I.L.R. (2013) III DELHI

Part-II (June, 2013)
(Pages 2085-2454)

INDIAN LAW REPORTS
DELHI SERIES
2013

(Containing cases determined by the High Court of Delhi)

VOLUME-3, PART-II

(CONTAINS GENERAL INDEX)

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

P.S.D. 25.6.2013
600

Annual Subscription rate of I.L.R.(D.S.) 2013
(for 6 volumes each volume consisting of 2 Parts)

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

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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—2013.**

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decision of arbitrator. Held:- The arbitrator has the jurisdiction to interpret the contract, and unless that is shown to be manifestly unreasonable, or based on an untenable interpretation of the law, the Court would be slow in substituting its opinion.

Wishwa Mittar Bajaj & Sons v. *UOI* *2252*

CWC STAFF REGULATIONS, 1996—Regulation 10 Sub-Regulation (1)—Petitioner appointed as Junior Technical Assistant in December 1983—On probation for one year—Suspended on 6.9.1984—Pending initiation of disciplinary proceedings—However in disciplinary proceedings initiated against him—His suspension revoked on 16.2.1985—Instead one P.P. Singh was charged and in the enquiry proceedings, P.P. Singh held guilty in regular D.E. However, in the report, the enquiry officer made certain observations qua the working of petitioner as well. Meanwhile, probation period of petitioner ended in December 1984—No formal order of extension of probation or confirming the petitioner—Petitioner's services terminated on 22.10.1983 under Sub-Regulation (1) of Regulation (10) of CWC (Staff) Regulations 1966 held the petitioner was examined as a witness in the departmental proceedings against P.P. Singh an his credibility was Doubted by the enquiry officer. The genuiness of warnings/memos issued against the petitioner by P.P. Singh was doubted in the enquiry by the enquiry officer—Thus, the warning/memos could not have been relied against the petitioner to terminate the services of petitioner. The comments of enquiry officer about any creditworthiness of the petitioner in the DE cannot be characterised as evidence to judge suitability of petitioner. The comments of enquiry amended to findings of misconduct without any notice or hearing to the petitioner. No other material to support termination order as based on bonafide assessment of petitioners suitability—The innocuously word termination order was not reality based on allegations of serious misconduct, for which the petitioner was not even charged or made to face any form of inquiry and was not granted hearing—Termination set aside. However, since termination order was 28 years old, balancing the two

seemingly competing public interest the petitioner awarded 40% of the back salary and allowances that would have been paid to the petitioner, had he continued in the same post from the date of his termination at all.

Prem Kishore v. *Central Warehousing Corporation* *2227*

CINEMATOGRAPHY ACT, 1952—Section 7 (1) (C)—Copyright Act, 1957—Section 63—Case registered in P.S. Special Cell, Delhi U/s 7 (1) (C) of Cinematography Act and Section 63 of Copyright Act alleging raid was conducted at Akash Cinema, Delhi wherein movie with uncensored obscene scenes was being exhibited—On conclusion of investigation, chargesheet was presented in Court of Ld. A.C.M.M, Delhi naming three accused persons kept in column no. 4 of chargesheet and four accused persons including two petitioners were kept in column no. 2 of chargesheet—Ld. A.C.M.M. took cognizance of offence and ordered issuance of summons against accused persons—Though no specific order for taking cognizance against four accused persons kept in column no. 2 was made but process was issued to them also—Out of said four accused persons, two challenged order taking cognizance which was set aside and case was remanded back with direction to hear the parties afresh and to pass a detail reasoned order—Ld. A.C.M.M. thereupon directed further investigation—Aggrieved petitioners challenged said order averring it to be illegal as after taking cognizance, Ld A.C.M.M. could not have ordered to further investigation of case—Per contra on behalf of State it was contended, Ld. A.C.M.M, specifically did not take cognizance against petitioners and if at all had taken, said order was set aside by Hon'ble Delhi High Court, thus, Ld. A.C.M.M, was not debarred from directing further investigation. Held:- An order of further investigation can be made at various stages including at the stage of the trial, that is, after taking cognizance of the offence.

Rishi Raj & Anr. v. *State* *2159*

CODE OF CRIMINAL PROCEDURE, 1973—Section 482; Indian Penal Code, 1860—Section 406, 420—Petition was quashing of criminal complaint against Petitioner—Inherent powers of the Court u/s 482—SCOPE HELD—Though very wide have to be invoked sparingly and with circumspection only (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of the Court and (iii) otherwise to secure the ends of justice, Inherent powers of the Court to quash an FIR or a criminal complaint can be invoked where the allegations made in the complaint even if admitted do not disclose any offence. Since there are disputed questions of fact, Court in exercise of its power u/s 482 cannot be stifled with the Petitioner's prosecution. Petition dismissed.

Kanak Installments Pvt. Ltd. v. *State of NCT of Delhi & Anr.* *2125*

— Section 482—Negotiable Instruments Act, 1881—Section 138, 141—Cheques issued by the accused company dishonoured—Petition for quashing of summoning order by Director of the accused company—Petitioner contends that Complaint does not reveal as to how Petitioner was in charge of and responsible for the conduct of business of accused company and mere averment that the Petitioner being a Director was in charge of the and responsible for conduct of the business of the company was not enough—Held—Only bald allegations that Petitioner and other Directors were responsible for the day to day affairs of the accused company. Following law laid down in *National Small Industries Corporation Ltd., Central Bank of India* and *Anita Malhotra,* averments not sufficient to issue process against petitioner. Summoning order quashed—Petition allowed.

Chintan Arvind Kapadia & Anr. v. *State & Anr.* *2135*

— Section 161, 164, 173, 482—Allegations of rape and molestation—Magistrate's order taking cognizance not interfered with by ASJ—Petition for quashing order taking cognizance in view of the final report filed by the investigating

agency—Held—The factum of withdrawal of allegations, non appearance of any misconduct in CD, delay in making complaint to police, initial reluctance to make statement u/s 164 and the contradiction about place of incidence were required to be gone into only at the stage of trial—At the time of taking cognizance, the Ld. M.M was only required to analyze whether there exists sufficient ground for summoning the accused or not. Magistrate not required to see whether the material was sufficient to convict the accused no error or illegality in the order—Petition dismissed.

D.N. Taneja v. *State NCT of Delhi* *2150*

— Section 173—Cinematography Act, 1952—Section 7 (1) (C)—Copyright Act, 1957—Section 63—Case registered in P.S. Special Cell, Delhi U/s 7 (1) (C) of Cinematography Act and Section 63 of Copyright Act alleging raid was conducted at Akash Cinema, Delhi wherein movie with uncensored obscene scenes was being exhibited—On conclusion of investigation, chargesheet was presented in Court of Ld. A.C.M.M, Delhi naming three accused persons kept in column no. 4 of chargesheet and four accused persons including two petitioners were kept in column no. 2 of chargesheet—Ld. A.C.M.M. took cognizance of offence and ordered issuance of summons against accused persons—Though no specific order for taking cognizance against four accused persons kept in column no. 2 was made but process was issued to them also—Out of said four accused persons, two challenged order taking cognizance which was set aside and case was remanded back with direction to hear the parties afresh and to pass a detail reasoned order—Ld. A.C.M.M. thereupon directed further investigation—Aggrieved petitioners challenged said order averring it to be illegal as after taking cognizance, Ld A.C.M.M. could not have ordered to further investigation of case—Per contra on behalf of State it was contended, Ld. A.C.M.M, specifically did not take cognizance against petitioners and if at all had taken, said order was set aside by Hon'ble Delhi High Court, thus, Ld. A.C.M.M, was not

debarred from directing further investigation. Held:- An order of further investigation can be made at various stages including at the stage of the trial, that is, after taking cognizance of the offence.

Rishi Raj & Anr. v. *State* *2159*

— Section 173, 177 & 178—Petitioner prayed for quashing of FIR and report based on it, registered in P.S. Janakpuri averring, alleged acts of cruelty/misappropriation pleaded by complainant took place either at Faridabad or at Chandigarh—But neither offence nor any part thereof was committed within jurisdiction of NCT of Delhi, Delhi Police could not carry out investigation and was not competent to take cognizance of charges of said offences—Per contra on behalf of State, it was urged Officer Incharge of Police Station is under obligation to investigate any case which a Court having jurisdiction over local area, within limits of such police station would have power to inquire into or try under provisions of Chapter XIII of the Code. Held:—When no part of cause of action arose in Delhi and alleged acts were committed at some other place outside Delhi, the concerned Magistrate had no jurisdiction to deal with the matter. Report U/s 173 of Code to be returned to Officer Incharge of Police Station with directions to present it to the Court of competent jurisdiction.

Puneet Chawla v. *State & Anr.* *2169*

— Section 340—Arbitration Act, 1940—Section 20—Several litigations ensued between appellant between appellant and respondent no.1 over business dealings—Respondent no.1 has also filed petition U/s 20 of Arbitration Act and settlement was arrived between appellant and respondent no.1—On account of the settlement, evidently all proceedings between them came to an end—Though two years later, appellant initiated proceedings U/s 340 of New Code alleging a previous agreement arrived between them was fabricated, forged and ante-dated document—Petition U/s 340 was dismissed by Ld. Single Judge—Aggrieved appellant preferred appeal to Division Bench—However, appeal was referred to a Larger

Bench in view of judgment rendered by Division Bench of the Court in another matter wherein view was taken "an appeal under clause 10 of the Letter Patent is not available to an aggrieved party to assail an order passed on an application filed U/s 340 of the Code of Criminal Procedure, 1973"—The Larger Bench, thus, was seized of the question:- 'Does a Court while taking decision on application U/s 340 of New Code exercise criminal jurisdiction'. Held:- The formation of opinion U/s 340 of New Code is not in exercise of criminal jurisdiction. The decision taken on an application under Section 340 of the New Code, involves only a formation of an opinion as to whether or not a complaint should be filed. At the stage of formation of such an opinion, the Court does not exercise criminal jurisdiction.

Weizmann Ltd. v. *Shoes East Ltd. & Ors.* *2337*

— Section 244 & 245—Aggrieved petitioner challenged order passed by Ld. Additional Chief Metropolitan Magistrate, Delhi in complaint case instituted by petitioner against respondent and one another accused, as respondent was discharged by Ld. A.C.M.M. stating that complaint against him was groundless—Petitioner had also challenged said order in revision petition which was dismissed by Ld. ASJ. Held:- A Magistrate can discharge an accused in a warrant case instituted otherwise than on a police report U/s 245 (2) of the Code if he finds the charge to be groundless.

M.G. Attri v. *S.K. Jain* *2176*

CONSTITUTION OF INDIA, 1950—Article 226—DDA floated a scheme for 7000 expendable houses vide a resolution dated 27th August, 1996, whereby 50% of the flats were proposed to be offered to the general public while 50% were proposed to be offered to PSUs/Govt. Organisations—Discount was announced for those individuals who would make payment on cash down basis and it was made clear that the said discount will not be provided to the PSUs/Govt. Organisations—Respondent association through Naval Head Quarter vide letter dated 29/4/1999 requested DDA to register

104 flats for allotment of employees of Navy—DDA informed the respondent that the houses could not be allotted in the names of employees and accordingly allotted 104 flats in favour of respondent association only and issued demand cum allotment letters—Respondent Association deposited full payment of 77 flats within a month—Vide three letters issued in June, 2001, DDA demanded additional sums from the respondent by claiming the inadvertently while computing the demand amount, discounts had been given to the allottees whereas no such discounts were to be given to the members of the Association who had not applied under the public scheme. Certain amounts as conversion charges from lease hold to free hold were also demanded—Respondent association challenged the said demands and the Ld. Single Judge vide order dated 25/04/2005 allowed the said writ and held the demands arbitrary and illegal. Held: Appellant DDA is not entitled to recover any additional sums from the allottees. The Demand cum Allotment Letter clearly stipulated that the terms and condition in the brochures for the scheme would apply to the respondent/ allottees and the page 3 of the said brochures nowhere stipulates that the discount is confined only to allottees other than PSUs/Government Organisations but infact clearly provided for discount to an allottee who made 100% payment before possession. In terms of the Demand cum Allotment Letter, the appellant demanded a price and gave a date of confirmation of acceptance by payment of amount demanded. The respondent accepted the offer, made the payment in terms of Demand cum Allotment Letter and thus a binding contract came into being between the parties and now the appellant cannot back track and seek to recover enhanced price based on some resolution which was never made public. The conversion charges are also arbitrary for there is nothing on record to show as to how and on what basis, DDA is demanding the said amount—Appeal dismissed.

DDA v. *All India Naval Draughtsman* *2427*

CUSTOMS ACT, 1962—Section 138B—Appellants in the aforementioned four appeal petitions raised a common question

with respect to the admissibility, in adjudication proceedings, of certain statements recorded u/s 138B of the Act—Principle allegation against appellants was that they had imported ball bearings of Chinese origin but showed them as having been imported from Sri Lanka, in order to evade anti- dumping duty—Show cause notices issued to the appellants contained references to several statements of various individuals recorded u/s 138B of the Act, 1962 but a request made by the appellants for summoning the said individuals during adjudication proceedings denied by the Commissioner of Customs—Adjudication proceedings concluded on 14.10.2004 and the Commissioner of Customs, in its impugned order dated 30.11.2005, not only relied upon the statements recorded u/s 138B of the Act but also on a report dated 20.07.2005 of Sri Lankan Custom Authority, which was based on an investigation conducted after the conclusion of the hearing on 14.10.2004—On appeal, Tribunal upheld the order of the Commissioner on the ground that the evidence led by the agency was credible the trustworthy. Held: There can be no denying that when any statement is used against an assessee, an opportunity of cross-examining the persons who made those statements ought to be given to the assessee, Right of cross-examination, of the person who had given a statement against the assessee, even in a quasi judicial proceeding is a valuable right given to the accused/notice which cannot be taken away unless the circumstances relating to the unavailability of such person referred to, in section 138B exist. Matters remitted to the Tribunal to have a fresh look at the cases keeping in mind the provisions of section 138B and the fact of non supply of the report obtained from Sri Lanka after conclusion of the proceedings.

Basudev Garg v. *Commissioner of Customs* *2269*

DELHI SALES TAX ACT, 1975—Section 2(o)/4/50/21/23&27 read with Rule 7&8 of the Delhi Sales Tax Rules, 1975—Assessing Authority made a demand of Rs. 1,98,590/- including interest, on the ground that nine ST-1 Forms submitted by the petitioner were invalid as the said forms were

issued by a purchasing dealer who did not hold a registration certificate in respect of the goods sold by the petitioner. The Assessing Authority thus did not allow deduction of Rs. 11,30,478 from the 'taxable turnover' of the petitioner—The Assessing Authority assessed sales tax at the rate of 10% of the said disallowance and also imposed interest on such tax from the date of filing of the return. Petitioner's appeal under Section 43 of the Act before the Deputy Commissioner, Sales Tax and Appeal before the Appellate Tribunal dismissed. The Appellate Tribunal held that the return made by a dealer must be correct and complete and to the best of his knowledge and belief and without any willful omission on the part of the dealer and the return made by the petitioner could not be stated to be without any willful omission as the petitioner ought to have been vigilant and aware that ST-1 Forms, on the basis of which the petitioner had claimed deduction from the taxable turnover, were invalid and the same could have been discovered by the petitioner with little care and due diligence. The Tribunal further held that as the petitioner was guilty of willful omission in paying the correct sales tax, the petitioner was also liable to pay interest under Section 27 of the Delhi Sales Tax Act from the date of submission of the return. The first question whether the petitioner is guilty of willful omission?, answered in the negative. It was held that, ST-1 Forms are printed under the Authority of the Commissioner and are issued by the Assessing Authority of the purchasing dealer on an application made to him by the purchasing dealer. An application for issuance of forms may also be rejected by the Assessing Officer, if the Assessing Officer if satisfied that the declaration forms have not been used bonafide or if the conditions in sub-rule (4) of Rule 8 of the Rules are not satisfied. Further, the declarations made in the ST Forms are unequivocal and the purchaser is liable to be subjected to punitive action if the same are found to be untrue. Thus, in the normal course, there would be no reason for the selling dealer to doubt the declaration made by the purchasing dealer, in the Form ST-1. In the present case too, the petitioner has relied upon such Forms and there is no material on record to suggest that the

petitioner accepted the ST-1 Forms with the knowledge that the declarations made there under by the purchasing dealer were wrong. We are, thus, unable to agree with the view that there was any "willful omission" on the part of the petitioner in making his return or that the return was made by the petitioner knowing that the particulars in the ST-1 Forms on the strength of which deduction in the taxable turnover was claimed were inaccurate. The Second question whether the claim for deduction of sales against prescribed ST-1 Forms, furnished by the purchasing dealer, in respect of goods which are not specified in the Registration Certificate of the purchasing dealer, would dis-entitle the selling dealer to the deduction in respect of those sales within the meaning of proviso-II to sub-clause (V) of clause (a) of sub-Section (2) of Section 4 of the Delhi Tax Act, 1975, answered in the affirmative and the petitioner held disentitled to reduce his taxable turnover in respect of sale of goods made to a dealer who does not hold a registration certificate in respect of goods purchased by him. The third question whether interest under section 27(1) is payable on the tax as assessed or as returned by the assessee, answered in the negative, being covered by the decision in the case of Pure Drinks (New Delhi) Ltd.

Pentex Sales Corporation v. *Commissioner of Sales Tax, Delhi* *2296*

— Assessing Authority made a demand of Rs. 1,98,590/- including interest, on the ground that nine ST-1 Forms submitted by the petitioner were invalid as the said forms were issued by a purchasing dealer who did not hold a registration certificate in respect of the goods sold by the petitioner. The Assessing Authority thus did not allow deduction of Rs. 11,30,478 from the 'taxable turnover' of the petitioner—The Assessing Authority assessed sales tax at the rate of 10% of the said disallowance and also imposed interest on such tax from the date of filing of the return. Petitioner's appeal under Section 43 of the Act before the Deputy Commissioner, Sales Tax and Appeal before the Appellate Tribunal dismissed. The Appellate Tribunal held that the return made by a dealer must

be correct and complete and to the best of his knowledge and belief and without any willful omission on the part of the dealer and the return made by the petitioner could not be stated to be without any willful omission as the petitioner ought to have been vigilant and aware that ST-1 Forms, on the basis of which the petitioner had claimed deduction from the taxable turnover, were invalid and the same could have been discovered by the petitioner with little care and due diligence. The Tribunal further held that as the petitioner was guilty of willful omission in paying the correct sales tax, the petitioner was also liable to pay interest under Section 27 of the Delhi Sales Tax Act from the date of submission of the return. The first question whether the petitioner is guilty of willful omission?, answered in the negative. It was held that, ST-1 Forms are printed under the Authority of the Commissioner and are issued by the Assessing Authority of the purchasing dealer on an application made to him by the purchasing dealer. An application for issuance of forms may also be rejected by the Assessing Officer, if the Assessing Officer if satisfied that the declaration forms have not been used bonafide or if the conditions in sub-rule (4) of Rule 8 of the Rules are not satisfied. Further, the declarations made in the ST Forms are unequivocal and the purchaser is liable to be subjected to punitive action if the same are found to be untrue. Thus, in the normal course, there would be no reason for the selling dealer to doubt the declaration made by the purchasing dealer, in the Form ST-1. In the present case too, the petitioner has relied upon such Forms and there is no material on record to suggest that the petitioner accepted the ST-1 Forms with the knowledge that the declarations made there under by the purchasing dealer were wrong. We are, thus, unable to agree with the view that there was any "willful omission" on the part of the petitioner in making his return or that the return was made by the petitioner knowing that the particulars in the ST-1 Forms on the strength of which deduction in the taxable turnover was claimed were inaccurate. The Second question whether the claim for deduction of sales against prescribed ST-1 Forms, furnished by the purchasing dealer, in respect of goods which

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Pentex Sales Corporation v. *Commissioner of Sales Tax, Delhi* *2296*

FINANCE ACT, 1994–Taxable event—Respondent assessee company provided certain services prior to 14.05.2003 and also raised bills with respect to the same prior to 14.05.2003 but payments were received after 14.05.2003—Vide order dated 16.03.2012, CESTAT held the rate of service tax to be levied on the assessee to be 5% in as much as the service had been provided prior to 14.05.2003—Appellant aggrieved by the said order and sought to place reliance upon Rule 5B of the Service Tax Rules, 1994 and section 67A of the Finance Act to contend that the rate of tax to be levied should have been fixed at 8%. Held:- None of the provisions on which reliance is being sought are applicable in as much as the relevant period for determining the rate of tax to be levied is April, 2003 to September, 2003 and Rule 5B of the Service Tax Rules came into effect only on 01.04.2011 and section 67A of the Finance Act, 1994 was inserted only w.e.f 28.05.2012. The taxable event, as per the Finance Act, 1994 is the providing of the taxable service, which in the present case took place prior to 14.05.2003 and therefore the rate of 5% applicable prior to this date could only be levied. Appeal of revenue dismissed.

Commissioner of Service Tax v. *Consulting Engineering Services (I) Pvt. Ltd.* *2110*

of fact that the contract was between the assessee's clients and the transporters and that the assessee mainly acted as a facilitator or as an intermediary. The assessee collected freight charges from the clients who intended to transport their goods through separate transporters and the entire amount thus collected from the clients were paid to the transporters after deducting commission therefrom. He was thus not 'the person responsible' for making payments as provided in section 194C read with section 204 of the Act and therefore he was not liable to deduct TDS.

Commissioner of income tax v. *Hardarshan Singh* *2097*

— Section 44—Common questions referred to the Court in the aforementioned five ITRs—Assessee company, being in the business of insurance, in its balance sheets of the relevant assessment years included 'export market development allowance' as a 'reserve'—Revenue sought to adjust the same as an expenditure by invoking Rule 5(a) of the First Schedule to the Act. Held:- For the purposes of income tax, the figures in the accounts of the assessee drawn up in accordance with the provisions of the First Schedule to the Income Tax Act and satisfying the requirements of the Insurance Act are binding on the Assessing Officer under the Income Tax Act and he has no power to correct the errors in the accounts of an insurance business and hence the export market development allowance shown as reserve in the accounts of the assessee company cannot be altered. Once it is recognized as a reserve it is neither an expenditure nor an allowance and therefore no adjustment can be made by invoking Rule 5 (a) of the First Schedule to the Income Tax Act.

The Oriental Insurance Co. Ltd. v. *CIT* *2114*

— Section 69—Assessee filed on 18.07.2006, his return declaring his income, including income earned from immovable properties as Rs. 39,90,410/- Search and survey operations were carried out on the properties of the assessee and during assessment proceedings, Assessing Officer referred the

question of valuation of 3 immovable properties to the District Valuation Officer (DVO) and on the basis of the Valuation report of the DVO, Assessing Officer u/s 69 of the Act, made an addition of about Rs. 59,78,938/- in the income of the assessee—On appeal, both CIT and Tribunal deleted the additions made by holding that the reference to the DVO was not in accordance with law and that even otherwise the report of the DVO was based on incomparable sales and therefore could not be relied upon. Held: When no material was found during the search and survey to justify the reference to the DVO, the view of the Tribunal that the reference to the DVO was not in accordance with law, is absolutely correct. Further DVO's valuation being based on incomparable sales is impermissible in law.

Commissioner of Income Tax v. *Abhinav Kumar Mittal* *2121*

— Section 115 J(1A)—Assessee company made a provision for payment of bonus to its employees and deducted the same in the computation of the net profit—Assessing Officer however included the same in the computation of the net profit on the basis that it was only an estimation. Held: Position of facts not clear. Hence Assessing Officer directed to determine whether the computation of the provision for bonus was on the basis of Payment of Bonus Act, 1965 and if so, the provision is to be treated as an ascertained liability. On the contrary, if the provision was not in accordance with the provisions of the said Act and was merely an estimation, then the original assessment of the Assessing Officer would hold.

O.B.C. v. *Commissioner of Income Tax-I & Anr.* ... *2145*

— Insertion of clause (i) to Explanation 1 in Section 115 JB—Retrospectively of the amendment—Brief Facts—Petitioner, a public limited company is engaged in the business of manufacture and trading/export of consumer items such as refrigerators, washing machines, etc.—It was assessed to income tax on the "book profit" computed in accordance with the provisions of Section 115 JB of the Act inserted into the

Act by the Finance Act, 2000 w.e.f. 01.04.2001—The gist of the section is that certain companies were liable to pay tax on their "book profit" if the total income computed in accordance with the provisions of the Act was less than 18% of its book profit—In that case, book profit was deemed to be the total income of such companies—Explanation 1 to the section permitted certain adjustments to be made to the figure of book profit as shown in the profit and loss account prepared as per the Companies Act—The first part of the Explanation provided for certain upward adjustments to the book profit—Under clause (c)—The amount or amounts set aside to provisions made for meeting liabilities, other than the ascertained liabilities was/were to be added to the book profit as shown in the profit and loss account—A controversy arose as to whether the provision for bad and doubtful debts made in the profit and loss account can be added to the book profit under the aforesaid clause—The income tax authorities took the view that such a provision was made for meeting a liability other than an ascertained liability and therefore the book profit had to be increased by the amount of the provision—The case of the companies which were liable to tax under Section 115 JB was that a provision for bad and doubtful debts cannot be regarded as a provision made for meeting a liability, let alone an company and what in effect the company does, when making the provision for bad and doubtful debts, is only to provide for a possible non-recovery of the debt—According to the companies, a provision made for the diminution in the value of the debt due to possible non-recovery or the debt going bad cannot be treated as a provision made for meeting an unascertained liability. Special Bench of Income Tax Appellate Tribunal rules in *JCIT Vs. Usha Martin Ltd.* (2006) 105 TTJ (Kol.) 543 (SB) that such a provision cannot be considered as a provision for meeting an unascertained liability and that in truth and substance it was a provision for the diminution of the value of the debt and therefore, it fell outside, clause (e) of the Explanation and the book profit cannot be increased by the amount of the provision—This view of the Special Bench of the Tribunal was upheld by the Delhi High

Court in a case where a similar issue had arisen and this judgment is reported as *CIT Vs. Eicher Ltd.* (2006) 287 ITR 170—The controversy was eventually resolved by the Supreme Court in the judgment reported as *CIT v. HCL Comnet Systems & Services Ltd.* (2008) 305 ITR 409 by observing that for the purposes of section 115JA, the Assessing Officer can increase the net profit determined as per the profit and loss account prepared as per Parts II and III of Schedule VI to the Companies Act only to the extent permissible under the Explanation thereto as per which six items, i.e., item Nos. (a) to (f) which if debited to the profit and loss account can be added back to the net profit for computing the book profit—The provision for bad and doubtful debts can be added back to the net profit only if item (c) dealing with amount(s) set aside as provision made for meeting liabilities, other than ascertained liabilities stands attracted—The assessee's case would, therefore, fall within the ambit of item (c) only if the amount is set aside as provision; the provision is made for meeting a liability; and the provision should be for other than an ascertained liability, i.e., it should be for an unascertained—A debt payable by the assessee is different from a debt receivable by the assessee—A debt is payable by the assessee where the assessee has to pay the amount to others whereas the debt receivable by the assessee is an amount which the assessee has to receive from others—In the present case, the debt under consideration is a debt receivable by the assessee—The provision for bad and doubtful debt, therefore, is made to cover up the probable diminution in the value of the asset, i.e., debt which is an amount receivable by the assessee—Therefore, such a provision cannot be said to be a provision for a liability, because even if a debt is not recoverable no liability could be fastened upon the assessee—After the judgment of the Supreme Court was rendered in favour of the company assessees amendment of section 115JB was effected by substituting with effect from the 1st day of April, 2001, namely the amount or amounts set aside as provision for diminution in the value of any asset—The amendment to

section 115JB is proposed to be made effective retrospectively from 1st day of April, 2001 and will, accordingly apply in relation to assessment year 2001-02 and subsequent assessment years—The petitioner filed its returns of income for the assessment years 2002-03, 2003-04 and 2009-10 on 31.10.2002, 28.11.2003 and 29.09.2009 respectively—It is averred in the petition that the petitioner was advised to re-compute its book profit for these years by taking into account the provision for diminution in the value of assets, including any provision made for bad and doubtful debts, in view of the retrospective amendment—The petitioner accordingly, recomputed its book profit and deposited Rs. 1,08,64,425/- on 30.10.2009 towards additional taxes for these years consequent to the re-computation—This writ petition is for quashing the retrospectivity of the amendment on the ground that it is unreasonable, discriminatory and therefore, unconstitutional—It is also prayed that the respondents be directed to refund the tax deposited suo motu by the petitioner on 30.10.2009 as a result of the retrospective amendment along with applicable interest. Held—Explanation 1 below section 115JB contains several clauses—If the profit and loss account prepared by the company contains any debit which answers to the description of any of those clauses, the amount of the debit can be added to the book profit and the book profit shall stand increased by the said amount—The purpose of the Explanation is to broaden the base amount on which tax is payable by the company—No new levy is imposed—The tax-base stands widened by the amendment in as much as the amount or amounts set aside as provision for diminution in the value of any asset and debited to the profit and loss account shall be added to the book profit—It is well settled that income tax is only one tax on the total income of the assessee—The book profit of a company as shown in the profit and loss accounts prepared in accordance with the Companies Act, 1956 and as adjusted by the various clauses of Explanation 1 is deemed to be the total income of the company on which tax is payable—It is, therefore, a misnomer to refer to the amendment as imposing a new tax or levy—

Since the amendment does not provide for any new levy of income tax, there is no question of it being struck down on the ground of retrospectivity—The memorandum explaining the provisions of the Finance Bill, 2012 (2012) 342 ITR (St) 234 at page 265 contained a detailed justification as to why certain amendments were being proposed in section 9 of the Act in order to rationalise the international taxation provisions. In order to successfully challenge the retrospectivity of the amendment it is necessary for the petitioner to show that the retrospective operation so completely alters the character of the tax as to take it outside the limits of the entry which gives the legislature competence to enact the law—Present amendment is not open to such criticism as all it does, is to widen the base upon which the levy operates by adding one more category of a debit to the profit and loss account by which the book profit of the company can be increased—The nature of the tax has not undergone any change and it still remains a tax on the book profit of the company—It is perfectly open to the legislature to prescribe how the book profit of a company can be computed and this it has done by first enacting that the book profit should be the figure of the profit as per the profit and loss account prepared in accordance with parts II and III of the Companies Act and then by prescribing, in Explanation 1, the items by which the said book profit may either be increased or reducted. In the case of completed assessments the amendment can be invoked only if reopening of the assessments under Section 147 of the Act or modification of the assessments under any other provision of the Act is permissible—The provisions relating to limitation and finality of assessments cannot be disturbed, as they are also the result of legislation by Parliament as the Supreme Court itself has recognised—Different considerations would, therefore, arise if by the amendment even final assessments are sought to be reopened—Petitioner can have a grievance and it can be successfully ventilated, only if the revenue authorities seek to disturb the finality of a completed assessment, overlooking the provisions of the Act relating to reopening of assessments—For the above reasons the writ

petition is dismissed but in the circumstances with no order as to costs.

