petty Officer

Engineering Mechanic who was nominated to the POME in-charge for the task assigned, and therefore, he was required to carry out the job by following the laid down procedure and thereby ensuring the safety of his own self as well as of his subordinates working directly under him. The learned counsel for the respondents further contended that the other personnel senior to the petitioner had directed him to lead the party conducting the evolution and that they were not present to personally supervise the said evolution. Lt. Panicker too was an under-trainee officer, who was present solely to observe the evolution for the first time and thus, he was not the officer in charge of the evolution. Therefore, it is submitted that in the facts and circumstances the responsibility of the evolution had squarely rested on the petitioner and it was due to his negligence in performing his duties which had led to the death of M. Baig ME II, who was directly working under him in the same evolution. The Board of Inquiry was careful to fix the blame on the various officers and the sailors involved in the said incident including the petitioner and each one of them was dealt with in accordance with law.

29. It is also urged that the petitioner was given due opportunity to exercise his option as per Regulation 30 of the Regulations for the Navy Part II to be tried either by the summary trial or by the Court Martial. It is also submitted that at the relevant time, the petitioner was properly explained the charges and the consequences of facing a summary trial by the Commanding Officer viz-a-viz the consequences of a Court martial. The petitioner was given ample time of 24 hours to make his decision, and he was also allowed the assistance of a defending officer. It was also explained to the petitioner that if the rank is taken away by the Court Martial, then it cannot be regained without the approval of the Chief of the Naval Staff, whereas, if the punishment of reduction in rank is rendered by the Commanding Officer, it can be restored either by the CABS or the Commanding Officer himself and thus the petitioner had made the voluntary and informed decision of opting to be tried by the Commanding Officer by way of Summary proceedings. Since the petitioner had opted for summary proceedings in writing on 9th August, 1995, the same was initiated after the Board of Inquiry.

30. The learned counsel for the respondent has further contended that the petitioner's representation against the order of penalty, under Section 23 of the Navy Act was also duly dealt with by the Naval

Authorities in the manner prescribed in the Regulations 235-241 of the Regulations for the navy Part II (Statutory). The relevant record was called for and the petitioner's case was reconsidered on merits, however, it was found to be devoid of any merits and thus, consequently, the same was disposed of by the Headquarters Western Naval Command by letter dated 8th May, 1996. Thereafter, the petitioner was transferred to INS Netaji Subhash under the Eastern Naval Command and thus the representation was forwarded to the Headquarters, Eastern Naval Command at Vishakapatnam, which is at the moment under active consideration.

31. Therefore, the learned counsel for the respondent has contended that the writ petition of the petitioner is premature, as he has not exhausted the remedy available to him in terms of Section 162 and 163 of the Navy Act, 1957, by making an appeal to the Chief of the Naval Staff or Government.

32. The pleas of the respondents are refuted by the petitioner in his rejoinder dated 3rd March, 1997, inter alia, on the grounds that as per the record itself it is clear that the charges were not read to the petitioner as per Chapter II of the Regulations for the Navy Part II (Statutory). It is also denied that warning was given to the petitioner that he should make a statement or evidence until all the evidence against him had been heard. It is further denied that time was given to the petitioner to elect the option of being tried by either the Summary trial or by the Court Martial and that the petitioner had opted to be tried summarily.

33. This Court has heard the learned counsel for the parties in detail and has also perused the relevant records and the relevant documents filed with the pleadings. The learned counsel on behalf of the petitioner has vehemently argued that the petitioner had not been given a reasonable opportunity to defend himself and that the principles of natural justice had not been complied with during the summary proceedings. The petitioner has stated that the charge sheet was not issued, and that the statements of the witnesses recorded during the Board of Inquiry was not given to him nor was he given the opportunity to cross-examine the witnesses during the summary proceedings. It is also alleged that the petitioner was not given the option to choose between the proceedings of Court Martial and the summary court proceedings, nor were the consequences of exercising such an option explained to him and, consequently, he has contended that he had been gravely prejudiced at

the hands of the respondents.

34. Per contra the learned counsel for the respondents has contended that the petitioner has not been singled out in the present matter and that the other officers involved in the alleged incident have also been tried summarily by the competent authority. It is also urged that there was reasonable compliance of the provisions of the Navy Act and the Regulations for the Navy Part II while initiating the summary proceedings against the petitioner and that after affording due opportunity to the petitioner to defend himself, on the basis of the evidence on record it was found that the charges against the petitioner were made out and, consequently, the punishment by order dated 16th September, 1995 was imposed on the petitioner.

35. A perusal of the record reveals the following facts which are pertinent in inferring whether there was compliance of the Regulations and principles of natural justice in the present case. The alleged incident whereby Mohammed Baig ME II had lost his life while washing the A-1 Boiler had taken place on 29th October, 1994. The Board of Inquiry was initiated to enquire into the alleged incident on 8th November, 1994 and thereafter the report was prepared on 7th July, 1995. The Board of Inquiry report stipulated the lapses on the part of three sailors, namely Rajkumar, POME, the petitioner, S. Raju, POME and N. Singh, MCME II and it was ordered that the said sailors be tried summarily for their alleged lapses. The report dated 7th July, 1995 is reproduced as under:

BOARD OF INQUIRY-DEATH OF M BAIG ME II, NO.118012-T

A perusal of the above subject Board of Inquiry has brought out the fact of the following sailors were culpable of the lapses as follows:-

(a) Rajkumar, POME, No.110871-F. For prematurely opening the water drum door before ensuring the drum was dry and empty. In addition, he adopted incorrect engineering practices in not securing the door by rope and additionally place late M.Baig, ME II, in a vulnerable position within the air casing.

(b) S.Raju, POME, No.147442-V, Duty Chief ME. He was culpable of remaining in the mess decks instead of supervising the operation. Subsequently, when the emptied

the stdb side water drum, he repeated the error of not securing the door by rope despite the occurrence of a serious accident just hours before.

(c) N.Singh, MCME II, No.094464-T, OOD Engine Room. He is guilty in that during the hosing down operations, he was not present when the port water drum door was being opened incorrectly and was not aware of the correct engineering practice despite having served for over 10 years on board.

He is also culpable of not instructing S Raju, POME, to use the rope on the stbd water drum door despite the occurrence of the accident, earlier in the night.

2. It is, therefore, requested that the above mentioned sailors be summarily tried for their above mentioned lapses and a completion report made to this Headquarters.

36. Thereafter, on 2nd August, 1995 a signal was received by the petitioner, ordering him to appear for the Court Martial or Trial by the Commanding Officer at Bombay on 6th August, 1995. As per the General Information recording the arrival of the petitioner, he had arrived in Bombay and reported on board of the ship on 7th August, 1995. Thereafter, on 8th August, 1995 the charges were explained to the petitioner and he was asked to make any statement he wished in his defense.

37. On 8th August, 1995 the petitioner was also allegedly asked to exercise his option to be tried by either the Court Martial or the Summary Proceedings. According to the petitioner, the said option was not given and in any case the consequences of exercising the option of Court Martial was not explained to him as is required under Regulation 30 of the Regulations for the Navy Part II. This plea seems to have some merit in the facts and circumstances since as per the record it is evident that though there is a document stipulating that the consequences of exercising the option of being tried by the Court Martial was explained to the petitioner, however, the same is not endorsed by the petitioner and it only bears the signatures of the Commanding Officer, Lalit Kapur. Thus, there is no way of knowing if the said aspect was explained to the petitioner before exercising his option for Court Martial or Summary proceedings by the Commanding Officer.

38. In any case, the petitioner had given his alleged consent to be tried summarily by the Commanding Officer only on 9th August, 1995. However, it is pertinent to note that as per the record the statements of all the witnesses were recorded during the period of 7th to 9th August, 1995, even before the petitioner had exercised his option of being tried summarily. Thus the statements of the witnesses were already recorded. It is also evident that while the statements of the witnesses were recorded there is no mention that the petitioner was given the opportunity to cross-examine the said witnesses. The learned counsel for the respondents has not been able to give any satisfactory explanation as to how evidence could be recorded even before commencement of Summary Security Court. No regulation or rules have been pointed out under which evidence could be recorded even before the accused had opted for trial summarily though the accused/petitioner has denied that the option was taken from him. In fact, the only clarification given is that the statements of the witnesses have been confirmed to be correct and signed in the presence of the Commander. It also does not bear any signatures of the petitioner. Therefore, the plea that the witnesses were not cross-examined by the petitioner, nor was he provided a copy of the statements of the witnesses, is apparent on the face of the record, and therefore, the petitioner has been able to establish the violation of regulations and denial of principles of natural justice.

39. The petitioner also contended that even during the Board of Inquiry the statements of the witnesses was recorded in his absence, and that he was not allowed to be present at the time nor was he given copies of the same. The respondents have merely denied this plea and stated that reasonable opportunity was given, however, the learned counsel on behalf of the respondents has been unsuccessful in showing anything on the record that would establish that such an opportunity was given to the petitioner to cross examine the witnesses or that the opportunity was given, however, the petitioner had declined it.

40. Other violations of the mandatory regulations are also evident in the manner the trial was conducted and the investigation was carried out against the petitioner. On the one hand, the investigating officer has stated on 8th August, 1995 that he had thoroughly investigated the case and recorded the evidence of the witnesses, but since he did not have the power to punish the petitioner, the case was forwarded to the

Commanding Officer for his decision, on the other hand, the perusal of the record reveals that the statements of the witnesses PK Dey, LME and B.A. Kumar, LME were recorded on 9th August, 1995 by the investigating officer. There is no explanation given as to why the said witnesses were examined on 9th August, 1995 by the investigating officer, Karnail Singh, if as per his own admission he had forwarded the matter to the Commanding Officer for his decision on 8th August, 1995. These glaring violations in the trial of the petitioner casts a huge doubt on the veracity of the said proceedings and it is also clear that the petitioner was not afforded the proper opportunity to defend himself and in the process the entire trial and proceedings by the respondents are vitiated.

41. The decision of the Apex Court in **The State of Punjab v. Dewan Chuni Lal** [1970] 3 SCR 694, is pertinent to the facts of the present case. It was a case of dismissal of a Police Sub-Inspector on charges of inefficiency and dishonesty based on adverse reports of superior officers. Such officers, though available, were not examined to enable the Police Sub-Inspector to cross-examine them. The Supreme Court held that the refusal of the right to examine such witnesses amounted to denial of reasonable opportunity of showing cause against the action of dismissal. The Supreme Court had held that the dismissal was not legal.

42. Union of India v. T. R. Varma (1958) IILLJ 259 SC related to the dismissal of a public servant. The question was whether the enquiry held under Art. 311 of the Constitution of India was in accordance with the principles of natural justice. The Court, speaking through Venkatarama Aiyar J. had observed as follows at p. 507:-

> " Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them".

43. In the matter of **Sri Narayan Rajput v. Union of India & Ors.** Cr.W.P 277 of 2005 decided on 12th December, 2008 relied on by the petitioners, the Division Bench of the High Court of Bombay had held

that from the record it was not evident that the accused was given the right to cross examine the witnesses, and that as per Regulation 27 of the Navy Regulations, the leading of evidence must also include the opportunity to cross examine the witnesses, who are examined in support of the charge. The relevant portion of the judgment is as under:

> "9. As regards the right to cross examine in a trial conducted by the Commanding Officer, reference may be made to regulation 27 which provides for the procedure to be followed at investigation in general. The said Regulation is in the following terms.
>
> 27-Procedure at investigations in general-
>
> (1) At all investigations the evidence in support of the charge shall be heard first.
>
> (2) Immediately after the charge has been read out, the Investigating officer shall warn the accused that he should not make any statement or give any evidence on his own behalf until all the evidence against him has been heard.
>
> (3) On conclusion of the evidence in support of the charge, the investigating officer shall decide whether a case has been made out against the accused.
>
> (4) If there is no case, the investigating officer shall either dismiss the case or, it further evidence is likely to become available, stand it over and if there is a prima facie case, and it is a simple one with which the investigating officer thinks he scandal with himself, he shall ask the accused if he admits the charge.
>
> (5) If the accused does not admit the charge and the matter is one within the investigating offer's powers of punishment, he shall inform the accused that he will proceed to try the, giving him an opportunity of making a statement and calling witnesses.
>
> 10. From the aforesaid procedure it becomes quite clear that what is contemplated by Section 27(1) relates to evidence in support of the charge. It cannot be lost sight that these proceedings can result in imprisonment up to 90- days and also result in other serious consequence such as loss of service and service benefits. In our view leading of evidence must include an

opportunity to cross examine the witness who are examined in support of the charge. In this regard, it is also relevant to note that Regulation 27(5) also gives opportunity to the accused also of making a statement and calling witnesses. It goes without saying that these defense witnesses can also be cross examined by the prosecution.

11. At this stage useful reference may be made to a judgment of this court in the case of Rajesh Singh Tanwar Vs. Admiral R.L.Pereira and others delivered on 31.8.1985 in Writ Petition No.1369 of 1981. One of the contention raised before this court in that case was that the trial by the Commanding Officer was vitiated because it has been held in violation of rules of natural justice as copies of such statements were not given to the petitioner in advance and therefore, he was not given a proper opportunity to cross examine this witness. The stand of the Navy in that case was that the statements of the witnesses were read out very slowly to the petitioner and he was also asked to cross examine the witnesses in question but he declined to cross examine the witnesses. In the circumstances, the Single Judge of this court concluded from the facts that it was not possible to hold that the petitioner was not given any opportunity to cross examine the witnesses. We note that, in the aforesaid case, it was not the contention of the Navy that the right to cross examine was not available at all to the petitioner. In fact, in the present case also, it was fairly conceded that the petitioner had a right to cross examine the witnesses. In fact the onus to prove that the right of cross examination was given would be upon the prosecution and they should therefore take care to see that the fact that such a right was offered should be made clear through an entry in the trial record.

12. In our view, therefore, the petition deserves to succeed on two grounds firstly that the petitioner was not given opportunity to cross examine the witnesses and secondly the additional material in the form of questions raised by the petitioner and answered by the witnesses as referred to in Para-29 of the affidavit in reply were not made as part and parcel of the summary of evidence required to be forwarded to the approving officer who

approved the punishment. On these two grounds alone, petition deserves to be allowed."

44. The principles of natural justice, therefore, contemplate that reasonable opportunity is to be given to the accused to make him aware of the facts and evidence that is against him, so that he can properly defend himself. In the investigation conducted by the respondents, the statements of the witnesses were recorded in the absence of the petitioner. Such evidence which was not recorded in his presence was also relied upon by the Commanding officer while inculpating the guilt of the petitioner and punishing him for the same. Thus, the denial of the opportunity to cross-examine the said witnesses and the non communication of the said statements of the witnesses to the petitioner, has denied the petitioner of the opportunity to properly defend himself, thereby violating the principles of natural justice and relevant regulations. No cogent reason has been given as to why the charge sheet could not be given to the petitioner. There is no rational of merely reading the charges to the accused. The charges should not have been merely read to him but in the language which the accused understands, and thereafter, a copy of the charge should have been given to him. The learned counsel for the respondents is unable to show any regulations or rules which approves of such a procedure which had been adopted by the respondents. Therefore, the summary proceedings in the facts and circumstances are vitiated.

45. In the Summary of Evidence Report dated 14th August, 1995, on the basis of which the punishment was imposed on the petitioner by order dated 16th September, 1995, it is clear that reliance was mostly placed on the statement of Lt Panicker to inculpate the guilt of the petitioner. The relevant portion of the report is as follows:

> "5. It has been established by the evidence of Lt GP Panicker (41586-N) that water was still flowing down from the run down drain when the door of the boiler was opened, that in fact Lt Panicker questioned the accused on whether it was safe to open the door and the accused replied that it was perfectly safe to do so. It has also been established by the evidence of Lt GP Panicker (41586-N) that water continued to pour out of the water drum through the door for some time after the door was opened.
>
> 6. There is no past recorded instance of the run down drain

being completely chocked by sludge/slurry/other objects after boiling out. While the drain may have been partially choked, this accident would not have happened if the accused had waited till flow of water from the run down valve came to a stop.

7. There is no evidence of malafide intentions or conflict between Raj Kumar POME No.110871-F and M Baig ME II No.178012-T. Thus premature opening of the water drum can be attributed to an error of judgment on the part of Raj Kumar POME No.110871-F, caused by overconfidence, hurry and an improper appreciation of the situation which directly lead to severe burn injuries followed by death of M Baig ME II No.178012-T.

8. The accused was warned in accordance with Regulation 28(i) of the Regs Navy Part II before he made a statement. The accused pleaded not guilty to the charges. The assistance of the Divisional Officer was provided to the accused through out the investigation and he was afforded all opportunity to defend himself."

46. However, a perusal of the statement of Lt Panicker reveals that Lt Panicker had not questioned the petitioner on whether it was safe to open the door or not. In fact, when a specific question was asked as Question No. 14 asking him if he had mentioned anything to the petitioner, he had stated "no". It is also evident that though the report stipulates that all opportunity was given to the petitioner to defend himself, however, it does not specify if the petitioner was given the opportunity to cross examine the witnesses or that he was given the opportunity to cross examine the witnesses, however, he had declined the same.

47. An examination of the statements of the other witnesses, namely N. Singh, POME, S. Raju, POME, B.A. Kumar LME, P. K Dey, LME also do not reveal anything substantial regarding the allegations imputed against the petitioner. These witnesses have all been asked the same questions pertaining to the procedure to be followed while opening the water drum, however, they have not deposed about the role played by the petitioner or the lapse on the part of the petitioner for the mishap that had occurred on the alleged day of the incident. Thus there is even no evidence regarding the allegations of negligence as imputed against the petitioner.

48. The petitioner has further contended that the other officers who were also responsible for the alleged incident have been let off with a mere warning, while the petitioner who is the junior-most officer has been made solely responsible for the unfortunate incident and punished for the same. The respondents in their counter affidavit have only negated this plea by stating that the said plea of the petitioner is false and that the other two sailors named in the report of Board of Inquiry Report dated 7th July, 1995 were also summarily tried for their lapses. However, the respondents have not given any other details regarding the trial of the said sailors, or the outcome of the same. In this light, the only inference that can be drawn in the facts and circumstances is that the petitioner alone has been made responsible for the death of Mohammed Baig ME II, even though the party that was detailed for the washing of A1 boiler also included other officers. How the petitioner can be held solely responsible has not been explained by the respondents. The evidence led before the summary trial either cannot be read as it was not recorded during the trial or even before the trial commenced or there is no evidence at all to inculpate the petitioner solely for the mishap.

49. The learned counsel for the respondents has also contended that the petitioner has got an effective alternative remedy under Section 162 and 163 of the Navy Act. However, considering the fact that the petitioner had sent his statutory representation against the order of penalty on 8th November, 1995 and that on 4th January, 1996 the petitioner was informed that his statutory representation had been forwarded to the Flag Officer Commanding in Chief, Eastern Naval Command, Vishakapatanam and that still till today no decision has been given by the respondents, this Court is not inclined to accept the submission of the learned counsel for the respondents that the petitioner should be asked to exhaust his alternative remedy. The writ petition is pending for the last sixteen years and at this stage to send the petitioner back to make a statutory representation will be unjust and denial of another reasonable opportunity to the petitioner.

50. There cannot be any doubt whatsoever that the question as to when a discretionary jurisdiction is to be exercised or refused to be exercised by the High Court has to be determined having regard to the facts and circumstances of each case for which no hard-and-fast rule can be laid down. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case,

something going to the root of the jurisdiction, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. To the doctrine of exhaustion of alternative remedy, there are two exceptions. One is when the proceedings are under a provision of law which is ultra vires which will entail quashing of the same on the ground that the proceedings are incompetent without a party being obliged to wait until those proceedings run their full course. The other exception is when an order is made in violation of the principles of natural justice and the proceedings itself are an abuse of process of law. The Supreme Court in **ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.** ((2004) 3 SCC 553 : JT (2003) 10 SC 300 [12]) observed that the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition and it is the Court that has imposed upon itself certain restrictions in the exercise of this power. The Supreme Court had held on page 572 in para 28 as under:

> "28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. **The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. v. Registrar of Trade Marks13.)** And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

51. The copy of the charge sheet was not given to the petitioner, whether the petitioner was given an appropriate option between the Court Martial and Summary Trial has not be established satisfactorily. Statements of witnesses in summary of evidence were not recorded in the presence

of the petitioner nor he was given an opportunity to cross examine them. No rule or regulation has been shown which permits or allows the respondents not to give the copy of the charge sheet on the premise that the accused is aware of the charges and the defending officer had not asked for the same. The respondents cannot take shelter under the plea that the petitioner's Divisional officer had access to the charge sheet and therefore, there was no necessity to supply the copy of the charge sheet. The learned counsel for the respondents failed to show any regulation or rule which allow the respondents to record the statement of witnesses even prior to commencement of summary trial. Such evidence could not be used by the respondents to hold that the petitioner was guilty of charges made against him. The learned counsel for the respondents has utterly failed in these circumstances to show as to how the relevant regulations had been complied with. The witnesses who were examined in absence of the petitioner were not produced for the cross examination by the petitioner and in the circumstances it could not be even contended that the petitioner declined to cross examine the witnesses. From the record it also does not appear that the petitioner was given 24 hours to decide the alleged option given to him whether to be tried by Court Martial or by Summary Trial. In the circumstances, the evidence which had not been led before the Summary Court could not be considered and evidence which was recorded before the trial started in which also the petitioner was not given the right to cross examine the witnesses, also cannot be considered. Thus there is no evidence against the petitioner in the facts and circumstances. For these reasons as detailed hereinbefore the entire trial and punishment awarded to the petitioner is vitiated.

52. In the facts and circumstances and the forgoing reasons the writ petition is, accordingly, allowed. The finding and the sentence of reduction in Rank to MEI (No.4), deprivation of third, second and first good conduct badges (No.9) and stoppage of leave for a period of sixty days (No.12) imposed by the Summary Court on 16th September, 1995 is set aside. The petitioner shall be entitled to restoration of his rank and badges and all the consequential benefits including promotions and pay. The petitioner shall also be entitled to costs of Rs.20,000/- in the facts and circumstances, payable by the respondents. Costs be paid within four weeks. With these observations and directions the Writ petition is allowed.

ILR (2012) V DELHI 625
CRL

RANJIT TIWARI ….PETITIONER

VERSUS

NARENDER NAYYAR ….RESPONDENT

(SURESH KAIT, J.)

CRL. M.C. NO. : 4077/2011 & CRL. M.A. NOS. : 19016/2011 & 3720/2012 **DATE OF DECISION: 02.07.2012**

Negotiable Instrument Act, 1981—Section 138, 141—Respondent filed complaint u/s 138 of Act against company in which petitioner was Managing Director—Ld. Metropolitan Magistrate (M.M), Delhi issued summons to Company—Thereafter, respondent moved application to include name of petitioner being the Company in the complaint, which was allowed by the Ld. M.M—Aggrieved, petitioner challenged the order—It was urged, petitioner could not have been impleaded in the complaint without making specific averments that offence was committed when he was incharge and responsible for conduct of business of the Company—In absence of such specific allegations, he could not be made accused in complaint as it violated provisions of section 141 of the Act—On the other hand, it was urged on behalf of respondent, there was sufficient material against petitioner; cheques were issued by him, same were drawn on the account maintained by accused persons and legal notice was duly served upon accused persons—An inadvertent mistake to mention the name of petitioner in complaint in no manner precluded him to be impleaded as accused. Held:— The principal offender in each cases

is only the body corporate and it is a juristic person and when the Company is the drawer of the cheque, such company is the principal offender and the remaining persons were made offenders by virtue of the legal fiction created by the legislature as per Section 141—Petitioner being the Managing Director of the company, was liable for the acts of the company.

According to Section 141(1), vicarious liability is attributed to the persons mentioned therein for the offence committed by the company, on the very same analogy notice served on the company amounts to serving of notice on all the persons as found in Section 141 of N.I. Act. A person who was in charge of the company and was responsible to the company for the conduct of the business of the company alone can be prosecuted, while so, such a person cannot deny knowledge about the service of notice to the company. Only in that view of the matter vicarious liability is cast upon those persons and that is why no notice to them is contemplated. **(Para 16)**

Important Issue Involved: The principal offender in each cases is only the body corporate and it is a juristic person and when the company is the drawer of the cheque, such company is the principal offender and the remaining persons were made offenders by virtue of the legal fiction created by the legislature as per Section 141.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Himansu Upadhyay Mr. J.P. Sahrawat and Mr. Shivam Tripathi, Advocate.

FOR THE RESPONDENT : Mr. Ankur Bansal, Advocate.

CASES REFERRED TO:

1. *M/s. Sarvaraya Textiles Limited* vs. *M/s Integrated Finance*

Limited, [2001] 107 Comp Cas 256 (Mad)

2. *Anil Hada* vs. *Indian Acrylic Ltd.*, MANU/SC/0736/1999.

3. *Jain Associates and Ors.* vs. *Deepak Chawdhary & Co.*, 80(1999) DLT 654.

RESULT: Petition dismissed.

SURESH KAIT, J.

1. The instant petition is being filed while challenging the order dated 21.09.2011 passed by learned Metropolitan Magistrate which reads as under:-

"21.09.2011

CC No.987/1/10

Present: Complainant along with ld. Counsel. AR of accused along with ld. Counsel.

Counsel for complainant has filed an application for summoning of Sh. Ranjit Tiwari as co-accused in the present complaint on the ground that earlier he is not aware about the name of the Managing Director and hence, company was arrayed as accused. However, now he has come to know that Mr. Ranjit Tiwari is the Managing Director of the

Company and requested for the summoning. Further today Vinod Yadav office assistance/AR of company is present today and court has verified from him about the name of the Managing Director that Sh. Ranjit Tiwari is the Managing Director of the company.

Section 141 NI Act is reproduced hereunder:-

"If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and proceeded against and punished accordingly"

So it is clear from section 141 NI Act that any person who was Incharge and responsible of company for conduct the business is deemed to be guilty of the offence u/s 138 NI Act. Summons have already been served upon the company. Hence, it is settled law that no separate notice is required to be served upon the Director.

I have perused the complaint. Prima facie case for commission of offence u/s 138 NI Act is made out against Managing Director Sh. Ranjit Tiwari.

Application dated 05.09.2008 is disposed off. Let he be served on filing of PF and RC.

Be listed for 01.12.2011."

2. Ld. Counsel for the petitioner has submitted as alleged in the complaint that by virtue of partial discharge of legal and enforceable liability, the accused had issued and delivered cheques bearing No.522451 and 522428, both drawn on State Bank of Patiala, Parliament Street, New Delhi, in the name of the respondent/complainant. The said cheques, when presented by the complainant, were returned vide memo dated 12.11.2007. The information qua the same was communicated to the accused person on 13.12.2007 through a legal notice.

3. He further submitted that thereafter, the respondent filed a complaint before the Metropolitan Magistrate, Tis Hazari, Delhi, who without looking into the contents of the complaint, issued summons to M/s Mirik Health Food Pvt. Ltd.

4. Ld. Counsel has further submitted that the alleged M/s Mirik Health Food Pvt. Ltd. cannot be alleged to be the accused. Thereafter, the respondent/complainant moved an application to include the name of the Managing Director of the company wherein both the petitioners have been made party in the complaint due to their designation M/s Liverpool Retail India Pvt. Ltd.

5. He argued that the respondent, at the later stage, without even mentioning the provisions of law, filed an application to summon the Managing Director of the company, i.e., the petitioner despite making any specific allegation in the entire complaint in respect of their respective roles in the affairs of the company, as is required under section 141 of

the Negotiable Instruments Act (hereinafter referred to as "the said Act") which is reproduced as under:-

"Section 141. Offences by companies:

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and proceeded against and punished accordingly];

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

[2]["Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attribute to, any neglect on the part of, any director, Manager, secretary, or other office of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

6. It is further submitted that in the complaint under Section 138 read with Section 141 of the Act, there should be some specific averment that the accused has committed the offence when he was in-charge of and responsible for the conduct of the business of the company. Since this is an essential requirement of Section 141 of the said Act which should be made in the complaint and without this averment, the requirement of Section 141 cannot be said to be satisfied. Merely being an employee

of the company, i.e., petitioner herein, has been made a party in the complaint, therefore, he is not liable under Section 141 of the said Act.

7. Ld. counsel further submits that the petitioner, who is admittedly the Managing Director of M/s Mirik Health Food Pvt. Ltd., cannot be made accused until and unless there are specific allegations in the complaint. Therefore the impugned order dated 21.09.2011 passed by the learned MM is contrary to the provisions of Section 138 and 141 of the said Act.

8. On the other hand, ld. counsel for the respondent has submitted that the aforesaid cheques were issued by the accused in favour of the complainant/respondent to clear the outstanding liability towards the respondent. The said cheques were drawn on an account maintained by the accused persons with the aforesaid bankers. The said cheques were returned bounced because the accused persons failed to make requisite arrangement for funds with their bankers.

9. On receipt of the information about the dishonour of the aforesaid cheques, a legal notice dated 01.12.2007 was sent on 03.12.2007 for the offence punishable under Section 138 of the said Act. The said legal notice was duly served upon the accused. Despite that they failed to pay the liquidated amount of the aforesaid cheque to the respondent/complainant.

10. It is further submitted in the complaint the Memo of parties is mentioned as under:-

"Sh. Narender Nayyar
Proprietor
M/s Enn Enn Advertising & Marketing
11, Rani Jhansi Road,
New Delhi-110055.

Versus

M/s Mirik Health Foods Pvt. Ltd.
16-A, 16th Floor, Atma Ram House,
1, Tolstoy Marg,
Connaught Place,
New Delhi-110001."

11. It is further submitted that inadvertently the respondent/ complainant could not name any person, therefore, he moved an application for impleadment of the petitioner as he was the Managing Director of the

company.

12. To strengthen his argument, ld. counsel has relied upon the judgment delivered by High Court of Madras in the case of **M/s. Sarvaraya Textiles Limited vs. M/s Integrated Finance Limited,** [2001] 107 Comp Cas 256 (Mad) wherein the Madras High Court has held as under:-

> "12. With regard to the third accused, who is the director of the company, admittedly no separate notice has been served on him. Will it entitle him to be absolved of the offence alleged against him.? Section 141 creates the basis for liability upon the persons who were incharge of and were responsible to the company for the conduct of the business of the company. It is in the nature of vicarious liability. Section 141 is a deeming provision to enable the complainant to prosecute the persons who were incharge of the company and were responsible for the conduct of the business of the company along with the company. Nowhere Section 141 stipulates in such case, notice shall be issued to all such persons. But there is a proviso to Section 141 enabling those persons to prove that the offence was committed without that person's knowledge or that the said person exercised all due diligence to prevent the commission of such offence. This safeguard is available only to the persons who are prosecuted by virtue of section 141(1) and this safeguard is not available to the drawer of the cheque. Moreover, unless the company is made liable, the question of punishing the persons who are in charge of and are responsible for the conduct of the business of the company does not arise. The Supreme Court in the case of **Anil Hada v. Indian Acrylic Ltd.,** MANU/SC/0736/1999 has held that though the company itself is not prosecuted, the persons mentioned in section 141(1) and (2) become liable if a finding is given that such company has infact committed the offence. But the only course open to the office bearers of the company is that they can adduce rebuttal evidence to establish that the company did not issue the cheque towards any antecedent liability. The Apex court in the very same ruling has held as follows:
>
> "The offender in Section 138 of N.L Act is the drawer of the cheque. He alone would have been the offender thereunder if the Act do not contain other provisions. It is because of Section 141 of the Act that penal liability under Section 138 is cast on other persons connected with the company."

Further, the Apex Court has also held that normally an offence can be committed by human beings who are natural persons and such offence can be tried according to the procedure established by law; but there are offences when can be attributed to juristic persons also and if the drawer of the cheque happens to be a juristic person like a body corporate, it can be prosecuted for the offence under Section 138 of the Act. The principal offender in each cases is only the body corporate and it is a juristic person and when the company is the drawer of the cheque, such company is the principal offender and the remaining persons are made offenders by virtue of the legal fiction created by the legislature as per Section 141. Therefore, actual offence should have been committed by the company and then alone the other two categories of persons as found in sub- Sections 1 and 2 of Section 141 can also become liable for the offence. Since according to Section 141(1), vicarious liability is attributed to the persons mentioned therein for the offence committed by the company, on the very same analogy notice served on the company amounts to serving of notice on all the persons as found in Section 141 of N.I. Act. Merely because, these persons also are punishable for the act of the company, no separate notice is essential. After all according to the very scheme of the Section, anybody who is not concerned with the conduct of the business cannot be prosecuted. But only a person who was in charge of the company and was responsible to the company for the conduct of the business of the company alone can be prosecuted, while so, such a person cannot deny knowledge about the service of notice to the company. Only in that view of the matter vicarious liability is cast upon those persons and that is why no notice to them is contemplated. Though the ruling cited by the learned counsel appearing for the accused/petitioners rendered in Crl.O.P.No.12094 of 1999 discusses about the individual liability of the persons coming under section 141(1) of the Act and the consequential penalty that could be imposed on them by way of imprisonment as well as fine affecting their personal liberty and as such individual notice to them is essential, by virtue of their

position in relationship to the company to whom these persons are responsible for the conduct of the business of the said company, no separate notice is necessary. Notice is said to be necessary in the above said ruling only because of the consequential penal suffering. When once it is held that they are responsible to the company for the conduct of the business of the company and they were incharge of the company, naturally they ought to have knowledge about the service of notice on the company. Otherwise, if the intention of the legislature is such that anybody working in the company can be prosecuted under section 138 of the Negotiable Instruments Act for the default of payment on the part of the company, then so much of emphasis need have been made on the persons, who were in-charge of the company and who were responsible to the company for the conduct of its business for being made liable under this provision. Therefore, I hold that notice to the company, who is the principal offender and who is the drawer of the cheque, is notice to all the persons coming under the purview of section 141(1) as well as Section 141(2) and in that view of the matter merely because individual notice has not been served on the third accused director, the complainant cannot be said to be out of court. Thus, with great respect, I am unable to agree with the ruling cited by the learned counsel appearing for the petitioners as rendered in Crl. O.P.No.12904 of 1999. The rulings cited by the learned counsel appearing for the respondent/complainant as reported in K. Pannir Selvam v. M.M.T.C. Ltd. and another, 2000 (2) Crime 354 and Jain Associates and others, v. Deepak Chaudkary and Co., 2000 (2) Crimes 374 and also supported by the rulings reported in MANU/AP/0182/1997 by various High Courts namely, the High Court of Delhi, the High Court of Andhra Pradesh, the High Court of Karnataka and the High Court of Punjab and Haryana appear to be correct and appropriate in view of the wordings found in Section 141 of N.I. Act. Therefore, the plea of the petitioners 1 and 2 that no notice was separately served on them and hence the proceedings have to be quashed is rejected. It cannot be taken that notice need not be served on the directors of the company. It is purely a matter of knowledge on the part of the so called directors and others regarding service of notice

to the company. This is purely a question of evidence and on the premise of want of notice to the individual directors, complaint cannot be quashed."

13. Ld. counsel has further relied upon the judgment of the Delhi High Court in the case of **Jain Associates and Ors. Vs. Deepak Chawdhary & Co.,** 80(1999) DLT 654, wherein this Court has observed as under:-

"16. Insofar as proceedings with the matter against the two partners Prahlad Kr. Jain and Deepak Chaudhry is concerned the assertions in complaint in para 2 and 3 are as under:

"(2) That the accused No. 1 is a partnership firm and accused No. 2 and 3 are its partners. Both are responsible for the conduct of the business of the accused No. 1 firm. The accused No. 2 Prahlad Rai Jain is also an authorised signatory who has issued the cheque in question.

(3) That the accused No.1 firm is carrying on business in the purchase and sale of shares, debentures, bonds and other securities. The accused No. 2 is also a member of the Delhi Stock Exchange Association Ltd."

These assertions indicate that prima facie both the accused have been partners of the partnership firm and are responsible for the conduct of the business of the accused firm. Prahlad Rai Jain, petitioner No. 2 is a authorised signatory as well. So far as the petitioner No. 3 is concerned it also appears that petitioner No.1 and 2 are members of Delhi Stock Exchange Association Ltd. and both are acting partners in the business run in the name of firm petitioner No. 1. Consequently the provisions of Section 141 of Act are attracted.

17. On the material before the learned Trial Court and the allegations made in the complaint, it cannot be said that the complaint did not disclose the essential ingredients of the offence and if the assertions made are prima facie accepted, it cannot be said that no case was made out."

14. The law has been settled in the case of **Anil Hada** (supra), way

back in 1999 by the Supreme Court holding that though the company itself is not prosecuted, the persons mentioned in section 141(1) and (2) become liable if a finding is given that such company has in fact committed the offence. But the only course open to the office bearers of the company is that they can adduce rebuttal evidence to establish that the company did not issue the cheque towards any antecedent liability. The offender in Section 138 of N.I. Act is the drawer of the cheque. He alone would have been the offender there under if the Act do not contain other provisions. It is because of Section 141 of the Act that penal liability under Section 138 is cast on other persons connected with the company.

15. Normally an offence can be committed by human beings who are natural persons and such offence can be tried according to the procedure established by law; but there are offences when can be attributed to juristic persons also and if the drawer of the cheque happens to be a juristic person like a body corporate, it can be prosecuted for the offence punishable under Section 138 of the Act. The principal offender in each cases is only the body corporate and it is a juristic person and when the company is the drawer of the cheque, such company is the principal offender and the remaining persons are made offenders by virtue of the legal fiction created by the legislature as per Section 141.

16. According to Section 141(1), vicarious liability is attributed to the persons mentioned therein for the offence committed by the company, on the very same analogy notice served on the company amounts to serving of notice on all the persons as found in Section 141 of N.I. Act. A person who was in charge of the company and was responsible to the company for the conduct of the business of the company alone can be prosecuted, while so, such a person cannot deny knowledge about the service of notice to the company. Only in that view of the matter vicarious liability is cast upon those persons and that is why no notice to them is contemplated.

17. The same view has been taken by this Court in the case of **Jain Associates** (supra). Therefore, in view of the legal position discussed above, the petitioner being the Managing Director of the company is responsible for the act, commission and omission of the company. Therefore, I find no discrepancy in the order passed by the learned trial court. I concur with the same.

18. Accordingly, the instant petition is dismissed.

19. No order as to costs.

Crl. M.A. 19016/2011(stay)

Dismissed as infructuous.

Crl. M.A. No. 3720/2012

Vide the instant application, the applicant/petitioner is seeking permanent exemption from appearance in the trial Court.

Dismissed with liberty to move the same before the trial Court.

ILR (2012) V DELHI 636
FAO

STEPHANIE JOAN BECKER ….APPELLANT

VERSUS

STATE & ANR. ….RESPONDENT

(VEENA BIRBAL, J.)

FAO NO. : 425/10 DATE OF DECISION: 09.07.2012

Guardians and Wards Act, 1890—Section 47—Adoption by foreign citizen—Appellant, a single lady aged 53 years and citizen of USA applied for adoption of a child from India After conducting the proceedings under Section 7 and 26 of the Act, the learned District Judge dismissed the petition, citing para 4.1 of Chapter IV of Guidelines for Adoption from India, 2006 issued by Central Adoption Resource Authority to the effect that single person upto 45 years of age can adopt—Appeal—appellant conducted that next clause of the same para dealing with foreign proposed adoptive

parent contemplated that age of parent should not be less than 30 years and more than 55 years so the appellant ought to have been allowed adoption—held, the clause relied upon by the appellant is applicable where adoption is sought by a married couple where the clause referred to by the learned District Judge pertains to single person seeking to adopt a child and the appellant being a single person, falls under clause 4.1 where persons upto 45 years of age are eligible while appellant is aged 53 years.

The reliance placed on aforesaid clause appearing in para 4.1 of Chapter IV of the Guidelines by the Ld. counsel for appellant is misplaced. The present is a case of single person (never married) and for that category person upto 45 years of age is eligible. In view of clause specifically dealing with single person i.e., single person (never married, widowed, divorced), the age limit is 45 years and the age difference of single adoptive parent and child should be 21 years or more, the contentions raised has no force. The clause pointed out by learned counsel for the appellant that FPAP upto 55 years can adopt is qua married couple which is dealt in para 4.1 wherein criteria for prospective adoptive parents having composite age is discussed. **(Para 15)**

[Gi Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Mohinder Singh, Adv.

FOR THE RESPONDENT : Mr. Ashok Singh, Adv.

RESULT: Appeal dismissed.

VEENA BIRBAL, J.

1. Present is an appeal under Section 47 of the Guardians and Wards Act, 1890 (hereinafter referred to as 'the Act.) for setting aside the judgment dated 17.9.2010 passed by the learned District Judge-IV wherein petition under section 7 and 26 of the Act filed on behalf of the appellant has been dismissed.

2. The factual background of the case is as under:-

Appellant is a single lady. She had filed a petition under section 7 and 26 of the Act through her attorney Ms.Vijay Rana. At the time of filing petition, appellant was 53 years of age. Appellant is a citizen/ national of USA. She wanted to adopt a child from India in order to complete her family. She is a Naturopathic Physician since 2000 for the Washington Centre for Complementary Medicine (WCCM). As per the averments in the petition, appellant enjoys high status and has sufficient means of livelihood.

Respondent no.2 is a registered society and is licensed by Government of NCT of Delhi to keep and maintain abandoned, orphaned and destitute children at the children homes. Respondent no.2 has been granted recognition by the Ministry of Social Justice and Empowerment, Government of India for submitting the applications to the Competent Court for declaration of foreigners as guardians of Indian Children under the Act.

On 16th March, 2008, a minor female child, namely, Tina born on 20.10.2003 (hereinafter referred to as 'the child.) was found abandoned by the police officials, Police Station Connaught Place and the said child was handed over to the care and custody of respondent no.2 society on the same day and since then no one has claimed the child. The child has been declared as abandoned child and free for adoption by the Child Welfare Committee vide its order dated 26.11.2008. The appellant had expressed desire and intention to adopt the child.

It is further stated that every attempt was made to place the child in an Indian family but no suitable Indian family came forward to adopt the child, as such, Coordinating Voluntary Adoption Resource Agency (in short CVARA) has cleared the said child for foreign adoption. Central Adoption Resource Authority (in short 'CARA.) has also issued No Objection Certificate in her favour for adopting the said child. Appellant has been recommended by Journeys of the Heart Adoption Services, USA, recognized by Government of India and is competent to sponsor her. It is stated that appellant has undertaken to send the respondent no.2 a progress report and photograph of the child quarterly for two years and thereafter half yearly for the next three years until adoption is completed. She has undertaken to bring up the child and provide necessary

education as per her status.

3. Notice of the aforesaid petition was issued to the respondents and citation was also affixed on the notice board of the court house. No one appeared on behalf of the respondents to contest the petition.

4. On behalf of the appellant, two witnesses were examined i.e., Ms.Vijay Rana, Attorney of appellant as PW-1 and Ms.Surekha Pawar, Senior Social Worker, SOS Children as PW-2.

5. After hearing counsel for the appellant, the learned District Judge has dismissed the petition relying upon para 4.1 of Chapter IV titled 'Procedure for Inter-Country Adoption. of Guideless for Adoption from India, 2006, issued by the Central Adoption Resource Authority, Ministry of Social Justice & Empowerment Government of India, (hereinafter referred to as 'the Guidelines.) wherein it is specifically mentioned that "single person (never married, widowed, divorced) upto 45 years can adopt. It was held that if these Guidelines are taken into consideration, appellant who is admittedly more than 53 years of age at the time of filing of the petition was not eligible to adopt the child. It is further held that as per information given in Ex.P-2 i.e., Home Study Report, appellant is not eligible to adopt the child in question being more than 53 years of age. Relying on aforesaid report, learned District Judge has also observed that there is huge age difference between the appellant and the child and the appellant is also working and has to hire a help for looking after the child and accordingly dismissed the petition.

6. Aggrieved with the aforesaid order, present appeal is filed.

7. Learned counsel for the appellant has contended that though the learned District Judge has referred to para 4.1 Chapter IV titled "Procedure for Inter Country Adoption" of aforesaid Guidelines but did not further go to the next clause in the same para where it is stated that a 'Foreign Proposed Adoptive Patient' in no case should be less than 30 years and more than 55 years of age. It is contended that the learned District Judge has completely ignored the said clause. It is contended that if the said clause is taken into consideration, in that event, appellant was eligible for adoption when the petition was filed. It is contended that the impugned judgment suffers from infirmity and is illegal and not in the welfare of the child and appellant ought to have been appointed as a guardian with permission to adopt the child as her daughter.

8. It is further submitted that the Central Adoption Resource Authority (hereinafter referred to as 'CARA.), an autonomous body of the Ministry of Women and Child Development, Government of India has already given 'No Objection Certificate. dated 3rd February, 2010 i.e., Ex.R-3 for placement of the said child with prospective adoptive parent and the procedure as contemplated in Chapter IV of the said Guidelines has been followed. It is contended that even the Guidelines can be relaxed in suitable cases and in the present case, the same were relaxed by CARA when No Objection Certificate dated 3.2.2010 was issued. It is submitted that under these circumstances, the learned District Judge ought to have allowed the petition. It is further contended that appellant is a Doctor by profession and has high status and is financially capable of maintaining the child. It is submitted that allowing the prayer of appellant would serve the interest of minor.

9. The respondent nos. 1 and 2 did not appear despite being served. Notice was also issued to standing counsel Union of India. Mr Ashok Singh, Advocate has appeared for the Union of India and has contended that the order passed by the learned District Judge does not call for any interference. It is stated that appellant is a working woman and she may not be in a position to take care of the child as there is a huge gap between the age of appellant and the child to be adopted. It is contended that there is nothing on record to show that the Guidelines were relaxed in her case as is alleged.

10. I have considered the submissions made and perused the material on record.

11. As per own case of appellant, she was 53 years of age when petition u/s 7 and 26 of the Act was filed before the Ld. District Judge for appointment of appellant as guardian of the child Tina with permission to adopt her as her daughter in accordance with local laws of her country.

12. The aims and objects of the Guidelines is to provide a sound basis for inter country adoption within the framework of the norms and principles laid down by the Supreme Court of India and to take all other measures necessary for the promotion of in-country adoption of children as well as welfare of children in general. The goal is to find a family for as many orphan as possible and to safeguard their interests as visualized

in the UN Convention of Child Rights and Hague Convention on Inter-country Adoption.

13. The criteria for Foreign Prospective Adoptive Parent/s (FPAP) as given in Chapter-IV of the said Guidelines is as under:-

> "4.1Married couple with 5 years of a stable relationship, age, financial and health status with reasonable income to support the child should be evident in the Home Study Report.
>
> Prospective adoptive parents having composite age of 90 years or less can adopt infants and young children. These provisions may be suitably relaxed in exceptional cases, such as older children and children with special needs, for reasons clearly stated in the Home Study Report. However, in no case should be age of any one of the prospective adoptive parents exceed 55 years.
>
> Single persons (never married, widowed, divorced) upto 45 years can also adopt.
>
> Age difference of the single adoptive parent and child should be 21 years or more.
>
> A FPAP in no case should be less than 30 years and more than 55 years.
>
> A second adoption from India will be considered only when the legal adoption of the first child is completed.
>
> Same sex couples are not eligible to adopt."

14. The appellant is a single lady who has never married and as per the Guidelines, single person never married/widowed/divorced upto 45 years of age can adopt. The stand of the learned counsel is that the learned District Judge did not go to the other clause i.e., "FPAP" in no case should be less than 30 years and more than 55 years as stated in para 4.1 of Chapter IV of the Guidelines.

15. The reliance placed on aforesaid clause appearing in para 4.1 of Chapter IV of the Guidelines by the Ld. counsel for appellant is misplaced. The present is a case of single person (never married) and for that category person upto 45 years of age is eligible. In view of clause specifically dealing with single person i.e., single person (never married,

widowed, divorced), the age limit is 45 years and the age difference of single adoptive parent and child should be 21 years or more, the contentions raised has no force. The clause pointed out by learned counsel for the appellant that FPAP upto 55 years can adopt is qua married couple which is dealt in para 4.1 wherein criteria for prospective adoptive parents having composite age is discussed.

16. As regards the contention that CARA can relax the Guidelines in suitable cases, nothing is placed on record to substantiate that the Guidelines were relaxed in the present case. No Objection Certificate given by the CARA dated 3rd February, 2010 Ex.R-3 does not indicate as to how the appellant fulfils the age criteria. Chapter-X para 10.3 of the Guidelines provides that in such cases where CARA feels that a particular provision needs to be relaxed, it may do so by recording reasons as to how the best interest of the child is being served by such relaxation. In the present case, no such reasons are placed on record either before this court or before the learned District Judge.

17. In the present case, the appellant does not fit in the criteria laid down by the aforesaid Guidelines. The learned District Judge has categorically observed that there is huge gap between the age of the appellant and that of the child and it will be very difficult for the child to adapt to the new environment. The Home Study Report Ex.P2 has also been considered while dismissing the petition.

18. Considering the totality of the facts and circumstances, there is no illegality in the impugned order. The appeal stands dismissed.

ILR (2012) V DELHI 643
CS (OS)

GAJINDER PAL SINGH ….PLAINTIFF

VERSUS

MAHTAB SINGH & ORS. ….DEFENDANTS

(REVA KHETRAPAL, J.)

CS (OS) : 374/1993 DATE OF DECISION: 09.07.2012

Hindu Succession Act, 1956—Brief Facts—One Prof. Parman Singh, a displaced person from Pakistan, had come to India leaving behind vast joint Hindu family immovable properties—He expired in Delhi leaving behind his legal heirs and the properties—Suit for partition and rendition of accounts filed by the plaintiff praying for partition of HUF immovable properties—Asserted in the plaint that late Prof. Parman Singh after coming from Pakistan had applied for the allotment of a house under the Scheme for displaced persons under the Displaced Persons Act, to the Ministry of Rehabilitation, Government of India—Ministry of Rehabilitation, Government of India informed late Prof. Parman Singh that one double room house in Nizamuddin Extension (now known as Nizamuddin East) had been decided to be allotted to him—Final figure of the actual cost of the house was 5,946/- According to the plaintiff, since Prof. Parman Singh had brought with him movable properties in the form of cash and jewellery from Pakistan, which belonged to the HUF and were given to him by his father etc., he paid 5,000/- to the Ministry of Rehabilitation by depositing the same in the Treasury and also and paid 946/- from the same—Hence, the property allotted to him at Nizamuddin was HUF

property and continues to be so even today—Right from the beginning, he had been keeping tenants in the said property and had been receiving rent—Using this amount, he built extra and additional structures on the property—After his death in 1975. his widow, Smt. Balwant Kaur continued to stay there and receive rents and had her bank account, including a joint account with the defendant No.1 used for depositing HUF rents and withdrawing the same—All HUF moneys were being handled by the defendant No. 1—Defendant No.2 Hari Singh (brother of the defendant No.1) had left India somewhere in the late sixties and never returned to India thereafter—Plaintiff further alleges that the defendant No.1 father of the plaintiff, making use of the HUF rents from the Nizamuddin property purchased a plot at B-22, East of Kailash, New Delhi and constructed a super-structure thereon—Nucleus of the said property came from HUF money and thus the said property is also HUF property—Plaintiff claims that being the son of the defendant Nos.1 and 5, he has 1/10th Share in both the aforesaid HUF properties—Plaintiff also claims rendition of accounts kept by the defendant No.1 assessed to be in the sum of 60,000/- on the date of the institution of the suit—In the written statement filed by the defendant No.1 the father of the plaintiff, it is categorically denied that late Prof. Parman Singh had left behind him HUF immovable and movable properties—Denied that the plaintiff has any right to seek partition of the aforesaid properties or any share in either of the aforesaid properties—He brought no cash and jewellery to India as alleged by the plaintiff—The property at B-13, Nizamuddin East was his self—acquired property and at B-22, East of Kailash, New Delhi was the self—acquired property of defendant No.1—As regards immovable property at B-22, East of Kailash, New Delhi, the defendant No.1 has stated that the land in respect thereof was purchased by him from the Delhi

Development Authority in 1965 with his own resources including 7,000/- from his GPF account—He constructed the Held:— admitted documents clearly show that the said property was purchased by Prof. Parman Singh from his own resources and not out of the claims or compensation—Plaintiff, in his cross—examination, has categorically admitted that Prof. Parman Singh was gainfully employed as soon as he came to India from West Pakistan in the year 1947 as a Lecturer in the Camp College and was subsequently appointed as a Special Magistrate—Clearly, therefore, the said property was purchased by Prof. Parman Singh from his own funds Plaintiff has failed to establish the existence of any HUF of which Prof. Parman Singh was the Karta, and in the course of his cross-examination candidly admitted that he was not aware whether any HUF had been legally created by Prof. Parman Singh— As regards the property at East of Kailash, there is ample documentary evidence on record to conclusively establish that the said property was the self-acquired property of the defendant No.1 Mahtab Singh—In view of the aforesaid overwhelming evidence on record, oral and documentary, the inevitable conclusion is that it must be held that neither Prof. Parman Sing nor the defendant No.1 Mahtab Singh had created any HUF and the properties acquired by them respectively cannot, therefore, partake of the nature of HUF properties. Plaintiff has failed to establish that either of the two properties mentioned hereinabove were HUF properties—Cause of action for the filing of the suit in respect of the property at East of Kailash has not yet arisen, the said property being the self—acquired property of the defendant No.1, who is still alive-son or daughter can ask for partition of HUF property from the father during his lifetime, but not of self acquired property—Plaintiff is not entitled to the partition of the suit properties and to the rendition of accounts in respect thereof—Suit fails and is

accordingly, dismissed—The defendants having contested the case from the year 1993 onwards are held entitled to costs throughout.

The Hon'ble Supreme Court in the case of **Yudhishter vs. Ashok Kumar,** AIR 1987 SC 558 has laid down that after the amendment of the Hindu Succession Act, 1956 and in view of Section 8 of the said Act, when the son of a male Hindu inherits the property in the situation contemplated by Section 8, he does not take the said property as Karta of his own HUF assuming that the same exists, but takes it in his individual capacity. Thus, when a property devolves on a Hindu under Section 8 of the Hindu Succession Act, 1956, it would not be HUF property in his hands vis-a-vis his own sons, but would partake the character of self-acquired property of his predecessor-in-interest. **(Para 61)**

It is also well established that though under the old Hindu Law, the son would have inherited the property of his father as Karta of his own family, the Hindu Succession Act has modified the aforesaid rule of succession. In the case of **Chander Sen** (supra), the Hon'ble Supreme Court has dwelt on this aspect of succession at some length, observing that the Act lays down the general rules of succession in the case of males which must prevail over the old Hindu Law of Succession. The first rule is that the property of a male Hindu dying intestate shall devolve according to the provisions of Chapter II and Class I of the Schedule provides that if there is a male heir of Class I then upon the heirs mentioned in Class I of the Schedule. The Schedule indicates that the heirs in Class I only includes son/s and does not include son's son, but does include son of a pre-deceased son. It is thus not possible to say that when the son inherits the property in the situation contemplated by Section 8, he takes it as a Karta of his own undivided family. As observed by the Supreme Court, if a contrary view is taken, it would mean that though the son of a pre-deceased son and not the son of a son who is intended to be excluded under Section 8 to inherit, the latter would by applying the old

Hindu Law get a right by birth in the said property contrary to the scheme outlined in Section 8. The express words of Section 8 as held in **Chander Sen's** case (supra) cannot be ignored and must prevail. Thus, the defendant No.1 in the instant case must be held to have inherited the property of Prof. Parman Singh as an individual and not as a Karta of his own family, even assuming there was an HUF created by the defendant No.1, though in the instant case it stands established that no HUF was created by the defendant No.1. **(Para 62)**

Important Issue Involved: Hindu Succession Act, 1956—After the amendment of the Hindu Succession Act, 1956 and in view of Section 8 of the said Act, when the son of a male Hindu inherits the property in the situation contemplated by Section 8, he does not take the said property as Karta of his own HUF assuming that the same exists, but takes it in his individual capacity—Thus, when a property devolves on a Hindu under Section 8 of the Hindu Succession Act, 1956, it would not be HUF property in his hands vis-à-vis his own sons, but would partake the character of self—acquired property of his predecessor-in-interest—Property of a male Hindu dying intestate shall devolve according to the provisions of Chapter II and Class I of the Schedule.

[Sa Gh]

APPEARANCES:

FOR THE PLAINTIFF : Ms. Mala Goel, Adv.

FOR THE DEFENDANTS : Mr. P.R. Chopra, Adv. for defendant Nos. 1, 3, 4 and 5.

CASES REFERRED TO:

1. *Pratap* vs. *Shiv Shanker*, 2009 (113) DRF 811.
2. *Rahul Behl and Others* vs. *Smt. Ichayan Behl and Anr.*, DRJ 1991 (21) 205.

3. *Prof. C.D. Tase* vs. *University of Bombay and Ors.*, AIR 1989 SC 829.
4. *Yudhishter* vs. *Ashok Kumar*, AIR 1987 SC 558.
5. *Mrs. Indra K. Singh* vs. *Gajinder Pal Singh* Petition No.269/1987.
6. *Commissioner of Wealth-tax, Kanpur, etc. etc.* vs. *Chander Sen etc.*, AIR 1986 SC 1753.
7. *J.S. Khanna and Ors.* vs. *University of Delhi and Ors.*. ILR 1980 Delhi 1404.
8. *Shital Prasad Tyagi* vs. *The Principal, Central Institution of Education, Delhi and Others*, ILR 1969 Delhi 1184.

RESULT: Suit dismissed.

REVA KHETRAPAL, J.

1. The aforementioned suit for partition and rendition of accounts has been filed by the plaintiff praying for partition of HUF immovable properties, viz., B-13, Nizamuddin East comprising of a plot of 200 sq. yards along with two storeyed super-structure and B-22, East of Kailash, New Delhi comprising of a plot of 211 sq. yards along with two and a half storeyed super-structure.

FACTS

2. The facts as delineated in the plaint are that one Prof. Parman Singh, who was a 'displaced person' from Pakistan, had come to India leaving behind vast joint Hindu family immovable properties. Prof. Parman Singh was the only surviving child of his father Lala Behari Mal, who was a businessman and had extensive properties in Rawalpindi (Pakistan). Prof. Parman Singh expired in Delhi on 17.09.1975. He was survived by his widow and two sons (i.e., the defendant Nos.1 and 2) and grand sons (i.e., the plaintiff, the defendant No.3 and the defendant No.4). The widow of Prof. Parman Singh, namely, Smt. Balwant Kaur also expired on 16.06.1991 leaving behind the aforesaid persons and the aforementioned properties, viz., B-13, Nizamuddin East and B-22, East of Kailash, New Delhi.

3. It is asserted in the plaint that late Prof. Parman Singh after coming from Pakistan had applied for the allotment of a house under the

Scheme for displaced persons under the Displaced Persons Act, to the Ministry of Rehabilitation, Government of India. By a letter dated 26.02.1950, late Prof. Parman Singh was informed by the Ministry of Rehabilitation, Government of India with reference to his aforesaid application that several houses for displaced persons were under construction and were likely to be completed by June, 1950. By another letter dated 12.03.1950, late Prof. Parman Singh was requested to deposit a sum of Rs. 5,000/- towards the allotment of the house applied for by him. Thereafter, by letter dated 25.05.1950, the Ministry of Rehabilitation, Government of India informed late Prof. Parman Singh that one double room house in Nizamuddin Extension (now known as Nizamuddin East) had been decided to be allotted to him, the possession whereof would be handed over to him when it was ready.

4. By another letter dated 23rd October 1953, late Prof. Parman Singh was informed that the final figure of the actual cost of the house was Rs. 5,946/- and since Rs. 5,000/- was already paid by him, the balance of Rs. 946/- was to be paid. According to the plaintiff, since Prof. Parman Singh had brought with him movable properties in the form of cash and jewellery from Pakistan, which belonged to the HUF and were given to him by his father etc., he paid Rs. 5,000/- to the Ministry of Rehabilitation by depositing the same in the Treasury and also paid Rs. 946/- from the same. Hence, the property allotted to him at Nizamuddin was HUF property and continues to be so even today.

5. In 1960, Prof. Parman Singh applied to the MCD for sanction to carry out construction in the said premises. Right from the beginning, he had been keeping tenants in the said property and had been receiving rent. Using this amount, he built extra and additional structures on the property. After his death in 1975, his widow, Smt. Balwant Kaur continued to stay there and receive rents and had her bank account, including a joint account with the defendant No.1 used for depositing HUF rents and withdrawing the same. All HUF moneys were being handled by the defendant No.1. The defendant No.2 Hari Singh (brother of the defendant No.1) had left India somewhere in the late sixties and never returned to India thereafter.