— Section 148—Assessee filed its return of income on 31.03.2003 w.r.t the assessment year 2002-03—On scrutiny of the books of account of the assessee, which revealed that he had received a sum of Rs. 4,82,01,000/- as share application money from various persons and same was outstanding, pending allotment of shares, the Assessing Officer conducted a detailed inquiry to determine the genuineness of the transactions relating to the share applications and vide order dated 30.03.2005 concluded that a sum of Rs. 42 lacs on account of share application money was liable to be taxed as unexplained credit in the books of account u/s 68 of the act—The said assessment was carried in appeal and CIT in the light of the evidence produced before it, deleted the additions made by the Assessing Officer to the extent of Rs. 37 lacs—On 25.03.2009 Assessing Officer again issued notice dated 25.03.2009 u/s 148 of the Act, seeking to reassess the income of the assessee pertaining to the assessment year 2002-03, on the basis of a statement of one person recorded on 25.09.2004, that he had been providing accommodation entries to the assessee and on the basis that information had also been received that goods of the assessee had been seized by DRI and penalty of Rs. 2 crore had been levied by Commissioner, Customs—Based on the said reassessment proceedings, vide order dated 24.12.2009 Assessing Officer made an addition of app. Rs. 4 crores 75 lacs in relation to the share application and another amount of Rs. 3 crore 46 lacs on the alleged ground of concealment of goods—On appeal CIT upheld the order of the Assessing Officer but on further appeal Tribunal held reassessment proceedings as illegal and without jurisdiction. Held:- It is well settled that in order to reopen an assessment by invoking the provisions of Section 147 of the Act, after a period of four years from the end of the relevant assessment year, in addition to the Assessing Officer (AO)

having reason to believe that any income had escaped assessment, it must also be established that the income had escaped assessment on account of the assessee failing to make returns under Section 139 or on account of failure on the part of the assessee to disclose, fully and truly, the necessary material facts. In the reasons furnished by the AO there is neither any allegation that the assessee had failed to make any disclosure at the time of assessment nor the same can be inferred in view of the fact that a detailed inquiry with regard to the genuineness of the transactions in relation to the share application money, had been conducted by the AO in the first round of assessment and therefore it was not open for the AO to reopen the assessment. Further in view of the failure on part of the AO to record a belief that some income had escaped assessment on account of seizure of certain goods of the assessee by the DRI, the said seizure or the penalty levied by DRI cannot also be stated to be a reason for reopening of the assessment.

INCOME TAX RULES, 1962—Rule 17—In all the aforementioned four appeals filed by the assessee association, the common fact in issue was that the assessee association had not filed Form 10 prescribed under Rule 17 of the Income Tax Rules alongwith its annual returns of the relevant assessment years, but in three of the said cases, had filed it during the course of re-assessment proceedings and in the fourth case (ITA No. 523/2012) had filed it only at the stage of the appeal before the Tribunal—Tribunal rejected the claim of the assessee for accumulation of income on the ground that Form 10 could have been only filed during the course of initial assessment proceedings. Held: The assessee could not have filed the Form 10 at the stage of appeal, for the said form has to be filed before the assessment is completed and hence ITA No. 523/2012 stands dismissed. As regards the other three ITAs, though re-opening of an assessment cannot be asked for by the assessee on the ground that he had not

furnished the Form 10 during the original assessment proceedings, however when the revenue itself reopens the assessment by invoking section 147 of the Income Tax Act, the assessee cannot be barred from furnishing Form 10 during such proceedings. The said three ITAs therefore stand allowed.

Association of Corporation & Apex Societies of Handlooms v. *Assistant Director of Income Tax* *2104*

INDIAN PENAL CODE, 1860—Section 366/376—Appellant convicted and sentenced by trial Court—Prosecutrix aged 15 years and 8 months—She travelled with appellant willingly in bus and train—Prosecutrix brought back to Delhi by appellant—Held:- While awarding punishment the Court has to take into consideration the mitigating and aggravating circumstances—Held:- It was a fit case for sentence less than the minimum prescribed.

Sanjay v. *State* *2389*

— Section 302/34—Identification of accused during night—All four accused well known to the deceased and his eye witness brother—Incident witnessed from a distance of 2 to 10 paces—Paucity of light—Accused could be identified easily by their voices, gait, clothes, manner of speaking etc.

— Improbable conduct of PW3 brother of deceased—Held, different persons react differently in different situations.

— Motive—Loses significance when ocular and medical evidence is clear to establish guilt.

— 302 IPC or 304 Part-I or Part-II of IPC—Ten injuries inflicted with knife and danda—The force with which the injuries were inflicted speaks of the intent to cause death—Danda broke into two pieces—Conviction U/s 302 IPC maintained.

Parveen Kumar v. *State of Delhi* *2393*

— Section 302/307—Medical evidence and forensic evidence in line with ocular evidence—PW1 real brother of deceased and

also injured in the incident, named the accused at very first instance—His presence at the spot natural—Such witness would not allow real culprit to go scot free. In such circumstances not much importance can be attached to slight variation of 0.5 cm to 1 cm in the dimension of the handle and blade of knife in the two sketches prepared by IO and the doctor—Nor any importance can be attached to a stray sentence in the testimony of witness that he had snatched the knife from accused and handed it over to the IO, whereas, the case of prosecution was that knife was recovered from the roof of adjoining jhuggi.

Sanjay Kumar v. *State* *2414*

— Section 406, 420—Petition was quashing of criminal complaint against Petitioner—Inherent powers of the Court u/s 482—SCOPE HELD—Though very wide have to be invoked sparingly and with circumspection only (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of the Court and (iii) otherwise to secure the ends of justice, Inherent powers of the Court to quash an FIR or a criminal complaint can be invoked where the allegations made in the complaint even if admitted do not disclose any offence. Since there are disputed questions of fact, Court in exercise of its power u/s 482 cannot be stifled with the Petitioner's prosecution. Petition dismissed.

Kanak Installments Pvt. Ltd. v. *State of NCT of Delhi & Anr.* *2125*

INDUSTRIAL DISPUTES ACT, 1947—S. 33C(2)—SC in the case of *Surender Singh vs. CPWD,* AIR 1986 SC 584 directed payment to Daily Wagers in CPWD w.e.f. initial date of engagements, the same salary and allowances paid to permanent/regular employees of G.O.I.—Computation of entitlements u/s 33C(2) by Labour Court upheld by Supreme Court—Payment not made by appellant—Recovery certificate issued—Challenged. Held:- although the principle "equal pay for equal work" has subsequently changed, but in the present case the directions in *Surender Singh's* case were binding

because of principle of finality.

The Director General of Works v. *Regional Labour Commissioner & Ors.* *2243*

NEGOTIABLE INSTRUMENTS ACT, 1881—Section 138, 141—Cheques issued by the accused company dishonoured—Petition for quashing of summoning order by Director of the accused company—Petitioner contends that Complaint does not reveal as to how Petitioner was in charge of and responsible for the conduct of business of accused company and mere averment that the Petitioner being a Director was in charge of the and responsible for conduct of the business of the company was not enough—Held—Only bald allegations that Petitioner and other Directors were responsible for the day to day affairs of the accused company. Following law laid down in *National Small Industries Corporation Ltd., Central Bank of India* and *Anita Malhotra,* averments not sufficient to issue process against petitioner. Summoning order quashed—Petition allowed.

Chintan Arvind Kapadia & Anr. v. *State & Anr.* *2135*

— Industrial Disputes Act, 1947—S. 33C(2)—SC in the case of *Surender Singh vs. CPWD,* AIR 1986 SC 584 directed payment to Daily Wagers in CPWD w.e.f. initial date of engagements, the same salary and allowances paid to permanent/regular employees of G.O.I.—Computation of entitlements u/s 33C(2) by Labour Court upheld by Supreme Court—Payment not made by appellant—Recovery certificate issued—Challenged. Held:- although the principle "equal pay for equal work" has subsequently changed, but in the present case the directions in *Surender Singh's* case were binding because of principle of finality.

The Director General of Works v. *Regional Labour Commissioner & Ors.* *2243*

SERVICE LAW—Canara Bank Officer Employees (conduct) Regulations, 1976—Respondent arrested in a criminal case—Suspended—Suspension revoked—Suspension order stipulated

with period under suspension spent by respondent shall not be treated as having been spent on duty and shall not be reckoned for any purpose—Respondent Superannuated on 31.10.2002—Later on acquitted in the criminal trial on 19.01.2004. Held, Regulation 15 (1) deals with departmental proceedings only and does not apply to acquittals in criminal cases—Also held, it is only in cases where the competent authority specifically directs that such period of suspension should be treated as having been "spent on duty" with the competent authority is required to give reasons in writing—No reasons are necessary when the period of suspension in cases falling under Sub Regulation 15(2) is treated as "not spent on duty". Reliance on the case of *Union Bank of India Vs. K.V. Jankiraman & Others* 1991 (4) SCC 109 held that concerned authorities are to be vested with the power to decide whether an employee at all deserves any salary for the intervening period and if he does, the extent to which he is entitled.

General Manager, Canara Bank & Others v. *Kuldeep Raj Sharma* *2085*

— CWC Staff Regulations, 1996—Regulation 10 Sub-Regulation (1)—Petitioner appointed as Junior Technical Assistant in December 1983—On probation for one year—Suspended on 6.9.1984—Pending initiation of disciplinary proceedings—However in disciplinary proceedings initiated against him—His suspension revoked on 16.2.1985—Instead one P.P. Singh was charged and in the enquiry proceedings, P.P. Singh held guilty in regular D.E. However, in the report, the enquiry officer made certain observations qua the working of petitioner as well. Meanwhile, probation period of petitioner ended in December 1984—No formal order of extension of probation or confirming the petitioner—Petitioner's services terminated on 22.10.1983 under Sub-Regulation (1) of Regulation (10) of CWC (Staff) Regulations 1966 held the petitioner was examined as a witness in the departmental proceedings against P.P. Singh an his credibility was Doubted by the enquiry officer. The genuiness of warnings/memos issued against the

petitioner by P.P. Singh was doubted in the enquiry by the enquiry officer—Thus, the warning/memos could not have been relied against the petitioner to terminate the services of petitioner. The comments of enquiry officer about any creditworthiness of the petitioner in the DE cannot be characterised as evidence to judge suitability of petitioner. The comments of enquiry amended to findings of misconduct without any notice or hearing to the petitioner. No other material to support termination order as based on bonafide assessment of petitioners suitability—The innocuously word termination order was not reality based on allegations of serious misconduct, for which the petitioner was not even charged or made to face any form of inquiry and was not granted hearing—Termination set aside. However, since termination order was 28 years old, balancing the two seemingly competing public interest the petitioner awarded 40% of the back salary and allowances that would have been paid to the petitioner, had he continued in the same post from the date of his termination at all.

Prem Kishore v. *Central Warehousing Corporation* *2227*

SERVICE TAX—Finance Act, 1994–Taxable event—Respondent assessee company provided certain services prior to 14.05.2003 and also raised bills with respect to the same prior to 14.05.2003 but payments were received after 14.05.2003—Vide order dated 16.03.2012, CESTAT held the rate of service tax to be levied on the assessee to be 5% in as much as the service had been provided prior to 14.05.2003—Appellant aggrieved by the said order and sought to place reliance upon Rule 5B of the Service Tax Rules, 1994 and section 67A of the Finance Act to contend that the rate of tax to be levied should have been fixed at 8%. Held:- None of the provisions on which reliance is being sought are applicable in as much as the relevant period for determining the rate of tax to be levied is April, 2003 to September, 2003 and Rule 5B of the Service Tax Rules came into effect only on 01.04.2011 and section 67A of the Finance Act, 1994 was

inserted only w.e.f 28.05.2012. The taxable event, as per the Finance Act, 1994 is the providing of the taxable service, which in the present case took place prior to 14.05.2003 and therefore the rate of 5% applicable prior to this date could only be levied. Appeal of revenue dismissed.

Commissioner of Service Tax v. *Consulting Engineering Services (I) Pvt. Ltd.* *2110*

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GENERAL MANAGER, CANARA BANK & OTHERS **....APPELLANTS**

VERSUS

KULDEEP RAJ SHARMA **....RESPONDENT**

(BADAR DURREZ AHMED & V.K. JAIN, JJ.)

LPA NO. : 771/2010 **DATE OF DECISION: 07.01.2013**

Service Law—Canara Bank Officer Employees (conduct) Regulations, 1976—Respondent arrested in a criminal case—Suspended—Suspension revoked—Suspension order stipulated with period under suspension spent by respondent shall not be treated as having been spent on duty and shall not be reckoned for any purpose—Respondent Superannuated on 31.10.2002—Later on acquitted in the criminal trial on 19.01.2004. Held, Regulation 15 (1) deals with departmental proceedings only and does not apply to acquittals in criminal cases—Also held, it is only in cases where the competent authority specifically directs that such period of suspension should be treated as having been "spent on duty" with the competent authority is required to give reasons in writing—No reasons are necessary when the period of suspension in cases falling under Sub Regulation 15(2) is treated as "not spent on duty". Reliance on the case of Union Bank of India Vs. K.V. Jankiraman & Others 1991 (4) SCC 109 held that concerned authorities are to be vested with the power to decide whether an employee at all deserves any salary for the intervening period and if he does, the extent to which he is entitled.

[Di Vi]

APPEARANCES:

FOR THE APPELLANTS : Mr. Naveen R. Nath.

FOR THE RESPONDENT : Ms. Sumedha Sharma.

CASES REFERRED TO:

1. *General Manager, UCO Bank and Another* vs. *M. Venuranganath:* 2007 (13) SCC 251.
2. *Union Bank of India* vs. *K.V. Jankiraman & Others:* 1991 (4) SCC 109.

RESULT: Appeal allowed.

BADAR DURREZ AHMED, J.

1. This Letters Patent Appeal is directed against the judgment dated 09.02.2010 passed by a learned single Judge of this court in WP (C) 7383/2009 as also against the order dated 20.09.2010 passed by the said learned single Judge in the review petition No.243/2010. By virtue of the judgment dated 09.02.2010, the respondent's writ petition was allowed and by virtue of the order dated 20.09.2010, the appellant's review petition was dismissed.

2. The issue sought to be raised in the present appeal pertains to the manner in which the period for which the respondent Kuldeep Raj Sharma was under suspension, that is, from 05.08.2000 to 20.07.2002, is to be dealt with. The respondent's claim for difference in salary as well as of treating the said period of suspension as having been "spent on duty" was allowed by the learned single Judge by virtue of the impugned judgment / order. It is the case of the appellant that the said decision runs contrary to the regulations and also to the Supreme Court decision which had been relied upon by the learned single Judge in the case of **General Manager, UCO Bank and Another v. M. Venuranganath:** 2007 (13) SCC 251.

3. Before we examine the rival contentions of the parties, it would be relevant to notice some facts. The respondent Kuldeep Raj Sharma was working with the appellant. The respondent had two sons Pradeep Sharma and Manish Sharma. The younger son (Manish Sharma) married one Anita Sharma sometime in the year 2000. Unfortunately, Anita Sharma died an unnatural death on 01.08.2000. A criminal case came to be

registered under FIR No.1643/2000 at police station Sahibabad under Sections 498A/ 304-B/302/34 IPC and under Sections 3/4 of the Dowry Prohibition Act, 1961. The respondent was arrested in connection with that criminal case and by virtue of an office order bearing No. DC/DAC/ 700/2000 dated 05.08.2000, the respondent was placed under suspension. Subsequently, the respondent and his wife were granted bail by the Sessions Court, Ghaziabad (U.P.) on 30.09.2000. By an order dated 20.07.2002 issued by the Deputy General Manager of the appellant, the suspension order was revoked. The revocation of suspension order clearly indicated that the question of suspension of the respondent was reviewed and it had been decided to revoke the same. The suspension was revoked from the date of reporting for duty by the said respondent at the appellants Ballimaran, Chandni Chowk Branch, Delhi. The order dated 20.07.2002 also indicated that upon revocation of suspension, the respondent would be paid salary and allowances which he was drawing prior to the date of suspension. Furthermore, the said order dated 20.07.2002 stipulated that the period spent under suspension by the respondent shall not be treated as having been "spent on duty" and the same shall not be reckoned for any purpose whatsoever.

4. The respondent superannuated on 31.12.2002. He was acquitted of all the criminal charges by the Sessions Court at Ghaziabad on 19.01.2004.

5. We may point out that on 03.10.2000, the respondent had made a representation to the General Manager, Canara Bank requesting for revocation of the suspension and release of the differential salary. We have already mentioned above that the suspension order was subsequently revoked by virtue of an order dated 20.07.2002. However, his request for differential salary was not acceded to. A further representation was made by the respondent on 23.08.2004, whereby he requested for counting the period of suspension as having been "spent on duty". By a communication dated 28.10.2004 from the appellant to the respondent, the respondent was informed that at the time of revocation of suspension, the competent authority had ordered to treat the period of suspension as one "not spent on duty". As such, the request for treating the period of suspension as "spent on duty" could not be acceded to.

6. These are the facts leading upto the filing of the writ petition. The learned single Judge by virtue of the impugned judgment dated

09.02.2010, after considering the Canara Bank Officer Employees' (Conduct) Regulations, 1976 (hereinafter referred to as 'the said Regulations'), came to the conclusion that in the order dated 28.10.2004, no reasons had been given as to why the request of the respondent for treating the period of suspension as the period "spent on duty", had not been acceded to. Consequently, the learned single Judge held that the said order 'smacked' of arbitrariness, having been passed without application of mind. The learned single Judge also sought to place reliance on the decision of the Supreme Court in the case of **General Manager, UCO Bank** (supra) and directed that the respondent was entitled to the difference of salary for the period 05.08.2000 to 20.07.2002 and that the said period should be treated as "spent on duty" by the respondent for all intents and purposes.

7. As mentioned above, the appellant had filed a review petition being review petition No.243/2010, wherein, inter alia, the plea was taken that the decision of the Supreme Court in the case of **General Manager, UCO Bank** (supra) does not support the case of the respondent at all. But, on the contrary, supports the case of the appellant. However, the learned single Judge repelled this contention after setting out Regulation 15 of the said Regulations and para 10 of the said Supreme Court decision. We may point out that the learned single Judge also referred to clause 22(8) of the Manual on Disciplinary Action and Related Matters of UCO Bank and came to the conclusion that the review petition had no merit and affirmed his decision as per the impugned judgment dated 09.02.2010.

8. Regulation 15 of the said Regulations reads as under:-

"15. Pay, allowances and treatment of service on termination of suspension:

(1) Where the competent authority holds that the officer employee has been fully exonerated or that the suspension was unjustifiable, the officer employee concerned shall be granted the full pay to which he would have been entitled, had he not been suspended, together with any allowance of which he was in receipt immediately prior to his suspension, or may have been sanctioned subsequently and made applicable to ail officer employees.

(2) In all cases other than those referred to in sub-regulation (1), the officer employee shall be granted such proportion of pay and allowances as the Competent Authority may direct:

Provided that the payment of allowances under this sub-regulation shall be subject to all other conditions to which such allowances are admissible:

Provided further that the pay and allowances granted under this sub-regulation shall not be less than the subsistence and other allowances admissible under regulation 14.

(3) (a) In a case falling under sub-regulation (1), the period of absence from duty shall, for all purpose, be treated as a period spent on duty;

(b) In a case falling under sub-regulation (2), the period of absence from duty shall not be treated as a period spent on duty unless the Competent Authority specifically directs, for reasons to be recorded in writing, that it shall be so treated for any specific purpose."

9. A plain reading of the said Regulations makes it clear that Regulation 15(1) deals with departmental proceedings inasmuch as the expression used is where the "employee has been fully exonerated". Regulation 15(1) does not apply to acquittals in criminal cases. This has been so held by the Supreme Court in **General Manager, UCO Bank** (supra). In the said decision, it has also been held that Regulation 15(2) applies to all other cases which include criminal cases. Therefore, reading Regulation 15 by itself, it is abundantly clear that the respondent cannot get the benefit under Regulation 15(1) as his case is not of a departmental proceeding, but of a criminal case. The respondent's case falls under Regulation 15(2) and, if that be so, the respondent is only entitled to be granted such proportion of pay and allowances as the competent authority may direct. The respondent is not entitled to the grant of full pay to which he would have been entitled had he not been suspended. That is only possible under Regulation 15(1) which does not apply to the respondent's case. We may also point out that Regulation 15(3) deals with two situations; one, where the case falls under sub-Regulation (1) and; two, where the case falls under sub-Regulation (2). Since the respondent's case falls under Regulation 15(2), it would be Regulation

15(3)(b) which would apply. According to that sub-Regulation, the period of absence from duty shall not be treated as a period "spent on duty" unless the competent authority specifically directs, for reasons to be recorded in writing, that it shall be so treated for any specific purpose. In other words, normally, the period of absence from duty in such cases is not to be treated as a period "spent on duty". It is only in cases where the competent authority specifically directs that such period of suspension should be treated as having been "spent on duty" that the competent authority is required to give reasons in writing. No reasons are necessary when the period of suspension in cases falling under sub-Regulation 15(2) is treated as "not spent on duty".

10. The reliance by the learned single Judge on the Supreme Court decision in **General Manager, UCO Bank** (supra) is also misplaced. The Supreme Court in the said decision had ultimately held in favour of the respondent therein because of clause 22(8) of the said UCO Bank Manual. The Supreme Court observed as under:" 14. Clause 22(8) obviously is relatable to Clause 15(2), meaning that it provides guidelines for operating Sub-regulation (2) of Regulation 15. The High Court was, therefore, justified in holding that because of Clause 22(8), the respondent was entitled to all benefits to which he would have been normally entitled, had he been on duty. Therefore, no interference is called for."

11. Unfortunately, for the respondent, there is no provision analogous to the said clause 22.8 of the UCO Bank Manual insofar as Canara Bank is concerned. The learned counsel for the appellant had also drawn our attention to the Supreme Court decision in the case of **Union Bank of India v. K. V. Jankiraman & Others:** 1991 (4) SCC 109, wherein the Supreme Court observed as under:-

"25. We are not much impressed by the contentions advanced on behalf of the authorities. The normal rule of "no work no pay" is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him. It is for this reason that F.R. 17(1) will also be inapplicable to such cases.

26. We are, therefore, broadly in agreement with the finding of the Tribunal that when an employee is completely exonerated

meaning thereby that he is not found blameworthy in the least and is not visited with the penalty even of censure, he has to be given the benefit of the salary of the higher post along with the other benefits from the date on which he would have normally been promoted but for the disciplinary/criminal proceedings. However, there may be cases where the proceedings, whether disciplinary or criminal, are, for example, delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of non-availability of evidence due to the acts attributable to the employee etc. In such circumstances, the concerned authorities must be vested with the power to decide whether the employee at all deserves any salary for the intervening period and if he does, the extent to which he deserves it. Life being complex, it is not possible to anticipate and enumerate exhaustively all the circumstances under which such consideration may become necessary. To ignore, however, such circumstances when they exist and lay down an inflexible rule that in every case when an employee is exonerated in disciplinary / criminal proceedings he should be entitled to all salary for the intervening period is to undermine discipline in the administration and jeopardise public interests. We are, therefore, unable to agree with the Tribunal that to deny the salary to an employee would in all circumstances be illegal. While, therefore, we do not approve of the said last sentence in the first sub-paragraph after Clause (iii) of paragraph 3 of the said Memorandum, viz., '"but no arrears of pay shall be payable to him for the period of notional promotion preceding the date of actual promotion", we direct that in place of the said sentence the following sentence be read in the Memorandum:

> 'However, whether the officer concerned will be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion, and if so to what extent, will be decided by the concerned authority by taking into consideration all the facts and circumstances of the disciplinary proceeding / criminal prosecution. Where the authority denies arrears of salary or part of it, it will record its reasons for doing so.'"

12. On going through the above extract from the Supreme Court decision in **K.V. Jankiraman** (supra), it is clear that the concerned authorities are to be vested with the power to decide whether an employee at all deserves any salary for the intervening period and if he does, the extent to which he is entitled. This is specifically provided in Regulation 15(2) of the said Regulations. Therefore, the observations of the Supreme Court in **K.V. Jankiraman** (supra) tend to support the case of the appellant. The Supreme Court also observed that it would not be possible to lay down an inflexible rule that in every case when an employee is exonerated in disciplinary / criminal proceedings, he should be entitled to all salary for the intervening period and to lay down such an inflexible rule would be to undermine the discipline in the administration and jeopardize public interest. Therefore, there was nothing wrong with the appellant deciding not to grant salary to the respondent during the period of suspension because this was in exercise of the discretion under Regulation 15(2) of the said Regulations.

13. For these reasons, the impugned judgment and order cannot be sustained and the same are set aside. The appeal is allowed. There shall be no order as to costs.

ILR (2013) III DELHI 2092
ITA

COMMISSIONER OF INCOME TAX-VIII ....APPELLANT

VERSUS

AVINASH JAIN ....RESPONDENT

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

ITA NO. : 703/2012 DATE OF DECISION: 09.01.2013

Income Tax Act, 1961—Assessee engaged in sale and purchase of shares and maintaining two separate portfolios, one for investment and other for trading

and the said practice of the assessee was recognized by the revenue for earlier years prior to the assessment year 2007-08—In the said assessment year, Assessing Officer however construed the entire activity of the assessee as a business activity and made additions of certain amounts to the business income of the assessee by treating, as business income, both the short term capital gain and the long term capital gain, in relation to the sale of shares out of the assessee's investment portfolio—On appeal both the CIT and the Tribunal allowed the appeal of the assessee by relying on a CBDT circular no.4/2007 dated 15.06.2007. Held: The intent and purport of the CBDT circular in question is to demonstrate that a tax payer may have two portfolios and therefore an assessee can own shares for the purpose of investment and for the purposes of trading and once the short term and the long term capital gains are admittedly out of the investment account, they cannot be treated as profits of any business venture. Appeal filed by revenue dismissed.

Before us the ld. Counsel for the revenue submitted that while the CBDT circular only mentioned that it was "possible" for a tax payer to have two portfolios, namely, an investment portfolio and a trading portfolio, the Tribunal has misunderstood the said circular by holding that the circular had "allowed" the assessee to maintain two types of portfolios. Although technically the ld. Counsel for the revenue may be right but that really does not make any difference when the entire circular is considered. The intent and purport of the circular is to demonstrate that a tax payer could have two portfolios, namely, an investment portfolio and a trading portfolio. In other words, the assessee could own shares for the purposes of investment and/or for the purposes of trading. In the former case whenever the shares are sold and gains are made the gains would be capital gains and not profits of any business venture. In the latter case any gains would amount to profits in business. This has been

made clear by the CBDT circular in the remaining portion of the circular itself. **(Para 5)**

Important Issue Involved: An assessee can own shares for the purpose of investment and for the purposes of trading and once the short term and the long term capital gains are admittedly out of his investment account, they cannot be treated as profits earned by the assessee from any business venture.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Sanjeev Rajpal, Advocate.

FOR THE RESPONDENT : None.

CASES REFERRED TO:

1. *CIT* vs. *Associated Industrial Development Co. (P) Ltd.* : 82 ITR 586 (SC).
2. *CIT* vs. *H.Holck Larsen* : 160 ITR 67 (SC).

RESULT: Appeal Dismissed.

BADAR DURREZ AHMED, J. (ORAL)

This appeal has been filed by the revenue against the order dated 20.07.2012 passed by the Income Tax Appellate Tribunal in ITA No.3379/Del./10. That appeal had also been filed by the revenue in which the following ground was raised in relation to the assessment year 2007-08:-

> "The Ld. CIT(A) erred in law and on the facts in holding that the action of the Assessing Officer in holding short Term capital gain and long term capital gain be treated as business income has no substance and are without any cogent reason and thereby deleting addition of Rs. 1,38,015/- and Rs. 1,07,44,493/- made by the AO on account of Short Term capital gain and Long Term capital gain respectively."

The assessee is engaged in sale and purchase of shares and maintains two separate portfolios. One is an investment portfolio and the other is

a trading portfolio. This practice of the assessee has been going on for earlier years also and this has been recognized by the revenue as also by the Tribunal in the impugned order. It is only in this year that the assessing officer made additions of Rs.1,38,015/- and Rs.1,07,44,493/- on account of short term capital gains and long term capital gains respectively in relation to the sale of shares out of the assessee's investment portfolio. The assessing officer did so by treating both the short term capital gain as well as the long term capital gain as business income by construing the entire activity of the assessee as a business activity.

2. The Commissioner of Income Tax (Appeals) by an order dated 24.06.2010 allowed the appeal of the assessee. Being aggrieved thereby the revenue preferred the said ITA No.3379/Del./10 before the Tribunal on the above mentioned ground.

3. The Tribunal noted that the Commissioner of Income Tax (Appeals) had placed reliance, inter alia, on the CBDT circular No.4/2007 dated 15.06.2007 as also upon decisions of the Supreme Court in the cases of **CIT Vs. Associated Industrial Development Co. (P) Ltd.** : 82 ITR 586 (SC) and **CIT Vs. H.Holck Larsen** : 160 ITR 67 (SC).

4. The said circular of the CBDT reads as under:-

> "CBDT also wishes to emphasize it is possible for a tax payer to have two portfolios i.e. an investment portfolio comprising of securities which are to be treated as capital assets and a trading portfolio comprising of stock in trade which are to be treated as trading assets. Where an appellant has two portfolios, the appellant may have income under both heads i.e. capital gains as well as business income.
>
> Assessing Officer are advised that the above principles should guide them in determining whether, in a given case, the shares are held by the appellant as investment (and therefore giving rise to capital gains) or as stock-in-trade and therefore giving rise to business profits). The Assessing Officer is further advised that no single principle would be decisive and the total effect of all the principles should be considered to determine whether, in a given case, the shares are held by the appellant as investment or stock-in-trade."

After concurring with the views expressed by the CIT(Appeals), the Tribunal held as follows :-

> "6. We have heard rival contentions and gone through the relevant material available on record. CBDT by way of above Circular has allowed the assessee to maintain two types of portfolios in their books of accounts - one on account of investment and the other on account of trading. It is not the case that the assessee started these activities in the year under consideration. The practice is supported by earlier years also which is not disputed. The department has earlier accepted the assessee's practice and treatment under heads of capital gains and business. Assessee's separate activities in share are further supported and endorsed by the fact that separate de mat accounts, bank accounts are being maintained and separate trading account and investment accounts ae(sic) maintained in the books. Under these circumstances it leaves no room for doubt that the assessee was dealing in different activities of trading and investment. In vie(sic) thereof we find no infirmity in the order of CIT(A) which is upheld."

5. Before us the ld. Counsel for the revenue submitted that while the CBDT circular only mentioned that it was "possible" for a tax payer to have two portfolios, namely, an investment portfolio and a trading portfolio, the Tribunal has misunderstood the said circular by holding that the circular had "allowed" the assessee to maintain two types of portfolios. Although technically the ld. Counsel for the revenue may be right but that really does not make any difference when the entire circular is considered. The intent and purport of the circular is to demonstrate that a tax payer could have two portfolios, namely, an investment portfolio and a trading portfolio. In other words, the assessee could own shares for the purposes of investment and/or for the purposes of trading. In the former case whenever the shares are sold and gains are made the gains would be capital gains and not profits of any business venture. In the latter case any gains would amount to profits in business. This has been made clear by the CBDT circular in the remaining portion of the circular itself.

6. On facts, the Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal have held that the short term capital gains and the long term capital gains in the present case were out of the investment account and were not related to the trading account of the

assessee. That being the position, no interference with the decision of the Tribunal is called for. No question of law arises for our consideration. The appeal is dismissed.

ILR (2013) III DELHI 2097
ITA

COMMISSIONER OF INCOME TAX ....APPELLANT

VERSUS

HARDARSHAN SINGH ....RESPONDENT

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

ITA NO. : 604/2012 DATE OF DECISION: 09.01.2013

Income Tax Act, 1961—Section 194C—Assessee had four trucks and was in the business of transporting goods and also acted as a commission agent by arranging for transportation of goods through other transporters and thus in his income included payments received under two heads—'lorry booking' and 'own booking' business but treated the payments received in the 'lorry booking' business as commission as in the said transactions he only acted as a facilitator and had no privity of contract with the clients for transportation of goods and therefore did not deduct TDS—Assessing Officer and Commissioner of Income Tax held that the assessee was not an intermediary or a facilitator and there was a privity of contract between him and the clients for carriage of goods—On further appeal, the Tribunal upheld the contention of the assessee. Held: No infirmity in the view expressed by the Tribunal. It is a matter of fact that the contract was between the assessee's clients and the transporters

and that the assessee mainly acted as a facilitator or as an intermediary. The assessee collected freight charges from the clients who intended to transport their goods through separate transporters and the entire amount thus collected from the clients were paid to the transporters after deducting commission therefrom. He was thus not 'the person responsible' for making payments as provided in section 194C read with section 204 of the Act and therefore he was not liable to deduct TDS.

It is also the case of the assessee that it did not undertake any carriage of goods by itself through its trucks / lorries other than in respect of its 'own booking' business which has already suffered TDS at the time of receipt of payments by the assessee. The learned counsel for the respondent/ assessee referred to the decision of a Division Bench of this Court in the case of **CIT v. Cargo Linkers:** (2009) 179 Taxman 151 (Del). We find that the said decision covers the case of the assessee in its favour. In **Cargo Linkers** (supra), the assessee was a partnership firm carrying on the business of clearing and forwarding agents and booking cargo for the transportation abroad by various airlines operating in India. The assessee collected freight charges from the exporters who intended to send the goods through a particular airline and paid the amount to the airline or its general sales agents and for the services rendered, the assessee charged commission from the airlines. According to the Assessing Officer, in that case, the assessee was liable to deduct tax at source on the payments made to the airlines. As can be noticed, the factual position is somewhat similar to the facts of the present case. Here also, the assessee collects freight charges from the clients who intended to transport their goods through separate transporters. The entire amount collected from the clients is paid to the transporters after deducting commission from the said amount. **(Para 7)**

In **Cargo Linkers** (supra), it was contended on behalf of the assessee that the assessee was not the 'person responsible' for making payment in terms of Section 194C of the said Act. In that case, the Tribunal had also noted and found as a matter of fact that the assessee was nothing but an intermediary between the exporters and the airlines as it booked cargo for and on behalf of the exporters and mainly facilitated the contract for carrying goods. The principal contract was between the exporter and the airline. This court, in **Cargo Linkers** (supra), agreed with the view of the Tribunal which had mainly decided an issue of fact, namely, the nature of the contract between the parties concerned. The Court also observed that it had also been found as a matter of fact that the contract was actually between the exporter and the airline and the assessee was only an intermediary and, therefore, it was not the 'person responsible' for deduction of tax at source in terms of Section 194C of the said Act. **(Para 8)**

Important Issue Involved: An assessee who merely acts as a facilitator or as an intermediary between two parties and has no privity of contract with either of such parties, is not liable to deduct TDS u/s 194 C of the Income Tax Act, for he receives only his commission and cannot be held to be the 'person responsible' for making payment for the services taken, in terms of the said section.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Rohit Madan, Advocate.

FOR THE RESPONDENT : Mr. S. Krishnan, Advocate.

CASE REFERRED TO:

1. *CIT* vs. *Cargo Linkers:* (2009) 179 Taxman 151 (Del).

RESULT: Appeal Dismissed.

BADAR DURREZ AHMED, J. (ORAL)

CM 17463/2012

The delay in re-filing is condoned.

This application stands disposed of.

ITA 604/2012

1. The revenue is aggrieved by the order dated 26.08.2011 passed by the Income Tax Appellate Tribunal in ITA 1447/Del/2011 pertaining to the assessment year 2007-08. Before the Tribunal, the assessee, who was aggrieved by the orders passed by the Assessing Officer as well as the Commissioner of Income Tax (Appeals), had, inter alia, taken the ground that the addition of Rs. 8,51,43,744/-by invoking the provisions contained in Section 40(a)(ia) of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') was erroneous.

2. The assessee has four trucks and is in the business of transporting goods. He also carries on the business of a commission agent by arranging for transportation of goods through other transporters. Initially, the assessee filed a return on 31.10.2007 declaring a total income of Rs. 8,57,684/-. The return was picked up on scrutiny and a notice was issued under Section 143(2) of the said Act. During the scrutiny proceedings, the assessee was required to file a revised profit and loss account. On 18.12.2009, the revised profit and loss account was filed by the assessee, wherein the details of income and expenses were given. The same is as under:-

Expenses		**Income**	
Particulars	**Amount**	**Particulars**	**Amount**
Direct Expenses		**Direct Expenses**	
Lorry Booking Expenses	8,51,43,744/-	Own Booking Income	36,50,803/-
Own Booking Expenses	25,91,248/-	Lorry Booking Income	8,51,43,744/-
Indirect Expenses	28,03,903/-	Indirect Expenses	
Net Profit	8,57,684/-	Booking Commission	26,02,032/-
Total	**9,13,96,579/-**	**Total**	**9,13,96,579/-**

3. On going through the above table, it becomes clear that the assessee had shown two kinds of businesses. One is the 'lorry booking' business and the other is the 'own booking' business. Insofar as the 'own booking' business is concerned, there is no dispute that the payments received by the assessee were after deduction of tax. However, insofar as the 'lorry booking' business is concerned, it has been the stand of the assessee that the income derived from that business was by way of booking commission which has been shown at Rs. 26,02,032/-. The rest of the money received from the clients was passed on entirely to the lorry owners/ transporters. That is why the lorry booking expenses and the lorry booking income are identical.

4. The whole issue in the present appeal is whether the assessee was liable to deduct TDS under Section 194C of the said Act. According to the assessee, insofar as the 'lorry booking' business is concerned, there is no contract of carriage between the assessee or any other person. The contract is between the clients and the lorry owners/ transporters, in which the assessee only acts as a facilitator or as an intermediary. This stand has been taken by the assessee right from the stage of the assessment up to the Tribunal.

5. Unfortunately for the assessee, the Assessing Officer as also the Commissioner of Income Tax (Appeals) did not agree with this contention of the assessee and both of them held that the assessee was not an intermediary or a facilitator but, there was a privity of contract between the assessee and the clients for carriage of goods. The Tribunal, however, has reversed this finding by holding that the assessee had no privity of contract for carriage of goods with the clients and that the assessee merely acted as a facilitator or as an intermediary. The Tribunal observed as under:

> "5.3 We have considered the facts of the case and submissions made before us. We may explain the contents of the bill as mentioned above. The assessee raised a bill no. 3916 dated 26.03.2007 on the aforesaid Delhi Assam Roadways and asked it to arrange the trucks of the capacity of 25 tons on his behalf. The bill amount was Rs. 70,000/- and Rs. 50,000/- were paid to Ram Kishan, driver. Second bill of same number and date shows the contract value at Rs. 70,000/- and balance payable at Rs. 20,000/-. The challan no. 3916 of the same date shows balance

> freight at Rs. 17,900/ and commission of Rs. 2,100/-. This details show that a contract has been entered into between the two parties for a sum of Rs. 70,000/- and advance payment of Rs. 50,000/- has been made through the driver of the Delhi Assam Roadways. The assessee has not done the work of actual transportation of goods. He earned only the commission of Rs. 2,100/-. Thus, it becomes clear that the assessee acted as intermediary between the client and Delhi Assam Roadways Corporation Ltd. The company carried the goods and the advance received from the customer was handed over to the driver of the company. In the final bill, the advance and the commission of the assessee were deducted from the bill amount of Rs. 70,000/ - and the assessee had to receive commission of Rs. 2,100/- from the company. According to us, it cannot be said that assessee really entered into the contract of transportation of goods. He merely acted as an intermediary. Thus, the facts seem to be similar to the facts in the case of **Grewal Brothers** (supra) although the provisions of Partnership Act make the position of law somewhat messy. In the case of Cargo Linkers, the assessee acted as an intermediary between the exports and the airlines. It received the amount from the exporter and handed over the same to the airline, who paid commission. These facts are also nearer to the facts of the case at hand. Accordingly, following this decision, it is held that the assessee was not liable to deduct tax at source. In view thereof, no addition could have been made u/ s 40(ia). Thus, ground no.1 is allowed."

6. Before us, the learned counsel for the revenue sought to argue that the assessee was the 'person responsible' for paying as provided in Section 194C read with Section 204 of the said Act. However, that would only apply if there was privity of contract of carriage between the assessee and its clients. On facts, the Tribunal has held that the assessee was merely a facilitator or an intermediary and that it did not enter into any contract for carriage of goods with its clients.

7. It is also the case of the assessee that it did not undertake any carriage of goods by itself through its trucks / lorries other than in respect of its 'own booking' business which has already suffered TDS at the time of receipt of payments by the assessee. The learned counsel for the respondent/ assessee referred to the decision of a Division Bench

of this Court in the case of **CIT v. Cargo Linkers:** (2009) 179 Taxman 151 (Del). We find that the said decision covers the case of the assessee in its favour. In **Cargo Linkers** (supra), the assessee was a partnership firm carrying on the business of clearing and forwarding agents and booking cargo for the transportation abroad by various airlines operating in India. The assessee collected freight charges from the exporters who intended to send the goods through a particular airline and paid the amount to the airline or its general sales agents and for the services rendered, the assessee charged commission from the airlines. According to the Assessing Officer, in that case, the assessee was liable to deduct tax at source on the payments made to the airlines. As can be noticed, the factual position is somewhat similar to the facts of the present case. Here also, the assessee collects freight charges from the clients who intended to transport their goods through separate transporters. The entire amount collected from the clients is paid to the transporters after deducting commission from the said amount.

8. In **Cargo Linkers** (supra), it was contended on behalf of the assessee that the assessee was not the 'person responsible' for making payment in terms of Section 194C of the said Act. In that case, the Tribunal had also noted and found as a matter of fact that the assessee was nothing but an intermediary between the exporters and the airlines as it booked cargo for and on behalf of the exporters and mainly facilitated the contract for carrying goods. The principal contract was between the exporter and the airline. This court, in **Cargo Linkers** (supra), agreed with the view of the Tribunal which had mainly decided an issue of fact, namely, the nature of the contract between the parties concerned. The Court also observed that it had also been found as a matter of fact that the contract was actually between the exporter and the airline and the assessee was only an intermediary and, therefore, it was not the 'person responsible' for deduction of tax at source in terms of Section 194C of the said Act.

9. We feel that the decision in **Cargo Linkers** (supra) completely covers the case in favour of the assessee and against the respondent. The Tribunal has already found as a matter of fact that the contract was between the assessee's clients and the transporters and that the assessee had mainly acted as a facilitator or as an intermediary.

10. In this view of the matter, no question of law arises for our consideration. The appeal is dismissed.

ILR (2013) III DELHI 2104
ITA

ASSOCIATION OF CORPORATION & APEX SOCIETIES OF HANDLOOMS ....APPELLANT

VERSUS

ASSISTANT DIRECTOR OF INCOME TAX ....RESPONDENT

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

ITA NO. : 523/2012 TO 526/2012 DATE OF DECISION: 10.01.2013

Income Tax Rules, 1962—Rule 17—In all the aforementioned four appeals filed by the assessee association, the common fact in issue was that the assessee association had not filed Form 10 prescribed under Rule 17 of the Income Tax Rules alongwith its annual returns of the relevant assessment years, but in three of the said cases, had filed it during the course of re-assessment proceedings and in the fourth case (ITA No. 523/2012) had filed it only at the stage of the appeal before the Tribunal—Tribunal rejected the claim of the assessee for accumulation of income on the ground that Form 10 could have been only filed during the course of initial assessment proceedings. Held: The assessee could not have filed the Form 10 at the stage of appeal, for the said form has to be filed before the assessment is completed and hence ITA No. 523/2012 stands dismissed. As regards the other three ITAs, though re-opening of an assessment cannot be asked for by the assessee on the ground that he

had not furnished the Form 10 during the original assessment proceedings, however when the revenue itself reopens the assessment by invoking section 147 of the Income Tax Act, the assessee cannot be barred from furnishing Form 10 during such proceedings. The said three ITAs therefore stand allowed.

The learned counsel for the revenue relied on this portion of the finding of the Supreme Court to contend that during re-assessment proceedings, the said Form-10 could not be furnished by an assessee. However, we have to keep in mind the fact that while reopening of an assessment cannot be asked for by the assessee on the ground that he had not furnished the Form-10 during the original assessment proceedings, this does not mean that when the revenue re-opens the assessment by invoking Section 147 of the said Act, the assessee would be remediless and would be barred from furnishing Form-10 during those assessment proceedings. Consequently, insofar as the second question is concerned and with regard to the appeal No's 524/2012, 525/2012 and 526/2012, the same has to be answered in favour of the assessee/appellant and against the revenue. However, with regard to the ITA No.523/2012 because the Form-10 was filed only before the Tribunal, the question has to be decided, in that appeal, against the assessee and in favour of the revenue. **(Para 6)**

Important Issue Involved: When the revenue itself reopens the assessment by invoking section 147 of the Income Tax Act, the assessee cannot be barred from furnishing From 10 during such proceedings.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Rajat Navet and Mr. Kushagra Pandit, Advocates.

FOR THE RESPONDENT : Mr. Sanjeev Sabharwal, Sr. Standing counsel with Mr. Puneet Gupta, Jr. Standing counsel with Ms. Gayatri Verma, Advocates.

RESULT: I.T.A. 523/2012 Dismissed other appeals allowed to extent indicated.

BADAR DURREZ AHMED, J. (ORAL)

CM 15411/2012 in ITA No.524/2012

CM 15423/2012 in ITA No.525/2012

CM 15434/2012 in ITA No.526/2012

Exemption is allowed subject to all just exceptions.

The applications are disposed of.

ITA No.523/2012

ITA No.524/2012

ITA No.525/2012

ITA No.526/2012

These appeals were admitted for hearing by an order dated 04.09.2012 on the following substantial questions of law :-

"(i) Was the Tribunal correct in holding that the sum of Rs.9.80 crores, which accrued towards interest on Fixed Deposits, made by the Assessee (to secure the bank guarantee amount furnished to the State of Bihar) bear the character of income in the Assessee's hands for the relevant years under appeal?

(ii) Was the Tribunal correct in rejecting the claim for accumulation of income on the ground that Form-10 had not been furnished along with the return but was filed during the course of the assessment proceedings?"

The learned counsel for the appellant took up arguments on the second question first. He submitted that insofar as ITA No.523/2012 is concerned (which pertains to assessment year 2001-02), the Form-10 prescribed under Rule 17 of the Income Tax Rules, 1962 was filed only at the stage of the appeal before the Tribunal. In respect of the other

three appeals, which pertain to assessment years 1998-99, 1999-2000, 2000-01 the said Form-10 has been furnished during the course of re-assessment proceedings pursuant to proceedings initiated under Section 147 of the Income Tax Act, 1961 (hereinafter referred to as the said Rules).

2. It is an admitted position, in view of several decisions of the Courts including the decision of the Supreme Court in the case of **CIT Vs. Nagpur Hotel Owners Association** : (2001) 247 ITR 201 (SC), that the said Form-10 could be furnished by the assessee up to the stage of completion of the assessment under Section 143(3) of the said Act. The only point in issue in the present case is whether the Form-10 could be furnished by the assessee for the purposes of Section 11 of the said Act during the re-assessment proceedings.

3. The learned counsel for the revenue contended that Form-10 could be produced by the assessee only up to the completion of the original assessment proceedings under Section 143(3). He submitted that the re-assessment proceedings are for the benefit of the revenue and the assessee cannot take advantage of the same. Therefore, in the course of re-assessment proceedings the assessee would not be entitled to furnish the said Form-10 to seek the benefit of Section 11 of the said Act.

4. On the other hand, the learned counsel for the assessee/appellant submitted that assessment included re-assessment as was evident from Section 2(8) of the said Act. Therefore, whether the assessment was an original assessment or as a part of a re-assessment, it would not make any difference and that the assessee would be entitled to file the said Form-10 in either of the two proceedings and the revenue would have to take the said form that into account.

5. Having considered the arguments advanced by the counsel for the parties on this aspect of the matter we feel that it would be necessary to set out the reasoning adopted by the Supreme Court in **Nagpur Hotel Owners Association** (supra). The Supreme Court held as under :-

> "It is abundantly clear from the wording of sub-section (2) of section 11 that it is mandatory for the person claiming the benefit of section 11 to intimate to the assessing authority the particulars required, under rule 17 in Form No. 10 of the Rules. If during the assessment proceedings, the Assessing Officer does not have the necessary information, question of excluding such income from assessment does not arise at all. As a matter of fact, this benefit of excluding this particular part of the income from the net of taxation arises from section 11 and is subjected to the conditions specified therein. Therefore, it is necessary that the assessing authority must have this information at the time he completes the assessment. In the absence of any such information, it will not be possible for the assessing authority to give the assessee the benefit of such exclusion and once the assessment is so completed, in our opinion, it would be futile to find fault with the assessing authority for having included such income in the assessable income of the assessee. Therefore, even assuming that there is no valid limitation prescribed under the Act and the Rules even then, in our opinion, it is reasonable to presume that the intimation required under section 11 has to be furnished before the assessing authority completes the concerned assessment because such requirement is mandatory and without the particulars of this income, the assessing authority cannot entertain the claim of the assessee under section 11 of the Act, therefore, compliance with the requirement of the Act will have to be any time before the assessment proceedings. Further, any claim for giving the benefit of section 11 on the basis of information supplied subsequent to the completion of assessment would mean that the assessment order will have to be reopened. In our opinion, the Act does not contemplate such re-opening of the assessment. In the case in hand it is evident from the records of the case that the respondent did not furnish the required information till after the assessments for the relevant years were completed. In the light of the above, we are of the opinion that the stand of the Revenue that the High Court erred in answering the first question in favour of the assessee is correct, and we reverse that finding and answer the said question in the negative and against the assessee. In view of our answer to the first question, we agree with Mr. Verma that it is not necessary to answer the second question on the facts of this case."

On going through the above extract we find that the Supreme Court observed that it was necessary that the assessing authority must have the information under Form-10 at the time he completes the assessment and

in its absence it is not possible for the assessing authority to give benefit of such exclusion. Furthermore, once the assessment is so completed it would be futile to find fault with the assessing authority for having included such income in the assessable income of the assessee. The Supreme Court held categorically that without the particulars of this income as given in Form-10, the assessing authority cannot entertain the claim of the assessee under section 11 of the Act and therefore, compliance with the requirement of the Act will have to be at any time before the assessment proceedings are completed. The Supreme Court also observed that any claim for giving the benefit of section 11 on the basis of information supplied subsequent to the completion of assessment would mean that the assessment order will have to be reopened. The Supreme Court noticed that the Act did not contemplate such re-opening of the assessment.

6. The learned counsel for the revenue relied on this portion of the finding of the Supreme Court to contend that during re-assessment proceedings, the said Form-10 could not be furnished by an assessee. However, we have to keep in mind the fact that while reopening of an assessment cannot be asked for by the assessee on the ground that he had not furnished the Form-10 during the original assessment proceedings, this does not mean that when the revenue re-opens the assessment by invoking Section 147 of the said Act, the assessee would be remediless and would be barred from furnishing Form-10 during those assessment proceedings. Consequently, insofar as the second question is concerned and with regard to the appeal No.s 524/2012, 525/2012 and 526/2012, the same has to be answered in favour of the assessee/appellant and against the revenue. However, with regard to the ITA No.523/2012 because the Form-10 was filed only before the Tribunal, the question has to be decided, in that appeal, against the assessee and in favour of the revenue.

7. In view of the fact that we have decided the question No.2 as above, the learned counsel for the appellant does not press for a decision on question No.1.

As a result appeal no.523/2012 is dismissed. The other appeals are allowed to the extent indicated above. There shall be no order as to costs.

ILR (2013) III DELHI 2110
ST. APPL.

COMMISSIONER OF SERVICE TAX ....PETITIONER

VERSUS

CONSULTING ENGINEERING SERVICES (I) PVT. LTD. ....RESPONDENT

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

ST. APPL. NO. : 76/2012 DATE OF DECISION: 14.01.2013

Service Tax—Finance Act, 1994–Taxable event—Respondent assessee company provided certain services prior to 14.05.2003 and also raised bills with respect to the same prior to 14.05.2003 but payments were received after 14.05.2003—Vide order dated 16.03.2012, CESTAT held the rate of service tax to be levied on the assessee to be 5% in as much as the service had been provided prior to 14.05.2003—Appellant aggrieved by the said order and sought to place reliance upon Rule 5B of the Service Tax Rules, 1994 and section 67A of the Finance Act to contend that the rate of tax to be levied should have been fixed at 8%. Held:- None of the provisions on which reliance is being sought are applicable in as much as the relevant period for determining the rate of tax to be levied is April, 2003 to September, 2003 and Rule 5B of the Service Tax Rules came into effect only on 01.04.2011 and section 67A of the Finance Act, 1994 was inserted only w.e.f 28.05.2012. The taxable event, as per the Finance Act, 1994 is the providing of the taxable service, which in the present case took place prior to 14.05.2003 and therefore the rate of 5% applicable prior to this date could only be levied. Appeal of revenue dismissed.

However, we find that none of these provisions are applicable in the facts and circumstances of the present case as Rule 5B of the Service Tax Rules, 1994 came into effect on 01.04.2011 and was out of the statute books on 01.07.2012. Section 67A of the Finance Act, 1994, was inserted in the said Act by virtue of the Finance Act, 2012 w.e.f. 28.05.2012. In the present case, the relevant period is April, 2003 to September, 2003. Therefore, none of the above provisions apply. Moreover, even Rule 4(a)(i) of the Point of Taxation Rules 2011 is not applicable because those Rules came into effect on 01.03.2011. **(Para 6)**

In the absence of any Rules, we will have to examine as to what is the taxable event. The taxable event as per the Finance Act, 1994 is the providing of the taxable service. In the present case, we find that not only were the services admittedly provided prior of 14.05.2003 but also the bills have been raised prior to 14.05.2003. The only thing that happened after 14.05.2003 was that the payments were received after that date. That, in our view would not change the date on which the taxable event had taken place. Since the taxable event in the present case took place prior to 14.05.2003, the rate of tax applicable prior to that date would be the one that would apply. In the present case, the rate of 5% would be applicable and not the rate of 8%. Consequently, we answer the question in favour of the respondent and against the appellant. **(Para 7)**

Important Issue Involved: The rate of service tax to be levied on a transaction of services rendered, can only be the rate which is provided for/applicable on the date on which the said service is rendered and not on the date of its billing.

[An Gr]

APPEARANCES:

FOR THE PETITIONER : Mr. Rahul Kaushik, Advocate.

FOR THE RESPONDENT : Mr. M.P. Devnath, Mr. Aditya Bhattacharya, Mr. Tarun Jain, Mr. Bhuvnesh Satija and Mr. Abhishek Anand, Advocates.

CASES REFERRED TO:

1. *Commissioner of Central Excise & Customs* vs. *Reliance Industries Ltd.* : 2010 (19) STR 807 (Guj.).
2. *Reliance Industries Ltd.* vs. *Commissioner of Central Excise, Rajkot* : 2008 (10) STR 243 (Tri-Ahmd.).

RESULT: Appeal Dismissed.