6. The plaintiff further alleges that the defendant No.1 – father of the plaintiff, making use of the HUF rents from the Nizamuddin property purchased a plot at B-22, East of Kailash, New Delhi and constructed

a super-structure thereon. The nucleus of the said property came from HUF money and thus the said property is also HUF property. In the aforesaid property, the plaintiff is residing on the ground floor, the defendant No.3 is residing on the first floor and the defendant No.1 with his wife the defendant No.5 also resides in one bed room on the ground floor of the said house. The defendant No.4 is living in the ground floor of Nizamuddin house, which was earlier let out to the Punjab and Sind Bank. The first floor of the Nizamuddin house is let out on rent for the last many years.

7. The plaintiff claims that being the son of the defendant Nos.1 and 5, he has 1/10th share in both the aforesaid HUF properties. The defendant Nos.1 and 2 are both entitled to one-half share each in the said properties, and the defendant Nos.3 and 4 are entitled to 1/10th share each, i.e., as much as that of the plaintiff. Since, on partition, defendant No.5 is also entitled to an equal share in the properties as her sons, she is entitled to 1/10th share in the properties. In the event, however, that the defendant No.2 Hari Singh does not claim any share in the properties, the plaintiff and the defendants Nos.1, 3, 4 and 5 are entitled to 1/5th share each of the aforesaid properties.

8. The cause of action for filing of the present suit arose in March, 1992 when the plaintiff demanded his separate share on account of family disputes and the defendants failed to hand over the same to him and again in September, 1992 when the defendants failed to hand over his share. It again arose on 30th January, 1993 when the plaintiff again asked for his share and was refused the same.

9. Apart from his share of the immovable properties, the plaintiff claims rendition of accounts kept by the defendant No.1 assessed to be in the sum of ‘ 60,000/- on the date of the institution of the suit.

WRITTEN STATEMENT

10. In the written statement filed by the defendant No.1 Shri Mahtab Singh, the father of the plaintiff, it is categorically denied that late Prof. Parman Singh had left behind him HUF immovable and movable properties including B-13, Nizamuddin East, New Delhi and B-22, East of Kailash, New Delhi. It is denied that the plaintiff has any right to seek partition of the aforesaid properties or any share in either of the aforesaid properties. It is asserted that the properties are not HUF properties as alleged by the

plaintiff and the plaintiff has no share in the same. It is specifically denied that the plaintiff is in possession of any of the properties directly or indirectly through the tenants.

11. The facts as narrated in the written statement briefly stated are that late Prof. Parman Singh's father, Lala Behari Mal lived in a small village, Village Mochh, District Mianwali (now in Pakistan) in a kutcha mud house and had a small shop. He was a small shopkeeper and not a businessman as alleged by the plaintiff. He passed away in the year 1935, his wife having pre-deceased him. He did not leave behind any asset of substance or value. The mud house and the small shop had to be abandoned because Prof. Parman Singh, the only living heir, had at a very young age lived away from the village to further his education and later for his employment and was not living at Mochh at the time of death of his father. Prof. Parman Singh lived at Shahpur and later at Rawalpindi. Here, he worked as a teacher, and later as a professor. He constructed a house in Rawalpindi in 1946 out of his own funds, after 11 years of the death of his father in the year 1935. He, however, had to abandon the said house upon partition in 1947, when he was air lifted in a military plane from Rawalpindi and to accommodate the maximum passengers (who squatted on the chair-less floor of the airplane), no luggage was allowed. He brought no cash and jewellery to India as alleged by the plaintiff. The property at B-13, Nizamuddin East was his self-acquired property and at B-22, East of Kailash, New Delhi was the self-acquired property of defendant No.1. It is falsely alleged that the said properties were acquired from HUF funds and the nucleus thereof was HUF. The said properties are not HUF properties. There never was any HUF of Prof. Parman Singh, nor is there any HUF of defendant No.1. Plaintiff, therefore, has no right in the said properties and his suit claiming partition is liable to be dismissed with costs.

12. It is further stated in the written statement that Prof. Parman Singh, who was a displaced person, had lodged a claim with the Government of India for compensation for his self-acquired house left in Rawalpindi (presently in Pakistan) and in settlement of his claim he received a sum of Rs. 4,486/- only, which he had perforce to use for purchasing clothes and other personal articles for himself and his wife Mrs. Balwant Kaur. With part of this compensation received by Prof. Parman Singh for his self-acquired property and with further money

given to him by his son (defendant No.1, Mahtab Singh), who had been in Government service in Delhi since 1942, Prof. Parman Singh purchased the property B-13, Nizamuddin East. He got possession of the said property only in 1951 and started living there and continued to live there till his death in 1975. Prof. Parman Singh, therefore, acquired the Nizamuddin property from his own sources and did not inherit the same. By his Will dated 08.06.1972, he bequeathed his property to his wife Smt. Balwant Kaur, excluding his sons, i.e., the defendant No.1 and the defendant No.2 from his Will. On the basis of the said Will executed by Prof. Parman Singh, the property was mutated in the name of Mrs. Balwant Kaur vide letter dated 27.06.1981 by the Land and Development Officer, Government of India. Mrs. Balwant Kaur later bequeathed the property to the defendant No.1 vide her Will dated 25.01.1986, and the property was thereafter mutated in the name of the defendant No.1 by letter dated 27.09.1991 by the Land and Development Officer. The defendant No.1 asserts that the plaintiff knew about the Will of Prof. Parman Singh and the consequent mutation of the property at the time of the death of Prof. Parman Singh in 1975 and never objected to the same and now after 18 years he is claiming his share in the said property, falsely calling it HUF property. Even at the time of the second mutation in 1991 on the death of Mrs. Balwant Kaur, the plaintiff did not object.

13. As regards immovable property at B-22, East of Kailash, New Delhi, the defendant No.1 has stated that the land in respect thereof was purchased by him from the Delhi Development Authority in 1965 with his own resources including Rs. 7,000/- from his GPF account. He constructed the house also from his own resources, including the loans obtained by him from the Government of India against the mortgage of the property and advances from his GPF account, loans against LIC policies held by him, loan from cooperative society and also from his friends. He categorically denied that the said property was HUF property or that the defendant No.1 had used HUF funds for the purchase or construction of the said property. The plaintiff's prayer for a decree of partition and rendition of accounts, therefore, is without cause of action and the suit liable to be dismissed with costs.

14. The defendant Nos.3, 4 and 5 adopted the aforesaid written statement of the defendant No.1 by filing affidavits in reply and stating that the plaintiff had no title or legal or statutory right to live in or

possess any part of the properties in question, which were not ancestral properties but were the self-acquired properties of the defendant No.1.

ISSUES

15. On the pleadings of the parties, the following issues were settled on 07.01.2003:-

"1. Whether the suit property is a HUF property or not?

2. Whether the plaintiff is entitled to any share in the property and if so to what extent?

3. Whether the plaintiff is entitled for rendition of account claimed by him?"

16. On 25.04.2003, on the defendant's application, being IA No.1273/2003, for the framing of additional issues, the following additional issues were framed:-

"1. Whether the suit is bad for non-joinder of defendant no.2? OPD

2. Whether suit is barred by time? OPD"

17. On the same date, that is, on 25.04.2003, the additional issue: *"Whether the suit is bad for non-joinder of defendant No.2?"* was ordered to be treated as a preliminary issue. The said issue was decided on 23rd September, 2003 by a detailed order of this Court, whereby the defendant No.2 was held to be a necessary party and ordered to be served. However, even after the said order, the defendant No.2 was not served by the plaintiff with the result that an order was passed on 7th April, 2004 deleting defendant No.2 from the array of parties. It may be noticed that against the order dated 23rd September, 2003, defendants had preferred an appeal bearing FAO(OS) No.351/2003, which was disposed of on 25.11.2004 as infructuous in view of the order dated 7th April, 2004 deleting defendant No.2 from the array of parties.

18. By a subsequent order dated 18.10.2005 passed in IA No.4154/2004 filed by the defendants under the provisions of Order I Rule 9 and Order VII Rule 11 read with Section 151 CPC for rejection of the plaint on account of the suit being barred by law, this Court, after noting the stand of both the parties that the defendant No.2 had not been heard of for well over 30 years, held, after referring to the provisions of Sections

107 and 108 of the Indian Evidence Act, 1872, that the presumption would have to be drawn that the said defendant is no more. The application was accordingly disposed of with the direction to continue the suit against the impleaded defendants. The issue of non-joinder of defendant No.2, therefore, does not survive for consideration and only four issues survive for consideration on which evidence was adduced by the parties.

EVIDENCE

19. In the course of evidence, the plaintiff examined himself as his sole witness while the defendants produced in the witness box six witnesses in support of their case including the defendant No.1 Mahtab Singh.

20. In support of their case, the defendants had filed affidavits of Shri Jodh Singh, Shri Harnam Singh and Shri Santokh Singh Dua as reflected from the list of documents filed by the defendants dated 08.02.1997. The first and second named witnesses were born and lived in Mochh and in their affidavits deposed as to the poor economic condition of Lala Behari Mal and the fact that the kutcha mud house and the shop belonging to him were abandoned by Prof. Parman Singh (who lived at Rawalpindi), the value of which during those days was only a few hundred rupees. Shri Harnam Singh in his affidavit also stated that Prof. Parman Singh after his matriculation had become a school teacher and lived away from Mochh, notably in Shahpur and Rawalpindi, whereas Lala Behari Mal continued to live in village Mochh till his death in 1935. He further stated in his affidavit that in 1946 Prof. Parman Singh, who by then had privately passed M.A. and had become a college lecturer, constructed a small house in Rawalpindi. Prof. Parman Singh came to Delhi in September, 1947 virtually penniless as he admitted to him in Delhi. He had come by air in the military plane. The third named witness, namely, Santokh Singh Dua had lived in Rawalpindi and Delhi and had personally known Prof. Parman Singh at both the places.

21. As is borne out from their affidavits, all three persons were over 70 years of age in 1993 when the said affidavits were executed by them. Shri Jodh Singh and Shri Harnam Singh passed away during the pendency of the case and keeping in view the advanced age of Shri Santokh Singh, who at the time of recording of his evidence was 86 years of age, this Court had permitted the defendants to produce him as

DW1 before the plaintiff could lead his evidence.

22. DW1 Shri Santokh Singh Dua, who tendered in evidence his affidavit as Ex.DW1/A proved that Prof. Parman Singh and his wife came to Delhi from Rawalpindi in the first half of September, 1947 by a military aircraft and did not bring with them any luggage other than the clothes they were wearing. Thereafter, Prof. Parman Singh and his wife lived in the same house at Mahatma Niwas in Ram Nagar in which their son Mahtab Singh was residing. The latter, the witness stated, had come to Delhi in 1942 for the first time when he (Santokh Singh) gave him accommodation in his rented house at Mahatma Niwas in Ram Nagar, near New Delhi Railway Station. Mahtab Singh continued to live in the said house upto 1951.

23. It may be noted that DW1 was extensively cross-examined but his testimony remained unshaken. In the course of his cross-examination, he stated that he was residing in Delhi since September, 1940. He knew defendant No.1 from Rawalpindi, that he was related to the defendant No.1 as well as the plaintiff as his daughter's sister-in-law (Nand) is married to the son of the defendant No.1 and brother of the plaintiff and that for the first time he had met Prof. Parman Singh in the year 1946 when Prof. Parman Singh had built a house by the side of his sister's house in Akalgarh, Rawalpindi. His (DW1's) family had come from Pakistan to Delhi in October, 1947. When Prof. Parman Singh arrived at Safdarjung Airport with his wife, he had nothing with him. He (DW1) was present at the airport to find out the welfare of his family from the persons who were coming from Pakistan, he was carrying nothing. About 60 persons had got down from the military plane. **They were carrying nothing with them.**

24. The defendant No.1, who appeared in the witness box as DW2, tendered in evidence his affidavit by way of evidence Ex.DW2/A and exhibited documents Ex.DW2/1 to Ex.DW2/14, stating that he also relied on exhibits D1 to D4, the admitted documents. He was extensively cross-examined by the plaintiff himself on 02.04.2009, 25.04.2009, 25.07.2009 and 24.10.2009.

25. DW3 Mrs. Katyani Mathur, UDC, L&DO, Nirman Bhawan, New Delhi appeared in the witness box with the original record wherefrom she proved Ex.DW3/1 and Ex.DW3/2, i.e., the letter of mutation in

favour of Smt. Balwant Kaur dated 27.06.1981 and the letter of mutation dated 27.09.1991 in favour of the defendant No.1 in respect of the Nizamuddin property.

26. DW4 Shri Ram Prakash Bhatia exhibited his affidavit in evidence as DW4/A wherein he stated that he was related to the defendants and the plaintiff. The defendant No.1 was the son of his mother's sister and the plaintiff was the son of defendant No.1. He further stated that Prof. Parman Singh, father of the defendant No.1 and grandfather of the plaintiff had passed away on 17.09.1975 leaving behind a Will dated 08.06.1972. On 20.09.1975, the defendant No.1, Mahtab Singh had read the aforesaid Will in the presence of all close relatives including the plaintiff and the defendant Nos.3, 4 and 5, Late Harnam Das Bhatia, Late Smt. Balwant Kaur, Late Madan Lal and Late Smt. Ram Bai. Plaintiff was about 22 years old at that time. In cross-examination, DW4 stated that he was not able to read English but was aware of the fact that by his Will Ex.DW2/1 Late Prof. Parman Singh had left his properties to his wife Smt. Balwant Kaur.

27. DW5 Shri Brahm Pal, Assistant, Ministry of Defence, was next summoned in the witness box to prove letters relating to money raised as loans and advances by the defendant No.1 from his office for the purpose of construction of the property bearing no. B-22, East of Kailash, Nizamuddin. He submitted his letter of authorization Ex.DW5/A and informed that such old record stood destroyed under the relevant rules Ex.DW5/B.

28. DW6 Shri Akbar Ali, UDC, LIG Section (Housing), DDA, New Delhi, last appeared in the witness box and placed on record the certified copy of the page No.57 of the Original Register of Registration Record in respect of LIG Scheme of 1979 containing Entry No.48624 Ex.DW6/A. He also proved Ex.DW6/B, the affidavit of the plaintiff that he owned no property in Delhi (condition precedent for entitlement under the aforesaid claim) with letter dated 19.05.1989. He also proved Ex.DW6/C, the possession letter dated 26.05.1989 issued by the DDA in favour of the plaintiff in respect of the flat allotted to the plaintiff.

PLAINTIFF'S CONTENTIONS

29. Detailed submissions at the bar were addressed by Ms. Mala Goel, Advocate on behalf of the plaintiff and Mr. P.R. Chopra, Advocate

on behalf of the defendant Nos.1, 3, 4 and 5. The evidence adduced by the parties and the submissions of the parties are for the sake of facility and in order to avoid prolixity being dealt with hereunder issue-wise:-

30. ISSUE NO.1

"Whether the suit property is HUF property or not?"

31. At the outset, Ms. Mala Goel, the learned counsel for the plaintiff contended that the documents produced by the plaintiff being more than 30 years old, the presumption under section 90 of the Evidence Act flows and, therefore, implicit reliance may be placed upon the said documents by this Court. In order to prove that B-13, Nizamuddin East was HUF property, Ms. Goel relied upon the following documents tendered in evidence by PW1 Mr. Gajinder Pal Singh, the plaintiff:-

(i) Certificate of payment of interim compensation issued by the Government of India, Ministry of Rehabilitation dated 07.05.1955 to Prof. Parman Singh – Ex.PW1/1 [Document was denied by the defendant on account of being incomplete.].

(ii) Letter dated 26.03.1950 from the Government of India, Ministry of Rehabilitation to late Prof. Parman Singh with reference to his application dated 10th February, 1950 for allotment of a house to be constructed in displaced persons colonies which were likely to be completed by the end of June, 1950 – Ex.PW1/2 (also Ex.P1). The said letter which is an admitted document stipulated that the houses can be allotted to those displaced persons who –

"(a) are registered in Delhi as displaced persons within the prescribed dates, that is, 10.12.1947 in the case of those who migrated from West Punjab and 29.02.1948 in the case of those who migrated from other areas of Western Pakistan;

(b) are gainfully employed; and

(c) are prepared to pay in lumpsum Rs. 5,000/- as the approximate price of the house."

It was further stated in the said letter that if the aforesaid conditions were satisfied, the applicant was required to deposit

a sum of Rs. 2,000/- in the Imperial Bank of India, Government Treasury. After deposit, the Treasury receipt should be sent to the Ministry by 15th April, 1950 stating in the covering letter the names of colonies in order of preference where the applicant would like to purchase the house. The remaining sum of Rs.3,000/- was to be paid immediately on the allotment of the house.

(iii) Letter dated 17.03.1950 from the Ministry of Rehabilitation to Prof. Parman Singh requesting him to deposit Rs. 5,000/- in the Government Treasury/Imperial Bank of India towards the allotment of the house – Ex.PW1/3 (also Ex.P4) and stating that his Cheque No.451453 dated 03.04.1950 for Rs.5,000/- was being returned.

(iv) Letter dated 25.05.1950 from the Ministry of Rehabilitation informing Prof. Parman Singh that the Ministry had decided to allot to him one double roomed house in Nizamuddin Extension against the sum of Rs. 5,000/- deposited by him in the Treasury – Ex.PW1/4 (also Ex.P2).

(v) Letter dated 23rd October, 1953 whereby Prof. Parman Singh was informed that the final figure of the actual cost of the house was Rs. 5,946/- and since Rs. 5,000/- was already deposited by him, the balance of Rs. 946/- was to be paid by him within one month of the receipt of the letter – Ex.PW1/5 (also Ex.P3).

(vi) Letter dated 04.03.1958 from the Ministry of Rehabilitation, Government of India, whereby late Prof. Parman Singh was asked to deposit the arrears of ground rent, etc. amounting to Rs. 608.12 upto 31.03.1958 – Ex.PW1/6.

(vii) Letter dated 28.10.1960 from the Municipal Corporation of Delhi to late Prof. Parman Singh granting sanction to carry out constructions in House No.13, Block B situated at Nizamuddin, New Delhi – Ex.PW1/7.

(viii) Receipts dated 03.07.1960 for Rs.40/- and 10.04.1961 for Rs. 500/- to show construction and repairs done by Prof. Parman Singh in the aforesaid premises – **Ex.PW1/8 and Ex.PW1/9** respectively.

(ix) Bill No.202 dated 05.01.1963 for Rs. 234/- in the name

of Prof. Parman Singh from M/s. Hoora Steel Furnishers – Ex.PW1/10.

(x) Labour rates stated to be procured by Prof. Parman Singh from one Ishar Singh, a building contractor for construction of B-13, Nizamuddin East – Ex.PW1/11.

As regards the purchase of the plot known as B-22, East of Kailash, New Delhi and construction of a super-structure thereon stated by the plaintiff to be HUF property, reliance was placed upon the following documents:-

(i) Central Bank of India Pass Book Joint Account No.12278 of Smt. Balwant Kaur and Shri Mahtab Singh (defendant No.1) from 02.06.1984 to 03.06.1986.

(ii) Central Bank of India Pass Book Joint Account No. 12278 from 03.04.1986 to 22.03.1988 (**Ex.PW1/12 Colly.**).

(iii) Central Bank of India, Deposit Slips (41 in number) relating to Joint Saving Account No. 12278 from 02.04.1986 to 15.04.1987 (**Ex.PW1/13 Colly.**).

32. The contention of the learned counsel for the plaintiff was that the documents at Serial Nos.(i) to (x) taken cumulatively conclusively show that Prof. Parman Singh had himself registered in the category of displaced persons with the Ministry of Rehabilitation, had applied on 10th February, 1950 for allotment of a house in the aforesaid category, had been registered within the prescribed period, that is, period intervening 10.02.1947 and 29.02.1948 and had paid a sum of Rs. 5,946/- for the allotment of the house.

33. Ms. Goel further relied upon document Ex.D2 dated 01.12/02.12.1959 produced by the defendant No.1. The said document purports to be a **Certificate of Payment of Compensation** issued by the office of the Regional Settlement Commissioner to Prof. Parman Singh, resident of B-13, Nizamuddin East, New Delhi, whereby, **the total assessed value of his claim(s) or share was taken to be Rs. 12,316.62 under Column 5 thereof.** Clauses 6(f), 7 and 8(c) on which specific reliance has been placed read as under:-

Clause 6(f)

"6(f) Particulars of rehabilitation benefits received:- B-13,

Nizamuddin, Delhi."

Clause 7

"7. Amount of net compensation paid – Already Rs.4,486/-."

Clause 8(c)

"8. Deductions made from gross compensation.

(a) .....

(b) .....

(c) Arrears of Rent Rs.288/- partly adjusted towards the arrears of ground rent."

34. Ms. Goel vehemently contended that Ex.D2, which has emanated from the defendant No.1 himself, conclusively shows that B-13, Nizamuddin East was not the self-acquired property of the defendant No.1 and was given to him as rehabilitation benefit. She further contended that by virtue of the provisions of Section 114 of the Evidence Act, this Court ought to take judicial notice that displaced persons/refugees from Pakistan brought with them assets, such as moneys and jewelleries concealed and hidden on their persons. No displaced person coming from Pakistan would disclose the assets brought by him on his person for fear of being looted and killed. Heavy looting and killing, she contended, was admitted even by DW2 Mahtab Singh (the defendant No.1) in the course of his cross-examination.

35. Ms. Goel contended that in such circumstances Prof. Parman Singh and his wife had come from Rawalpindi with the money and jewellery hidden on their person.

36. Next, Ms. Goel relied upon the following excerpts from the evidence of PW1 G.P. Singh:-

"My grandmother till she was alive in 1992, she confided me that her husband's family had a large house in the village and a large business property, a shop with a godown and some landed property, all in the village. The family business of wholesale of household products. My grandmother always told me the truth and besides her telling me, there is no other sources, from which

I knew of the said properties.

.....The name of my great grandfather is Lala Bihari Mal. It is correct that the business that I have referred above was the business run by my great grandfather. The village in which the said properties were located was known as Mochh, District Mianwali, now in Pakistan.

.....I am not aware what amount was realized from the sale of properties in the village Mochh.

.....My grandparents came to India to Delhi in the year 1947. My grandparents came by air. They came with 20 Kgs. of valuable luggage, which was the permissible limit. My grandparents told me this fact. They came by a military aircraft."

37. Ms Goel contended that documents Ex.PW1/1 [Certificate dated 09.05.1955 of payment of interim compensation], Ex.PW1/2 [letter of the Ministry dated 26.03.1950 to Prof. Parman Singh on his application dated 10th February, 1950 for allotment of house in colonies for displaced persons] and Ex.PW1/4 [letter dated 25.05.1950 showing allotment of a house to Prof. Parman Singh in Nizamuddin Extension on the amount of Rs. 5,000/- already deposited by him in the Treasury] demonstrate beyond an iota of doubt that Prof. Parman Singh was allotted B-13, Nizamuddin East as compensation upon his coming to Delhi as a refugee from West Pakistan. She pointed out that the contention of the defendant No.1 in his written statement that Prof. Parman Singh had come to India penniless and for the property B-13, Nizamuddin he had paid from his earnings, was wholly false. Prof. Parman Singh could not have paid for the aforesaid property from his earnings which the defendant No.1 (DW2 Mahtab Singh) on oath stated to be Rs. 1,500/- per month in 1947 as lecturer in Delhi University. The pay-scale of a lecturer of Delhi University in 1948 was Rs. 500 – 800/- per month and in 1961 it was revised to Rs.700 – 1,100/- per month. Thus, the statement made by the defendant No.1 on oath that the income of Prof. Parman Singh as a lecturer was Rs.1500/- per month was false. To substantiate the said contention, Ms. Goel referred to the following judgments:-

(i) **J.S. Khanna and Ors. vs. University of Delhi and Ors..** ILR 1980 Delhi 1404.

(ii) Prof. C.D. Tase vs. University of Bombay and Ors., AIR 1989 SC 829.

(iii) **Shital Prasad Tyagi vs. The Principal, Central Institution of Education, Delhi and Others,** ILR 1969 Delhi 1184.

38. Ms. Goel thus contended that the property B-13, Nizamuddin was in fact purchased from the money and jewellery brought by Prof. Parman Singh and his wife from Pakistan; and it was a rehabilitation benefit for properties left in Pakistan. The father of Prof. Parman Singh (Lala Behari Mal) died in 1935 leaving behind property in Mochh valued by the defendants themselves at a few hundred rupees. Prof. Parman Singh had shifted to Rawalpindi where he had built a house in 1946. It is submitted that the money from the sale of the ancestral house at Mochh and the compensation provided for the property at Rawalpindi were used by Prof. Parman Singh for the purchase of the property in Nizamuddin, and thus the Nizamuddin property was not the self-acquired property of Prof. Parman Singh.

39. Referring to the evidence of the defendant No.1 (Mahtab Singh), who appeared in the witness box as DW2, it was submitted by Ms. Goel that the defendant No.1 had falsely claimed on oath that B-13, Nizamuddin was the self-acquired property of Prof. Parman Singh. She specifically referred to the admission made by DW2 in his cross-examination that NOC from Hari Singh (the defendant No.2) was submitted to L&DO for mutation of B-13; and the further admission made by DW2 that he did not pay any amount to his father for the purchase of the property bearing No.B-13 and that mutation of the said property to his name was conditional. Ms. Goel contended that the plea of the defendants that Rs. 4,486/- received as compensation was spent by Prof. Parman Singh for clothes, etc. for himself and for his wife was totally unbelievable. A person who did not even have a roof over his head and who had valued his claim for Rs. 12,316.62 could not be expected to spend Rs. 4,486/- for clothes, etc.

40. Ms. Goel contended that B-22, East of Kailash, New Delhi was also HUF property as it had been derived from the rents of B-13, Nizamuddin. The records of the joint account of the defendant No.1 with Mrs. Balwant Kaur, wife of Prof. Parman Singh (Ex.PW1/12 and Ex.PW1/

13) were sufficient to establish the same. The defendants in any case, she contended, had been unable to prove that B-22, East of Kailash was the self-acquired property of the defendant No.1 as claimed by them.

DEFENDANTS' CONTENTIONS

41. Rebutting the aforesaid contentions of Ms. Goel, the learned counsel for the defendants, Mr. P.R. Chopra contended that the properties in question were not HUF properties as alleged by the plaintiff. There was never any HUF of Prof. Parman Singh nor is there any HUF of the defendant No.1, Mahtab Singh. The plaintiff has no right in the said properties and his suit claiming partition was liable to be dismissed with costs. The property at Nizamuddin was the self-acquired property of Prof. Parman Singh, father of the defendant No.1. He bequeathed the said property to his wife Smt. Balwant Kaur vide Will dated 8th June, 1972, (Ex.DW2/1) and it was mutated in her name on 27th June, 1981 vide mutation letter (Ex.DW2/2). Smt. Balwant Kaur, in turn, bequeathed the said property by Will dated 25.01.1986 (Ex.DW2/12) to the defendant No.1 and the same now stands mutated in the name of the defendant No.1 vide mutation letter dated 27.09.1991 in the record of the L&DO (Ex.DW2/13). As regards the property at East of Kailash, the plaintiff's contention that the same is HUF property is also wholly false as is borne out from the fact that the defendant No.1 had paid the full consideration for the said property to the DDA upon allotment of the land to him and had raised money by way of loans from his office and other agencies for the said purchase and to raise the super-structure thereon. There was voluminous documentary evidence to bear out that the defendant No.1 was all through in Government service and retired as Joint Secretary; and it was from his income and the loans raised by him that the East of Kailash property was acquired by him. Documents Ex.DW2/3 to Ex.DW2/11 proved by the defendant No.1 were sufficient to show that the said property was the self-acquired property of the defendant No.1 and built out of his own resources.

42. The learned counsel next contended that the onus to prove Issue Nos.1, 2 and 3 was on the plaintiff, but the plaintiff had failed to produce any documentary proof in support of the alleged HUF of Prof. Parman Singh or even of his own father, Mahtab Singh (the defendant No.1). In fact, the admitted documents Ex.P1 and Ex.P2, letters dated 26th March, 1950 and 25th May, 1950 respectively from the Ministry of

Rehabilitation to Prof. Parman Singh, in relation to the allotment of Nizamuddin property, state that he was eligible to purchase the said property if (i) he was a displaced person from Pakistan, (ii) he was gainfully employed, and, (iii) he was prepared to pay the consideration for the property in lumpsum, i.e., Rs. 5,000/-, **proving thereby that the said property was not purchased out of the claims or compensation.**

43. He pointed out that in his cross-examination on 03.03.2006, the plaintiff (PW1) admitted that Prof. Parman Singh was employed as a Lecturer in the Camp College upon coming to Delhi and was later appointed as a Special Magistrate. Thus, on his coming to India in 1947, he started earning immediately and the payment of the Nizamuddin property was made out of his own savings/earnings. Clearly, the said property was not paid out of compensation, as alleged by the plaintiff. This is also evident from the fact that the plaintiff has produced the original Compensation Card issued by the Ministry of Rehabilitation (Ex.PW1/1) to Prof. Parman Singh at the time of payment of interim compensation. The said card is dated 07.05.1955. This was so, because the Displaced Persons (Compensation and Rehabilitation) Act was passed in 1954 and the rules thereunder promulgated in 1955. Thus, quite clearly, the Compensation Card (Ex.PW1/1) was issued five years after the purchase of the Nizamuddin property. **Thus, on the own showing of the plaintiff, no compensation element could possibly have been utilized for the purchase of the suit property five years earlier in 1950, when the said property was purchased and paid for.**

44. Emphasizing that there was no question of any HUF and that the plaintiff's contention that Prof. Parman Singh and his wife had brought valuables/cash from Pakistan was wholly false, the learned counsel submitted that it is borne out from the record that Prof. Parman Singh and Smt. Balwant Kaur had come empty handed in a military aircraft. It was so stated by DW1 Santokh Singh in his affidavit in evidence and reiterated in his cross-examination. The statements/admissions made by the plaintiff in his cross-examination, which was conducted on several dates, i.e., on 07.02.2006, 03.03.2006, 21.04.2006, 14.03.2008, 08.07.2008, 01.08.2008 and 18.09.2008, were also relied upon. The following are the excerpts relevant to the present case.

(A) On the aspect of HUF, PW1 in his cross-examination recorded on 03.03.2006 stated:-

> **"I am not aware if any HUF was legally created by Prof. Parman Singh.** Vol. But since the property allotted to him by the Ministry of Rehabilitation, Government of India, were paid for out of the funds received as compensation in lieu of property surrendered in Pakistan, HUF automatically stands created."

(B) On the aspect of income-tax returns of Prof. Parman Singh, PW1 stated in his cross-examination recorded on 03.03.2006:-

> "While in service, **Prof. Parman Singh was an income-tax payee. I do not have the copy of his income-tax returns.....**. It is correct that defendant No.1 my father was already employed when Prof. Parman Singh came to India."

(C) On the aspect of utilization of compensation for the purchase of B-13, Nizamuddin East and the Compensation Card issued to Prof. Parman Singh dated 07.05.1955, PW1 in his cross-examination recorded on 03.03.2006 admitted:-

> **"I cannot say whether this document (Ex.PW1/1) is related to the Nizamuddin property** or not because it is not mentioned in the document."

(D) Admitting that Prof. Parman Singh and his wife were air lifted from Rawalpindi to Delhi, PW1 in his cross-examination recorded on 07.02.2006, stated:-

> "My grandparents came to India to Delhi in the year 1947. **My grandparents came by air."**

(E) On the aspect of valuables brought from Pakistan by Prof. Parman Singh, PW1 in his cross-examination on 3.03.2006 was compelled to state as follows:-

> **"I am not aware as to what did my grandparents do with the valuables they brought from Pakistan. Vol. I was not born at that time.** It is correct that I am not aware as to how much was realized from the sale of the valuables or as to how the said money was utilized."

(F) On being asked if he had raised any objection to the mutation of the Nizamuddin property in the name of his grandmother, late

Smt. Balwant Kaur, in 1981, the plaintiff in his cross-examination on 03.03.2006 said:-

> "I did not raise any such objection and have not written to L&DO to make a claim of ownership/share since this property was always HUF." (It is not in dispute that the plaintiff was 27/28 years old at that time and living with the family, i.e., his parents and brothers, now defendants.)

(G) As regards the earnings of his grandfather, the plaintiff was compelled to admit in his cross-examination on 03.03.2006:-

> **"My grandfather already had a job when he arrived in Delhi.** He was a Lecturer with Camp College, a constituent of Punjab University. He was appointed as a Special Magistrate, being a Lecturer of Camp College. I cannot tell whether my grandfather was performing the duty of Special Magistrate simultaneously alongwith his lecturership in Camp College. I am not aware of the UGC pay scales at that time. I am not aware as to what was the income of my grandfather at that time.....**It is correct that defendant No.1 my father was already employed when Prof. Parman Singh came to India."**

45. In relation to property at **B-22, East of Kailash,** the learned counsel argued that the falsity of the allegation of the plaintiff that the land was purchased and construction made out of the HUF rents and other moneys, etc. was evident from a bare look at the documents on record. The defendant No.1 Mahtab Singh and the defendant No.5 Smt. Raminder Kaur (wife of the defendant No.1) had placed ample documentary evidence on record to prove that no part of the said property, land or construction, was contributed by Prof. Parman Singh. The said house was constructed in the year 1970 by the defendant No.1, Mahtab Singh. In the course of his cross-examination, the plaintiff admitted that Prof. Parman Singh had retired in 1959 from the Delhi University and was not doing anything after his retirement. The plaintiff himself stated in his affidavit in evidence that Prof. Parman Singh was a cancer patient. He also admitted that the defendant No.1, his father, was already employed when Prof. Parman Singh came to India. Further, in his cross-examination, the plaintiff admitted:-

"So far as defendant No.1 is concerned, it is correct that there was no need or any reason for Prof. Parman Singh to pay any sum to him."

46. Apart from the above, Mr. Chopra has drawn my attention to the following excerpts from the cross-examination of the plaintiff recorded on 21.04.2006, which, according to him, prove beyond any shadow of doubt that the property purchased and constructed at East of Kailash by the defendant No.1 is his self-acquired property:-

(a) "There is no document on record to substantiate my statement that Prof. Parman Singh contributed towards purchase of land at East of Kailash."

(b) "It is correct that my grand-father Prof. Parman Singh did not have any joint account with defendant No.1."

(c) "It is correct that the joint account referred by me in the last Vol. statement pertains to the account which was opened in year 1984."

47. The learned counsel pointed out that the said joint account relied upon by the plaintiff came into existence after about 14 years of the construction of the property at East of Kailash, and the said account was in fact joint between the defendant No.1, Mahtab Singh and Smt. Balwant Kaur; and was opened 9 years after the death of Prof. Parman Singh.

48. Mr. Chopra next pointed out that the plaintiff had admitted in Ex.D4, which was an affidavit filed by him in Matrimonial Petition No.269/1987 titled "**Mrs. Indra K. Singh vs. Gajinder Pal Singh**" that he had no rights in either the Nizamuddin property or the property at East of Kailash. Apart from this, the plaintiff had sworn an affidavit to the DDA that he owned no immovable properties in Delhi, a condition precedent for entitlement to the allotment of a flat under the LIG Scheme of 1979, floated by the DDA at the relevant time. Reference in this context was made by him to the testimony of DW6 Shri Akbar Ali, who was summoned with the record from the DDA to prove the certified copy of the registration of the flat in the name of the plaintiff at Entry No.48624 on Page 57 (Ex.DW6/A); and the affidavit of the plaintiff that he owned no property in Delhi submitted by the plaintiff to the DDA with his covering letter dated 19.05.1989 (Ex.DW6/B). He also proved on record

Ex.DW6/C, the possession letter of the DDA flat in favour of the plaintiff. The learned counsel urged that the Delhi Development Authority (Management and Disposal of Housing Estates) Regulations, 1968 and, in particular, Regulation No.7 thereof provides for the allotment of a dwelling unit only to such persons who do not own in full or in part any residential plot or house in the urban area of Delhi/New Delhi. For the sake of facility and ready reference, the said Regulation is reproduced hereunder:-

Regulation No.7 of the Delhi Development Authority (Management and Disposal of Housing Estates) Regulations, 1968

"7. A dwelling unit or flat in the Housing Estates of the Authority shall be allotted only to such person who or his wife/her husband or any of his/her dependents relations including unmarried children does not own in full or in part on free hold or lease hold basis a residential plot or house in the urban area of Delhi, New Delhi and Delhi Cantonment."

49. Mr. Chopra contended that the defendant No.1 who appeared in the witness box as DW2 to tender in evidence his affidavit in evidence dated 17.12.2008 as Ex.DW2/A and to prove documents Ex.DW2/1 to DW2/14 had withstood the test of extensive cross-examination conducted, as stated earlier, by the plaintiff himself on several dates of hearing, i.e., on 02.04.2009, 25.04.2009, 25.07.2009 and 24.10.2009. On 07.11.2009, the opportunity to further cross-examine DW2 was closed. He proved on record the following relevant documents to show that the Nizamuddin property was not HUF property and it now stands mutated in his name, i.e., in the name of the defendant No.1:-

(1) Ex.DW2/1 – Will dated 08.06.1972 of Prof. Parman Singh in favour of Smt. Balwant Kaur,

(2) DW2/2 – L&DO's letter dated 27.06.1981 mutating the Nizamuddin property in the name of Smt. Balwant Kaur,

(3) Ex.DW2/12 – Will dated 25.01.1986 of Smt. Balwant Kaur in favour of defendant No.1, and

(4) Ex.DW2/13 – L&DO's letter dated 27.09.1991 mutating the Nizamuddin property in favour of the defendant No.1.

50. DW1 Mahtab Singh also proved on record documents Ex.DW2/3 to DW2/11, to show that the property at B-22, East of Kailash was his self-acquired property and built out of his own resources, the particulars whereof are as follows:-

(i) **Ex.DW2/3** is the **Certificate dated 13th February, 1970** issued by Shri G.L. Goswami, Advocate, Government Pleader to certify that the East of Kailash property is the absolute property of Shri Mahtab Singh, son of Prof. Parman Singh and of Mrs. Raminder Mahtab Singh, wife of Shri Mahtab Singh **and is not joint family property.**

(ii) **Ex.DW2/4** is the abstract of cost for the building at B-22, East of Kailash certified by Shri G.G. Bhatia, Gazetted Valuer for Rs. 70,620/- issued to Shri Mahtab Singh (the defendant No.1) and Mrs. Raminder Mahtab Singh (the defendant No.5).

(iii) **Ex.DW2/5** is the Government of India letter No.3(107)/65/10470/D(Est-2) dated 17.12.1965 **for grant of non-refundable advance of Rs. 7,000/- to Mahtab Singh,** Under Secretary, Ministry of Defence (the defendant No.1) from his GPF Account for the purchase of a residential plot.

(iv) Ex.DW2/6 is letter No.2381/70/D(Est-2)/G dated 13.03.1970 communicating the sanction of non-refundable advance to **Shri Mahtab Singh from his GPF Account for** Rs. 9,300/- and **certifying therein that he had withdrawn** Rs. 7,000/- for the purchase of the plot and proposed to apply for **a loan of Rs. 35,000/- under the House Building Advance Scheme.**

(v) **Ex.DW2/7** is letter No.3(37)/70/D(Est.2) dated 25.04.1970 from the Ministry of Defence, Government of India to the Accountant General, Central Revenue, New Delhi conveying **sanction of loan of Rs.35,000/- to Shri Mahtab Singh.**

(vi) Ex.DW2/8 is the Certificate dated 05.07.1971 issued by Assistant Director, Postal Services, Delhi Circle, New Delhi regarding **sanction of Rs. 5,273/- to Shri Mahtab Singh as the surrender value of his PLI Policy No.41113-C.**

(vii) **Ex.DW2/9** is the attested letter dated 02.06.1970 **from Life Insurance Corporation of India to Shri M. Singh sending therewith cheque bearing No. 169433 for** Rs. **3,286.41 as loan against the policy.**

(viii) **Ex.DW2/10** is the Certificate dated 22.06.1971 from the Secretary, The Sikh Co-operative Thrift & Credit Society Ltd. regarding loans advanced to Shri Mahtab Singh. (ix) Ex.DW2/11 is the original memo dated 05.06.1970 from Shri Mahtab Singh with remarks thereon of the officials of Ministry of Defence that **Government's permission for raising loan of Rs. 3,000/- from Sardar Tarlok Singh by Shri Mahtab Singh** was not necessary.

51. In the above context, the learned counsel pointed out that though DW5 Shri Brahm Pal, Assistant, Ministry of Defence was summoned to prove the letters relating to money raised as loans and advances from his office by the defendant No.1, Shri Mahtab Singh for the construction of the East of Kailash property, DW5 submitted his letter of authorization DW5/A and informed that such old record stood destroyed.

52. The learned counsel submitted that in view of the aforesaid, it stood clearly established on record that the suit properties were not HUF properties and that the plaintiff had filed a false suit. There was not an iota of evidence on record to the contrary. The suit, therefore, deserved to be dismissed forthwith as the very basis on which the suit had been predicated, namely, that the suit properties were HUF properties had not been proved by the plaintiff. Reliance was placed by him upon the following decisions:-

(i) **Pratap vs. Shiv Shanker,** 2009 (113) DRF 811 – The case of the appellant, as set out in the plaint, was that the suit property was an ancestral property, which the respondent had got in partition amongst his other brothers and that the appellant, being the son of the respondent, was the coparcener in the suit property and thus entitled to a decree of partition to the extent of half share therein. It was held by the High Court that the trial court had not

erred in arriving at a conclusion that upon the demise of his father, grandfather of the appellant, the suit property devolved on the respondent in his individual capacity and thus, had to be treated as self-acquired property in his hands. The appellant had failed to establish that there existed any coparcenary, in which the appellant and the respondents were coparceners or there existed any HUF of which the respondent was a Karta. The appeal was accordingly dismissed.

(ii) **Commissioner of Wealth-tax, Kanpur, etc. etc. vs. Chander Sen etc.,** AIR 1986 SC 1753 – In this case, there was a partition of joint family business between a father and his only son. Thereafter, they continued the business in the name of a partnership firm. The son formed a joint family with his own sons. The father died and the amount standing to the credit of the deceased father in the account of the firm devolved on his son. It was held by the Supreme Court that the son had inherited the property as an individual and not as Karta of his own family. Hence, it could not be included in computing the assessee's wealth. **[1983 Tax LR 1370 (Andhra Pradesh), AIR 1979 Madras 1 (Full Bench) and 1983 Tax LR 559 (Madhya Pradesh),** Approved.]

(iii) **Rahul Behl and Others vs. Smt. Ichayan Behl and Anr.,** DRJ 1991 (21) 205 – In this case, the plaintiff Rahul Behl and Others filed a suit for declaration against Smt. Ichayan Behl and Dr. Surender Nath Behl on the ground that House No.R-20, Greater Kailash Part I, New Delhi was the self-acquired property of Dr. Brij Nath Behl, father of the defendant No.2 and the grandfather of the plaintiffs and the plaintiffs had 1/6th share in the same. A learned Single Judge of the Delhi High Court held that the express language of Section 8 of the Hindu Succession Act, 1956 excludes sons of son though includes sons of a pre-deceased son. Applying the provisions of the said Section to the facts of the case, it was clear that on the date of the death of the father, the property in question devolved on the son, not as Karta but in his

individual capacity, and the plaintiffs being the sons of the son cannot claim any right as coparceners nor the property fell into the pool of the Hindu Undivided Family. It was further observed that when a property devolves upon a Hindu under Section 8 of the Hindu Succession Act, 1956 it would not be HUF property in his own hands vis-a-vis his own sons.

FINDINGS

53. The Court after having heard the respective contentions of the parties and scrutinized the oral and documentary evidence on record, all of which is more than 30 years old, is constrained to hold that the plaintiff has miserably failed to prove the existence of any HUF and there being no HUF, the question of the suit property being HUF property does not arise as alleged or at all. **The defendant has admitted the following documents:-**

(i) Ex.P1 (also Ex.PW1/2) dated 26.03.1950 from the Ministry of Rehabilitation to Prof. Parman Singh.

(ii) Ex.P2 (also Ex.PW1/4) dated 25.05.1950 from the Ministry of Rehabilitation to Prof. Parman Singh.

(iii) Ex.P3 (also Ex.PW1/5) dated 17.10.1953 from the Ministry of Rehabilitation to Prof. Parman Singh.

54. Admitted documents Ex.P1 and P2, letters dated 26th March, 1950 and 25th May, 1950 respectively from the Ministry of Rehabilitation to Prof. Parman Singh, in relation to the allotment of Nizamuddin property, state that he was eligible to purchase the said property if (i) he was a displaced person from Pakistan, (ii) he was gainfully employed, and, (iii) he was prepared to pay the consideration of Rs. 5,000/- in lump-sum for the suit property. The aforesaid documents thus clearly show that the said property was purchased by Prof. Parman Singh from his own resources and not out of the claims or compensation. The Court is fortified in coming to the aforesaid conclusion from the fact that the plaintiff, in his cross-examination, has categorically admitted that Prof. Parman Singh was gainfully employed as soon as he came to India from West Pakistan in the year 1947 as a Lecturer in the Camp College and was subsequently appointed as a Special Magistrate. Clearly, therefore, the said property was purchased by Prof. Parman Singh from his own

funds. Even otherwise, the plaintiff has failed to establish the existence of any HUF of which Prof. Parman Singh was the Karta, and in the course of his cross-examination candidly admitted that he was not aware whether any HUF had been legally created by Prof. Parman Singh. The plaintiff was also compelled to admit that he did not have copies of the income-tax returns of Prof. Parman Singh, who was an income-tax payee, to substantiate his contention that Prof. Parman Singh was the Karta of an HUF which had purchased the property in question.

55. The plaintiff also proved on record the original Compensation Card issued by the Ministry of Rehabilitation (Ex.PW1/1) to Prof. Parman Singh, which is dated 07.05.1955, and was apparently issued 5 years after the purchase of the property at Nizamuddin East, which admittedly was purchased in the year 1950. Thus, on the own showing of the plaintiff, no compensation element could possibly have been utilized for the purchase of the property five years in advance of the receipt of the compensation, in 1950, when the said property was purchased and paid for. Even assuming the same was acquired with the funds generated from the claims of Prof. Parman Singh, the property would have nevertheless remained the self-acquired property of the father of the defendant No.1, namely, Prof. Parman Singh [See **Chander Sen** (Supra)].

56. The whole story concocted by the plaintiff that Prof. Parman Singh and his wife had brought valuables and jewellery with them and were carrying 20 kgs. of luggage is also not borne out from the record. The plaintiff himself in his cross-examination was compelled to admit that he was not born at that time nor he was aware as to what his grandparents had done with the valuables they had brought from Pakistan nor he was aware as to how much was realized from the sale of the said valuables nor as to how the said money was utilized. In direct contrast, DW2 Mahtab Singh categorically stated in the witness box that Prof. Parman Singh and his wife were air lifted from Rawalpindi to Delhi in a military plane with 60 other passengers and had come empty handed. DW1 Santokh Singh, a close relative of the plaintiff and the defendants, corroborated this fact by deposing that he was personally present when Prof. Parman Singh and his wife arrived at the Safdarjung Airport in the year 1947 empty handed. It may be noted that the testimony of this witness withstood the test of cross-examination and nothing emerged therefrom to discredit the witness in any manner.

57. There is also on record the registered Will and testament of Prof. Parman Singh dated 08.06.1972 (Ex.DW2/1) in favour of his wife Smt. Balwant Kaur bequeathing to her House No.13, Block B, Nizamuddin East and the resultant mutation of the property in her favour by L&DO's letter dated 27.06.1981 (Ex.DW2/2). There is also on record the Will of Smt. Balwant Kaur in favour of the defendant No.1, Mahtab Singh (Ex DW2/12) and the resultant mutation of the property in favour of Mahtab Singh by L&DO's letter dated 27.09.1991 (Ex.DW2/13). Then there is the testimony of DW4 Shri Ram Prakash Bhatia, which establishes that the Will of Prof. Parman Singh was read out to the family members, including the plaintiff and the other defendants on 20th September, 1975, four days after Prof. Parman Singh had passed away. The witness was extensively cross-examined by the plaintiff, but nothing could be elicited from him in his cross-examination to discredit his aforesaid statement on oath. The plaintiff himself admitted in his cross-examination that he had not raised any objection to the aforesaid mutations of the Nizamuddin property in favour of Smt. Balwant Kaur and, subsequently in favour of the defendant No.1, and had not written to the L&DO to make a claim of ownership/share in the said property.

58. There are also on record the affidavits filed by the plaintiff in Matrimonial Petition No.269/1987 stating that the deponent did not own any immovable property in Delhi or anywhere else in India. There is also on record the testimony of DW6 Akbar Ali from the office of the Delhi Development Authority, who has placed on record the affidavit of the plaintiff with the supporting documents (Ex.DW6/A to Ex.DW6/C) to show that the plaintiff had sworn an affidavit before the DDA that he owned no property in Delhi, a condition precedent for entitlement of a flat in respect of the LIG Scheme of 1979 floated by the Delhi Development Authority.

59. As regards the property at East of Kailash, there is ample documentary evidence on record to conclusively establish that the said property was the self-acquired property of the defendant No.1, Mahtab Singh. As noted above, documents Ex.DW2/3 to DW2/11, proved on record by DW2, the defendant No.1, sufficiently establish that the plot for the aforesaid property was purchased by the defendant No.1 and the building thereon constructed by the defendant No.1 from the loans and advances generated by the office of the defendant No.1, i.e., the Ministry

of Defence, from time to time. There is also on record the Certificate of the Government of India to show that the said property was the self-acquired property of the defendant No.1 and his wife, the defendant No.5. The plaintiff has been wholly unable to challenge the aforesaid documentary evidence on record. The oral evidence too is tilted in favour of the defendants, in that according to the plaintiff's own admissions in his affidavit by way of evidence and cross-examination, no funds were given by Prof. Parman Singh to the defendant No.1 for the construction of House No.B-22, East of Kailash. Prof. Parman Singh, according to the plaintiff, had retired in 1959 from the Delhi University, whereas the property in question was acquired and built in the year 1970. Prof. Parman Singh was a cancer patient and the plaintiff in his cross-examination admitted that there was no need or reason for Prof. Parman Singh to pay any sum to the defendant No.1. He also admitted that Prof. Parman Singh did not have any joint account with the defendant No.1. To be noted at this juncture that the joint account relied upon by the plaintiff was a joint account of Smt. Balwant Kaur and the defendant No.1, which admittedly was opened in the year 1984, i.e., 14 years after the construction of the property at East of Kailash and, therefore, has no bearing on the matter in issue.

60. In view of the aforesaid overwhelming evidence on record, oral and documentary, the inevitable conclusion is that it must be held that neither Prof. Parman Singh nor the defendant No.1 Mahtab Singh had created any HUF and the properties acquired by them respectively cannot, therefore, partake of the nature of HUF properties.

61. The Hon'ble Supreme Court in the case of **Yudhishter vs. Ashok Kumar,** AIR 1987 SC 558 has laid down that after the amendment of the Hindu Succession Act, 1956 and in view of Section 8 of the said Act, when the son of a male Hindu inherits the property in the situation contemplated by Section 8, he does not take the said property as Karta of his own HUF assuming that the same exists, but takes it in his individual capacity. Thus, when a property devolves on a Hindu under Section 8 of the Hindu Succession Act, 1956, it would not be HUF property in his hands vis-a-vis his own sons, but would partake the character of self-acquired property of his predecessor-in-interest.

62. It is also well established that though under the old Hindu Law, the son would have inherited the property of his father as Karta of his

own family, the Hindu Succession Act has modified the aforesaid rule of succession. In the case of **Chander Sen** (supra), the Hon'ble Supreme Court has dwelt on this aspect of succession at some length, observing that the Act lays down the general rules of succession in the case of males which must prevail over the old Hindu Law of Succession. The first rule is that the property of a male Hindu dying intestate shall devolve according to the provisions of Chapter II and Class I of the Schedule provides that if there is a male heir of Class I then upon the heirs mentioned in Class I of the Schedule. The Schedule indicates that the heirs in Class I only includes son/s and does not include son's son, but does include son of a pre-deceased son. It is thus not possible to say that when the son inherits the property in the situation contemplated by Section 8, he takes it as a Karta of his own undivided family. As observed by the Supreme Court, if a contrary view is taken, it would mean that though the son of a pre-deceased son and not the son of a son who is intended to be excluded under Section 8 to inherit, the latter would by applying the old Hindu Law get a right by birth in the said property contrary to the scheme outlined in Section 8. The express words of Section 8 as held in **Chander Sen's** case (supra) cannot be ignored and must prevail. Thus, the defendant No.1 in the instant case must be held to have inherited the property of Prof. Parman Singh as an individual and not as a Karta of his own family, even assuming there was an HUF created by the defendant No.1, though in the instant case it stands established that no HUF was created by the defendant No.1.

63. Accordingly, it must be held that the plaintiff has failed to establish that either of the two properties mentioned hereinabove were HUF properties. Issue No.1 is accordingly decided against the plaintiff.

64. ISSUE NOS.2 AND 3

"2. Whether the plaintiff is entitled to any share in the property and if so to what extent?

3. Whether the plaintiff is entitled for rendition of accounts claimed by him?"

65. In view of my findings on Issue No.1 that the suit properties are not HUF properties, it must be held that the plaintiff is not entitled to any share in the said properties. The plaintiff is also not entitled to rendition of accounts of rent as claimed by him.

66. Issue Nos.2 and 3 are accordingly decided against the plaintiff.

ISSUE NO.4

"Whether suit is barred by time?"

67. The onus of proving this issue is upon the defendants, but in view of my findings on Issue Nos.1, 2 and 3, Issue No.4 does not survive for consideration.

68. It may, however, be noted that only the defendant Nos.1 and 2 could have contested the Will dated 8th June, 1972 (Ex.DW2/1) of Prof. Parman Singh being his only legal heirs, other than his wife Smt. Balwant Kaur. The cause of action to challenge the said Will arose on 17.09.1975, i.e., the date of death of Prof. Parman Singh and at any rate on 20th September, 1975 when the said Will was read out in the presence of all concerned. There was no contest to the Will of Prof. Parman Singh and the said property was accordingly mutated in the name of Smt. Balwant Kaur. The limitation to contest the said Will expired on 16.09.1987, i.e., at the end of 12 years from 17.09.1975. Thus, the present suit filed by the plaintiff/grandson in the year 1993 is clearly barred by limitation and liable to be dismissed on this short ground.

69. It also deserves to be noted that while the suit in respect of the property at Nizamuddin is barred by time for the reasons stated hereinabove, the cause of action for the filing of the suit in respect of the property at East of Kailash has not yet arisen, the said property being the self-acquired property of the defendant No.1, who is still alive. It is settled law that a son or daughter can ask for partition of HUF property from the father during his lifetime, but not of self acquired property.

CONCLUSION

70. In view of the findings rendered on Issue Nos.1 to 4, it is held that the plaintiff is not entitled to the partition of the suit properties and to the rendition of accounts in respect thereof. The suit fails and is accordingly dismissed. The defendants having contested the case from the year 1993 onwards are held entitled to costs throughout.

71. CS(OS) No.374/1993 stands disposed of accordingly. All interim orders stand vacated.

ILR (2012) V DELHI 678
CS

JINESH KUMAR JAIN ….PLAINTIFF

VERSUS

IRIS PAINTAL & ORS. ….DEFENDANTS

(VALMIKI J. MEHTA, J.)

CS (OS) NO. : 1154/1989 DATE OF DECISION: 10.07.2012

Specific Relief Act, 1963—Sections 16 (c) & 20—Delhi Lands (Restriction of Transfer) Act, 1972—Suit for specific performance—Brief facts—Agreement to self entered into between the plaintiff as the prospective purchaser and the defendants as the prospective sellers—Total sale consideration was Rs.48,50,000/-—Defendants received a sum of Rs. 4,50,000/— as advance—Award under Land Acquisition Act, 1894 passed acquiring the land about 9 months before the agreement to sell was entered into between the parties—Plaintiff pleads that the defendants were guilty of breach of contract inasmuch as they failed to obtain the permissions to sell the property from the Income Tax Authority and from the appropriate authority under the Delhi Lands (Restriction of Transfer) Act, 1972—Plaintiff pleads that the defendants failed to perform the contract because a Division Bench of this Court in a case quashed the acquisition proceedings and consequently the price of land increased, giving the reason for the defendants to back out from the contract—Plaintiff claims to have always been and continuing to be ready and willing to perform his part of contract—Written statements filed by the defendants contending inter alia that the agreement in question is barred by the Act of 1972 and Plaintiff failed to

perform his part of the contract as the sale transaction had to be completed in 45 days—Also claimed that the plaintiff was not ready and willing to perform his part of the contract and that the discretionary relief for specific performance should not be granted in his favour—Issues framed—Evidence led. Section 3 of Delhi Lands (Restriction of Transfer) Act, 1972 places an absolute bar with respect to transferring those lands which have already been acquired by the Government i.e. with respect to which Award has been passed—Lands in the process of acquisition—transfer can take place with the permission of appropriate authority—Contracts entered into in violation of the 1972 Act are void and against public policy—In the present case, agreement to sell was entered into after the land was acquired i.e. after an Award was passed and therefore agreement to sell is void—Even presuming that the plaintiff or even both the parties were not aware of the Award having been passed with respect to the subject lands under the Lands Acquisition Act, 1894, that cannot take away the binding effect of Section 3 of the 1972 Act which provides that any purported transfer of the land which has already acquired is absolutely barred—Plaintiff miserably failed to prove his readiness and willingness i.e. his financial capacity with respect to making available the balance sale consideration of 44,00,000/— hence it cannot be said that the plaintiff was and continued to be ready and willing to perform his part of the obligation under the agreement to sell at all points of time i.e. for the periods of 45 days after entering into the agreement to sell, after the period of 45 days till the filing of the suit, and even thereafter when evidence was led—Plaintiff has failed to comply with the requirement of Section 16(c) of the Specific Relief Act, 1963, and therefore, the plaintiff is not entitled to the relief of specific performance—Sub—Section 3 of section 20 of Specific Relief Act, 1963

makes it clear that Courts decree specific performance where the plaintiff has done substantial acts in consequence of a contract/agreement to sell—Where the acts are not substantial i.e. merely 5% or 10% etc of the consideration is paid and/or plaintiff is not in possession of the subject land, plaintiff is not entitled to the discretionary relief of specific performance—Specific Relief Act dealing with specific performance is in the nature of exception to Section 73 of the Contract Act, 1872—Normal rule with respect to the breach of a contract under Section 73 of the Contract Act, 1872 is of damages, and, the Specific Relief Act, 1963 only provides the alternative discretionary remedy that instead of damages, the contract in fact should be specifically enforced—For breach of contract, the remedy of damages is always there and it is not that the buyer is remediless—However, for getting specific relief, while providing for provisions of specific performance of the agreement (i.e. performance instead of damages) for breach, requires discretion to be exercised by the Court as to whether specific performance should or should not be granted in the facts of each case or that the plaintiff should be held entitled to the ordinary relief of damages or compensation—From the point of view of Section 20 sub—Section 3 of the Specific Relief Act, 1963 or the ratio of the judgment of the Supreme Court in the case of *Saradamani Kandappan* (supra) or even on first principle with respect to equity because 10% of the sale consideration alongwith the interest will not result in the defendants even remotely being able to purchase an equivalent property than the suit property specific performance cannot be granted—Subject suit is only a suit for specific performance in which there is no claim of the alternative relief of compensation/damages—No cases set out with respect to the claim of damages/compensation—Plaintiff has led no evidence as to difference in market price of the

subject property and equivalent properties on the date of breach, so that the Court could have awarded appropriate damages to the plaintiff, in case, this Court came to the conclusion that though the plaintiff was not entitled to specific performance, but he was entitled to damages/compensation because it is the defendants who are guilty of breach of contract—However in exercise of power under Order 7 Rule 7 CPC, the Court can always grant a lesser relief or an appropriate relief as arising from the facts and circumstances of the case—Undisputed that the defendants have received a sum of 4,50,000/- under the agreement to sell—Considering all the facts of the present case, it is fit to hold that though an agreement itself was void under the 1972 Act, the plaintiff should be entitled to refund of the amount of 4,50,000/- alongwith the interest thereon at 18% per annum simple pendente life and future till realization—Suit of the plaintiff claiming the relief of specific performance is dismissed.