BADAR DURREZ AHMED, J. (ORAL)

1. We have heard the learned counsel for the parties.

2. Admit.

3. With their consent this appeal shall be taken for disposal straightaway. The question for determination is: -

> "Whether, in respect of the services provided prior to 14.05.2003 but, in respect of which payments were received on or after 14.05.2003 service tax was chargeable @ 5% or @8% which rate came into force on 14.05.2003?"

4. The appellant is aggrieved by the order dated 16.03.2012 passed by the Customs, Excise and Service Tax Appellate Tribunal in Service Tax Appeal No.424/2008 where this question has been answered in favour of the assessee and against the department. The Tribunal came to the conclusion that the rate of service tax would be 5% inasmuch as the services had been provided prior to 14.05.2003. While doing so, the Tribunal placed reliance on a decision of the Tribunal, West Zonal Bench, Ahmadabad in the case of **Reliance Industries Ltd. Vs. Commissioner of Central Excise, Rajkot** : 2008 (10) STR 243 (Tri-Ahmd.). We find that the matter had travelled to the Gujarat High Court and the Gujarat High Court, itself, in the case of **Commissioner of Central Excise & Customs Vs. Reliance Industries Ltd.** : 2010 (19) STR 807 (Guj.) had affirmed the decision of the Ahmadabad Tribunal. However, this fact had not been brought to the notice of the Tribunal in the present case. In fact, the matter had travelled even up to the Supreme Court wherein the Supreme Court did not enter into the question because the same had

become academic in that case. In other words, the Supreme Court had not expressed any view on this issue. However, the view of the Gujarat High Court is clear. The view of the Gujarat High Court is that the effective rate of service tax would be based on the date on which the service is provided and not the date of billing.

5. The learned counsel for the appellant submitted that the view taken by the Gujarat High Court is not binding on this Court and based upon this submission he sought to place reliance on Rule 5B of the Service Tax Rules, 1994. He also placed reliance on Rule 4(a)(i) of the Point of Taxation Rules, 2011 as also Section 67A of the Finance Act, 1994.

6. However, we find that none of these provisions are applicable in the facts and circumstances of the present case as Rule 5B of the Service Tax Rules, 1994 came into effect on 01.04.2011 and was out of the statute books on 01.07.2012. Section 67A of the Finance Act, 1994, was inserted in the said Act by virtue of the Finance Act, 2012 w.e.f. 28.05.2012. In the present case, the relevant period is April, 2003 to September, 2003. Therefore, none of the above provisions apply. Moreover, even Rule 4(a)(i) of the Point of Taxation Rules 2011 is not applicable because those Rules came into effect on 01.03.2011.

7. In the absence of any Rules, we will have to examine as to what is the taxable event. The taxable event as per the Finance Act, 1994 is the providing of the taxable service. In the present case, we find that not only were the services admittedly provided prior of 14.05.2003 but also the bills have been raised prior to 14.05.2003. The only thing that happened after 14.05.2003 was that the payments were received after that date. That, in our view would not change the date on which the taxable event had taken place. Since the taxable event in the present case took place prior to 14.05.2003, the rate of tax applicable prior to that date would be the one that would apply. In the present case, the rate of 5% would be applicable and not the rate of 8%. Consequently, we answer the question in favour of the respondent and against the appellant.

The appeal is dismissed.

ILR (2013) III DELHI 2114
ITR

THE ORIENTAL INSURANCE CO. LTD. ....APPELLANT

VERSUS

CIT ....RESPONDENT

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

ITR NO. 113-117/1998 DATE OF DECISION: 17.01.2013

Income Tax Act, 1961—Section 44—Common questions referred to the Court in the aforementioned five ITRs—Assessee company, being in the business of insurance, in its balance sheets of the relevant assessment years included 'export market development allowance' as a 'reserve'—Revenue sought to adjust the same as an expenditure by invoking Rule 5(a) of the First Schedule to the Act. Held:- For the purposes of income tax, the figures in the accounts of the assessee drawn up in accordance with the provisions of the First Schedule to the Income Tax Act and satisfying the requirements of the Insurance Act are binding on the Assessing Officer under the Income Tax Act and he has no power to correct the errors in the accounts of an insurance business and hence the export market development allowance shown as reserve in the accounts of the assessee company cannot be altered. Once it is recognized as a reserve it is neither an expenditure nor an allowance and therefore no adjustment can be made by invoking Rule 5 (a) of the First Schedule to the Income Tax Act.

Mr Sabharwal, however, contended that it was not a reserve but an allowance. However, on going through the balance-sheet, we find that the export market development allowance has been shown as a reserve. In the very same decision,

that is, in the case of **General Insurance Corporation of India** (supra), the Supreme Court observed that there was another approach to the same issue which was that Section 44 of the said Act read with the rules contained in the First Schedule, laid down an artificial mode of computing profits and gains of an insurance business. For the purposes of income tax, the figures in the accounts of the assessee drawn up in accordance with the provisions of the First Schedule to the Income Tax Act and satisfying the requirements of the Insurance Act are binding on the Assessing Officer under the Income Tax Act and he has no general power to correct the errors in the accounts of an insurance business and undo the entries made therein. Keeping this in mind, it is clear that the accounts reveal that the said export market development allowance has been shown as a reserve and that cannot be altered. Once it is recognized as a reserve, then it is neither an expenditure nor an allowance and, therefore, the very first condition, which was required to be satisfied, as indicated by the Supreme Court decision, has not been satisfied in this case and, therefore, no adjustment can be made by invoking Rule 5(a) of the First Schedule to the said Act. **(Para 14)**

Important Issue Involved: Accounts of an insurance company drawn up in accordance with the requirements of the Insurance Act are binding on the Assessing Officer under the Income Tax Act and he has no powers to alter the same.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. M.S. Syali, Sr. Advocate with Mr. Mayank Nagi and Mr. Prakhar Dixit.

FOR THE RESPONDENT : Mr. Sanjeev Sabharwal with Mr. Puneet Gupta.

CASES REFERRED TO:

1. *General Insurance Corporation of India* vs. *CIT:* 240 ITR 139 (SC).
2. *Oriental Fire and General Insurance Co. Ltd.* vs. *CIT:* 278 ITR 312 (Del).
3. *Britannia Industries Ltd.* vs. *CIT & Anr.* : 278 ITR 546 (SC).
4. *CIT* vs. *Hero Cycles Pvt. Ltd. & Ors:* 228 ITR 463 (SC).
5. *CIT* vs. *Oriental Fire and General Insurance Co. Ltd:* 291 ITR 370 (SC).

RESULT: Reference stands Disposed of.

BADAR DURREZ AHMED, J. (ORAL)

1. In these references, several common questions have been referred to this Court. The assessee's references are ITR 113/1998 and ITR 114/1998 pertaining to the assessment years 1980-81 and 1981-82, respectively. The department's references are ITR 115/1998, ITR 116/1998 and ITR 117/1998, which pertain to the assessment years 198081 and 1981-82. In ITR 113/1998, which is the assessee's reference, the following questions have been referred to this Court for consideration:-

(I) Whether on the facts and circumstances of the case and a true interpretation of Section 44 of the Income Tax Act, 1961 read with Rule 5 of the First Schedule to the said Act, the Tribunal was right in confirming the addition of Rs. 85,55,077/-representing tax deducted at source to the balance of profits disclosed by the annual accounts of the appellant insurance company?

(II) Whether on the facts and circumstances of the case and a true interpretation of Section 44 of the Income Tax Act, 1961 read with Rule 5 of the First Schedule to the said Act, the Tribunal was right in confirming the addition of provision for taxation to Rs. 9,30,00,000/- to the balance of profits disclosed by the annual accounts of the appellant insurance company?

(III) Whether on the facts and circumstances of the case and a true interpretation of Section 44 of the Income Tax Act,

1961 read with Rule 5 of the First Schedule to the said Act, the Tribunal was right in rejecting the applicant insurance company claim for allowing weighted deduction under Section 35B of the Act at Rs. 82,19,658/ in respect of total expenditure of Rs. 1,04,93,445/-?

2. ITR 114/1998, which is also a reference of the assessee, raises the same three questions, though the amounts mentioned therein are different. The amounts in ITR 114/1998 are -Rs. 2,02,98,457/- and Rs. 9,50,00,000/- in question Nos. I and II, respectively. Insofar as question No. III is concerned, the amounts are -Rs. 1,07,76,524/- and Rs. 3,23,29,571/-.

3. Thus, it is seen that the questions in the two references on behalf of the assessee are identical except for the differences in the amounts.

4. Insofar as the department's reference is concerned, only two questions arise for consideration. In ITR 115/1998, the following question has been referred to us:

(IV) Whether on the facts and circumstances of the case, the ITAT is right in law in holding that assessee's claim for deduction of Rs. 1,08,66,420/- and Rs. 49,341/- being reserves for export market development allowance and bad/ doubtful debt is allowable under the Income Tax Act, 1961?

5. In ITR 116/1998, the following question has been referred to us:-

(V) Whether on the facts and circumstances of the case, the ITAT is right in law in holding the disallowance of Rs. 57,047/- made under Section 37 (4) of the Income Tax Act on account of expenditure on lease rent, taxes and repairs and maintenance of a guest house, on the ground that this expenditure was allowable under certain other provisions of the Income Tax Act?

6. Insofar as ITR 117/1998 is concerned, the question in this reference is identical to question No. IV above except that the amounts are Rs. 1,16,14,440/- and Rs. 3,94,916/-. ITR 115/1998 pertains to the assessment year 1980-81, ITR 116/1998 pertains to the assessment year

1981-82 and so does ITR 117/1998. Thus, although there are several questions referred in each of the references mentioned above, only five questions need to be answered by this Court.

7. Insofar as question Nos. (I) and (II) are concerned, they are covered against the revenue by virtue of the Supreme Court decision in the assessee's own case in **CIT v. Oriental Fire and General Insurance Co. Ltd:** 291 ITR 370 (SC). Question Nos. (I) and (II) are, therefore, answered in favour of the assessee and against the revenue.

8. Insofar as question No. (III) is concerned, that is covered against the assessee and in favour of the revenue by virtue of the Supreme Court decision in the case of **CIT v. Hero Cycles Pvt. Ltd. & Ors:** 228 ITR 463 (SC).

9. As regards question No. (V), that is also covered against the assessee by virtue of the Supreme Court decision in the case of **Britannia Industries Ltd. v. CIT & Anr.** : 278 ITR 546 (SC).

10. That leaves us with question No. (IV). This question has two parts. One deals with the export market development allowance and the other with bad / doubtful debts. Insofar as the part pertaining to bad/ doubtful debts is concerned, there is no debate that it stands covered against the revenue in the assessee's own case in **CIT v. Oriental Fire and General Insurance Co. Ltd.** (supra) which confirms this court's decision in **Oriental Fire and General Insurance Co. Ltd v. CIT:** 278 ITR 312 (Del).

11. As regards the reserves for export market development allowance, there was some controversy before us inasmuch as according to the learned counsel for the assessee, this aspect also stood covered by the very same decision i.e., **CIT v. Oriental Fire and General Insurance Co. Ltd.** (supra) because the reserves for export market development allowance stood in an identical position as the reserves for bad / doubtful debts and since the question of bad/ doubtful debts has been decided by the Supreme Court in **CIT v. Oriental Fire and General Insurance Co. Ltd.** (supra), the same decision would apply to reserves for export market development allowance. However, the learned counsel for the revenue sought to bring about a distinction in the two elements in this question. He submitted that export market development allowance would have to be construed in the light of the provisions of Section 35B of the

Income Tax Act, 1961. A reference was made to the Supreme Court decision in the case of **General Insurance Corporation of India v. CIT:** 240 ITR 139 (SC).

12. In the said decision, Section 44 of the Income Tax Act was considered and so was the First Schedule to the said Act and particularly Rule 5(a) thereof. The Supreme Court observed that Section 44 of the said Act is a special provision governing computation of taxable income earned from the business of insurance. It further observed that the said provision begins with a non-obstante clause and thus has an overriding effect over other provisions contained in the Act. The Supreme Court noted that the provision mandates the assessing authorities to compute the taxable income for business of insurance in accordance with the provisions of the First Schedule. Furthermore, the Supreme Court held that a plain reading of Rule 5(a) of the First Schedule of the said Act makes it clear that in order to attract the applicability of the said provision the amount in question should satisfy twin conditions. First of all, it must be an expenditure or allowance and secondly, it should be one not admissible under the provisions of Section 30 to 43A of the said Act. The Supreme Court also held that if the amount was not an expenditure or allowance, the question of testing its eligibility for adjustment by reference to Rule 5(a) of the First Schedule would not arise at all.

13. Mr Syali, the learned senior counsel appearing on behalf of the assessee, submitted that the very first test is not satisfied in the present case inasmuch as the export market development allowance is actually a reserve and it has been shown as such in the accounts of the assessee. He further states that it is also so treated in the statement of the case which has been prepared by the Tribunal, while referring the said question to this Court.

14. Mr Sabharwal, however, contended that it was not a reserve but an allowance. However, on going through the balance-sheet, we find that the export market development allowance has been shown as a reserve. In the very same decision, that is, in the case of **General Insurance Corporation of India** (supra), the Supreme Court observed that there was another approach to the same issue which was that Section 44 of the said Act read with the rules contained in the First Schedule, laid down an artificial mode of computing profits and gains of an insurance business. For the purposes of income tax, the figures in the

accounts of the assessee drawn up in accordance with the provisions of the First Schedule to the Income Tax Act and satisfying the requirements of the Insurance Act are binding on the Assessing Officer under the Income Tax Act and he has no general power to correct the errors in the accounts of an insurance business and undo the entries made therein. Keeping this in mind, it is clear that the accounts reveal that the said export market development allowance has been shown as a reserve and that cannot be altered. Once it is recognized as a reserve, then it is neither an expenditure nor an allowance and, therefore, the very first condition, which was required to be satisfied, as indicated by the Supreme Court decision, has not been satisfied in this case and, therefore, no adjustment can be made by invoking Rule 5(a) of the First Schedule to the said Act.

15. We may point out that all the years in question are prior to 01.04.1989, when an amendment was introduced in Rule 5(a) of the First Schedule to the said Act. By virtue of that amendment, the following phrase was added:-

> "including any amount debited to the profit and loss account either by way of a provision for any tax, dividend, reserve or any other provisions as may be prescribed."

In the present case, since the relevant assessment years are all prior to 01.04.1989, this additional phrase would not apply. Even the Supreme Court decision in **General Insurance Corporation of India** (supra) was in respect of the assessment years 1977-78 when this phrase was not there in the statute book.

16. Consequently, this aspect of the matter pertaining to reserves for export market development allowance would also have to be decided in favour of the assessee and against the revenue. It is so decided. All the questions stand answered. The references stand disposed of accordingly.

ILR (2013) III DELHI 2121
ITA

COMMISSIONER OF INCOME TAX ....APPELLANT

VERSUS

ABHINAV KUMAR MITTAL ....RESPONDENT

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

ITA NO. : 42/2013 DATE OF DECISION: 23.01.2013

Income Tax Act, 1961—Section 69—Assessee filed on 18.07.2006, his return declaring his income, including income earned from immovable properties as Rs. 39,90,410/- Search and survey operations were carried out on the properties of the assessee and during assessment proceedings, Assessing Officer referred the question of valuation of 3 immovable properties to the District Valuation Officer (DVO) and on the basis of the Valuation report of the DVO, Assessing Officer u/s 69 of the Act, made an addition of about Rs. 59,78,938/- in the income of the assessee—On appeal, both CIT and Tribunal deleted the additions made by holding that the reference to the DVO was not in accordance with law and that even otherwise the report of the DVO was based on incomparable sales and therefore could not be relied upon. Held: When no material was found during the search and survey to justify the reference to the DVO, the view of the Tribunal that the reference to the DVO was not in accordance with law, is absolutely correct. Further DVO's valuation being based on incomparable sales is impermissible in law.

We have no reason to differ from the view taken by the Tribunal, particularly, as no material was found in the search and seizure operations, which would justify the Assessing

Officer's action in referring the matter to the DVO for his opinion on valuation of the said properties. If that be the case, then the valuation arrived at by the DVO would be of no consequence. In any event, the Tribunal has also, on facts, held that the DVO's valuation was based on incomparable sales, which is not permissible in law.

(Para 6)

Important Issue Involved: A condition precedent for making a reference to the District Valuation Officer with respect to the valuation of the immovable properties of an assessee is that there must be some material to show that the investment made by the assessee with respect to the said properties was outside the books and in the absence of any such material, an Assessing Officer cannot make additions in the income of an assessee, earned from the said properties, based on the report of the valuation officer.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Sanjeev Rajpal.

FOR THE RESPONDENT : None.

RESULT: Appeal Dismissed.

BADAR DURREZ AHMED, J (ORAL)

1. This appeal has been filed by the revenue against the order dated 29.06.2012 passed by the Income Tax Appellate Tribunal in ITA 4460/Del/2010 pertaining to the assessment year 2006-07.

2. The facts are that the respondent/ assessee had filed a return declaring an income of Rs. 39,90,410/- on 18.07.2006. Subsequently, a search was conducted under Section 132 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') on 26.04.2007 as also a survey operation under Section 133A in the premises of A. K. Capital Services Limited and its group companies as also in the premises of the Directors of those companies and their relatives. Thereafter, a notice under Section 153C of the said Act was issued on 07.10.2009. A response was issued

by the assessee by their letter dated 13.10.2009 and the return already filed on 18.07.2006 was requested to be treated as the return in response to the said notice under Section 153C.

3. The Assessing Officer, in the course of the assessment proceedings, considered the valuation of three properties which had been purchased by the assessee in the relevant year. The three properties included two office premises at Ahmedabad and one commercial property at Kolkata. The Assessing Officer referred the question of valuation of the said properties to the District Valuation Officer (DVO). The DVO submitted his report on 14.12.2009 in respect of the Ahmedabad properties and on 24.12.2009 in respect on the Kolkata property. As per the said report, the DVO has valued the said properties as under:-

Sl. No.	Address of the property	Value determined by DVO [in Rs.]	Value deeeclared by the assessee [in Rs.]	Difference [in Rs.]
(i)	101, Kaivana Building Malkans, Near Polytechnic Ahmedabad	44,00,600/-	18,00,000/-	26,00,600/-
(ii)	102, Kaivana Building Malkans, Near Polytechnic Ahmedabad	41,57,300/-	17,36,000/-	24,21,300/-
(iii)	Commercial Property Chowranghee, Kolkata	43,19,800/-	32,11,680/-	11,08,120/-

4. The difference in the values, as declared by the assessee and as opined by the DVO, amounted to ' 50,21,900/- in respect of the properties at Ahmedabad and an amount of ' 9,57,038/- was the difference in respect of the Kolkata property. These additions were made by the Assessing Officer under Section 69 of the said Act.

5. Being aggrieved by the said additions, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals), who deleted the additions. The Income Tax Appellate Tribunal confirmed the said deletion. The issue that is sought to be raised here is that the deletion was not in accordance with law. However, we find that the Income Tax Appellate Tribunal as well as the Commissioner of Income Tax (Appeals) had concluded, on facts, that there was no material found during the search to justify the reference to the DVO for his valuation of the said properties. The Tribunal held that there must be some material to show that the investment made by the assessee was outside the books. This, according to the Tribunal, was a condition precedent for making a reference to the DVO. The Tribunal also held that, in any event, the DVO's report was based on incomparable sales and, therefore, could not be relied upon. The Tribunal also held that the burden was on the revenue to show that the real investment in the said properties was greater than the apparent investment, as disclosed by the respondent/ assessee. The Tribunal held, on facts, that the said burden had not been discharged by the revenue. Consequently, the Tribunal held in favour of the assessee and against the revenue and found that the reference to the DVO itself was not in accordance with law.

6. We have no reason to differ from the view taken by the Tribunal, particularly, as no material was found in the search and seizure operations, which would justify the Assessing Officer's action in referring the matter to the DVO for his opinion on valuation of the said properties. If that be the case, then the valuation arrived at by the DVO would be of no consequence. In any event, the Tribunal has also, on facts, held that the DVO's valuation was based on incomparable sales, which is not permissible in law.

7. For these reasons, no question of law arises for our consideration. The appeal is dismissed. There shall be no order as to costs.

ILR (2013) III DELHI 2125
CRL. M.C.

KANAK INSTALLMENTS PVT. LTD. ....PETITIONER

VERSUS

STATE OF NCT OF DELHI & ANR. ....RESPONDENTS

(G.P. MITTAL, J.)

CRL. M.C. NO. : 649/2012, 838/2012 & CRL. M.A. NO. 2254/2012 & 2936/2012

DATE OF DECISION: 12.02.2013

Code of Criminal Procedure, 1973—Section 482; Indian Penal Code, 1860—Section 406, 420—Petition was quashing of criminal complaint against Petitioner—Inherent powers of the Court u/s 482—SCOPE HELD—Though very wide have to be invoked sparingly and with circumspection only (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of the Court and (iii) otherwise to secure the ends of justice, Inherent powers of the Court to quash an FIR or a criminal complaint can be invoked where the allegations made in the complaint even if admitted do not disclose any offence. Since there are disputed questions of fact, Court in exercise of its power u/s 482 cannot be stifled with the Petitioner's prosecution. Petition dismissed.

It is very well settled that inherent powers under Section 482 of the Code though very wide have to be invoked sparingly and with circumspection only (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of the Court and (iii) otherwise to secure the ends of justice. In **Satish Mehra v. State (NCT of Delhi) & Anr.,** (Criminal Appeal No.1834/2012) decided on 22.11.2012, the Supreme Court held that inherent powers of the High Court to quash

an FIR or a criminal complaint can be invoked where the allegations made in the complaint even if admitted do not disclose any offence. The relevant part of the report in Satish Mehra is extracted hereunder:

> "15. The power to interdict a proceeding either at the threshold or at an intermediate stage of the trial is inherent in a High Court on the broad principle that in case the allegations made in the FIR or the criminal complaint, as may be, prima facie do not disclose a triable offence there can be reason as to why the accused should be made to suffer the agony of a legal proceeding that more often than not gets protracted. A prosecution which is bound to become lame or a sham ought to interdicted in the interest of justice as continuance thereof will amount to an abuse of the process of the law. This is the core basis on which the power to interfere with a pending criminal proceeding has been recognized to be inherent in every High Court. The power, though available, being extraordinary in nature has to be exercised sparingly and only if the attending facts and circumstances satisfies the narrow test indicated above, namely, that even accepting all the allegations levelled by the prosecution, no offence is disclosed...." **(Para 9)**

The criminal proceedings are quashed by the High Court in exercise of its inherent powers under Section 482 of the Code on the premise that the criminal prosecution should not be and ought not to be permitted to denigrate into a weapon of harassment or persecution. **(Para 10)**

In **Janta Dal v. H.S. Chowdhary & Ors.,** (1992) 4 SCC 305, the Supreme Court, while referring to the inherent powers to make orders as may be necessary for the ends of justice, clarified that such power has to be exercised in appropriate cases *ex debito justitiae*, that is, to do real and substantial justice, for administration of which alone the Courts exist. The powers possessed by the High Court

under Section 482 of the Code are very wide plentitude and the powers require great caution in its exercise. The High Court, being the highest Court exercising criminal jurisdiction in a State, has inherent powers to make any order for the purposes of securing the ends of justice. Being an extraordinary power, it will, however, not be pressed in aid except for remedying a flagrant abuse by a subordinate Court of its powers. **(Para 11)**

It is true that repossession of the vehicle in terms of the Hire Purchase Agreement will not amount to any criminal offence. The facts of the instant case, however, are distinguishable. Respondent No.2's (the Complainant) case is that Hire Purchase Agreement was a only cloak to deprive him of his bus and he was not paid any money by the Petitioner. **(Para 14)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Vibhor Verdhan, Advocate.

FOR THE RESPONDENTS : Ms. Rajdipa Behura, APP for State Mr. Ajit Kumar & Ms. Saira Sharma, Advocates for R-2.

CASES REFERRED TO:

1. *Satish Mehra* vs. *State (NCT of Delhi) & Anr.,* (Criminal Appeal No.1834/2012) decided on 22.11.2012.
2. *Charanjit Singh Chadha & Ors.* vs. *Sudhir Mehra,* (2001) 7 SCC 417.
3. *Sunil Kumar* vs. *M/s Escorts Yamaha Motors Ltd. & Ors.,* (1999) 8 SCC 468
4. *Janta Dal* vs. *H.S. Chowdhary & Ors.,* (1992) 4 SCC 305.

RESULT: Petition dismissed.

G.P. MITTAL, J. (ORAL)

1. The Petitioners invoke inherent powers of this Court under Section

482 of the Code of Criminal Procedure ('the Code') for quashing a Criminal Complaint filed by Respondent No.2 for offence punishable under Sections 406/420 IPC.

2. The case of the Petitioners is that on 02.08.2000 Respondent No.2 (the Complainant) along with Petitioner Devpal Singh (in Crl.M.C. 838/2012) approached the Petitioner M/s Kanak Installments Pvt. Ltd. for grant of a loan of Rs. 1,00,000/- on the basis of the 'Agreement of Hire Purchase', which was duly signed by Respondent No.2 (the Complainant).

3. It is common case of Petitioners (in both the Petitions) that the Petitioner Devpal Singh stood as a guarantor for the earlier said finance of Rs. 1,00,000/-. A cheque No.076066 dated 20.03.2001 drawn at Oriental Bank of Commerce, Rishikesh was delivered to Respondent No.2 (the Complainant). The cheque was encashed and the payment was collected by Respondent No.2 (the Complainant) on the same date.

4. According to the Petitioner (in Crl.M.C.649/2012), after obtaining the loan of Rs. 1,00,000/- Respondent No.2 disappeared and very cleverly and maliciously filed a false Complaint dated 13.12.2001 against M/s Kanak Installments Pvt. Ltd. Company and its Director and also against the guarantor alleging that they cheated him of an amount of Rs. 1,00,000/-. It is stated that instead of repaying the loan amount of Rs.1,00,000/-, Respondent No.2 filed the Complaint to blackmail the Petitioner and to obtain illegal monetary gains.

5. In Crl.M.C. 838/2012, the Petitioner who was arrayed as Accused No.3 in the Complaint states that Respondent No.2 (the Complainant) was his friend and also a relative. He (Respondent No.2) was in dire need of money. Keeping in view the old friendship and the relation, the Petitioner Devpal Singh approached M/s Kanak Installments Pvt. Ltd. Company along with Respondent No.2 (the Complainant) for grant of loan of Rs. 1,00,000/-. Petitioner Devpal Singh also states that the loan amount was given to Respondent No.2 (the Complainant) by the earlier said cheque and thereafter he (the Complainant) and also Petitioner Devpal Singh submitted a post dated cheque for the amount of Rs. 1,00,000/- in favour of the Petitioner M/s Kanak Installments Pvt. Ltd. Company. The Petitioner Devpal Singh says that after the grant of loan, he was not aware of the whereabouts of Respondent No.2. According to him, because of non-

payment of the loan amount by Respondent No.2, the cheque given by him (Petitioner Devpal Singh) in favour of M/s Kanak Installments Pvt. Ltd. Company (Petitioner in Crl.M.C.649/2012) was presented to the bank by the Company. Since, the cheque was dishonoured proceedings under Section 138 of the Negotiable Instruments Act, 1881 ('the Act') were also preferred against him (Devpal Singh) by M/s Kanak Installments Pvt. Ltd. Company. It is stated that the Complaint filed by Respondent No.2 (the Complainant) is false, manipulated and procured. It fails to constitute an offence punishable under Sections 420/406 IPC and is thus, liable to be quashed.

6. The Petition is resisted by Respondent No.2.

7. I have heard learned counsel for the parties and have perused the record.

8. It is urged by Mr.Vibhor Vardhan the learned counsel for the Petitioner that repossession of the goods in pursuance of the Hire Purchase Agreement may not amount to any criminal offence. In support of the contention, reliance is placed on **Charanjit Singh Chadha & Ors. v. Sudhir Mehra,** (2001) 7 SCC 417. He also relies on **Sunil Kumar v. M/s Escorts Yamaha Motors Ltd. & Ors.,** (1999) 8 SCC 468, to contend that where an FIR is lodged to pre-empt the filing of a criminal complaint against informant and where there is failure to make out necessary ingredients of the offence of cheating or criminal breach of trust, the High Court will be well within its power to quash the FIR.

9. It is very well settled that inherent powers under Section 482 of the Code though very wide have to be invoked sparingly and with circumspection only (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of the Court and (iii) otherwise to secure the ends of justice. In **Satish Mehra v. State(NCT of Delhi) & Anr.,** (Criminal Appeal No.1834/2012) decided on 22.11.2012, the Supreme Court held that inherent powers of the High Court to quash an FIR or a criminal complaint can be invoked where the allegations made in the complaint even if admitted do not disclose any offence. The relevant part of the report in Satish Mehra is extracted hereunder:

> "15. The power to interdict a proceeding either at the threshold or at an intermediate stage of the trial is inherent in a High Court on the broad principle that in case the allegations made in the FIR or the criminal complaint, as may be, prima facie do not disclose a triable offence there can be reason as to why the accused should be made to suffer the agony of a legal proceeding that more often than not gets protracted. A prosecution which is bound to become lame or a sham ought to interdicted in the interest of justice as continuance thereof will amount to an abuse of the process of the law. This is the core basis on which the power to interfere with a pending criminal proceeding has been recognized to be inherent in every High Court. The power, though available, being extraordinary in nature has to be exercised sparingly and only if the attending facts and circumstances satisfies the narrow test indicated above, namely, that even accepting all the allegations levelled by the prosecution, no offence is disclosed...."