The difference of language employed in Sections 3 and 4 of the Act of 1972 is very clear. This difference of language is apparent even from a plain reading of the same. Whereas under Section 3 there is an absolute bar with respect to transferring those lands which have already been acquired by the Government i.e. with respect to which Award has been passed, those lands which are in the process of acquisition i.e. Award has not been passed, then Section 4 of the Act of 1972 will apply, and as per which, there is no absolute bar with respect to such lands, and, transfer can take place subject to permission of appropriate authority being taken under Section 5 of the 1972 Act, and whose orders are appealable under Section 6 of the Act of 1972. The Supreme Court has with respect to difference between these two provisions observed as under in para 66 of the judgment in the case of **Shanti Sports Club & Anr. vs. Union Of India & Ors.,** 2009 (15) SCC 705:-

> "66. The distinction between the above-reproduced two provisions is that while Section 3 contains an absolute prohibition on transfer of the acquired land by sale, mortgage, gift, lease or otherwise, Section 4 declares that no person shall, except with the previous permissions in writing of the competent authority, transfer or purport to transfer by sale, etc. of any land or part thereof, which is proposed to be acquired in connection with the scheme and in relation to which a declaration to the effect that such land or part thereof is needed for a public purpose has been made by the Central Government and the Central Government has not withdrawn from the acquisition under Section 48(1)." **(Para 6)**

A Division Bench of this Court in the case of **Sh.Raghubir vs. Union of India,** WP(C) No.3186/2000 decided on 19.5.2005, has held that contracts which have been entered into in violation of the 1972 Act are void. Paras 17 and 19 of this judgment are relevant and they read as under:-

> "17. It cannot be disputed that the lands in question were acquired for a public purpose which can itself be a continuing public purpose like 'Planned Development of Delhi'. Large chunks of land are acquired for the development projects from time to time. Once a notification is issued under section 4 of the Act and it is clearly indicated by way of a notification for the benefit of public at large that the land is sought to be acquired by the appropriate Government, in such circumstances, any sale, mortgage or creation of a charge subsequent thereto would be ineffective. Such transactions would be in apparent conflict with the provisions of Delhi Land (Restriction on Transfer) Act as well as the Indian Contract Act, 1872. Under section 3 of the Delhi Land (Restriction on Transfer) Act, there is a complete prohibition to the effect that no person shall purport to transfer, sale, gift, lease or otherwise any land or part thereof situated in the

Union Territory of Delhi which the Central Government under the Land Acquisition or any other law for acquisition of Land for public purpose. Sections 4 and 5 of the abovesaid Act intends to regulate the transfer of the lands in regard to which acquisition proceedings have been initiated and the manner in which such an application is to be filed before the Competent Authority. Section 4 would come into the play where declaration under section 6 has been issued and the land has not been withdrawn by the Central Government under section 48 of the Act. In the case of **Krishan Kumar Malik vs. Union of India and Ors.** AIR 1985 Delhi 225, this Court has held that the effect of permission under the Act if that the same, may be recognized as valid for the purposes of claiming compensation or other benefits arising therefrom, which in absence of the permission would be deemed to be a void sale thus conferring no right at all. In the case of **O.P.C.Jain vs. ADM** 42 (1990) DLT 478, division bench of this court took the view that if no notification under Section 4 and 6 of the Act has been issued, there is no need for obtaining a certificate or permission or no objection certificate under the Provisions under the Delhi Land (Restriction on Transfer), Act. In the case of **Meera Sawhney & Ors. vs. Lt. Governor,** 89 (2001) DLT 484, a Full Bench of this court took the view that the very object of 1972 Act was to curb such illegal transactions of sale and purchase of land. The Bench held as under:-

"16. We are of the view that NOC is of no legal consequence. We also hold that no permission under Section 5 of the 1972 Act was ever sought regarding transfer of land in question nor any permission was granted. The alleged transfer, therefore, is clearly in violation of the provision of the 1972 Act. It has no legal validity. The Act does not envisage any NOC. Section 5 only recognizes a permission in writing for transfer of lands under Sections 4 and 6 notifications

and the permission is to be granted by the Competent Authority under the Act alone. In fact the learned Counsel for the petitioner did not dispute that permission was a sine qua non. His entire case, however, was that the alleged NOC amounted to permission under Section 5 of the Act. We are enable to accept this. The onus was clearly on the petitioners to show that they had applied for permission under Section 5 and they had obtained the same in accordance with the provisions of Section 5 of the 1972 Act. The petitioners have miserably failed to discharge this onus. The very object of the 1972 Act was to curb such illegal transactions of sale and purchase of lands and to protect unwary customers in this behalf. The object of the Act is given in the preamble which runs as under:

An Act to impose certain restrictions on transfer of land which have been acquired by the Central Government or in respect of which acquisition proceedings have been initiated by the Government, with a view to preventing large scales transactions of purported transfers, or, as the case may be, transfers of such lands to unwary public."

xxxx xxxxx xxxx

19. Further more the documents executed in favour of the petitioners (subsequent purchasers) are also opposed to the provisions of the Indian Contact Act in as much as they offend the provisions of Sections 23, 24 of the Act. The Supreme Court in the above judgment have clearly stated that they have no right as these contracts are void. One of the main essentials for a contract to be valid is that the agreement should not be opposed to public policy. Keeping in view the effect of acquisition policy of the State, public at large being beneficiary of such acquisition and there being specific restriction upon transfer of land in terms of

the provisions of 1972 Act there can be no doubt that such contracts would be opposed to public policy. No right would vest in such purchasers to question the legality and validity of the notifications."(underlining added). **(Para 7)**

A reading of the aforesaid judgment of the Division Bench shows that contracts which are entered into in violation of the 1972 Act are against public policy and hence are of no legal effect. In the present case inasmuch as admittedly the agreement to sell dated 26.9.1988 was entered into after the land was acquired i.e. after an Award was passed (para 15 of the plaint states this in so many words) clearly, the agreement to sell dated 26.9.1988 is void. Though it is a moot question whether the plaintiff was or was not aware of the Award being passed, however, I would hold that in the facts of the present case it is inconceivable for the plaintiff not to have known when the agreement to sell was entered into that the subject lands were already acquired by an Award passed under the Land Acquisition Act, 1894. This I say so because no one agrees to pay lakhs of rupees unless the proposed buyer has taken some necessary steps for enquiring the status / title of the lands which are proposed to be bought. A reading of para 7 of the plaint also shows knowledge by the plaintiff that the land had already been acquired before the agreement to sell was entered into. In any case, even if I for the sake of the argument even presume that the plaintiff was not aware, or even both the parties were not aware of the Award having been passed with respect to the subject lands under the Land Acquisition Act, 1894, that cannot take away the binding effect of Section 3 of the 1972 Act which provides that any purported transfer of the land which has already been acquired is absolutely barred. In my opinion, counsel for the plaintiff is not right in contending that what Section 3 bars is only a sale deed and not an agreement to sell. This I say so because the Division Bench in the case of **Sh.Raghubir** (supra) has held that agreements in violation

of the provisions of Sections 3 and 4 of the 1972 Act are void being against the public policy. The Division Bench in para 19 of its judgment reproduced above, has specifically held that the documents in the nature of a power of attorney, an agreement to sell, etc. are hit by Section 23 of the Contract Act, 1872 being violative of the public policy and the intention of the Legislature enacting the 1972 Act, are hence void. I therefore hold that the agreement to sell dated 26.9.1988 itself was void in view of a complete bar to any agreement being entered into which "purport" to transfer by sale etc. land which is acquired under the Land Acquisition Act, 1894 i.e. with respect to lands for which an Award has been passed. **(Para 8)**

Important Issue Involved: (A) Delhi Lands (Restriction of Transfer) Act, 1972—Section 3—absolute bar to transfer those lands already acquired by the Government i.e. with respect to which Award has been passed—Lands in the process of acquisition, transfer can take place with the permission of appropriate authority.

(B) Readiness and willingness to perform contract—Merely stating that the plaintiff is ready to perform his part of the contract is not sufficient and the same has to be proved by clear—cut evidence such as Income Tax Returns, statement of bank accounts and details of his assets in any form to show his financial capacity to pay the balance consideration.

(C) Specific Relief Act, 1963—Sections 16(c) & 20—Courts decree specific performance where the plaintiff has done substantial acts in consequence of a contract/agreement to sell—Substantial acts mean and include payment of substantial amounts of money.

(D) Order 7 Rule 7 CPC—Court can always grant a lesser relief or an appropriate relief as arising from the facts and circumstances of the case irrespective of the fact that no prayer has been made to this effect.

[Sa Gh]

APPEARANCES:

FOR THE PLAINTIFF : Mr. B.P. Aggarwal with Mr. Rajinder Singh, Adv.

FOR THE RESPONDENT : Ms. Rekha Aggarwal, Adv. for D-1 Mr. Ashim Vachher with Mr. S.M. Hasmi, Adv.for D-2 and LRs of D-4 Mr. Davinder Verma, Adv. for D-3.

CASES REFERRED TO:

1. *Laxmi Devi* vs. *Mahavir Singh* being RFA No. 556/2011 decided on 1.5.2012.
2. *Shanti Sports Club & Anr.* vs. *Union Of India & Ors.*, 2009 (15) SCC 705.
3. *Meera Sawhney & Ors.* vs. *Lt. Governor*, 89 (2001) DLT 484.
4. *Sh.Raghubir* vs. *Union of India*, WP(C) No.3186/2000 decided on 19.5.2005.
5. *O.P.C.Jain* vs. *ADM* 42 (1990) DLT 478.
6. *Krishan Kumar Malik* vs. *Union of India and Ors.* AIR 1985 Delhi 225.

RESULT: Suit Dismissed.

VALMIKI J. MEHTA, J (ORAL)

1. This is suit for specific performance. The agreement to sell in question is dated 26.9.1988 (Ex.P1) entered into between the plaintiff as the prospective purchaser and the defendants as the prospective sellers. Defendant no.1 acted as an attorney for and on behalf of the defendants no. 2 to 4 at the time of the execution of the agreement to sell. The total

sale consideration was Rs.48,50,000/-. The defendant no.1 for and on behalf of the defendants received a sum of Rs.4,50,000/- as advance. In the plaint, the plaintiff specifically admits that with respect to the subject land there were acquisition proceedings going under the Land Acquisition Act, 1894. There is a reference to notifications under Sections 4 and 6 of the Land Acquisition Act, 1894 in paras 3 and 5 of the plaint. Para 7 of the plaint mentions of an Award being passed acquiring the land on 6.6.1987 i.e. about 9 months before the agreement to sell was entered into between the parties on 26.9.1988. The plaintiff pleads that the defendants were guilty of breach of contract inasmuch as they failed to obtain the permissions to sell the property from the Income Tax Authority and from the appropriate authority under the Delhi Lands (Restriction of Transfer) Act, 1972 (hereinafter referred to as "Act of 1972/1972 Act"). The plaintiff pleads that the defendants failed to perform the contract because a Division Bench of this Court in a case quashed the acquisition proceedings and consequently the price of land increased, giving the reason for the defendants to back out from the contract. Plaint para 15 refers to the factum of the quashing of the acquisition notification issued for various lands, including the subject land. The plaintiff claims to have always been and continuing to be ready and willing to perform his part of contract.

2. Written statements have been filed by the defendants. Defendant no.1 has filed her written statement. Defendants no.2 to 4 have jointly filed their written statements separate from the defendant no.1. Whereas the defendant no.1 has taken up pleas with respect to the agreement in question being barred by the Act of 1972 as also the breach committed by the plaintiff in failing to perform his part of the contract as the sale transaction had to be completed in 45 days, it is also claimed that the plaintiff was not ready and willing to perform his part of the contract and that the discretionary relief for specific performance should not be granted in his favour. The defendants no. 2 to 4 have in their written statement in addition to pleading the aforesaid defences pleaded that the power of attorneys, if any, executed by defendants no.2 to 4 in favour of defendant no.1 were not valid or in any case were cancelled prior to the subject agreement to sell dated 26.9.1988 was entered into between the defendant no.1 and the plaintiff, and thus on the said date the defendant no.1 could not have acted as the power of attorney-holder for defendants no. 2 to 4.

3. The following issues in this case were framed on three separate dates i.e. 11.4.1991, 12.12.1995 and 26.9.2001:-

"11.4.1991

1. Whether the agreement is not enforceable as the provisions of section 269 UC of Income Tax Act were not complied with (PO2 WS)
2. Whether the agreement is barred by Section 4 of the Delhi Land (Restriction of Transfer) Act, 1972 and is void under section 23 of the Contract Act. (PO3 WS).
3. Whether the defendant has obtained the necessary permission, if so, by what date and if not, what is the effect.
4. Whether the plaintiff was ready and willing to perform his part of the contract.
5. Whether the plaintiff is entitled to the relief of specific performance.
6. Relief.

12.12.1995

1. Whether the plaintiff has filed the suit in collusion with defendant No.1? OPD 2-4.
2. Whether the agreement dated 26.9.1988 purported to have been entered on behalf of defendants 2 to 4 was illegal, collusive, fictitious, fraudulent and unauthorized? (Onus to prove on parties.)
3. Whether defendants 2 to 4 did not execute any valid power of attorney in favour of defendant No.1 to sell their shares in the property in question? OPD 2 to 4.
4. Whether the defendants 2 to 4 did not receive any consideration for the purported sale of their interest in the suit property? If so, to what effect? OPD 2-4.
5. Whether the defendants 2 to 4 had revoked and cancelled the power of attorney issued in favour of defendant No.1 prior to 26.9.1988? OPD 2-4.
6. Relief.

26.9.2001

1. Whether payment received by defendant no.1 on behalf of defendants 2 to 4 is illegal and prohibited in view of Section 9 of Foreign Exchange Regulation Act, 1973? OPD 2 to 4"

4. Counsel for the defendants no. 2 to 4 does not press the issue framed on 26.9.2001. During the course of hearing, counsel for the defendants, and in my opinion very fairly, also did not press the issues framed on 12.12.1995 including with respect to lack of authority in the defendant no.1 to execute the agreement to sell, and I say that this has rightly been done inasmuch as, the defendant no.1 herself has filed photocopies of these power of attorneys. Accordingly, no decision is also therefore required to be given with regard to any of the issues as framed on 12.12.1995. Counsel for the defendants also do not press issue no.1 which was framed on 11.4.1991. The real issues are thus issues no. 2 to 5 as framed on 11.4.1991, and which I would now deal with and decide hereinafter.

5. I will take up issue no.2 framed on 11.4.1991 at the outset. In this issue, though the reference is to Section 4 of the Act of 1972, really it is Section 3 which will apply inasmuch as whereas Section 3 applies where the land has been acquired i.e. Award has been passed in the land acquisition proceedings, Section 4 applies when land has not been acquired but it is proposed to be acquired because notifications have been issued under Sections 4 and 6 of the Land Acquisition Act, 1894. Since the issue really is an issue of law, I re-frame issue no.2 in exercise of my powers under Order 14 Rule 5 CPC which permits the Court to amend or strike out issues at any stage of the suit. Issue no.2 is therefore re-framed as under:-

> "Whether the agreement to sell dated 26.9.1988 is barred under Section 3 of the Delhi Lands (Restriction of Transfer) Act, 1972 and is void under Section 23 of the Contract Act, 1872?"

6. The difference of language employed in Sections 3 and 4 of the Act of 1972 is very clear. This difference of language is apparent even from a plain reading of the same. Whereas under Section 3 there is an absolute bar with respect to transferring those lands which have already been acquired by the Government i.e. with respect to which Award has

been passed, those lands which are in the process of acquisition i.e. Award has not been passed, then Section 4 of the Act of 1972 will apply, and as per which, there is no absolute bar with respect to such lands, and, transfer can take place subject to permission of appropriate authority being taken under Section 5 of the 1972 Act, and whose orders are appealable under Section 6 of the Act of 1972. The Supreme Court has with respect to difference between these two provisions observed as under in para 66 of the judgment in the case of **Shanti Sports Club & Anr. vs. Union Of India & Ors.,** 2009 (15) SCC 705:-

> "66. The distinction between the above-reproduced two provisions is that while Section 3 contains an absolute prohibition on transfer of the acquired land by sale, mortgage, gift, lease or otherwise, Section 4 declares that no person shall, except with the previous permissions in writing of the competent authority, transfer or purport to transfer by sale, etc. of any land or part thereof, which is proposed to be acquired in connection with the scheme and in relation to which a declaration to the effect that such land or part thereof is needed for a public purpose has been made by the Central Government and the Central Government has not withdrawn from the acquisition under Section 48(1)."

7. A Division Bench of this Court in the case of **Sh.Raghubir vs. Union of India,** WP(C) No.3186/2000 decided on 19.5.2005, has held that contracts which have been entered into in violation of the 1972 Act are void. Paras 17 and 19 of this judgment are relevant and they read as under:-

> "17. It cannot be disputed that the lands in question were acquired for a public purpose which can itself be a continuing public purpose like 'Planned Development of Delhi'. Large chunks of land are acquired for the development projects from time to time. Once a notification is issued under section 4 of the Act and it is clearly indicated by way of a notification for the benefit of public at large that the land is sought to be acquired by the appropriate Government, in such circumstances, any sale, mortgage or creation of a charge subsequent thereto would be ineffective. Such transactions would be in apparent conflict with the provisions of Delhi Land (Restriction on Transfer) Act as well as the Indian Contract Act, 1872. Under section 3 of the

Delhi Land (Restriction on Transfer) Act, there is a complete prohibition to the effect that no person shall purport to transfer, sale, gift, lease or otherwise any land or part thereof situated in the Union Territory of Delhi which the Central Government under the Land Acquisition or any other law for acquisition of Land for public purpose. Sections 4 and 5 of the abovesaid Act intends to regulate the transfer of the lands in regard to which acquisition proceedings have been initiated and the manner in which such an application is to be filed before the Competent Authority. Section 4 would come into the play where declaration under section 6 has been issued and the land has not been withdrawn by the Central Government under section 48 of the Act. In the case of **Krishan Kumar Malik vs. Union of India and Ors.** AIR 1985 Delhi 225, this Court has held that the effect of permission under the Act if that the same, may be recognized as valid for the purposes of claiming compensation or other benefits arising therefrom, which in absence of the permission would be deemed to be a void sale thus conferring no right at all. In the case of **O.P.C. Jain vs. ADM** 42 (1990) DLT 478, division bench of this court took the view that if no notification under Section 4 and 6 of the Act has been issued, there is no need for obtaining a certificate or permission or no objection certificate under the Provisions under the Delhi Land (Restriction on Transfer), Act. In the case of **Meera Sawhney & Ors. vs. Lt. Governor,** 89 (2001) DLT 484, a Full Bench of this court took the view that the very object of 1972 Act was to curb such illegal transactions of sale and purchase of land. The Bench held as under:-

> "16. We are of the view that NOC is of no legal consequence. We also hold that no permission under Section 5 of the 1972 Act was ever sought regarding transfer of land in question nor any permission was granted. The alleged transfer, therefore, is clearly in violation of the provision of the 1972 Act. It has no legal validity. The Act does not envisage any NOC. Section 5 only recognizes a permission in writing for transfer of lands under Sections 4 and 6 notifications and the permission is to be granted by the Competent Authority under the Act alone. In fact the learned Counsel for the petitioner did not dispute that permission was a sine qua non. His entire case, however, was that the

alleged NOC amounted to permission under Section 5 of the Act. We are enable to accept this. The onus was clearly on the petitioners to show that they had applied for permission under Section 5 and they had obtained the same in accordance with the provisions of Section 5 of the 1972 Act. The petitioners have miserably failed to discharge this onus. The very object of the 1972 Act was to curb such illegal transactions of sale and purchase of lands and to protect unwary customers in this behalf. The object of the Act is given in the preamble which runs as under:

An Act to impose certain restrictions on transfer of land which have been acquired by the Central Government or in respect of which acquisition proceedings have been initiated by the Government, with a view to preventing large scales transactions of purported transfers, or, as the case may be, transfers of such lands to unwary public."

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19. Further more the documents executed in favour of the petitioners (subsequent purchasers) are also opposed to the provisions of the Indian Contact Act in as much as they offend the provisions of Sections 23, 24 of the Act. The Supreme Court in the above judgment have clearly stated that they have no right as these contracts are void. One of the main essentials for a contract to be valid is that the agreement should not be opposed to public policy. Keeping in view the effect of acquisition policy of the State, public at large being beneficiary of such acquisition and there being specific restriction upon transfer of land in terms of the provisions of 1972 Act there can be no doubt that such contracts would be opposed to public policy. No right would vest in such purchasers to question the legality and validity of the notifications."(underlining added).

8. A reading of the aforesaid judgment of the Division Bench shows that contracts which are entered into in violation of the 1972 Act are against public policy and hence are of no legal effect. In the present case inasmuch as admittedly the agreement to sell dated 26.9.1988 was entered into after the land was acquired i.e. after an Award was passed (para 15 of the plaint states this in so many words) clearly, the agreement to sell

dated 26.9.1988 is void. Though it is a moot question whether the plaintiff was or was not aware of the Award being passed, however, I would hold that in the facts of the present case it is inconceivable for the plaintiff not to have known when the agreement to sell was entered into that the subject lands were already acquired by an Award passed under the Land Acquisition Act, 1894. This I say so because no one agrees to pay lakhs of rupees unless the proposed buyer has taken some necessary steps for enquiring the status / title of the lands which are proposed to be bought. A reading of para 7 of the plaint also shows knowledge by the plaintiff that the land had already been acquired before the agreement to sell was entered into. In any case, even if I for the sake of the argument even presume that the plaintiff was not aware, or even both the parties were not aware of the Award having been passed with respect to the subject lands under the Land Acquisition Act, 1894, that cannot take away the binding effect of Section 3 of the 1972 Act which provides that any purported transfer of the land which has already been acquired is absolutely barred. In my opinion, counsel for the plaintiff is not right in contending that what Section 3 bars is only a sale deed and not an agreement to sell. This I say so because the Division Bench in the case of **Sh.Raghubir** (supra) has held that agreements in violation of the provisions of Sections 3 and 4 of the 1972 Act are void being against the public policy. The Division Bench in para 19 of its judgment reproduced above, has specifically held that the documents in the nature of a power of attorney, an agreement to sell, etc. are hit by Section 23 of the Contract Act, 1872 being voilative of the public policy and the intention of the Legislature enacting the 1972 Act, are hence void. I therefore hold that the agreement to sell dated 26.9.1988 itself was void in view of a complete bar to any agreement being entered into which "purport" to transfer by sale etc. land which is acquired under the Land Acquisition Act, 1894 i.e. with respect to lands for which an Award has been passed.

9. Let us now take the case as if the agreement is not void, and then examine as to who is guilty of breach of contract. It will also have to be seen as to whether the plaintiff was always ready and willing to perform his part of the contract, and also as to whether the plaintiff should be held entitled to the discretionary remedy of specific performance.

10. On the aspect as to who is guilty of breach of contract, one

thing is clear that the agreement to sell does provide for the necessary permissions to be obtained by the defendants. The defendants have not proved on record that they ever applied to the Income Tax Authority or appropriate authority under the 1972 Act for permission to transfer the land. Of course, I have already stated above that the appropriate authority under the 1972 Act would never have given permission because there is an absolute bar under Section 3 of the Act where the land has already been acquired, however, so far as the permission of the Income Tax Authority is concerned, I do not find any document placed on record whereby the defendants have applied for permission. In my opinion, however, this is not the end of the matter because the defendant no.1 sent a notice dated 2.12.1988 (Ex.P2), and in which notice there is an allegation against the plaintiff of having committed breach of contract in not completing the transaction within 45 days as provided under the agreement to sell. Reference in this notice, Ex.P2 therefore is clearly to the lack of availability of finances with the plaintiff for completing the transaction of sale. Though this aspect will also be dealt with by me while dealing with the issue of readiness and willingness, it is clear in the facts of the present case, that the plaintiff is also guilty of breach of contract inasmuch as the plaintiff has not filed even a single document of any substance whatsoever of his having financial capacity from 26.9.1988 to the period of 45 days after entering into agreement to sell, and thereafter till filing of the suit. No doubt, plaintiff may want to say that he was liable to have the moneys ready only after the defendants had obtained the necessary permissions, however, one cannot overlook the fact that considering the period of performance to be a short period of 45 days, the plaintiff cannot presume that the permissions will not be applied for; nor obtained, and therefore, he need not be ready to perform his part of the bargain by having the balance sale consideration of Rs. 44,00,000/- in the 45 days period. I do not think that it is open for the plaintiff to urge that he need not have established on record his financial capacity during this period of 45 days after entering into the agreement to sell. I must hasten to add that where no period of performance is provided for or where there is a very long period to enable the proposed buyer for completion of his obligations the position possibly may have been different than in this case where the period is only of 45 days. I therefore hold that both the parties were guilty of breach of their respective obligations to be performed under the agreement dated 26.9.1988.

11. Now on to the related crucial issue no.4 framed on 11.4.1991 with respect to readiness and willingness on the part of the plaintiff to perform his obligation under the agreement to sell. I take up this issue for disposal. Section 16(c) of the Specific Relief Act, 1963 requires that the plaintiff in a suit for specific performance must aver and prove that he has always been ready and willing and continues to be ready and willing to perform his part of the contract. The Courts have interpreted the expression "readiness" under Section 16(c) to mean capacity to perform i.e. financial capacity of a purchaser to pay the balance consideration. Willingness is the intention to go ahead with the agreement to sell.

12. The undisputed position which emerges on record is that the plaintiff has miserably failed to prove his readiness and willingness i.e. his financial capacity with respect to making available the balance sale consideration of Rs. 44,00,000/-. No Income Tax Returns of the plaintiff have been filed for any of the years including post the filing of the suit. The plaintiff has similarly failed to file his bank accounts to show availability with him of amounts to pay balance consideration of Rs. 44,00,000/-. The plaintiff has in fact not even filed details of his assets in any form to show his financial capacity to pay the balance consideration of Rs. 44,00,000/-. In my opinion, merely stating in legal notices or replies that the plaintiff is ready to perform his part of the contract is neither here nor there inasmuch as the issue of readiness is a crucial aspect which requires that by clear-cut evidence, which can be believed by the Court, the plaintiff proves his financial capacity. The plaintiff has wholly failed to do so in the present case. I therefore hold that the plaintiff has totally failed to prove the financial capacity to pay the balance consideration and, hence it cannot be said that the plaintiff was and continued to be ready and willing to perform his part of the obligation under the agreement to sell at all points of time i.e. for the period of 45 days after entering into the agreement to sell, after the period of 45 days till the filing of the suit, and even thereafter when evidence was led. I therefore hold that the plaintiff has failed to comply with the requirement of Section 16(c) of the Specific Relief Act, 1963, and therefore, the plaintiff is not entitled to the relief of specific performance.

13. Now let us assume that the agreement to sell dated 26.9.1988 was not hit by the 1972 Act; the defendants were guilty of breach of

their obligation to perform their part of contract; and that the plaintiff was ready and willing to perform his part; even then, can it be said that the plaintiff is yet entitled to the discretionary relief of specific performance. It will be appropriate at this stage to refer to Section 20 of the Specific Relief Act, 1963, and more particularly sub-Section 3 thereof. Section 20 reads as under:-

20. Discretion as to decreeing specific performance.-

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capably of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:-

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(C) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party."

14. Sub-Section 3 makes it clear that Courts decree specific performance where the plaintiff has done substantial acts in consequence of a contract/agreement to sell. Substantial acts obviously would mean and include payment of substantial amounts of money. Plaintiff may have paid 50% or more of the consideration or having paid a lesser consideration he could be in possession pursuant to the agreement to sell or otherwise is in the possession of the subject property or other substantial acts have been performed by the plaintiff, and acts which can be said to be substantial acts under Section 20(3). However, where the acts are not substantial i.e. merely 5% or 10% etc of the consideration is paid i.e. less than substantial consideration is paid, (and for which a rough benchmark can be taken as 50% of the consideration), and/or plaintiff is not in possession of the subject land, I do not think that the plaintiff is entitled to the discretionary relief of specific performance.

15. The Supreme Court in the recent judgment of **Saradamani Kandappan vs. Mrs. S. Rajalakshmi,** 2011 (12) SCC 18 has had an occasion to consider the aspect of payment of a nominal advance price by the plaintiff and its effect on the discretion of the Court in granting the discretionary relief of specific performance. Though in the facts of the case before the Supreme Court, it was the buyer who was found guilty of breach of contract, however, in my opinion, the observations of the Supreme Court in the said case are relevant not only because I have found in this case the plaintiff/ buyer guilty of breach of contract, but also because even assuming the plaintiff/buyer is not guilty of breach of contract, yet, Section 20 sub-Section 3 of the Specific Relief Act, 1963 as reproduced above clearly requires substantial acts on behalf of the plaintiff/proposed purchaser i.e. payment of substantial consideration. Paras 37 and 43 of the judgment in the case of **Saradamani Kandappan** (supra) are relevant and they read as under:

"37. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of

contracts relating to immovable property, to cover his delays, laches, breaches and "non-readiness". The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. **In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for rupees one lakh and received rupees ten thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining rupees ninety thousand, when the property value has risen to a crore of rupees.**

xxxxxx xxxxxxx xxxxxxx

43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S. Vidyanandam.

(i) The courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) **The courts will apply greater scrutiny and strictness when considering whether the purchaser was "ready and willing" to perform his part of the contract.**

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. The courts will also "frown" upon suits which are not filed immediately after the

breach/refusal. The fact that limitation is three years does not mean that a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three-year period is intended to assist the purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part-performance, where equity shifts in favour of the purchaser."

(emphasis is mine)

16. A reading of the aforesaid paras shows that Courts have a bounden duty to take notice of galloping prices. Surely it cannot be disputed that the balance of convenience i.e. equity in the present case is more in favour of the defendants who have only received 10% of the consideration. If the hammer has to fall in the facts of the present case, in my opinion, it should fall more on the plaintiff than on the defendants inasmuch as today the defendants cannot on receiving of the balance consideration of Rs. 44,00,000/-, and even if exorbitant rate of interest is received thereon, purchase any equivalent property for this amount. Correspondingly, the plaintiff has had benefit of 90% of sale consideration remaining with him (assuming he has any) and which he could have utilized for purchase of assets including an immovable property. In specific performance suits a buyer need not have ready cash all the time and his financial capacity has to be seen and thus plaintiff can be said to have taken benefit of the 90% balance with him. It is well to be remembered at this stage that in a way that part of Specific Relief Act dealing with specific performance is in the nature of exception to Section 73 of the Contract Act, 1872 i.e. the normal rule with respect to the breach of a contract under Section 73 of the Contract Act, 1872 is of damages, and, the Specific Relief Act, 1963 only provides the alternative discretionary remedy that instead of damages, the contract in fact should be specifically enforced. Thus for breach of contract the remedy of damages is always there and it is not that the buyer is remediless. However, for getting specific relief, the Specific Relief Act, 1963 while providing for provisions of specific performance of the agreement (i.e. performance instead of damages) for breach, requires discretion to be exercised by the Court as to whether specific performance should or should not be granted in the facts of each case or that the plaintiff should be held entitled to the ordinary relief of damages or compensation.

17. I have recently in the case titled as **Laxmi Devi vs. Mahavir Singh** being RFA No. 556/2011 decided on 1.5.2012 declined specific performance, one of the ground being payment of only nominal consideration under the agreement to sell. Para 11 of the said judgment reads as under:-

> "11. Besides the fact that respondent/plaintiff was guilty of breach of contract and was not ready and willing to perform his part of the contract lacking in financial capacity to pay the balance consideration, in my opinion, the facts of the present case also disentitle the respondent/plaintiff to the discretionary relief of specific performance. There are two reasons for declining the discretionary relief of specific performance. The first reason is that the Supreme Court has now on repeated occasions held that unless substantial consideration is paid out of the total amount of consideration, the Courts would lean against granting the specific performance inasmuch as by the loss of time, the balance sale consideration which is granted at a much later date, is not sufficient to enable the proposed seller to buy an equivalent property which could have been bought from the balance sale consideration if the same was paid on the due date. In the present case, out of the total sale consideration of Rs. 5,60,000/-, only a sum of Rs. 1 lakh has been paid i.e. the sale consideration which is paid is only around 17% or so. In my opinion, by mere payment of 17% of the sale consideration, it cannot be said that the respondent/plaintiff has made out a case for grant of discretionary relief or specific performance....."

18. Therefore, whether we look from the point of view of Section 20 sub-Section 3 of the Specific Relief Act, 1963 or the ratio of the judgment of the Supreme Court in the case of **Saradamani Kandappan** (supra) or even on first principle with respect to equity because 10% of the sale consideration alongwith the interest will not result in the defendants even remotely being able to purchase an equivalent property than the suit property specific performance cannot be granted. In fact, on a rough estimation, the property prices would have galloped to at least between 30 to 50 times from 1988 till date. I take judicial notice of this that in the capital of our country, like in all other megapolis, on account of the increase in population and rapid urbanization, there is a phenomenal

increase in the prices of urban immovable property.

I therefore hold and answer issue no. 5 against the plaintiff and in favour of the defendants holding that the plaintiff is not entitled to discretionary relief of specific performance.

19. At this stage, I must note that actually the plaintiff should have been cautious enough to claim the alternative relief of damages/compensation and which a prospective purchaser is always entitled to. Unfortunately, the subject suit is only a suit for specific performance in which there is no claim of the alternative relief of compensation/damages. Not only is there no case set out with respect to the claim of damages/compensation, the plaintiff has led no evidence whatsoever as to difference in market price of the subject property and equivalent properties on the date of breach, so that the Court could have awarded appropriate damages to the plaintiff, in case, this Court came to the conclusion that though the plaintiff was not entitled to specific performance, but he was entitled to damages/compensation because it is the defendants who are guilty of breach of contract.

20. The question is therefore what ought to be done. Though this has not been at all argued on behalf of the plaintiff, I think in exercise of my power under Order 7 Rule 7 CPC I can always grant a lesser relief or an appropriate relief as arising from the facts and circumstances of the case. It cannot be disputed that the defendants have received a sum of Rs. 4,50,000/- under the agreement to sell dated 26.9.1988. Considering all the facts of the present case as detailed above, I consider it fit that though an agreement itself was void under the 1972 Act, the plaintiff should be entitled to refund of the amount of Rs. 4,50,000/- alongwith the interest thereon at 18% per annum simple pendente lite and future till realization.

21. In view of the above discussion, suit of the plaintiff claiming the relief of specific performance is dismissed. The plaintiff however will be entitled to a money decree for a sum of Rs. 4,50,000/- alongwith pendente lite and future interest at 18% per annum simple till realization.

22. Parties are left to bear their own costs. Decree sheet be prepared.

ILR (2012) V DELHI 703
CS (OS)

DAVENDER KUMAR SHARMA ….PLAINTIFF

VERSUS

MOHINDER SINGH & ORS. ….DEFENDANTS

(V.K. JAIN, J.)

CS (OS) NO. : 65/2012 DATE OF DECISION: 16.07.2012.

Specific Relief Act, 1963—Section 14(1) (b) and (d)—Brief facts case of the plaintiff is that vide agreement to sell dated 14.03.2011 and a Memorandum of Understanding of even date, defendants No.1 to 10, who are the owners of suit Property agreed that the ground floor of the aforesaid property would be sold by them to the plaintiff for a total sale consideration of Rs. 95 lakh—It was further agreed that on receiving possession of the ground floor of the aforesaid property, the plaintiff would demolish the same and construct a four—storey building on it—The ground floor and the third floor of that building were to come to the share of the plaintiff, whereas, the first and second floor were to come to the share of defendants No. 1 and 2. Defendants No.3 to 10 were to get the amount of Rs.95 lakh—Admittedly, a sum of Rs 66,16,666/- was paid by the plaintiff to defendants No. 1 to 10—However, neither defendants No.3 to 10 have surrendered their share in the suit property in favour of defendants No.1 and 2 nor has the possession of the property been given to the plaintiff—Hence, the present suit for specific performance of the agreement along with an application claiming interim relief for grant of injunction, restraining the defendants from creating third party interest in the suit property.

Held:— Under the agreement, Plaintiff has to construct a four—storey building, after demolishing the existing construction and out of the four floors to be constructed by him, ground and third floor have to come to his share, whereas the first and the second floor have to go to defendants No. 1 and 2—There is no agreement between the parties as regards the specifications of the proposed construction on the suit property—The agreement does not say as to what would happen if the plan, agreed between the parties, is not sanctioned or in the event a plan for construction of floors on the suit property is not sanctioned by the Municipal Corporation/DDA—The agreement is silent as to what happens if the parties do not agree on the specifications of the proposed construction—No mechanism has been agreed between the parties for joint supervision and qualify control during construction—There is no agreement that the specifications of the construction will be unilaterally decided by the plaintiff and/or that the quality of the construction will not be disputed by the defendants—There is no provision in the agreement with respect to supervision of the construction—The agreement does not provide for the eventuality, where the construction raised by the plaintiff is not found acceptable to the defendants—No time has been fixed in the agreement for completion of the proposed new construction—Agreement is silent as to what happens if the plaintiff does not complete the construction or even does not commence it at all after taking possession from the defendants—It is not possible for the Court or even a Court Commissioner to supervise the construction—In these circumstances, it is difficult to disputes that the agreement between the parties is an agreement of the nature envisaged in Section 14(1) (b) and (d) of Specific Relief Act and thus, is not specifically enforceable—Therefore, prima facie, the plaintiff has failed to make out a case with

respect to enforceability of the agreements set up by him. Hence, he is not entitled to grant of any injunction, restraining the defendants from creating third party interest in the suit property or dealing with it in any manner they like.

In the case before this Court, the case of the plaintiff is that under the agreement, he has to construct a four-storey building, after demolishing the existing construction and out of the four floors to be constructed by him, ground and third floor have to come to his share, whereas the first and the second floor have to go to defendants No. 1 and 2. There is no agreement between the parties as regards the specifications of the proposed construction on the suit property. The agreement does not say as to what would happen if the plan, agreed between the parties, is not sanctioned or in the event a plan for construction of floors on the suit property is not sanctioned by the Municipal Corporation/DDA, as the case may be. The agreement is silent as to what happens if the parties do not agree on the specifications of the proposed construction. No mechanism has been agreed between the parties for joint supervision and quality control during construction. There is no agreement that the specifications of the construction will be unilaterally decided by the plaintiff and/or that the quality of the construction will not be disputed by the defendants. There is no provision in the agreement with respect to supervision of the construction. The agreement does not provide for the eventuality, where the construction raised by the plaintiff is not found acceptable to the defendants. The learned counsel for the parties concede that no time has been fixed in the agreement for completion of the proposed new construction. The agreement is silent as to what happens if the plaintiff does not complete the construction or even does not commence it at all after taking possession from the defendants. It is not possible for the Court or even a Court Commissioner to supervise the construction. In these circumstances, it is difficult to dispute that the agreement

between the parties is in agreement of the nature envisaged in Section 14(1) (b) and (d) of Specific Relief Act. If this is so, the contract is not specifically enforceable. Therefore, prima facie, the plaintiff has failed to make out a case with respect to enforceability of the agreements set up by him. Hence, he is not entitled to grant of any injunction, restraining the defendants from creating third party interest in the suit property or dealing with it in any manner they like.

As regards the amount received by defendants No. 1 to 10 from the plaintiff, the learned counsel for the defendants No. 1 to 10, on instructions, states that the aforesaid amount along with interest on that amount at the rate of 12% per annum from the date of its receipt will be deposited by way of an FDR in the name of Registrar General of this Court, within four weeks from today.

The applications stand disposed of accordingly.

The observations made in this order being tentatively would and prima facie would not affect the suit on merits.

CS(OS) No. 65/2012

The parties are directed to appear before Joint Registrar on 29.08.2012 for admission/denial of the documents and the matter be listed before Court for framing of issues on 08.10.2012. **(Para 5)**

Important Issue Involved: Specific Relief Act, 1963—Section 14(1) (b) and (d)—The performance of the obligations of a developer/builder under a collaboration agreement cannot be compared to the statutory liability of a landlord to reconstruct and deliver a shop premises to a tenant under a rent control legislation, which is enforceable under the statutory provisions of the special law.

[Sa Gh]

APPEARANCES:

FOR THE PLAINTIFF : Mr. H.C. Mittal and Mr. Manoj Mital, Adv.

FOR THE DEFENDANTS : Mr. Sunil Sabharwal, Adv. for Ds-1 to 10.

CASE REFERRED TO:

1. *Vinod Seth* vs. *Devinder Bajaj & Anr.* 2010 (6) SCALE.

RESULT: Interim Applications disposed.

V.K. JAIN, J. (ORAL)

IA No. 404/2012 (O. 39 R. 1&2 CPC) and IA No. 8907/2012 (O 39 R. 3A & 4 CPC), by D-1 to 10

1. This is a suit for specific performance of the agreements, alleged to have been executed between the parties. The case of the plaintiff in nutshell is that vide agreement to sell dated 14.03.2011 and a Memorandum of Understanding of even date, defendants No. 1 to 10, who are the owners of Property No. MPL No. WZ-14-C, built on plot Ahata No. 40, measuring 200 sq. yards, out of Khasra No. 217, 218, 219 & 220, Manohar Park, Delhi, agreed that the ground floor of the aforesaid property would be sold by them to the plaintiff for a total sale consideration of Rs 95 lakh. It was further agreed that on receiving possession of the ground floor of the aforesaid property, the plaintiff would demolish the same and construct a four-storey building on it. The ground floor and the third floor of that building were to come to the share of the plaintiff, whereas, the first and second floor were to come to the share of defendants No. 1 and 2. Defendants No. 3 to 10 were to get the amount of Rs 95 lakh. It is an admitted position that a sum of Rs 66,16,666/- was paid by the plaintiff either directly or through defendant No. 11 to defendants No. 1 to 10. However, neither defendants No. 3 to 10 have surrendered their share in the suit property in favour of defendants No. 1 and 2 nor has the possession of the property been given to the plaintiff. The plaintiff has accordingly claimed the following reliefs in this suit:-

> a) pass a decree for specific performance of the Agreement to Sell dated 14.03.2011 in favour of the plaintiff and against defendants 1 to 10 directing defendants 1 to 10 to execute Sale Deed of the Ground floor and had over its vacant physical possession of the suit property bearing MPL-No. WZ-14-C, built on plot ahata No. 40 measuring 200 yds., situated in Manohar Park, out of Khasra No. 217, 218, 219 & 220 area of village Basai Darapur, Delhi in favour of the plaintiff/or his nominated person on receipt of the balance sale consideration, and on the failure of the defendants-1 to 10, the above acts/functions may be got done by the Hon'ble Court through the Registrar of Hon'ble Court;
>
> b) direct defendants 1 to 10 to perform their parts of the MOU dated 14.03.2011 and by getting the building plan of the four storeyed with stilt parking building from the MCD and to be constructed by the plaintiff, the defendants 1 to 10 (especially defendant Nos. 1 and 2) to execute sale deed of the third floor with roof/terrace rights and hand over its physical possession of the suit property bearing MPL No. WZ-14-C, built on plot ahata No. 40 measuring 200 yds., situated in Manohar Park, out of khasra No. 217, 218, 219 & 220 area of village Basai Darapur, Delhi in favour the plaintiff/or his nominated person-defendant No. 11 Sh. Ishwar Chand Bansal, and on the failure of the defendants 1 to 10, the above acts/functions may be got done by the Hon'ble Court through the Registrar of the Hon'ble Court;
>
> c) pass a decree in favour of the plaintiff and against the defendants 1 to 10 for permanent injunction restraining the defendants 1 to 10 from alienating, selling, creating third party interest or parting with possession of the suit property, bearing MPL No. WZ-14-C, built on plot ahata No. 40 measuring 200 yds., situated in Manohar Park, out of khasra No. 217, 218, 219 & 220 area of village Basai Darapur, Delhi."

2. The case of the plaintiff is that the balance sale consideration was to be paid at the time of execution of the sale deed and prior to that defendants No. 3 to 10 had to surrender their share in the suit property in favour of defendants No. 1 and 2, in order to enable them to execute the sale deed in his favour. The case of the contesting defendants, on the other hand, is that the whole of the payment of Rs 95 lakh was to be made within 120 days from the date of the agreement.

3. Relying upon the Supreme Court decision in **Vinod Seth v. Devinder Bajaj & Anr.** 2010 (6) SCALE, the learned counsel for the defendants No. 1 to 10 has submitted that a contract of the nature set up by the plaintiff cannot be enforced and, therefore, no interim order can be passed, restraining them from creating any third party interest in the suit property, during pendency of the suit. In the case before Supreme Court, the plaintiff had an oral agreement between the parties and the oral terms alleged by him were as follows:-

> "a) The defendants will apply to the DDA for conversion of the above property from leasehold to freehold and within 2-3 months the defendants will handover vacant physical possession of the above property to the plaintiff.
>
> b) The plaintiff will reconstruct the above property from his own money/funds with three storeys i.e. ground floor, first floor and second floor.
>
> c) Out of the said reconstructed three storeyed building, the plaintiff shall be entitled to own and possess the ground floor; and the first and second floors will be owned and possessed by the defendants.
>
> d) Besides bearing the expenses of construction and furnishing etc. of the proposed three storeyed building, the plaintiff shall also pay a sum of Rs. 3,71,000/- to the defendants at the time of handing over possession of the above house for reconstruction.
>
> e) Out of the agreed consideration of Rs.3,71,000/-, a sum of Rs.51,000/- was paid to the defendants in cash and the remaining consideration of Rs.3,20,000/- was to be paid to the defendants at the time of handing over possession of the above house for reconstruction. In token of the same a Receipt for Rs.51,000/- was duly executed by defendant No.1.
>
> f) On getting conversion of the above property from leasehold to freehold, the above agreement/proposed collaboration of the property bearing No. A-1/365, Paschim Vihar, New Delhi and the above terms and conditions were to be reduced into writing vide an appropriate Memorandum Of Understanding to be duly executed by the parties i.e. the builder and the owners of the above property."

It was also alleged by him that he had paid a sum of Rs 51,000/- to respondent No. 1 who had also executed a receipt in his favour. Alleging failure of the respondents to comply with the agreement, he filed a suit for specific performance of the collaboration agreement.

No application for interim relief was filed in that case. The learned Single Judge of this Court directed the plaintiff to file an affidavit/undertaking to the Court to the effect that in the event of his not succeeding in the suit, he will pay a sum of Rs 25 lakh by way of damages to the defendants. The intra-court appeal against that order having been dismissed by the Division Bench of this Court, the matter was taken by the plaintiff to Supreme Court by way of Special Appeal. The Court, while disposing of the appeal, inter alia, observed and held as under:-

> "8.1) It is doubtful whether the collaboration agreement, as alleged by the appellant, is specifically enforceable, having regard to the prohibition contained in section 14(1) (b) and (d) of the Specific Relief Act, 1963. The agreement propounded by the appellant is not an usual agreement for sale/transfer, where the contract is enforceable and if the defendant fails to comply with the decree for specific performance, the court can have the contract performed by appointing a person to execute the deed of sale/transfer under Order XXI Rule 32(5) of the Code of Civil Procedure ('Code' for short). The agreement alleged by the appellant is termed by him as a commercial collaboration agreement for development of a residential property of the respondents. Under the alleged agreement, the obligations of the respondents are limited, that is, to apply to DDA for conversion of the property from leasehold to freehold, to submit the construction plan to the concerned authority for sanction, and to deliver vacant possession of the suit property to the appellant for development. But the appellant/plaintiff has several obligations to perform when the property is delivered, that is, to demolish the existing building, to construct a three-storeyed building within one year in accordance with the agreed plan, deliver the first and second floors to the respondents and also pay a token cash consideration of Rs.3,71,000/-. The performance of these obligations by appellant is dependant upon his personal

qualifications and volition. If the court should decree the suit as prayed by the appellant (the detailed prayer is extracted in para 3 above) and direct specific performance of the "collaboration agreement" by respondents, it will not be practical or possible for the court to ensure that the appellant will perform his part of the obligations, that is demolish the existing structure, construct a three-storeyed building as per the agreed specifications within one year, and deliver free of cost, the two upper floors to the respondents. Certain other questions also will arise for consideration. What will happen if DDA refuses to convert the property from leasehold to freehold? What will happen if the construction plan is not sanctioned in the manner said to have been agreed between the parties and the respondents are not agreeable for any other plans of construction? Who will decide the specifications and who will ensure the quality of the construction by the appellant? The alleged agreement being vague and incomplete, require consensus, decisions or further agreement on several minute details. It would also involve performance of a continuous duty by the appellant which the court will not be able to supervise. The performance of the obligations of a developer/builder under a collaboration agreement cannot be compared to the statutory liability of a landlord to reconstruct and deliver a shop premises to a tenant under a rent control legislation, which is enforceable under the statutory provisions of the special law. A collaboration agreement of the nature alleged by the appellant is not one that could be specifically enforced. Further, as the appellant has not made an alternative prayer for compensation for breach, there is also a bar in regard to award of any compensation under section 21 of the Specific Relief Act."

4. Section 14 of Specific Relief Act, to the extent it is relevant, reads as under:-

14. **Contracts not specifically enforceable.-**(1) The following contracts cannot be specifically enforced, namely:—

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the

court cannot enforce specific performance of its material terms;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.

5. In the case before this Court, the case of the plaintiff is that under the agreement, he has to construct a four-storey building, after demolishing the existing construction and out of the four floors to be constructed by him, ground and third floor have to come to his share, whereas the first and the second floor have to go to defendants No. 1 and 2. There is no agreement between the parties as regards the specifications of the proposed construction on the suit property. The agreement does not say as to what would happen if the plan, agreed between the parties, is not sanctioned or in the event a plan for construction of floors on the suit property is not sanctioned by the Municipal Corporation/DDA, as the case may be. The agreement is silent as to what happens if the parties do not agree on the specifications of the proposed construction. No mechanism has been agreed between the parties for joint supervision and quality control during construction. There is no agreement that the specifications of the construction will be unilaterally decided by the plaintiff and/or that the quality of the construction will not be disputed by the defendants. There is no provision in the agreement with respect to supervision of the construction. The agreement does not provide for the eventuality, where the construction raised by the plaintiff is not found acceptable to the defendants. The learned counsel for the parties concede that no time has been fixed in the agreement for completion of the proposed new construction. The agreement is silent as to what happens if the plaintiff does not complete the construction or even does not commence it at all after taking possession from the defendants. It is not possible for the Court or even a Court Commissioner to supervise the construction. In these circumstances, it is difficult to dispute that the agreement between the parties is in agreement of the nature envisaged in Section 14(1) (b) and (d) of Specific Relief Act. If this is so, the contract is not specifically enforceable. Therefore, prima facie, the plaintiff has failed to make out a case with respect to enforceability of the agreements set up by him. Hence, he is not entitled to grant of any injunction, restraining the defendants from creating third party interest in the suit property or dealing with it in any manner they like.

As regards the amount received by defendants No. 1 to 10 from the

plaintiff, the learned counsel for the defendants No. 1 to 10, on instructions, states that the aforesaid amount along with interest on that amount at the rate of 12% per annum from the date of its receipt will be deposited by way of an FDR in the name of Registrar General of this Court, within four weeks from today.

The applications stand disposed of accordingly.

The observations made in this order being tentatively would and prima facie would not affect the suit on merits.

CS(OS) No. 65/2012

The parties are directed to appear before Joint Registrar on 29.08.2012 for admission/denial of the documents and the matter be listed before Court for framing of issues on 08.10.2012.

ILR (2012) V DELHI 713
CRL.

HARBEEN ARORA ….PETITIONER

VERSUS

JATINDER KAUR ….RESPONDENT

(MUKTA GUPTA, J.)

CRL. M.C. NO. : 2777/2010 DATE OF DECISION: 16.07.2012

Code of Criminal Procedure, 1973—Section 205— Petitioner instituted complaint case before Metropolitan Magistrate (M.M) against respondent and two other accused persons for offences punishable u/s 147/201/327/352/388/392/411/452/120B/506 IPC— Respondent moved application seeking exemption from personal appearance which was allowed unconditionally by M.M—Aggrieved, petitioner,

challenged the order on ground that respondent had failed to respond summons issued to her twice by Ld. M.M and first application moved by her seeking exemption permanently was already rejected— Percontra, respondent urged that dispute between parties was of civil nature and criminal complaint was filed only to pressurize her to withdraw civil suit filed by her family members against petitioner. Held:— An accused at the first instance or at any stage can be granted exemption from appearing personally in Court where the learned Court deems it appropriate and the offences are not of serious nature. Secondly, while granting such exemption from personal appearance, the accused shall always be represented through an advocate who, on his behalf, will proceed in the trail matter. Thirdly, the statements made by the counsel for the accused person shall be deemed to be made with the consent of the accused and the accused shall have no objection in taking evidence in his absence. Lastly, there is a word of caution attached to the use of discretion that a Court while granting such applications, will not pass blanket order, and has to make sure that the accused will not dispute his/her identity or any other proceedings that take places in his absence and in presence of his counsel. The Court may impose conditions to secure the presence of the accused as and when required.

The requirement of attendance of the accused at the trial is not a mere formality, but is to ensure that the trial is allowed to be conducted in an expedient manner and is not hampered or prejudiced in the absence of the accused. Therefore, while granting permanent exemption from appearance, the Magistrate is deemed to have reserved his discretion to call the accused person to appear in person during the trial, at any stage of the proceeding, if necessary. **(Para 11)**

Important Issue Involved: An accused at the first instance or at any stage can be granted exemption from appearing personally in Court where the learned Court deems it appropriate and the offences are not serious nature. Secondly, while granting such exemption from personal appearance, the accused shall always be represented through an advocate who on his behalf will proceed in the trial/matter. Thirdly, the statements made by the counsel for the accused person shall be deemed to be made by the consent of the accused and the accused shall have no objection in taking evidence in his absence. Lastly, there is a word of caution attached to the use of discretion that a Court while granting such applications will not pass blanket orders, and has to make sure that the accused will not dispute his/her identity or any other proceedings that take places in his absence and in presence of his counsel.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Siddharth Aggarwal with Mr. Simon Benjamin, Adv.

FOR THE RESPONDENT : Ms. Kanwaljit Kochar with Mr. G.S. Arora, Adv.

CASES REFERRED TO:

1. *S.V. Muzumdar* vs. *Gujarat State Fertilizer Company Limited* (2005) 4 SCC 173.
2. *Bashkar Industries Ltd.* vs. *Bhiwani Denim and Apparels Ltd & Ors.* (2001) 7 SCC 401.

RESULT: Petition allowed.

MUKTA GUPTA, J.

1. By the present Petition, the Petitioner seeks setting aside of the order dated 12th July, 2010 passed in CC No. 1396/1/2004 granting permanent exemption from personal appearance to the Respondent herein.

2. Learned counsel for the Petitioner contends that the learned Metropolitan Magistrate erred in law while granting the permanent exemption to the Respondent herein, Jatinder Kaur. It is contended that the present case was not an appropriate case to grant permanent exemption from personal appearance to the Respondent. Learned Metropolitan Magistrate failed to appreciate the fact that the demeanor of the Respondent herein was not appropriate and she failed to respond to the summons issued to her twice by the learned Trial Court. The first application moved by the Respondent herein for permanent exemption from appearance was rejected by the learned Metropolitan Magistrate observing insufficiency of grounds and frivolity in the application. Thus, when the learned Trial Court granted/allowed the second application on same grounds, the same was an abuse of process of law and the learned Trial Court could not have reviewed its own order. Principles of natural justice have been violated in the present case as the learned Metropolitan Magistrate while granting/allowing the application of the Respondent herein did not grant opportunity to be heard to the Petitioner. Application of the Respondent was not supported by any document fortifying the facts stated by the Respondent in her application. The order of the learned Metropolitan Magistrate allowing the application of the Respondent unconditionally is in contravention of the law laid down in **Bhaskar Industries Ltd v. Bhiwani Denim and Apparels Ltd & Ors.** (2001) 7 SCC 401 wherein the Hon'ble Supreme Court held that while granting an application for permanent exemption from personal appearance in Summon cases, precaution has to be taken. No condition has been imposed while granting permanent exemption to the Respondent. When the Respondent appeared in the Court on 23rd March, 2012, she stated that she was not aware of the statement made by her counsel. Thus the implied terms of the exemption are also violated by the Respondent. Hence the impugned order is erroneous and is liable to be set aside.

3. Per contra, learned counsel for the Respondent states that the dispute between the parties is of civil nature and a criminal complaint has been filed only to pressurize the Respondent to withdraw the civil suit filed against the Petitioner and her family members. It is further stated that the impugned order suffers from no illegality. She had produced the relevant record before the Trial Court when the application was heard and allowed. Further, the contention of the learned counsel for the Petitioner that the acts of the Respondent are only to cause delay has no merit as

the Respondent was present on all occasions during the pendency of the proceedings and delay was always attributable to the Petitioner. Learned counsel contends that there was some miscommunication between the Respondent and her counsel thus she stated that she did not know the terms of settlement. There is no merit in the present petition and thus the same be dismissed

4. I have heard learned counsels for parties.

5. Briefly, the case of the Petitioner is that the Petitioner had instituted Complaint Case No.1396/1/2004 before the learned Metropolitan Magistrate against the Respondent and two other accused persons for offences punishable under Sections 147/201/327/352/388/392/ 411/452/120B/506 IPC. In the complaint it is alleged that on 10th September, 1971, the residential plot at A-16/10 Vasant Vihar, New Delhi was granted to Petitioner's father's family i.e. late Giani Pratap Singh, Anand Singh (Petitioner's father), Satinder Kaur (other accused person) and Amrik Singh by Delhi Administration (Land and Building Department) byway of perpetual sub lease. The Respondent is the Petitioner's aunt who is a permanent resident of the United Kingdom. It is alleged that on 28th November, 2004 the accused persons began pressurizing the Petitioner to vacate the rooms/ portions in her occupation and on 29th November, 2004 they began throwing items belonging to Petitioner's family out of the garage which was in occupation of the Respondent. They threatened to throw her out of the property and even kill her. On 30th November, 2004, the Petitioner lodged a written complaint with the SHO PS Vasant Vihar in relation to the events described above, which was duly received by him. Since the Petitioner's parents were out of town, and she was all by herself at the time, she employed two private security guards for the protection of her property and person from the accused persons. On being informed that the Petitioner has lodged a written complaint against them, the accused persons (along with two other unknown persons) barged into the Petitioner's room in a fury, and began throwing/ damaging/ destroying her belongings, including her Ph.D. thesis, which they tore apart. They threatened, abused and physically assaulted her. The Petitioner even appealed to the SHO, PS Vasant Vihar to restore possession of the said premises to her, but her plea fell on deaf ears. Therefore, the Petitioner was constrained to file a criminal complaint against the accused persons before the Ld. Metropolitan Magistrate, New Delhi, for offences

under Sections 120-B, 147, 201, 327, 352, 388, 392, 411, 452 and 506 IPC on 14th December, 2004. After recording pre-summoning evidence, the Ld. Metropolitan Magistrate was pleased to issue summons on 3rd July, 2008 to the accused persons including the Respondent herein for offences under Sections 352, 452 and 506 IPC for 19th December, 2008. The accused persons failed to appear before the Ld. Metropolitan Magistrate on the next date i.e., on 19th December, 2008 and fresh summons were issued to them for 17th July, 2009. However, even on that date the accused persons failed to appear before the Ld. Metropolitan Magistrate, thus again summons had to be issued to them for 26th November, 2009. On 12th July, 2010 the matter was fixed for recording of pre-charge evidence, but the Complainant was unable to be personally present as she was unwell. When the matter was called out by the Ld. Metropolitan Magistrate, counsel for the Petitioner was not present. The Petitioner's counsel thereafter found that the matter had already been heard for the day. Therefore, he mentioned the matter before the Ld. Metropolitan Magistrate and moved the application for exemption from personal appearance on behalf of the Petitioner which was allowed and duly recorded by the Ld. Metropolitan Magistrate in his order dated 12th July, 2010. However, on a subsequent inspection of the court file, it was found that the Respondent had moved an application for grant of permanent exemption from personal appearance before the Ld. Metropolitan Magistrate on 12th July, 2010 which had been allowed unconditionally. This order of learned Metropolitan Magistrate granting permanent exemption from appearance is impugned in the present petition.

6. Before proceeding further, it is relevant to reproduce Sec. 205 CrPC which reads as follows:

> **"Section 205 - Magistrate may dispense with personal attendance of accused**
>
> (1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.
>
> (2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided."

7. A bare perusal of Sec. 205 CrPC shows that the learned Metropolitan Magistrate has a discretion under this Section that he may dispense with the personal attendance of the accused in suitable cases at any stage. It is trite law that the exemption from appearance under Section 205 CrPC cannot be claimed by a person as a matter of right but while dealing with an application for exemption, the discretion of the Court is to be applied judiciously.

8. Hon'ble Supreme Court in **Bashkar Industries Ltd v. Bhiwani Denim and Apparels Ltd & Ors** (2001) 7 SCC 401 observed :

> "17. Thus, in appropriate cases the magistrate can allow an accused to make even the first appearance through a counsel. The magistrate is empowered to record the plea of the accused even when his counsel makes such plea on behalf of the accused in a case where the personal appearance of the accused is dispensed with. Section 317 of the Code has to be viewed in the above perspective as it empowers the court to dispense with the personal attendance of the accused (provided he is represented by a counsel in that case) even for proceeding with the further steps in the case. However, one precaution which the court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in court and that he has no objection in taking evidence in his absence. This precaution is necessary for the further progress of the proceedings including examination of the witnesses.
>
> 18. A question could legitimately be asked - what might happen if the counsel engaged by the accused (whose personal appearance is dispensed with) does not appear or that the counsel does not co-operate in proceeding with the case? We may point out that the legislature has taken care for such eventualities. Section 205(2) says that the magistrate can in his discretion direct the personal attendance of the accused at any stage of the proceedings. The last limb of Section 317(1) confers a discretion on the magistrate to direct the personal attendance of the accused at any subsequent

> stage of the proceedings. He can even resort to other steps for enforcing such attendance.
>
> 19. The position, therefore, bogs down to this: It is within the powers of a magistrate and in his judicial discretion to dispense with the personal appearance of an accused either throughout or at any particular stage of such proceedings in a summons case, if the magistrate finds that insistence of his personal presence would itself inflict enormous suffering or tribulations to him, and the comparative advantage would be less. Such discretion need be exercised only in rare instances where due to the far distance at which the accused resides or carries on business or on account of any physical or other good reasons the magistrate feels that dispensing with the personal attendance of the accused would only be in the interests of justice. However, the magistrate who grants such benefit to the accused must take the precautions enumerated above, as a matter of course. We may reiterate that when an accused makes an application to a magistrate through his duly authorised counsel praying for affording the benefit of his personal presence being dispensed with the magistrate can consider all aspects and pass appropriate orders thereon before proceeding further."

9. Hon'ble Supreme Court in **S.V.Muzumdar vs. Gujarat State Fertilizer Company Limited** (2005) 4 SCC 173, observed:-

> "13....It has to be borne in mind that while dealing with an application in terms of Section 205 of the Code, the court has to consider whether any useful purpose would be served by requiring the personal attendance of the accused or whether progress of the trial is likely to be hampered on account of his absence. We make it clear that if at any stage the trial court comes to the conclusion that the accused persons are trying to delay the completion of trial, it shall be free to refuse the prayer for dispensing with personal attendance."

10. Thus, in view of the law laid down by Hon'ble Supreme Court, the clear position of law which emerges is that an accused at the first instance or at any stage can be granted exemption from appearing personally in Court where the learned Court deems it appropriate and the offences

are not of serious nature. Secondly, while granting such exemption from personal appearance, the accused shall always be represented through an advocate who on his behalf will proceed in the trial/matter. Thirdly, the statements made by the counsel for the accused person shall be deemed to be made by the consent of the accused and the accused shall have no objection in taking evidence in his absence. Lastly, there is a word of caution attached to the use of discretion that a Court while granting such applications will not pass blanket orders, and has to make sure that the accused will not dispute his/her identity or any other proceedings that take places in his absence and in presence of his counsel. The Courts may impose conditions to secure the presence of the accused as and when required.

11. The requirement of attendance of the accused at the trial is not a mere formality, but is to ensure that the trial is allowed to be conducted in an expedient manner and is not hampered or prejudiced in the absence of the accused. Therefore, while granting permanent exemption from appearance, the Magistrate is deemed to have reserved his discretion to call the accused person to appear in person during the trial, at any stage of the proceeding, if necessary.

12. Applying the abovementioned criterions to the present case, it may be noted that the accused/Respondent along with the Petitioner and the co-accused Satinder Kaur and Harleen Kaur agreed to enter into mediation for settling the *inter se* dispute. The mediation order dated 4th June, 2011 was received by the learned Trial Court on 4th July, 2011. Subsequently, the matter remained pending before the learned Trial Court on the pretext that settlement talks were going on between the parties and therefore the matter was adjourned. On 13th January, 2012, it was stated before the learned Metropolitan Magistrate by all the parties i.e. the Petitioner herein, the counsel for the Respondent herein and the other two accused persons that they are ready to agree to the settlement arrived between them before the Mediation Cell and that their statements have been recorded separately. Learned counsel for the Respondent on the same date made statement on behalf of the Respondent that he has authority to make statement on behalf of Respondent/accused No.1 who had been permanently exempted to appear before the Court. He stated that accused No.1/Respondent herein has no objection to the agreed terms of settlement before Mediation Cell on 4th June, 2011.

13. Thereafter when the matter was fixed for pre-charge evidence on 23rd March, 2012, Respondent Jatinder Kaur entered appearance in Court before learned Metropolitan Magistrate and her statement was recorded on SA wherein she stated that she did not want to settle the dispute as per the mediation settlement. She further stated that she was not aware about the statement made on her behalf by her counsel through whom she had been permanently exempted from appearance on 13th January, 2012. Thus, it is relevant to note that the Respondent resiled/ negated the statement made by her counsel on her behalf through whom she was permanently exempted. Such a demeanour of the Respondent is unwarranted.

14. A perusal of the order dated 12th July, 2010 passed by learned Metropolitan Magistrate shows that the order was passed vaguely without keeping in mind the precautions embibed in the Section. The Court could not have passed a blanket order without imposing appropriate conditions.

15. Keeping in view the facts and circumstances of the present case, I deem it proper to allow the present petition. The order dated 12th July, 2010 passed by learned Metropolitan Magistrate granting permanent exemption to Respondent is set aside. The Respondent is at liberty to file an application seeking exemption from personal appearance as and when required. The learned Metropolitan Magistrate will consider the same in accordance with the law.

16. Petition is disposed of.

ILR (2012) V DELHI 723
CS (OS)

PRAGATI CONSTRUCTION COMPANY (P) LTD. ….PLAINTIFF

VERSUS

DELHI DEVELOPMENT AUTHORITY ….DEFENDANT

(VALMIKI J. MEHTA, J.)

CS (OS) NOS. : 993/1983 AND 1633/1983 **DATE OF DECISION: 16.07.2012**

Indian Contract Act, 1872—Section 74—Measure of damages—Brief Facts—Auction notice was inserted in the newspaper by defendant for plot No. 8, Asaf Ali Road having an area of approximately 351 sq. mts—Plaintiff was the successful bidder quoting the price of 1.92 crores—At the fall of hammer, the plaintiff deposited 25% of the amount viz 48 lacs, as per the terms and conditions of the auction—Forfeiture has been affected by DDA on account of the plaintiff having committed default in having failed to deposit the balance amount—Case argued and predicated by the plaintiff on the ground that even if the plaintiff is guilty of breach of contract, yet, the defendant cannot forfeit the huge amount of 48 lacs, and, at best, can only forfeit a reasonable amount inasmuch as the liquidated damages amount of 48 lacs is only the upper limit of damages and the defendant having failed to plead and prove the loss caused to it, therefore, in terms of the law as laid down under Section 74 the plaintiff is entitled to refund of the amount of 48 lacs less a reasonable amount which can only be forfeited by the defendant—Defendant claims the entitlement to forfeit the amount of 48 lacs only on the ground that such a term of forfeiture exists in the terms and conditions of the auction—Issues framed and evidence led. Held:— Section 74 provides only the upper limit of damages/ amounts which are allowed to be forfeited by a proposed seller in case of breach of contract by the proposed buyer, and in case the seller wants to forfeit an unduly large amount which is paid by the proposed buyer to the proposed seller, it is necessary that the proposed seller pleads and proves the loss which is caused to him. Defendant having failed to plead and prove the loss on account of failure by the plaintiff to perform his part of the contract, it cannot be allowed to forfeit an amount except a reasonable amount of 5 lacs—Plaintiff will also be entitled to pendente lite and future interest @ 9% per annum simple till realization.

In the case of **Fateh Chand Vs Balkishan Dass** (supra), the facts before the Supreme Court were that the proposed buyer under an agreement to sell paid two amounts, first the earnest money amount of Rs. 1,000/- and second another amount of Rs. 24,000/- which was given towards part price paid in advance. In the agreement to sell there were clauses of forfeiture of both the amounts of Rs. 1,000/- and also of the advance price paid of Rs. 24,000/- if there was a breach by the proposed buyer. The Supreme Court has held that Section 74 provides only the upper limit of damages/amounts which are allowed to be forfeited by a proposed seller in case of breach of contract by the proposed buyer, and in case the seller wants to forfeit an unduly large amount which is paid by the proposed buyer to the proposed seller, it is necessary that the proposed seller pleads and proves the loss which is caused to him. The underlined portions of the paras of the judgment of the Supreme Court in the case of **Fateh Chand Vs Balkishan Dass** (supra) bring out the following salient points:-

(i) Huge amounts which are deposited by the proposed buyer with the proposed seller, and which in terms of covenants of the agreement can be forfeited, then, such

covenants are in the nature of penalty and are hit by Section 74 of the Contract Act, 1872.

(ii) In case of breach of contract, a seller under an agreement to sell can only forfeit a reasonable amount out of the amount which has been paid by the proposed seller, the liquidated damages clauses or the forfeiture clauses only provide an upper limit.

(iii) In the absence of loss having been pleaded and proved by the proposed seller to have been caused to him, merely because there is a clause in the contract which allows forfeiture of a huge amount, the said huge amount cannot be forfeited unless to that extent of the said huge amount the proposed seller pleads and proves that loss in fact has been caused to him.

(iv) Even on the loss being pleaded and proved by the proposed seller, the proposed seller can in such a case forfeit amounts lying with him of the proposed buyer, however, what can be forfeited is to the upper limit of the amount of liquidated damages provided i.e. the amounts of liquidated damages are the upper limit of damages and Courts cannot award more than the amount of liquidated damages provided for. **(Para 8)**

Important Issue Involved: Indian Contract Act—Section 74—Measure of damages of damages—Section 74 provides only the upper limit of damages/amounts which are allowed to be forfeited by a proposed seller in case of breach of contract by the proposed buyer, and in case the seller wants to forfeit an unduly large amount which is paid by the proposed buyer to the proposed seller, it is necessary that the proposed seller pleads and proves the loss which is caused to him.

[Sa Gh]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Amit P. Deshpande, Adv.

FOR THE RESPONDENT : Ms. Maldeep Sidhu, Adv.

CASES REFERRED TO:

1. *Bhuley Singh* vs. *Khazan Singh and Ors.* in RFA No.422/2011 decided on 9.11.2011.
2. *V.K. Ashokan* vs. *CCE,* 2009 (14) SCC 85.
3. *Fateh Chand* vs. *Balkishan Dass,* (1964) 1 SCR 515; AIR 1963 SC 1405.

RESULT: Suit decreed.

VALMIKI J. MEHTA, J. (ORAL)

1. These suits are being disposed of by this common judgment inasmuch as facts and issues in both the cases are almost identical. The basic issue revolves around the entitlement of the defendant/Delhi Development Authority (DDA) to forfeit the amount of 25% price deposited by the plaintiff pursuant to an auction. Forfeiture has been affected by DDA on account of the plaintiff having committed default in having failed to deposit the balance amount. For the sake of convenience, facts of CS(OS) No.993/1983 are stated. At the end of judgment, the directions/decree which will be specifically required with respect to CS(OS) No.1633/1983 shall be passed.

CS(OS) No.993/1983

2. The facts of the case are that the defendant was seeking to auction commercial plots. Auction notice was inserted in the newspaper for such plots situated at Asaf Ali Road, New Delhi. The subject matter of the present suit pertains to auction of plot No.8, Asaf Ali Road having an area of approximately 351 sq. mts. Defendant conducted the auction on 12.3.1982. The plaintiff was the successful bidder quoting the price of Rs. 1.92 crores. At the fall of hammer, the plaintiff deposited 25% of the amount viz Rs. 48 lacs, as per the terms and conditions of the auction. Though many issues were framed in this case pertaining to the relevant pleadings of the respective parties including as to who is guilty of breach of contract, however, I need not refer to such facts and issues

inasmuch as this case has been argued and predicated by the plaintiff on the ground that even if the plaintiff is guilty of breach of contract, yet, the defendant cannot forfeit the huge amount of Rs. 48 lacs, and, at best, can only forfeit a reasonable amount inasmuch as the liquidated damages amount of Rs. 48 lacs is only the upper limit of damages and the defendant having failed to plead and prove the loss caused to it, therefore, in terms of the law as laid down under Section 74 of the Contract Act, 1872, the plaintiff is entitled to refund of the amount of Rs. 48 lacs less a reasonable amount which can only be forfeited by the defendant. This reasonable amount, as argued by the plaintiff, can be at the very best, considering the huge amount which has been deposited by the plaintiff, 10% of the amount deposited of Rs. 48 lacs.

3. Before this Court, counsel for the defendant could not dispute that as per the record on behalf of the defendant, neither are there any pleadings, nor any evidence led as to any loss which was suffered by the defendant on account of default committed by the plaintiff. The defendant claims the entitlement to forfeit the amount of Rs. 48 lacs only on the ground that such a term of forfeiture exists in the terms and conditions of the auction, being clause No.2(iv). The said terms have been proved and exhibited as Ex.P1.

4. In this case, the following issues were framed on 1.12.1983:-

"1.Whether the plaint has been signed, verified and instituted by a duly authorized and competent person?

2. Whether the present suit is barred under Order II Rule 2 of the Code of Civil Procedure?

3. Whether the present suit is not maintainable as alleged in the preliminary objections?

4. Whether plaintiff has waived its right to sue as alleged in para 3 of the preliminary objections in written statement?

5. What were the terms and conditions for the auction of the plot in suit held on 12th March, 1982?

6. Whether plaintiff has been ready and willing to perform the various terms and conditions of the auction?

7. Whether the architectural control drawings were not exhibited and/or furnished as per requirement of the terms and conditions of the auction as contained in Annexure 'A' to the plaint?

8. Whether any erasure referred to in para 15 of the plaint was unilaterally made by the defendant after the auction? If so, to what effect?

9. Whether the architectural control drawings must necessarily conform to the municipal bye-laws, master plan, zonal plan, Delhi Development Act or the building bye-laws thereunder?

10. Whether there is any trade practice of making payment of balance auction money by instalments dependent on the plaintiff negotiating with its prospective purchaser?

11. Whether the plea covered by issue No.10 is not contrary to the terms and conditions of the auction and is available to the plaintiff?

12. Whether defendant violated any of the terms and conditions of the auction?

13. Whether clause 2(iv) of the terms and conditions detailed in Annexure 'A' to the plaint is not enforceable?

14. Whether defendant is entitled to forfeit the sum of Rs. 48,00,000/- or any other sum?

15. Whether plaintiff is entitled to damages? If so, to what amount?

16. Whether plaintiff is entitled to interest? If so, at what rate and to what amount?

17. Relief."

5. I may note that at an earlier stage the suit CS(OS) No.1633/1983 was decreed by a learned Single Judge of this Court, however, the appellate Court remanded the matter back for rehearing inasmuch as the appellate Court found that the Single Judge had not dealt with all the issues in the case.

At the outset therefore I put on record that none of the issues

which were framed on 1.12.1983, and which pertained to the issue that defendant is guilty of breach of contract and its consequential and related issues of which onus was on the plaintiff are not pressed by the plaintiff, except issue Nos.13 and 17. These issues are accordingly decided against the plaintiff. The other issues upto issue No.12 of which onus was on the defendant in view of the detailed discussion below were not pressed by the defendant and are thus decided against the defendant. At one stage counsel for the defendant had sought to place reliance upon Section 65 of the Contract Act, 1872, however, in view of the law as laid down by the Supreme Court under Section 74 of the said Act, that aspect was not argued further. I would also like to further note that there in any case cannot be any issue of acquiescence or estoppel against the plaintiff in view of Section 74 of the Contract Act, 1872 and that there cannot be an estoppel against law.

6. The only issues which I am thus called upon to decide are issue Nos. 13 to 17 above. The main issues are, issue No.13 as to validity of Clause 2(iv) of Ex.P1 being the terms and conditions of the auction and the related issue No.14 with respect to entitlement of the defendant to forfeit the amount of Rs. 48 lacs or any other lesser sum. I now deal with them and also the issue of interest.

7. The law with respect to entitlement of a proposed seller to forfeit an amount or part of the amount has been dealt with by the Constitution Bench judgment of the Supreme Court no less than 50 years back. The celebrated decision of the Supreme Court in this regard is the judgment in the case of **Fateh Chand Vs Balkishan Dass,** (1964) 1 SCR 515; AIR 1963 SC 1405. The relevant paras of the judgment of the Supreme Court in the said case are paras 8, 10, 15 and 16 which read as under:-

> "8. The claim made by the plaintiff to forfeit the amount of Rs 24,000 may be adjusted in the light of Section 74 of the Indian Contract Act, which in its material part provides:-
>
> "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable

> compensation not exceeding the amount so named or as the case may be, the penalty stipulated for."
>
> The section is clearly an attempt to eliminate the sometime elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.
>
> **10.** Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. **In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case.** Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage"; **it does not justify the award of**

compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

15. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.

16. There is no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant, save as to the loss suffered by him by being kept out of possession of the property. There is no evidence that the property had depreciated in value since the date of the contract provided; nor was there evidence that any other special damage had resulted. The contact provided for forfeiture of Rs 25,000 consisting of Rs, 1039 paid as earnest money and Rs 24,000 paid as part of the purchase price. The defendant has conceded that the plaintiff

was entitled to forfeit the amount of Rs 1000 which was paid as earnest money. We cannot however agree with the High Court that 13 percent of the price may be regarded as reasonable compensation in relation to the value of the contract as a whole, as that in our opinion is assessed on an arbitrary assumption. The plaintiff failed to prove the loss suffered by him in consequence of the breach of the contract committed by the defendant and we are unable to find any principle on which compensation equal to ten percent of the agreed price could be awarded to the plaintiff. The plaintiff has been allowed Rs 1000 which was the earnest money as part of the damages. Besides he had use of the remaining sum of Rs 24,000, and we can rightly presume that he must have been deriving advantage from that amount throughout this period. In the absence therefore of any proof of damage arising from the breach of the contract, we are of opinion that the amount of Rs 1000 (earnest money) which has been forfeited, and the advantage that the plaintiff must have derived from the possession of the remaining sum of Rs 24,000 during all this period would be sufficient compensation to him. It may be added that the plaintiff has separately claimed mesne profits for being kept out possession for which he has got a decree and therefore the fact that the plaintiff was out of possession cannot be taken, into account in determining damages for this purpose. The decree passed by the High Court awarding Rs.11,250 as damages to the plaintiff must therefore be set aside." (Underlining added)

8. In the case of **Fateh Chand Vs Balkishan Dass** (supra), the facts before the Supreme Court were that the proposed buyer under an agreement to sell paid two amounts, first the earnest money amount of Rs. 1,000/- and second another amount of Rs. 24,000/- which was given towards part price paid in advance. In the agreement to sell there were clauses of forfeiture of both the amounts of Rs. 1,000/- and also of the advance price paid of Rs. 24,000/- if there was a breach by the proposed buyer. The Supreme Court has held that Section 74 provides only the upper limit of damages/amounts which are allowed to be forfeited by a proposed seller in case of breach of contract by the proposed buyer, and in case the seller wants to forfeit an unduly large amount which is paid by the proposed buyer to the proposed seller, it is necessary that the

proposed seller pleads and proves the loss which is caused to him. The underlined portions of the paras of the judgment of the Supreme Court in the case of **Fateh Chand Vs Balkishan Dass** (supra) bring out the following salient points:-

(i) Huge amounts which are deposited by the proposed buyer with the proposed seller, and which in terms of covenants of the agreement can be forfeited, then, such covenants are in the nature of penalty and are hit by Section 74 of the Contract Act, 1872.

(ii) In case of breach of contract, a seller under an agreement to sell can only forfeit a reasonable amount out of the amount which has been paid by the proposed seller, the liquidated damages clauses or the forfeiture clauses only provide an upper limit.

(iii) In the absence of loss having been pleaded and proved by the proposed seller to have been caused to him, merely because there is a clause in the contract which allows forfeiture of a huge amount, the said huge amount cannot be forfeited unless to that extent of the said huge amount the proposed seller pleads and proves that loss in fact has been caused to him.

(iv) Even on the loss being pleaded and proved by the proposed seller, the proposed seller can in such a case forfeit amounts lying with him of the proposed buyer, however, what can be forfeited is to the upper limit of the amount of liquidated damages provided i.e. the amounts of liquidated damages are the upper limit of damages and Courts cannot award more than the amount of liquidated damages provided for.

9. I have had an occasion to consider an issue similar to the issue in the present case in the judgment in the case of **Bhuley Singh Vs. Khazan Singh and Ors.** in RFA No.422/2011 decided on 9.11.2011. I have in **Bhuley Singh's** case referred to the judgment of the Supreme Court in the case of **Fateh Chand Vs Balkishan Dass** (supra) and a later judgment of the Supreme Court following the judgment of **Fateh Chand Vs Balkishan Dass** (supra) viz. **V.K. Ashokan Vs. CCE** 2009 (14) SCC 85. As per the conspectus of the legal position emerging, I held that in the facts in Bhuley Singh's case out of the total amount of Rs. 5 lacs which was lying with the proposed seller he could only be allowed to forfeit an amount of Rs. 50,000/- once the proposed buyer is found

guilty of breach of contract i.e. failing to perform his part of obligations under the agreement to sell since the seller failed to plead and prove the actual loss caused to him. The facts of the present case are similar inasmuch as the contract of sale could not go through because the plaintiff for various reasons failed to deposit the balance amount of the agreed price. The observations made by me in paras 5 to 7 of the judgment in the case of **Bhuley Singh** are relevant and the same read as under:-

> "5. In my opinion, the appeal deserves to be allowed as the appellant/plaintiff has rightly claimed a lesser relief of Rs.5,00,000/- instead of a sum of Rs.10,00,000/- as claimed in the plaint and which he is surely entitled to under Order 7(7) CPC. The Trial Court had framed a specific issue being issue no.2 as to whether plaintiff was entitled to recover Rs.5,00,000/- from the respondents/defendants paid against the receipt dated 5.1.2007 and therefore the argument of the counsel for the respondents/defendants that no issue was framed has no force. Once there was a specific issue, this issue could well have been urged so that the appellant/plaintiff could claim a sum of Rs.5,00,000/- from the respondents/defendants which was paid under the agreement to sell as an earnest amount on the basis of the undisputed position that the respondents/defendants did not plead or prove that loss had been caused to them so as to entitle them to forfeit the amount paid to them under the Agreement to Sell. The Constitution Bench of the Supreme Court in the case of **Fateh Chand** (supra) makes it more than clear that a mere breach of contract by a buyer does not entitle the seller to forfeit the amount as received, unless, loss is proved to have been caused to the prospective sellers/defendants/respondents. The Supreme Court in the judgment of **Fateh Chand** (supra) allowed forfeiture of amount of Rs.1,000/- out of the amount paid of Rs.25,000/-. I may also note that nomenclature of a payment is not important and what is important is really the quantum of price which is paid. In the present case, the total price payable for the suit property is Rs.20,00,000/- and therefore 25% of the payment made stricto sensu cannot be an earnest money, though it has been called so. Only a nominal amount can be an earnest money, inasmuch as, the object of such a clause is to allow

forfeiture of that amount to a nominal extent as held in the case of **Fateh Chand** (supra). For example can it be said that 100% of the price or 75%/80% of the price or 50% of the price is earnest money so that it can be forfeited. The answer surely is in the negative. Such high amounts called earnest money will be in the nature of penalty and thus hit by Section 74 of the Indian Contract Act, 1872 in view of **Fateh Chand's** case. The principles laid down in **Fateh Chand's** case; that forfeiture of a reasonable amount is not penalty but if forfeiture is of a large amount the same is in the nature of penalty attracting the applicability of Section 74; have been recently reiterated by the Supreme Court in the case of **V.K.Ashokan vs. CCE,** 2009 (14) SCC 85.

6. I also cannot accept the argument as raised on behalf of the respondents/defendants that it was the duty of the appellant/ plaintiff to plead that no loss was caused to the respondents/ defendants and therefore the amount could not have been forfeited because once it is admitted that the respondents/defendants have received an amount, and it was their/defendants./respondents, case that they were entitled to forfeit such amount, it was for the respondents/defendants therefore to plead and prove that they could forfeit such an amount. Thus unless, there are pleadings and proof as to entitlement to forfeit the amount on account of loss being caused there cannot be a forfeiture in view of the ratio of Fateh Chand's case.

7. Since in the facts of the present case, the Trial court has held the appellant/plaintiff guilty of breach of contract, therefore, the respondents/defendants are entitled to only forfeit a reasonable amount. In my opinion, a reasonable amount of Rs.50,000/- can, at best, be allowed to be forfeited out of an amount of Rs.5,00,000/- paid by the appellant/plaintiff to the respondents/ defendants. At this stage, I also reject the argument of the respondents/defendants that they only received a sum of Rs.4 lacs because the agreement to sell dated 5.1.2007 itself mentions in so many words that the respondents/defendants have received Rs. 5 lacs and thus no evidence to contradict the terms of a written document is permissible vide Section 92 of the Indian Evidence Act, 1872."

An S.L.P. was preferred against the judgment of **Bhuley Singh** and which S.L.P.(Civil) No.8689/2012 was dismissed by the Supreme Court on 26.3.2012.

10. The issue therefore boils down to the fact that what should be the amount which the defendant should be allowed to forfeit out of the 25% price deposited of Rs. 48 lacs. Applying the ratio of the Supreme Court in the case of **Fateh Chand Vs Balkishan Dass** (supra) and my judgment in the case of **Bhuley Singh**, I hold that in the facts and circumstances of the present case an amount of Rs. 5 lacs should be considered as sufficient for being forfeited by the defendant on account of breach committed by the plaintiff, the proposed buyer. At the cost of repetition, it is stated that the defendant having failed to plead and prove the loss on account of failure by the plaintiff to perform his part of the contract, it cannot be allowed to forfeit an amount except a reasonable amount of Rs. 5 lacs. Though the counsel for the plaintiff, at one stage, sought to rely upon letter dated 6.11.1989 of the defendant to show that actually the defendant has subsequently sold the plot for a higher amount of Rs. 1.99 crores, however, since this document is not proved and exhibited, I am not looking into this document. In any case, I have already noted that the plaintiff has agreed to forfeiture of a reasonable amount.

11. The plaintiff will also be entitled to pendente lite and future interest @ 9% per annum simple till realization. I may state that actually this rate of interest would not even cover inflation cost to the plaintiff. Also, the defendant would have also earned (taken benefit) of the amount of the plaintiff deposited with it by earning a return thereon.

12. In view of the above, the suit of the plaintiff is decreed for a sum of Rs. 43 lacs in favour of the plaintiff and against the defendant-DDA alongwith pendente lite and future interest @ 9% per annum simple. Plaintiff is also allowed proportionate costs of the suit. Decree sheet be prepared.

CS(OS) No.1633/1983

13. The facts of the present case are more or less identical to suit No.993/1983 except that plaintiff has deposited an amount of Rs. 46.5 lacs. I therefore allow the defendant No.1/DDA to forfeit a sum of Rs. 4.5 lacs in the facts and circumstances of the present case. The plaintiff

therefore will be entitled to a decree for a sum of Rs. 42 lacs and against the defendant –DDA alongwith pendente lite and future interest @ 9% per annum simple till realization. Plaintiff will also be entitled to proportionate costs of the suit. Decree sheet be prepared.

ILR (2012) V DELHI 737
RFA

HINDUSTAN PAPER CORPORATION ….APPELLANT

VERSUS

NAV SHAKTI INDUSTRIES P. LTD. ….DEFENDANT

(V.K. JAIN, J.)

RFA NO. : 366/2003 DATE OF DECISION: 16.07.2012

Limitation Act, 1963—Article 1—Contract Act, 1872—Section 8—Appellant is a Government company manufacturing paper from which respondent had been purchasing from time to time—Respondent deposited a sum of Rs. 1,00,000/- with the appellant as security deposit which was to carry interest @ 15% per annum—Plaintiff/respondent was maintaining a current account of the defendant/appellant and there were occasions when it made excess/advance payment to the appellant/defendant, which was subject to adjustment for future purchases—A sum of Rs. 2,81.161.47 was alleged to be due to it from the appellant/defendant, being the excess/advance payment made to it—Plaintiff/respondent filed the aforesaid suit for recovery of that amount with interest, amounting to Rs. 74,718.75/- and also claimed the security deposit of Rs.1,00,000/- which it deposited with the appellant/defendant, thereby raising a total claim of

Rs.4,55,880.24.—The appellant/defendant filed the written statement contesting the suit and took a preliminary objection that the suit was barred by limitation—On merits, it was alleged that the entire amount due to the plaintiff/respondent, including the amount of security deposit was paid by way of a cheque of Rs. 1,40,113.77 which was accepted by the plaintiff/respondent—Decree for recovery of Rs. 3,55,744.96 with proportionate costs and pendent elite and future interest @ 10% per annum was passed in favour of the respondent and against the appellant—Hence present appeal. Held:— Excess/advance payment by the plaintiff/respondent to the appellant/defendant being towards purchase of the paper, cannot be said that the said payment was made towards an independent transaction, unconnected with the contract between the parties for purchase of paper—Of course, the appellant/defendant was under an obligation to either deliver the goods for which advance payment was received by it or it was required to refund the advance/excess payment to the plaintiff/respondent—However, this liability of the appellant/defendant arose under the same contract under which it was supplying paper to the plaintiff/respondent and was not an obligation independent of the contract for sale of paper to the plaintiff/respondent—There was only one contract between the parties, and that was for the sale of paper by the appellant/defendant to the respondent/plaintiff—Suit filed by the plaintiff/respondent was barred by limitation—Section 8 of Contract Act provides that the performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal—By remitting payment of Rs. 1,40,113.77/- towards full and final settlement of the account, the defendant/appellant gave an offer to the plaintiff/respondent for setting the account on payment of that

amount—The plaintiff/respondent accepted the offer by encashing the cheque sent by the defendant/ appellant—This led to a contract between the parties for settling the account on payment of 1,40,113.77/- by the defendant/appellant to the plaintiff/respondent—Not open to the plaintiff/respondent to now say that since they had credited the said payment as part payment, they are entitled to recover the balance amount from the defendant/respondent—Having enchased a cheque of Rs.1,40,113.77/-, the plaintiff/ respondent was not entitled to any further payment from the appellant/defendant—impugned judgment and decree set aside.

Section 8 of Contract Act, to the extent it is relevant, provides that the performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal. By remitting payment of Rs 1,40,113.77/- towards full and final settlement of the account, the defendant/appellant gave an offer to the plaintiff/ respondent for settling the account on payment of that amount. The plaintiff/respondent accepted the offer by encashing the cheque sent by the defendant/appellant. This led to a contract between the parties for settling the account on payment of 1,40,113.77/- by the defendant/appellant to the plaintiff/respondent. Therefore, it is not open to the plaintiff/respondent to now say that since they had credited the said payment as part payment, they are entitled to recover the balance amount from the defendant/respondent.

(Para 8)

Important Issue Involved: When payment is made in advance as consideration for supply of goods, the seller is under an obligation to make the supply. This obligation arises from the contract and not on account of the payment alone.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Nikhilsh Krishanan.

FOR THE RESPONDENT : Mr. K. Bhardwaj, Mr. Ajay Sejwal & Mr. S.K. Tanwar.

CASES REFERRED TO:

1. *Polar Industries Ltd.* vs. *Arihant Communications,* RFA No. 662/2003, decided on 16.01.2012.
2. *Sunil Dutt* vs. *Shankar Gupta,* RFA No. 85/2011, decided on 08.02.2011.
3. *New India Insurance Company Ltd.* vs. *Ghulam Mohi-Ud-Din* 2006 (2) JKJ 523.
4. *Manish Garg* vs. *East India Udyog Ltd.* 2001(3) AD (Delhi) 493.
5. *State of West Bengal* vs. *G Gopal Chander Paul* 1995(3) SCC 324.
6. *Indian Metal Industries* vs. *United Glass Co.* 34 (1988) DLT 405.
7. *Union of India (UOI)* vs. *Rameshwarlall Bhagchand* 1973 AIR Guwahati.
8. *Kerala High Court in Union Bank Ltd.* vs. *N. Raghavan Nair* AIR 1959 Ker 204.
9. *Hindustan Forest Company* vs. *Lal Chand and Ors.* AIR 1959 SC 1349.
10. *Behari Lal* vs. *Radhye Shyam* AIR 1953 ALL745.

RESULT: Appeal Allowed.

V.K. JAIN, J.

1. This appeal is directed against the judgment and decree dated 27.01.2003, whereby a decree for recovery of Rs.3,55,744.96 with proportionate costs and pendente lite and future interest @ 10% per annum was passed in favour of the respondent and against the appellant. The facts giving rise to filing of this appeal can be summarized as under:-

The appellant is a Government company manufacturing paper, which the respondent had been purchasing from it from time to time. The respondent had deposited a sum of Rs.1,00,000/- with the appellant as security deposit, which was to carry interest @ 15% per annum. The case of the plaintiff/ respondent was that it was maintaining a current account of the defendant/appellant and there were occasions when it made excess/advance payment to the appellant/defendant, which was subject to adjustment for future purchases. A sum of Rs.2,81.161.47 was alleged to be due to it from the appellant/defendant, being the excess/ advance payment made to it. The plaintiff/respondent filed the aforesaid suit for recovery of that amount with interest, amounting to Rs.74,718.75/- and also claimed the security deposit of Rs.1,00,000/- which it deposited with the appellant/defendant, thereby raising a total claim of Rs.4,55,880.24.

2. The appellant/ defendant filed the written statement contesting the suit and took a preliminary objection that the suit was barred by limitation. On merits, it was alleged that the entire amount due to the plaintiff/respondent, including the amount of security deposit was paid by way of a cheque of Rs.1,40,113.77 which was accepted by the plaintiff/ respondent.

It was also alleged in the written statement that the plaintiff/ respondent had indented about 450 m.t. of papers which the defendant/ appellant made available to the plaintiff/respondent. The plaintiff/respondent however failed to lift the entire indented paper and lifted only 198 m.t. This, according to the defendant/appellant, resulted in considerable loss to it on account of payment of godown rent for storage of the indented and subsequently unlifted papers, insurance related charges and premium of the stored and unlifted paper besides the expenses incurred in finding out the alternative buyers. It was alleged in the written statement that the godown rent and insurance cost to the extent of Rs. 78,878/- was debited to the account of the plaintiff/respondent.

3. On the pleadings of the parties, the following issues were framed:-

1. Whether the plaintiff is entitled to the suit amount? OPP
2. If so, the rate of interest which the plaintiff is entitled? OPP
3. Whether the suit is not barred by limitation? OPD

4. Whether the suit is not properly valued for the purpose of the court fees and jurisdiction? OPD
5. Relief.

4. ISSUE NO.4:

This issue was decided by the learned Trial Judge in favour of the plaintiff/respondent. The finding on this issue has not been assailed by the learned counsel for the appellant/defendant.

5. ISSUE NO. 3:

This suit was filed on 2nd February, 1995. Admittedly, no payment was made by the plaintiff/respondent to the defendant/appellant after December, 1991. The defendant/appellant neither made any past payment in writing nor did it acknowledge any liability towards the plaintiff/ respondent at any time between December 1991 and February 1995. Computed from the date of the excess payment, the suit would be barred by limitation. Even the stockistship of the plaintiff/respondent was terminated vide letter dated 4th February, 1992. The learned counsel for the plaintiff/respondent has, however, contended that since Article 1 of the Limitation Act applies to the suit filed by them, computed from the end of the year in which the last entry in the mutual current account which the plaintiff/respondent was maintaining in respect of its transaction with the defendant/appellant, the suit was within limitation. Article 1 of the Limitation Act reads as under:-

PART I— SUITS RELATING TO ACCOUNTS			
1.	For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three years	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.

The above referred Article came up for consideration before the Supreme Court in **Hindustan Forest Company v. Lal Chand and Ors.** AIR 1959 SC 1349. In the case before the Supreme Court, the parties had entered into an agreement whereby the respondents/sellers were to supply food articles to the appellant/buyer at the rates and times specified

therein. The buyer had paid a sum of Rs.3,000/- to the seller and agreed to pay a further sum of Rs.10,000/- as advance within 10-12 days of the agreement. The balance was to be paid after the expiry of every month. Since the whole of the price was not paid by the buyer, the sellers filed a suit for recovery of the balance price of the goods. The suit was dismissed as barred by limitation. The Division Bench of the High Court in an appeal filed by the seller, held that Article 115 of the J&K Limitation Act (which is identical to the Limitation Act, 1963) was applicable and therefore the suit was not barred. It was an admitted position in that case that the last item in the account having been entered in June, 1947, the suit having been filed in October, 1950 was within limitation. Therefore, the question which came up before the Supreme Court for consideration was as to whether the account between the parties was a mutual account. The High Court had, inter alia had given the following reason while holding the suit to be within limitation:

> "The point then reduces itself to the fact that the defendant company had advanced a certain amount of money to the plaintiffs for the supply of grains. This excludes the, question of monthly payments being made to the plaintiffs. The plaintiffs having received a certain amount of money, they became debtors to the defendant company to this extent, and when the supplies exceeded Rs. 13,000 the defendant company became debtors to the plaintiff and later on when again the plaintiff 's supplies exceeded the amount paid to them, the defendants again became the debtors. This would show that there were reciprocity of dealings and transactions on each side creating independent obligations on the other."

Setting aside the decision of the Division Bench of the High Court, the Supreme Court inter alia held as under:

> "The learned Judges however held that the payment of Rs. 13,000 by the buyer in advance before delivery had started, made the sellers the debtor of the buyer and had created an obligation on the sellers in favour of the buyer. This apparently was the reason which led them to the view that there were reciprocal demands and that the transactions had created independent obligations on each of the parties. This view is unfounded. The sum of Rs. 13,000 had been paid as and by way of advance payment of

> price of goods to be delivered. It was paid in discharge of obligations to arise under the contract, It was paid under the terms of the contract which was to buy goods and pay for them. It did not itself create any obligation on the sellers in favour of the buyer; it was not intended to be and did not amount to an independent transaction detached from the rest of the contract. The sellers were under an obligation to deliver the goods but that obligation arose from the contract and not from the payment of the advance alone. If the sellers had failed to deliver goods, they would have been liable to refund the monies advanced on account of the price and might also have been liable in damages, but such liability would then have arisen from the contract and not from the fact of the advances having been made. Apart from such failure, the buyer could not recover the monies paid in advance. No question has, however, been raised as to any default on the part of the sellers to deliver goods. This case therefore involved no reciprocity of demands. Article 115 of the Jammu and Kashmir Limitation Act cannot be applied to the suit."

5. The facts of the case before this Court are identical to the case of **Hindustan Forest Company** (supra). In that case, the buyer had paid an initial amount of Rs 3,000/- to the seller and advance payment of Rs 10,000/- thereafter. In the case before this Court, it has been specifically alleged in the plaint that there were occasions when the plaintiff/respondent made excess/advance payment to the appellant/defendant which was subject to adjustment for future purchases. Therefore, any excess payment made by the plaintiff/respondent was to be treated as advance payment towards purchase of the paper by the plaintiff/respondent from the defendant/appellant. The excess/advance payment by the plaintiff/respondent to the appellant/defendant being towards purchase of the paper, it cannot be said that the said payment was made towards an independent transaction, unconnected with the contract between the parties for purchase of paper by the plaintiff/respondent from the defendant/appellant. Of course, the appellant/defendant was under an obligation to either deliver the goods for which advance payment was received by it or it was required to refund the advance/excess payment to the plaintiff/respondent. But, this liability of the appellant/defendant arose under the same contract under which it was supplying paper to the plaintiff/respondent and was not an obligation independent of the contract for sale

of paper to the plaintiff/respondent. There was only one contract between the parties, and that was for the sale of paper by the appellant/defendant to the respondent/plaintiff. Had there been no contract between the parties for sale of paper by the appellant/defendant to the plaintiff/respondent, there would have been no occasion for the plaintiff/respondent to make any excess payment to the appellant/defendant. The suit filed by the plaintiff/respondent being squarely covered by the decision of Supreme Court **Hindustan Forest Company** (supra), there is no escape from the conclusion that it was barred by limitation.

6. The learned counsel for the plaintiff/respondent has relied upon the decision of this Court in **Polar Industries Ltd. v. Arihant Communications,** RFA No. 662/2003, decided on 16.01.2012, **Sunil Dutt v. Shankar Gupta,** RFA No. 85/2011, decided on 08.02.2011 and **Indian Metal Industries v. United Glass Co.** 34 (1988) DLT 405, on the other hand, the learned counsel for the appellant has placed reliance upon the decision of a Division Bench of this Court in **Manish Garg v. East India Udyog Ltd.** 2001(3) AD (Delhi) 493, and decision of **Kerala High Court in Union Bank Ltd. v. N. Raghavan Nair** AIR 1959 Ker 204. However, since the matter before this Court is squarely covered by the decision of Supreme Court in **Hindustan Forest Company** (supra), I need not undertake an analysis of these judgments. The issue is, therefore, decided against the plaintiff/respondent and in favour of the appellant/defendant.

7. Issues No. 1, 2 and 5

It is an admitted fact that the appellant/defendant had made a payment of Rs 1,40,113.77/-. This payment was made on 01.07.1993. The case of the appellant/defendant is that the payment was made after settling the entire account between the parties. The case of the plaintiff/respondent, on the other hand, is that this was a part payment. If the payment dated 01.07.1993 is held to be a part payment, the suit would be within the prescribed period of limitation since in view of the provisions contained in Section 19 of Limitation Act, 1963, a fresh period of limitation starts from the date of part payment in writing and admittedly the payment was made by way of a cheque, which amounts to payment in writing. I find that in his examination-in-chief recorded in the Court on 19.02.1997, PW-1 Kishan Chand Goel, director of the plaintiff-company specifically stated that the defendant, after expiry of one and a half years after

termination of the contract, sent a cheque of Rs 1,40,000/- and something which, 'according to them', was in full and final settlement of the account of the plaintiff. Though in his cross-examination recorded after a long gap, PW-1 tried to get out of this admission, but, in my view, such attempt would not take away the admission made by him in the earlier examination, particularly when there is no explanation of the admission made by him. It is thus evident that while remitting payment of Rs 1,40,113.77/-, the appellant/defendant had made it clear to the plaintiff/respondent that the said payment was being made in full and final settlement of the account between the parties. Even otherwise, part payments are ordinarily made for a lump sum amount or for the whole or balance amount of one or more invoices and not for an odd amount such as Rs 1,40,113.77/-. This is yet another indicator that this payment was remitted by the defendant/appellant in full and final settlement of its account. If this conditional payment was not acceptable to the plaintiff/respondent, it ought not to have been accepted the same. However, not only did the plaintiff/respondent accept that payment by encashing the cheque, no communication was sent by it to the defendant/appellant stating therein that the payment was being accepted by it as a part payment and not as a payment in full and final settlement of the account between the parties.

8. Section 8 of Contract Act, to the extent it is relevant, provides that the performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal. By remitting payment of Rs 1,40,113.77/- towards full and final settlement of the account, the defendant/appellant gave an offer to the plaintiff/respondent for settling the account on payment of that amount. The plaintiff/respondent accepted the offer by encashing the cheque sent by the defendant/appellant. This led to a contract between the parties for settling the account on payment of 1,40,113.77/- by the defendant/appellant to the plaintiff/respondent. Therefore, it is not open to the plaintiff/respondent to now say that since they had credited the said payment as part payment, they are entitled to recover the balance amount from the defendant/respondent.

9. The view taken by me finds support from a number of decisions on the subject. In **Union of India (UOI) v. Rameshwarlall Bhagchand** 1973 AIR Guwahati, the consignee served a notice on the Railway

Administration, claiming compensation of Rs.2368.25. The General Manager, N.F. Railway Pandu, sent a cheque of Rs. 1173.19 to the consignee in full and final settlement of his claim. The consignee encashed the cheque, but subsequently informed the General Manager that the cheque received satisfied only a part of the claim and consequently he (the General Manager) should reopen the case and remit the balance amount. Referring to the provisions of Section 8 of the Contract Act, the High Court observed that the General Manager sent a cheque of Rs.1173.19 to the plaintiffs, subject to the condition that it was in full and final settlement of the claim. If the plaintiffs believed that the amount of the cheque fell short of the sum legally due to them, the obvious course for them to adopt was to write immediately to the General Manager, while retaining the cheque with them, that they would not accept the amount of the cheque as fully settling their claim, and that if he (the General Manager) would not agree with them they would send back the cheque to him or treat it in partial satisfaction of their claim. It was further observed that the plaintiffs should have proceeded to deal with the cheque, only after getting a reply from the General Manager to such a communication. The High Court also observed that had the plaintiff written to the General Manager before encashing the cheque, he may have been withdrawn the proposal made by him, but by getting the amount of the cheque first and then writing a letter to the General Manager that its amount did not satisfy their claim fully, the plaintiffs placed the General Manager in a situation where he could not be restored to his former position. The High Court held that the plaintiffs having encashed the cheque, without first communicating to the General Manager that they did not agree to the proposal made by him, they must be assumed, in terms of Section 8, to have accepted his proposal by mere acceptance of the consideration of Rs. 1173.19. It was further held that the subsequent letter sent by the plaintiffs, denying that the amount of the cheque had fully settled their claim would not alter the position in any manner to the detriment of the defendants.

In **Behari Lal v. Radhye Shyam** AIR 1953 ALL745, the defendants made a proposal to the plaintiffs by his letter, enclosing a cheque, offering the money under that cheque, in full satisfaction of the rent, subject to the condition that the plaintiff gave him a credit for the sum, which, according to him, was spent in the repair of the bungalow. It was held that the plaintiff shall be deemed to have accepted the correctness of the

sum which the defendants claimed to have spent towards the repairs and it was not open to him to turn around and say that he has accepted the cheque in part satisfaction and was disputing the amount spent on repairs. In **New India Insurance Company Ltd. v. Ghulam Mohi-Ud-Din** 2006 (2) JKJ 523, the High Court observed that when a party accepts the claim in full and final settlement, then that party is stopped by his act and conduct to raise the issue that the claim had not been settled. In taking this view, the High Court placed reliance upon the decision of Supreme Court in **State of West Bengal v. G Gopal Chander Paul** 1995(3) SCC 324. I, therefore, have no hesitation in holding that having encashed a cheque of Rs.1,40,113.77/-, the plaintiff/respondent was not entitled to any further payment from the appellant/defendant. The issues are decided in favour of the defendant/appellant and against the plaintiff/respondent.

In view of the findings recorded by me on the issues, the impugned judgment and decree dated 27.01.2003 are hereby set aside. However, in the facts and circumstances of the case, there shall be no order as to costs either in the suit or in the appeal.

ILR (2012) V DELHI 748
CRIMINAL APPEAL

NARAIN SINGH ….APPELLANT

VERSUS

STATE ….RESPONDENT

(SANJIV KHANNA & S.P. GARG, JJ.)

CRIMINAL APPEAL NO. : 337/1998 **DATE OF DECISION: 16.07.2012**

Indian Penal Code, 1860—Section 302, 324 Appellant challenged his conviction u/s 302/324 urging various important witnesses like boys who had transported

deceased to hospital and other important persons not produced or even named as witnesses, which made prosecution case doubtful. Held:— Once the prosecution evidence is reliable and trustworthy and proves the offence, Failure to examine other witnesses is not fatal. Non—examination of further witnesses does not affect the credibility of the witnesses relied upon. It is the quality of the evidence and not the number of witnesses that matter.

Immediately after the incident and on suffering injuries, Prem Pal PW-6 ran away from site, i.e. house of the appellant. This was natural. He wanted to save himself. It was also natural for PW-6 Prem Pal to run to the residence of the mother of Pradeep Kumar and inform her about the attack on her son. Thereafter, he returned and had spoken to the boys at the bus stand. The conduct of PW6 Prem Pal is, therefore, not abnormal but understandable and natural. The conduct does not create any doubt. The said boys have not been produced as witnesses, but this need not distract us and does not cast or create premonition about the prosecution case. Failure to examine the boys or the person, who had taken Pradeep Kumar to the hospital, does not affect and dilute the statement of Prem Pal PW6 as an eye witness to the offence. There is ample evidence and material to show that the deceased Pradeep Kumar was taken to the hospital by a third person and was seen by the Examining Medical Officer Dr. Preetish S. Vaidhyanathan (PW11). He was brought to the hospital at 3.25 PM soon after the incident and was declared dead at 3.55 PM. MLC recording the said facts was proved and marked Ex.PW 11/A. In these circumstances, we do not think that the prosecution has failed to prove or establish the commission and involvement of the appellant because they have not examined the boys or the person who had brought Pradeep Kumar to the hospital. The said boys were not eye witnesses to the occurrence but post occurrence witnesses. Their non examination is not fatal to the prosecution case, when the eye witness to the occurrence, PW 6 Prem Pal's statement

is trustworthy and reliable. It is corroborated by medical evidence, forensic evidence, photographs etc. In such cases, the question which has to be raised and answered is whether the evidence actually produced is reliable or not? Once it is held that the prosecution evidence is reliable and trustworthy and proves the offence, failure to examine other witnesses is not fatal. Non examination of further witnesses does not affect the credibility of the witnesses relied upon. It is quality of the evidence and not the number of witnesses that matters. (See **Pal Singh vs. State of U.P.,** (1979) 4 SCC 345, **State of UP vs. Anil Singh,** AIR 1988 SC 1998 and **Krishna Mochi vs. State of Bihar,** (2002) 6 SCC 81). **(Para 11)**

Important Issue Involved: Once the prosecution evidence is reliable and trustworthy and proves the offence failure to examine other witnesses is not fatal. Non-examination of further witnesses does not affect the credibility of the witnesses relied upon. It is the quality of the evidence and not the number of witnesses that matter.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Jayant K. Sud, Mr. Harendra Singh and Mr. Vishal Dabas, Adv.

FOR THE RESPONDENT : Ms. Richa Kapoor, APP.

CASES REFERRED TO:

1. *Arjun* vs. *State of Maharashtra*, (2012) 5 SCC 530.
2. *Jagtar Singh @ Jagga @ Ganja* vs. *State of Delhi* 2012 II AD (DELHI) 517.
3. *Bipin Kumar Mondal* vs. *State of West Bengal,* (2010) 12 SCC 91.
4. *State of Uttar Pradesh* vs. *Krishna Master,* (2010) 12 SCC 324.

5. *Kandaswamy* vs. *State of Tamil Nadu,* (2008) 11 SCC 97.
6. *Preetam Singh* vs. *State of Rajasthan,* (2003) 12 SCC 594.
7. *Abdul Waheed Khan* vs. *State of A.P.,* (2002) 7 SCC 175.
8. *Krishna Mochi* vs. *State of Bihar,* (2002) 6 SCC 81.
9. *Gurdeep Singh* vs. *State,* 1995 JCC 138, 1994 (31) DRJ 579.
10. *Subran* vs. *State of Kerala* (1993) 3 SCC 32.
11. *State of UP* vs. *Anil Singh,* AIR 1988 SC 1998.
12. *Gurdip Singh and Another* vs. *State of Punjab,* AIR 1987 SC 1151.
13. *Mohinder Pal Jolly* vs. *State of Punjab* (1979) 3 SCC 30 : 1979 SCC (Cri) 635 : AIR 1979 SC 577.
14. *Salim Zia* vs. *State of U.P.* (1979) 2 SCC 648 : 1979 SCC (Cri) 568 : AIR 1979 SC 391.
15. *Pal Singh* vs. *State of U.P.,* (1979) 4 SCC 345.
16. *State of U.P.* vs. *Mohd. Musheer Khan* [(1977) 3 SCC 562 : 1977 SCC (Cri) 565 : AIR 1977 SC 2226.
17. *State of Gujarat* vs. *Bai Fatima* [(1975) 2 SCC 7 : 1975 SCC (Cri) 384 : AIR 1975 SC 1478].
18. *Shivji Genu Mohite* vs. *State of Maharashtra,* (1973) 3 SCC 219.
19. *Munshi Ram* vs. *Delhi Admn.* [AIR 1968 SC 702 : 1968 Cri LJ 806].
20. *Virsa Singh* vs. *State of Punjab,* 1958 SCR 1495.

RESULT: Appeal dismissed.

SANJIV KHANNA, J.

1. Narain Singh, the appellant impugns his conviction vide judgment dated 23rd July, 1998, under Section 302 of the Indian Penal Code, 1860 ('IPC' for short) for murder of Pradeep Kumar and under Section 324 IPC for having caused injuries to Prem Pal. The appellant also impugns

the order on sentence directing the appellant to undergo rigorous imprisonment for life and fine of Rs.2,000/- (in default to undergo rigorous imprisonment for one year) for the offence under Section 302 IPC and rigorous imprisonment of one year for the offence under Section 324 IPC. The two sentences are to run concurrently and the appellant has been granted benefit of Section 428, Code of Criminal Procedure, 1973.

2. Death due to injuries caused on the head of deceased Pradeep Kumar on 22nd March, 1994 is not disputed. It is also not disputed that Prem Pal, who had appeared as PW6, had suffered injuries on his right palm. The prosecution has proved the Medico Legal Report of the deceased Pradeep Kumar as Ex.PW11/A issued by Dr. Preetish S. Vaidyanathan, the examining Medical Officer, Safdarjung Hospital, which states that the deceased Pradeep Kumar was brought to the hospital at 3.25 p.m., with an alleged history of assault. He was declared dead at 3.55 p.m. Dr. Preetish S. Vaidyanathan had appeared as PW11. The post mortem report has been proved as Ex.PW12/A. Similarly, injuries suffered by Prem Pal have been proved by Medico Legal Report, Ex.PW3/A which was recorded by Dr. A. Ganesh, the examining Medical Officer. The same was recorded at 4 p.m. on 22nd March, 1994 with "alleged history of assault". As Dr. A. Ganesh had left the hospital for UK after preparing Prem Pal's MLC report, Dr. Preetish S. Vaidyanathan (PW11) identified Dr. A. Ganesh's handwriting and signature on the MLC report.

3. The case of the prosecution, which has been accepted by the trial court, is that the appellant had caused injuries to Pradeep Kumar and Prem Pal by an axe Ex.P-1 in his house at 279, Sector-II, R.K. Puram, Delhi on 22nd March, 1994. The case made out against the appellant is that he knew the deceased Pradeep Kumar and Prem Pal from before. On the date of the occurrence, the appellant saw them coming from market and asked them to come inside his house as he wanted to talk to them about something urgent. Pradeep Kumar and Prem Pal came inside the house of the appellant. The appellant asked them why they were spreading rumours about him and a girl, Veena. Thereafter, the appellant went towards the kitchen. When he came back, he took out an axe from underneath the bed and gave two blows from the axe on the head of the deceased Pradeep Kumar. The appellant gave a third blow on the right hand palm of Prem Pal. Prem Pal ran away to save himself and went to inform the mother of Pradeep Kumar at village Mohammadpur.

Subsequently, he came back to the bus stand of the village Mohammdpur and informed some boys standing there about the incident. The said boys reached the appellant's house, where they found Pradeep Kumar and took him in a three-wheeler scooter to Safdarjung Hospital. Prem Pal also went to the said hospital. The information regarding the incident was recorded in DD No.24, Ex.PW5/A. After the death of Pradeep Kumar, DD No.27, Ex.PW12/B was recorded. Another DD being DD No.28, Ex.PW5/C was recorded on receiving information that Prem Pal had been admitted in the hospital in injured condition.

4. There is ample evidence to show that the incident in question had taken place at the scene of crime i.e. House No.279, Sector-II, R.K. Puram, Delhi. SI Manu Sharma, PW-18 in his statement had stated that pool of blood was found on the floor of the house. He had also found blood stains on the axe, Ex.P-1, which was lying there. The site map Ex.PW18/C gives details of the blood which was found on the floor of the house. The said statement is corroborated by other police witnesses, namely, ASI Narender Sing (PW4), SI V.P. Singh (PW7) and Constable Ravinder Singh (PW-16). The police seized a blood stained ball pen (Ex.P7), slippers (Ex.P1), some hair (Ex.P3), and earth from the spot (Ex.PW6/H). Photographs were also taken and have been marked as Ex.PW18/B1 to Ex.PW18/B5.

5. The appellant was arrested in the night intervening 22-23, March, 1994 while he was sitting at the bus stand of Munirka, Sector 4 at Pratap Market. The next question is whether the appellant had caused the said injuries on Pradeep Kumar and Prem Pal.

6. Prem Pal, the injured, is the eye witness to the injuries caused by the appellant to Pradeep Kumar. He appeared as PW-6 and stated that Pradeep Kumar was his friend as they were studying in the same school in class Xth. About two months prior to 22nd March, 1994, one girl Monika had come to his house when the deceased Pradeep Kumar was also present. She wanted to 'develop friendship' with Pradeep Kumar. When she came out of the house after 10-15 minutes, she saw that Narain Singh was standing outside his house. She asked Prem Pal to ask the appellant Narain Singh to step inside his house and, only then she would come out. Prem Pal asked the appellant, Narain Singh to go inside his house and on this Narain Singh abused him and stated that he would give knife blow to him. Narain Singh chased him with an axe in his hand

and Prem Pal had to run away to save his life. On 22nd March, 1994 at about 2.45 p.m. Prem Pal along with the deceased were coming back after strolling in the market and saw the appellant standing on the stairs of his house. The appellant called them and stated that he wanted to have urgent talk with them. He took them inside his house. He spoke to them about their raising false rumours against him and a girl, Veena. After about 2-3 minutes, the appellant went towards the kitchen and then came back. Immediately, he took out an axe from underneath the bed/cot and exhorted that he would not leave them alive. He gave two blows with the axe on the head of Pradeep Kumar and third blow on the palm of the Prem Pal. Thereupon, Prem Pal ran towards the entrance of the house to save his life. After opening the bolt, he went towards Mohammadpur and reported the incident to the mother of the Pradeep Kumar. Then he came back to the bus stand of village Mohammadpur and narrated the incident to some of the boys, who were standing there. The said boys went to the site of the crime and took Pradeep Kumar to Safdarjung hospital. Prem Pal also reached the hospital. He came to know that Pradeep Kumar had died. SI Manu Sharma recorded his statement Ex.PW6/A. He identified the clothes worn by the appellant i.e. pant, shirt and shoes, which were marked Ex.P-5, 6 and Ex.PW-4/1-2.

7. Prem Pal (PW6) was cross-examined at great length but he has affirmed what was stated by him in the examination in chief. His testimony could not be shaken/challenged.

8. Leaned counsel for the appellant has submitted that PW-6 SI, Prem Pal had not given the name of the boys from Mohammadpur with whom he had conversation about the incident. The boys had transported the deceased Pradeep Kumar to the hospital but were not produced or even named as witnesses. It was submitted that the conduct of Prem Pal to first go to village Mohammadpur and talk to the mother of Pradeep Kumar, rather than taking Pradeep Kumar to the hospital casts a serious or grave doubt whether he was an eye witness at all. It was stated that he did not even know the name of the boys who had taken Pradeep to the hospital. Our attention was drawn to the MLC, Ex.PW11/A, in which the name of the person who had brought Pradeep Kumar to the hospital was mentioned as Chander Pal s/o Om Prakash. He also submitted that the alleged conversation and incident much prior to 24th March, 1994 relating to girl Monika was concocted and she was not produced as a

witness. Our attention was also drawn to the statement in the cross examination of PW-6 Prem Pal that he did not see the accused taking out axe from underneath the bed.

9. We have examined the contentions, but do not finding any merit in the same. Presence of appellant Narain Singh at the time of incident in the house has not been disputed. Narain Singh's finger prints were found on the Ex. P-1 and have been proved in the CFSL Report (Ex. 4-A). The chance finger prints marked as Q2 and Q6 are identical with the right palm and left palm (S1 & S2) of the palm impressions of Narain Singh. Appellant Narain Singh in his statement under Section 313 of the Code of Criminal Procedure, 1973 had stated as under:-

> "A. I am innocent. I have been falsely implicated in this case. I was attacked by the deceased and his friends at my house. They came in my house forcibly and were armed with knives and Axe. I snatched the axe and used the same in my private defence otherwise they would have killed me."

10. Reference to the incidence involving Monika, two months prior to the date of occurrence as a pre-cursor, it appears was to explain and establish motive. Monika was a young girl, who was studying in a school, is apparent from the cross-examination of PW6 Prem Pal. The prosecution and Prem Pal PW6 had not alleged or stated that Monika had seen the appellant running behind Prem Pal with an axe. It is well settled that prosecution is not required to necessarily prove motive when it relies upon direct evidence i.e. evidence of eyewitnesses. Failure to establish motive, it was observed in **Shivji Genu Mohite vs. State of Maharashtra,** (1973) 3 SCC 219, would not reflect upon the credibility of a witness who is proved to be a reliable eyewitness. Of course evidence as to motive may go a long way in cases wholly dependent on circumstantial evidence (See **Bipin Kumar Mondal vs. State of West Bengal,** (2010) 12 SCC 91, **State of Uttar Pradesh vs. Krishna Master,** (2010) 12 SCC 324.) Failure to cite and produce Monika as a witness in the facts of the present case is not material.