10. The criminal proceedings are quashed by the High Court in exercise of its inherent powers under Section 482 of the Code on the premise that the criminal prosecution should not be and ought not to be permitted to denigrate into a weapon of harassment or persecution.

11. In **Janta Dal v. H.S. Chowdhary & Ors.,** (1992) 4 SCC 305, the Supreme Court, while referring to the inherent powers to make orders as may be necessary for the ends of justice, clarified that such power has to be exercised in appropriate cases *ex debito justitiae*, that is, to do real and substantial justice, for administration of which alone the Courts exist. The powers possessed by the High Court under Section 482 of the Code are very wide plentitude and the powers require great caution in its exercise. The High Court, being the highest Court exercising criminal jurisdiction in a State, has inherent powers to make any order for the purposes of securing the ends of justice. Being an extraordinary power, it will, however, not be pressed in aid except for remedying a flagrant abuse by a subordinate Court of its powers.

12. There is no gain saying that if the averments made in the Complaint do not constitute a criminal offence, the FIR is liable to be quashed. The case of Respondent No.2 (the Complainant) is that Petitioner No.2 (in Crl.M.C.649/2012) and the Petitioner (in Crl.M.C. 838/2012) were in league. According to him, these two Petitioners had entered into a criminal conspiracy to defraud Respondent No.2 with that object Accused No.3 (Petitioner Devpal Singh) came forward to get Respondent No.2 a

loan of Rs. 1,00,000/- against hypothecation of his bus No.UA-7/4391. According to Respondent No.2, it was Petitioner Devpal Singh who persuaded him under an illegal design to change the registration of the bus from Delhi to Dehradun (U.P.) and he handed over the original registration certificate of the bus to Petitioner Devpal Singh for its temporary registration with the Motor Vehicle Department, Dehradun (U.P.). It is the case of Respondent No.2 (the Complainant) that Accused Nos.3 and 4 induced him to sign some documents. Accused Nos.2 and 3 (Petitioners herein) also obtained his signatures on some documents and also on a blank cheque for Rs.1,00,000/- prepared in the name of Respondent No.2 (the Complainant). Paras 3 to 9 of the Complainant are extracted hereunder:-

> "3. That Sh.Dev Pal, S/o Sh. Hukum Singh, R/o D-47, Sanjay Colony, Dehradun (Uttranchal) is relative of the complainant and guarantor of the finance transaction entered with the "Kanak Installments Pvt. Ltd." for financing for purchase of bus against hypothecation of my Bus No.UA-7/4391.
>
> 4. That both the Accused No.2 & 3 had under a planned strategy defrauded the complainant. The complainant owned one bus and wanted to purchase another bus. The accused no.3 had given assurance to complainant to get against hypothecation of the complainant's Bus No.UA-7/4391. Sh. Dev Pal, the accused No.3 had taken the complainant the Dehradun and persuaded under an illegal design to change the registration of the bus from Delhi to Dehradun, Utter Pradesh and the original R/C paper of the bus were handed over to Sh.Dev Pal for temporary registration of the bus with the department of Motor Vehicle, Dehradun.
>
> 5. That on 19th March, 2001, Sh.Dev Pal, accused No.3 and Sh.Dinesh Goel (employee of the company), accused No.4 had come to the complainant's residence in Delhi and induced the complainant to settle the terms of the finance transaction in the presence of Sh.Amar Pal Singh. The accused No.3 and 4 further induced and pressurized the complainant to sign documents for the finance transaction. That on the same day, the accused No.3 and 4 took the complainant and Sh.Amar Singh to Sh.Ramesh Chand (Director Kanak Installments Pvt. Ltd.) at the Registered

> office at Delhi Road, Meerut. There Sh.Ramesh Chand, accused No.2 and Sh.Dev Pal, accused No.3 in connivance and collusion with had pressurized the complainant to sign the papers and under protest had taken the signatures of the complainant on several written and printed papers of "Kanak Installments Pvt. Ltd.", along with some blank papers. The complainant had signed all the papers in the presence of Sh.Amar Pal Singh, as the complainant desperately want to finance for another bus and also because want to finance for another bus and also because the complainant is a semi-illiterate person and had deposed faith on Sh.Dev Pal, accused No.3. Sh.Ramesh Chand, accused No.2 had after obtaining signatures on all the documents told the complainant that before handing over the cheque of Kanak Installments Pvt. Ltd., of Rs. One Lac to the complainant, the accused No.2 require post dated cheques of the complainant as security. As the complainant was not having his cheque book of bank A/c in Delhi, Sh.Ramesh Chand, Accused No.2 instructed the complainant to go back to Delhi and bring the cheque book. Sh. Ramesh Chand, accused No.2 also took the signature of the complainant on the back of the aforesaid blank cheque of "Kanak Installments Pvt. Ltd." as a token of acceptance of the transaction but the complaint was told that cheque can only be delivered after post dated cheque are deposited with the company.
>
> 6. That the complainant along with Sh.Amar Pal Singh came back to Delhi on the same day and after collecting the cheque book returned to Meerut on 21.3.2001 and visited the Registered Office of "Kanak Installments Pvt. Ltd." at Delhi Road, Meerut and presented the post dated cheques. However, to the utter shock and surprise, the complainant was told that the payment of Rs. One Lac had already been paid by the company to Sh.Dev Pal, accused No.3 in cash against post dated Cheques of Sh.Dev Pal, accused No.3 that Sh.Dev Pal, accused No.3 was a guarantor in the transaction and not the borrower and therefore, had no authority (written or oral) to receive the said amount on behalf of the complainant. Sh.Dev Pal, accused No.3 was also not authorized to present the original R.C. of the bus for making endorsement of hypothecation, the originals were given to accused No.3 only for safe custody. Sh.Ramesh Chand, accused No.2

Director of Kanak Installments Pvt. Ltd., accused No.2 therefore, had deliberately and in collusion with Sh.Dev Pal had released the amount of ' One Lac in cash without any authority, to defraud the complainant.

7. That the complainant contracted Sh.Dev Pal, accused No.3 and he flatly denied the acceptance of the said amount of Rs. One Lac from Kanak Installments Pvt. Ltd. The complainant also demanded the original papers of the bus. Which were returned by Sh.Dev Pal, but on inspection it was found that the R.C. was endorsed (hypothecated) by Kanak Installments Pvt. Ltd., and on asking for an explanation Sh.Dev Pal started fighting with the complainant.

8. That the complainant had thereafter visited the Registered office of the company several time and at all times Sh. Ramesh Chand, accused No.2 had promised orally that the payment shall be made to the complainant after the same is recovered from Sh.Dev Pal, accused No.3. The accused No. 2 had also requested the complainant not to lodge any complaint with police regarding the transaction as the accused No.2 was confident of recovering money from Sh.Dev Pal, accused No.3 and of the same being paid to the complainant.

9. That the complainant got issued a Regd.A.D./U.P.C. Legal notice dated 10th November, 2001 to the Accused (s) through Sh.Ajit Kumar, Advocate for Recovery of money/cancellation of agreement and/or filing of criminal complaint for cheating and defrauding. On receipt of the aforesaid notice, Mr.Dinesh Goel, employee of Kanak Installments Pvt. Ltd. and Sh.Ramesh Chand, accused No.2 had met the complainant at his residence in Delhi and in the presence of Sh.Amar Pal Singh threatened to withdraw the notice of else be ready of dire consequences."

13. A perusal of photocopy of the cheque, which is placed on the paper book shows that it was a bearer cheque. This fact was not even disputed by the learned counsel for the Petitioner. Thus, Respondent No.2's (the Complainant) averments that amount of Rs. 1,00,000/- was not paid to him or that Accused Nos. 2 and 3 (i.e. Petitioner No.2 in Crl.M.C.649/2012 and Petitioner in Crl.M.C. 838/2012) were in collusion to cheat him (the Complainant) cannot be rejected at this stage.

14. It is true that repossession of the vehicle in terms of the Hire Purchase Agreement will not amount to any criminal offence. The facts of the instant case, however, are distinguishable. Respondent No.2's (the Complainant) case is that Hire Purchase Agreement was a only cloak to deprive him of his bus and he was not paid any money by the Petitioner.

15. Learned counsel for Respondent No.2 (the Complainant) also draws my attention to the photocopy of the cheque which shows that the cheque is in the name of 'Om Veer' whereas the name of Respondent No.2 (the Complainant) even according to the Hire Purchase Agreement is 'Om Bir Singh'. By itself it may not be enough to draw an inference that the Petitioners entered into any conspiracy to cheat Respondent No.2. But in view of the averments made in the complaint, it will be a matter of trial whether the cheque in question was handed over to Respondent No.2 (the Complainant) and whether he (the Complainant) received the payment or not. Since, these are disputed questions of fact; this Court in exercise of its power under Section 482 of the Code cannot be stifled with the Petitioners' prosecution at this stage.

16. The Petitions are devoid of any merits; the same are accordingly dismissed.

17. Pending Applications stand disposed of.

ILR (2013) III DELHI 2135
CRL. M.C.

CHINTAN ARVIND KAPADIA & ANR. ....PETITIONERS

VERSUS

STATE & ANR. ....RESPONDENTS

(G.P. MITTAL)

CRL. M.C. NO. : 3749/2012 DATE OF DECISION: 12.02.2013

Code of Criminal Procedure, 1973—Section 482—Negotiable Instruments Act, 1881—Section 138, 141—Cheques issued by the accused company dishonoured—Petition for quashing of summoning order by Director of the accused company—Petitioner contends that Complaint does not reveal as to how Petitioner was in charge of and responsible for the conduct of business of accused company and mere averment that the Petitioner being a Director was in charge of the and responsible for conduct of the business of the company was not enough—Held—Only bald allegations that Petitioner and other Directors were responsible for the day to day affairs of the accused company. Following law laid down in *National Small Industries Corporation Ltd., Central Bank of India* and *Anita Malhotra,* averments not sufficient to issue process against petitioner. Summoning order quashed—Petition allowed.

The only ground of challenge raised by the learned counsel for the Petitioner is that the Complaint filed by Respondent No.2 did not reveal as to how the Petitioner was in charge of and responsible for the conduct of business of the accused company and mere averments in the complaint that the Petitioner being a Director was in charge of and responsible for conduct of the business of the company was

not enough to issue process against the Petitioner. **(Para 3)**

In **National Small Industries Corporation Ltd. v. Harmeet Singh Paintal & Anr.,** (2010) 3 SCC 330, the Supreme Court analysed the provisions of Section 141 of the Act and observed that mere repetition of the words as given in Section 141(2) of the Act will not be enough to make a director or an officer vicariously liable for the act of the company. Para 38 of the report is extracted hereunder:

> "38. But if the accused is not one of the persons who falls under the category of "persons who are responsible to the company for the conduct of the business of the company" then merely by stating that "he was in charge of the business of the company" or by stating that "he was in charge of the day-to-day management of the company" or by stating that "he was in charge of, and was responsible to the company for the conduct of the business of the company", he cannot be made vicariously liable under Section 141(1) of the Act. To put it clear that for making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act." **(Para 7)**

To the same effect are the observations of the Supreme Court in **Central Bank of India v. Asian Global Limited & Ors.,** (2010) 11 SCC 203. The Supreme Court held that although the managing director or a joint managing director of the company would be admittedly in charge of the company and responsible for the conduct of its business, the same yardstick would not apply to a director. It was stated that for making a director vicariously liable for the act of the company, there has to be clear and unambiguous

averments as to the part played by the director in the transaction in question and how they were in charge of and responsible to the company for the conduct of its business. Paras 17 to 19 of the report are extracted hereunder:

> "17. The law as laid down in **S.M.S. Pharmaceuticals Ltd.** case (2005) 8 SCC 89 has been consistently followed and as late as in 2007, this Court in **N.K. Wahi** case (2007) 9 SCC 481 while considering the question of vicarious liability of a Director of a company, reiterated the sentiments expressed in S.M.S. Pharmaceuticals Ltd. that merely being a Director would not make a person liable for an offence that may have been committed by the company. For launching a prosecution against the Directors of a company under Section 138 read with Section 141 of the 1881 Act, there had to be a specific allegation in the complaint in regard to the part played by them in the transaction in question. It was also laid down that the allegations had to be clear and unambiguous showing that the Directors were in charge of and responsible for the business of the company. This was done to discourage frivolous litigation and to prevent abuse of the process of court and from embarking on a fishing expedition to try and unearth material against the Director concerned.
>
> 18. In this case, save and except for the statement that the respondents, Mr Rajiv Jain and Sarla Jain and some of the other accused, were Directors of the accused Companies and were responsible and liable for the acts of the said Companies, no specific allegation has been made against any of them. The question of proving a fact which had not been mentioned in the complaint did not, therefore, arise in the facts of this case. This has prompted the High Court to observe that the Bank had relied on the mistaken presumption that as Directors, Rajiv Jain, Sarla Jain and the other Directors were vicariously liable for the acts of the Company.
>
> 19. Admittedly, except for the aforesaid statement, no other material has been disclosed in the complaint to make out a case against the respondents that they had been in charge of the affairs of the Company and were responsible for its action. The High Court, therefore, rightly held that in the absence of any specific charge against the respondents, the complaint was liable to be quashed and the respondents were liable to be discharged." **(Para 8)**

There is a latest report of the Supreme Court in **Anita Malhotra v. Apparel Export Promotion Council & Anr.** (2012) 1 SCC 520, wherein it was laid down that reproduction of the statutory requirement (as laid down in Section 141(2) of the Act) by itself would not be sufficient to make director of a company liable. The complainant should specifically spell out as to how and in what manner the director was in charge and responsible to the accused company for conduct of its business. Relying on National Small Industries Corporation Ltd., the Supreme Court held as under:

> "22. This Court has repeatedly held that in case of a Director, the complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the accused company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient. (Vide **National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal** (2010) 3 SCC 330. In the case on hand, particularly, in Para 4 of the complaint, except the mere bald and cursory statement with regard to the appellant, the complainant has not specified her role in the day-to-day affairs of the Company. We have verified the averments as regards to the same and we agree with the contention of Mr Akhil Sibal that except reproduction of the statutory

requirements the complainant has not specified or elaborated the role of the appellant in the day-to-day affairs of the Company. On this ground also, the appellant is entitled to succeed." **(Para 9)**

I have also extracted above para 2 of the complaint. There are simply bald allegations that the Petitioner (accused No.6) and other directors were responsible for day to day affairs of the accused company. Following the law laid down in *National Small Industries Corporation Ltd., Central Bank of India* and *Anita Malhotra,* these averments were not sufficient to issue process against the Petitioner. The Petitioner's summoning is, therefore, quashed. **(Para 12)**

[An Ba]

APPEARANCES:

FOR THE PETITIONERS : Mr. Tanmaya Mehta, Advocate.

FOR THE RESPONDENTS : Ms. Rajdipa Behura, APP for the State/Respondent No.1. Mr. Harshvardhan Singh, Advocate for the Respondent No.2.

CASES REFERRED TO:

1. *Anita Malhotra* vs. *Apparel Export Promotion Council & Anr.* (2012) 1 SCC 520.
2. *Rallis India Limited* vs. *Poduru Vidya Bhusan & Ors.,* (2011) 13 SCC 88.
3. *National Small Industries Corpn. Ltd.* vs. *Harmeet Singh Paintal* (2010) 3 SCC 330.
4. *Central Bank of India* vs. *Asian Global Limited & Ors.* (2010) 11 SCC 203.
5. *Paresh P. Rajda* vs. *State of Maharashtra & Anr.* (2008) 7 SCC 442.
6. *N. Rangachari* vs. *BSNL* (2007) 5 SCC 108.

RESULT: Petition allowed.

G.P. MITTAL, J. (ORAL)

1. The Petitioners invoke inherent powers of this Court under Section 482 of the Code of Criminal Procedure, 1973(Cr.P.C.) for quashing of the order dated 26.05.2012 passed by the learned Metropolitan Magistrate ("MM), Rohini, summoning the Petitioners and other accused in a complaint case No.596/2012 titled **"M/s. Rama Krishna Electro Components Pvt. Ltd. v. Sandeep Ramkrishan Arora @ Karan Arora & Ors."**

2. In the complaint, it was alleged that M/s. High Ground Enterprises Pvt. Ltd. (Accused No.3 before the Court of MM) had issued certain cheques in favour of the Respondent No.2 in discharge of its liability. The cheques when presented were dishonoured with the remarks "payment stopped by the drawer". A statutory notice under Section 138 of the Negotiable Instruments Act, 1881(the Act) was served upon the drawer company. Accused No.4 was alleged to be the authorized signatory of accused No.3 company and accused Nos.1 and 4 to 6 were alleged to be directors of the company and responsible for day to day affairs of the accused company.

3. The only ground of challenge raised by the learned counsel for the Petitioner is that the Complaint filed by Respondent No.2 did not reveal as to how the Petitioner was in charge of and responsible for the conduct of business of the accused company and mere averments in the complaint that the Petitioner being a Director was in charge of and responsible for conduct of the business of the company was not enough to issue process against the Petitioner.

4. Referring to **National Small Industries Corporation Ltd. v. Harmeet Singh Paintal & Anr.** (2010) 3 SCC 330; **Central Bank of India v. Asian Global Limited & Ors.** (2010) 11 SCC 203; and **Anita Malhotra v. Apparel Export Promotion Council & Anr.** (2012) 1SCC 520, the learned counsel for the Petitioner urges that unless it was specifically averred in the complaint as to how and in what manner the Petitioner was in charge of and responsible for the conduct of the business of the company, he cannot be made vicariously liable.

5. On the other hand, learned counsel for Respondent No.2 argues that it will be enough to aver in the Complaint that the Director or the officer concerned was in charge of and responsible for the conduct of the business of the Company, it would be only matter of trial as to how

the person sought to be prosecuted was in charge of and responsible for the conduct of the business. Learned counsel for the Respondent presses into service **Paresh P. Rajda v. State of Maharashtra & Anr.** (2008) 7 SCC 442 and **Rallis India Limited v. Poduru Vidya Bhusan & Ors.,** (2011) 13 SCC 88.

6. To appreciate the contention raised, it would be appropriate to extract Para 2 of the Complaint whereby vicarious liability is sought to be fixed on the Petitioner. The same reads as under:

> "2. That the accused No.1 is the director of the accused No.3 company and is responsible and liable for day to day affairs of accused No.3 company. Further, accused No.2 is the authorized signatory of the accused No.3 company and has been duly authorized for the same. Apart, the accused No.4 to 6 are also the directors of the company and are responsible for day to day affairs of the accused No.3 company."

7. In **National Small Industries Corporation Ltd. v. Harmeet Singh Paintal & Anr.,** (2010) 3 SCC 330, the Supreme Court analysed the provisions of Section 141 of the Act and observed that mere repetition of the words as given in Section 141(2) of the Act will not be enough to make a director or an officer vicariously liable for the act of the company. Para 38 of the report is extracted hereunder:

> "38. But if the accused is not one of the persons who falls under the category of "persons who are responsible to the company for the conduct of the business of the company" then merely by stating that "he was in charge of the business of the company" or by stating that "he was in charge of the day-to-day management of the company" or by stating that "he was in charge of, and was responsible to the company for the conduct of the business of the company", he cannot be made vicariously liable under Section 141(1) of the Act. To put it clear that for making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act."

8. To the same effect are the observations of the Supreme Court in **Central Bank of India v. Asian Global Limited & Ors.,** (2010) 11 SCC 203. The Supreme Court held that although the managing director or a joint managing director of the company would be admittedly in charge of the company and responsible for the conduct of its business, the same yardstick would not apply to a director. It was stated that for making a director vicariously liable for the act of the company, there has to be clear and unambiguous averments as to the part played by the director in the transaction in question and how they were in charge of and responsible to the company for the conduct of its business. Paras 17 to 19 of the report are extracted hereunder:

> "17. The law as laid down in **S.M.S. Pharmaceuticals Ltd.** case (2005) 8 SCC 89 has been consistently followed and as late as in 2007, this Court in **N.K. Wahi** case (2007) 9 SCC 481 while considering the question of vicarious liability of a Director of a company, reiterated the sentiments expressed in S.M.S. Pharmaceuticals Ltd. that merely being a Director would not make a person liable for an offence that may have been committed by the company. For launching a prosecution against the Directors of a company under Section 138 read with Section 141 of the 1881 Act, there had to be a specific allegation in the complaint in regard to the part played by them in the transaction in question. It was also laid down that the allegations had to be clear and unambiguous showing that the Directors were in charge of and responsible for the business of the company. This was done to discourage frivolous litigation and to prevent abuse of the process of court and from embarking on a fishing expedition to try and unearth material against the Director concerned.
>
> 18. In this case, save and except for the statement that the respondents, Mr Rajiv Jain and Sarla Jain and some of the other accused, were Directors of the accused Companies and were responsible and liable for the acts of the said Companies, no specific allegation has been made against any of them. The question of proving a fact which had not been mentioned in the complaint did not, therefore, arise in the facts of this case. This has prompted the High Court to observe that the Bank had relied on the mistaken presumption that as Directors, Rajiv Jain, Sarla Jain and the

other Directors were vicariously liable for the acts of the Company.

19. Admittedly, except for the aforesaid statement, no other material has been disclosed in the complaint to make out a case against the respondents that they had been in charge of the affairs of the Company and were responsible for its action. The High Court, therefore, rightly held that in the absence of any specific charge against the respondents, the complaint was liable to be quashed and the respondents were liable to be discharged."

9. There is a latest report of the Supreme Court in **Anita Malhotra v. Apparel Export Promotion Council & Anr.** (2012) 1 SCC 520, wherein it was laid down that reproduction of the statutory requirement (as laid down in Section 141(2) of the Act) by itself would not be sufficient to make director of a company liable. The complainant should specifically spell out as to how and in what manner the director was in charge and responsible to the accused company for conduct of its business. Relying on National Small Industries Corporation Ltd., the Supreme Court held as under:

"22. This Court has repeatedly held that in case of a Director, the complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the accused company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient. (Vide **National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal** (2010) 3 SCC 330. In the case on hand, particularly, in Para 4 of the complaint, except the mere bald and cursory statement with regard to the appellant, the complainant has not specified her role in the day-to-day affairs of the Company. We have verified the averments as regards to the same and we agree with the contention of Mr Akhil Sibal that except reproduction of the statutory requirements the complainant has not specified or elaborated the role of the appellant in the day-to-day affairs of the Company. On this ground also, the appellant is entitled to succeed."

10. The judgment in **Paresh P. Rajda v. State of Maharashtra & Anr.** (2008) 7 SCC 442 was distinguished by the Supreme Court in

National Small Industries Corporation Ltd and it was held that necessary averments had been made in the Complaint in Paresh P. Rajda. Para 32 of the report is extracted hereunder:-

"32. Learned counsel for the appellants after elaborately arguing the matter, by inviting our attention to **Paresh P. Rajda v. State of Maharashtra** (2008) 7 SCC 442 contended that a departure/ digression has been made by the Court in **N. Rangachari v. BSNL** (2007) 5 SCC 108. However, in this case also the Court has observed in para 4 that the High Court had noted that: (Paresh P. Rajda case)

"4. ... an overall reading of the complaint showed that specific allegations had been levelled against [the accused] as being a responsible officer of the accused Company and therefore equally liable...."

In fact, the Court recorded the allegations in the complaint that the complainant knew all the accused and that Accused 1 was the Chairman of the accused Company and was responsible for day-to-day affairs of the Company. This Court though has only noted the decision in N. Rangachari case and observed that an observation therein showed a slight departure vis-a-vis the other judgments (i.e. **S.M.S. Pharmaceuticals Ltd.** case (2005) 8 SCC 89 and **S.M.S. Pharmaceuticals Ltd.** case (2007) 4 SCC 70, but then the Court went on to record that in **N.K. Wahi** case (2007) 9 SCC 481 this Court had reiterated the view in **S.M.S. Pharmaceuticals Ltd.**. The Court then concluded in para 11 that:

"11. It was clear from the aforequoted judgments that the entire matter would boil down to an examination of the nature of averments made in the complaint...."

On facts, the Court found necessary averments had been made in the complaint."

11. Similarly in *Rallis India Limited* relied upon by the learned counsel for the Respondent, the accused persons were the working partners in the firm. There were disputed questions as to when the earlier partnership was dissolved and since which date the Respondents (in that case) ceased to be the partners of the firm. It was in that context that

the Supreme Court ruled that the High Court should not have discharged the respondents who were being prosecuted under Section 141 of the Act being working partners of the firm.

12. I have also extracted above para 2 of the complaint. There are simply bald allegations that the Petitioner (accused No.6) and other directors were responsible for day to day affairs of the accused company. Following the law laid down in *National Small Industries Corporation Ltd., Central Bank of India* and *Anita Malhotra,* these averments were not sufficient to issue process against the Petitioner. The Petitioner's summoning is, therefore, quashed.

13. The Petition, therefore, has to be allowed. I accordingly quash the complaint No.596/2012 so far as it concerned the Petitioners.

14. Pending Applications stand disposed of.

ILR (2013) III DELHI 2145
ITA

O.B.C. ....APPELLANT

VERSUS

COMMISSIONER OF INCOME TAX-I & ANR. ....RESPONDENTS

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

ITA NO. : 20/1999 DATE OF DECISION: 14.02.2013

Income Tax Act, 1961—Section 115 J(1A)—Assessee company made a provision for payment of bonus to its employees and deducted the same in the computation of the net profit—Assessing Officer however included the same in the computation of the net profit on the basis that it was only an estimation. Held: Position of

facts not clear. Hence Assessing Officer directed to determine whether the computation of the provision for bonus was on the basis of Payment of Bonus Act, 1965 and if so, the provision is to be treated as an ascertained liability. On the contrary, if the provision was not in accordance with the provisions of the said Act and was merely an estimation, then the original assessment of the Assessing Officer would hold.

We see no reason to take a different view from that adopted by the Bombay High Court. However, Mr Sabharwal, appearing on behalf of the revenue, raised a pointed question as to whether, in fact, the provision for payment of bonus in this case was actually an ascertained liability. He raised this issue because, according to him there is a suggestion given in the Tribunal's order that the provision for payment of bonus was a mere estimation as would be apparent from paragraph 7.1 of the impugned order. However, the learned counsel for the assessee categorically submitted that the provision for payment of bonus was computed on the basis of the provisions of the Payment of Bonus Act, 1965 and, therefore, it was an ascertained liability. The position in law is clear that if the provision for bonus had been computed on the basis of Payment of Bonus Act, 1965 then it would be an ascertained liability. However, if it was only an estimation then it could not be regarded as an ascertained liability. Since, the position is not clear on facts, we direct that the assessing officer should determine as to whether the computation of the provision for bonus was on the basis of Payment of Bonus Act, 1965. If so, the said provision would have to be treated as an ascertained liability. On the contrary, if he finds the provision for payment of bonus was not in accordance with the provisions of the Payment of Bonus Act, 1965 and it was merely an estimation then the original assessment of the assessing officer would hold. The question No.2 is answered accordingly. **(Para 3)**

Important Issue Involved: The position in law is clear that if the provision for bonus for its employees, has been computed by an assessee company, on the basis of Payment of Bonus Act, 1965 then it would be an ascertained liability and shall not to be liable to be included in the computation of the net profit of the company. However if it is only an estimation then it cannot be regarded as an ascertained liability and would therefore be included in the computation of the net profit of the assessee company.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Rajat Navet, Advocate.

FOR THE RESPONDENT : Mr. Sanjeev Sabharwal, Sr. Standing Counsel with Mr. Puneet Gupta, Jr. Standing Counsel.

CASE REFERRED TO:

1. *CIT* vs. *Echjay Forgings Pvt. Ltd.:* (2001) 251 ITR 15 (Bom.).

RESULT: Appeal allowed.

BADAR DURREZ AHMED, J. (ORAL)

1. This appeal under section 260A of the Income Tax Act, 1961 has been filed by the assessee being aggrieved by the order dated 23.02.1999 passed by the Income Tax Appellate Tribunal, New Delhi in ITA No.331/Del/93 relating to the assessment year 1989-90. On 29.10.1999 this Court had framed the following questions for consideration: -

'1. Whether Section 115-J is applicable to a banking company?

2. Whether the phrase "ascertained liability" as used in Explanation (c) of Section 115J(1A) of the Income Tax Act, 1961 includes in its sweep, the entire amount set aside for payment of bonus or merely the actual payment of bonus?

3. Whether on the facts and circumstances of the case the Tribunal was right in holding that the following items

were unascertained liabilities and were, therefore, rightly added back to the book profits of the assessee by invoking Section 115-J(1A) read with Explanation (c) of the Act?

a)	Rural Branches- provision for bad and doubtful debts	2,30,34,000
b)	Reserve for bad and doubtful debt further provision	6,56,00,000
c)	Reserve for bad & doubtful debts 5% of taxable income	30,00,000"

2. The learned counsel for the appellant/ assessee submitted at the outset that question Nos.2 & 3 are covered in favour of the assessee. In so far as question No.2 is concerned, he placed reliance on the decision of the Bombay High Court in the case of **CIT vs. Echjay Forgings Pvt. Ltd.:** (2001) 251 ITR 15 (Bom.) where the Bombay High Court considered the question as to whether the net profit was required to be increased by an amount of Rs.3,46,370/- being the provision for bonus while considering computation under section 115J of the said Act. The Bombay High Court observed as under: -

"IV. Whether the net profit was required to be increased by an amount of Rs.3,46,370/- being the provision for bonus:

The assessee has shown that it was liable to pay bonus under the Payment of Bonus Act. Accordingly, it provided for payment of bonus to the employees. Therefore, it cannot be said that the provision for bonus amounting to Rs.3,46,370/- is not an ascertained liability till it is actually paid to the employees."

3. We see no reason to take a different view from that adopted by the Bombay High Court. However, Mr Sabharwal, appearing on behalf of the revenue, raised a pointed question as to whether, in fact, the provision for payment of bonus in this case was actually an ascertained liability. He raised this issue because, according to him there is a suggestion given in the Tribunal's order that the provision for payment of bonus was a mere estimation as would be apparent from paragraph 7.1 of the impugned order. However, the learned counsel for the assessee categorically

submitted that the provision for payment of bonus was computed on the basis of the provisions of the Payment of Bonus Act, 1965 and, therefore, it was an ascertained liability. The position in law is clear that if the provision for bonus had been computed on the basis of Payment of Bonus Act, 1965 then it would be an ascertained liability. However, if it was only an estimation then it could not be regarded as an ascertained liability. Since, the position is not clear on facts, we direct that the assessing officer should determine as to whether the computation of the provision for bonus was on the basis of Payment of Bonus Act, 1965. If so, the said provision would have to be treated as an ascertained liability. On the contrary, if he finds the provision for payment of bonus was not in accordance with the provisions of the Payment of Bonus Act, 1965 and it was merely an estimation then the original assessment of the assessing officer would hold. The question No.2 is answered accordingly.

4. In so far as question No.3 is concerned, the learned counsel for the appellant/ assessee submitted that it was covered by the decision of the Supreme Court in the case of **Commissioner of Income Tax vs. HCL Comnet Systems and Services Ltd.:** (2008) 305 ITR 409 (SC). We find that this submission of the learned counsel for the appellant is well founded particularly in respect of the year in question, that is, assessment year 1989-90. Accordingly, question No.3 is decided in favour of the assessee/ appellant and against the revenue.

5. In view of the aforesaid answers to question Nos.2 & 3 the learned counsel for the appellant submits that he does not press question No.1. Accordingly, all the questions pressed before us are answered and the appeal is allowed to the aforesaid extent.

ILR (2013) III DELHI 2150
CRL. M.C.

D.N. TANEJA **....PETITIONER**

VERSUS

STATE NCT OF DELHI **....RESPONDENT**

(G.P. MITTAL, J.)

CRL. M.C. NO. : 552/2013 **DATE OF DECISION: 18.02.2013**

Code of Criminal Procedure, 1973—Section 161, 164, 173, 482—Allegations of rape and molestation—Magistrate's order taking cognizance not interfered with by ASJ—Petition for quashing order taking cognizance in view of the final report filed by the investigating agency—Held—The factum of withdrawal of allegations, non appearance of any misconduct in CD, delay in making complaint to police, initial reluctance to make statement u/s 164 and the contradiction about place of incidence were required to be gone into only at the stage of trial—At the time of taking cognizance, the Ld. M.M was only required to analyze whether there exists sufficient ground for summoning the accused or not. Magistrate not required to see whether the material was sufficient to convict the accused no error or illegality in the order—Petition dismissed.

The learned Senior Counsel for the Petitioner fervently argues that although there are allegations of molestation, rape etc. in the statements under Sections 161 and 164 of the Code, yet the circumstances under which the allegations were levelled will indicate that the same were totally false. The learned Senior Counsel states that wholesome powers under Section 482 of the Code have been conferred on the High Court to put an end to the harassment and oppression of an accused where it is shown that the allegations levelled

are totally false and unbelievable. The learned Senior Counsel points out that since the allegations of rape was of October, 2010, nothing much could have emerged from the MLC of the prosecutrix when she was medially examined in June, 2012 and the delay of 20 months by itself may not be sufficient for quashing of the FIR. Yet, these facts coupled with the prosecutrix's subsequent report dated 26.07.2012 to the SHO, the analysis of the CD presented by the prosecutrix herself which did not indicate commission of any offence; the statement of the Prosecutrix on oath dated 11.09.2012 made to the learned M.M. after filing of the cancellation report and the discrepancy regarding the place of incident in the statement under Sections 161 and 164 of the Code would clearly show that the case was clearly cooked up and this Court should come to the rescue of the Petitioner to put an end to his harassment. **(Para 6)**

There is no gainsaying that as per the CD analysed by the Police, there was no indication that the offence of molestation or rape was committed by the Petitioner upon the prosecutrix. I have already extracted above an application dated 26.07.2012 written by the prosecutrix to the SHO, P.S. Barakhamba Road. In this application, the prosecutrix simply stated that she made allegations of rape and misconduct against the Petitioner. She further stated that the allegations were made under bad advice. She stated that she had found her document. She felt sorry for making the allegations and wanted the matter to be closed. **(Para 11)**

It is important to note that the prosecutrix nowhere stated that she had levelled false allegations against the Petitioner. The factum of withdrawal of the allegations, non-appearance of any misconduct in the CD, the delay in making the complaint about the sexual assault to the police, initial reluctance, if any, on the part of the prosecutrix to make the statement under Section 164 of the Code to the learned M.M. on the ground that she was to take her examination, and the contradiction about the place of incident, particularly in view of her explanation in this regard that it was a

typographical error were required to be gone into only at the stage of the trial. **(Para 12)**

At the stage of taking cognizance, the learned M.M. was only required to analyse whether there exists sufficient ground for summoning the accused or not. The Magistrate was not required to see whether the material was sufficient to convict the accused. There is no error or illegality in the order dated 17.11.2012 passed by the learned M.M. and the order dated 17.12.2012 passed by the learned A.S.J. **(Para 16)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Uday Lalit, Sr. Advocate with Mr. N. Hariharan, Mr. Bhanoo Sood and Mr. Yogesh Dahiya, Advocates.

FOR THE RESPONDENT : Ms. Rajdipa Behura, APP for the State.

CASE REFERRED TO:

1. *V.K. Tulsian* vs. *State,* 2000 III AD(Cri) DHC 176.

RESULT: Petition dismissed.

G.P. MITTAL, J.

1. The Petitioner invokes inherent powers of this Court under Section 482 of the Code of Criminal Procedure ("the Code") for setting aside of the order dated 17.12.2012 passed by the learned Additional Sessions Judge ("A.S.J.") and for quashing of FIR No.76/2012 dated 07.06.2012 registered at Police Station Barakhamba Road in view of the final report filed by the investigating agency.

2. The facts of the case and the contentions raised on behalf of the Petitioner can be broadly culled out from paras 2 and 3 of the impugned order which are extracted hereunder:

> "2.Facts in brief, are that on the written complaint of prosecutrix dated 07.06.2012, the above FIR was registered under Section 376 IPC. After investigation, the investigating officer filed final

report of cancellation under Section 173 Cr.P.C. dated 21.08.2012. Learned M.M. after considering the record concluded that there are sufficient allegations vide FIR and statements recorded by the investigating officer under Section 161 Cr.P.C. for taking cognizance of the offence against the accused and directed that the accused be summoned for 19.12.2012. The said order of Ld.MM is under challenge before this Court.

3. The revisionist has challenged the impugned order, inter alia, on the ground that the said order suffers from procedural illegality and lack of evidence. It is pleaded that although, from the facts no prima facie case is made out, but the Ld. M.M. has taken cognizance. He has failed to appreciate that the FIR was lodged after a period of 1+ years; the prosecutrix has made improvements in her statement under Section 164 Cr.P.C.; the complainant is a law student and intentionally delayed recording of her statement under Section 164 Cr.P.C.; negative opinion (no injury was found on the body of complainant/prosecutrix) was given by Doctor of RML Hospital who examined the complainant; the C.D. placed on evidence disclosed no offence; during the course of investigation, the prosecutrix herself gave in writing on 26.07.2012 that she had made the allegations under bad advice and did not wish to pursue her complaint; accordingly, the investigating officer had rightly filed the closure report."

3. The learned A.S.J. while declining to interfere with the order dated 17.11.2012 passed by the learned Metropolitan Magistrate ("M.M.") taking cognizance against the Petitioner reasoned that there was consistent complaint of rape in the statement made to the police under Section 161 of the Code and the statement recorded by the learned M.M under Section 164 of the Code. There were other supporting materials to the statements of the prosecutrix recorded under Sections 161 and 164 of the Code. The learned A.S.J. held that the delay in registration of the FIR and the negative opinion on MLC were not material because the prosecutrix in her statement had stated that because of fear and shame, she did not lodge any complaint against the Petitioner earlier.

4. I have heard Mr. Uday Lalit, learned Senior Counsel for the Petitioner and Ms. Rajdipa Behura, learned APP for the State.

5. It is not in dispute that the prosecutrix (the complainant) in her statement under Section 161 of the Code gave a detailed account as to how the Petitioner made advances, how he initially molested her and then on 17.10.2010 committed rape on her. It is also not in dispute that the prosecutrix was consistent in the allegations of molestation and rape even in her statement recorded on oath under Section 164 of the Code by the learned M.M.

6. The learned Senior Counsel for the Petitioner fervently argues that although there are allegations of molestation, rape etc. in the statements under Sections 161 and 164 of the Code, yet the circumstances under which the allegations were levelled will indicate that the same were totally false. The learned Senior Counsel states that wholesome powers under Section 482 of the Code have been conferred on the High Court to put an end to the harassment and oppression of an accused where it is shown that the allegations levelled are totally false and unbelievable. The learned Senior Counsel points out that since the allegations of rape was of October, 2010, nothing much could have emerged from the MLC of the prosecutrix when she was medially examined in June, 2012 and the delay of 20 months by itself may not be sufficient for quashing of the FIR. Yet, these facts coupled with the prosecutrix's subsequent report dated 26.07.2012 to the SHO, the analysis of the CD presented by the prosecutrix herself which did not indicate commission of any offence; the statement of the Prosecutrix on oath dated 11.09.2012 made to the learned M.M. after filing of the cancellation report and the discrepancy regarding the place of incident in the statement under Sections 161 and 164 of the Code would clearly show that the case was clearly cooked up and this Court should come to the rescue of the Petitioner to put an end to his harassment.

7. The learned Senior Counsel with regard to the CD took me through the cancellation report. The portion of the report under Section 173 of the Code relied upon by the learned Senior Counsel is extracted hereunder:

"Case work begins from custody, the Video CD, was sent to FSL, Rohini Delhi for purpose of examination and copying the same. It's report is received vide FSL No.2012/P-4945/Phy-182/12 dated 25.07.12, as per that original CD in sealed condition was deposited in open condition which was run on 03.08.12 to

see it. CD is in VLC media file. Its recorded data is of 58:36 minutes. On running the CD it displays date as 2009-1-03 and time as 10:19:22.

In the CD voice is not coming that much clear and whatever persons are speaking in between themselves that conversation is not understandable. In video our persons was sitting on chair in front of mirror who appears of applying some cream on his face. Camera was moving regularly and its direction is also changing. Camera is not fixed at one place. A person sitting in front is not operating the same. The place where complainant is camera's location is nearby her. In video another girl was seen sitting with the man at around 10:30 p.m. At 10:41 p.m. near complainant a glass of juice appears, which she start drinking. At around after 10:42:54 p.m. a person looks like servant come and go from the room. Complainant appears to be walking freshly.

In video around 10:47:11 for a long period a door appears which is opened. In video at 10:55:11 again some person as like servant comes. The static position of the camera changes and man sitting in front has come near and start camera recording from the back side.

At around 11:07 p.m. the complainant appears while doing face cleaning by cotton and it appears that she was doing that willingly. After that video became dark and at 11:18:11 p.m. video ended. After seeing the video it appears that there was no misbehaviour or teasing was done with the complainant. After drinking of juice for a long time there it does not appear that she is under the influence of any toxicant. In the video the door of the room is also open and there is moment of different people in the room. While running the CD there was no any scene found which proves the complaint of complainant.

While investigation going on in the case as on 26.07.12 complainant herself given in written that she filed this complaint on the wrong advice of someone and she has received her documents as well. She has written that this matter to be treated as closed.

Accused D.N. Taneja was also examined who has vehemently denied all these accusations. Wife and son of accused were also

examined and they told that they live in a joint family on the date of incident they were in home. Servants in their home are also examined, they also can't provide any information related to it. There was also a delay of almost one and half years by the complainant in filing of police report, which cannot be explained, in CD no offensive act is found, the place of offence is also not confirmed by complainant after such long period, complainant is a student of law, complainant knowingly took so much of time in giving her statement u/s 164 Cr.P.C. she has given in written herself."

8. A written report dated 26.07.2012 submitted to the SHO is also extracted hereunder:

"To,

The SHO
Police Station Barakhamba Road
New Delhi-110001.

Respect Sir,

I had made a complaint to you on 07.06.2010 which resulted in FIR No.76/2012. I had made allegation of rape and misconduct against Mr. D.N. Taneja.

I regret that I had made those allegations under bad advice. I have found my document.

I am sorry that I made these allegations and I repent having made them. I do not wish to persist in them. Kindly treat the matter as closed. I will separately make suitable amends to Mr. D.N. Taneja.

Yours sincerely,
Sd/- S
Sonu D/o Lt. Sh. Jeewan
Dass 51A, Ist Floor,
Indra Park, Gali No.13,
Near Chander Nagar,
New Delhi."

9. On the other hand, Ms.Rajdipa Behura, learned APP submits that at the stage of taking cognizance the learned MM was not required to give any detailed reason. Moreover, the Court at that time is not to reach a conclusion whether the evidence collected is sufficient to base conviction of the accused. What is required to be seen is whether on the basis of material collected there are sufficient grounds for proceeding against the accused.

10. The learned Senior Counsel places reliance on a judgment of a Co-ordinate Bench of this Court in **V.K. Tulsian v. State,** 2000 III AD(Cri) DHC 176 in support of his contention that where initially allegations of rape are levelled against an accused and during subsequent investigation it transpires that the allegations are false, the FIR can be quashed.

11. There is no gainsaying that as per the CD analysed by the Police, there was no indication that the offence of molestation or rape was committed by the Petitioner upon the prosecutrix. I have already extracted above an application dated 26.07.2012 written by the prosecutrix to the SHO, P.S. Barakhamba Road. In this application, the prosecutrix simply stated that she made allegations of rape and misconduct against the Petitioner. She further stated that the allegations were made under bad advice. She stated that she had found her document. She felt sorry for making the allegations and wanted the matter to be closed.

12. It is important to note that the prosecutrix nowhere stated that she had levelled false allegations against the Petitioner. The factum of withdrawal of the allegations, non-appearance of any misconduct in the CD, the delay in making the complaint about the sexual assault to the police, initial reluctance, if any, on the part of the prosecutrix to make the statement under Section 164 of the Code to the learned M.M. on the ground that she was to take her examination, and the contradiction about the place of incident, particularly in view of her explanation in this regard that it was a typographical error were required to be gone into only at the stage of the trial.

13. Unfortunately the IO of the case W/SI Rajender Kaur took upon herself to undertake the job of the Court in disbelieving the statement under Sections 161 and 164 of the Code and on the basis of the CD and the application dated 26.07.2012 returned a verdict that the Petitioner was not guilty of the offence alleged against him.

14. V.K. Tulsian relied upon by the learned Senior Counsel is not of any avail to the Petitioner in view of the fact that in **V.K. Tulsian**, in her statement under Section 164 of the Code the prosecutrix specifically came out with the plea that she had lodged a false complaint against the Petitioner on account of frustration. In **V.K. Tulsian**, the prosecutrix had also given the reasons for the said frustration, which is not the case here.

15. It is very intriguing that even in the face of the statement under Section 164 of the Code recorded on oath before the learned M.M., the IO preferred to conclude that there was no ground for proceeding against the Petitioner. Not only this, the supervisory officers, that is, Inspector Amardeep Sehgal, SHO, P.S. Barakhamba Road and ACP H.P. Hareesh simply turned a blind eye to the cancellation report prepared by the IO. The manner in which the cancellation report has been submitted to the learned M.M., the only inference that can be drawn is that either the three police officers were too inefficient to analyse as to on what material the accused should be challaned and when a cancellation report has to be filed or the cancellation report is motivated.

16. At the stage of taking cognizance, the learned M.M. was only required to analyse whether there exists sufficient ground for summoning the accused or not. The Magistrate was not required to see whether the material was sufficient to convict the accused. There is no error or illegality in the order dated 17.11.2012 passed by the learned M.M. and the order dated 17.12.2012 passed by the learned A.S.J.

17. The Petition is devoid of any merit; the same is accordingly dismissed.

18. Pending Applications stand disposed of.

19. In view of the observations made in para 15 of the judgment, the Commissioner of Police is required to look into the conduct of the IO, SHO and the ACP concerned and to take appropriate action against them within eight weeks and send a report to this Court within 10 weeks.

ILR (2013) III DELHI 2159
CRL. M.C.

RISHI RAJ & ANR. ....PETITIONERS

VERSUS

STATE ....RESPONDENT

(G.P. MITTAL, J.)

CRL. M.C. NO. : 2012/2011 DATE OF DECISION: 19.02.2013

Code of Criminal Procedure, 1973—Section 173—Cinematography Act, 1952—Section 7 (1) (C)—Copyright Act, 1957—Section 63—Case registered in P.S. Special Cell, Delhi U/s 7 (1) (C) of Cinematography Act and Section 63 of Copyright Act alleging raid was conducted at Akash Cinema, Delhi wherein movie with uncensored obscene scenes was being exhibited—On conclusion of investigation, chargesheet was presented in Court of Ld. A.C.M.M, Delhi naming three accused persons kept in column no. 4 of chargesheet and four accused persons including two petitioners were kept in column no. 2 of chargesheet—Ld. A.C.M.M. took cognizance of offence and ordered issuance of summons against accused persons—Though no specific order for taking cognizance against four accused persons kept in column no. 2 was made but process was issued to them also—Out of said four accused persons, two challenged order taking cognizance which was set aside and case was remanded back with direction to hear the parties afresh and to pass a detail reasoned order—Ld. A.C.M.M. thereupon directed further investigation—Aggrieved petitioners challenged said order averring it to be illegal as after taking cognizance, Ld A.C.M.M. could not have ordered to further investigation of case—Per contra on behalf of

State it was contended, Ld. A.C.M.M, specifically did not take cognizance against petitioners and if at all had taken, said order was set aside by Hon'ble Delhi High Court, thus, Ld. A.C.M.M, was not debarred from directing further investigation. Held:- An order of further investigation can be made at various stages including at the stage of the trial, that is, after taking cognizance of the offence.

At this stage, it would be appropriate to revert back to the facts of the instant case. As stated earlier, the investigating officer in the report under Section 173(2) himself stated that the Petitioners and some other accused persons were evading arrest and that *the supplementary challan shall be filed if some material came on record, but the same is not reflected in the investigation report.* Since the cognizance, if at all taken by the learned A.C.M.M. was set aside by this Court by an order dated 29.04.2008, the learned M.M. was well within his powers to direct further investigation in the case. A perusal of the order dated 11.02.2011 shows that Inspector Devender had stated that no evidence could be collected against the present Petitioners whereas on the next date, that is, 28.04.2011, it was stated that the investigation against the Petitioners was still pending. The learned A.C.M.M., therefore, directed that the status of the investigation should be placed before the Court on the next date, that is, 02.06.2011. Finding that there was total laxity on the part of the Investigating Officer, the learned A.C.M.M. preferred to direct the matter to be brought to the notice of the Commissioner of Police and for expediting the investigation. There could be twin purpose of the order dated 02.06.2011. If there is no material against the Petitioners, the damocles sword must not hang on the Petitioners head and the matter can be put to rest. Secondly, if there is sufficient material disclosed by the investigating agency, the Magistrate can take cognizance and proceed further. Thus the order dated 02.06.2011 on this aspect cannot be faulted. **(Para 12)**

Important Issue Involved: An order of further investigation can be made at various stages including at the stage of the trial, that is, after taking cognizance of the offence.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONERS : Mr. Vikas Arora & Mr. Manish Sharma, Advocates.

FOR THE RESPONDENT : Ms. Rajdipa Behura, APP for the State.

CASES REFERRED TO:

1. *Vinay Tyagi* vs. *Irshad Ali,* (in Crl.A.2040-2041/2012) arising out of SLP(Crl) Nos.9185-9186 of 2009) decided on 13.12.2012.
2. *Mithabhai Pashabhai Patel* vs. *State of Gujarat* (2009) 6 SCC 332 : (2009) 2 SCC (Cri) 1047 : (2009) 7 Scale 559.
3. *Kishan Lal* vs. *Dharmendra Bafna & Anr.,* (2009) 7 SCC 685.
4. *Reeta Nag* vs. *State of West Bengal & Ors.,* (2009) 9 SCC 129.
5. *Randhir Singh Rana* vs. *State,* (1997) 1 SCC 361.
6. *Bhagwant Singh* vs. *Commissioner of Police & Anr.,* (1985) 2 SCC 537.
7. *Sooraj Devi* vs. *Pyare Lal,* (1981) 1 SCC 500.
8. *Master Construction Co. (P) Ltd. case Master Construction Co. (P) Ltd.* vs. *State of Orissa,* AIR 1966 SC 1047.
9. *Sankatha Singh* vs. *State of U.P.,* AIR 1962 SC 1208.

RESULT: Petition dismissed.

G.P. MITTAL, J.

1. By virtue of this Petition under Section 482 of the Code of Criminal Procedure ("the Code"), the Petitioners challenge an order dated 02.06.2011 passed by the learned A.C.M.M. whereby the police was

directed to conduct further investigation expeditiously and promptly. The order dated 02.06.2011 is extracted hereunder:

> "02.06.2011
>
> Present: SI Bhushan Azad in person
>
> Accused Shiv Narain, Raj Kumar & Kewal Singh alongwith counsel.
>
> Counsel for the accused B.Subhash
>
> Further status report regarding the accused persons namely B.Subhash, Muni Raj, Rish Raj and Girdhari Lal is filed. The IO is not able to show the case diary written by him since the last date of hearing in regard to the further investigations. The facts disclose that investigations are not being conducted properly. In the circumstances the matter be brought into the notice of the Commission of Police for intimation and to take appropriate steps for conducting the further investigations expeditiously and promptly."

2. This case has a chequered history. A case under Section 7(1)(C) of Cinematograph Act, 1952 and Section 63 of the Copyright Act, 1957 vide FIR No.120/2004 P.S. Special Cell, Delhi was registered on the basis of a complaint dated 15.09.2004 to the effect that a movie 'Divine Lovers' with adult scenes was being run at Aakash Cinema at Azadpur, North Delhi, during exhibition of the film a raid was conducted at Aakash Cinema and it was found that at the end of the film, some scenes showing a man and a woman doing sexual intercourse were shown. On 19.04.2005, a report under Section 173 of the Code was presented to the Court of learned Metropolitan Magistrate("M.M.") wherein the names of the three accused persons who were actually exhibiting the film were shown in column No.4, whereas the names of the four accused including the two Petitioners herein were shown in column No.2. It would be relevant to refer to the averments made in the report under Section 173 of the Code against the two Petitioners and the two other persons as under:

> "...In the course of interrogation it was revealed that this film was taken by the abovesaid accused persons from Raj Karan Movies, 1783, 2nd floor Kundan Mansion, Bhagirath Place, ND for Rs. 750/- on 09.09.04 for viewing from 10.09.04 to 16.09.04.

SI Arvind joined Sh. Muni Raj in the investigation who has admitted that he was looking after the office of Raj Karan Movies and this film has been sold from his office. Further Muni Raj told that this film was purchased by his brother Rishi Raj who is nowadys working somewhere in Mumbai from B.Subhash Movies, Juhu Mumbai. SI has obtained the opinion of CBFC, which shows that several censored scenes are still present in all the reels. The CBFC report reads as "the seized belluloid print of the film contained insertion of several objectionable visuals of bare breasts, nudity and sexual intercourse acts as indicated under item B (i), (ii), (iii) & (iv) above, which are not available in the video copy of the film certified by the Central Board of Film Certification, Mumbai. Further, copy of cuts has been provided by CBFC in support of their opinion alongwith CBFC copy. In the course of investigation SI has seized 16 page photocopies of documents from the office of producer of the file i.e. B. Subhash at Mumbai. Which suggests that the film has been produced by B. Subhash and this film was sold to M/s Raj Rishi Films, 6046/2 Dev Nagar, ND for period of seven years as on 10th January 1996, M/s Ramnord Research Laboratory was authorized to prepare and deliver the prints to M/s Raj Rishi Films, 6046/2, Dev Nagar, ND. It is apprehended that the uncensored copy of film has been obtained from M/s Ramnord Research Lab Ltd., Mumbai. SI has gone to Mumbai to interrogate B. Subhash in this case but B.Subhash could never be available. However, on the basis of evidence available on file SI has obtained the NBW against 1. Rishi Raj s/o Man Singh R/o 6046/2, Dev Nagar, Karol Bagh, ND, who has been running the office of distributor of the film, Muni Raj s/o Man Singh R/o 6046/2, Dev Nagar, Karol Bagh, ND who is proprietor of the office of distributor in this film, B.Subhash, the producer of the film and Girdhari Lal Sakseria MD M/s Ramnord Research Lab Ltd. who has supplied the uncensored copy of film to the distributor. SI has tried his best to serve the NBW upon these persons who are evading arrest by taking calculated steps. So, their names have been kept in col. No.2 of the challan. The supplementary challan shall be filed against them if deemed fit after conducting interrogation. Now, the investigation in this case has been completed and challan against the accused persons who names

have been entered in col. No.2 is being sent for trial."

3. By an order dated 23.04.2005, the learned A.C.M.M. took cognizance of the offence and ordered issuance of the summons against the accused. The order dated 23.04.2005 is extracted hereunder:

"23.04.2005

Present: APP for the State with I.O. SI Davinder Kumar

Fresh challan filed today. It be checked and registered. Ld. CMM is on half day's leave.

I take cognizance for the offence u/s 7(1(C) Cinematograph, 63 CR Act.

Accd. Shiv Narain, Raj Kumar and Kamal Singh are already on bail.

Other accused not arrested shown in column No.2.

Issue summons to the accused and notice to their surety for next date.

Put up on 17-08-05. IO to be present on the date fixed."

4. It appears that although there was no specific order for taking cognizance against the Petitioners and the two other accused persons, the process was, however, issued by the ministerial staff attached to the Court which prompted the two other accused mentioned in column No.2 to challenge the order of taking cognizance. The order dated 23.04.2005 was set aside in Crl.M.C.5564/2006 by an order dated 29.04.2008. The learned Single Judge of this Court while setting aside the order dated 23.04.2005, remanded the case back to the Court with the direction that the parties will be heard afresh and a detailed reasoned order will be passed.

5. It is also borne out from the record and is also the case of the Petitioners that an interim protection was granted to the Petitioners by this Court in Bail Appln.1470-71/2005 till 28.09.2005 and the Application came to be dismissed by an order dated 30.09.2005.

6. The Petitioners grievance is that the order dated 02.06.2011 passed by the learned ACMM is wholly illegal in view of the fact that the Magistrate having taken cognizance by an order dated 23.04.2005 could not have ordered for further investigation of the case and thus the order

dated 02.06.2011 is liable to be set aside. The learned counsel for the Petitioners relies on the judgment of the Supreme Court in **Reeta Nag v. State of West Bengal & Ors.,** (2009) 9 SCC 129 and **Randhir Singh Rana v. State,** (1997) 1 SCC 361. Referring to Section 468(2) of the Code, the learned counsel for the Petitioners argues that the offences under which the case was registered was punishable for a maximum punishment of three years and thus, the period of limitation for taking cognizance was three years and since the same has not been taken for a period of seven years the FIR is liable to be quashed.