11. Immediately after the incident and on suffering injuries, Prem Pal PW-6 ran away from site, i.e. house of the appellant. This was natural. He wanted to save himself. It was also natural for PW-6 Prem Pal to run to the residence of the mother of Pradeep Kumar and inform

her about the attack on her son. Thereafter, he returned and had spoken to the boys at the bus stand. The conduct of PW6 Prem Pal is, therefore, not abnormal but understandable and natural. The conduct does not create any doubt. The said boys have not been produced as witnesses, but this need not distract us and does not cast or create premonition about the prosecution case. Failure to examine the boys or the person, who had taken Pradeep Kumar to the hospital, does not affect and dilute the statement of Prem Pal PW6 as an eye witness to the offence. There is ample evidence and material to show that the deceased Pradeep Kumar was taken to the hospital by a third person and was seen by the Examining Medical Officer Dr. Preetish S. Vaidhyanathan (PW11). He was brought to the hospital at 3.25 PM soon after the incident and was declared dead at 3.55 PM. MLC recording the said facts was proved and marked Ex.PW 11/A. In these circumstances, we do not think that the prosecution has failed to prove or establish the commission and involvement of the appellant because they have not examined the boys or the person who had brought Pradeep Kumar to the hospital. The said boys were not eye witnesses to the occurrence but post occurrence witnesses. Their non examination is not fatal to the prosecution case, when the eye witness to the occurrence, PW 6 Prem Pal's statement is trustworthy and reliable. It is corroborated by medical evidence, forensic evidence, photographs etc. In such cases, the question which has to be raised and answered is whether the evidence actually produced is reliable or not? Once it is held that the prosecution evidence is reliable and trustworthy and proves the offence, failure to examine other witnesses is not fatal. Non examination of further witnesses does not affect the credibility of the witnesses relied upon. It is quality of the evidence and not the number of witnesses that matters. (See **Pal Singh vs. State of U.P.,** (1979) 4 SCC 345, **State of UP vs. Anil Singh,** AIR 1988 SC 1998 and **Krishna Mochi vs. State of Bihar,** (2002) 6 SCC 81).

12. We also do not agree that one sentence in the cross-examination of PW-6 Prem Pal that he did not see the accused taking out the axe from underneath the bed creates doubt whether the appellant Narain Singh had taken out the axe. The PW-6 Prem Pal had stated that he was sitting on the chair and there was a table in front of the chair. A cot/bed was on the right side of the chair. The appellant was sitting on the bed. He has stated that the appellant Narain Singh took out the axe from underneath the bed. The single sentence in the cross examination of PW

6 that he did not see the appellant take out the axe from underneath the bed, read with the aforesaid statement, indicates that he did not bend down or actually see the appellant take out the axe but the manner in which axe was taken out indicated that the axe was underneath the bed. The contention of the counsel ignores and fails to take due notice of the entire testimony and repeated statements of PW6. He has repeatedly stated and reiterated that the appellant had taken out the axe from underneath the bed.

13. There is no evidence or material to show that the deceased Pradeep Kumar and PW-6, Prem Pal had barged or had trespassed into the house. Pradeep Kumar and Prem Pal were two in number, whereas the appellant-Narain Singh was alone but they and not the appellant had suffered injuries. It is not the case of the appellant that he had suffered injuries and no such allegation was made before the Magistrate when he was produced for the first time after arrest. There was no damage to the furniture, fixtures or the main door of the house. We have reproduced the relevant portion of the statement of Narain Singh under Section 313 of the Code of Criminal Procedure. The appellant had pleaded private self defence but did not even try to establish the said plea. Recently in **Arjun versus State of Maharashtra,** (2012) 5 SCC 530, the Supreme Court has observed:-

> "21. Further, there is also sufficient evidence to show that the appellant had inflicted injuries on the wife of the deceased as well when she tried to save her husband. The deceased was unarmed so also his wife and the son. At the same time, the accused was armed with a knife. No explanation is forthcoming either in his statement under Section 313 CrPC or otherwise as to why he was having a knife (sura) in his hand at the time of the incident. There is no evidence to show that the deceased, his wife (PW 8) or his son (PW 1) had ever attacked the accused.
>
> 22. The law clearly spells out that the right of private defence is available only when there is a reasonable apprehension of receiving injury. Section 99 IPC explains that the injury which is inflicted by a person exercising the right should commensurate with the injury with which he is threatened. True, that the accused need not prove the existence of the right of private defence beyond reasonable doubt and it is enough for him to show as in

a civil case that preponderance of probabilities is in favour of his plea. The right of private defence cannot be used to do away with a wrongdoer unless the person concerned has a reasonable cause to fear that otherwise death or grievous hurt might ensue in which case that person would have full measure of right to private defence.

23. It is for the accused claiming the right of private defence to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution, if a plea of private defence is raised. (**Munshi Ram v. Delhi Admn.** [AIR 1968 SC 702 : 1968 Cri LJ 806], **State of Gujarat v. Bai Fatima** [(1975) 2 SCC 7 : 1975 SCC (Cri) 384 : AIR 1975 SC 1478], **State of U.P. v. Mohd. Musheer Khan** [(1977) 3 SCC 562 : 1977 SCC (Cri) 565 : AIR 1977 SC 2226], **Mohinder Pal Jolly v. State of Punjab** [(1979) 3 SCC 30 : 1979 SCC (Cri) 635 : AIR 1979 SC 577] and **Salim Zia v. State of U.P.** [(1979) 2 SCC 648 : 1979 SCC (Cri) 568 : AIR 1979 SC 391])

24. A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find out whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting.

25. Section 97 deals with the subject-matter of right of private defence. The plea of right comprises the body or property of the person exercising the right or of any other person, and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to the property.

26. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To plea a right of private defence extending to voluntary causing of death, the accused

must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him."

14. It is correct that the finger prints of Prem Pal, PW-6 or the deceased Pradeep Kumar were not taken. This does not, however, in the present case, taint or affect the prosecution version. As per the CFSL reports, Exhibit PW 13/C and Exhibit PW 13/D, chance finger prints found on the axe marked Q 3, 4 and 5 were either hazy, blurred or smudged and did not disclose sufficient details for comparison. Other prints matched with the appellant.

15. Another contention raised on behalf of the appellant was that there was no motive or intention to kill and, therefore, conviction should be modified from Section 302 to one under Section 304 Part I of the IPC. Reliance was placed upon the decision of the Supreme Court in **Gurdip Singh and Another versus State of Punjab,** AIR 1987 SC 1151 and decision of this Court in **Gurdeep Singh versus State,** 1995 JCC 138, 1994 (31) DRJ 579. We do not agree with the said contention. The Supreme Court in **Gurdip Singh's** case (supra) observed that the Court were not fully satisfied that the convicted appellant had the intention to kill the deceased. It was observed that they had considerable doubt in their mind, whether the appellant's intention was to kill the victim or he wanted to merely attack him in order to take revenge for the victim's suspected illicit relations with a female member of their family. This judgment was relied by the Delhi High Court in **Gurdeep Singh** (supra) and the Division Bench has observed that the appellant therein had no motive or intention to kill the deceased in the said case. He lost self control when filthy abuses were hurled at him. Consequently, the appellant therein gave random blows on different parts of the body.

16. Reference was made to **Jagtar Singh @ Jagga @ Ganja vs. State of Delhi** 2012 II AD (DELHI) 517, of which one of us (S.P. Garg J.) was a member. In the said decision, conviction under Section 302 was converted into Section 304 Part I of the IPC, inter-alia recording as under:-

"11. In the present case, there were two injuries on the neck, and two in the chest, of the deceased, caused by a sharp edged weapon. There were other minor injuries and abrasions; in all

there were nine injuries. According to the doctor who conducted the post mortem of Parveen's body, the shock caused as a result of the injuries to the neck and chest was sufficient to cause death in the ordinary course of nature. The surrounding circumstances in the case point to some previous quarrel between the deceased and the Appellant; the latter was agitated and confronted the deceased in the first part of the incident, on the day of occurrence. The eyewitnesses sought to mollify the Appellant; however, the deceased slapped him. This resulted in the Appellant holding out a threat of dire consequences, and returning very shortly later, and inflicting knife injuries. Though he did inflict several blows - some of which were fatal, it is clear that he did not set out with a pre-meditated intention to kill the deceased. The facts clearly establish an offence under Section 304 Part-I, in which the intention was to cause such bodily injuries as would have resulted in death in the ordinary course of nature." (emphasis supplied)

The said decision refers to **Kandaswamy vs. State of Tamil Nadu,** (2008) 11 SCC 97 in which reference was made to **Preetam Singh vs. State of Rajasthan,** (2003) 12 SCC 594 and **Subran vs. State of Kerala** (1993) 3 SCC 32.

17. However, in the present case the factual position as noticed above is entirely different. The appellant had used an axe. The injuries suffered by Pradeep Kumar, as per the MLC Exhibit PW-11/A, are as under:-

"1) Sharp incised wound 5 cm long, 3 cm deep in frontal region

2) Sharp incised wound 5 cm long and 3 cm deep in occipital region, brain matter being visible from both the injuries."

18. In the post mortem report Exhibit PW 12/A, it is stated that the following injuries were suffered by the deceased Pradeep Kumar:

"1. One incised wound on the right parietal region, obliquely placed, both margins cut out, the upper margin contused and front margin not contused. Both angles acutely cutting the underneath parietal bone. Middle angle was 8cm above from bridge of nose, size 7cm x 1cm x brain tissue deep, cutting the

right parietal bone and superior surface of right parietal lobes corresponding with the injury externally.

2. One incised wound longitudinally placed on the left parietal region, the frontal angle was 3 cm away from injury no.2, both margins clean cut lateral (on the left side) margins contused, both angles acute, size 8cm x 1.3cm x brain tissue deep. Underneath left parietal bone cutting upto the superior surface of the left parietal lobe, size 5.9cm x 1 cm

3. One incised wound transversely placed in the middle of the right parietal region 8 cm away from injury no. 1, both margins clean cut, posterior margin contused, with both angles acute size 8cms x 1.3cm x brain tissue deep. Underneath right parietal lobe, cutting of superior surface of right parietal lobe corresponding with ante mortem injury externally size 6.1 cm x 1.2cm x brain deep.

4. One longitudinally placed incised wound on left occipital region, outer of left mastoid region, both angles acute, both margins clean cut and contused size 7cm x 1cm x bone deep (with clotting of left occipital bone)

5. One incised wound transversely placed in the left and right occipital region, both margins clean cut, contused, both angles acute size 10cm x 2.3cm x brain tissue deep, fracture of occipital bone size 8.3cm x 2.1cm x brain deep.

Internal injuries:

Cutting of right parietal bone frontal side with cutting of brain tissue size 6cm x 1.2cm x brain tissue deep, corresponding with ante mortem injury no.1

Both the lungs, kidneys and spleen were congested

Stomach contained semi digested liquid contents weighing 190gm, with healthy mucosa."

19. These injuries were on the head. The present case is of a brutal attack causing multiple injuries on the head with an axe. The present case would not fall under Section 304 Part I and the appellant has been rightly convicted under Section 302. Section 302 IPC is attracted when

death is caused by an act done with the intention of causing death and also when the intention is to cause a bodily injury and the said injury inflicted is sufficient in the ordinary course to cause death (See **Abdul Waheed Khan Vs. State of A.P.,** (2002) 7 SCC 175 and **Virsa Singh Vs. State of Punjab,** 1958 SCR 1495). PW-12, Dr. Chander Kant, who had conducted the post mortem and given his report, has opined and stated that the cause of death was due to shock, haemorrhage and head injuries. The injuries were caused by a sharp edged heavy cutting weapon and necessarily fatal and would cause death in ordinary course of nature.

20. In view of the aforesaid discussion, we do not find any merit in the present appeal and the same is dismissed. Bail bond is cancelled.

The appellant shall surrender immediately. Trial Court Records will be sent back with a direction that if the appellant does not surrender, the Trial Court will initiate process for arrest of the appellant to serve the remaining sentence.

ILR (2012) V DELHI 762
CRL. APPEAL

VIKRAM @ BABLOO ….APPELLANT

VERSUS

STATE ….RESPONDENT

(MUKTA GUPTA, J.)

CRL. A. NO. : 1234/2011 & CRL. M.B. : 1734/2011 **DATE OF DECISION: 17.07.2012**

Indian Penal Code—1860—Section 397, 307, 458—Appellant challenged his conviction u/s 458/307/397/34 IPC on ground, recovery at his instance not proved. Held:— Recovery of stolen goods is one of the chain in the circumstances. When a person was duly

identified as participant in the offence with specific role assigned to him, then absence of recovery will not discredit the otherwise credible testimony of witness.

I also do not find any merit in the contention of the learned counsel for the Appellant that the Appellant was identified after he was shown to the witnesses and the Investigating Officer deliberately took a long date. PW-7 in his testimony has stated that he identified the Appellant as one of the accused involved in the crime and he had also correctly identified him in Tihar Jail during TIP proceedings. The Investigating Officer moved the application for TIP on 19th January, 2000 when the Appellant was produced in muffled face before the learned Metropolitan Magistrate. At that stage no objection was raised by the Appellant that he had already been shown to the witness. Subsequently, the TIP was fixed for 29th January, 2000 and the Appellant was sent to judicial custody. On 29th January, 2000 the Appellant was produced from judicial custody in muffled face before the learned Metropolitan Magistrate. The witness correctly identified the Appellant as the person who had committed the crime. At this stage also no objection was raised by the Appellant nor did he refuse to participate in the TIP proceedings on the pretext that he was shown to the witness prior to the TIP proceedings. Despite lengthy cross-examination PW-7 has stood the ground and has stated that the Appellant was one of the persons who committed robbery at his place and he had identified him at Tihar Jail before he identified at Tis-Hazari Courts. **(Para 7)**

This witness has also correctly identified the stolen jewellery articles in the TIP proceedings conducted and before the Learned Trial Court. The contention of the learned counsel for the Appellant that no recovery was made at the instance of the Appellant also holds no ground as the recovery of the stolen goods is one of the chain in the circumstances. The Appellant has been duly identified as participant in the offence with specific role assigned to him. Absence of

recovery will not discredit the otherwise credible testimony of PW7. **(Para 8)**

Important Issue Involved: Recovery of stolen goods is one of the chain in the circumstances. When a person was duly identified as participant in the offence with specific role assigned to him then absence of recovery will not discredit the otherwise credible testimony of witness.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. K. Singhal, Mr. Sidharth Mittal, Adv.

FOR THE RESPONDENT : Mr. Mukesh Gupta, APP.

CASE REFERRED TO:

1. *Krishna Kumar* vs. *State of Delhi* 2009 (157) DLT 121.

RESULT: Appeal dismissed.

MUKTA GUPTA, J.

1. By this appeal the Appellant challenges the judgment dated 16th May, 2011 convicting him for offences punishable under Sections 458/307/397/34 IPC and the order on sentence dated 19th May, 2011 whereby he has been directed to undergo Rigorous Imprisonment for a period of 7 years for offence punishable under Section 397 IPC, Rigorous Imprisonment for 10 years and fine of Rs. 3000/- and in default of payment of fine simple imprisonment for three months for offence punishable under Section 307 IPC, and Rigorous Imprisonment for 7 years and fine of Rs. 2000/- and in default of payment of fine to undergo simple imprisonment for four months for offence under Section 458 IPC.

2. Learned counsel for the Appellant contends that the co-accused from whom recovery of pistol and the looted articles was made has been acquitted, however, the Appellant has been convicted though there was no evidence against him. There is no recovery at the instance of the Appellant. It is alleged that the Appellant had shown a pistol, however the

injuries inflicted on the injured are by sharp edged weapon and thus, the same cannot be at the instance of the Appellant. For an offence punishable under Section 307 IPC mensrea is an essential requirement. However, there is no evidence that the Appellant had the intention to commit the said offence. The impugned judgment is bereft of any discussion as to how the prosecution has proved its case beyond reasonable doubt. In the absence of theft or extortion being proved, the Appellant could not have been convicted for offence under Section 397 IPC. The Appellant himself expressed his desire for getting the TIP conducted and even as per the Learned Metropolitan Magistrate a long date was given at the request of the Investigating Officer, however, in the meantime, the Appellant was shown to the witnesses in Tis-Hazari. The recovery of the allegedly looted property has not been proved. There is no evidence that the Appellant used the deadly weapon. Thus the charge of offence under Section 397 IPC is not proved against the Appellant. Reliance is placed on **Krishna Kumar vs. State of Delhi** 2009 (157) DLT 121. There is an inordinate delay in examining the witnesses. Further, the incriminating evidence has not been put to the Appellant under Section 313 Cr.P.C.

3. Learned APP on the other hand contends that PW-7 has made specific allegations against the Appellant. The TIP of the accused was conducted at Tihar Jail where they were identified. PW-9 Dr. Rajan Madan has proved the injuries caused as dangerous. Thus, there is no merit in the present appeal and the application, and the same be dismissed.

4. I have heard learned counsel for the parties. FIR No. 5/2000 under Sections 397/307/452/411/120B IPC was registered at PS Karol Bagh on the statement of Smt. Ravi Mangi, wife of Jitender Pal Mangi wherein she stated that her husband was running jewellery shop in the name of Mangi Jewellers on rent in Beadon Pura, Karol Bagh. At around 10.30 PM at night she was waiting for her husband to come back and called up at the shop. Nobody picked up the phone. At around 11.00 PM she received a phone call from the neighbour of the shop stating that Mr. Mangi was lying in the shop and there are injuries on him. When she reached the shop she found her husband injured and his clothes blood-stained. Further, articles of the shop were lying scattered, the safe, rack, etc., were open and the gate of the shop was broken. After the injured Jitender Pal Mangi was declared fit for statement, his statement was recorded. She stated that her husband had informed her that at about 9.30/10.00 PM, three-four boys aged about 20-25 years entered his

shop, caused him injuries and committed robbery of various jewellery articles lying in the shop. During investigation, the injured Jitender Mangi identified the Appellant and the co-accused. The co-accused Vijay @ Nikku and Trilok Singh were arrested at Rohtak and their transit remand was sought. Vijay @ Nikku the co-accused refused to take part in Test Identification Parade and disclosed about the involvement of two more accused namely Vikram @ Babloo and Hemant @ Sonu. He further disclosed that Hemant and Trilok Singh had got the jewellery melted from a jeweller at Rohtak and at his instance certain slabs of gold and silver were recovered from the jeweller. Appellant Vikram @ Babloo was arrested by the Crime Branch in another case whereafter he was arrested in this case. On a TIP proceeding being conducted the Appellant was duly identified by the injured Jitender Pal Singh Mangi. The case property was also got identified and a charge-sheet was submitted thereafter. Out of the 4 accused, accused Hemant @ Sonu was declared a proclaimed offender and Vijay @ Nikku died during the pendency of trial. Thus the trial proceeded against the Appellant and Trilok Singh. On conclusion of the trial Trilok Singh was acquitted, however the Appellant was sentenced as above.

5. PW-7 Jitender Pal Mangi in his statement before the Court has stated that on 4th January, 2000 at about 8.30/8.45 PM he was present at his jewellery shop and was about to close the same, when three boys entered into his shop and one boy remained standing outside. The three boys firstly disconnected his phone by removing telephone cables, thereafter threatened him not to raise alarm and forced him to hand over all the jewellery and cash and stated that if he would raise alarm they would shoot him. When PW-7 tried to escape, the three boys taped his mouth and tied him. However, PW-7 continued making efforts to save himself and his property. All the three boys again threatened him and asked him to deliver all the cash and jewellery. Then the third boy took out a sharp edged knife and caused knife blow on his arm and stomach. PW-7 tried to stand up but the three boys caught hold of him and tried to kill him by strangulation. PW-7 was again pushed by one of the accused and he fell down and they opened the remaining two almirahs. When he regained consciousness, he found the shutter of the shop closed and the almirahs and the doors lying open. The articles were also lying in scattered condition. On recovery, PW-7 gave list of looted articles from his shop.

6. Learned counsel for the Appellant has strenuously contended that there is no recovery made from the Appellant and further PW-7 has received injury by sharp edged weapon, whereas it is alleged that the Appellant was carrying a pistol. PW-7 in this regard has stated that the Appellant was having a country made pistol which he used against him for committing the robbery. The Appellant gave a butt blow on PW-7 and thereafter took knife from his associates and gave knife blow also on his stomach and hands due to which he sustained injuries. The statement of PW-7 in this regard is corroborated by his MLC Ex.PW9/B as per which the Appellant has received incised wounds at the umbilical region and over the right upper arm. The injuries were opined to be dangerous in nature by PW-9 Dr. Rajan Madan, Senior Consultant Surgeon, Bali Nursing Home, DBG Road, Karol Bagh. According to him he had operated PW-7 in early hours of 5th January, 2000 by performing a life saving operation. Further, PW-7 has correctly identified the country made pistol used by the Appellant as Ex.P-1. The witness had identified the country made pistol used by the Appellant even in the TIP proceedings exhibited as Ex.PW-7/D.

7. I also do not find any merit in the contention of the learned counsel for the Appellant that the Appellant was identified after he was shown to the witnesses and the Investigating Officer deliberately took a long date. PW-7 in his testimony has stated that he identified the Appellant as one of the accused involved in the crime and he had also correctly identified him in Tihar Jail during TIP proceedings. The Investigating Officer moved the application for TIP on 19th January, 2000 when the Appellant was produced in muffled face before the learned Metropolitan Magistrate. At that stage no objection was raised by the Appellant that he had already been shown to the witness. Subsequently, the TIP was fixed for 29th January, 2000 and the Appellant was sent to judicial custody. On 29th January, 2000 the Appellant was produced from judicial custody in muffled face before the learned Metropolitan Magistrate. The witness correctly identified the Appellant as the person who had committed the crime. At this stage also no objection was raised by the Appellant nor did he refuse to participate in the TIP proceedings on the pretext that he was shown to the witness prior to the TIP proceedings. Despite lengthy cross-examination PW-7 has stood the ground and has stated that the Appellant was one of the persons who committed robbery at his place and he had identified him at Tihar Jail before he identified at Tis-Hazari

Courts.

8. This witness has also correctly identified the stolen jewellery articles in the TIP proceedings conducted and before the Learned Trial Court. The contention of the learned counsel for the Appellant that no recovery was made at the instance of the Appellant also holds no ground as the recovery of the stolen goods is one of the chain in the circumstances. The Appellant has been duly identified as participant in the offence with specific role assigned to him. Absence of recovery will not discredit the otherwise credible testimony of PW7.

9. Further, while committing robbery, the Appellant showed the pistol to PW-7 and caused threat to him. Therefore, the ingredients of an offence punishable under Section 397 IPC are duly attracted against the Appellant and have been proved beyond reasonable doubt besides the offences under Sections 307 and 458 IPC. I find no merit in the appeal.

10. Appeal and application are dismissed.

ILR (2012) V DELHI 768
CRL. M.C.

VED PRAKASH SHARMA ….PETITIONER

VERSUS

STATE & ANR. ….RESPONDENTS

(PRATIBHA RANI, J.)

CRL. M.C. : 1556/2012 DATE OF DECISION: 19.07.2012

Code of Criminal Procedure, 1973—Section 311—Petitioner, witness in criminal trial, challenged order allowing request of respondent to recall prosecution witnesses for cross—examination including him—As per petitioner, he was examined as witness and was

tendered for cross—examination but accused/ respondent informed court that Legal Aid Counsel appointed for him, was not available and requested for adjournment—Request was declined and thus, petitioner was cross—examined at length by accused/ respondent himself—Also, application to recall witness moved after long gap of 7 years—Percontra, on behalf of respondent it was urged, counsel provided from Legal Aid did not appear, at most cost could be awarded to petitioner for inconvenience caused to him for appearing again for cross—examination. Held:— The Cr.P.C. provides that in all criminal prosecutions, the accused has a right to have the assistance of a counsel and the Cr.P.C also requires the court in all criminal cases, where the accused is unable to engage counsel, to appoint a counsel for him at the expenses of the State. The Legal Aid Counsel provided to accused did not appear and thus, discretion exercised by Ld. M.M in judicious manner by permitting him to recall persecution witnesses for cross-examination.

I find it advantageous to refer to the decision of this Court in the case **Lakhmi & Ors. vs. The State** 1996 I AD (Delhi) 578 wherein the application under Section 311 CrPC moved by the accused to recall PW-1 besides other witnesses for cross examination was declined by learned Trial Court. That order was impugned before this court. Perusal of the record revealed that the contention of the petitioner about non-availability of his counsel at the time of cross examination of PW-1 and that his counsel came to Court only when PW-2 Shiv Narain was cross examined, was not found to be correct. Rather, the record reflected that opportunity was granted to the defence counsel to cross examine PW-1 which was not availed of. The Court considered the fact that PW-1 Krishan Kumar was an extremely material witness and in the absence of his cross examination, his testimony could greatly prejudice the defence. In para 5 o the judgment, it was held as under :

'5. Undoubtedly, the decision and the discretion in regard to the application which falls within the first part of Section 311 of the Code of Criminal Procedure is that of the trial court, but then in matters like these, the role of the trial Magistrates is not akin to an uninterested by-stander. The very width of the discretion vested in him requires of him a corresponding caution. The goal is to do complete justice. And I do feel that here is a case where the learned Magistrate lost the grip. The cross examination of the witness would obviously enable the court to arrive at the truth and ultimately to a just conclusion. The failure was of the counsel. Let the petitioners not suffer for that. Consequently, the application is allowed. Let the learned Metropolitan Magistrate re-summon PW-1 Krishan Kumar on a date convenient to him for cross examination by the present petitioners. This disposes of the petition.' **(Para 12)**

Important Issue Involved: The Cr.P.C provides that in all criminal prosecutions, the accused has a right to have the assistance of a counsel and the Cr.P.C also requires the court in all criminal cases, where the accused is unable to engage counsel, appoint a counsel for him at the expenses of the State. In absence of counsel, if cross—examination conducted by accused himself, he may be permitted to recall that witness again for cross-examination by counsel.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Pradeep Arya, Adv. with Mr. Narinder Chaudhary, Mr. Ashish Sharma, And Ms. Shobhit Mittal, Adv.

FOR THE RESPONDENTS : Mr. Navin Sharma, APP for State R-1. Mr. M.K. Sharma Adv for R-2.

CASES REFERRED TO:

1. *Hussain @ Julfikar Ali (Mohd.)* vs. *State* 2012 AD (Cri.) (SC) 401.
2. *S.K.Kapoor* vs. *Municipal Corporation of Delhi* 2010 (7) AD (Delhi 572.
3. *Mangey Khan* vs. *State (NCT of Delhi)* 2009 (4) JCC 2506.
4. *Vinay Kumar* vs. *State* 2007 (4) JCC 2683.
5. *Lakhmi & Ors.* vs. *The State* 1996 I AD (Delhi) 578.

RESULT: Petition dismissed.

PRATIBHA RANI, J. (Oral)

1. The petitioner before this Court is Ved Prakash Sharma, a witness in case FIR No.202/1998 under Section 386/511 IPC, PS Malviya Nagar who is aggrieved by the order dated 06.02.2012 passed by learned MM on the application under Section 311 CrPC filed by the accused Rajender Kumar Gupta, respondent No.2 herein.

2. The impugned order reveals that the application under Section 311 Cr.P.C requesting to recall PWs – 1, 4, 5 and 6 for cross examination on the ground that the witnesses could not be cross examined properly as the counsel provided by Legal Aid did not appear before the Court, was allowed by the Court finding that the witnesses have not been cross examined through defence counsel.

3. Mr.Pradeep Arya, learned counsel for the petitioner has submitted that he has placed on record the statement of PW-1 Ved Prakash Sharma recorded in the Court as Annexure-C which shows that examination of witness is running into just two pages and when the witness was tendered for cross examination, accused informed the Court that he has been provided a counsel Mr.Amir Hassan Haq, Advocate from Legal Aid. The learned defence counsel did not appear before the Court nor sent any request and in that circumstance, the request of the accused was declined and witness was cross examined by accused at length.

4. Mr.Pradeep Arya, Advocate for the petitioner has further submitted that when the petitioner i.e. PW-1 Ved Prakash Sharma has been cross examined by the accused at length on all material details, just

because his counsel could not appear on that day, is no reason to allow the application under Section 311 CrPC after a long gap of about seven years. Learned counsel for the petitioner has relied upon **S.K.Kapoor vs. Municipal Corporation of Delhi** 2010 (7) AD (Delhi 572; **Mangey Khan vs. State (NCT of Delhi)** 2009 (4) JCC 2506; and **Vinay Kumar vs. State** 2007 (4) JCC 2683, in support of his contentions.

5. On behalf of State, it has been submitted that the discretion has been exercised by the Court judicially taking into consideration that at the time of examination of material witnesses, the counsel provided from Legal Aid did not appear and in the circumstances, the Court may at the most award some cost to the petitioner for the inconvenience being caused to him for appearing again and again in the court for cross examination.

6. I have considered the case law relied upon by the petitioner. In the case **S.K.Kapoor vs. Municipal Corporation of Delhi** (Supra), the petitioner declined to avail the opportunity to cross examine a witness either himself or by engaging a counsel and in that circumstance, it was observed that he cannot be permitted to do so at the belated stage without offering any sufficient cause or justification for not doing so when the opportunity was so granted.

7. In the case **Mangey Khan vs. State (NCT of Delhi)** (Supra), the request to recall the witnesses for cross examination was declined as the reason for recalling the witnesses was that the material witnesses were not effectively cross examined by the petitioner's counsel.

8. In the report **Vinay Kumar vs. State** (Supra) request to recall the witnesses for cross examination was declined in view of the fact of the case that cross examination of PW2 and 3 was not completed despite several opportunities being granted and PW-3 was a Cancer Patient aged about 60 years and the witnesses had been appearing for more than three years before the Court except on few occasions, in that circumstance the Court observed that the time of the witnesses was equally precious and they cannot be asked to come time and again to the Court.

9. The facts and circumstances of the present case are just entirely different. Here, it is a matter of record that PW-1 Ved Prakash Sharma – petitioner herein appeared in the Court only once and on that day, the accused was not represented through any counsel. On being asked by

the Court, the accused cross examined the witness without any legal assistance. So none of the authorities relied upon by learned counsel for the petitioner and referred to above can be of any help to him.

10. The question that arises for consideration is if his prayer to recall the material witnesses for cross-examination after he was able to engage a private counsel has rightly been allowed by the Court to provide him a fair trial and whether failure to get the material witnesses cross-examined without legal assistance has caused prejudice to the accused.

11. The petitioner has also placed on record the copies of the proceedings of the Trial Court which reveal that after being summoned by the Court, the accused was regularly appearing before the Court. When the case was at the stage of charge on 18.07.2002, he requested for legal aid and then proceedings dated 27.09.2002 reveal that till that date, legal aid was not provided. Thereafter, the case was also transferred. On 17.03.2004 legal aid counsel Mr.Amir Khan appeared along with accused before the Court informing the Court that he has been appointed in this case. On the date fixed for charge, learned counsel from legal aid was reported to be out of station. Even on 24.08.2004 when the charge was framed against the accused, he was unrepresented. Further proceedings of the Court dated 02.03.2005, 25.08.2005, 25.09.2006 reveal that the counsel was not present on that day. The proceedings dated 27.09.2007 reveal that legal aid counsel provided to him was not available and thereafter also, the accused was appearing but legal aid counsel was not appearing on all the subsequent dates. When the case was fixed for recording the statement of accused under Section 313 CrPC on 25.04.2011, at the fag end of the trial, the accused engaged counsel who moved an application under Section 311 CrPC praying for recalling of PW-1, 4, 5 and 6 for cross examination.

12. I find it advantageous to refer to the decision of this Court in the case **Lakhmi & Ors. vs. The State** 1996 I AD (Delhi) 578 wherein the application under Section 311 CrPC moved by the accused to recall PW-1 besides other witnesses for cross examination was declined by learned Trial Court. That order was impugned before this court. Perusal of the record revealed that the contention of the petitioner about non-availability of his counsel at the time of cross examination of PW-1 and that his counsel came to Court only when PW-2 Shiv Narain was cross examined, was not found to be correct. Rather, the record reflected that

opportunity was granted to the defence counsel to cross examine PW-1 which was not availed of. The Court considered the fact that PW-1 Krishan Kumar was an extremely material witness and in the absence of his cross examination, his testimony could greatly prejudice the defence. In para 5 o the judgment, it was held as under :

> '5. Undoubtedly, the decision and the discretion in regard to the application which falls within the first part of Section 311 of the Code of Criminal Procedure is that of the trial court, but then in matters like these, the role of the trial Magistrates is not akin to an uninterested by-stander. The very width of the discretion vested in him requires of him a corresponding caution. The goal is to do complete justice. And I do feel that here is a case where the learned Magistrate lost the grip. The cross examination of the witness would obviously enable the court to arrive at the truth and ultimately to a just conclusion. The failure was of the counsel. Let the petitioners not suffer for that. Consequently, the application is allowed. Let the learned Metropolitan Magistrate re-summon PW-1 Krishan Kumar on a date convenient to him for cross examination by the present petitioners. This disposes of the petition.'

13. Here in the present case the learned Trial Court has rightly considered the circumstances of the case taking note of the fact that the legal aid counsel provided to the accused to defend him was not appearing and has exercised his discretion in a judicious manner by permitting the accused to recall PW-1, 4, 5 and 6 for cross examination.

14. The Apex Court in the case **Hussain @ Julfikar Ali (Mohd.) vs. State** 2012 AD (Cri.) (SC) 401 in similar situation where the appellant remained unrepresented throughout the trial, while remanding the case to the Trial Court for fresh disposal after providing necessary assistance, emphasized the need to provide legal assistance as under :

> '17. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result, the accused charged with a serious offence must not be stripped of his valuable right of a fair and impartial trial. To do that, would be negation of concept of due process of law, regardless of the merits of the appeal. The Cr.P.C. provides that in all criminal prosecutions,

the accused has a right to have the assistance of a counsel and the Cr.P.C. also requires the court in all criminal cases, where the accused is unable to engage counsel, to appoint a counsel for him at the expenses of the State. Howsoever guilty the appellant upon the inquiry might have been, he is until convicted, presumed to be innocent. It was the duty of the Court, having these cases in charge, to see that he is denied no necessary incident of a fair trial. In the present case, not only the accused was denied the assistance of a counsel during the trial and such designation of counsel, as was attempted at a late stage, was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. The Court ought to have seen to it that in the proceedings before the court, the accused was dealt with justly and fairly by keeping in view the cardinal principles that the accused of a crime is entitled to a counsel which may be necessary for his defence, as well as to facts as to law. The same yardstick may not be applicable in respect of economic offences or where offences are not punishable with substantive sentence of imprisonment but punishable with fine only. The fact that the right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our judicial proceedings. The necessity of counsel was so vital and imperative that the failure of the trial court to make an effective process of law. It is equally true that the absence of fair and proper trial would be violation of fundamental principles of judicial procedure on account of breach of mandatory provisions of Section 304 of CrPC.'

15. The learned M.M. has provided an opportunity to the accused to give him just and fair trial. Denying the opportunity to get material prosecution witnesses cross-examined through counsel would have caused serious prejudice to the accused. The impugned order being just and fair, does not call for any interference by this Court.

16. Accordingly, the present petition being devoid of merit, is hereby dismissed.

ILR (2012) V DELHI 776
MAC. APP.

AJIT SINGH & ANR. ….APPELLANTS

VERSUS

PARAMJIT SINGH & ORS. ….RESPONDENTS

(G.P. MITTAL, J.)

MAC. APP. : 498/2007 DATE OF DECISION: 09.08.2012

Motor Vehicles Act, 1988—Section 149(2), 157 and 166—Code of Civil Procedure, 1908—Order XII Rule 8—Claims Tribunal awarded compensation in favour of appellants and Respondent No. 3 for death of Anupam Chaudhary, aged 28 years—Claimants and Insurer filed appeals against judgment passed by Claims Tribunal—Plea taken by claimants, compensation awarded is on lower side as claimants were entitled to addition of 50% towards future prospects as deceased was a meritorious boy in permanent employment and Claims Tribunal erred in applying multiplier of 8 which should have been 17 as per age of deceased—Per contra, plea of insurer that First Respondent committed willful breach of terms of policy as his driving license was proved to be forged—Thus, it was entitled to be exonerated or in any case was entitled to recovery rights—Held—Claimants undoubtedly are entitled to addition of 50% towards future prospects as deceased was in permanent employment—Claims petition was filed by deceased's parents—Deceased had suffered fatal injuries in accident just on 24th day after his marriage—Widow preferred not to join as a petitioner in Claim Petition—She preferred not to appear as a witness before Claims Tribunal—She preferred to be proceeded ex aprte—She did not file any appeal

against impugned judgment—In circumstances, it would be reasonable to draw inference that she has remarried and has therefore not come forward either before Claims Tribunal or in this Appeal—Thus, she would not be considered as a dependent after date of her remarriage—Appropriate multiplier—would be according to age of deceased's mother as widow had remarried—Appropriate multiplier would be 11 against 8 adopted by Claims Tribunal—Overall compensation enhanced—Notice was served upon First Respondent to produce driving license—First Respondent neither contested Claim Petition nor Appeal nor came forward with any driving license which was valid on date of accident—Driving license seized by Police was proved to be fake—Adverse inference has to be drawn against First Respondent that had he been in possession of a valid driving license, he would have produced same—Even in case of conscious and willful breach of terms of policy, Insurer has statutory liability of third party—Insurer entitled to recover amount of compensation paid from driver and owner in execution of this very judgment without recourse to independent civil proceedings.

Important Issue Involved: (A) It would be reasonable to draw an inference that widow has remarried where she preferred not to join as a petitioner in the Claim Petition, preferred not to appear as a witness before Claims Tribunal and is proceeded ex parte.

(B) Where the widow had remarried, the appropriate multiplier would be according to the age of deceased's mother.

(C) An adverse inference has to be drawn against the driver when he neither contested the Claim Petition nor the Appeal nor came forward with any driving license which was valid on the date of accident even after service of notice under Order XII Rule 8 CPC to produce Driving License that had he been in possession of a valid driving license, he would have produced the same.

(D) Even in case of conscious and willful breach of the terms of the Policy, the Insurer has statutory liability to satisfy the award in favour of the third party.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANT : Ms. Amita Kapoor, Advocate.

FOR THE RESPONDENT : Mr. Pradeep Gaur, Adv. with Mr. Vineet Mishra, Advocate For R-2.

CASES REFERRED TO:

1. *Oriental Insurance Company Limited* vs. *Rakesh Kumar and Others and other* MAC APP. No.329/2010.
2. *Sarla Verma (Smt.) & Ors.* vs. *Delhi Transport Corporation & Anr.*, (2009) 6 SCC 121.
3. *National Insurance Company Limited* vs. *Vidhyadhar Mahariwala & Ors.*, (2008) 12 SCC 701.
4. *Premkumari & Ors.* vs. *Prahalad Dev & Ors.*, (2008) 3 SCC 193.
5. *Ishwar Chandra & Ors.* vs. *The Oriental Insurance Company Limited & Ors.*, (2007) 10 SCC 650.
6. *Nisha* vs. *Gyanwati*, ILR (2007) 2 Delhi 53.
7. *New India Assurance Co. Ltd.* vs. *Sanjay Kumar and Ors.*, ILR 2007(II) Delhi 733.
8. *National Insurance Company Limited* vs. *Kusum Rai & Ors.*, (2006) 4 SCC 250.

9. *National Insurance Company Limited* vs. *Swaran Singh & Ors.,* (2004) 3 SCC 297.

10. *United India Insurance Company Ltd.* vs. *Lehru & Ors.,* (2003) 3 SCC 338.

11. *Sohan Lal Passi* vs. *P. Sesh Reddy,* (1996) 5 SCC 21.

12. *Vijay* vs. *Laxmi Chand Jain & Ors.,* 1995 ACJ 755.

13. *Skandia Insurance Company Limited* vs. *Kokilaben Chandravadan,* (1987) 2 SCC 654.

14. *Oriental Fire and General Insurance Co. Ltd.* vs. *Shrimati Chandrawati,* AIR 1983 Allahabad 174.

RESULT: Appeal allowed.

G.P. MITTAL, J. (ORAL)

1. These two Appeals (MAC APP.498/2007 and MAC APP.592/2007) arise out of a common judgment dated 02.07.2007 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby a compensation of Rs. 19,00,000/- lacs along with interest @ 6% per annum was awarded in favour of the Appellants and Respondent No.3 for the death of Anupam Chaudhary, a young boy aged 28 years.

2. For the sake of convenience, the Appellants in MAC APP.498/2007 shall be referred to as the Claimants and Appellant in MAC APP.592/2007 shall be referred to as the Insurer.

3. The Claimants, grievance is that the compensation awarded is on the lower side as the Claimants were entitled to an addition of 50% towards future prospects as the deceased was a meritorious boy in permanent employment with M/s. UBICS Enterprises Solution Pvt. Ltd. The Claims Tribunal erred in applying the multiplier of '8' which should have been '17' as per the age of the deceased.

4. On the other hand, the Insurer's plea is that it had successfully proved the breach of the terms of policy and thus, it was entitled to be exonerated or in any case was entitled to recovery rights.

5. First of all, the quantum of compensation.

6. Hema Bisht (Ms.) Senior Executive Finance, UBICS was examined as PW-2. She proved the deceased's appointment letter Ex.PW-2/1. She

deposed that the deceased's joined UBICS on 29.10.2003 and was made permanent with effect from 22.03.2004. The deceased's salary without transport allowance was proved to be Rs. 31,700/-.

7. The Claimants undoubtedly are entitled to an addition of 50% towards future prospects. (See **Sarla Verma (Smt.) & Ors. v. Delhi Transport Corporation & Anr.,** (2009) 6 SCC 121).

8. A Claim Petition under Section 166 of the Act was filed by the deceased's parents who also filed the Appeal (MAC 498/2007). The deceased suffered fatal injuries in the accident just on 24th day after his marriage. Anamika Chaudhary (Ms.) was a young widow. She preferred not to join as a Petitioner in the Claim Petition. She preferred not to appear as a witness before the Claims Tribunal. The Claims Tribunal opined that Anamika Chaudhary became widow after 24 days of her marriage and in all probabilities she would have married.

9. Although, the prospects of remarriage are not considered as a ground to deny, refuse or even reduce the award of compensation even if the widow is young. However, where a widow remarries, she is not entitled to the grant of compensation after her remarriage. In **Vijay v. Laxmi Chand Jain & Ors.,** 1995 ACJ 755, a contention made on prospect of re-marriage as a ground for reduction of compensation was rejected, but it was held that if by additional evidence, it was proved that the widow had remarried, the same could have affected the award of compensation. In **Oriental Fire and General Insurance Co. Ltd. v. Shrimati Chandrawati,** AIR 1983 Allahabad 174, Allahabad High Court held that a widow is not entitled to compensation after she remarries. In **Nisha v. Gyanwati,** ILR (2007) 2 Delhi 53, this Court held that "It would be appropriate if the loss of dependency is confined to the period from the date of the accident till the date of remarriage of the widow". As stated earlier Anamika Chaudhary preferred not to appear and not to join the Petitioner in the Claim Petition. She preferred to be proceeded ex-parte. She did not file any Appeal against the impugned judgment. In the circumstances, it would be reasonable to draw an inference that she has re-married and has therefore, not come forward either before the Claims Tribunal or in this Appeal.

Thus, she would not be considered as a dependent after the date of her remarriage.

10. In case of death of a bachelor deduction of 50% is made. In the instant case, the deceased married just 24 days before unfortunate death. As stated earlier, an inference has to be drawn that the widow has re-married. The date when she got re-married is not known. She, therefore, cannot be deprived of the total compensation thus instead of making deduction of 50% towards personal and living expenses, the Claims Tribunal rightly made deduction of one-third in order to award some compensation to the widow.

11. At the same time, the appropriate multiplier would be according to the age of deceased's mother as the widow had re-married. As per the statement dated 29.08.2005 made by Ajit Singh, the deceased's father, the deceased's mother Jagbiri Devi (the Claimant) was aged 55 years on 29.08.2005. Thus, she was aged about 54 years on the date of the accident. The appropriate multiplier, in the circumstances, would be '11' as against '8' adopted by the Claims Tribunal.

12. Applying the principle laid down in **Sarla Verma (Smt.) & Ors. v. Delhi Transport Corporation & Anr.,** (2009) 6 SCC 121, the loss of dependency would come to Rs.38,54,400/- (31,700/- x 12 = 3,80,400/- - 30,000/- (income tax) = 3,50,400/- + 50% x 2/3 x 11).

13. On adding a notional sum of Rs.25,000/- towards loss of love and affection and Rs.10,000/- each towards loss of consortium, loss to estate and funeral expenses, the overall compensation comes to Rs.39,09,400/-.

14. The overall compensation is enhanced from Rs.19,00,000/- to Rs.39,09,400/-.

15. Thus, there is enhancement of '20,09,400/- which shall carry interest @ 6% per annum from the date of filing of the Petition till the date of award and @ 7.5% per annum from the date of filing of the Appeal till its payment.

16. In the Claim Petition filed by the Claimants, Respondent No.1 was impleaded as driver and registered owner. Respondent No.2 as the Insurer, Respondent No.3 as the deceased's widow and Respondent No.4 as the Insurer.

17. In Para 23 (13), the Claimants averments that Respondent No.1 was the registered owner and he got the offending truck released on

Superdari were not challenged by Respondent No.1 by filing any written statement rather he was ordered to be proceeded ex-parte. The fourth Respondent was the Insured and certificate of Insurance was not transferred in the name of the First Respondent.

18. As per Section 157 of the Act on transfer of the vehicle the Certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer. Although, the registration certificate has not been placed on record but in view of the unchallenged averments it stands established that the Respondent No.1 was the driver and registered owner of the vehicle.

19. It is the case of the Insurer that the first Respondent committed willful breach of the terms of the policy as his driving licence was proved to be forged. Respondent No.1 has not come forward with any explanation with regard to his driving licence and in the circumstances, the Appellant Insurance Company is entitled to avoid the Insurance policy on account of statutory defence available under Section 149 (2) (a) (ii) of the Act.

20. The Appeal must succeed on this ground.

21. The Insurer's application for additional evidence was allowed by this Court by order dated 20.05.2001. In pursuance thereof, the Insurer examined Mahmood, a Junior Clerk form Regional Transport Office, Dehradun, Uttrakhand as AW-1 who deposed that the driving licence No.36925/UA dated 12.06.2003 was issued in the name of the Raghuvir Singh son of Sh. Ranjeet Singh and not in the name of the First Respondent. In cross-examination, he deposed that the driving licence with 'UA' series pertains to computerized records. In the year 2003 the licences were issued under 'D' series and not under 'UA' series. He also proved copy of the driving licence No. 36925/D/2003 which was issued on 12.06.2003 as Ex.AW-1/3. Driving licence No.42655/D/2003 (Ex.AW-1/1) which was issued on 24.10.2003 and the driving licence No.42656/D/2003 (Ex.AW-1/2) which was issued on 28.10.2003.

22. A notice under Order XII Rule 8 CPC served upon the First Respondent to produce the driving licence was proved as Ex.R2W-1/1. The First Respondent neither contested the Claim Petition nor the Appeal nor came forward with any driving licence which was valid on the date

of the accident. The driving licence which was seized by the police was proved to be fake. In the circumstances, an advert inference has to be drawn against the First Respondent that had he been in possession of a valid driving licence, he would have produced the same. I am supported in this view by a judgment of the learned Single Judge of this Court in **New India Assurance Co. Ltd. v. Sanjay Kumar and Ors.,** ILR 2007(II) Delhi 733, where it was held as under:-

> "23. Where the assured chooses to run away from the battle i.e. fails to defend the allegation of having breached the terms of the insurance policy by opting not to defend the proceedings, a presumption could be drawn that he has done so because of the fact that he has no case to defend. It is trite that a party in possession of best evidence, if he withholds the same, an adverse inference can be drawn against him that had the evidence been produced, the same would have been against said person. As knowledge is personal to the person possessed of the knowledge, his absence at the trial would entitle the insurance company to a presumption against the owner.
>
> 24. That apart, what more can the insurance company do other than to serve a notice under Order 12 Rule 8 of the Code of Civil Procedure calling upon the owner as well as the driver to produce a valid driving licence. If during trial such a notice is served and proved to be served, non response by the owner and the driver would fortify the case of the insurance company."

23. It is well settled that even in case of conscious and willful breach of the terms of the policy, the Insurer has statutory liability to satisfy the award in favour of third party.

24. The issue of satisfying the third party liability even in case of breach of the terms of insurance policy is settled by three Judge Bench report in **Sohan Lal Passi v. P. Sesh Reddy,** (1996) 5 SCC 21. As per Section 149(2) of the Motor Vehicles Act (the Act), an insurer is entitled to defend the action on the grounds as mentioned under Section 149(2)(a)(i)(ii) of the Act. Thus, the onus is on the insurer to prove that there is breach of the condition of the policy. It is well settled that the breach must be conscious and willful. Even if a conscious breach on the part of the insured is established, still the insurer has a statutory liability

to pay the compensation to the third party and will simply have the right to recover the same from the insured/tortfeasor either in the same proceedings or by independent proceedings as the case may be, as ordered by the Claims Tribunal or the Court. The question of statutory liability to pay the compensation was discussed in detail by a two Judge Bench of the Supreme Court in **Skandia Insurance Company Limited v. Kokilaben Chandravadan,** (1987) 2 SCC 654 where it was held that exclusion clause in the contract of Insurance must be read down being in conflict with the main statutory provision enacted for protection of victim of accidents. It was laid down that the victim would be entitled to recover the compensation from the insurer irrespective of the breach of the condition of policy. The three Judge Bench of the Supreme Court in Sohan Lal Passi analyzed the corresponding provisions under the Motor Vehicles Act, 1939 and the Motor Vehicles Act, 1988 and approved the decision in Skandia. In **New India Assurance Co., Shimla v. Kamla and Ors.,** (2001) 4 SCC 342, the Supreme Court referred to the decision of the two Judge Bench in Skandia, the three Judge Bench decision in Sohan Lal Passi and held that the insurer who has been made liable to pay the compensation to third parties on account of issuance of certificate of insurance, shall be entitled to recover the same if there was any breach of the policy condition on account of the vehicle being driven without a valid driving licence. The relevant portion of the report is extracted hereunder:

> "21. A reading of the proviso to sub-section (4) as well as the language employed in sub-section (5) would indicate that they are intended to safeguard the interest of an insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in Chapter XI of the Act. This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy.
>
> 22. To repeat, the effect of the above provisions is this: when a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the

insurer to pay to the third parties, whether or not there has been any breach or violation of the policy conditions. But the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.

23. It is advantageous to refer to a two-Judge Bench of this Court in **Skandia Insurance Company Limited v. Kokilaben Chandravadan,** (1987) 2 SCC 654. Though the said decision related to the corresponding provisions of the predecessor Act (Motor Vehicles Act, 1939) the observations made in the judgment are quite germane now as the corresponding provisions are materially the same as in the Act. Learned Judge pointed out that the insistence of the legislature that a motor vehicle can be used in a public place only if that vehicle is covered by a policy of insurance is not for the purpose of promoting the business of the insurance company but to protect the members of the community who become suffers on account of accidents arising from the use of motor vehicles. It is pointed out in the decision that such protection would have remained only a paper protection if the compensation awarded by the courts were not recoverable by the victims (or dependants of the victims) of the accident. This is the raison d'etre for the legislature making it prohibitory for motor vehicles being used in public places without covering third-party risks by a policy of insurance.

24. The principle laid down in the said decision has been followed by a three-Judge Bench of this Court with approval in **Sohan Lal Passi v. P. Sesh Reddy,** (1996) 5 SCC 21.

25. The position can be summed up thus:

The insurer and the insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid driving

licence....."

25. Again in **United India Insurance Company Ltd. v. Lehru & Ors.,** (2003) 3 SCC 338, in para 18 of the report the Supreme Court referred to the decision in **Skandia, Sohan Lal Passi** and **Kamla** and held that even where it is proved that there was a conscious or willful breach as provided under Section 149(2)(a) (ii) of the Motor Vehicle Act, the Insurance Company would still remain liable to the innocent third party but may recover the compensation paid from the insured. The relevant portion of the report is extracted hereunder:

> "18. Now let us consider Section 149(2). Reliance has been placed on Section 149(2)(a)(ii). As seen, in order to avoid liability under this provision it must be shown that there is a "breach". As held in Skandia and Sohan Lal Passi cases the breach must be on the part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results. Just to take an example, suppose a vehicle is stolen. Whilst it is being driven by the thief there is an accident. The thief is caught and it is ascertained that he had no licence. Can the insurance company disown liability? The answer has to be an emphatic "No". To hold otherwise would be to negate the very purpose of compulsory insurance....."
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> x x x x
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> 20. .....If it ultimately turns out that the licence was fake, the insurance company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly, even in such a case the insurance company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in Skandia, Sohan Lal Passi and Kamla cases. We are in full agreement with the views expressed therein and see no reason to take a different view."

26. The three Judge Bench of the Supreme Court in **National Insurance Company Limited v. Swaran Singh & Ors.,** (2004) 3 SCC

297 again emphasized that the liability of the insurer to satisfy the decree passed in favour of the third party was statutory. It approved the decision in Sohan Lal Passi, Kamla and Lehru. Paras 73 and 105 of the report are extracted hereunder:

> "73. The liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory.
>
> xxxx xxxx xxxx xxxx xxxx xxxx xxxx xxxx xxxx xxxx
>
> 105. Apart from the reasons stated hereinbefore, the doctrine of stare decisis persuades us not to deviate from the said principle."

27. This Court in MAC APP. No.329/2010 **Oriental Insurance Company Limited v. Rakesh Kumar and Others and other** Appeals decided by a common judgment dated 29.02.2012, noticed some divergence of opinion in **National Insurance Company Limited v. Kusum Rai & Ors.,** (2006) 4 SCC 250, **National Insurance Company Limited v. Vidhyadhar Mahariwala & Ors.,** (2008) 12 SCC 701; **Ishwar Chandra & Ors. v. The Oriental Insurance Company Limited & Ors.,** (2007) 10 SCC 650 and **Premkumari & Ors. v. Prahalad Dev & Ors.,** (2008) 3 SCC 193 and held that in view of the three Judge Bench decision in **Sohan Lal Passi**(supra) and Swaran Singh, the liability of the Insurance Company vis-a-vis the third party is statutory. If the Insurance Company successfully proves the conscious breach of the terms of the policy, then it would be entitled to recovery rights against the owner or driver, as the case may be.

28. In the circumstances, I am of the view that the liability of the Insurance Company to satisfy the award in the first instance is statutory. It is bound to satisfy the same and entitled to recover the amount of compensation paid from the driver and the owner (Respondent No.1) in execution of this very judgment without having recourse to independent civil proceedings.

29. The enhanced compensation of 20,09,400/- along with interest shall be equally apportioned amongst the Claimants and the Third Respondent.

30. 80% of the enhanced compensation shall be held in fixed deposit for a period of two years, four years and six years in equal proportion.

Rest shall be released on deposit.

31. The National Insurance Company Limited Respondent No.2 in MAC APP.498/2007 is directed to deposit the enhanced compensation with the Claims Tribunal within six weeks.

32. The statutory deposit of Rs. 25,000/- shall be refunded to the Appellant Insurance Company.

33. The Appeals are allowed in above terms.

34. Pending Applications stand disposed of.

ILR (2012) V DELHI 788
W.P. (C)

UK PRIYADARSHI ….PETITIONER

VERSUS

NDPL ….RESPONDENT

(SURESH KAIT, J.)

W.P. (C): 4955/2010 & CM NO. : 9806/2010 **DATE OF DECISION: 23.08.2012**

Constitution of India, 1950—Petitioner was appointed as Adhoc Medical Officer with DESU for period of 3 months, against permanent post in the year 1986—Thereafter his adhoc appointment was extend from time to time for six years—In year 1992, his case was referred to Union Public Service Commission for considering his appointment on regular basis, as special case-In year 1996, Delhi Vidyut Board became successor of DESU-In meanwhile, no response was received from UPSC-Again request letter was sent to UPSC to expedite approval on proposal sent by DVB-

Till January, 1998, no approval was received, thus petitioner filed OA before Central Administrative Tribunal for redressal of his grievance which was subsequently transferred to High Court of Delhi to be treated as Writ Petition—However, on assurance given by respondent to petitioner that he would be regularized, he withdrew writ petition in year 2000-But vide office order dated June 2010 his services were terminated abruptly and strangely, without prior notice or information to him-Petitioner filed petition seeking quashing of said order and prayed to be reinstated in service with all service benefits—On behalf of respondent, it was urged that petitioner was appointed purely on adhoc basis and subsequently his appointment as Medical Officer was required to be made through UPSC, therefore, he could not have a right to be treated at par with regularly recruited employee. Held—As per Recruitment & Promotion Rules, 1984 for making direct recruitment, the UPSC has to be consulted. However, in a situation of non-decision on behalf of UPSC a party should not suffer—Petitioner was qualified doctor and appointed through proper procedure—Termination was illegal and in violation of principles of natural justice—Petitioner directed to be reinstated without back wages.

Moreover, the respondent sent the case of the petitioner to the UPSC twice, but no decision was taken at their end. As per Recruitment and Promotion Rules, 1984 for making the direct recruitment, the UPSC has to be consulted. The respondent already taken the steps and consulted the UPSC, however, the UPSC did not take any decision. In such a situation, the petitioner should not suffer on non-decision on behalf of the UPSC. **(Para 31)**

Important Issue Involved: As per Recruitment & Promotion Rules, 1984 for making direct recruitment the UPSC has to be consulted, However, in a situation of non-decision on behalf of UPSC a party should not suffer.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. O.P. Saxena with Mr. Sanjay Verma, Advs.

FOR THE RESPONDENT : Mr. Vikram Nandrajog and Mr. Sushil Jaswal, Advs.

CASES REFERRED TO:

1. *Secretary, State of Karnataka & Ors.* vs. *Umadevi & Ors.* AIR 2006 Supreme Court 1806.
2. *Rudra Kumar Sain & Ors.* vs. *Union of India & Ors.* AIR 2000 Supreme Court 2808.
3. *Dr. Rai Shivendra Bahadur* vs. *The Governing Body of the Nalanda College* [(1962) Supp. 2 SCR 144].

RESULT: Petition allowed.

SURESH KAIT, J.

1. Vide the instant petition petitioner seeks quashing of the order dated 15.06.2010 and consequently prayed that the respondent be directed to reinstate the petitioner in service with all service benefits.

2. Respondent (erstwhile DESU) vide letter dated 19.05.1986 advanced an offer of appointment to the petitioner as Medical Officer on an ad-hoc basis for a period of three months against a permanent post in the pay scale of Rs.1000-40-1200-EB-1400-60-1700-75-1850 plus other usual allowances as admissible under the Rules.

3. Thereafter, vide Office Order dated 26.05.1986, it is conveyed to the petitioner that he was appointed in pursuance of the DESC's approval vide Item No. 58B dated 09.04.1986. Thereafter, the ad-hoc appointment of the petitioner has been extended from time to time.

4. The petitioner had completed six years of service till the year 1992. Thereafter, vide the proposal contained in GM (E)'s letter no. F.4 (1)A&G/86/Mtg./2132 dated 23.09.1992 regarding filling up the post of Medical Officers was considered and decided vide decision No. 1790/ DESU dated 29.09.1992 that it would be appropriate to refer the case of

the petitioner to the Union Public Service Commission for considering his appointment on regular basis as a special case.

5. In the year 1996, Delhi Vidyut Board (DVB) became the Successor of DESU (MCD). Additional General Manager (A) of the then Delhi Vidyut Board also vide letter dated 31.03.1997 referred the matter, for regularization of the petitioner for the post of Medical Officer in DVB, to the Secretary, Union Public Service Commission, New Delhi

6. Since no response came from the Union Public Service Commission, the Additional GM (A) of Delhi Vidyut Board vide letter dated 04.07.1997 again requested the Union Public Service Commission to expedite the approval on the proposal sent by them.

7. On 28.01.1998, petitioner also made representation to the Chairman of Delhi Vidyut Board for his regularization as Medical Officer. When no decision was taken by the Union Public Service Commission, the petitioner on 02.12.1998 filed an OA before the Central Administrative Tribunal, Principal Bench, New Delhi for redressal of his grievance, which application was subsequently transferred to this Court and numbered as W.P.(C) 188/1999.

8. On 13.01.1999, this court passed an order as under:

> "13.01.1999 Present: Mr. Rajnish Shekhar for the petitioner.
>
> CW No. 188/1999
>
> Rule
>
> CM. NO. 265/1999
>
> Notice to the respondents for 27.07.1999. There shall be an injunction restraining the first respondent from creating any break in service of the petitioner until further orders. Dasti."

9. In pursuance to the aforesaid order passed by this Court, the Delhi Vidyut Board vide office Order dated 28.07.1999 allowed the petitioner to continue in the post of Medical Officer w.e.f 23.07.1999 until further orders subject to the outcome of the aforesaid Writ Petition.

10. Mr. O.P. Saxena, ld. Counsel appearing on behalf of the petitioner submitted that though the petitioner had a very strong case and he was enjoining interim protection, however, on the assurance of the respondent

that the petitioner will be regularized, petitioner withdrew the said petition on 04.07.2000 in the presence of Counsel of Delhi Vidyut Board and this fact was very much within the knowledge of the officials of the respondent.

11. He further submitted that service record of the petitioner with the erstwhile DESU from the year 1986 to 1996, with Delhi Vidyut Board from the year 1996 to 2001 and with the present respondent i.e. NDPL from the year 2001 to 2010 has been quite clean and unblemished.

12. Ld. Counsel for the petitioner has argued that vide Office Order dated 15.06.2010 service of the petitioner was terminated abruptly which was quite strangely and without prior notice or information to the petitioner. The contents of the aforesaid impugned order are as under:-

> "Vide Office Order No. F4 (112)/A&G/NT/86/68 dated 28.07.1999 issued by erstwhile DVB, the appointment of Dr. U.K. Priyadarshi on the Post of Medical Office on ad-hoc basis in the pay scale of Rs.8000-13775/- plus other allowances as admissible under the rules, was allowed to continued on the post of Medical Officer in DVB w.e.f 23.07.1999 until further orders, in terms of the Hon'ble High Court of Dlehi order dated 13.01.1999 passed in CMP No. 265/1999 in CWP No. 188/1999 subject to the final outcome of the aforesaid Writ Petition.
>
> Now it has been informed that the Writ Petition No. 188/1999 on the basis of which the said office order dated 28.07.1999 was issued, has been dismissed as withdrawn by an order dated 04.07.2000 by the Hon'ble High Court of Delhi but no intimation in this regard was given by Dr. U.K. Priyadarshi to NDPL.
>
> Accordingly, since the said Writ Petition no. 188/1999 stands withdrawn, the appointment of Dr. U.K. Priyadarshi no longer continues after 04.07.2000 in DVB / NDPL.
>
> In view of the above the appointment of Dr. U.K. Priyadarshi as Medical Officer, on ad-hoc basis in NDPL automatically stands terminated with immediate effect. He may be relieved from the service immediately and he will hand over the charge to CMO."

13. Ld. Counsel for the petitioner argued that on perusal of the said order, the impression given is that respondents were not aware of the withdrawal of the petition, whereas the said petition was withdrawn in

the presence of the ld. Counsel appearing on behalf of the respondent. Moreover, it is mentioned in the impugned order that the appointment of the petitioner is no longer continues after 04.07.2000 in DVB/NDPL whereas the impugned order has been issued on 15.06.2010 itself, which is contrary to their own record and service rendered by the petitioner.

14. Ld. Counsel for the petitioner has pointed out that vide Decision NO. 1790/DESU dated 29.09.1992, following decision was taken:

> "Proposal contained in GM (E)'s letter No. F.4(1)A&G/86/Mtg.-2132 dated 23.09.1992 regarding filling up the post of Medical Officer considered. It is observed that the incumbent working against vacancy / leave vacancy on short term arrangement basis right from 1986. It would be appropriate to refer her case to the UPSC for considering her regular appointment as a special case. With this stipulation, approval is accorded to the ad-hoc appointment of Dr. U.K. Priyadarshi as Medical Officer in the scale of pay of Rs.2200-4100 for short-term vacancy on three months basis or till the post is filling up on regular basis, whichever is earlier, subject to the usual terms and conditions of appointment applicable to such case of short-term arrangements. Also, AGM (A) is authorized to make ad-hoc appointment.

15. Moreover, vide communication dated 31.03.1997, Delhi Vidyut Board also communicated to the Union Public Service Commission for considering the case of the petitioner for regularization.

16. In representation dated 28.01.1998, petitioner apprised the Chairman (DVB) that he was entitled for regularization as Medical Officer for the reasons that in a similar case the Junior Medical Officers, who were appointed on ad-hoc and short-term contract basis by the Delhi Administration in the year 1986 and were paid consolidated monthly wage had been regularized for the post as per the Judgment given by the Central Administrative Tribunal on 18.12.1987. 17. Ld. Counsel has submitted that, moreover, vide order dated 13.01.1999 respondents were restrained from creating any break in service of the petitioner till further orders.

18. Ld. Counsel has relied upon a case of **Rudra Kumar Sain & Ors. vs. Union of India & Ors.** AIR 2000 Supreme Court 2808 wherein it is held as under:

> "The three terms ad hoc, stop gap and fortuitous are in frequent use in service jurisprudence. In the absence of definition of these terms in the rules in question we have to look to the dictionary meaning of the words and the meaning commonly assigned to them in service matters. The meaning given to the expression fortuitous in Stroud's Judicial Dictionary is accident or fortuitous casualty. This should obviously connote that if an appointment is made accidentally, because of a particular emergent situation and such appointment obviously would not continue for a fairly long period. But an appointment made either under Rule 16 or 17 of the Recruitment Rules, after due consultation with the High Court and the appointee possesses the prescribed qualification for such appointment provided in Rule 7 and continues as such for a fairly long period, then the same cannot be held to fortuitous. In Blacks Law dictionary, the expression fortuitous means occurring by chance, a fortuitous event may be highly unfortunate. It thus, indicates that it occurs only by chance or accident, which could not have been reasonably foreseen. The expression ad hoc in Blacks Law Dictionary means something which is formed for a particular purpose. The expression stop-gap as per Oxford Dictionary means a temporary way of dealing with a problem or satisfying a need.
>
> The meaning to be assigned to these terms while interpreting provisions of a Service Rule will depend on the provisions of that Rule and the context in and the purpose for which the expressions are used. The meaning of any of these terms in the context of computation of inter-se seniority of officers holding cadre post will depend on the facts and circumstances in which the appointment came to be made. For that purpose it will be necessary to look into the purpose for which the post was created and the nature of the appointment of the officer as stated in the appointment order. If the appointment order itself indicates that the post is created to meet a particular temporary contingency and for a period specified in the order, then the appointment to such a post can be aptly described as ad hoc or stop-gap. If a post is created to meet a situation which has suddenly arisen on account of happening of some event of a temporary nature then the appointment of such a post can aptly be described as fortuitous

in nature. If an appointment is made to meet the contingency arising on account of delay in completing the process of regular recruitment to the post due to any reason and it is not possible to leave the post vacant till then, and to meet this contingency an appointment is made then it can appropriately be called as a stop-gap arrangement and appointment in the post as ad hoc appointment. It is not possible to lay down any straight-jacket formula nor give an exhaustive list of circumstances and situation in which such an appointment (ad hoc, fortuitous or stop-gap) can be made.

As such, this discussion is not intended to enumerate the circumstances or situations in which appointments of officers can be said to come within the scope of any of these terms. It is only to indicate how the matter should be approached while dealing with the question of inter se seniority of officers in the cadre.

In the Service Jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such appointment cannot be held to be stop-gap or fortuitous or purely ad hoc. In this view of the matter, the reasoning and basis on which, the appointment of the promotees in the Delhi Higher Judicial Service in the case in hand was held by the High Court to be fortuitous/ad hoc/stop-gap are wholly erroneous and, therefore, exclusion of those appointees to have their continuous length of service for seniority is erroneous."

19. Ld. Counsel has further relied upon a case of **Secretary, State of Karnataka & Ors. v. Umadevi & Ors.** AIR 2006 Supreme Court 1806 wherein it is held as under:-

"Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to

refer to the decision of the Constitution Bench of this Court in **Dr. Rai Shivendra Bahadur Vs. The Governing Body of the Nalanda College** [(1962) Supp. 2 SCR 144]. That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent.

One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in **S.V. Narayanapa** (supra), **R.N. Nanjudappa** (supra), and **B.N. Nagarajan** (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not

duly appointed as per the constitutional scheme."

20. On the other hand, Mr. Vikram Nandrajog, ld. Counsel appearing on behalf of the respondent NDPL has submitted that petitioner was never appointed on a regular basis to the post of Medical Officer under the then DESU. He was purely on ad-hoc basis for a period of three months or till the post is filled up on a regular basis whichever is earlier. He submitted that the Recruitment and Promotion Rule dated 14.11.1975 qua the appointment to the post of Medical Officer were amended in the year 1984 and the Medical Officer was changed from Class-II to Category-'A'.

21. It is further submitted that the appointment to the said post of Medical Officer was required to be made / filled up through Union Public Service Commission. However, he has fairly conceded that DVB and DESU forwarded the case of the petitioner to the Union Public Service Commission, but the name of the petitioner was never recommended for appointment for the post of Medical Officer on regular basis.

22. Moreover on 04.07.2000 petitioner withdrew the aforesaid Writ Petition, therefore, the relief sought by the petitioner was given up on withdrawing the same. Therefore, the petitioner has no claim qua regularization of service as Medical Officer or any other post / capacity under DESU / DVB or the present respondent.

23. Ld. Counsel for the respondent has further submitted that "Rule" along with an interim order having been issued in the aforesaid Writ Petition on the first hearing itself, it seems the subsequent withdrawal of the said Writ on 04.07.2000 was not processed / noted by the erstwhile DVB in its records. The present respondent i.e. New Delhi Power Limited (NDPL) was incorporated on 04.07.2001 and inherited the distribution undertaking on 01.07.2002 along with the assets, liabilities, personnel and proceedings in pursuance of Statutory Transfer Scheme notified by the Government pursuant to Section 14-16 and 60 of the Delhi Electricity Reforms Act, 2000. The petitioner got transferred in routine to the present respondent.

24. Ld. Counsel has relied upon a case of **Secretary, State of Karnataka & Ors.** (Supra), wherein it is held as under:

"When a person enters a temporary employment or gets

engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

39. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the concerned department on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by

making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled.

25. I heard ld. Counsel for parties.

26. No doubt, no right can be founded on an employment on daily wages to claim that such employee should be treated at par with a regularly recruited candidate, however, in a case of **Uma Devi** (supra), the Apex Court directed the Union of India, the State Government and their instrumentalities to take steps to regularize as an one time measure, the services of such irregularly appointed, who had worked for 10 years or more.

27. The case in hand is on better footings. The petitioner was appointed in pursuance of the DESC's approval vide order dated 09.04.1986. Moreover, vide proposal contained in GM (E)'s letter No. F 4(1) A & G /86/Mtg./2132 dated 23.09.1992 regarding filling the post of Medical Officer was considered, decided and sent to UPSC. Therefore, the respondent had given him high hope and he continued in service.

28. In the year, 1996, Delhi Vidyut Board (DVB) became the successor of DESU. Second time, Addl. General Manager (A) of the then Delhi Vidyut Board vide letter dated 31.03.1997 referred the case of the petitioner for regularization to the Secretary, UPSC. When no response came from the UPSC, the aforesaid authority vide letter dated 04.07.1997 again requested the UPSC to expedite the approval on the proposal sent by them. Thus the hope of the petitioner continued till 1997.

29. In the absence of any response from the UPSC, finally, the petitioner knocked the door of the court. Vide order dated 13.01.1999, this court granted interim protection, restraining the first respondent from creating any break in service of the petitioner until further orders. In this manner, petitioner was enjoying the interim protection from the Court and the case was pending.

30. It emerges from the submission of ld. Counsel for the parties that at one point of time, respondent assured the petitioner that if he withdraws the case, he will be regularized. On this, petitioner had withdrawn the case in the presence of Counsel for respondent as is evident from the order of withdrawal. Therefore, from any stretch of imagination, it cannot be believed that respondents were not aware of the withdrawal of the petition by the petitioner and he continued with the present respondent till the impugned order dated 15.06.2010.

31. Moreover, the respondent sent the case of the petitioner to the UPSC twice, but no decision was taken at their end. As per Recruitment and Promotion Rules, 1984 for making the direct recruitment, the UPSC has to be consulted. The respondent already taken the steps and consulted the UPSC, however, the UPSC did not take any decision. In such a situation, the petitioner should not suffer on non-decision on behalf of the UPSC.

32. The petitioner is a qualified Doctor and eligible for the post of Medical Officer. He was appointed through proper procedure. Even no notice was issued to him prior to his termination. Petitioner worked for more than 24 years w.e.f 19.05.1986 with DESU, DVB and NDPL (present respondent).

33. Therefore, the termination order dated 15.06.2010 is bad in law, arbitrary and in violation of the principles of natural justice. Therefore, the order dated 15.06.2010 is set aside and the respondent is directed to reinstate the petitioner in service with no back wages.

34. In view of the above, instant petition is allowed with no order as to costs.

CM. NO. 9806/2010

In view of the above, the instant application becomes infructuous and disposed of as such.

ILR (2012) V DELHI 801
CS (OS)

NAVENDU ….PLAINTIFF

VERSUS

AMARJIT S. BHATIA ….DEFENDANT

(V.K. JAIN, J.)

CS (OS) : 643/2009 DATE OF DECISION: 30.8.2012

Specific Relief Act, 1963—Section 16—Plaintiff filed suit claiming specific performance of agreement executed between parties for sale of suit property to plaintiff—As averred by plaintiff, defendant being owner of suit property, had agreed to sell property to him for consideration of Rs. 69,50,000/— and received part consideration of Rs. 20 lac, on day of execution of agreement dated 17/11/08—Balance amount was agreed to be paid within two months at time of registration of sale deed and defendant was to handover possession of property to plaintiff—However, despite requests made by plaintiff from time to time, defendant refused to produce original documents of title of suit property for perusal of representatives of bank, from which plaintiff intended to take loan—Plaintiff had further arranged entire balance payment required to complete transaction and vide notice called upon defendant to bring original paper and execute sale deed on or before expiry of date settled—But defendant did not turn up at Office of Sub—Registrar to execute document and subsequently also failed to keep his promise to execute sale deed; thus, plaintiff filed suit seeking specific performance of agreement and in alternative for recovery of Rs. 20 lacs. Held—A party seeking specific performance of contract must show

and specify the court that he is ready and willing to perform the contract. By readiness it is meant his capacity to perform the contract including his financial position to pay the consideration for which he should not necessarily always carry the money with him from the date of the suit till date of decree. By willingness it is meant his intention and conduct to complete the transaction.

Section 16(c) of the Specific Reliefs Act provides that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. The explanation to Clause (c) provides that where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court. The philosophy behind the aforesaid statutory provision is that a person who comes to the Court seeking specific performance of a contract to which he is a party must show and satisfy the Court that his conduct having been blemishless he is entitled to grant of specific performance of the contract. **(Para 5)**

(B) Specific Relief Act, 1963—Section 16—Plaintiff filed suit claiming specific performance of agreement vide which defendant had agreed to sell his property to him—Plaintiff also made part payment as per agreement—As averred by plaintiff, defendant failed to perform his part of contract, whereas plaintiff would be willing to pay the balance sale consideration along with interest @ 15% per annum and he be directed to execute the agreement. Held:- Escalation of price during the intervening period, may be relevant consideration under certain circumstances for either refusing to grant decree of specific performance or

for decreeing the specific performance with a direction to the plaintiff to pay an additional amount to the defendant and to compensate him. It would depend upon facts and circumstances of each case. The court while directing specific performance of agreement to sell, may grant additional compensation to the vendor on account of appreciation in the prices of the property on the subject matter of the agreement.

In **Gobind Ram Vs. Gian Chand** [AIR 2000 SC 3106], Supreme Court, in order to mitigate the hardship resulting to the vendor due to lapse of time and escalation of prices of urban properties, directed payment of further compensation to the vendor while granting a decree for specific performance, in terms of the agreement between the parties.

In **Nirmala Anand Vs. Advent Corporation (P)Ltd. and Ors.** (2002) 8 SCC 146, Hon'ble Mr Justice Doraiswamy Raju, after noticing the facts and circumstances of the case, including that out of the total sale consideration of Rs 60,000/-, only a sum of Rs 35,000/- had been paid by the purchaser, observed that it would be not only unreasonable, but too inequitable for Courts to make the appellant the sole beneficiary of the escalation of real estate prices and the enhanced value of flat in question which the respondents had all along preserved by keeping alive the issues pending with the authorities of the Government and municipal bodies. The Hon'ble Judge was of the view that the balance of equity has also to be struck taking into account all the relevant aspects of the matter, including the lapses which had occurred and parties respectively responsible therefor. The Hon'ble Judge felt that before decreeing the specific performance, it is obligatory for the Courts to consider, whether by doing so any unfair advantage would result for the plaintiff over the defendant, the extent of hardship that may be caused to the defendant and if it would render such enforcement inequitable, besides taking into consideration the totality of the circumstances of each case. The Court, therefore, directed the appellant to pay at least a sum of Rs

40 lakh to the respondent Nos. 1 and 2, in addition to the amount which she had already paid. She was also held entitled to a decree for specific performance only subject to compliance of condition for this additional amount. Hon'ble Mr Justice Ashok Bhan, however, had reservations with respect to this part of the order. Noticing that in certain cases, the Court in equity and to mitigate the hardship to the vendor had directed the vendee to pay further compensatory amount, His Lordship was of the view that this is not a principle of universal application and payment of additional compensation would depend on the facts and circumstances of each case. His Lordship was of the view that escalation of price during the period may be relevant consideration under certain circumstances for either refusing to grant the decree of specific performance or for decreeing the specific performance with a direction to the plaintiff to pay an additional amount to the defendant and compensate him. It would depend upon on the facts and circumstances of each case. His Lordship observed that the respondents cannot take advantage of their own wrong and then plead that the grant of decree of specific performance would amount to an unfair advantage to the appellant. The view taken by his Lordship is that the appellant was entitled to specific performance of the agreement on the prices stipulated in the agreement to sell. **(Para 15)**

Important Issue Involved: (A) party seeking specific performance of contract must show and specify the court that he is ready and willing to perform the contract. By readiness it is meant his capacity to perform the contract including his financial position to pay the consideration for which he should not necessarily always carry the money with him from the date of the suit till date of decree. By willingness it is meant his intention and conduct to complete the transaction.

(B) Escalation of price during the intervening period may be relevant consideration under certain circumstances for either refusing to grant decree of specific performance or for decreeing the specific performance with a direction to the plaintiff to pay an additional amount to the defendant and to compensate him. It would depend upon facts and circumstances of each case. The court while directing specific performance of agreement to sell, may grant additional compensation to the vendor on account of appreciation in the prices of the property on the subject matter of the agreement.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Gaurav Gupta. Adv.

FOR THE RESPONDENT : Mr. Anukul Raj. Adv.

CASES REFERRED TO:

1. *J.P. Builders and another* vs. *A. Ramadas Rao and another* [(2011) 1 SCC 429].
2. *P.D'Souza* vs. *Shondrilo Naidu* [(2004) 6 SCC 649].
3. *Nirmala Anand* vs. *Advent Corporation (P)Ltd. and Ors.* (2002) 8 SCC 146.
4. *Gobind Ram* vs. *Gian Chand* [AIR 2000 SC 3106].
5. *His Holiness Acharya Swami Ganesh Dassji v Sita Ram Thapar* [1996 (4) SCC 526].
8. *Sukhbir Singh and others v Brij Pal Singh and others* [AIR 1996 SC 2510].
9. *N.P. Thirugnanam* vs. *Dr. R. Jagan Mohan Rao* [(1995) 5 SCC 115].

RESULT: Suit Decreed.

V.K. JAIN, J.

1. The defendant, who is the owner of the property bearing number Q-12-B, Jangpura Extension, New Delhi-110 014, entered into an agreement dated 17.11.2008 to sell the first floor of the above referred property to the plaintiff for a consideration of Rs.69,50,000/- and received a part consideration of Rs.20 lac from his on the same day. The balance amount was agreed to be paid within two months i.e. by 17.01.2009, at the time of registration of the sale deed, and the defendant was to handover possession of the property to the plaintiff at that time. It is alleged that despite requests made by the plaintiff from time to time, defendant refused to produce the original documents of title of the aforesaid property for perusal of the representative of the bank from which the plaintiff intended to take a loan. It is further alleged that the plaintiff arranged the entire balance payment required for completing the transaction and vide notice dated 13.01.2009 called upon the defendant to bring the original papers and execute the sale deed on or before 17.01.2009. He also informed the defendant that the balance sale consideration was ready with him. The plaintiff also visited the Office of Sub-Registrar on 16.01.2009, but the defendant did not turn up on that date. It is further alleged that in the second week of February, 2009, the defendant assured the plaintiff that he would produce the original documents in the second week of February, 2009 and that the plaintiff should arrange the sale consideration partly in cash and partly by way of a demand draft of Rs.19 lac. The defendant kept on assuring the plaintiff that he would be able to locate the original title deeds. Apprehensive of the intentions of the defendant, the plaintiff issued a public notice on 22.02.2009 in the newspapers informing the public in general with respect to the agreement which the defendant had executed with him. Since the transaction was not completed, the plaintiff has filed this suit claiming specific performance of the agreement dated 17.4.2008, production or the original title deeds and execution of conveyance deed in his favour. He also claimed an alternative relief for recovery of Rs.20 lac as also such damages as may be quantified by the Court.

2. The defendant has contested the suit. He has admitted execution of the agreement with the plaintiff as also receiving Rs.20 lac from him. It is alleged in the written statement that the original sale deed has been misplaced and a certified copy was, therefore, obtained by the defendant

from the Office of Sub-Registrar, well before signing the agreement with the plaintiff. The defendant provided this information to the plaintiff and only thereafter did the plaintiff request him to sell the property. It is also alleged that in December, 2008, the plaintiff asked the defendant to sell the property at a lesser price since there was a recession in the market. The defendant, however, denied the illegal demand of the plaintiff and asked him to pay the balance amount as per the agreement. It is further alleged that the plaintiff informed the defendant that he did not have the remaining amount to pay to him. The receipt of the letter/ notice dated 13.5.2009 has however not been disputed in the written statement.

3. On 24.11.2009, the following issues were framed on the pleadings of the parties:

> "1. Whether the plaintiff has always been willing and ready to perform his part of the contract under the agreement 17th November 2008? OPP
>
> 2. Whether the plaintiff is entitled to specific performance of the agreement dated 17th November 2008? OPP
>
> 3. Whether in case specific performance is not granted, in alternative, plaintiff is entitled to recovery of Rs.20 lac as damages along with interest, as claimed? OPP 4. Whether it was defendant who failed to perform his part of the contract? OPP
>
> 5. Relief."

4. **Issue No.1 to 4:** These issues are interconnected and, therefore, can be conveniently decided together.

A perusal of the agreement to sell dated 27.11.2008 (Ex.PW1/1) would show that the balance sale consideration of Rs.49,50,000/- was to be paid by the plaintiff to the defendant at the time of registration of the sale deed in the office of Sub-Registrar, within two months from the date of the agreement. This would mean that the balance sale consideration could be paid to the defendant on or before 17.11.2009.

5. Section 16(c) of the Specific Reliefs Act provides that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to

be performed by him, other than terms the performance of which has been prevented or waived by the defendant. The explanation to Clause (c) provides that where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court. The philosophy behind the aforesaid statutory provision is that a person who comes to the Court seeking specific performance of a contract to which he is a party must show and satisfy the Court that his conduct having been blemishless he is entitled to grant of specific performance of the contract.

6. As observed by the Supreme Court in **His Holiness Acharya Swami Ganesh Dassji v Sita Ram Thapar** [1996 (4) SCC 526], there is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness is meant the capacity of the plaintiff to perform his part of the contract including his financial position to pay the sale consideration whereas willingness signifies his intention and conduct to complete the transaction. As held by the Supreme Court in **Sukhbir Singh and others v Brij Pal Singh and others** [AIR 1996 SC 2510] that it is sufficient for the purchaser to establish that he had the capacity to pay the sale consideration. It is not necessary that he should always carry the money with them from the date of the suit till date of the decree.

7. In the case before this Court, a perusal of Ex.PW4/A which is the statement of the accounts of the plaintiff with Oriental Bank of Commerce, Defence Colony, New Delhi would show that on 14.01.2011, there was a credit balance of Rs.13,51,806.42 in his account. It further shows that on the same day, a sum of Rs.12,50,000/- was debited from his account by way of auto sweep which mean that the amount was transferred to the FD account of the plaintiff. Thereafter, three cheques, one for Rs.6,01,582/-, second for Rs.17,787/- and the third for Rs.1,91,787/- were credited in his account on 17.01.2009. Thus, the plaintiff had Rs.21,62,962.42 in Oriental Bank of Commerce, Defence Colony, New Delhi on that date. A perusal of Ex.PW5/A which is the statement of account with HDFC Bank, would show that the plaintiff had a credit balance of Rs.21,81,349.70 in the aforesaid account on 14.01.2009. Thus, the plaintiff had a total sum of Rs.43,44,311/- available with him on 17.01.2009.

It was contended by the learned counsel for the defendant that the credit balance of the plaintiff with Oriental Bank of Commerce on 13.01.2009, even after taking into credit the sweep entry of Rs.12,50,000/-, was Rs.13,51,806.42 and if this amount is added to the amount available in HDFC Bank, the total would come only to Rs.35,33,156/-. In my view, the contention is misconceived. The very fact that the three cheques were credited in the account of the plaintiff with Oriental Bank of Commerce on 17.01.2009 clearly shows that he had the financial capacity to raise the aforesaid amount even on 16.01.2009, since the cheques which were credited on 17.01.2009 must have been deposited in the bank account on or before 16.01.2009. This is also the case of the plaintiff that in addition to the amount available in the banks, he also had cash amounting to Rs.7.5 lac with him which he had also carried to the office of the Sub-Registrar. However, the plaintiff was not cross examined with respect to this part of his deposition. He was not asked wherefrom he had arranged the cash amounting to Rs.7.5 lac. He was not asked why he had kept so much of cash with him and fromwhere that money was arranged by him. No suggestion was given to him that he did not have Rs.7.5 lac in cash with him. In absence of any cross examination of plaintiff with respect to this part of his deposition, the defendant is deemed to have admitted that the plaintiff did have Rs.7.5 lac in cash with him. If the aforesaid cash amount of Rs.7.5 lac is added to the amount available with the plaintiff with Oriental Bank of Commerce and HDFC Bank, it is evident that the plaintiff had made arrangements for payment of Rs.49,50,000/- to the defendant on or before 17.01.2009.

8. It was contended by the learned counsel for the defendant that since the three cheques, one of Rs.6,01,582/-, second for Rs.17,787 and the third for Rs.1,91,797/- were credited in the account of the plaintiff only on 17.01.2009, this much amount was not available with him on 13.01.2009 when he went to the office of Sub-Registrar. The case of the plaintiff is that he was to pay Rs 7.5 lakh in cash and the balance by way of a cheque. Considering the fact that the last date stipulated in the agreement for payment of the balance sale consideration was 17.10.2009, it would be sufficient compliance with the requirement of Section 16(c) of the Specific Reliefs Act. If the plaintiff has been able to prove that he had financial capacity to pay Rs.49,50,000/- to the defendant even on 17.01.2009.

9. As regards willingness of the plaintiff to complete the transaction, a perusal of the letter dated 13.01.2009 (Ex.PW1/2) would show that vide this letter the plaintiff had informed the defendant that he had balance payment ready with him and had requested the defendant to show the original documents to him before 17.01.2009, complete the registration and transfer of the property on or before 17.01.2009. This letter written by the plaintiff to the defendant well before expiry of the last date stipulated for completing the transaction clearly indicates his willingness to come forward for the transaction and complete the same in accordance with the terms agreed between the parties. The plaintiff also inserted a public notice in the newspapers on 22.02.2009 and also got prepared a demand draft of Rs.19 lac in favour of the defendant on 19.02.2009. This is yet another proof of willingness of the plaintiff to complete the transaction. It is true that vide letter dated 13.01.2009, the plaintiff had also asked the defendant to show the original title documents to him. But, since the agreement between the parties did not take away the right of the plaintiff to seek inspection of the original documents of title, he was well within his right in seeking inspection of the original documents of title. Section 55 of the Transfer of Properties Act to the extent it is relevant provides that in the absence of a contract to the contrary, the seller is bound to produce to the buyer, at his request, for examination, documents of title relating to the property which are in the seller's possession or power. The case of the defendant is that the original of the title had been lost by him and this was brought to the notice of the plaintiff at the time of execution of the agreement. However, no such indication is found in the agreement Ex.PW1/1. Had the defendant disclosed to the plaintiff that the original document of title have been lost, the parties would, in the natural course of human conduct, certainly have stated so in the agreement. Moreover, even on receipt of the letter dated 13.01.2009 from the plaintiff, the defendant did not write to him, saying that the original document of title had been lost and this fact had already been brought by him to the knowledge of the plaintiff at the time of execution of agreement dated 17.11.2008. Even after the plaintiff issuing a public notice in the newspaper on 22.02.2009, the defendant did not write to him stating therein that the original documents had been lost/misplaced and this fact was in the knowledge of the plaintiff.

10. The defendant, even after publishing the public notice in the newspapers did not write to the plaintiff stating therein that he had failed

to perform his part of the agreement and that he did not have the balance sale consideration available with him. The case of the defendant is that after execution of the agreement, the plaintiff asked him for reduction of the sale price on the ground that prices in the market had gone down. The defendant, however, has not been able to substantiate this plea. Neither any reply to the letter dated 13.01.2009 nor any response to the public notice published in the newspaper was given by the defendant claiming that it was the plaintiff who wanted reduction in the sale consideration and, therefore, was not willing to go ahead with the transaction.

11. The learned counsel for the defendant has placed reliance upon the decision of the Supreme Court in **J.P. Builders and another v A. Ramadas Rao and another** [(2011) 1 SCC 429], following the view was taken by it in **N.P. Thirugnanam v Dr. R. Jagan Mohan Rao** [(1995) 5 SCC 115]:

> "5.Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the

> plaintiff was ready and was always ready and willing to perform his part of contract."

The following view was taken in **P.D'Souza v Shondrilo Naidu** [(2004) 6 SCC 649], was also referred in the case of **J.P. Builders** (supra):

> "19. It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to perform his part of contract. The question as to whether the onus was discharged by the plaintiff or not will depend upon the fact and circumstances of each case. No straitjacket formula can be laid down in this behalf....
>
> 21. ....The readiness and willingness on the part of the plaintiff to perform his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale."

This judgment does not help the defendant in any manner since the plaintiff has been able to establish his readiness and willingness to perform his part of the contract and the conduct of the plaintiff has also been found to be consistent with such readiness and willingness on his part. It is the defendant who was not ready and willing to go ahead with the transaction as is evident from his conduct in not responding either to the letter dated 13.01.2009 or to the public notice dated 22.02.2009.

12. For the reasons hereinabove, I have no hesitation in holding that the plaintiff had always been ready and willing to perform his part of the agreement dated 17.11.2008 and it was the defendant who committed breach of the aforesaid agreement by not coming to execute the sale deed in favour of the plaintiff.

13. During the course of arguments, it was contended by the learned counsel for the defendant that since there has been steep appreciation in the value of the suit property during the pendency of this suit and the defendant is living there with his family, specific performance of the contract, which is otherwise a discretionary relief and cannot be claimed as a matter of right, should not be granted to the plaintiff.

14. It is true that the Court is not bound to grant specific performance

of an agreement to sell immovable property merely because it is lawful to do so, but, the discretion whether to grant or refuse specific performance of such an agreement being a judicial discretion, cannot be exercised arbitrarily and needs to be guided by sound and reasonable judicial principle. It is neither possible nor desirable to classify the cases where specific performance should be granted and the cases where it should be refused. Ordinarily, in the cases where the plaintiff has not played any fraud and has duly performed his obligations under the agreement, the Court should direct specific performance of an agreement unless it is satisfied that in the facts and circumstances of the case, it would be unreasonable, inequitable and unconscionable to do so. The inordinate delay, if any, in coming to the Court, which results in steep appreciation in the value of the property in the interregnum, is one of the factors which the Court can take into consideration in such cases. If the vendor, anticipating receipt of sale consideration from the vendee, has entered into another transaction for purchase of some other property and delay in payment of balance sale consideration by the vendee results in that transaction getting cancelled, leading to the vendor being deprived of appreciation in the value of the other property which he contracted to purchase, would be yet another circumstance, which, if found to exist, can be taken into consideration by the Court. If the vendor had agreed to sell the property on account of a time bound requirement of money and he is unable to meet that requirement on account of delay on the part of the vendee in making payment of the balance sale consideration, that would be yet another relevant factor which the Court can take into consideration in appropriate cases.

I find that no evidence has been led by the parties to prove as to how much has been appreciation in the value of the suit property during pendency of this suit, though it can hardly be disputed that there must have been substantial appreciation in line with appreciation of the immovable properties throughout the country. What is important in this regard is that there has been no delay on the part of the plaintiff in coming to the Court. He sent a written notice /letter to the defendants four days before the last date stipulated in completion of the transaction. This was followed by giving a public notice in newspapers on 22.02.2009. The defendant did not write to the plaintiff at any point of time saying that since he did not pay the balance sale consideration within the stipulated period, the part payment made by him had been forfeited by him and the

agreement, therefore, stood terminated.

The present suit was filed on 6.4.2009. The plaintiff had paid 30% of the sale consideration to the defendant at the time of execution of the agreement on 18.11.2008. The written statement in this case was filed on 23.06.2009. In the written statement, the defendant did not express any desire to complete the transaction on receipt of the balance sale consideration with or without any interest on that amount. The plea taken by him on the other hand was that the part payment made to him by the plaintiff stood forfeited on account of his failure to pay the balance sale consideration within the stipulated time. Had the defendant, while filing written statement, expressed desire either to accept balance sale consideration with interest or refund the amount received by him from the plaintiff with appropriate interest, one of them could have purchased another property since there would not have been much appreciation between 17.1.2009 when the transaction was to be completed and 23.6.2009 when the written statement was filed. During the course of arguments, the learned counsel for the plaintiff stated that though it is the defendant who has been in breach of the agreement and has been in possession of the suit property throughout during pendency of this suit, the plaintiff is willing to pay the balance sale consideration along with interest on that amount @ 15% per annum. This proposal, however, was rejected by the defendant who gave a counter offer to refund the amount received from the plaintiff at a higher interest.

15. In **Gobind Ram Vs. Gian Chand** [AIR 2000 SC 3106], Supreme Court, in order to mitigate the hardship resulting to the vendor due to lapse of time and escalation of prices of urban properties, directed payment of further compensation to the vendor while granting a decree for specific performance, in terms of the agreement between the parties.

In **Nirmala Anand Vs. Advent Corporation (P)Ltd. and Ors.** (2002) 8 SCC 146, Hon'ble Mr Justice Doraiswamy Raju, after noticing the facts and circumstances of the case, including that out of the total sale consideration of Rs 60,000/-, only a sum of Rs 35,000/- had been paid by the purchaser, observed that it would be not only unreasonable, but too inequitable for Courts to make the appellant the sole beneficiary of the escalation of real estate prices and the enhanced value of flat in question which the respondents had all along preserved by keeping alive the issues pending with the authorities of the Government and municipal

bodies. The Hon'ble Judge was of the view that the balance of equity has also to be struck taking into account all the relevant aspects of the matter, including the lapses which had occurred and parties respectively responsible therefor. The Hon'ble Judge felt that before decreeing the specific performance, it is obligatory for the Courts to consider, whether by doing so any unfair advantage would result for the plaintiff over the defendant, the extent of hardship that may be caused to the defendant and if it would render such enforcement inequitable, besides taking into consideration the totality of the circumstances of each case. The Court, therefore, directed the appellant to pay at least a sum of Rs 40 lakh to the respondent Nos. 1 and 2, in addition to the amount which she had already paid. She was also held entitled to a decree for specific performance only subject to compliance of condition for this additional amount. Hon'ble Mr Justice Ashok Bhan, however, had reservations with respect to this part of the order. Noticing that in certain cases, the Court in equity and to mitigate the hardship to the vendor had directed the vendee to pay further compensatory amount, His Lordship was of the view that this is not a principle of universal application and payment of additional compensation would depend on the facts and circumstances of each case. His Lordship was of the view that escalation of price during the period may be relevant consideration under certain circumstances for either refusing to grant the decree of specific performance or for decreeing the specific performance with a direction to the plaintiff to pay an additional amount to the defendant and compensate him. It would depend upon on the facts and circumstances of each case. His Lordship observed that the respondents cannot take advantage of their own wrong and then plead that the grant of decree of specific performance would amount to an unfair advantage to the appellant. The view taken by his Lordship is that the appellant was entitled to specific performance of the agreement on the prices stipulated in the agreement to sell.

16. It would thus be seen that in appropriate cases, the Court while directing specific performance of an Agreement to Sell may grant additional compensation to the vendor on account of appreciation in the prices of the property subject matter of the agreement though it is not a rule of law that the court must direct payment of additional compensation in each and every case merely because there has been overall appreciation in the prices of the properties. Whether additional compensation should be directed to be paid or not and if so how much would depend upon

the facts and circumstances of each case, the purpose being to balance the equity between the parties.

17. **Issues No. 5:** In view of my findings on the above issues, the plaintiff is entitled to a decree for specific performance of the agreement to sell dated 17.11.2008. However, considering the overall appreciation in the value of immovable properties, I am of the view that the defendant should be paid the balance sale consideration along with interest on that amount @ 24% per annum by way of additional compensation, so as to balance the equities between the parties.

18. For the reasons stated hereinabove, a decree for specific performance of the agreement to sell dated 17.11.2008 is hereby passed in favour of the plaintiff and against the defendant by directing the defendant to execute the sale deed in favour of the plaintiff of the first floor of the property bearing number Q-12-B, Jangpura Extension, New Delhi-110 014 in favour of the plaintiff, subject to the plaintiff depositing the balance sale consideration of Rs. 49,50,000/- with interest on that amount @ 24% per annum with effect from 17.01.2009 till date, towards additional compensation, by way of a pay order in the name of Registrar General of this Court, within six weeks. The defendant is also directed to handover peaceful and vacant possession of the first floor of the aforesaid property to the plaintiff as soon as the aforesaid amount is deposited. The sale deed would be executed by the defendant within six weeks of plaintiff's depositing the balance amount in terms of this order, under intimation to him. If the defendant fails to execute the sale deed in favour of the plaintiff and/or fails to handover peaceful and vacant possession of the first floor of the aforesaid premises to him, it would be open to the plaintiff to approach to the Court for appointment of a Court Commissioner to execute the sale deed and for issuing warrants of possession of the first floor of the aforesaid premises in his favour. The amount which the plaintiff deposits, in compliance of this order shall be kept by the Registry in a short term FDR and shall be released to the defendant on his executing the sale deed and handing over the possession of the first flo7or premises to the plaintiff. In the facts and circumstances of the case, there shall be no orders as to costs. Decree sheet be drawn accordingly.

ILR (2012) V DELHI 817
W.P.(C)

BALJIT SINGH BAHMANIA ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(BADAR DURREZ AHMED & SIDDHARTH MRIDUL, JJ.)

W.P.(C) NO. : 8955/2011 DATE OF DECISION: 03.09.2012

Constitution of India, 1950—Service Law—Seniority—Petitioner challenged order passed by Central Administrative Tribunal, whereby his original application was rejected on the grounds of laches and non-joinder of affected persons, holding that the cause of action to challenge the seniority accrued to the petitioner on 01.04.02 when provisional seniority list was circulated showing him junior to respondent No. 3, as such original application brought in the year 2011 is barred by laches and since petitioner failed to implead 233 persons except respondent No. 3 who would be affected, the petition is bad for non-joinder—Held, the provisional seniority list dated 01.04.02 stood substituted by the final seniority list dated 01.08.11 and petitioner having approached the Tribunal in 2011 itself, it cannot be said that the petition is barred by latches and in view of settled legal position, all the affected persons need not be added as respondent as some of them could be impleaded in representative capacity, if number of such persons is too large or petitioner should be given opportunity to implead all the necessary parties and only on refusal, the petition could be dismissed for non-joinder of parties, as such the Tribunal was in error in dismissing the original application.

It would be seen that in **G.P. Doval** (supra), the provisional seniority list had been taken out on 22.03.1971, whereas the writ petitions had been filed in the year 1983. The plea on behalf of the respondents was that the petitions should be thrown out on the ground of delay, laches and acquiescence. The Supreme Court, however, did not agree with the respondents therein on the ground that the respondents had not finalized the seniority list for a period of more than 12 years and were operating the same for further promotions to the utter disadvantage of the petitioners therein. Of course, in that case, the petitioners had gone on making representations after representations which had not yielded any response, reply or relief. In the present case also, we find that the provisional list had been circulated on 01.04.2002 and even promotions had taken place on the basis of that list, to the detriment of the petitioner. It is not as if, in the present case, the petitioner was a silent sufferer. He had, as pointed out above, made representations and was even driven to approach the Central Information Commission in order to obtain information with regard to his seniority. Of course, in **G.P. Doval** (supra), the final seniority list had not been published at all by the time the petitions came to be filed, but that would not make the petitioner's case any worse. On the contrary, the petitioner's case is better inasmuch as the final seniority list came to be published on 01.08.2011 and immediately thereafter, the petitioner approached the Tribunal by way of the said O.A. 4154/2011. Therefore, the decision in **G.P. Doval** (supra) clearly supports the petitioner's plea that he had approached the Tribunal within time. **(Para 16)**

From the above extract, two things are clear. First of all, all the affected persons need not be added as respondents as some of them could be impleaded in a representative capacity if the number of such persons is too large. Secondly, when such a situation arises before a court and, for that matter before the Tribunal, an opportunity should be given to the petitioner to implead the necessary parties or at least

some of them in a representative capacity. If the petitioner still refuses to do so, then the petition could be dismissed for non-joinder of necessary parties and not otherwise. In the present case, no such opportunity was offered by the Tribunal to the petitioner and, therefore, we are of the view that the Tribunal erred in dismissing the original application at the admission stage itself. Another important aspect which we must not lose sight of is the fact that the petitioner had, in fact, impleaded one such person, namely, the respondent No.3 (Shree Pal Singh), who was the person, according to the petitioner, immediately below him in seniority. Although, it is true that the petitioner has not stated in the original application that the respondent No.3 was impleaded in a representative capacity, but it is also clear that the respondent No.3 would, while defending his case, also be espousing the case of all the 233 persons, who were similarly situated to him. **(Para 25)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONERS : Mr. Vinay Kumar with Ms. Namrata Singh.

FOR THE RESPONDENT : Mr. B.V. Niren with Mr. Prasouk Jain.

CASES REFERRED TO:

1. *S. Sumnyan and Others* vs. *Limi Niri and Others:* 2010 (6) SCC 791.
2. *M. Pachiappan and Others* vs. *S. Markandam and Others:* 2009 (16) SCC 616.
3. *Union of India and Others* vs. *Tarsem Singh:* 2008 (2) SCC (L&S) 765.
4. *S.K. Jain* vs. *P.S. Gupta and Others:* 2002 IV A.D. (Delhi) 596.
5. *B.S. Bajwa and Another* vs. *State of Punjab and Others:* 1998 (2) SCC 523.

6. *V.P. Shrivastava and Others* vs. *State of M.P. and Others* : 1996 (7) SCC 759.
7. *Shadi Ram Yadav* vs. *Director General, CISF and Others:* 59 (1995) DLT 579 (DB).
8. *G.P. Doval and Others* vs. *Chief Secretary, Government of U.P. and Others:* 1984 (4) SCC 329.
9. *Prabodh Verma and Others* vs. *State of U.P. and Others:* 1984 (4) SCC 251.

RESULT: Petition allowed.

BADAR DURREZ AHMED, J.

1. The petitioner is aggrieved by the order dated 24.11.2011 passed by the Central Administrative Tribunal, Principal Bench, New Delhi, whereby his original application being O.A. No.4154/2011 has been rejected on the ground of limitation as well as on the ground of nonjoinder of all the affected persons.

2. The petitioner had approached the Tribunal seeking the following reliefs:

> "a) quash seniority list circulated vide O.M. dated 01.08.2011 to the extent applicant has been placed at sl. No.791 therein; and
>
> b) direct the respondents to accord the applicant his due seniority and place him below Sl. No.557 and above Sl. No.558 in the seniority list circulated vide O.M. dated 01.08.2011; and
>
> c) direct the respondents to accord all the consequential benefits to the applicant w.e.f. the date when his juniors in the cadre of AE (Civil) have been accorded such benefits; and
>
> d) pass any such further order or direction as may be deemed fit, proper and necessary."

3. From the above, it is apparent that the petitioner sought the quashing of the final seniority list of Assistant Engineers (Civil) in CPWD as on 01.01.2011. The said final seniority list was circulated through the Office Memorandum dated 01.08.2011 issued by the Directorate General

of Works, CPWD, Government of India. The petitioner had also sought a direction from the Tribunal to place him below S.No.557 and above S.No.558 in the said final seniority list. The petitioner had, as a consequence thereof, also prayed that he be given all the benefits with effect from the date his juniors in the cadre of Assistant Engineers (Civil) had been accorded such benefits. It is, therefore, clear that the primary challenge of the petitioner was to the final seniority list circulated vide the said O.M. dated 01.08.2011. In that seniority list, the petitioner had been placed at S.No.791 and his claim was that he ought to be placed below S.No.557 and above S.No.558.

4. The petitioner was initially appointed as a Junior Engineer (Civil) in the CPWD on 01.11.1979. He was promoted on an ad hoc basis to the post of Assistant Engineer (Civil) on 04.06.1993. The respondent No.3 (Shree Pal Singh) was also appointed as a Junior Engineer (Civil) on 30.10.1983. It may be pointed out that the promotions to the post of Assistant Engineer (Civil) were on the basis of 50% from amongst the Junior Engineers (Civil), who had six years regular service in the grade and the balance 50% through limited departmental competitive examination.

5. A provisional seniority list was circulated by an Office Memorandum dated 04.06.2002 which had been issued by the Directorate General of Works, CPWD. The said O.M. dated 04.06.2002 was explicit that the seniority list was provisional and was subject to the final outcome of various court cases pending in various courts. In the said provisional seniority list of Assistant Engineers (Civil), the petitioner was shown at S.No.2600 and it had been indicated that he had been promoted to the post of Assistant Engineer (Civil) with effect from 29.11.1994. It was the case of the petitioner that his date of promotion as Assistant Engineer (Civil) should have been indicated as 04.06.1993 and not as 29.11.1994. According to the petitioner, this was a mistake. Because of this mistake, a person, such as the respondent No.3 (Shree Pal Singh) who was, according to the petitioner, junior to him, was shown at S.No.2078 inasmuch as the said respondent No.3 (Shree Pal Singh) had been indicated to have been promoted as Assistant Engineer (Civil) with effect from 17.09.1993. It was the grievance of the petitioner that the respondent No.3 (Shree Pal Singh), who was the next immediate junior as also the other junior officers, were shown to be higher in the seniority list than the petitioner.

6. Thereafter, promotions to the post of Executive Engineer (Civil) were ordered on 12.05.2006. These promotions were from amongst the Assistant Engineers of both categories, namely diploma holders and degree holders. Since the petitioner was not amongst the list of persons who were promoted to the post of Executive Engineer (Civil) and, according to him, officers junior to him had been promoted to that post, the petitioner submitted a representation to the Directorate General (Works), CPWD, through proper channel on 22.05.2006. In that representation, the petitioner made a categorical grievance with regard to him being wrongly placed in the seniority list on account of the fact that his date of joining as Assistant Engineer (Civil) was shown as 29.11.1994, when, according to him, it should have been 04.06.1993. He took the plea that his position in the seniority list was not correct.

7. This was followed by another representation dated 22.06.2006, which was in the nature of a reminder. Both these representations went unheeded. As such, the petitioner filed an application under the Right to Information Act, 2005 on 05.01.2007 seeking information with regard to his position in the seniority list.

8. Even this information was not forthcoming, as a result of which, the petitioner had to approach the Central Information Commission and it is only thereafter that the information sought by the petitioner had been furnished to him as would be apparent from Annxure-J to the writ petition which is a copy of an order of the Central Information Commission dated 18.06.2008. As pointed out above, the final seniority list of Assistant Engineers (Civil) in the CPWD as on 01.01.2011, was circulated by the said O.M. dated 01.08.2011. It is that final seniority list which was challenged by the petitioner by virtue of the said O.A. No.4154 which was filed immediately thereafter, in 2011 itself.

9. The Tribunal, however, at the admission stage itself, took the view that the said O.A. was not maintainable on account of delay and laches. According to the Tribunal, the cause of action accrued to the petitioner on 01.04.2002 when the provisional seniority list of the Assistant Engineers (Civil) in the CPWD was circulated. The date of promotion of the petitioner as an Assistant Engineer (Civil) was shown in that list as being 29.11.1994 and his serial number was also indicated to be 2600 much below that of the respondent No.3 (Shreepal Singh), whose serial number was 2078. Thus, according to the Tribunal, the petitioner was

well aware that persons, such as the respondent No.3 (Shreepal Singh), had been shown senior to him as early as on 01.04.2002 when the said provisional seniority list was circulated. The Tribunal also felt that the cause of action again accrued to the petitioner in the year 2006 when promotions were made to the next higher post of Executive Engineer (Civil) based on the seniority position indicated in the said provisional seniority list. According to the Tribunal, the claim of the petitioner in the said O.A. No.4154/2011 was stale because the petitioner did not agitate the matter in 2002 nor did he agitate the matter in 2006 and the validity of the promotion order dated 12.05.2006 had not been challenged. The Tribunal further held that the issuance of the final seniority list on 01.08.2011 would not result in an automatic condonation of the delay / laches in respect of the original cause of action, which, according to the Tribunal, had accrued on 01.04.2002. Since the petitioner had not filed any application for condonation of delay, the Tribunal felt that it could not even examine the case from the standpoint of the petitioner having a sufficient cause for approaching the court after the said alleged delay.

10. The Tribunal also rejected the petitioner's said O.A. No.4154/2011 on the ground that 233 persons would be adversely affected if the prayers sought by the petitioner were to be allowed. Some of those 233 persons, according to the Tribunal, might have even been promoted to the posts of Executive Engineers (Civil) in 2006 itself. The Tribunal felt that since the petitioner had not impleaded these 233 persons, except the respondent No.3 (Shreepal Singh), the said O.A. was liable to be rejected on account of non-joinder of necessary parties. Thus, both on the ground of delay and on the ground of non-joinder of necessary parties, the Tribunal rejected the petitioner's said O.A.

11. The learned counsel for the petitioner submitted that the Tribunal had erred on both counts. He submitted that the petitioner had been agitating his alleged wrong placement in the seniority list and that this would be evident from the representations made by him from time to time as also from the fact that the petitioner was driven to seek recourse under the Right to Information Act and ultimately to the Central Information Commission to obtain information with regard to his seniority. Therefore, according to the learned counsel for the petitioner, this was not a case where the petitioner had accepted his position in the provisional seniority list and was only agitating the matter after several years had elapsed.

Furthermore, the learned counsel for the petitioner submitted that the petitioner was entitled in law to challenge the final seniority list even though he had not approached the Tribunal insofar as the provisional seniority list was concerned. He submitted that as the final seniority list had been circulated only on 01.08.2011, the said original application filed by the petitioner shortly thereafter cannot, by any stretch of imagination, be regarded as a stale claim. According to the learned counsel, the Tribunal committed a serious error in rejecting the petitioner's said original application on the ground of limitation. In support of this submission, the learned counsel for the petitioner placed reliance on the following decisions of the Supreme Court:

1) **G.P. Doval and Others v. Chief Secretary, Government of U.P. and Others:** 1984 (4) SCC 329;

2) **V.P. Shrivastava and Others v. State of M.P. and Others :** 1996 (7) SCC 759;

3) **M. Pachiappan and Others v. S. Markandam and Others:** 2009 (16) SCC 616;

12. In response to the submissions made by the learned counsel for the petitioner on the question of limitation, the learned counsel for the respondent reiterated the stand and approach reflected in the impugned order passed by the Tribunal. In support of the plea of the respondents that the Tribunal was right in rejecting the original application on the ground of limitation, the learned counsel for the respondents placed reliance on the following decisions of the Supreme Court:

1) **B.S. Bajwa and Another v. State of Punjab and Others:** 1998 (2) SCC 523;

2) **Union of India and Others v. Tarsem Singh:** 2008 (2) SCC (L&S) 765;

3) **S. Sumnyan and Others v. Limi Niri and Others:** 2010 (6) SCC 791.

13. On the second aspect of non-joinder of necessary parties, the learned counsel for the petitioner submitted that, although the petitioner had not impleaded all the 233 persons, who might have been adversely affected if an order was passed in favour of the petitioner, the petitioner had, in fact, impleaded the respondent No.3 (Shree Pal Singh), who was, according to the petitioner, the next junior person to the petitioner. The

learned counsel submitted that having done so, it was not necessary for the petitioner to implead all the persons who might be adversely affected, particularly when the number of such persons was as large as 233. He further submitted that, in any event, if the Tribunal felt that it was necessary for the petitioner to implead all the 233 persons, it ought to have given an opportunity to the petitioner to implead them. If the opportunity to implead all the 233 persons had been given by the Tribunal and the petitioner did not still implead such persons, then, perhaps, the Tribunal would have been right in dismissing the original application on the ground of non-joinder, but not otherwise. In support of these submissions, the learned counsel for the petitioner placed reliance on the following decisions:

1) **Prabodh Verma and Others v. State of U.P. and Others:** 1984 (4) SCC 251;
2) **V.P. Shrivastava** (supra);
3) **Shadi Ram Yadav v. Director General, CISF and Others:** 59 (1995) DLT 579 (DB);
4) **S.K. Jain v. P.S. Gupta and Others:** 2002 IV A.D. (Delhi) 596.

14. On the other hand, the learned counsel for the respondents, as in the case of limitation, relied upon the observations and findings of the Tribunal on the aspect of non-joinder of the said 233 persons. He supported the decision of the Tribunal that because the petitioner had not joined all the adversely affected persons, the Tribunal was well within its right in dismissing the original application on the ground of non-joinder of necessary parties.

15. Let us now examine the decisions cited on both sides on the issue of limitation. The first decision was that of the Supreme Court in the case of **G.P. Doval** (supra). Paragraph 16 of the said decision had been relied upon by the learned counsel for the petitioner. It reads as under:

> "A grievance was made that the petitioners have moved this Court after a long unexplained delay and the Court should not grant any relief to them. It was pointed to that the provision seniority list was drawn up on March 22, 1971 and the petitions have been filed in the years 1983. The respondents therefore

> submitted that the Court should throw out the petitions on the ground of delay, laches and acquiescence. It was said that promotions granted on the basis of impugned seniority list were not questioned by the petitioners and they have acquiesced into it. We are not disposed to accede to this request because respondent 1 to 3 have not finalised the seniority list for a period of more than 12 years and are operating the same for further promotion to the utter disadvantage of the petitioners. Petitioners went on making representations after representations which did not yield any response, reply or relief. ..."
>
> (underlining added)

16. It would be seen that in **G.P. Doval** (supra), the provisional seniority list had been taken out on 22.03.1971, whereas the writ petitions had been filed in the year 1983. The plea on behalf of the respondents was that the petitions should be thrown out on the ground of delay, laches and acquiescence. The Supreme Court, however, did not agree with the respondents therein on the ground that the respondents had not finalized the seniority list for a period of more than 12 years and were operating the same for further promotions to the utter disadvantage of the petitioners therein. Of course, in that case, the petitioners had gone on making representations after representations which had not yielded any response, reply or relief. In the present case also, we find that the provisional list had been circulated on 01.04.2002 and even promotions had taken place on the basis of that list, to the detriment of the petitioner. It is not as if, in the present case, the petitioner was a silent sufferer. He had, as pointed out above, made representations and was even driven to approach the Central Information Commission in order to obtain information with regard to his seniority. Of course, in **G.P. Doval** (supra), the final seniority list had not been published at all by the time the petitions came to be filed, but that would not make the petitioner's case any worse. On the contrary, the petitioner's case is better inasmuch as the final seniority list came to be published on 01.08.2011 and immediately thereafter, the petitioner approached the Tribunal by way of the said O.A. 4154/2011. Therefore, the decision in **G.P. Doval** (supra) clearly supports the petitioner's plea that he had approached the Tribunal within time.

17. The next decision referred to by the learned counsel for the petitioner is that of the Supreme Court in the case of **V.P. Shrivastava**

(supra). In that case, in the year 1983, a provisional seniority list of Additional Directors was drawn up by the State Government, wherein ad hoc promotees were shown senior to the regular appointees like the appellants before the Supreme Court. The appellants therein filed objections to the said provisional list. Without taking a decision on the same, the State Government issued another provisional list in the year 1986, but continued the mistake which was there in the 1983 list. The appellants before the Supreme Court again put forward their grievances in 1987 and, thereafter, the seniority lists prepared in 1983 and 1986 were withdrawn. Subsequently, on 19.09.1988, yet another provisional list was brought out wherein the appellants were again shown junior to the *ad hoc* promotees. The appellants before the Supreme Court again filed a representation and finally on 23.12.1988 the State Government brought out the final seniority list wherein the appellants were again shown junior to the said ad hoc promotees. Thereafter, the appellants approached the State Administrative Tribunal, which, *inter alia,* rejected their application on the ground that the promotions in favour of the respondents therein in the year 1980 could not be challenged at that length of time.

18. On behalf of the appellants before the Supreme Court, it was argued on the question of delay and laches that the appellants did not challenge the so-called *ad hoc* appointments of the respondents by way of promotions, but that they merely challenged the position assigned to them in the seniority list which was finalized only in the year 1988 and, thereafter, their applications before the Tribunal in 1989 could, by no stretch of imagination, be held to be barred on the principle of delay and laches. The Supreme Court agreed with the submission made on behalf of the appellants therein by holding that as the final gradation list was prepared on 23.12.1988 and the appellants had approached the Tribunal in 1989, the question of delay did not arise. The exact words used by the Supreme Court in this connection were as under:-

> "19. So far as question of delay and laches is concerned, as we have noticed earlier the final gradation list was prepared only on 23.12.1988 and the appellants had approached the Tribunal in 1989 and therefore the question of delay does not arise. In the aforesaid premises the impugned order of the Tribunal is set aside and this appeal is allowed. ..."

19. So, it is seen that in the case of **V.P. Shrivastava** (supra) also,

the Supreme Court took into account the starting point to be the issuance of the final gradation list. In the present case, as we have already pointed out above, the final seniority list came to be circulated on 01.08.2011 and shortly thereafter in 2011 itself the petitioner had approached the Tribunal by way of the said O.A. No.4154/2011. Thus, in view of this decision also, we do not see as to how the petitioner's said O.A. could have been dismissed on the ground of delay and laches. This is all the more clear from the observations of the Supreme Court in **M. Pachiappan** (supra), wherein it has observed as under:-

> "After the publication of the final seniority list, the provisional seniority list gets substituted by the final list".

Thus, the provisional seniority list of 01.04.2002 got substituted by the final seniority list of 01.08.2011. In these circumstances, it would be incongruous to hold that the petitioner could not challenge the final seniority list. If it was open to the petitioner to challenge the final seniority list, then, it is clear that he did so well within time.

20. We must also deal with the decisions which were cited by the learned counsel for the respondents. The first of them being the case of **B.S. Bajwa** (supra). The facts of that case, as indicated in the decision of the Supreme Court itself, are as under:

> "3. The material facts in brief are this. Both B.S. Bajwa and B.D. Gupta joined the Army and were granted Short Service Commission on 30th March, 1963 and 30th October, 1963 respectively when they were students in the final year of the Engineering Degree Course. B.S. Bajwa graduated thereafter in June, 1963 and B.D. Gupta graduated in 1964. On being released from the Army B.S. Bajwa joined the PWD (B&R) on 4.5.1971 and B.D. Gupta joined the same department on 12th May, 1972. There position in the gradation list was shown throughout with reference to these dates of joining the department. It is sufficient to state that throughout their career as Assistant Engineer, Executive Engineer and Superintending Engineer both B.S. Bajwa and B.D. Gupta were shown as juniors to B.L. Bansal, Nirmal Singh, GR Chaudhary, D.P. Bajaj and Jagir Singh. It is also undisputed that B.L. Bansal, Nirmal Singh, G.R. Chaudhary, D.P. Bajaj and Jagir Singh got their promotions as Executive Engineer select grade and promotion as Superintending Engineer prior to

B.S. Bajwa and B.D. Gupta. It is obvious that the grievance, if any, of B.S. Bajwa and B.D. Gupta to their placement below B.L. Bansal, Nirmal Singh, G.R. Chaudhary, D.P. Bajaj and Jagir Singh should have been from the very inception of their career in the department, i.e. from 1971-72. However, it was only in the year 1984 that B.S. Bajwa and B.D. Gupta filed the aforesaid writ petition in the High Court claiming a much earlier date of appointment in the department. The learned Single Judge allowed the writ petition which led to Letters Patent Appeal No. 424/86 being filed by B.L. Bansal, Nirmal Singh, G.R. Chaudhary, D.P. Bajaj and Jagir Singh before a Division Bench of the High Court."

In the backdrop of the aforesaid facts, the Supreme Court observed as under:

"7. Having heard both sides we are satisfied that the writ petition was wrongly entertained and allowed by the Single Judge and, therefore, the judgments of the Single Judge and the Division Bench have both to be set aside. The undisputed facts appearing from the record are alone sufficient to dismiss the writ petition on the ground of latches because the grievance made by B.S. Bajwa and B.D. Gupta only in 1984 which was long after they had entered the department in 1971-72. During this entire period of more than a decade they were all along treated as junior to the other aforesaid persons and the rights inter se had crystalised which ought not to have been re-opened after the lapse of such a long period. At every stage the others were promoted before B.S Bajwa and B.D. Gupta and this position was known to B.S. Bajwa and B.D. Gupta right from the beginning as found by the Division Bench itself. It is well settled that in service matters the question of seniority should not be re-opened in such situations after the lapse of a reasonable period because that results in disturbing the settled position which is not justifiable. There was inordinate delay in the present case for making such a grievance. This alone was sufficient to decline interference under Article 226 and to reject the writ petition."