7. On the other hand, the learned APP for the State contends that since the cognizance was not taken by the learned A.C.M.M. specifically against the Petitioners and, if at all taken, was set aside by the Delhi High Court by its order dated 29.04.2008, the learned A.C.M.M. was not debarred from directing further investigation in the case. The learned APP argues that in the instant case in fact the learned APP had requested the Court (as recorded in order dated 28.04.2011) that the investigation against the Petitioners and two other accused was still pending. Thus, by the order dated 02.06.2011, the learned A.C.M.M. had simply reminded the investigating agency of its obligation to complete the investigation promptly. The learned APP relies on **Kishan Lal v. Dharmendra Bafna & Anr.,** (2009) 7 SCC 685, **Bhagwant Singh v. Commissioner of Police & Anr.,** (1985) 2 SCC 537, **Vinay Tyagi v. Irshad Ali,** (in Crl.A.2040-2041/2012) arising out of SLP(Crl) Nos.9185-9186 of 2009) decided on 13.12.2012.

8. I have given my thoughtful consideration to the respective contentions raised on behalf of the parties. I have also extracted the portion of the report under Section 173 of the Code filed by the investigating agency whereby three accused were shown in column No.4 and the four accused including the two Petitioners herein were shown in column No.2. With regard to the Petitioners, the investigating agency had stated that the NBWs had been obtained against the Petitioners but they were evading arrest. The IO had stated that the names of these four persons have been kept in column No.2 of the challan. The supplementary challan shall be filed against them if deemed fit after conducting interrogation.

9. In *Reeta Nag* relied upon by the learned counsel for the Petitioners, the charge sheet was filed against 16 accused persons. The Magistrate

took cognizance against six of the original 16 accused persons for offences under Sections 467/468/120B of the Indian Penal Code. He discharged the remaining 10 accused persons on the prayer of the investigating officer. Subsequently, on an Application filed by the *de facto* complainant, the learned Magistrate by an order dated 20.08.2004 directed officer in charge of the Police Station to reinvestigate the case and submit a report. On a Petition under Section 482 of the Code preferred by the Respondents No.2 and 3, the Calcutta High Court having regard to the provisions of Section 362 of the Code held that the Magistrate had no jurisdiction to order reinvestigation of the case. The Calcutta High Court further observed that if any material was produced during the course of trial, the Magistrate would be competent to act in accordance with the provisions of Section 319 of the Code. The *de facto* complainant challenged the order passed by the Calcutta High Court. The Supreme Court referring to the judgments in **Master Construction Co. (P) Ltd. v. State of Orissa,** AIR 1966 SC 1047, **Sankatha Singh v. State of U.P.,** AIR 1962 SC 1208 and **Sooraj Devi v. Pyare Lal,** (1981) 1 SCC 500 held that the Magistrate had no power to order reinvestigation in the case. In paras 19 and 20, the Supreme Court laid down as under:

> "19. As has been rightly held by the High Court, having regard to the decisions of this Court in **Master Construction Co. (P) Ltd. case Master Construction Co. (P) Ltd. v. State of Orissa,** AIR 1966 SC 1047 and **Sankatha Singh v. State of U.P.,** AIR 1962 SC 1208, which were reflected in **Sooraj Devi** case [(1981) 1 SCC 500 : 1981 SCC (Cri) 188] , having passed a final order framing charge against six persons and discharging the remaining accused persons, it was no longer within the Magistrate's jurisdiction to direct a reinvestigation into the case.
>
> 20. The aforesaid question was considered by a three-Judge Bench of this Court in **Adalat Prasad v. Rooplal Jindal** [(2004) 7 SCC 338 : 2004 SCC (Cri) 1927] , on a reference made with regard to the correctness of the law laid down by the Supreme Court in **K.M. Mathew v. State of Kerala** [(1992) 1 SCC 217 : 1992 SCC (Cri) 88] , where it was held that the Court issuing summons was entitled to recall the same on being satisfied that the issuance of summons was not in accordance with law. Holding that the said decision in **K.M. Mathew** case [(1992) 1 SCC 217 : 1992 SCC (Cri) 88] did not lay down the correct law, this

Court in **Adalat Prasad** case [(2004) 7 SCC 338 : 2004 SCC (Cri) 1927] held that the Magistrate had no jurisdiction to recall his order issuing process in the absence of any power of review or inherent power which did not inhere in the subordinate criminal courts, but was available to the High Court under Section 482 CrPC."

10. The Supreme Court also referred to its judgment in **Randhir Singh Rana** (as relied upon by the learned counsel for the Petitioners) and held that the Magistrate cannot suo moto direct further investigation under Section 173(8) of the Code or direct reinvestigation into a case on account of the bar under Section 167(2) of the Code. The judgment in Reeta Nag proceeded primarily on the premise that cognizance was taken against six accused persons who were charged and the rest ten accused persons had been ordered to be discharged on the basis of the report under Section 173(2) of the Code filed by the police and that the Magistrate had no power to review his own order. In **Kishan Lal,** a complaint under Section 420 etc. was filed before the Commissioner of Police, Chennai naming nine accused persons on the basis of which, an FIR was registered on 22.01.2006. On 08.10.2007, a charge sheet was filed in the Court of M.M. for an offence punishable under Sections 406/420/120B IPC against only two persons. The learned M.M. took cognizance against the two accused on 29.10.2007. On the premise that the learned Magistrate had not taken cognizance against the other accused persons, the complainant filed an Application under Section 482 of the Code before the High Court for setting aside of the said order. The Application was disposed of with liberty to the complainant to move an Application before the M.M. concerned. While disposing the Application, the learned M.M. ordered further investigation under Section 173(8) of the Code. The order of the learned M.M. was unsuccessfully challenged before the High Court. The accused No.2 took the matter to the Supreme Court. Dismissing the Criminal Appeal, the Supreme Court observed that the investigating agency can request the Magistrate in terms of Section 173(8) to carry out further investigation. It was observed that in certain situations, such a formal request is not necessary. In para 15 of the report, the Supreme Court held as under:

"15. An order of further investigation can be made at various stages including the stage of the trial, that is, after taking cognizance of the offence. Although some decisions have been

referred to us, we need not dilate thereupon as the matter has recently been considered by a Division Bench of this Court in **Mithabhai Pashabhai Patel v. State of Gujarat** [(2009) 6 SCC 332 : (2009) 2 SCC (Cri) 1047 : (2009) 7 Scale 559] in the following terms: (SCC pp. 336-37, paras 12-13)

"12. This Court while passing the order in exercise of its jurisdiction under Article 32 of the Constitution of India did not direct reinvestigation. This Court exercised its jurisdiction which was within the realm of the Code. Indisputably the investigating agency in terms of sub-section (8) of Section 173 of the Code can pray before the Court and may be granted permission to investigate into the matter further. There are, however, certain situations, where such a formal request may not be insisted upon....."

11. Similarly, in **Vinay Tyagi,** the Supreme Court relied on the three Judge Bench decision in **Bhagwant Singh** and referred to **Reeta Nag** and **Randhir Singh Rana** and held that where the Court has taken cognizance on the basis of the police report, it can still direct further investigation.

12. At this stage, it would be appropriate to revert back to the facts of the instant case. As stated earlier, the investigating officer in the report under Section 173(2) himself stated that the Petitioners and some other accused persons were evading arrest and that *the supplementary challan shall be filed if some material came on record, but the same is not reflected in the investigation report.* Since the cognizance, if at all taken by the learned A.C.M.M. was set aside by this Court by an order dated 29.04.2008, the learned M.M. was well within his powers to direct further investigation in the case. A perusal of the order dated 11.02.2011 shows that Inspector Devender had stated that no evidence could be collected against the present Petitioners whereas on the next date, that is, 28.04.2011, it was stated that the investigation against the Petitioners was still pending. The learned A.C.M.M., therefore, directed that the status of the investigation should be placed before the Court on the next date, that is, 02.06.2011. Finding that there was total laxity on the part of the Investigating Officer, the learned A.C.M.M. preferred to direct the matter to be brought to the notice of the Commissioner of Police and for expediting the investigation. There could be twin purpose of the order

dated 02.06.2011. If there is no material against the Petitioners, the damocles sword must not hang on the Petitioners head and the matter can be put to rest. Secondly, if there is sufficient material disclosed by the investigating agency, the Magistrate can take cognizance and proceed further. Thus the order dated 02.06.2011 on this aspect cannot be faulted.

13. The learned counsel for the Petitioners referring to Section 468(3) of the Code argues that no fruitful purpose would be served in continuing the investigation or even filing of the charge sheet against the Petitioners as the same would be barred by limitation. This aspect cannot be gone into by this Court at this stage. The Petitioner shall be at liberty to raise this point before the learned A.C.M.M. if the need arises. I do not find any illegality or abuse of the process of the Court in passing the order dated 02.06.2011 passed by the learned A.C.M.M.

14. The order does not call for any interference by this Court under its inherent powers under Section 482 of the Code. The Petition is accordingly dismissed.

15. Pending Applications stand disposed of.

ILR (2013) III DELHI 2169
CRL. M.C.

PUNEET CHAWLA **....PETITIONER**

VERSUS

STATE & ANR. **....RESPONDENTS**

(G.P. MITTAL, J.)

CRL. M.C. NO. : 2534/2011 **DATE OF DECISION: 26.02.2013**

Code of Criminal Procedure, 1973—Section 173, 177 & 178—Petitioner prayed for quashing of FIR and report based on it, registered in P.S. Janakpuri averring, alleged acts of cruelty/misappropriation pleaded by

complainant took place either at Faridabad or at Chandigarh—But neither offence nor any part thereof was committed within jurisdiction of NCT of Delhi, Delhi Police could not carry out investigation and was not competent to take cognizance of charges of said offences—Per contra on behalf of State, it was urged Officer Incharge of Police Station is under obligation to investigate any case which a Court having jurisdiction over local area, within limits of such police station would have power to inquire into or try under provisions of Chapter XIII of the Code. Held:—When no part of cause of action arose in Delhi and alleged acts were committed at some other place outside Delhi, the concerned Magistrate had no jurisdiction to deal with the matter. Report U/s 173 of Code to be returned to Officer Incharge of Police Station with directions to present it to the Court of competent jurisdiction.

It is true that in **Y. Abraham Ajith** which is a latter decision than in Satvinder Kaur, the Supreme Court had quashed the proceedings, yet in para 19 it was observed that the complaint shall be returned to the Respondent No.2 who shall be at liberty to file the same in the appropriate Court to be dealt with in accordance with law. Thus, there is no contradiction in the law laid down in Satvinder Kaur and Y.Abraham Ajith. **(Para 6)**

A co-ordinate Bench of this Court in Malkiat Singh noticed the reports in Y.Abraham Ajith and Satvinder Kaur and observed that the concerned Metropolitan Magistrate may be directed to return the police report to the Investigating Officer so that the same could be presented to the appropriate Court. **(Para 7)**

Important Issue Involved: When no part of cause of action arose in Delhi and alleged acts were committed at some other place outside Delhi, the concerned Magistrate had no jurisdiction to deal with the matter.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Prag Chawla Advocate with Mr. K.K. Sharma, Advocate. Mr. Saurav, Advocate.

FOR THE RESPONDENTS : Ms. Rajdipa Behura, APP for the State.

CASES REFERRED TO:

1. *Malkiat Singh* vs. *State,* (2005) 121 DLT 668.
2. *Y.Abraham Ajith & Ors.* vs. *Inspector of Police, Chennai & Anr.,* 2004 VIII AD(S.C.) 288.
3. *Satvinder Kaur* vs. *State (N.C.T.) of Delhi,* (1999) 8 SCC 728.
4. *Pratibha Rani* vs. *Suraj Kumar,* (1985) 2 SCC 370, 395 : 1985 SCC (Cri) 180.
5. *State of W.B.* vs. *Swapan Kumar Guha,* (1982) 1 SCC 561 : 1982 SCC (Cri) 283.

RESULT: Petition disposed of.

G.P. MITTAL, J.

1. The Petitioner invokes inherent powers of this Court under Section 482 of the Code of Criminal Procedure ("the Code") for quashing of FIR No.518/2007 dated 28.11.2007, registered at Police Station (PS) Janakpuri and the report under Section 173 of the Code filed on the basis of the said FIR.

2. The short ground taken by the Petitioner is that the allegations made by the complainant in the charge sheet would show that the alleged acts of cruelty/misappropriation took place either at Faridabad or at Chandigarh. Relying on Sections 177 and 178 of the Code, the learned counsel for the Petitioner urges that since neither the offence nor any part thereof was committed within the jurisdiction of NCT of Delhi, Delhi Police was not entitled to carry out the investigation in respect of the offence alleged and the Court at Delhi was not competent to take cognizance of the charge sheet. Relying on **Y.Abraham Ajith & Ors. v. Inspector of Police, Chennai & Anr.,** 2004 VIII AD(S.C.) 288, the learned counsel for the Petitioner prays for quashing of the FIR.

3. On the other hand, Ms. Rajdipa Behura, learned APP for the State drawing my attention to Section 156 of the Code and states that an Officer in charge of Police Station is under obligation to investigate any case which a Court having jurisdiction over the local area, within the limits of such Police Station, would have power to inquire into or try under the provisions of Chapter XIII of the Code. It is stated that the proceedings of a Police Officer cannot be called in question on the ground that the case is one which such officer was not empowered to investigate under this Section. The learned APP presses into service a judgment of the Supreme Court in **Satvinder Kaur v. State(N.C.T.) of Delhi,** (1999) 8 SCC 728 and a judgment of a Co-ordinate Bench of this Court in **Malkiat Singh v. State,** (2005) 121 DLT 668. The learned APP argues that although Delhi Court may not have any jurisdiction to try the case, yet the investigation carried out by the IO will not be illegal and the case can be returned to the SHO for presenting it to the Court having jurisdiction.

4. In Y.Abraham Ajith, on facts it was found that the offence was committed at Nagercoil. The Supreme Court quashed the complaint on the ground that no part of the cause of action arose in Chennai and, therefore, the concerned Magistrate had no jurisdiction to deal with the matter.

5. In **Satvinder Kaur** relied upon by the learned APP, the Supreme Court analysed the provisions of Sections 156, 168, 169, 170, 177 and 178 of the Code. The Supreme Court laid emphasis on Section 156(1) of the Code and observed that although a Police officer can investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such Police Station would have power to inquire into or try under Chapter XIII of the Code, yet by virtue of sub-Section (2) the investigation carried out by a Police officer on the ground that the case was one in which he was not empowered to investigate would not make his investigation illegal. The Supreme Court thus set aside the order of the High Court quashing the FIR and the Investigating Officer was directed to complete the investigation. Paras 10, 11, 12 and 14 of the report are extracted hereunder:

"10. It is true that territorial jurisdiction also is prescribed under sub-section (1) to the extent that the officer can investigate any cognizable case which a court having jurisdiction over the local area within the limits of such police station would have power to enquire into or try under the provisions of Chapter XIII. However, sub-section (2) makes the position clear by providing that no proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered to investigate. After investigation is completed, the result of such investigation is required to be submitted as provided under Sections 168, 169 and 170. Section 170 specifically provides that if, upon an investigation, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit for trial. Further, if the investigating officer arrives at the conclusion that the crime was not committed within the territorial jurisdiction of the police station, then FIR can be forwarded to the police station having jurisdiction over the area in which the crime is committed. But this would not mean that in a case which requires investigation, the police officer can refuse to record the FIR and/or investigate it.

11. Chapter XIII of the Code provides for "jurisdiction of the criminal courts in enquiries and trials". It is to be stated that under the said chapter there are various provisions which empower the court for enquiry or trial of a criminal case and that there is no absolute prohibition that the offence committed beyond the local territorial jurisdiction cannot be investigated, enquired or tried. This would be clear by referring to Sections 177 to 188. For our purpose, it would suffice to refer only to Sections 177 and 178 which are as under:

"177. Ordinary place of enquiry and trial. - Every offence shall ordinarily be enquired into and tried by a court within whose local jurisdiction it was committed.

178. Place of enquiry or trial. - (a) When it is uncertain in which of several local areas an offence was committed, or

(b) where an offence is committed partly in one local area and partly in another, or

(c) where an offence is continuing one, and continues to be committed in more local areas than one, or

(d) where it consists of several acts done in different local areas,

it may be enquired into or tried by a court having jurisdiction over any of such local areas.

12. A reading of the aforesaid sections would make it clear that Section 177 provides for "ordinary" place of enquiry or trial. Section 178, inter alia, provides for place of enquiry or trial when it is uncertain in which of several local areas an offence was committed or where the offence was committed partly in one local area and partly in another and where it consisted of several acts done in different local areas, it could be enquired into or tried by a court having jurisdiction over any of such local areas. Hence, at the stage of investigation, it cannot be held that the SHO does not have territorial jurisdiction to investigate the crime.

x x x x x x x x

14. Further, the legal position is well settled that if an offence is disclosed the court will not normally interfere with an investigation into the case and will permit investigation into the offence alleged to be completed. If the FIR, prima facie, discloses the commission of an offence, the court does not normally stop the investigation, for, to do so would be to trench upon the lawful power of the police to investigate into cognizable offences. [**State of W.B. v. Swapan Kumar Guha,** (1982) 1 SCC 561 : 1982 SCC (Cri) 283] It is also settled by a long course of decisions of this Court that for the purpose of exercising its power under Section 482 CrPC to quash an FIR or a complaint, the High Court would have to proceed entirely on the basis of the allegations made in the complaint or the documents accompanying the same per se; it has no jurisdiction to examine

the correctness or otherwise of the allegations. [**Pratibha Rani v. Suraj Kumar,** (1985) 2 SCC 370, 395 : 1985 SCC (Cri) 180]."

6. It is true that in **Y.Abraham Ajith** which is a latter decision than in Satvinder Kaur, the Supreme Court had quashed the proceedings, yet in para 19 it was observed that the complaint shall be returned to the Respondent No.2 who shall be at liberty to file the same in the appropriate Court to be dealt with in accordance with law. Thus, there is no contradiction in the law laid down in Satvinder Kaur and Y.Abraham Ajith.

7. A co-ordinate Bench of this Court in Malkiat Singh noticed the reports in Y.Abraham Ajith and Satvinder Kaur and observed that the concerned Metropolitan Magistrate may be directed to return the police report to the Investigating Officer so that the same could be presented to the appropriate Court.

8. In view of foregoing discussion, the FIR and the charge sheet filed on the basis thereof cannot be quashed. The learned Metropolitan Magistrate concerned is directed to return the report under Section 173 of the Code to the officer in charge of the Police Station with the direction to present it to the Court of competent jurisdiction.

9. The Petition is disposed of in above terms.

10. Pending Applications stand disposed of.

ILR (2013) III DELHI 2176
CRL. M.C.

M.G. ATTRI **....PETITIONER**

VERSUS

S.K. JAIN **....RESPONDENT**

(G.P. MITTAL, J.)

CRL. M.C. NO. : 2011/2007 **DATE OF DECISION: 26.02.2013**

Foreign Exchange Regulation Act, 1973 (FERA)—Section 8 & 14—Code of Criminal Procedure, 1973—Section 244 & 245—Aggrieved petitioner challenged order passed by Ld. Additional Chief Metropolitan Magistrate, Delhi in complaint case instituted by petitioner against respondent and one another accused, as respondent was discharged by Ld. A.C.M.M. stating that complaint against him was groundless—Petitioner had also challenged said order in revision petition which was dismissed by Ld. ASJ. Held:- A Magistrate can discharge an accused in a warrant case instituted otherwise than on a police report U/s 245 (2) of the Code if he finds the charge to be groundless.

In a warrant case, the procedure has to be as laid down under Sections 244 to 250 of the Code. The only distinction between the complaint made by a public servant and a private individual is as given in Section 200 of the Code whereby a Magistrate can dispense with the examination of a complainant if the complaint is made by a public servant acting or purporting to act in the discharge of his official duties. That stage was already over, in view of the fact that process had already been ordered to be issued against the Respondent. In the scheme of the provision for trial of a warrant case instituted otherwise than on a police report

Section 245(2) of the Code specifically empowers a Magistrate to discharge the accused at any previous stage of the case if, for reasons to be recorded, the Magistrate, considers the charge to be groundless. **(Para 5)**

Important Issue Involved: A Magistrate can discharge an accused in a warrant case instituted otherwise than on a police report U/s 245 (2) of the Code if he finds the charge to be groundless.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. A.K. Panda, Sr. Advocate with Mr. Naveen Kumar Matta, Advocate.

FOR THE RESPONDENT : Mr. Sudhir Nandrajog, Sr. Advocate with Mr. H.S. Bhullar & Mr. Ankit Aggarwal, Advocates.

CASES REFERRED TO:

1. *Ajay Kumar Ghose* vs. *State of Jharkhand & Anr.,* (2009) 14 SCC 115.
2. *Adalat Prasad* vs. *Rooplal Jindal & Ors.,* (2004) 7 SCC 338.
3. *Subramanium Sethuraman* vs. *State of Maharashtra & Anr.,* (2004) 13 SCC 324.
4. *Manmohan Malhotra* vs. *P.M. Abdul Salam* 1994 Cri LJ 1555 (Ker).
5. *Luis de Piedade Lobo* vs. *Mahadev Vishwanath Parulekar* 1984 Cri LJ 513 (Bom).
6. *Gopal Chauhan* vs. *Satya* [1979 Cri LJ 446 (HP)].
7. *Cricket Assn. of Bengal* vs. *State of W.B.* (1971) 3 SCC 239 : 1971 SCC (Cri) 446.
8. *Mohd. Sheriff Sahib* vs. *Abdul Karim Sahib* [AIR 1928 Mad 129 (1)].

RESULT: Petition dismissed.

G.P. MITTAL, J. (ORAL)

1. By virtue of this Petition under Section 482 of the Code of Criminal Procedure ("the code"), the Petitioner M.G.Attri (Chief Enforcement Officer) seeks *setting aside* of the order dated 26.11.1998 passed by the learned Additional Chief Metropolitan Magistrate ("A.C.M.M.") in the Complaint Case No.75/1/1996 instituted by the Petitioner against the Respondent and one Mohd. Ameerudeen for an offence punishable under Section 8(1) read with Section 14 of the Foreign Exchange Regulation Act, 1973 (the FERA) whereby on an Application under Section 245 (2) of the Code, the Respondent was discharged on the ground that the complaint against him is groundless. By virtue of a Revision Petition under Section 397 of the Code, the Petitioner challenged the order dated 26.11.1998 before the learned Additional Sessions Judge ('the learned ASJ'). The Revision Petition came to be dismissed by the learned ASJ by an order dated 08.03.2007.

2. The impugned orders are challenged on the following grounds:-

i) The Magistrate having taken cognizance issued the process on a complaint filed by the Petitioner. It was obligatory on the part of the learned A.C.M.M. to have first given an opportunity to the Petitioner to adduce its evidence as provided under Section 244 of the Code and only then to determine whether the Respondent is to be charged with the offence or he was liable to be discharged. Reliance is placed on **Adalat Prasad v. Rooplal Jindal & Ors.,** (2004) 7 SCC 338 and **Subramanium Sethuraman v. State of Maharashtra & Anr.,** (2004) 13 SCC 324.

ii) The learned A.C.M.M. acted in hot haste in holding that the charge against the Respondent was groundless. The Petitioner relied on some documents and the Criminal Complaints No. 28/1 and 63/1 filed against the Respondent apart from the evidence on record. The learned A.C.M.M. ought not to have discharged Respondent No.2.

3. There is no dispute about the proposition of law that a Magistrate or for that matter an ASJ does not enjoy any inherent powers as those conferred on a High Court under Section 482 of the Code. Admittedly, the Magistrate and the 'ASJ' do not have any power of review. In **Adalat Prasad**, a three Judge Bench of the Supreme Court held that

against an order of summoning (in a summons case) the only remedy available, to an aggrieved accused, is the extraordinary remedy available under Section 482 of the Code and not by an Application to recall the summons or to seek discharge. The law laid down in **Adalat Prasad** was approved by a three Judge Bench decision in **Subramanium Sethuraman**, and the contention raised that **Adalat Prasad** required reconsideration, was rejected. Para 14 of the report of the Supreme Court in **Subramanium Sethuraman** is extracted hereunder:-

> "14. In Adalat Prasad case this Court considered the said view of the Court in **K.M. Mathew** case (1992) 1 SCC 217 and held that the issuance of process under Section 204 is a preliminary step in the stage of trial contemplated in Chapter XX of the Code. Such an order made at a preliminary stage being an interlocutory order, same cannot be reviewed or reconsidered by the Magistrate, there being no provision under the Code for review of an order by the same court. Hence, it is impermissible for the Magistrate to reconsider his decision to issue process in the absence of any specific provision to recall such order. In that line of reasoning this Court in Adalat Prasad case held:
>
> > "Therefore, we are of the opinion, that the view of this Court in Mathew case that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law."

4. The instant case, however, is not a summons trial case. Admittedly, it is a warrant trial as the offence with which Respondent No.2 was being prosecuted was punishable with imprisonment which could extent to 7 years and also with fine. Although, the learned Senior Counsel for the Petitioner tried to convince this Court that since the complaint in this case was made by a public servant, the procedure would be that of a trial of warrant case instituted on a police report. I am, however, unable to subscribe to such interpretation in view of the fact that it is immaterial as to whether the complaint is made by a public servant or by a private individual.

5. In a warrant case, the procedure has to be as laid down under Sections 244 to 250 of the Code. The only distinction between the complaint made by a public servant and a private individual is as given in Section 200 of the Code whereby a Magistrate can dispense with the

examination of a complainant if the complaint is made by a public servant acting or purporting to act in the discharge of his official duties. That stage was already over, in view of the fact that process had already been ordered to be issued against the Respondent. In the scheme of the provision for trial of a warrant case instituted otherwise than on a police report Section 245(2) of the Code specifically empowers a Magistrate to discharge the accused at any previous stage of the case if, for reasons to be recorded, the Magistrate, considers the charge to be groundless.

6. In this connection a reference can be made to a report of the Supreme Court in **Ajay Kumar Ghose v. State of Jharkhand & Anr.,** (2009) 14 SCC 115, wherein the Supreme Court drew distinction between the provisions of Sections 244 and 245 of the Code and reiterated that the Magistrate is empowered to discharge an accused at any stage, that is, before evidence is recorded as provided under Section 244(1) of the Code, if the Magistrate finds the charge to be groundless. Paras 30, 31 and 36 of the report are reads as under:-

> 30. Under Section 244, on the appearance of the accused, the Magistrate proceeds to hear the prosecution and take all such evidence, as may be produced in support of the prosecution. He may, at that stage, even issue summons to any of the witnesses on the application made by the prosecution. Thereafter comes the stage of Section 245(1) CrPC, where the Magistrate takes up the task of considering on all the evidence taken under Section 244(1) CrPC, and if he comes to the conclusion that no case against the accused has been made out, which, if unrebutted, would warrant the conviction of the accused, the Magistrate proceeds to discharge him.
>
> 31. The situation under Section 245(2) CrPC, however, is different, as has already been pointed out earlier. The Magistrate thereunder has the power to discharge the accused at any previous stage of the case. We have already shown earlier that that previous stage could be from Sections 200 to 204 CrPC and till the completion of the evidence of prosecution under Section 244 CrPC. Thus, the Magistrate can discharge the accused even when the accused appears, in pursuance of the summons or a warrant and even before the evidence is led under Section 244 CrPC, and makes an application for discharge.

36. The Magistrate has the power to discharge the accused under Section 245(2) CrPC at any previous stage i.e. before the evidence is recorded under Section 244(1) CrPC, which seems to be the established law, particularly in view of the decision in **Cricket Assn. of Bengal v. State of W.B.** [(1971) 3 SCC 239 : 1971 SCC (Cri) 446] , as also the subsequent decision of the Bombay High Court in **Luis de Piedade Lobo v. Mahadev Vishwanath Parulekar** [1984 Cri LJ 513 (Bom)] . The same decision was followed by Kerala High Court in **Manmohan Malhotra v. P.M. Abdul Salam** [1994 Cri LJ 1555 (Ker)] and Hon'ble Justice K.T. Thomas, as the learned Judge then was, accepted the proposition that the Magistrate has the power under Section 245(2) CrPC to discharge the accused at any previous stage. The Hon'ble Judge relied on a decision of the Madras High Court in **Mohd. Sheriff Sahib v. Abdul Karim Sahib** [AIR 1928 Mad 129 (1)], as also the judgment of the Himachal Pradesh High Court in **Gopal Chauhan v. Satya** [1979 Cri LJ 446 (HP)].

7. A perusal of the order dated 26.11.1998 passed by the learned A.C.M.M. reveals that the position of law that the Magistrate can discharge an accused in a warrant case instituted otherwise than on a police report was even conceded on behalf of the Petitioner as could be seen from the para 9 of the impugned order. In any case, in view of catena of judgments including **Ajay Kumar Ghose**, there cannot be any manner of doubt that the Magistrate is entitled to discharge the accused under Section 245 (2) of the Code, if he finds the charge to be groundless.