21. The learned counsel for the petitioner had placed strong reliance on the observations of the Supreme Court to the effect that it is well-settled that in service matters, the question of seniority should not be

reopened in such situations after the lapse of a reasonable period because that results in disturbing the settled position which is not justifiable. However, in our view, this decision does not, in any way, hurt the case of the petitioner. This is so because the Supreme Court made the above observations with reference to a 'settled position' with regard to seniority. However, seniority based on a provisional list cannot be regarded as a settled position unless and until the final seniority list is published. Therefore, this decision of the Supreme Court would be of no use to the respondents. The next decision on which the learned counsel for the respondents placed reliance was that in the case of **Tarsem Singh** (supra). The learned counsel for the respondents had specifically placed strong reliance on the observations contained in paragraph 5 thereof. The same, to the extent relevant, reads as under:

"5. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion etc., affecting others, delay would render the claim stale and doctrine of laches / limitation will be applied. ..."

22. Here again, we find that the Supreme Court's observations are in the context and backdrop of "settled rights of third parties". In the present case, the seniority and promotions were on the basis of a provisional seniority list which only came to be settled by the final

seniority list circulated on 01.08.2011. Therefore, this decision of the Supreme Court in the case of **Tarsem Singh** (supra) also does not come to the aid of the respondents. Similar is the case with the Supreme Court decision in the case of **S. Sumnyan** (supra). The provisional seniority lists in question in **S. Sumnyan** (supra), as would be evident from paragraph 29, were never challenged. But, in the present case, we find that, although the petitioner did not approach the Tribunal until the publication of the final seniority list, it is not as if, he was a mere spectator inasmuch as we have already noticed the fact that he had submitted several representations and was even driven to approach the Central Information Commission to obtain information with regard to his seniority position. Therefore, on facts, the Supreme Court decision in **S. Sumnyan** (supra) is clearly distinguishable and would not run counter to the submissions made on behalf of the petitioner.

23. As a result of the foregoing discussion, we find that the Tribunal ought not to have dismissed the petitioner's said original application at the threshold on the ground of delay and / or laches. The question of the Tribunal considering the issue of sufficiency of the cause for such 'delay' would obviously not arise and there would obviously be no reason for the petitioner to have filed a condonation of delay application inasmuch as the original application in itself was not beyond time.

24. We are now left to consider the other aspect with regard to non-joinder of the 233 persons [except the respondent No.3 (Shree Pal Singh)], who would have been adversely affected by any order passed in favour of the petitioner. The submissions of the learned counsel on this aspect of the matter have already been noted above. We shall now consider the decisions which had been placed for our consideration by the learned counsel for the petitioner. The first of those decisions is of the Supreme Court in the case of **Prabodh Varma** (supra). Para 28 of the said decision is relevant and the same reads as under:

> "28. The real question before us, therefore, is the correctness of the decision of the High Court in the Sangh's case. Before we address ourselves to this question, we would like to point out that the writ petition filed by the Sangh suffered from two serious, though not incurable, defects. The first defect was that of nonjoinder of necessary parties. The only respondents to the Sangh's petition were the State of Uttar Pradesh and its concerned officers. Those who were vitally concerned, namely, the reserve

> pool teachers, were not made parties-not even by joining some of them in a representative capacity, considering that their number was too large for all of them to be joined individually as respondents. The matter, therefore, came to be decided in their absence. A High Court ought not to decide a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least by some of them being before it as respondents in a representative capacity if their number is too large, and, therefore, the Allahabad High Court ought not to have proceeded to hear and dispose of the Sangh's writ petition without insisting upon the reserve pool teachers being made respondents to that writ petition, or at least some of them being made respondents in a representative capacity, and had the petitioners refused to do so, ought to have dismissed that petition for non-joinder of necessary parties."

25. From the above extract, two things are clear. First of all, all the affected persons need not be added as respondents as some of them could be impleaded in a representative capacity if the number of such persons is too large. Secondly, when such a situation arises before a court and, for that matter before the Tribunal, an opportunity should be given to the petitioner to implead the necessary parties or at least some of them in a representative capacity. If the petitioner still refuses to do so, then the petition could be dismissed for non-joinder of necessary parties and not otherwise. In the present case, no such opportunity was offered by the Tribunal to the petitioner and, therefore, we are of the view that the Tribunal erred in dismissing the original application at the admission stage itself. Another important aspect which we must not lose sight of is the fact that the petitioner had, in fact, impleaded one such person, namely, the respondent No.3 (Shree Pal Singh), who was the person, according to the petitioner, immediately below him in seniority. Although, it is true that the petitioner has not stated in the original application that the respondent No.3 was impleaded in a representative capacity, but it is also clear that the respondent No.3 would, while defending his case, also be espousing the case of all the 233 persons, who were similarly situated to him.

26. The next decision referred to by the learned counsel for the petitioner was that of the Supreme Court in **V.P. Shrivastava** (supra).

The Supreme Court had placed reliance on an earlier decision in the case of **A. Janardhana v. Union of India:** 1983 (3) SCC 601, wherein it had observed as under:-

> "15. ... In this case, appellant does not claim seniority over particular individual in the background of any particular fact controverted by that person against whom the claim is made. The contention is that criteria adopted by the Union Government in drawing-up the impugned seniority list are invalid and illegal and the relief is claimed against the Union government restraining it from upsetting or quashing the already drawn up valid list and for quashing the impugned seniority list. Thus the relief is claimed against the Union Government and not against any particular individual. In this background, we consider it unnecessary to have all direct recruits to be impleaded as respondents."

It also placed reliance on the decision in **Prabodh Verma** (supra). In this backdrop, the Supreme Court, in **V.P. Shrivastava** (supra) held as under:

> '17. Even in Janardhana case referred to supra, this Court also rejected a similar objection on the ground that 9 of the direct recruits having been impleaded as party, therefore the case of direct recruits has not gone unrepresented and therefore the non-inclusion of all the 400 and odd direct recruits is not fatal to the proceedings.
>
> 18. In the aforesaid circumstances we have no hesitation to come to the conclusion that the Tribunal was wholly in error in coming to the conclusion that the appellants application becomes unsustainable in the absence of all the promotees being impleaded as party.'

27. This decision also, which is in the same line as that of **Prabodh Verma** (supra), does support the plea advanced by the learned counsel for the petitioner.

28. In **Shadi Ram Yadav** (supra), a Division Bench of this court, following the decision of the Supreme Court in **A. Janardhana** (supra), observed as under:

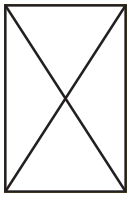
> '12. The law laid down in **A. Janardhan's** case (supra) applies on all the fours to the case at hand. The petitioner need not join all the persons in the seniority list as parties to the petition. He has joined S.C. Wadhwa the person next below the petitioner in the seniority list of the year 1985 as party to the petition and by way of illustration. That is sufficient.'

29. In **S.K. Jain** (supra) also, a Division Bench of this court followed, inter alia, the Supreme Court decision in **A. Janardhana** (supra) and observed as under:

> "13. To support their contentions Mr. P.H. Parekh as well as Mr. G.D. Gupta placed reliance on various decisions. After going through those decision and the arguments of the learned counsel, we are of the view that when there is a challenge to the principle of determination of seniority the persons who are likely to be adversely affected are not necessary parties. They are at the most a proper party. Their absence is not fatal to the maintainability of the writ petition. In this regard we are supported by the decisions of Supreme Court in the case of (i) **A. Janardhana v. Union of India,** AIR 1983 SC 769; (ii) **State of U.P. and Anr. v. Ram Gopal Shukla** 1981 (2) SLR page 3 and (iii) **The General Manager, South Central Railway, Secundrabad and Anr. v. A.V.R. Siddhanti and Ors.** 1974 (1) SLR 597. In view of the law laid down by the Supreme Court we find that non impleading of each and every Assistant or Senior Assistants was not necessary nor fatal to the writ petition."

30. It is clear from the above mentioned decisions that the Tribunal was in error in dismissing the petitioner's original application on the ground of non-joinder of necessary parties without first giving an opportunity to the petitioner to implead all the so-called persons who would be adversely affected. The Tribunal also did not take note of the fact that one such person, namely, the respondent No.3 (Shree Pal Singh) had, in any event, been impleaded by the petitioner. This in itself was sufficient in the view taken by this Court in **Shadi Ram Yadav** (supra).

31. For all these reasons, we are of the view that the Tribunal has erred on both counts, that is, on the point of limitation as well as on the point of non-joinder of parties. The impugned order is set aside and the said O.A. No.4154/2011 is restored. The Tribunal shall dispose of the same on merits. The writ petition is allowed accordingly. There shall be no order as to costs.



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DELHI SERIES
2012

(Containing cases determined by the High Court of Delhi)

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PUBLISHED UNDER THE AUTHORITY OF HIGH COURT OF DELHI,
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ARBITRATION AND CONCILIATION ACT, 1996—Section 34—Petitioner challenged award passed by International Arbitral Tribunal ('Tribunal') under International Centre for Dispute Resolution in dispute which arose between petitioner and Respondent no.1—Respondent raised objection to maintainability of petition on ground that Section 12.10 & Section 12.11 of Agreement clearly laid down that parties had agreed to jurisdiction of New York Court and had thus, excluded appellant of Indian Law not only on substance of dispute but also on conduct of Arbitration—On other hand, on behalf of petitioner it was urged that award was contrary to public policy of India and in view of Article V (2)(b) of New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958, recognition or enforcement of arbitral award may be refused, if competent authority of country where recognition or enforcement is sought, comes to conclusion that such recognition or enforcement of award could be contrary to public policy of that country—Also, as per clauses of agreement, there was no implied or express exclusion of jurisdiction of Indian Courts—Held:- A non-exclusive jurisdiction clause self evidently leaves open the possibility that there may be another appropriate jurisdiction—Decree of appropriateness of an alternative jurisdiction must depend on all circumstances of case—In addition to usual factors, wording of non-exclusive jurisdiction clause may be relevant, because of light which it may throw on parties intentions—Petitioner cannot invoke jurisdiction of this Court under Section 34 to challenge impugned award.

Indiabulls Financial Services Limited (India) v. *Amaprop Limited (Cayman Islands) & Anr.* *363*

— Section 8—Respondent filed suit for permanent injunction seeking restrain against infringement of Registered Trade Mark etc. against appellant—In course of business respondent had entered into arrangements to carry out its business through its business partners and franchisees—One such arrangement was arrived with appellant, which was to be carried under written agreement valid for three years—On expiry of agreement by efflux of time, fresh agreement was executed but it was mutually terminated prematurely between parties—Prior to institution of suit, respondent complained about appellant's breach of contractual obligations and instituted suit for permanent injunction—Appellant preferred application u/s 8 of the Act praying for appointment of Arbitrator in virtue of Arbitration Clause incorporated in both previous agreements arrived between the parties—Application was dismissed and aggrieved appellant moved appeal urging that subsequent document mutually terminating agreement between parties, does not bring arbitration clause to an end but only terminates agreement inter se parties. Held—If previous agreements mentioning arbitration clause are superseded/novated by a fresh document creating fresh agreement with no arbitration clause then dispute cannot be referred to Arbitration seeking help of previous agreement.

Young Achievers v. *IMS Learning Resources Pvt. Ltd.* *462*

ARMS ACT, 1959—Section 27—As per prosecution on day of incident, PW1, father of deceased and his son PW9 were in his factory-A-1 went to first floor of factory removed iron rod and broke wires as a result machines in factory stopped functioning—PW9 objected on which A-1 abused and hit him on head with iron rod—Deceased on reaching there enquired about the cause of quarrel-A-2 caught hold of deceased on exhortation of A-1 who brought chhuri from his shop and stabbed him on his chest and abdomen—When PW1 rushed to save his son, both accused fled-A-2 was arrested wearing a blood stained shirt-A-1 on arrest got recovered chhuri—Trial court convicted accused persons u/s 302/34—Held, from evidence on record involvement of A-2 not clear—No witness assigned any role to A-2 in initial altercation—Contradictory and inconsistence version in evidence as to who exhorted whom—No knowledge could be imputed to A-2 that A-1

would rush to shop bring chhuri-Un-Natural that PW1, PW3, PW5 and PW9 who were present would not have intervened to get released the deceased from the clutches of A-2-Servants in factory also exhibited un-natural conduct in not intervening in incident-highly improbable that A-2 continued to hold deceased from behind for long time awaiting arrival of A-1 with chhuri—Mere presence of A-2 at spot not sufficient to conclude that he shared common intention with A-1 to murder deceased—The fact that accused were together at the time of the incident and ran away together is not conclusive evidence of common intention in the absence of any more positive evidence PW1 and PW9 (injured witness) in their evidence have proved that A-1 stabbed to death deceased-Ocular testimony of PW1 and PW9 corroborated by medical evidence and no conflict between the two-Defence version accusing PW9 for murder of deceased not inspiring confidence—Initially A-1 was un-armed, when deceased on reaching the spot enquired cause of quarrel, A-1 rushed to his shop and brought the knife—This rules out that incident occurred suddenly in fit of rage A-1 acted in cruel manner and took undue advantage by inflicting repeated stab blows with force without any resistance from the deceased—Appeal of A-2 allowed—Appeal of A-1 dismissed.

Afsar and Anwar v. *State & Ors.* *469*

CODE OF CIVIL PROCEDURE, 1908—Section 36, 51—Indian Evidence Act, 1872—Section 114: Whether a person can be physically compelled to give a blood sample for DNA profiling in compliance with a civil court order in a penalty action and it the same is permissible how is the court to mould its order and what would be the modalities for drawing the involuntary sample—Held-yes the Single Judge is entitled to take police assistance and use of reasonable force for compliance of order in case of continuous defiance of the order. Compelled extraction of blood samples in the course of medical examination dose not amount to conduct that shocks the conscience and the use of force as may be reasonably necessary is mandated by law and hence, meets the threshold of procedure established by law. Further, Human

Right Law justifies carrying out of compulsory mandatory medical examination which may be bodily invasive and that the right to privacy is not an absolute right and can be reasonably curtailed. Judgment of the Court can never be challenged under article 14 or 21. Appeal allowed.

Rohit Shekhar v. *Narayan Dutt Tiwari & Anr.* *181*

— Section 47—Brief facts Plaintiff claimed to be the owner of property let out to the defendant in 2001 @ Rs. 10,000/- for running a Nursing Home—Defendant was making irregular payments; on certain occasions cheques issued by the defendant were bounced because of insufficient fund—Suit under section 37 of the Code for recovery filed on the basis of five cheques, all in the sum of Rs. 10,000/- except the last cheque which is in the sum of Rs. 16500/- Ex Parte judgment and decree passed in favour of the plaintiff in the sum of Rs.56,350/- alongwith interest @ 8% per annum from the date of the filing of suit till realization—Thereafter, an application under Order 37 Rule 4 of the Code filed by the defendant pleading special circumstances—Special circumstances being that the defendant had not been served with the summons of the suit and thus, ex parte judgment and decree dated 20.12.2004 is liable to be set aside—This application was dismissed by the court that by holding Special circumstances for setting aside the decree and judgment are not made out—Execution proceedings filed—In the course of execution proceedings, the application under Order 47 of the Code was filed where the first time the plea of fraud was set up—Executing court dismissed the objections—Hence present petition. Held:- Plea of fraud set up by the defendant for the first time before the executing court—No averment in his application under Order 37 Rule 4 of the Code wherein he detailed the ‘special circumstances’ for setting aside the ex parte judgment and decree—No doubt to the settled legal position that fraud vitiates all transactions and any decree which has been obtained by fraud is ‘non-est’, not legal and not binding—Averments made in the application under Order 47 of the Code do not in any manner detailed the fraud—Only a three line version application which makes a mention of the

concealment of certain documents but how the concealment of these documents perpetuated a fraud, has not been explained—An admitted fact that in the application under Order 37 Rule 4 of the Code 'special circumstances' had been alleged but plea of fraud was never taken before that court—Objections under Section 47 of the Code have no force and were thus rightly dismissed.

Veena Tripathi v. *Hardayal* *514*

— Section 10—Brief facts—Punjab and Sind Bank filed suit for specific performance against a partnership firm comprising of two partners—During the pendency of this suit, partnership firm filed a suit against the Punjab and Sind Bank seeking a declaration, permanent injunction on the basis of the same documents i.e. the agreement, the subject matter of the suit for specific performance filed by the Punjab and Sind Bank—Prayer in the second suit was that the agreement to sell be declared null and void—Suit was registered—During the course of these proceedings, the present application under Section 10 of the Code was filed by the petitioner seeking stay of the later suit—Application however dismissed declining the prayer—Hence the present petition. Held:— Essential ingredients for the applicability of Section 10 of the Code are (a) There must be two pending suits on same matter, (b) These suits must be between same parties or parties under whom they or any of them claim to litigate under same title, (c) The matter in issue must be directly and substantially same in both the suits, (d) The suits must be pending before competent Court or Courts, (e) The suit which shall be stayed is the subsequently instituted suit—Object of Section 10 is to prevent courts of current jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue—One of the test of the applicability of Section 10 is whether on the final decision being reached in the previous suit such a final decision will operate as res judicata in a subsequent suit—To decide whether the second suit is hit by Section 10, the test is to find out whether the plaint in one suit would be the written statement in the other suit or not—If this test is positive the decision in one suit will operate

as res judicata in the other suit—This is the principal test on which Section 10 is applied—Applying this test to the instant case, it is clear that the decision in the first suit (as is evident from the prayers) will operate as res judicata in the second suit—Matter in issue being directly and substantially in the previous suit and subsequent suit being the same. The provisions of Section 10 are attracted—Trial Court has committed an error; impugned order is accordingly set aside—Petition disposed of accordingly.

Punjab & Sind Bank v. *Lalit Mohan Madan & Co.* . . *525*

— Order 12 Rule 6—Judgement on admission—Suit for possession and mesne profits/damages—Plaintiff, landlord/owner of flat inducted the defendant as a tenant at monthly rent was Rs. 3,575/— Lease reduced into writing was limited to three years—On the expiry of lease, the defendant continued to occupy the premises—Rate of rent in December, 2009 was Rs.8,429.63—Respondent alleged that the tenancy was terminated in December, 2009 vide notice dated 23.12.2009 effective from the midnight of 31.01.2010—Possession not delivered, the plaintiff filed the suit—Defendant had been paying rent to the plaintiff w.e.f August, 2009 and the rent was increased to Rs. 8,429.63 w.e.f.16.10.2006—Defendant had denied the receipt of notice of termination of tenancy dated 23.12.2009.—Plaintiff moved an application under Order 12 Rule 6 read with Section 151 CPC stating therein that the defendant had admitted the relationship as lessor and lessee between the parties and had also admitted that last paid rent was Rs. 8,429.63 per month—Legal notice served upon defendant on 26.12.2009 and on 29.12.2009 respectively and the same had been confirmed by the postal authorities as having delivered vide their respective certificates dated 03.03.2007 and 04.03.2007—Defendant was month to month tenant and the relationship between the parties came to an end by virtue of notice dated 23.12.2009—In its reply, defendant stating therein that it continued to be a contractual tenant and there is no admission on their part—Defendant had denied having received any notice—At the same time, it had taken a stand that the notice was not valid and the same was

without any basis and had no meaning in the eyes of law—However, the rate of rent was admitted—Suit was decreed as regards possession on the basis of admission under Order 12 Rule 6 Appeal filed before the learned Addl. District Judge was also dismissed—Hence present second appeal. Held—Relationship of lessor and lessee as well as last paid rent as Rs.8429.63 have been admitted—Lease agreement was never renewed in writing after its expiry—Lease deed was unregistered and the tenancy was month to month basis—Finding of both the courts below show that respondent/plaintiff had placed on record original UPC and registered A.D. receipt and also the original returned A.D. card showing the receipt of notice by the appellant/defendant—UPC receipt and A.D. card bear the addresses of the appellant/defendant—Rightly held that the notice is presumed to have been duly served upon appellant/defendant—Further, there is letter on record showing that Department of Posts has certified the delivery of notice sent through registered A.D. at the address of the appellant/defendant—On the one hand, the appellant/defendant is denying having received the notice of termination dated 23.12.2009 and on the other hand, it is disputing the validity of notice of termination of the lease—Appellant/defendant failed to substantiate in what manner the notice was invalid—Even assuming the notice terminating tenancy was not served upon the appellant, as is contended, though it has been served as is noted above, the learned ADJ has rightly held that filing of eviction suit under general law itself is notice to quit on the tenant—No substantial question of law arises which requires consideration of this court—Appeal stands dismissed.

Cement Corporation of India Ltd. v. *Bharat Bhushan Sehgal* *589*

— Order 7 Rule 11-Appellant/plaintiff filed suit for declaration, possession mesne profits, mandatory injunction and permanent injunction—Three defendants, filed separate written statements—However, Ld. Trial Judge dismissed the suit on ground that it lacked cause of action—Plaintiff preferred appeal—Held—For the purpose of deciding plea under Order

7 Rule 11 of the Code, the contents of the plaint have to be taken as correct and final-It is not permissible to hold that plaint contains false facts and therefore, the suit is liable to be dismissed as lacking in cause of action.

Champa Joshi v. *Maan Singh & Ors.* *277*

CODE OF CRIMINAL PROCEDURE, 1973—Section 389, 482—Indian Penal Code 1872—Sections 304-B and 498A—Instant application under Section 389 Cr.PC read with Section 482 Cr.Pc is preferred by appellant/applicant for suspension of sentence and grant of interim bail—Main ground for suspension of sentence and grant of Interim bail—That has been pressed is that appellant is in jail for about six years and wants to establish family and social ties—It has been argued that grounds on which parole is granted to convicts under the Guidelines of 2010, and one of which is re-establing family and social ties, would be applicable to grant of interim bail to appellant—Held, since Appellate Court is in seisin of appeal of convict, as per Clause 10 of the Guidelines of 2010, parole cannot be granted to convict by Competent Authority and as per said clause, appropriate orders can be passed by Appellate Court is such cases where appeal of convict is pending.

Rajesh Kumar v. *State (Govt. of NCT) of Delhi* *36*

— Sections 482, 205 (2) & 317 (1)—Negotiable Instruments Act, 1881—Section 138—Petition filed for quashing of order of MM directing accused to appear personally on next date of hearing for furnishing bail bonds and disclosing defence where accused has been exempted from appearance—Contention of petitioner that after grant of personal exemption from appearance of the accused Magistrate become *functus officio* and cannot withdraw, the exemption so granted and that requirement of bail does not from part of proceeding within ambit of Section 205 (2) or Section 317 (1)- Held, grant of permanent personal exemption by the Magistrate to accused, in bailable offence, does not dispense with requirement of accused obtaining bail from Court and exemption from appearance granted by Magistrate could be revoked by Magistrate where necessary at any time—Purpose for

permanently dispensing with personal appearance of accused is to prevent accused from undue hardship and cost in attending trial—Sections 205 (2) and empower Magistrate to direct personal attendance at any stage if necessary-While granting permanent exemption, MM is deemed to have reserved his right to accused to appear in person at the trial at any stage of the proceedings if necessary—Concept and purpose of bail mutually exclusive to the purpose of grant of personal exemption from appearance, they operate in different spheres of trial though are intrinsically connected—Permanent personal exemption cannot be understood as a blanket order dispensing with appearance and shall be subject to Sections 205 (2) and 317 (1)—Obtaining bail by the accused is an independent requirement and grant of permanent personal exemption form appearance in court cannot usurp the requirement of obtaining bail by the petitioner—Petition dismissed.

Kajal Sen Gupta v. *Ahlcon Ready Mix Concrete, Division of Ahluwalia Contract (India) Limited*..... *498*

— Section 256—Negotiable Instrument Act—1981—Section 138—Petitioner assailed order of learned Metropolitan Magistrate (MM) dismissing his application under Section 256 of Code in a complaint filed under Section 138 of Act—According to petitioner, Respondent/complainant company due to non payment of cheque amounts preferred complaint under Section 138 of Act and trial was at stage of recording of statement of defence witnesses, but for six consecutive hearings, none had appeared on behalf of respondent/complainant before learned MM—Thus, petitioner preferred application under Section 256 of Code praying for acquittal of petitioner due to non appearance of complainant/Respondent which was dismissed by learned MM—Therefore, he preferred petition to assail said order—Held:— Section 256 Cr. P.C. has been incorporated keeping in mind the interest of both the complainant and the accused—To prevent any prejudice to complainant, Section 256 Cr. P.C. empowers Magistrate to adjourn hearing, for ensuring presence of complainant, if sufficient cause is shown with regard to his

inability to appear at appointed date of appearance—However, failure of complainant to appear, without sufficient cause, empowers a Magistrate to dismiss complaint and to acquit accused—Objective of proviso to Section 256 Cr.P.C. is to prevent any undue delay to trial or to prejudice rights of accused person facing trial as presence of complainant may be dispensed with through pleader or if his personal attendance is not necessary—Case being at stage of defence evidence, before which statement of petitioner under Section 313 Cr.P.C. was also recorded, absence of Respondent complainant has not prejudiced petitioner or hampered trial.

G. Karthik v. *Consortium Finance Ltd. Now Magma Leasing Ltd.* *507*

— Section 482, 125 Hindu Marriage Act, 1955—Section 24—Petitioner filed petition u/s 482 of the Code to assail order of Additional Sessions Judge (ASJ) passed in criminal revision against order of Metropolitan Magistrate (M.M)—Petitioner, wife of respondent no. 1 and mother of respondent no.2 and 3, had filed petition u/s 125 of the Code to seek maintenance and pressed for grant of interim maintenance which was declined by Ld. MM—In revision, interim maintenance at the rate of Rs. 2000/— granted—Aggrieved petitioner challenged the order and prayed for enhancement of maintenance against her husband and also for grant of maintenance from her sons i.e. respondent no. 2 and 3—Admittedly, petitioner was receiving maintenance at the rate of Rs. 3500/— per month u/s 24 of the Act from her husband.—Held:— The wife, who is unable to maintain herself is entitled to maintenance both u/s 125 Cr. P.C. and also u/s 24 Hindu Marriage Act but the maintenance claim under one provision is subject to adjustment under the other provisions.

Santosh Malhotra v. *Ved Prakash Malhotra and Others* *518*

— Section 205—Petitioner instituted complaint case before Metropolitan Magistrate (M.M) against respondent and two other accused persons for offences punishable u/s 147/201/327/352/388/392/411/452/120B/506 IPC—Respondent moved

application seeking exemption from personal appearance which was allowed unconditionally by M.M—Aggrieved, petitioner, challenged the order on ground that respondent had failed to respond summons issued to her twice by Ld. M.M and first application moved by her seeking exemption permanently was already rejected—Percontra, respondent urged that dispute between parties was of civil nature and criminal complaint was filed only to pressurize her to withdraw civil suit filed by her family members against petitioner. Held:— An accused at the first instance or at any stage can be granted exemption from appearing personally in Court where the learned Court deems it appropriate and the offences are not of serious nature. Secondly, while granting such exemption from personal appearance, the accused shall always be represented through an advocate who, on his behalf, will proceed in the trail matter. Thirdly, the statements made by the counsel for the accused person shall be deemed to be made with the consent of the accused and the accused shall have no objection in taking evidence in his absence. Lastly, there is a word of caution attached to the use of discretion that a Court while granting such applications, will not pass blanket order, and has to make sure that the accused will not dispute his/her identity or any other proceedings that take places in his absence and in presence of his counsel. The Court may impose conditions to secure the presence of the accused as and when required.

Harbeen Arora v. *Jatinder Kaur* *713*

— Section 311—Petitioner, witness in criminal trial, challenged order allowing request of respondent to recall prosecution witnesses for cross-examination including him—As per petitioner, he was examined as witness and was tendered for cross—examination but accused/respondent informed court that Legal Aid Counsel appointed for him, was not available and requested for adjournment—Request was declined and thus, petitioner was cross—examined at length by accused/ respondent himself—Also, application to recall witness moved after long gap of 7 years—Percontra, on behalf of respondent it was urged, counsel provided from Legal Aid did not appear, at most cost could be awarded to petitioner for inconvenience

caused to him for appearing again for cross—examination. Held:— The Cr.P.C. provides that in all criminal prosecutions, the accused has a right to have the assistance of a counsel and the Cr.P.C also requires the court in all criminal cases, where the accused is unable to engage counsel, to appoint a counsel for him at the expenses of the State. The Legal Aid Counsel provided to accused did not appear and thus, discretion exercised by Ld. M.M in judicious manner by permitting him to recall persecution witnesses for cross-examination.

Ved Prakash Sharma v. *State & Anr.* *768*

COMPANIES ACT, 1956—Section 433 (e) read with Section 434 and 439—Winding up petition filed as Respondent unable to pay its debts—Respondent company passed a Board Resolution guaranteeing the loan amount advanced by the petitioner to the principal debtor—By virtue of Board Resolution the Respondent Company pledged certain shares as Collateral Security—Tripartite Agreement cum Pledge was executed between the petitioner, principal debtor and Respondent-guarantor—On 12 February, 2000 the principal debtor defaulted in repaying the loan—Petitioner issued a statutory winding up the Respondent—Since no reply was received by the petitioner, present winding up petition was filed—On 9th August, 2004, Proceedings were stayed as the principal debtor had become a sick company—Principal debtor was wound up by BIFR, present proceedings revived—Respondents allege that statutory winding up notice was not served upon the registered office—Respondent alleges no agreement between the principal debtor and the surety or between creditor and the surety—Respondent alleges liability limited to the extent of the shares pledged—Held: Statutory winding up notice issued—Petitioner had discharged his duty—Respondent was a guarantor in consideration of loan advanced to the principal debtor—Agreement-cum-pledge constituted a composite Tripartie Agreement cum-pledge did not limit the liability of the Guarantor—Respondent's liability by the virtue of Section 128 of the Indian contract Act, 1872 is co-extensive with that of the principal debtor Petition

admitted—Respondent company directed to be wound up Official liquidator attached to the court appointed as the provisional Liquidator—Directed that citations be published in the newspapers and Delhi gazette—Official liquidator directed to file fresh status report before the next date of hearing.

Global Infosystem Ltd. v. *Lunar finance Ltd.* *387*

— Section 391 and Section 394—Sanction of the Court sought to the scheme of Amalgamation of Indrama Investment Pvt. Ltd. (transferor company) with select holiday Resorts Ltd (transferee company)—Second motion—earlier transferor company had filed application praying for directions regarding dispensing the requirement of convening of equity shareholders and creditors of the transferor company—further directions sought regarding convening and holding of meetings of the shareholders and unsecured and secured creditors of the transferee company for the purpose of convening and approving the scheme of arrangement—Said application disposed of dispensing with the meetings of shareholders and creditors of the transferor company and further directing convening of the equity shareholders, secured and unsecured creditors of the transferee company—No objection filed to the grant of sanction to the scheme of arrangement—scheme of amalgamation/arrangement sanctioned—After lapse of six months C.A. No. 280/2005 filed under section 394(2) and Section 395(1) of the Act by Capt. Swadesh Kumar, one of the shareholders—questioning the validity of the scheme—Within few days Shri Ram Kohli filed similar objections—Notices issued to the transferee company—Reply received stoutly contesting the objection—Amalgamation in consideration of transferee company issuing to equity shareholders of the transferor company shares in the transferee company—Reasons for amalgamation—Both transferor and transferee companies closely held unlisted companies with common lineage—transferee company incurring losses—Borrowings of transferee company guaranteed by corporate guarantee given by the transferor company—Cost and management of said companies shall be reduced by amalgamation-Grievances of individual

shareholders-artificial exchange ratio stipulated which prejudicially affects the interest of the applicants—Alleged that valuation of the shares of the company was not as per the law—No separate meeting held for the applicants who constituted a separate class of shareholdings which was required under Section 391 of the Act—Respondents replied stating valuation was as per law and applicants could not be treated as a separate class for the purpose of Section 391 Held:— Shareholders pattern and the fact of applicants having small fractions of shares would not make them a separate class—the remain in the same category i.e. equity shareholders Objection of Applicants dismissed—Merely because the arrangement results in extinguishing of shares and results into 100% shareholdings in the hands of a particular group cannot be treated improper per se—Profit earning method adopted by the auditors held to be valid—Report filed by applicants not accepted as events and circumstances which have taken place after amalgamation under which the profitability has increased, cannot be relevant consideration for valuation of shares at the time when decision for amalgamation was taken Applicants unable to show ulterior motives—no merit in the applications—application dismissed.

Indrama Investment Pvt. Ltd. v. *Select Holiday Resorts Ltd.* *561*

COMPANY LAW—Winding up—It is the case of the appellant that a partnership firm in the name and style of the appellant was constituted in January, 1998 with Shri Anil Kumar Manik as one of the partners; that the said partnership firm, between the years 1998 and 2003, acquired and set-up the factory at Panipat with financial assistance from Punjab National Bank; that on 10th May, 2005 the partnership firm was dissolved and its assets including the factory premises, Plant, machinery installed therein came to the share of Shri Anil Kumar Manik who is now the sole proprietor of the appellant. It is further the case of the appellant that the Company in liquidation was incorporated on 3rd August, 2005 with authorized share capital of Rs. 5 Lacs only and for which the appellant contributed

Rs. 2 lac. It is yet further the case of the appellant that on 7th September, 2005 a Memorandum of Understanding/Agreement was executed between the appellant and the Company in liquidation. Whereunder the appellant agreed to sell and transfer all fixed assets including industrial plot at Sector 29, Part-II, HUDA, Panipat and the outstanding liabilities of the bankers Punjab National Bank and the machines etc. to the Company in liquidation—The factory premises, plant, machinery sale whereof in liquidation proceedings of the Company is now sought to be restrained, since 7th September, 2005, has been in possession of and in use of the Company in liquidation. The argument aforesaid though prima facie attractive, has no merit. The learned single Judge in the order impugned before us has noticed that during the liquidation proceedings, Serious Fraud Investigation Office (SFIO) was set-up to took into the affairs of the Company in liquidation; The learned Single Judge further found that the appellant had in moving the Company Application No. 362/2012 also suppressed material facts once again tried to mislead Court. Accordingly, Company Application No. 326/2012 was dismissed—Even otherwise, the present case is a fit case for piercing of the corporate veil. From what has been recorded in detail by the learned Company Judge and as found, it is apparent that the appellant is using the cloak of the Company for defrauding the creditors of the Company. The appellant as aforesaid was a substantial shareholder in active management of the affairs of the Company. The appellant let others deal with the Company by representing that the factory premises, Plant, machinery etc. belonged to the Company. The appellant cannot now, when such other persons are enforcing their claims against the Company, be heard to contend otherwise.

Mahabir Industries v. *H.M. Dyeing Ltd.* *30*

CONSTITUTION OF INDIA, 1950—Article 21; Civil Procedure Code, 1908—Section 36, 51—Indian Evidence Act, 1872 Section 114: Whether a person can be physically compelled to give a blood sample for DNA profiling in compliance with

a civil court order in a penalty action and it the same is permissible how is the court to mould its order and what would be the modalities for drawing the involuntary sample—Held-yes the Single Judge is entitled to take police assistance and use of reasonable force for compliance of order in case of continuous defiance of the order. Compelled extraction of blood samples in the course of medical examination dose not amount to conduct that shocks the conscience and the use of force as may be reasonably necessary is mandated by law and hence, meets the threshold of procedure established by law. Further, Human Right Law justifies carrying out of compulsory mandatory medical examination which may be bodily invasive and that the right to privacy is not an absolute right and can be reasonably curtailed. Judgment of the Court can never be challenged under article 14 or 21. Appeal allowed.

Rohit Shekhar v. *Narayan Dutt Tiwari & Anr.* *181*

— Article 226, Disciplinary proceedings—Misconduct imputed against petitioner constable was that he was found under influence of Iiquor while on duty on a particular date and did not turn up for duty on certain particular dates and on certain dates found sleeping under influence of Iiquor and thereafter deserted the unit without permission—Inquiry officer held charges proved—Disciplinary authority awarded punishment of removal from service—Appeal dismissed—Writ petition challenging the punishment and dismissal of appeal—Perusal of original record of the inquiry found to reveal that petitioner participated in the inquiry and his plea that the inquiry was not conducted in accordance writ rules and he was given adequate opportunity was not made out—Held, the respondents produced sufficient proof to establish that petitioner was found under influence of alcohol and absent from duty—Further held, the court under writ jurisdiction dose not have to go into correctness or the truth of the charges and cannot sit in appeal on the findings of disciplinary authority and cannot assume the role appellate authority and cannot interfere with findings of fact arrived at in disciplinary proceedings unless there was perversity or mala fide or no reasonable opportunity were given

to the delinquent or there was non-application of mind or punishment is shocking to the conscience of the court.

Anoop Kumar v. *Central Industrial Security Force and Anr.* *261*

— Article 226—Writ Petitions arising out of the common order passed by the Administrative Tribunal, Principal Bench New Delhi—Petitioners were working in the National Institute of Health and Family Welfare (NIHFW)—The issue before the Tribunal was with regard to the age of superannuation of the Petitioners—Claim of the Petitioners was that they were governed by the University Grants Commission (UGC) package of 24.12.1998 whereby the age of superannuation had been increased from 60 to 62—Whereas, the claim of NIHF was the UGC package of 24.12..1998 did not apply to NIHFW and had not been adopted by NIHFW further, it was contended by the Respondent that in fact a conscious decision had taken by the Governing Body of NIHFW not to adopt the UGC package of 24.12.1998—Held—In order to fall within the ambit of the UGC package of 24.12.1998, it is not just affiliation which was to be taken into account but also the fact that the affiliated college must also be recognized by the UGC-Since the Petitioners could not produce evidence which indicated that the NIHFW was firstly, an affiliated college and secondly, was recognized by the UGC, it is abundantly clear that the UGC package of 1998 is not applicable to NIHFW—Even though the UGC package is not ipso fact applicable it can always be adopted by the NIHFW—But the Governing Body vide its decision taken 16.08.2000 took a conscious decision that the age of superannuation should remain at 60 years—Hence neither was the UGC package, by itself applicable nor had it been made applicable to NIHFW by adoption.

C.B. Joshi v. *National Institute of Health and Family Welfare* *404*

— Article 226—Complaint made by HC Datta Ram that the Petitioner had abused him with filthy language under the influence of intoxication on the same day—Also cocked his

rifle—damaged his weapon—Charges framed on account of misbehaviour—Tried by Summary Security Force Court (SSFC)—Petitioner plead guilty—Dismissed from service—Did not challenge the proceedings for 9 years—In Appeal Petitioner alleged that HC Datta Ram had used unparliamentarily language against him and had accused him of consuming liquor—Petitioner alleged that false report was prepared—Petitioner had pleaded "guilty" to all three charges before the SSFC—Opportunity was also given to the Petitioner to making statements in reference to the charge or for the mitigation of the punishment and call any witness—Past record had 2 awards but Petitioner had also been punished summarily four times during the service—Appellate Authority held that there was sufficient evidence in the ROE to support charges against Petitioner—Appellate Authority also noted that the allegations leveled by the petitioner are sustained by evidence on record—Petitioner preferred the above noted writ petition, on the grounds that the order of dismissal was biased and perverse—and alleged —that fair opportunity not given to present his defence—Held:— Decision of Summary Security Force Court can only be reviewed on grounds of “illegality”, “irrationality”, and “procedural impropriety”—If the power exercised on basis of facts which do not exist having are patent erroneous, such exercise of powers shall be vitiated—In judicial review the court will not take over the functions of the Summary Security Force Court—Writ Petition is not an appeal against the findings of the Summary Security force Court—Cannot interfere with findings of fact arrived at by SSFC except in the case of mala-fides or perversity—Petitioner not been able to substantiate any of his contentions—Friend of Accused appointed and no allegation made against that person about his unsuitability—No cogent explanation provided for false implication—Writ Petition without merit—dismissed.

Rajinder Singh v. *Union of India & Ors.* *542*

— Article 226—Petitioner seeks writ of certiorari for quashing order dated 10th September, 2007 passed by the Ministry of Defence—rejecting statutory complaint of the petitioner in the light of his career profile, relevant records and analysis/

recommendations of the army headquarters, holding that the Petitioner had not been empanelled for promotion to the rank of Colonel on account of his overall profile and comparative merit—Aggrieved Petitioner filed a writ petition contending that Reviewing Officer reduced his grade to 7/9 due to animosity—Phrase “inadequate knowledge” made by the SRO as he had no opportunity to see the performance of the Petitioner—Undue Delay in filing petition before the court without giving in any justification—Held:—Petitioner unable to show any rule or regulation or precedent holding that repeated representations will extend the time for filing the complaint by the Petitioner—Petitioner unable to point any rule, regulation or precedent on the basis of which it can be inferred that an SRO, who is not conversant with the performance of the Petitioner, was obliged to give a grading instead of writing "Inadequate Knowledge" in accordance with rules and regulations—Unable to show any lacunae or procedural irregularity—No sufficient grounds for relief—Petition dismissed.

Lt. Col. Sanjay Kashyap v. *Union of India & Anr.* ... *583*

—Petitioner was appointed as Adhoc Medical Officer with DESU for period of 3 months, against permanent post in the year 1986—Thereafter his adhoc appointment was extend from time to time for six years—In year 1992, his case was referred to Union Public Service Commission for considering his appointment on regular basis, as special case-In year 1996, Delhi Vidyut Board became successor of DESU-In meanwhile, no response was received from UPSC-Again request letter was sent to UPSC to expedite approval on proposal sent by DVB-Till January, 1998, no approval was received, thus petitioner filed OA before Central Administrative Tribunal for redressal of his grievance which was subsequently transferred to High Court of Delhi to be treated as Writ Petition—However, on assurance given by respondent to petitioner that he would be regularized, he withdrew writ petition in year 2000-But vide office order dated June 2010 his services were terminated abruptly and strangely, without prior notice or information to him-Petitioner filed petition seeking quashing of said order and prayed to be reinstated in service with all service benefits—

On behalf of respondent, it was urged that petitioner was appointed purely on adhoc basis and subsequently his appointment as Medical Officer was required to be made through UPSC, therefore, he could not have a right to be treated at par with regularly recruited employee. Held—As per Recruitment & Promotion Rules, 1984 for making direct recruitment, the UPSC has to be consulted. However, in a situation of non-decision on behalf of UPSC a party should not suffer—Petitioner was qualified doctor and appointed through proper procedure—Termination was illegal and in violation of principles of natural justice—Petitioner directed to be reinstated without back wages.

UK Priyadarshi v. *NDPL* *788*

— Article 226—Petitioner joined navy as an MER on 10th July 1981—Signal received from INS Vikrant at Calcutta, dated 2nd August sending the petitioner for court martial or trial by the Commanding Officer for an incident that occurred on 29th October 1994—Has sought that punishment imposed on the Petitioner of demotion to the first rank be quashed and he be restored to the original rank with all consequential benefits—Petitioner asked to accept or deny charge without being given a copy of the chargesheet—Charges only orally explained to him imputing allegations of negligence of duty—Asked to make a written statement—Petitioners stated that he had performed his duty under the supervision and guidance of his senior officer—Petitioner asserted that he was not informed by the Commanding Officer of any inquiry after the incident till he came to know about the chargesheet which was orally communicated to him After summary trial petitioner was awarded punishment of reduction in rank—Punishment challenged on the ground that no Court of Inquiry was instituted in his case—Statement of witnesses not recorded in presence of the petitioner—Not allowed to cross—examine the witness at any time—Petitioner contended that all superior officers were let off with a warning alone while he was given the strongest punishment which destroyed his creditable service of over 13 years—Petitioner contended that procedure contemplated under the Army Act or Navy Act was not

followed—No evidence recorded before deciding whether the Petitioners is to be tried by the court martial or summary trial—Respondents contend that petition premature—Allege that remedies under Section 162 and Section 163 not availed of—Respondents further contend chargesheet was not provided as it was not asked for—Available to the division officer who represented him in the Summary Trial—Respondents contend that petitioner was given the harshest punishment as the responsibility of evolution had rested squarely on the petitioner and the accident was a result of his negligence—Fall claims of Respondents denied by the Petitioner—Document providing option of court martial or summary trail not signed by the petitioner—Consent given on 9th August 1995—Evidence take from 7th August to 9th August 1995—clearly shows denial of opportunity to cross examine. Held:—There are two exceptions to the doctrine of exhaustion of alternative remedy—One is when the proceedings are under the provision of law which is ultra vires—The other exception is when an order is made in violation of the principles of natural justice and the proceedings itself are an abuse of process of law. The copy of the charge sheet was not given to the petitioner—whether the petitioner was given an appropriate option between Court Martial and Summary Trial has not been established satisfactorily—Statement of witnesses in Summary of evidence were not recorded in the presence of the petitioner—no opportunity of cross examination given to the Petitioner—Petitioner not given 24 hours to decide whether to be tried by Court Martial or Summary Trial—For the Aforementioned Reasons the entire trial and punishment awarded to the petitioner is vitiated—Writ petition allowed.

Raj Kumar M.E.-1 v. *Union of India & Ors.*..... *599*

— Service Law—Seniority—Petitioner challenged order passed by Central Administrative Tribunal, whereby his original application was rejected on the grounds of laches and non-joinder of affected persons, holding that the cause of action to challenge the seniority accrued to the petitioner on 01.04.02 when provisional seniority list was circulated showing him

junior to respondent No. 3, as such original application brought in the year 2011 is barred by laches and since petitioner failed to implead 233 persons except respondent No. 3 who would be affected, the petition is bad for non-joinder—Held, the provisional seniority list dated 01.04.02 stood substituted by the final seniority list dated 01.08.11 and petitioner having approached the Tribunal in 2011 itself, it cannot be said that the petition is barred by latches and in view of settled legal position, all the affected persons need not be added as respondent as some of them could be impleaded in representative capacity, if number of such persons is too large or petitioner should be given opportunity to implead all the necessary parties and only on refusal, the petition could be dismissed for non-joinder of parties, as such the Tribunal was in error in dismissing the original application.

Baljit Singh Bahmania v. *Union of India & Ors.* *817*

CUSTOMS ACT, 1962—Section 108—Indian Evidence Act, 1872—Section 25 Confession made before customs officer—Held to be confession made to person other than a police officer and thus not hit by Section 25 Evidence Act—Further held, at pre charge stage, the discretion to produce a witness lies with the prosecution and not court or the accused as the court has to satisfy itself about existence of prima facie case, as such statement of co-accused is admissible without examining the co-accused as a witness if the person before whom the confession is made is examined under Section 244 Cr.P.C.—However, confession of co-accused is admissible only where two accused are tried jointly—Since in the present case the co-accused was not being tried jointly with the petitioner and there was no other evidence, charge could not be framed against the petitioner for offence under Section 135A of Customs Act.

Krishan v. *R.K. Virmani, AIR Customs Officer*..... *168*

DELHI LANDS (RESTRICTION OF TRANSFER) ACT, 1972—Suit for specific performance—Brief facts—Agreement to self entered into between the plaintiff as the prospective purchaser and the defendants as the prospective sellers—Total

sale consideration was Rs.48,50,000/-—Defendants received a sum of Rs. 4,50,000/— as advance—Award under Land Acquisition Act, 1894 passed acquiring the land about 9 months before the agreement to sell was entered into between the parties—Plaintiff pleads that the defendants were guilty of breach of contract inasmuch as they failed to obtain the permissions to sell the property from the Income Tax Authority and from the appropriate authority under the Delhi Lands (Restriction of Transfer) Act, 1972—Plaintiff pleads that the defendants failed to perform the contract because a Division Bench of this Court in a case quashed the acquisition proceedings and consequently the price of land increased, giving the reason for the defendants to back out from the contract—Plaintiff claims to have always been and continuing to be ready and willing to perform his part of contract—Written statements filed by the defendants contending inter alia that the agreement in question is barred by the Act of 1972 and Plaintiff failed to perform his part of the contract as the sale transaction had to be completed in 45 days—Also claimed that the plaintiff was not ready and willing to perform his part of the contract and that the discretionary relief for specific performance should not be granted in his favour—Issues framed—Evidence led. Section 3 of Delhi Lands (Restriction of Transfer) Act, 1972 places an absolute bar with respect to transferring those lands which have already been acquired by the Government i.e. with respect to which Award has been passed—Lands in the process of acquisition—transfer can take place with the permission of appropriate authority—Contracts entered into in violation of the 1972 Act are void and against public policy—In the present case, agreement to sell was entered into after the land was acquired i.e. after an Award was passed and therefore agreement to sell is void—Even presuming that the plaintiff or even both the parties were not aware of the Award having been passed with respect to the subject lands under the Lands Acquisition Act, 1894, that cannot take away the binding effect of Section 3 of the 1972 Act which provides that any purported transfer of the land which has already acquired is absolutely barred—Plaintiff miserably failed to prove his readiness and willingness i.e. his

financial capacity with respect to making available the balance sale consideration of 44,00,000/— hence it cannot be said that the plaintiff was and continued to be ready and willing to perform his part of the obligation under the agreement to sell at all points of time i.e. for the periods of 45 days after entering into the agreement to sell, after the period of 45 days till the filing of the suit, and even thereafter when evidence was led—Plaintiff has failed to comply with the requirement of Section 16(c) of the Specific Relief Act, 1963, and therefore, the plaintiff is not entitled to the relief of specific performance—Sub—Section 3 of section 20 of Specific Relief Act, 1963 makes it clear that Courts decree specific performance where the plaintiff has done substantial acts in consequence of a contract/agreement to sell—Where the acts are not substantial i.e. merely 5% or 10% etc of the consideration is paid and/or plaintiff is not in possession of the subject land, plaintiff is not entitled to the discretionary relief of specific performance—Specific Relief Act dealing with specific performance is in the nature of exception to Section 73 of the Contract Act, 1872—Normal rule with respect to the breach of a contract under Section 73 of the Contract Act, 1872 is of damages, and, the Specific Relief Act, 1963 only provides the alternative discretionary remedy that instead of damages, the contract in fact should be specifically enforced—For breach of contract, the remedy of damages is always there and it is not that the buyer is remediless—However, for getting specific relief, while providing for provisions of specific performance of the agreement (i.e. performance instead of damages) for breach, requires discretion to be exercised by the Court as to whether specific performance should or should not be granted in the facts of each case or that the plaintiff should be held entitled to the ordinary relief of damages or compensation—From the point of view of Section 20 sub—Section 3 of the Specific Relief Act, 1963 or the ratio of the judgment of the Supreme Court in the case of *Saradamani Kandappan* (supra) or even on first principle with respect to equity because 10% of the sale consideration alongwith the interest will not result in the defendants even remotely being able to purchase an equivalent

property than the suit property specific performance cannot be granted—Subject suit is only a suit for specific performance in which there is no claim of the alternative relief of compensation/damages—No cases set out with respect to the claim of damages/compensation—Plaintiff has led no evidence as to difference in market price of the subject property and equivalent properties on the date of breach, so that the Court could have awarded appropriate damages to the plaintiff, in case, this Court came to the conclusion that though the plaintiff was not entitled to specific performance, but he was entitled to damages/compensation because it is the defendants who are guilty of breach of contract—However in exercise of power under Order 7 Rule 7 CPC, the Court can always grant a lesser relief or an appropriate relief as arising from the facts and circumstances of the case—Undisputed that the defendants have received a sum of 4,50,000/- under the agreement to sell—Considering all the facts of the present case, it is fit to hold that though an agreement itself was void under the 1972 Act, the plaintiff should be entitled to refund of the amount of 4,50,000/- alongwith the interest thereon at 18% per annum simple pendente life and future till realization—Suit of the plaintiff claiming the relief of specific performance is dismissed.

Jinesh Kumar Jain v. *Iris Paintal & Ors.* *678*

GUARDIANS AND WARDS ACT, 1890—Section 47—Adoption by foreign citizen—Appellant, a single lady aged 53 years and citizen of USA applied for adoption of a child from India After conducting the proceedings under Section 7 and 26 of the Act, the learned District Judge dismissed the petition, citing para 4.1 of Chapter IV of Guidelines for Adoption from India, 2006 issued by Central Adoption Resource Authority to the effect that single person upto 45 years of age can adopt—Appeal—appellant conducted that next clause of the same para dealing with foreign proposed adoptive parent contemplated that age of parent should not be less than 30 years and more than 55 years so the appellant ought to have been allowed adoption—held, the clause relied upon by the appellant is applicable where adoption is sought by a married couple where

the clause referred to by the learned District Judge pertains to single person seeking to adopt a child and the appellant being a single person, falls under clause 4.1 where persons upto 45 years of age are eligible while appellant is aged 53 years.

Stephanie Joan Becker v. *State & Anr.* *636*

HINDU MARRIAGE ACT, 1955—Section 13 (B); Delhi High Court Hindu Marriage Rules, 1979—Appeal against dismissal of petition u/s 13(B) on the ground that the parties have nowhere stated that there has been no cohabitation for one year. Petition categorically stated that since 30.03.2010 parties have been living separately under the same roof and they are not able to live together as husband and wife on account of temperamental differences since then. Along with the petition in separate affidavits both parties stated that they have been living separately and have not cohabited since 30.03.2010. Appellants contend that there is no requirement under Delhi High Court Hindu Marriage Rules, 1979 to state about non-cohabitation specifically in the petition—Held Even if parties are living under the same roof but are not living as husband and wife, they can be said to be living separately—Essence is the relationship of husband and wife and not the same roof. There is specific affidavit of not cohabitation and averments in the petition that parties are not living together as husband and wife—Petition fulfills all the requirements u/s 13(B) Appeal allowed.

Pradeep Pant & Anr. v. *Govt of NCT of Delhi*..... *485*

— Section 13 (B), 14—Appeal against dismissal of application seeking waiver u/s 14 in a petition for divorce on consent. Whether petition for dissolution of marriage on mutual consent be filed before expiry of one year separation—Held:- The requirements u/s 13 (1) (B) are (i) parties are living separately for a period of on year (ii) they have not been able to live together and (iii) they have mutually agreed that marriage should be dissolved. S.14 bars the filing of the petition for dissolution of marriage unless on the date of presentation of the petition one year has elapsed from the date of marriage. Proviso that the court may on application made to it in

accordance with such rules as may be made by the High Court in that behalf allow petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent. Period of one year for living separately under s. 13(B) is not directory but mandatory and the same cannot be condoned by the Court u/s 14. Appeal dismissed.

Sunny v. *Sujata*..... *491*

— Section 24—Petitioner filed petition u/s 482 of the Code to assail order of Additional Sessions Judge (ASJ) passed in criminal revision against order of Metropolitan Magistrate (M.M)—Petitioner, wife of respondent no. 1 and mother of respondent no.2 and 3, had filed petition u/s 125 of the Code to seek maintenance and pressed for grant of interim maintenance which was declined by Ld. MM—In revision, interim maintenance at the rate of Rs. 2000/— granted—Aggrieved petitioner challenged the order and prayed for enhancement of maintenance against her husband and also for grant of maintenance from her sons i.e. respondent no. 2 and 3—Admittedly, petitioner was receiving maintenance at the rate of Rs. 3500/— per month u/s 24 of the Act from her husband.—Held:— The wife, who is unable to maintain herself is entitled to maintenance both u/s 125 Cr. P.C. and also u/s 24 Hindu Marriage Act but the maintenance claim under one provision is subject to adjustment under the other provisions.

Santosh Malhotra v. *Ved Prakash Malhotra and Others* *518*

HINDU SUCCESSION ACT, 1956—Brief Facts—One Prof. Parman Singh, a displaced person from Pakistan, had come to India leaving behind vast joint Hindu family immovable properties—He expired in Delhi leaving behind his legal heirs and the properties—Suit for partition and rendition of accounts filed by the plaintiff praying for partition of HUF immovable properties—Asserted in the plaint that late Prof. Parman Singh after coming from Pakistan had applied for the allotment of a

house under the Scheme for displaced persons under the Displaced Persons Act, to the Ministry of Rehabilitation, Government of India—Ministry of Rehabilitation, Government of India informed late Prof. Parman Singh that one double room house in Nizamuddin Extension (now known as Nizamuddin East) had been decided to be allotted to him—Final figure of the actual cost of the house was 5,946/-According to the plaintiff, since Prof. Parman Singh had brought with him movable properties in the form of cash and jewellery from Pakistan, which belonged to the HUF and were given to him by his father etc., he paid 5,000/- to the Ministry of Rehabilitation by depositing the same in the Treasury and also and paid 946/- from the same—Hence, the property allotted to him at Nizamuddin was HUF property and continues to be so even today—Right from the beginning, he had been keeping tenants in the said property and had been receiving rent—Using this amount, he built extra and additional structures on the property—After his death in 1975. his widow, Smt. Balwant Kaur continued to stay there and receive rents and had her bank account, including a joint account with the defendant No.1 used for depositing HUF rents and withdrawing the same—All HUF moneys were being handled by the defendant No. 1—Defendant No.2 Hari Singh (brother of the defendant No.1) had left India somewhere in the late sixties and never returned to India thereafter—Plaintiff further alleges that the defendant No.1 father of the plaintiff, making use of the HUF rents from the Nizamuddin property purchased a plot at B-22, East of Kailash, New Delhi and constructed a super-structure thereon—Nucleus of the said property came from HUF money and thus the said property is also HUF property—Plaintiff claims that being the son of the defendant Nos.1 and 5, he has 1/10th Share in both the aforesaid HUF properties—Plaintiff also claims rendition of accounts kept by the defendant No.1 assessed to be in the sum of 60,000/- on the date of the institution of the suit—In the written statement filed by the defendant No.1 the father of the plaintiff, it is categorically denied that late Prof. Parman Singh had left behind him HUF immovable and movable properties—Denied that the

plaintiff has any right to seek partition of the aforesaid properties or any share in either of the aforesaid properties—He brought no cash and jewellery to India as alleged by the plaintiff—The property at B-13, Nizamuddin East was his self—acquired property and at B-22, East of Kailash, New Delhi was the self—acquired property of defendant No.1—As regards immovable property at B-22, East of Kailash, New Delhi, the defendant No.1 has stated that the land in respect thereof was purchased by him from the Delhi Development Authority in 1965 with his own resources including 7,000/- from his GPF account—He constructed the Held:— admitted documents clearly show that the said property was purchased by Prof. Parman Singh from his own resources and not out of the claims or compensation—Plaintiff, in his cross—examination, has categorically admitted that Prof. Parman Singh was gainfully employed as soon as he came to India from West Pakistan in the year 1947 as a Lecturer in the Camp College and was subsequently appointed as a Special Magistrate—Clearly, therefore, the said property was purchased by Prof. Parman Singh from his own funds Plaintiff has failed to establish the existence of any HUF of which Prof. Parman Singh was the Karta, and in the course of his cross-examination candidly admitted that he was not aware whether any HUF had been legally created by Prof. Parman Singh—As regards the property at East of Kailash, there is ample documentary evidence on record to conclusively establish that the said property was the self-acquired property of the defendant No.1 Mahtab Singh—In view of the aforesaid overwhelming evidence on record, oral and documentary, the inevitable conclusion is that it must be held that neither Prof. Parman Sing nor the defendant No.1 Mahtab Singh had created any HUF and the properties acquired by them respectively cannot, therefore, partake of the nature of HUF properties. Plaintiff has failed to establish that either of the two properties mentioned hereinabove were HUF properties—Cause of action for the filing of the suit in respect of the property at East of Kailash has not yet arisen, the said property being the self—acquired property of the defendant No.1, who

is still alive-son or daughter can ask for partition of HUF property from the father during his lifetime, but not of self acquired property—Plaintiff is not entitled to the partition of the suit properties and to the rendition of accounts in respect thereof—Suit fails and is accordingly, dismissed—The defendants having contested the case from the year 1993 onwards are held entitled to costs throughout.

Gajinder Pal Singh v. *Mahtab Singh & Ors.*..... *643*

INCOME TAX ACT, 1961—Section 80—Appellant preferred appeal against order of Income Tax Tribunal and Revenue Department also preferred two appeals against same order passed by Tribunal—Appellant, a public limited company, was providing satellite based telecommunication including VSAT services, up-linking services, play out services and broadband service through satellite—It earned income through said services besides rental income and income from other sources—Appellant filed income tax return for assessment year 2005-06 claiming deduction under Section 80-1A of Act after seeking adjustments—One of the issues raised by appellant was, it had earned interest of Rs.8,38,626/- on FDRs pledged with banks for availing non-found based credit limits but they had paid interest of Rs.1,70,09/277/- and effectively net interest paid was expenses, interest earned was business income directly connected with qualifying service and therefore, should be set off from interest paid—Assessing Officer, however, did not agree with said contention—CIT agreed (Appeals) with assessee and held that interest on deposit was taxable as business income and not under head “income from other sources” and therefore, assessee was entitled to deduction under Section 80-1A (4)(ii)—Tribunal reversed findings of CIT (Appeals) and agreed with Assessing Officer, so appellant agitated said issue by way of appeal—Held:- For determining income derived by an undertaking or enterprise, we have to compute total income of assessee from business referred in sub-section (4) to Section 801A—Words used in Section 80-1A (1) and (2A) are “profit and gains of eligible business”—On basis of same logic and reasoning, we have to first find out profit and gains of business from specified

activities—Case remanded back to Tribunal to examine balance sheets and account of assessee to decide question.

Essel Shyam Communication Ltd. v. *Commissioner of Income Tax* *306*

INDIAN CONTRACT ACT, 1872—Section 202—Whether a power of attorney given for consideration would stand extinguished on the death of the executant of the power of attorney—Held—No. The object of giving validity to a power of attorney given for consideration even after death of the executants is to ensure that entitlement under such power of attorney remains because the same is not a regular or a routine power of attorney but the same had elements of a commercial transaction which cannot be allowed to be frustrated on account of death of the executant of the power of attorney. Appeal dismissed.

Ramesh Chand v. *Suresh Chand & Anr.* *48*

— Section 74—Measure of damages—Brief Facts—Defendant invited tenders for licence of an air conditioned restaurant space measuring 5426 sq. ft. (approximately) located at Palika Parking Complex, Connaught Place, New Delhi—Since the first highest tenderer failed to complete the formalities, therefore, after forfeiting the earnest money amount of such tenderer, the plaintiff was offered the restaurant on licence of the defendant—As per the terms and conditions of auction, Plaintiff deposited Rs. 50,000/- as earnest money, and Rs. 20 lacs being two months advance licence fee—Plaintiff failed to comply the formalities of the contract—Filed suit for recovery contending that defendant was guilty of concealment of facts—Defendant relying on the terms and conditions of the tender to show that what was offered was "as is where is basis" and the plaintiff was in fact duty bound to inspect the premises and not raise any objection on any ground thereafter—Plaintiff has committed breach by not completing the formalities and because of which the contract of license could not be entered into between the parties—On that basis it was argued that in terms of Clause 2 of the terms and conditions of the allotment, the defendant had only a right to

forfeit the earnest amount of 50,000/- and no right to forfeit any other/more amount. Held:— Liquidated damages are the subject matter of Section 74 Which deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty—Measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for—Even if there is a clause of forfeiture of an amount in addition to the earnest money deposited, such a clause entitling forfeiture of what is part price paid as advance, is hit by the bar of Section 74 of the Contract Act, 1872—Merely because there is a provision in the contract for forfeiture of part of the price in addition to earnest money, that clause cannot be given effect to unless the defendant pleads and proves losses caused to him on account of breach by the plaintiff—Section 74 of the Contract Act prescribes the upper limit of damages which can be imposed, and the Court is empowered subject to loss being proved, only to award reasonable compensation, the upper limit being the liquidated amount specified in the contract. Once parties specifically in the terms and conditions provided that in case of the eventuality of non-completion of the formalities only the forfeiture of earnest money can take place, nothing further can be claimed by the defendant—When the defendant illegally retains the amount of the plaintiff, defendant is liable to pay compensation to the plaintiff, whatever name it be called, interest or otherwise—Suit of the plaintiff will stand decreed against the defendant for a sum of 20 lacs along with pendente lite and future interest at 9% per annum simple till realization.

Alfa Bhoj Pvt. Ltd. v. New Delhi Municipal Council *447*

— Section 8—Appellant is a Government company manufacturing paper from which respondent had been purchasing from time to time—Respondent deposited a sum of Rs. 1,00,000/- with the appellant as security deposit which was to carry interest @ 15% per annum—Plaintiff/respondent

was maintaining a current account of the defendant/appellant and there were occasions when it made excess/advance payment to the appellant/defendant, which was subject to adjustment for future purchases—A sum of Rs. 2,81.161.47 was alleged to be due to it from the appellant/defendant, being the excess/advance payment made to it—Plaintiff/respondent filed the aforesaid suit for recovery of that amount with interest, amounting to Rs. 74,718.75/- and also claimed the security deposit of Rs.1,00,000/- which it deposited with the appellant/defendant, thereby raising a total claim of Rs.4,55,880.24.—The appellant/defendant filed the written statement contesting the suit and took a preliminary objection that the suit was barred by limitation—On merits, it was alleged that the entire amount due to the plaintiff/respondent, including the amount of security deposit was paid by way of a cheque of Rs. 1,40,113.77 which was accepted by the plaintiff/respondent—Decree for recovery of Rs. 3,55,744.96 with proportionate costs and pendent elite and future interest @ 10% per annum was passed in favour of the respondent and against the appellant—Hence present appeal. Held:—Excess/advance payment by the plaintiff/respondent to the appellant/defendant being towards purchase of the paper, cannot be said that the said payment was made towards an independent transaction, unconnected with the contract between the parties for purchase of paper—Of course, the appellant/defendant was under an obligation to either deliver the goods for which advance payment was received by it or it was required to refund the advance/excess payment to the plaintiff/respondent—However, this liability of the appellant/defendant arose under the same contract under which it was supplying paper to the plaintiff/respondent and was not an obligation independent of the contract for sale of paper to the plaintiff/respondent—There was only one contract between the parties, and that was for the sale of paper by the appellant/defendant to the respondent/plaintiff—Suit filed by the plaintiff/respondent was barred by limitation—Section 8 of Contract Act provides that the performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is

an acceptance of the proposal—By remitting payment of Rs. 1,40,113.77/- towards full and final settlement of the account, the defendant/appellant gave an offer to the plaintiff/respondent for setting the account on payment of that amount—The plaintiff/respondent accepted the offer by encashing the cheque sent by the defendant/appellant—This led to a contract between the parties for settling the account on payment of 1,40,113.77/- by the defendant/appellant to the plaintiff/respondent—Not open to the plaintiff/respondent to now say that since they had credited the said payment as part payment, they are entitled to recover the balance amount from the defendant/respondent—Having enchased a cheque of Rs.1,40,113.77/-, the plaintiff/respondent was not entitled to any further payment from the appellant/defendant—impugned judgment and decree set aside.

Hindustan Paper Corporation v. *Nav Shakti Industries P. Ltd.* *737*

— Section 74—Measure of damages—Brief Facts—Auction notice was inserted in the newspaper by defendant for plot No. 8, Asaf Ali Road having an area of approximately 351 sq. mts—Plaintiff was the successful bidder quoting the price of 1.92 crores—At the fall of hammer, the plaintiff deposited 25% of the amount viz 48 lacs, as per the terms and conditions of the auction—Forfeiture has been affected by DDA on account of the plaintiff having committed default in having failed to deposit the balance amount—Case argued and predicated by the plaintiff on the ground that even if the plaintiff is guilty of breach of contract, yet, the defendant cannot forfeit the huge amount of 48 lacs, and, at best, can only forfeit a reasonable amount inasmuch as the liquidated damages amount of 48 lacs is only the upper limit of damages and the defendant having failed to plead and prove the loss caused to it, therefore, in terms of the law as laid down under Section 74 the plaintiff is entitled to refund of the amount of 48 lacs less a reasonable amount which can only be forfeited by the defendant—Defendant claims the entitlement to forfeit the amount of 48 lacs only on the ground that such a term of forfeiture exists in the terms and conditions of the auction—

Issues framed and evidence led. Held:— Section 74 provides only the upper limit of damages/ amounts which are allowed to be forfeited by a proposed seller in case of breach of contract by the proposed buyer, and in case the seller wants to forfeit an unduly large amount which is paid by the proposed buyer to the proposed seller, it is necessary that the proposed seller pleads and proves the loss which is caused to him. Defendant having failed to plead and prove the loss on account of failure by the plaintiff to perform his part of the contract, it cannot be allowed to forfeit an amount except a reasonable amount of 5 lacs—Plaintiff will also be entitled to pendente lite and future interest @ 9% per annum simple till realization.

Pragati Construction Company (P) Ltd. v. *Delhi Development Authority* *723*

INDIAN EVIDENCE ACT, 1872—Section 25 Confession made before customs officer—Held to be confession made to person other than a police officer and thus not hit by Section 25 Evidence Act—Further held, at pre charge stage, the discretion to produce a witness lies with the prosecution and not court or the accused as the court has to satisfy itself about existence of prima facie case, as such statement of co-accused is admissible without examining the co-accused as a witness if the person before whom the confession is made is examined under Section 244 Cr.P.C.—However, confession of co-accused is admissible only where two accused are tried jointly—Since in the present case the co-accused was not being tried jointly with the petitioner and there was no other evidence, charge could not be framed against the petitioner for offence under Section 135A of Customs Act.

Krishan v. *R.K. Virmani, AIR Customs Officer*..... *168*

— Section 114: Whether a person can be physically compelled to give a blood sample for DNA profiling in compliance with a civil court order in a penalty action and it the same is permissible how is the court to mould its order and what would be the modalities for drawing the involuntary sample—Held-yes the Single Judge is entitled to take police assistance

and use of reasonable force for compliance of order in case of continuous defiance of the order. Compelled extraction of blood samples in the course of medical examination dose not amount to conduct that shocks the conscience and the use of force as may be reasonably necessary is mandated by law and hence, meets the threshold of procedure established by law. Further, Human Right Law justifies carrying out of compulsory mandatory medical examination which may be bodily invasive and that the right to privacy is not an absolute right and can be reasonably curtailed. Judgment of the Court can never be challenged under article 14 or 21. Appeal allowed.

Rohit Shekhar v. *Narayan Dutt Tiwari & Anr.* *181*

INDIAN PENAL CODE 1872—Sections 304-B and 498A—Instant application under Section 389 Cr.PC read with Section 482 Cr.Pc is preferred by appellant/applicant for suspension of sentence and grant of interim bail—Main ground for suspension of sentence and grant of Interim bail—That has been pressed is that appellant is in jail for about six years and wants to establish family and social ties—It has been argued that grounds on which parole is granted to convicts under the Guidelines of 2010, and one of which is re-establing family and social ties, would be applicable to grant of interim bail to appellant—Held, since Appellate Court is in seisin of appeal of convict, as per Clause 10 of the Guidelines of 2010, parole cannot be granted to convict by Competent Authority and as per said clause, appropriate orders can be passed by Appellate Court is such cases where appeal of convict is pending.

Rajesh Kumar v. *State (Govt. of NCT) of Delhi* *36*

— Section 384, 387, 506, 467, 471—Chargesheet filed under I.P.C (MCOCA)—It was alleged that against the respondent there were 34 cases pending—He was also found in possession of properties any money in four bank accounts, out of which two existed in the name of wife and one in the name of his daughter, beyond the known sources of his income—Accused was discharged under the provisions of MCOCA on the ground that there was no material to substantiate that the accused was a member of any gang and that prosecution failed to show

that respondent was holding above properties either being a member of an organized crime syndicate or on behalf of other syndicate—Held, to attract Section 2(A) there has to be continuing unlawful activities by an individual singly or jointly either by an organized crime syndicate or on behalf of such syndicate—Such activities should involve use of violence or threat of violence or intimidation or coercion or other unlawful means with an activity of gaining pecuniary benefits or other undue advantage for the person who undertakes such an activity—Expression 'any unlawful means' refer to any such which has direct nexus with commission of a crime which MCOCA seeks to prevent or control—Section 2(e) of MCOCA cannot be invoked for petty offences—Unless there is prima facie material to establish that there is an organized crime syndicate and prima facie material firstly, to establish that there is organized crime syndicate and secondly, that organized crime has been committed by any member of organized crime syndicate or by anyone on its behalf, provisions of MCOCA cannot be involved.

State Govt of NCT of Delhi v. *Khalil Ahmed*..... *73*

— Section 304B, 306, 498A—On statement of brother of deceased, Smt. Usha Punjab Singh FIR was registered against husband of deceased for harassing her and raising dowry demands from her—On completion of investigation, chargesheet for offences punishable U/s 498A/304B/306 IPC was filed—After considering material on record, charge for offences punishable U/s 498A/304B IPC and in alternative charge for offence punishable U/s 306 IPC were framed against the husband of the deceased—By way of criminal revision petition, he challenged the order wherein he disputed his marriage with deceased and also put forth other lacunae in investigation—Whereas on behalf of state, it was urged, prosecution had produced sufficient material against petitioner and moreover at stage of charge, court has only to consider prima-facie evidence and not whether case would ultimately result in conviction or not—Held:— At the initial stage of trial, the Court is not required to meticulously judge the truth,

veracity and effect of evidence to be adduced by prosecution during trial—The probable defence of the accused need not be weighed at this stage—The Court at this stage is not required to see whether the trial would end in conviction—Only prima facie the Court has to consider whether there is strong suspicion which leads the court to think that thee are grounds for presuming that the accused has committed the offence.

Anand Mohan v. *State NCT of Delhi*..... *295*

— Section 307, 34—Appellant challenged his conviction U/s 307/34 of the Code and pointed out various lacunae and contradictions in prosecution case—He urged that benefit should have been given to him specifically as witnesses had turned hostile—On the other hand, it was urged on behalf of State that evidence led by it was sufficient and convincing to up hold conviction of appellant—Arguments raised regarding witnesses turning hostile, was also countered—Held:—Evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him—The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on careful scrutiny thereof.

Sandeep v. *State* *426*

— Sections 302 and 34—Arms Act, 1959—Section 27—As per prosecution on day of incident, PW1, father of deceased and his son PW9 were in his factory-A-1 went to first floor of factory removed iron rod and broke wires as a result machines in factory stopped functioning—PW9 objected on which A-1 abused and hit him on head with iron rod—Deceased on reaching there enquired about the cause of quarrel-A-2 caught hold of deceased on exhortation of A-1 who brought chhuri from his shop and stabbed him on his chest and abdomen—When PW1 rushed to save his son, both accused fled-A-2 was arrested wearing a blood stained shirt-A-1 on arrest got recovered chhuri—Trial court convicted accused persons u/

s 302/34—Held, from evidence on record involvement of A-2 not clear—No witness assigned any role to A-2 in initial altercation—Contradictory and inconsistence version in evidence as to who exhorted whom—No knowledge could be imputed to A-2 that A-1 would rush to shop bring chhuri-Un-Natural that PW1, PW3, PW5 and PW9 who were present would not have intervened to get released the deceased from the clutches of A-2-Servants in factory also exhibited un-natural conduct in not intervening in incident-highly improbable that A-2 continued to hold deceased from behind for long time awaiting arrival of A-1 with chhuri—Mere presence of A-2 at spot not sufficient to conclude that he shared common intention with A-1 to murder deceased—The fact that accused were together at the time of the incident and ran away together is not conclusive evidence of common intention in the absence of any more positive evidence PW1 and PW9 (injured witness) in their evidence have proved that A-1 stabbed to death deceased-Ocular testimony of PW1 and PW9 corroborated by medical evidence and no conflict between the two-Defence version accusing PW9 for murder of deceased not inspiring confidence—Initially A-1 was un-armed, when deceased on reaching the spot enquired cause of quarrel, A-1 rushed to his shop and brought the knife—This rules out that incident occurred suddenly in fit of rage A-1 acted in cruel manner and took undue advantage by inflicting repeated stab blows with force without any resistance from the deceased—Appeal of A-2 allowed—Appeal of A-1 dismissed.

Afsar and Anwar v. *State & Ors.* *469*

— Section 302, 324 Appellant challenged his conviction u/s 302/324 urging various important witnesses like boys who had transported deceased to hospital and other important persons not produced or even named as witnesses, which made prosecution case doubtful. Held:— Once the prosecution evidence is reliable and trustworthy and proves the offence, Failure to examine other witnesses is not fatal. Non—examination of further witnesses does not affect the credibility of the witnesses relied upon. It is the quality of the evidence

and not the number of witnesses that matter.

Narain Singh v. *State* *748*

— Section 397, 307, 458—Appellant challenged his conviction u/s 458/307/397/34 IPC on ground, recovery at his instance not proved. Held:— Recovery of stolen goods is one of the chain in the circumstances. When a person was duly identified as participant in the offence with specific role assigned to him, then absence of recovery will not discredit the otherwise credible testimony of witness.

Vikram @ Babloo v. *State* *762*

INDUSTRIAL DISPUTES ACT, 1947—Section 25-F by way of writ petition the company challenged the award dated 21.03.2002 in ID Case 241/1990 whereby the relief of reinstatement in service with 50% back wages had been granted to two respondent workmen—Petitioner contended that the Respondent workmen had not completed 240 days of service and hence, Section 25-F does not apply to the present case—Tribunal had earlier accepted the claim of the Respondents relying on the evidence of witness of the management Sh. K.K. Pahuja who in his cross examination said that Respondent no.1 had been employed w.e.f. 10.06.86 and Respondent no.2 had been employed w.e.f. 26.3.88 respectively—thus as per the statement both employees had completed 240 days of service—Petitioner contended that the management's witness in his affidavit had clearly given the exact dates of appointment of the workmen and therefore his statement to the contrary in cross examination could not be given any weightage. Held—Cross—examination is as much a part of the evidence of a witness as the examination in chief—If any party is able to elicit any admission on some vital point of dispute from a witness that admission can certainly be used by the party who is benefited from that admission. Jurisdiction of the High court to interfere in the awards of labour courts is very limited it is not entitled to act as an appellate court findings of fact reached by inferior Court or Tribunal as result of appreciation of evidence cannot be reopened or questioned in writ

proceedings—Only an error of law apparent on the face of record can be corrected by a writ.

Classic Bottle Caps (P) Ltd. v. *Usha Sinha & Ors.* .. *533*

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000—Section 7A—Appellant was convicted by Trial Court for committing offences punishable U/s 364A/506/120 IPC and was sentenced—Aggrieved, appellant filed appeal and also raised plea about his being juvenile for first time in appeal—Trial Court was directed to hold inquiry for determination of age of appellant—After appreciating evidence, Trial Court concluded that an approximate age of appellant on day of incident was between 19-24 years—Appellant also challenged said finding of Trial Court and urged he was less than 18 years of age on day of incident—Also, his ossification report by Dr. Mehra was ignored by Trial Court whereas his ossification report prepared in AIIMS should not have been considered—According to the prosecution, appellant failed to produce any material documents like ration card, voter's I card, electoral rolls to prove his age—Trial Court relied upon the ossification report prepared in AIIMS and also margin of error of six months was given to conclude that appellant was not juvenile on day of incident—Held:- Once the legislature has enacted a law to extend special treatment in respect of trial and conviction to juveniles, the courts should be jealous while administering such law so that the delinquent juveniles driver full benefit of the provisions of such Act but, at the same time, it is the duty of the courts that the benefit of the provisions meant for Juveniles are not derived by unscrupulous persons, who have been convicted and sentenced to imprisonment for having committed heinous and serious offences, by getting themselves declared as children or juveniles on the basis of procured certificates.

Mohd. Wasim v. *State* *286*

LIMITATION ACT, 1963—Article 1 Recovery of money for electronic goods supplied—Transactions were of 1999-suit

filed in 2003 plaintiff claimed that defendant maintained a "running account"—Thus extending the period of limitation. Held—No proof that part payment for goods supplied made—No extension of limitation—A running account is open mutual and current-there must be shifting balances or reciprocal demands—In this case legal relationship is single as no shifting balance is there hence Art. 1 of Limitation Act is inapplicable—Existence of sub relationships or certain debits and credits because of certain schemes or cash discounts between parties will not mean fulfillment of requirement of reciprocal demand-Such schemes are not independent contracts but arise out of single contractual relationship—Thus no extension of limitation—Suit is time barred.

Videocon International Ltd. v. *City Palace Electronics Pvt. Ltd.* *14*

— Section 5—Motor Vehicles Act, 1988—Section 103—Appellant impugns judgment passed by Claims Tribunal—Along with appeal, application for condonation of delay filed—Plea taken, award came to appellant's knowledge only when execution proceedings were initiated against appellant—Held—Courts normally do not throw away meritorious lis on hypertechincal grounds—Primary function of court is to adjudicate dispute between parties and to advance substantial justice—Object of providing a legal remedy is to repair damage caused by reason of legal injury—Law of limitation fixes a lifespan for such legal remedy for redresss of legal injury so suffered—Condonation of delay is a matter of discretion of Court—Section 5 of Limitation Act does not say that such discretion can be exercised only if delay is within a certain limit—Expression 'sufficient cause' should be given liberal interpretation so as to advance substantial justice between parties—It is not length of delay which is material for condonation of delay in filing Appeal but acceptability of explanation—Law that each day's delay must be explained has mellowed down yet it has to be shown by applicant that there was neither any gross negligence nor any inaction, nor want of bonafides—There is not even a whisper as to when

appellant stopped appearing before Claims Tribunal and reasons for same—Delay of 308 days, of course, a long delay, can be condoned provided there is sufficient cause to explain same—Since appellant has failed to show sufficient cause for condonation of delay, application cannot be allowed—No sufficient ground to condone delay—Application and appeal are dismissed.

Uttarakhand Transport Corporation v. *Ram Sakal Mahto & Anr.* *555*

— Article 1—Contract Act, 1872—Section 8—Appellant is a Government company manufacturing paper from which respondent had been purchasing from time to time—Respondent deposited a sum of Rs. 1,00,000/- with the appellant as security deposit which was to carry interest @ 15% per annum—Plaintiff/respondent was maintaining a current account of the defendant/appellant and there were occasions when it made excess/advance payment to the appellant/defendant, which was subject to adjustment for future purchases—A sum of Rs. 2,81.161.47 was alleged to be due to it from the appellant/defendant, being the excess/advance payment made to it—Plaintiff/respondent filed the aforesaid suit for recovery of that amount with interest, amounting to Rs. 74,718.75/- and also claimed the security deposit of Rs.1,00,000/- which it deposited with the appellant/defendant, thereby raising a total claim of Rs.4,55,880.24.—The appellant/defendant filed the written statement contesting the suit and took a preliminary objection that the suit was barred by limitation—On merits, it was alleged that the entire amount due to the plaintiff/respondent, including the amount of security deposit was paid by way of a cheque of Rs. 1,40,113.77 which was accepted by the plaintiff/respondent—Decree for recovery of Rs. 3,55,744.96 with proportionate costs and pendent elite and future interest @ 10% per annum was passed in favour of the respondent and against the appellant—Hence present appeal. Held:— Excess/advance payment by the plaintiff/respondent to the appellant/defendant being towards purchase of the paper, cannot be said that the

said payment was made towards an independent transaction, unconnected with the contract between the parties for purchase of paper—Of course, the appellant/defendant was under an obligation to either deliver the goods for which advance payment was received by it or it was required to refund the advance/excess payment to the plaintiff/respondent—However, this liability of the appellant/defendant arose under the same contract under which it was supplying paper to the plaintiff/respondent and was not an obligation independent of the contract for sale of paper to the plaintiff/respondent—There was only one contract between the parties, and that was for the sale of paper by the appellant/defendant to the respondent/plaintiff—Suit filed by the plaintiff/respondent was barred by limitation—Section 8 of Contract Act provides that the performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal—By remitting payment of Rs. 1,40,113.77/- towards full and final settlement of the account, the defendant/appellant gave an offer to the plaintiff/respondent for setting the account on payment of that amount—The plaintiff/respondent accepted the offer by encashing the cheque sent by the defendant/appellant—This led to a contract between the parties for settling the account on payment of 1,40,113.77/- by the defendant/appellant to the plaintiff/respondent—Not open to the plaintiff/respondent to now say that since they had credited the said payment as part payment, they are entitled to recover the balance amount from the defendant/respondent—Having enchased a cheque of Rs.1,40,113.77/-, the plaintiff/respondent was not entitled to any further payment from the appellant/defendant—impugned judgment and decree set aside.

Hindustan Paper Corporation v. *Nav Shakti Industries P. Ltd.* *737*

MAHARASHTRA CONTROL OF ORGANIZED CRIME ACT, 1999—Section 3(2), 3(4) and Section 4, Indian Penal Code, 1860—Section 384, 387, 506, 467, 471—Chargesheet

filed under I.P.C (MCOCA)—It was alleged that against the respondent there were 34 cases pending—He was also found in possession of properties any money in four bank accounts, out of which two existed in the name of wife and one in the name of his daughter, beyond the known sources of his income—Accused was discharged under the provisions of MCOCA on the ground that there was no material to substantiate that the accused was a member of any gang and that prosecution failed to show that respondent was holding above properties either being a member of an organized crime syndicate or on behalf of other syndicate—Held, to attract Section 2(A) there has to be continuing unlawful activities by an individual singly or jointly either by an organized crime syndicate or on behalf of such syndicate—Such activities should involve use of violence or threat of violence or intimidation or coercion or other unlawful means with an activity of gaining pecuniary benefits or other undue advantage for the person who undertakes such an activity—Expression 'any unlawful means' refer to any such which has direct nexus with commission of a crime which MCOCA seeks to prevent or control—Section 2(e) of MCOCA cannot be invoked for petty offences—Unless there is prima facie material to establish that there is an organized crime syndicate and prima facie material firstly, to establish that there is organized crime syndicate and secondly, that organized crime has been committed by any member of organized crime syndicate or by anyone on its behalf, provisions of MCOCA cannot be involved.

State Govt of NCT of Delhi v. *Khalil Ahmed*..... *73*

MENTAL HEALTH ACT, 1987—Section 22—Contention of the appellant is that the freedom of speech and expression and right of a litigant to self represent himself or the cosuitor are sacrosanct. There is no dissension between the fundamental right to freedom of speech and expression, the right to access the courts and appear in person or for a co-suitor. Denial of right of self representation is illegal and wrong—At that time, it was noticed that the appellant was recording the court

proceedings. Digital devices/gadgets, i.e. electronic recorder, mobile phone and a laptop, were seized and handed over to the Registrar (Vigilance). Writ help of experts, the recordings were copied on to a CD and the data was removed from the electronic recorder/mobile phone as directed by the learned single Judge—The impugned order records that The ld. Single Judge had heard the audio recordings and it was established that the appellant had recorded the proceedings of the said Court, proceedings before another Co-ordinate Single Bench of the High Court and proceedings before two different Additional Chief Metropolitan Magistrates (ACMMs, for short). The audio recordings of the proceedings before the ACMMs, revealed that appellant had not maintained dignity and decorum in the Court and the language used by him was condemnable. Thereafter, the order refers to and quotes the order dated 20th March, 2009 passed by the Arbitration Tribunal consisting of one retired Judge of the Supreme Court and two retired judges of this Court, who had tendered their resignation—A writ mandamus means a command that can be issued is favour of a person who establishes an inherent legal right in his case—Clause 8 of the Letters Patent Act, therefore, merely means that a litigant in person is not barred and prohibited from appearing in person and does not in any manner conflict with the inherent power/rights of the Court—Right to appear and address the Court under Section 32 of the Advocates Acts can be withdrawn subsequently. This right, even if granted, does not mean that it is permanent. Order granting permission can be always recalled for valid and just grounds—There is some controversy and dispute whether the learned single Judge had rejected the prayer for dasti copy of the impugned order. It appears that no such request was made when the order was dictated, but was made subsequently. The contention of the learned counsel for the appellant is that the request was rejected. However, the impugned order itself records that a copy of the order be given dasti to the appellant. In such cases, the order should be given to the party, his counsel or his family member. It should be also given before the order is implemented as the party concerned has right to file and

challenge the order in appeal and ask for stay. It is stated that the order was made available to the appellant only at 10 p.m. at night. We agree with the appellant that the order should have been given immediately—As noticed, there are number of proceedings/cases pending both in the High Court and in District Courts. Issue of this nature and whether or not Deepak Khosla is entitled to appear as a self represented litigant or for others, if taken up for consideration in different forums/ courts, would lead to and cause it's own problems and difficulties. Apart from the possibility of conflicting orders, there would be delay, confusion and judicial time will be spent in several courts dealing with an identical/similar question/ issue. It is therefore, advisable that this aspect be considered and decided before one Bench in the High Court rather than in different benches/courts. Further, this question should be decided first and immediately before Deepak Khosla can be permitted to appear and is given an audience. Keeping these aspect in mind, we feel that it will be appropriate that the entire aspect and issue is decided by the learned single Judge as expeditiously as possible and till the decision is taken, there should be stay of further proceedings in different matters before the High Court and in District Court. This direction will not apply and prevent Deepak Khosla for filing any writ petition under Article 226 or moving an application for bail/ anticipatory bail. This will also not apply to any proceedings pending before the Supreme Court or Courts outside Delhi

Deepak Khosla v. *Montreaux Resorts Pvt. Ltd. & Ors.* *117*

MOTOR VEHICLE ACT, 1988—Appeal filed before High Court for enhancement of compensation awarded in fovour of petitioner who suffered injuries in a motor accident—Plea taken, compensation towards loss of leave was awarded to appellant on basis of minimum wages for a period of nine months although it was established that he was a meter reader in DESU and was earning a salary of Rs. 2,226.15 per month—Compensation was awarded towards permanent disability and loss of amenities in life—Held:- It is established

that appellant had remained on medical leave for 383 days and was getting a salary of Rs. 2,226,15 per month-compensation for loss of leave to be enhanced from Rs. 4,500/- to Rs. 28,000/- Appellant's testimony that there was shortening of his right leg and that it is not in proper shape was not challenged in cross examination—His testimony that even after 12 years of accident he was unable to walk properly was not disputed in cross examination—Disability certificate issued by a Doctor shows that appellant suffered shortening of his right leg and foot—His permanent disability was assessed as 40%—Although, disability certificate has not been issued by a Board of Doctors, yet in absence of any challenge to same by respondents disability certificate can be relied on-considering that this accident took place in 1985, a compensation of Rs. 25,000/- towards loss of amenities and permanent disability awarded—Compensation enhanced—Appeal allowed.

Rajinder Singh v. *Ram Soni & Ors.* *256*

— Section 103—Appellant impugns judgment passed by Claims Tribunal—Along with appeal, application for condonation of delay filed—Plea taken, award came to appellant's knowledge only when execution proceedings were initiated against appellant—Held—Courts normally do not throw away meritorious lis on hypertechincal grounds—Primary function of court is to adjudicate dispute between parties and to advance substantial justice—Object of providing a legal remedy is to repair damage caused by reason of legal injury—Law of limitation fixes a lifespan for such legal remedy for redresss of legal injury so suffered—Condonation of delay is a matter of discretion of Court—Section 5 of Limitation Act does not say that such discretion can be exercised only if delay is within a certain limit—Expression 'sufficient cause' should be given liberal interpretation so as to advance substantial justice between parties—It is not length of delay which is material for condonation of delay in filing Appeal but acceptability of explanation—Law that each day's delay must be explained has mellowed down yet it has to be shown by applicant that there was neither any gross negligence nor any inaction, nor want

of bonafides—There is not even a whisper as to when appellant stopped appearing before Claims Tribunal and reasons for same—Delay of 308 days, of course, a long delay, can be condoned provided there is sufficient cause to explain same—Since appellant has failed to show sufficient cause for condonation of delay, application cannot be allowed—No sufficient ground to condone delay—Application and appeal are dismissed.

Uttarakhand Transport Corporation v. *Ram Sakal Mahto & Anr.* *555*

— Section 149(2), 157 and 166—Code of Civil Procedure, 1908—Order XII Rule 8—Claims Tribunal awarded compensation in favour of appellants and Respondent No. 3 for death of Anupam Chaudhary, aged 28 years—Claimants and Insurer filed appeals against judgment passed by Claims Tribunal—Plea taken by claimants, compensation awarded is on lower side as claimants were entitled to addition of 50% towards future prospects as deceased was a meritorious boy in permanent employment and Claims Tribunal erred in applying multiplier of 8 which should have been 17 as per age of deceased—Per contra, plea of insurer that First Respondent committed willful breach of terms of policy as his driving license was proved to be forged—Thus, it was entitled to be exonerated or in any case was entitled to recovery rights—Held—Claimants undoubtedly are entitled to addition of 50% towards future prospects as deceased was in permanent employment—Claims petition was filed by deceased's parents—Deceased had suffered fatal injuries in accident just on 24th day after his marriage—Widow preferred not to join as a petitioner in Claim Petition—She preferred not to appear as a witness before Claims Tribunal—She preferred to be proceeded ex aprte—She did not file any appeal against impugned judgment—In circumstances, it would be reasonable to draw inference that she has remarried and has therefore not come forward either before Claims Tribunal or in this Appeal—Thus, she would not be considered as a dependent after date of her remarriage—Appropriate multiplier—would

be according to age of deceased's mother as widow had remarried—Appropriate multiplier would be 11 against 8 adopted by Claims Tribunal—Overall compensation enhanced—Notice was served upon First Respondent to produce driving license—First Respondent neither contested Claim Petition nor Appeal nor came forward with any driving license which was valid on date of accident—Driving license seized by Police was proved to be fake—Adverse inference has to be drawn against First Respondent that had he been in possession of a valid driving license, he would have produced same—Even in case of conscious and willful breach of terms of policy, Insurer has statutory liability of third party—Insurer entitled to recover amount of compensation paid from driver and owner in execution of this very judgment without recourse to independent civil proceedings.

Ajit Singh & Anr. v. *Paramjit Singh & Ors.* *776*

NEGOTIABLE INSTRUMENTS ACT, 1881—Section 138—Petition filed for quashing of order of MM directing accused to appear personally on next date of hearing for furnishing bail bonds and disclosing defence where accused has been exempted from appearance—Contention of petitioner that after grant of personal exemption from appearance of the accused Magistrate become *functus officio* and cannot withdraw, the exemption so granted and that requirement of bail does not from part of proceeding within ambit of Section 205 (2) or Section 317 (1)- Held, grant of permanent personal exemption by the Magistrate to accused, in bailable offence, does not dispense with requirement of accused obtaining bail from Court and exemption from appearance granted by Magistrate could be revoked by Magistrate where necessary at any time—Purpose for permanently dispensing with personal appearance of accused is to prevent accused from undue hardship and cost in attending trial—Sections 205 (2) and empower Magistrate to direct personal attendance at any stage if necessary-While granting permanent exemption, MM is deemed to have reserved his right to accused to appear in person at the trial at any stage of the proceedings if

necessary—Concept and purpose of bail mutually exclusive to the purpose of grant of personal exemption from appearance, they operate in different spheres of trial though are intrinsically connected—Permanent personal exemption cannot be understood as a blanket order dispensing with appearance and shall be subject to Sections 205 (2) and 317 (1)—Obtaining bail by the accused is an independent requirement and grant of permanent personal exemption form appearance in court cannot usurp the requirement of obtaining bail by the petitioner—Petition dismissed.

Kajal Sen Gupta v. *Ahlcon Ready Mix Concrete, Division of Ahluwalia Contract (India) Limited.* *498*

— Section 138—Petitioner assailed order of learned Metropolitan Magistrate (MM) dismissing his application under Section 256 of Code in a complaint filed under Section 138 of Act—According to petitioner, Respondent/complainant company due to non payment of cheque amounts preferred complaint under Section 138 of Act and trial was at stage of recording of statement of defence witnesses, but for six consecutive hearings, none had appeared on behalf of respondent/complainant before learned MM—Thus, petitioner preferred application under Section 256 of Code praying for acquittal of petitioner due to non appearance of complainant/Respondent which was dismissed by learned MM—Therefore, he preferred petition to assail said order—Held:— Section 256 Cr. P.C. has been incorporated keeping in mind the interest of both the complainant and the accused—To prevent any prejudice to complainant, Section 256 Cr. P.C. empowers Magistrate to adjourn hearing, for ensuring presence of complainant, if sufficient cause is shown with regard to his inability to appear at appointed date of appearance—However, failure of complainant to appear, without sufficient cause, empowers a Magistrate to dismiss complaint and to acquit accused—Objective of proviso to Section 256 Cr.P.C. is to prevent any undue delay to trial or to prejudice rights of accused person facing trial as presence of complainant may be dispensed with through pleader or if his personal attendance

is not necessary—Case being at stage of defence evidence, before which statement of petitioner under Section 313 Cr.P.C. was also recorded, absence of Respondent complainant has not prejudiced petitioner or hampered trial.

G. Karthik v. *Consortium Finance Ltd. Now Magma Leasing Ltd.* *507*

— Section 138, 141—Respondent filed complaint u/s 138 of Act against company in which petitioner was Managing Director—Ld. Metropolitan Magistrate (M.M), Delhi issued summons to Company—Thereafter, respondent moved application to include name of petitioner being the Company in the complaint, which was allowed by the Ld. M.M—Aggrieved, petitioner challenged the order—It was urged, petitioner could not have been impleaded in the complaint without making specific averments that offence was committed when he was incharge and responsible for conduct of business of the Company—In absence of such specific allegations, he could not be made accused in complaint as it violated provisions of section 141 of the Act—On the other hand, it was urged on behalf of respondent, there was sufficient material against petitioner; cheques were issued by him, same were drawn on the account maintained by accused persons and legal notice was duly served upon accused persons—An inadvertent mistake to mention the name of petitioner in complaint in no manner precluded him to be impleaded as accused. Held:—The principal offender in each cases is only the body corporate and it is a juristic person and when the Company is the drawer of the cheque, such company is the principal offender and the remaining persons were made offenders by virtue of the legal fiction created by the legislature as per Section 141—Petitioner being the Managing Director of the company, was liable for the acts of the company.

Ranjit Tiwari v. *Narender Nayyar* *625*

RIGHT TO INFORMATION ACT, 2005—Section 8(i)(j) 2005—There were disputed between the appellant and his wife—The Central Public Information Officer (PIO) vide order dated 3rd

December, 2010 informed the appellant that the information sought was a third party personal information, disclosure where of was likely to cause undue invasion into the privacy of the individual concerned and the information also did not serve any public activity of interest and was therefore exempted from disclosure under Section 8 (1) (j) of the Act, The appellant was further informed that the information could be provide to the appellant subject to consent of third party i.e. his father-in-law and after following the procedure prescribed under Section 11(1) of the Act. The appellant was thus requested to provide postal address of his father-in-law, for the procedure under Section 11(1) to be followed—The appellant however instead of providing address of his father-in-law, preferred an appeal. The said appeal was dismissed—The appellant preferred by the second appeal to the CIC. The CIC however dismissed the said appeal. The learned Single Judge has dismissed the writ petition observing that the information sought was of personal nature and the appellant was unable to disclose any public interest in the disclosure thereof disclosure of information sought by the appellant was to wreck vengeance on account of his matrimonial dispute—The counsel for the appellant before us has argued that the learned Single Judge has erred in observing that there was no public interest in the disclosure sought by the appellant. It is argued that the same is irrelevant under the RTI Act. What is found in the present case is that the PIO had not refused the information. All that the PIO required the appellant to do was, to follow third party procedure. No. error can be found in the said reasoning of the PIO—There can be no dispute that the information sought by the appellant was relating to a third party and supplied by a party—The PIO was thus absolutely right in, response to the application for information of the appellant, calling upon the appellant to follow the third party procedure under Section 11. Reliance by the PIO on Section 8 (1) (j) which exempts from disclosure of personal information and the disclosure of which has no relationship to any public activity or interest and which would cause unwanted invasion of the privacy of the individual was also

apposite. Our constitutional aim is for a casteless society and it can safely be assumed that the disclosure made by a person of his caste is intended by such person to be kept confidential. The appellant however as aforesaid, wanted to steal a march over his father-in-law by assessing information, though relating to and supplied by the father-in-law, without allowing his father-in-law to oppose to such request.

Harish Kumar v. *Provost Marshal-Cum-Appellate Authority & Ors.* *41*

SERVICE LAW—The petitioner who was working as a Jail Warden, was charge sheeted for unauthorizedly abstaining from duty between 05.08.2007 to 25.06.2008—The petitioner received the charge sheet and submitted a reply dated 30.07.2008 claiming that his absence was neither deliberate nor intentional and was purely on account of circumstances beyond his control, he being unwell during this period. The petitioner, however, did not participate in the inquiry despite repeated notices and the inquiry was accordingly, held ex-parte—The Inquiry Officer, vide his report dated 05.02.2009 found the charges against the petitioner to be proved—The Disciplinary Authority vide order dated 11.05.2009, imposed penalty of removal from service upon the petitioner, which was ordinarily not to be a disqualification for further employment under the Government—The period of absence was treated as unauthorized, without any pay. The appeal filed by the petitioner was dismissed by the Appellate Authority vide order dated 26.08.2010. Being aggrieved by the orders passed by the Disciplinary Authority and the Appellate Authority, the petitioner filed the OA which came to be dismissed by the Tribunal by virtue of the impugned order—During the course of arguments, the first contention of the learned counsel for the petitioner was that since the petitioner was suffering from various ailments during the period of absence, he was not in a position to attend the duty and, therefore, his absence cannot be said to be deliberate and intentional—Admittedly, the petitioner was governed by CCS (Leave) Rules—Since the petitioner did not produce any medical certificate from an

authorized medical attendant with respect to his absence from duty except between 07.09.2007 to 18.10.2007, his absence from duty was clearly unauthorized—More importantly, the petitioner, despite receiving a charge-sheet and submitting a reply, chose not to participate in the inquiry. He thereby did not avail the opportunity which was available to him, to establish before the Inquiry Officer, that he was genuinely sick, during the period he did not attend duty, and therefore, had a sufficient cause for remaining away from the work—The petitioner remained absent from duty for almost one year and he made no attempt to justify his absence, by participating in the inquiry and satisfying the Inquiry Officer with respect to his alleged illness—It cannot be said that the punishment awarded to the petitioner is so disproportionate to the charge held proved against him as to shock the conscience of the Court Consequently, no valid ground to interfere with the penalty imposed upon the petitioner.

Manoj Kumar v. *Govt. of NCT of Delhi and Ors.*..... *63*

— Article 226, Disciplinary proceedings—Misconduct imputed against petitioner constable was that he was found under influence of Iiquor while on duty on a particular date and did not turn up for duty on certain particular dates and on certain dates found sleeping under influence of Iiquor and thereafter deserted the unit without permission—Inquiry officer held charges proved—Disciplinary authority awarded punishment of removal from service—Appeal dismissed—Writ petition challenging the punishment and dismissal of appeal—Perusal of original record of the inquiry found to reveal that petitioner participated in the inquiry and his plea that the inquiry was not conducted in accordance writ rules and he was given adequate opportunity was not made out—Held, the respondents produced sufficient proof to establish that petitioner was found under influence of alcohol and absent from duty—Further held, the court under writ jurisdiction dose not have to go into correctness or the truth of the charges and cannot sit in appeal on the findings of disciplinary authority and cannot assume the role appellate authority and cannot interfere with findings

of fact arrived at in disciplinary proceedings unless there was perversity or mala fide or no reasonable opportunity were given to the delinquent or there was non-application of mind or punishment is shocking to the conscience of the court.

Anoop Kumar v. *Central Industrial Security Force and Anr.* *261*

— Article 226—Writ Petitions arising out of the common order passed by the Administrative Tribunal, Principal Bench New Delhi—Petitioners were working in the National Institute of Health and Family Welfare (NIHFW)—The issue before the Tribunal was with regard to the age of superannuation of the Petitioners—Claim of the Petitioners was that they were governed by the University Grants Commission (UGC) package of 24.12.1998 whereby the age of superannuation had been increased from 60 to 62—Whereas, the claim of NIHF was the UGC package of 24.12..1998 did not apply to NIHFW and had not been adopted by NIHFW further, it was contended by the Respondent that in fact a conscious decision had taken by the Governing Body of NIHFW not to adopt the UGC package of 24.12.1998—Held—In order to fall within the ambit of the UGC package of 24.12.1998, it is not just affiliation which was to be taken into account but also the fact that the affiliated college must also be recognized by the UGC-Since the Petitioners could not produce evidence which indicated that the NIHFW was firstly, an affiliated college and secondly, was recognized by the UGC, it is abundantly clear that the UGC package of 1998 is not applicable to NIHFW—Even though the UGC package is not ipso fact applicable it can always be adopted by the NIHFW—But the Governing Body vide its decision taken 16.08.2000 took a conscious decision that the age of superannuation should remain at 60 years—Hence neither was the UGC package, by itself applicable nor had it been made applicable to NIHFW by adoption.

C.B. Joshi v. *National Institute of Health and Family Welfare* *404*

— Seniority—Petitioner challenged order passed by Central Administrative Tribunal, whereby his original application was rejected on the grounds of laches and non-joinder of affected persons, holding that the cause of action to challenge the seniority accrued to the petitioner on 01.04.02 when provisional seniority list was circulated showing him junior to respondent No. 3, as such original application brought in the year 2011 is barred by laches and since petitioner failed to implead 233 persons except respondent No. 3 who would be affected, the petition is bad for non-joinder—Held, the provisional seniority list dated 01.04.02 stood substituted by the final seniority list dated 01.08.11 and petitioner having approached the Tribunal in 2011 itself, it cannot be said that the petition is barred by latches and in view of settled legal position, all the affected persons need not be added as respondent as some of them could be impleaded in representative capacity, if number of such persons is too large or petitioner should be given opportunity to implead all the necessary parties and only on refusal, the petition could be dismissed for non-joinder of parties, as such the Tribunal was in error in dismissing the original application.

Baljit Singh Bahmania v. *Union of India & Ors.* *817*

SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985—Section 22—Whether the action filed in DRT by respondent in which the petitioner are also arrayed would fall under the category of "suit"—Whether protection u/s 22(1) should be accorded to a guarantor qua an action filed by a Bank under the RDDB Act—Held—The word suit cannot be understood in its broad and generic sense to include any action before a legal forum involving an adjudicatory process. If that were so, the legislature which is deemed to have knowledge of existing statute would have made the necessary provision like it did in inserting in the first limb of s. 22 of SICA where the expression "proceedings for winding up of an industrial company or execution, distress etc." is followed by the expression or "the like" against the properties of the industrial company. There is no such broad suffix placed alongside the term "suit". The term suit would this have to be confined in

the context S. 22(1) to those actions with are dealt with under the Code and not in the comprehensive or overarching sense so as to apply to any original proceedings before any legal forum. The term "suit" would only apply to proceedings in a civil Court and not actions for recovery proceedings filed by banks and financial institutions before a Tribunal such as DRT.

Inderjeet Arya & Anr. v. *ICICI Bank Ltd.* *218*

— Section 15, Section 22—Repeated references before BIFR by the Respondent for getting itself protection under the SICA—Petitioner aggrieved by actions of Respondent in making repeated references before BIFR and appeals therefrom before AAIFR, even when previous references made were rejected—Repeated reference and keeping them pending leads to the Respondent illegally enjoying protection under SICA—Petitioner alleges that it amounts to continuous and systematic abuse of process by the Respondent with the sole motive of defeating the rights of its creditors—In 2004 and 2005 Respondent was enjoying protection under the SICA, no references were filed—Respondent pleads that alternative and equally efficacious remedy was available to be the petitioner as protection under Section 22 is not absolute—Held: Even though no reference is pending at present, the case eloquently demonstrates that there has been misuse of the machinery provided under the SICA. When the effect submission of reference under Section 15 is that Section 22 gets triggered, appropriate steps need to be taken to ensure that this provision is not misused. Present case appears to be one where prima facia the provisions of Sections 22 are taken undue advantage of Guidelines can be issued to ensure that the fresh reference in subsequent years should not be mechanically entertained. Writ petition disposed of with direction that BIFR should formulate necessary Practice Directions in light of the discussion in this case within three months-issue the same for compliance.

Alcatel-Lucent India Ltd. v. *Usha India Ltd.* *411*

SPECIFIC RELIEF ACT, 1963—Sections 16 (c) & 20—Delhi Lands (Restriction of Transfer) Act, 1972—Suit for specific

performance—Brief facts—Agreement to self entered into between the plaintiff as the prospective purchaser and the defendants as the prospective sellers—Total sale consideration was Rs.48,50,000/-—Defendants received a sum of Rs. 4,50,000/— as advance—Award under Land Acquisition Act, 1894 passed acquiring the land about 9 months before the agreement to sell was entered into between the parties—Plaintiff pleads that the defendants were guilty of breach of contract inasmuch as they failed to obtain the permissions to sell the property from the Income Tax Authority and from the appropriate authority under the Delhi Lands (Restriction of Transfer) Act, 1972—Plaintiff pleads that the defendants failed to perform the contract because a Division Bench of this Court in a case quashed the acquisition proceedings and consequently the price of land increased, giving the reason for the defendants to back out from the contract—Plaintiff claims to have always been and continuing to be ready and willing to perform his part of contract—Written statements filed by the defendants contending inter alia that the agreement in question is barred by the Act of 1972 and Plaintiff failed to perform his part of the contract as the sale transaction had to be completed in 45 days—Also claimed that the plaintiff was not ready and willing to perform his part of the contract and that the discretionary relief for specific performance should not be granted in his favour—Issues framed—Evidence led. Section 3 of Delhi Lands (Restriction of Transfer) Act, 1972 places an absolute bar with respect to transferring those lands which have already been acquired by the Government i.e. with respect to which Award has been passed—Lands in the process of acquisition—transfer can take place with the permission of appropriate authority—Contracts entered into in violation of the 1972 Act are void and against public policy—In the present case, agreement to sell was entered into after the land was acquired i.e. after an Award was passed and therefore agreement to sell is void—Even presuming that the plaintiff or even both the parties were not aware of the Award having been passed with respect to the subject lands under the Lands Acquisition Act, 1894, that cannot take away

the binding effect of Section 3 of the 1972 Act which provides that any purported transfer of the land which has already acquired is absolutely barred—Plaintiff miserably failed to prove his readiness and willingness i.e. his financial capacity with respect to making available the balance sale consideration of 44,00,000/— hence it cannot be said that the plaintiff was and continued to be ready and willing to perform his part of the obligation under the agreement to sell at all points of time i.e. for the periods of 45 days after entering into the agreement to sell, after the period of 45 days till the filing of the suit, and even thereafter when evidence was led—Plaintiff has failed to comply with the requirement of Section 16(c) of the Specific Relief Act, 1963, and therefore, the plaintiff is not entitled to the relief of specific performance—Sub—Section 3 of section 20 of Specific Relief Act, 1963 makes it clear that Courts decree specific performance where the plaintiff has done substantial acts in consequence of a contract/ agreement to sell—Where the acts are not substantial i.e. merely 5% or 10% etc of the consideration is paid and/or plaintiff is not in possession of the subject land, plaintiff is not entitled to the discretionary relief of specific performance—Specific Relief Act dealing with specific performance is in the nature of exception to Section 73 of the Contract Act, 1872—Normal rule with respect to the breach of a contract under Section 73 of the Contract Act, 1872 is of damages, and, the Specific Relief Act, 1963 only provides the alternative discretionary remedy that instead of damages, the contract in fact should be specifically enforced—For breach of contract, the remedy of damages is always there and it is not that the buyer is remediless—However, for getting specific relief, while providing for provisions of specific performance of the agreement (i.e. performance instead of damages) for breach, requires discretion to be exercised by the Court as to whether specific performance should or should not be granted in the facts of each case or that the plaintiff should be held entitled to the ordinary relief of damages or compensation—From the point of view of Section 20 sub—Section 3 of the Specific Relief

Act, 1963 or the ratio of the judgment of the Supreme Court in the case of *Saradamani Kandappan* (supra) or even on first principle with respect to equity because 10% of the sale consideration alongwith the interest will not result in the defendants even remotely being able to purchase an equivalent property than the suit property specific performance cannot be granted—Subject suit is only a suit for specific performance in which there is no claim of the alternative relief of compensation/damages—No cases set out with respect to the claim of damages/compensation—Plaintiff has led no evidence as to difference in market price of the subject property and equivalent properties on the date of breach, so that the Court could have awarded appropriate damages to the plaintiff, in case, this Court came to the conclusion that though the plaintiff was not entitled to specific performance, but he was entitled to damages/compensation because it is the defendants who are guilty of breach of contract—However in exercise of power under Order 7 Rule 7 CPC, the Court can always grant a lesser relief or an appropriate relief as arising from the facts and circumstances of the case—Undisputed that the defendants have received a sum of 4,50,000/- under the agreement to sell—Considering all the facts of the present case, it is fit to hold that though an agreement itself was void under the 1972 Act, the plaintiff should be entitled to refund of the amount of 4,50,000/- alongwith the interest thereon at 18% per annum simple pendente life and future till realization—Suit of the plaintiff claiming the relief of specific performance is dismissed.

Jinesh Kumar Jain v. *Iris Paintal & Ors.* *678*

— Section 14(1) (b) and (d)—Brief facts case of the plaintiff is that vide agreement to sell dated 14.03.2011 and a Memorandum of Understanding of even date, defendants No.1 to 10, who are the owners of suit Property agreed that the ground floor of the aforesaid property would be sold by them to the plaintiff for a total sale consideration of Rs. 95 lakh—It was further agreed that on receiving possession of the ground floor of the aforesaid property, the plaintiff would

demolish the same and construct a four—storey building on it—The ground floor and the third floor of that building were to come to the share of the plaintiff, whereas, the first and second floor were to come to the share of defendants No. 1 and 2. Defendants No.3 to 10 were to get the amount of Rs.95 lakh—Admittedly, a sum of Rs 66,16,666/- was paid by the plaintiff to defendants No. 1 to 10—However, neither defendants No.3 to 10 have surrendered their share in the suit property in favour of defendants No.1 and 2 nor has the possession of the property been given to the plaintiff—Hence, the present suit for specific performance of the agreement along with an application claiming interim relief for grant of injunction, restraining the defendants from creating third party interest in the suit property. Held:— Under the agreement, Plaintiff has to construct a four—storey building, after demolishing the existing construction and out of the four floors to be constructed by him, ground and third floor have to come to his share, whereas the first and the second floor have to go to defendants No. 1 and 2—There is no agreement between the parties as regards the specifications of the proposed construction on the suit property—The agreement does not say as to what would happen if the plan, agreed between the parties, is not sanctioned or in the event a plan for construction of floors on the suit property is not sanctioned by the Municipal Corporation/DDA—The agreement is silent as to what happens if the parties do not agree on the specifications of the proposed construction—No mechanism has been agreed between the parties for joint supervision and qualify control during construction—There is no agreement that the specifications of the construction will be unilaterally decided by the plaintiff and/or that the quality of the construction will not be disputed by the defendants—There is no provision in the agreement with respect to supervision of the construction—The agreement does not provide for the eventuality, where the construction raised by the plaintiff is not found acceptable to the defendants—No time has been fixed in the agreement for completion of the proposed new construction—Agreement is silent as to what happens if the plaintiff does not complete the construction or even does not

commence it at all after taking possession from the defendants—It is not possible for the Court or even a Court Commissioner to supervise the construction—In these circumstances, it is difficult to disputes that the agreement between the parties is an agreement of the nature envisaged in Section 14(1) (b) and (d) of Specific Relief Act and thus, is not specifically enforceable—Therefore, prima facie, the plaintiff has failed to make out a case with respect to enforceability of the agreements set up by him. Hence, he is not entitled to grant of any injunction, restraining the defendants from creating third party interest in the suit property or dealing with it in any manner they like.

Davender Kumar Sharma v. *Mohinder Singh & Ors.* . *710*

— Section 16—Plaintiff filed suit claiming specific performance of agreement executed between parties for sale of suit property to plaintiff—As averred by plaintiff, defendant being owner of suit property, had agreed to sell property to him for consideration of Rs. 69,50,000/- and received part consideration of Rs. 20 lac, on day of execution of agreement dated 17/11/08—Balance amount was agreed to be paid within two months at time of registration of sale deed and defendant was to handover possession of property to plaintiff—However, despite requests made by plaintiff from time to time, defendant refused to produce original documents of title of suit property for perusal of representatives of bank, from which plaintiff intended to take loan—Plaintiff had further arranged entire balance payment required to complete transaction and vide notice called upon defendant to bring original paper and execute sale deed on or before expiry of date settled—But defendant did not turn up at Office of Sub—Registrar to execute document and subsequently also failed to keep his promise to execute sale deed; thus, plaintiff filed suit seeking specific performance of agreement and in alternative for recovery of Rs. 20 lacs. Held—A party seeking specific performance of contract must show and specify the court that he is ready and willing to perform the contract. By readiness it is meant his capacity to perform the contract including his financial

position to pay the consideration for which he should not necessarily always carry the money with him from the date of the suit till date of decree. By willingness it is meant his intention and conduct to complete the transaction.

Navendu v. *Amarjit S. Bhatia* *801*

— Section 16—Plaintiff filed suit claiming specific performance of agreement vide which defendant had agreed to sell his property to him—Plaintiff also made part payment as per agreement—As averred by plaintiff, defendant failed to perform his part of contract, whereas plaintiff would be willing to pay the balance sale consideration along with interest @ 15% per annum and he be directed to execute the agreement. Held:- Escalation of price during the intervening period, may be relevant consideration under certain circumstances for either refusing to grant decree of specific performance or for decreeing the specific performance with a direction to the plaintiff to pay an additional amount to the defendant and to compensate him. It would depend upon facts and circumstances of each case. The court while directing specific performance of agreement to sell, may grant additional compensation to the vendor on account of appreciation in the prices of the property on the subject matter of the agreement.

Navendu v. *Amarjit S. Bhatia* *801*

TRADEMARKS ACT, 1999—Section 9, 11, 18, 57, 125—Appellant got registered trademark FORZID—Respondent filed application for removal of aforesaid trademark or rectification of register, urging trademark FORZID was deceptively similar to earlier registered trademark ORZID (label mark) registered in name of respondent no.1—Plea of respondent was accepted by Intellectual Property Appellate Board (IPAB) and Registrar of trademark was directed to remove trademark FORZID—Appellant filed writ petition challenging the said order of IPAB which was dismissed by L.d. Single Judge thereby affirming order of IPAB—Appellant challenged said order and urged that two marks were not structurally and phonetically similar and would were not structurally and phonetically similar and would

not cause deception in minds of consumer—Held:— When a label mark is registered, it cannot be said that the word mark contained therein is not registered. Although the word ORZID is a label mark, the word ORZID contain therein is also worthy of protection.

United Biotech Pvt. Ltd. v. *Orchid Chemicals & Pharmaceuticals Ltd. & Ors.* *325*

TRADE AND MERCHANDISE MARKS ACT, 1958—Petitioner claims to be in the business of manufacture and sale of pharmaceutical drugs formulations. The case of the petitioner is that it is producing and marketing various drugs with the suffix "BION". The respondent is also in the same trade. The respondent advertised for registration of the mark "RECIBION" on 03.10.1989. It claims user since 01.04.1987. When the petitioner noticed the said advertisement, the petitioner filed an application to raise objections. The petitioner claims that it had got registered various marks such as BETABION, POLYBION CEBION etc. with the Registrar of Trade Marks which were pharmaceutical preparations. It is claimed by the petitioner that the trade mark sought to be registered by the respondent i.e. RECIBION in respect of a medicinal and pharmaceutical preparation is deceptively similar to its mark "CEBION" which also contains the suffix "BION", with which the petitioner's products are identified—The objection of the petitioner was rejected by the Assistant Registrar of Trade Marks vide order date 28.06.2001. The Registrar held that the mark RECIBION cannot be said to be either visually or phonetically similar to the petitioner's marks "CEBION"—The petitioner's appeal was also rejected by the IPAB by the impugned order—Learned counsel submits that there is phonetic similarity between "RECEBION" and CEBION" in as much, as the letter 'R' is often slurred. Learned counsel further submits that in matters of deceptive similarity in relation to drugs, this Court has held that the test of confusion has to be applied very strictly—On the other hand, the submission of learned counsel for the respondent is that the petitioner is not the original user of the mark "BION"—He submits that Cipla had advertised "Calcibion" as

early as in 1949, and claimed user since 25.08.1942. Learned counsel further submits that scores of other drugs are being sold in the market with suffix "BION" such as Mecobion, Rumbion, Embion. Pantabion, Lycobion etc.—Leaned counsel further submits that, in fact, the petitioner has not It is clear that there is no deceptive similarity between the marks in question. For all the above stated reasons, namely, the use of various marks in the market containing the terms 'BION' common to both the marks in question, the absence of visual and phonetic similarity between the marks, the fact of the Respondent's product with mark in question being a prescribed drug and the undisputed non-use of the mark 'CEBION' by the petitioner over the years, no infirmity found in the impugned order.

Merck Kgaa v. *Galaxy Hompro and Anr.* *1*

TRANSFER OF PROPERTY ACT, 1882—Section 48—Respondents filed suit for specific performance of agreement to sell executed by appellant in their favour and consequent decree for possession and damages—Suit decreed by Ld. Single Judge—Aggrieved, appellant preferred appeal urging equitable mortgage of the suit premises had existed in favour of Punjab National Bank prior to execution of agreement to sell which was thus, hit by Section 48 of the Act and could not be enforced over claim of Bank—Held:- Prior mortgage or encumbrance cannot deprive the vendee of a right to decree for specific performance and that such mortgage only become a liability or encumbrance on the property which the subsequent purchaser has to satisfy.

Jageshwar Parshad Sharma v. *Raghunath Rai & Ors.* *205*