8. The learned Senior Counsel for the Petitioner criticizes the finding reached by the learned A.C.M.M., which was approved by the learned ASJ on the ground that the statement made by the Respondent under Section 40 of the FERA, was admissible in evidence. The learned Senior Counsel states that the entry in the planner diary '5 Crores Amir Bhai' was established. This coupled with the statement dated 16.10.1995 given by the Respondent, his letter dated 04.12.1995 giving misleading explanation about the entry and the statement dated 23.01.2000 of the co-accused Mohd.Ameeruddin Habib would show that the charge against the Respondent could not be said to be groundless.

9. On the other hand, learned Senior Counsel for the Respondent submits that on the basis of this material, the Petitioner only speculated that the entry related to the sale of foreign exchange to Habib Bhai (accused No.1 in the Complaint Case by the Respondent).

10. The learned A.C.M.M. dealt with the evidence relied upon by the Petitioner and observed that it was not capable of being converted into legal evidence and thus, held the charge against the Respondent groundless. Similarly, the learned ASJ opined that the case cannot be proceeded against the Respondent merely on suspicion.

11. The evidence relied upon by the Petitioner against the Respondent is the entry in the planner diary '5 Crores Amir Bhai'. The second piece of evidence is the statement alleged to have been made by the Respondent. The same is extracted hereunder:-

> Q. I put it to you that the entry at S. No. three (3) is actually "5 crores Amir Bhai". What you have to say about this.
>
> Ans. No it is not true.
>
> Q. Then to which transaction this entry of '5 crores pertain to?
>
> Ans. I will try to recollect and let you know why I have written this.
>
> About entry at Sl.No.4, I am not able to read anything at this moment."

12. The explanation with regard to the above stated question was given by the Respondent by his letter dated 04.12.1995 wherein the Respondent has tried to explain that this entry might be with regard to the re-conciliation of accounts between the Bhilai Engineering Corporation Limited and TPE pertaining to certain contracts as mentioned in the earlier said letter. The other piece of evidence relied upon by the Petitioner is the statement of Mohd. Ameeruddin Habib, which was recorded on 23.01.2000 (much after filing of the complaint case). Even if, the statement is taken into consideration, it leads nowhere that the amount was related to some payments of foreign exchange by the Respondent to Mohd.Ameeruddin.

13. In the circumstances, I do not find any illegality committed by the learned A.C.M.M. in discharging the Respondent on the ground that

the charge against him is groundless. The learned ASJ rightly declined to interfere with the order dated 26.11.1998 for good reasons.

14. The Petition is devoid of any merits; the same is accordingly dismissed.

15. Pending applications also stand disposed of.

ILR (2013) III DELHI 2183
W.P. (C)

WHIRLPOOL OF INDIA LIMITED AND ANR. ....PETITIONERS

VERSUS

UOI AND ORS. ....RESPONDENT

(S. RAVINDRA BHAT & R.V. EASWAR, JJ.)

W.P. (C) NO. : 3126/2010 DATE OF DECISION: 28.02.2013

Income Tax Act, 1961—Insertion of clause (i) to Explanation 1 in Section 115 JB—Retrospectively of the amendment—Brief Facts—Petitioner, a public limited company is engaged in the business of manufacture and trading/export of consumer items such as refrigerators, washing machines, etc.—It was assessed to income tax on the "book profit" computed in accordance with the provisions of Section 115 JB of the Act inserted into the Act by the Finance Act, 2000 w.e.f. 01.04.2001—The gist of the section is that certain companies were liable to pay tax on their "book profit" if the total income computed in accordance with the provisions of the Act was less than 18% of its book profit—In that case, book profit was deemed to be the total income of such companies—Explanation 1 to the

section permitted certain adjustments to be made to the figure of book profit as shown in the profit and loss account prepared as per the Companies Act—The first part of the Explanation provided for certain upward adjustments to the book profit—Under clause (c)—The amount or amounts set aside to provisions made for meeting liabilities, other than the ascertained liabilities was/were to be added to the book profit as shown in the profit and loss account—A controversy arose as to whether the provision for bad and doubtful debts made in the profit and loss account can be added to the book profit under the aforesaid clause—The income tax authorities took the view that such a provision was made for meeting a liability other than an ascertained liability and therefore the book profit had to be increased by the amount of the provision—The case of the companies which were liable to tax under Section 115 JB was that a provision for bad and doubtful debts cannot be regarded as a provision made for meeting a liability, let alone an company and what in effect the company does, when making the provision for bad and doubtful debts, is only to provide for a possible non-recovery of the debt—According to the companies, a provision made for the diminution in the value of the debt due to possible non-recovery or the debt going bad cannot be treated as a provision made for meeting an unascertained liability. Special Bench of Income Tax Appellate Tribunal rules in *JCIT Vs. Usha Martin Ltd.* (2006) 105 TTJ (Kol.) 543 (SB) that such a provision cannot be considered as a provision for meeting an unascertained liability and that in truth and substance it was a provision for the diminution of the value of the debt and therefore, it fell outside, clause (e) of the Explanation and the book profit cannot be increased by the amount of the provision—This view of the Special Bench of the Tribunal was upheld by the Delhi High Court in a case where a similar issue had arisen and this judgment is reported

as *CIT Vs. Eicher Ltd.* (2006) 287 ITR 170—The controversy was eventually resolved by the Supreme Court in the judgment reported as *CIT v. HCL Comnet Systems & Services Ltd.* (2008) 305 ITR 409 by observing that for the purposes of section 115JA, the Assessing Officer can increase the net profit determined as per the profit and loss account prepared as per Parts II and III of Schedule VI to the Companies Act only to the extent permissible under the Explanation thereto as per which six items, i.e., item Nos. (a) to (f) which if debited to the profit and loss account can be added back to the net profit for computing the book profit—The provision for bad and doubtful debts can be added back to the net profit only if item (c) dealing with amount(s) set aside as provision made for meeting liabilities, other than ascertained liabilities stands attracted—The assessee's case would, therefore, fall within the ambit of item (c) only if the amount is set aside as provision; the provision is made for meeting a liability; and the provision should be for other than an ascertained liability, i.e., it should be for an unascertained—A debt payable by the assessee is different from a debt receivable by the assessee—A debt is payable by the assessee where the assessee has to pay the amount to others whereas the debt receivable by the assessee is an amount which the assessee has to receive from others—In the present case, the debt under consideration is a debt receivable by the assessee—The provision for bad and doubtful debt, therefore, is made to cover up the probable diminution in the value of the asset, i.e., debt which is an amount receivable by the assessee—Therefore, such a provision cannot be said to be a provision for a liability, because even if a debt is not recoverable no liability could be fastened upon the assessee—After the judgment of the Supreme Court was rendered in favour of the company assessees amendment of section 115JB was effected by substituting with effect

from the 1st day of April, 2001, namely the amount or amounts set aside as provision for diminution in the value of any asset—The amendment to section 115JB is proposed to be made effective retrospectively from 1st day of April, 2001 and will, accordingly apply in relation to assessment year 2001-02 and subsequent assessment years—The petitioner filed its returns of income for the assessment years 2002-03, 2003-04 and 2009-10 on 31.10.2002, 28.11.2003 and 29.09.2009 respectively—It is averred in the petition that the petitioner was advised to re-compute its book profit for these years by taking into account the provision for diminution in the value of assets, including any provision made for bad and doubtful debts, in view of the retrospective amendment—The petitioner accordingly, recomputed its book profit and deposited Rs. 1,08,64,425/- on 30.10.2009 towards additional taxes for these years consequent to the re-computation—This writ petition is for quashing the retrospectivity of the amendment on the ground that it is unreasonable, discriminatory and therefore, unconstitutional—It is also prayed that the respondents be directed to refund the tax deposited suo motu by the petitioner on 30.10.2009 as a result of the retrospective amendment along with applicable interest. Held—Explanation 1 below section 115JB contains several clauses—If the profit and loss account prepared by the company contains any debit which answers to the description of any of those clauses, the amount of the debit can be added to the book profit and the book profit shall stand increased by the said amount—The purpose of the Explanation is to broaden the base amount on which tax is payable by the company—No new levy is imposed—The tax-base stands widened by the amendment in as much as the amount or amounts set aside as provision for diminution in the value of any asset and debited to the profit and loss account shall be added to the book profit—It is well settled that

income tax is only one tax on the total income of the assessee—The book profit of a company as shown in the profit and loss accounts prepared in accordance with the Companies Act, 1956 and as adjusted by the various clauses of Explanation 1 is deemed to be the total income of the company on which tax is payable—It is, therefore, a misnomer to refer to the amendment as imposing a new tax or levy—Since the amendment does not provide for any new levy of income tax, there is no question of it being struck down on the ground of retrospectivity—The memorandum explaining the provisions of the Finance Bill, 2012 (2012) 342 ITR (St) 234 at page 265 contained a detailed justification as to why certain amendments were being proposed in section 9 of the Act in order to rationalise the international taxation provisions. In order to successfully challenge the retrospectivity of the amendment it is necessary for the petitioner to show that the retrospective operation so completely alters the character of the tax as to take it outside the limits of the entry which gives the legislature competence to enact the law—Present amendment is not open to such criticism as all it does, is to widen the base upon which the levy operates by adding one more category of a debit to the profit and loss account by which the book profit of the company can be increased—The nature of the tax has not undergone any change and it still remains a tax on the book profit of the company—It is perfectly open to the legislature to prescribe how the book profit of a company can be computed and this it has done by first enacting that the book profit should be the figure of the profit as per the profit and loss account prepared in accordance with parts II and III of the Companies Act and then by prescribing, in Explanation 1, the items by which the said book profit may either be increased or reducted. In the case of completed assessments the amendment can be invoked only if reopening of the assessments under

Section 147 of the Act or modification of the assessments under any other provision of the Act is permissible—The provisions relating to limitation and finality of assessments cannot be disturbed, as they are also the result of legislation by Parliament as the Supreme Court itself has recognised—Different considerations would, therefore, arise if by the amendment even final assessments are sought to be reopened—Petitioner can have a grievance and it can be successfully ventilated, only if the revenue authorities seek to disturb the finality of a completed assessment, overlooking the provisions of the Act relating to reopening of assessments—For the above reasons the writ petition is dismissed but in the circumstances with no order as to costs.

The legal position that emerges appears to be that the constitutionality of a law has to be examined and judged on its own terms having regard to the judicially well-recognised limitations on the legislative powers. If the law offends any provision of the Constitution, it is liable to be struck down. Several other limitations on the legislative powers have been judicially recognised and the law has to fall within those limitations. The statement of objects and reasons may be looked into merely to ascertain the intention of the legislature, the mischief sought to be remedied, and the state of affairs prevailing prior to the amendment. It is thus only an external aid to construction and by no means a touchstone to judge the validity or constitutionality of the statute. That should be decided on the terms of the statute and the statement of objects and reasons can have no decisive influence on the question. Reading more into the statement of objects and reasons would lead to this absurd result, namely, that if sufficient justification for the law is shown in the statement of objects and reasons, then the law must be held to be valid and constitutional irrespective of the question whether it offends the relevant provisions of the Constitution or exceeds the judicially recognised limitations

on the legislative powers. It would result in an absurd situation which cannot be countenanced, as pointed out in the judgment of the **Federal Court** (supra). **(Para 12)**

In order to successfully challenge the retrospectivity of the amendment it is necessary for the petitioner to show that the retrospective operation so completely alters the character of the tax as to take it outside the limits of the entry which gives the legislature competence to enact the law. We do not think that the present amendment is open to such criticism. As already pointed out, all it does is to widen the base upon which the levy operates by adding one more category of a debit to the profit and loss account by which the book profit of the company can be increased. The nature of the tax has not undergone any change and it still remains a tax on the book profit of the company. It is in our opinion perfectly open to the legislature to prescribe how the book profit of a company can be computed and this it has done by first enacting that the book profit should be the figure of the profit as per the profit and loss account prepared in accordance with parts II and III of the Companies Act and then by prescribing, in Explanation 1, the items by which the said book profit may either be increased or reduced. Section 4 of the Income Tax Act, 1961 lays the charge of tax on the total income of the previous year of every person. Section 2(45) defines "total income" as meaning "the total amount of income referred to in section 5, computed in the manner laid down in this Act". We have already seen that under sub-section (1) of section 115JB the book profit of a company shall be deemed to be its total income. Sub-section (1) is as follows:-

> "(1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after [the 1st day of April, 2012] is less than [eighteen and one-half per cent] of its book profit, [such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of eighteen and one-half per cent." **(Para 16)**

The only other contention which calls for our attention is the one based on different treatment given to different assessment years. It is pointed that the amended provision could not even be applied in the ordinary course in respect of the assessment years 2001-02 and 2002-03 for the reason that the time limit for reopening these assessments ended on 31.3.2008 and 31.3.2009 respectively. It is further pointed out that the amendment was introduced after these dates and only affects assessees in whose case some reassessment or appellate proceedings were pending at the time of introduction of the Bill. On this basis, it is argued that the sole reason for the amendment "appears to arm some assessing officers with a tool to support a prima face erroneous action of adding the provision for bad and doubtful debts to the book profit without any statutory support for the same". This aspect of the matter has been dealt with in the judgment of Supreme Court in **National Agricultural Co-operative Marketing Federation of India Ltd.** (Supra). The following passage from the judgment is relevant:-

> "It is hardly likely on the given facts, that assessments had been concluded on the basis of the decision in Kerala Marketing case MANU/SC/2021/1998 : [1998] 231 ITR 814(SC) and the period for reopening such assessments had become time barred. In any event the 1998 amendment cannot be construed as authorizing the revenue authorities to reopen assessments when the reopening is already barred by limitation. The amendment does not seek to touch on the periods of limitation provided in the Act, and in the absence of any such express provision or clear implication, the legislature clearly could not be taken to intend that the amending provision authorises the

Income Tax Officer to commence proceedings which before the new Act came into force, had, by the expiry of the period provided become barred- **S.S. Gadgil v. Lal & Co.** MANU/SC/0122/1964 : [1964] 53 ITR 231(SC) ; see also **J.P. Jani, ITO v. Induprasad Devshanker Bhatt** (supra); **K. M. Sharma v. ITO** MANU/SC/0312/2002: [2002] 254 ITR 772 (SC). Different considerations would arise if, by the amendment even final assessments were unambiguously sought to be opened- **Commercial Tax Officer v. Biswanath Jhunjhunwalla,** MANU/SC/0097/1997 : AIR1997SC357. That is not the case here."

These observations are a recognition of the consequence that is inevitable in the case of all retrospective amendments, which by their very nature, can be lawfully applied only to assessments that are open and pending either before the Assessing Officer or in appeal proceedings. In the case of completed assessments the amendment can be invoked only if reopening of the assessments under Section 147 of the Act or modification of the assessments under any other provision of the Act is permissible. The provisions relating to limitation and finality of assessments cannot be disturbed, as they are also the result of legislation by Parliament as the Supreme Court itself has recognised. Different considerations would, therefore, arise if by the amendment even final assessments are sought to be reopened. The petitioner can have a grievance and it can be successfully ventilated, only if the revenue authorities seek to disturb the finality of a completed assessment, overlooking the provisions of the Act relating to reopening of assessments. We, therefore, do not think that there is any substance in the contention of the petitioner. **(Para 34)**

Important Issue Involved: Income Tax Act, 1961—Insertion of clause (i) to Explanation 1 in Section 115 JB—Retrospectivity of the amendment—Tax-base stands widened by the amendment in as much as the amount or amounts set aside as provision for diminution in the value of any asset and debited to the profit and loss account shall be added to the book profit—Petitioner can have a grievance and it can be successfully ventilated, only if the revenue authorities seek to disturb the finality of a completed assessment, overlooking the provisions of the Act relating to reopening of assessments.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Tapas Ram Misra & Mr. Ashu Kansal, Advocates.

FOR THE RESPONDENTS : Mr. Sanjeev Sabharwal, Sr. Standing Counsel with Mr. Puneet Standing Counsel.

CASES REFERRED TO:

1. *Avani Exports and Ors.* vs. *CIT & Ors.,* (2012) 348 ITR 391.
2. *CIT* vs. *HCL Comnet Systems & Services Ltd.* (2008) 305 ITR 409.
3. *JCIT* vs. *Usha Martin Ltd.* (2006) 105 TTJ (Kol.) 543 (SB).
4. *CIT* vs. *Eicher Ltd.* (2006) 287 ITR 170.
5. *Virender Singh Hooda* vs. *State of Haryana,* (2004) 12 SCC 588.
6. *ITW Signode India Ltd.* vs. *Collector of Central Excise* (2004) 3 SCC 48.
7. *National Agricultural Co-operative Marketing Federation of India Ltd.* vs. *Union of India,* (2003) 260 ITR 548.
8. *Bakhtawar Trust & Ors.* vs. *M.D. Narayan & Ors.* (2003)

5 SCC 298.

9. *K.M. Sharma* vs. *ITO* MANU/SC/0312/2002.

10. *CIT* vs. *Hico Products (P) Ltd.,* (2001) 247 ITR 797 (SC).

11. *Commercial Tax Officer* vs. *Biswanath Jhunjhunwalla,* MANU/SC/0097/1997 : AIR 1997 SC 357.

12. *Escorts Ltd.* vs. *Union of India,* (1993) 199 ITR 43.

13. *CIT* vs. *Hico Products (P.) Ltd.,* (1991) 187 ITR 517.

14. *Government of AP* vs. *Hindustan Machine Tools Ltd.,* AIR 1975 SC 2037.

15. *M/s. Krishnamurthi & Co.* vs. *State of Madras* AIR 1972 SC 2455.

16. *Burmah Shell Oil Storage and Distributing Company of India Ltd.* vs. *State of Tamil Nadu,* (1968) 21 STC 227.

17. *S.S. Gadgil* vs. *Lal & Co*. MANU/SC/0122/1964 : [1964]53ITR231(SC).

18. *Rai Ramkishna* vs. *State of Bihar* (1963) 50 ITR 171=AIR 1963 SC 1667.

19. *Chhotabhai Jethabhai Patel* vs. *Union of India,* AIR 1962 Supreme Court 1006.

20. *Kunnathet Thathunni Moopil Nair* vs. *State of Kerala* MANU/SC/0042/1960 : [1961]3SCR77.

21. *Union of India* vs. *Madan Gopal Kabra,* AIR 1954 SC 158.

22. *The State of West Bengal* vs. *Subodh Gopal Bose* MANU/SC/0018/1953 : [1954]1SCR587.

23. *Express Newspapers (Private) Ltd.* vs. *The Union of India* (1954) 12 S.C.R. 139.

24. *Rex* vs. *Basudeva* AIR 37 1950 FC 67.

25. *The United Provinces* vs. *Mst. Atiqa Begum* (1940) F.C.R. 110.

26. *Lohia Machines Ltd. & Anr.* vs. *Union of India & Ors.,* 152 ITR 308.

RESULT: Writ Petition dismissed.

R.V. EASWAR, J.

1. In this writ petition, the petitioner challenges the retrospectivity of the amendment made to Section 115 JB of the Income Tax Act, 1961 by the Finance (No.2) Act, 2009 by insertion of clause (i) to Explanation 1 with retrospective effect from 01.04.2001.

2. The petitioner is a public limited company incorporated under the Companies Act, 1956 and is engaged in the business of manufacture and trading/export of consumer items such as refrigerators, washing machines, etc. It was assessed to income tax on the "book profit" computed in accordance with the provisions of Section 115 JB of the Act. This section was inserted into the Act by the Finance Act, 2000 w.e.f. 01.04.2001. It made special provision for payment of tax by certain companies. The gist of the section, shorn of the details, is that certain companies were liable to pay tax on their "book profit" if the total income computed in accordance with the provisions of the Act was less than 18% of its book profit. In that case, book profit was deemed to be the total income of such companies. These companies were required to prepare their profit and loss account in accordance with the provisions of parts -II and III of Schedule VI to the Companies Act, 1956. Explanation 1 to the section permitted certain adjustments to be made to the figure of book profit as shown in the profit and loss account prepared as per the Companies Act. The first part of the Explanation provided for certain additions to be made to the book profit and the second part provided for certain reductions to be made from the book profit. In the present petition we are not concerned with the second part, but are concerned only with the first part of Explanation 1 which provided for certain upward adjustments to the book profit. For the purposes of the present petition therefore, it would only be necessary to reproduce the first part of the Explanation, which reads as under: -

> 'Explanation [1]. - For the purposes of this section, 'book profit' means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by -
>
> (a) the amount of income-tax paid or payable, and the provision therefor; or

(b) the amounts carried to any reserves, by whatever name called [other than a reserve specified under section 33AC]; or

(c) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities; or

(d) the amount by way of provision for losses of subsidiary companies; or

(e) the amount or amounts of dividends paid or proposed ; or

(f) the amount or amounts of expenditure relatable to any income to which [section 10 (other than the provisions contained in clause (38) thereof) or [***] section 11 or section 12 apply; or]

[(g) the amount of depreciation,]

[(h) the amount of deferred tax and the provision therefor,"

It may be noticed that under clause (c) *"the amount or amounts set aside to provisions made for meeting liabilities, other than the ascertained liabilities"* was/were to be added to the book profit as shown in the profit and loss account. A controversy arose as to whether the provision for bad and doubtful debts made in the profit and loss account can be added to the book profit under the aforesaid clause. The income tax authorities took the view that such a provision was made for meeting a liability other than an ascertained liability and therefore the book profit had to be increased by the amount of the provision. The case of the companies which were liable to tax under Section 115 JB was that a provision for bad and doubtful debts cannot be regarded as a provision made for meeting a liability, let alone an unascertained liability, because a debt is not a liability but is an asset of the company and what in effect the company does, when making the provision for bad and doubtful debts, is only to provide for a possible non-recovery of the debt; according to the companies, a provision made for the diminution in the value of the debt due to possible non-recovery or the debt going bad cannot be treated as a provision made for meeting an unascertained liability. The matter ultimately reached various benches of the Income Tax Appellate Tribunal and on account of the importance of the issue, a Special Bench of the Tribunal was constituted which ruled in **JCIT Vs. Usha Martin Ltd.** (2006) 105 TTJ (Kol.) 543 (SB) that such a provision cannot be considered as a provision for meeting an unascertained liability and that

in truth and substance it was a provision for the diminution of the value of the debt and therefore, it fell outside clause (e) of the Explanation and the book profit cannot be increased by the amount of the provision. This view of the Special Bench of the Tribunal was upheld by the Delhi High Court in a case where a similar issue had arisen and this judgment is reported as **CIT Vs. Eicher Ltd.** (2006) 287 ITR 170. The controversy was eventually resolved by the Supreme Court in the judgment reported as **CIT v. HCL Comnet Systems & Services Ltd.** (2008) 305 ITR 409. This judgment was rendered on 23.09.2008. It was observed as under: -

For the purposes of section 115JA, the Assessing Officer can increase the net profit determined as per the profit and loss account prepared as per Parts II and III of Schedule VI to the Companies Act only to the extent permissible under the Explanation thereto. As stated above, the said Explanation has provided six items, i.e., item Nos. (a) to (f) which if debited to the profit and loss account can be added back to the net profit for computing the book profit. In this case, we are concerned with item No. (c) which refers to the provision for bad and doubtful debts. The provision for bad and doubtful debts can be added back to the net profit only if item (c) stands attracted. Item (c) deals with amount(s) set aside as provision made for meeting liabilities, other than ascertained liabilities. The assessee's case would, therefore, fall within the ambit of item (c) only if the amount is set aside as provision ; the provision is made for meeting a liability ; and the provision should be for other than an ascertained liability, i.e., it should be for an unascertained liability. In other words, all the ingredients should be satisfied to attract item (c) of the Explanation to section 115JA. In our view, item (c) is not attracted. There are two types of .debt.. A debt payable by the assessee is different from a debt receivable by the assessee. A debt is payable by the assessee where the assessee has to pay the amount to others whereas the debt receivable by the assessee is an amount which the assessee has to receive from others. In the present case, the 'debt' under consideration is a 'debt receivable' by the assessee. The provision for bad and doubtful debt, therefore, is made to cover up the probable diminution in the value of the asset, i.e., debt which is an amount receivable

by the assessee. Therefore, such a provision cannot be said to be a provision for a liability, because even if a debt is not recoverable no liability could be fastened upon the assessee. In the present case, the debt is the amount receivable by the assessee and not any liability payable by the assessee and, therefore, any provision made towards irrecoverability of the debt cannot be said to be a provision for liability."

3. After the judgment of the Supreme Court was rendered in favour of the company-assessees, the Finance (No.2) Bill, 2009 was introduced in the Lok Sabha on 06.07.2009 to give effect to the financial proposals of the Central Government for the financial year 2009-10. The Bill proposed an amendment to Section 115 JB as follows: -

"45. Amendment of section 115JB - In section 115JB of the Income-tax Act,ù

(a) in sub-section (1), with effect from the 1st day of April, 2010, -

(i) for the words, figures and letters "the 1st day of April, 2007", the words, figures and letters "the 1st day of April, 2010" shall be substituted;

(ii) for the words "ten per cent.", at both the places where they occur, the words "fifteen per cent." shall be substituted;

(b) in sub-section (2), after the second proviso, in Explanation 1, after clause (h), for the words, brackets and letters "if any amount referred to in clauses (a) to (h) is debited to the profit and loss account, and as reduced by -", the following shall be substituted and shall be deemed to have been substituted with effect from the 1st day of April, 2001, namely: -

"(i) the amount or amounts set aside as provision for diminution in the value of any asset,

if any amount referred to in clauses (a) to (i) is debited to the profit and loss account, and as reduced by, -"."

The notes on clauses appended to the Bill provided as follows: -

"Clause 45 of the Bill seeks to amend section 115JB of the Act

relating to special provision for payment of tax by certain companies.

Under the existing provisions contained in the said section 115JB, in case of a company, if the tax payable on the total income as computed under the income-tax Act in respect of any previous year relevant to the assessment year commencing on or after the 1st April, 2007, is less than ten per cent. of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable for the relevant previous year shall be ten per cent. of such book profit.

It is proposed to amend sub-section (1) of said section 115JB to provide that if the income-tax payable on the total income as computed under the Income-tax Act in respect of any previous year relevant to the assessment year commencing on or after 1st April, 2010 is less than fifteen per cent. of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable for the relevant previous year shall be fifteen per cent. of such book profit.

This amendment will take effect from 1st April, 2010 and will, accordingly, apply in relation to the assessment year 2010-11 and subsequent years.

It is further proposed to insert a new clause (i) after clause (h) in the Explanation 1 to sub-section (2) of said section so as to provide that any provision for diminution in the value of any asset will also be included in the computation of book profit under the said section.

This amendment will take effect retrospectively from 1st April, 2001 and will, accordingly, apply in relation to the assessment year 2001-02 and subsequent assessment years."

4. In the memorandum explaining the provisions in the Finance (No.2) Bill, 2009 the Central Board of Direct Taxes stated as follows: -

"Clarification regarding add back of "provision for diminution in the value of asset", while computing book profits

Section 115JB of the Income-tax Act provides for levy of Minimum Alternate Tax (MAT) on the basis of book profits of

a company. As per Explanation 1 after sub-section (2), the expression "book profit" means net profit as shown in the profit and loss account prepared in accordance with the provisions of Part-II and Part-III of Schedule-VI to the Companies Act, 1956 as increased or reduced by certain adjustments, as specified in that section.

It is proposed to insert a new clause (i) in Explanation 1 after sub-section (2) of the said section so as to provide that if any provision for diminution in the value of any asset has been debited to the profit and loss account, it shall be added to the net profit as shown in the profit and loss account for the purpose of computation of book profit.

Similar amendment is also proposed in section 115JA of the Income-tax Act by way of insertion of a new clause (g) in the Explanation after sub-section (2) of the said section.

The amendment to section 115JA is proposed to be made effective retrospectively from 1st day of April, 1998 and will, accordingly, apply in relation to assessment year 1998-99 and subsequent years.

The amendment to section 115JB is proposed to be made effective retrospectively from 1st day of April, 2001 and will, accordingly, apply in relation to assessment year 2001-02 and subsequent assessment years."

5. The petitioner filed its returns of income for the assessment years 2002-03, 2003-04 and 2009-10 on 31.10.2002, 28.11.2003 and 29.09.2009 respectively. It is averred in the petition that the petitioner was advised to re-compute its book profit for these years by taking into account the provision for diminution in the value of assets, including any provision made for bad and doubtful debts, in view of the retrospective amendment. The petitioner accordingly, recomputed its book profit and deposited Rs. 1,08,64,425/- on 30.10.2009 towards additional taxes for these years consequent to the re-computation.

6. The challenge in this writ petition is not to the amendment as such but is confined to the retrospectivity of the same. The prayer in the writ petition is for quashing the retrospectivity of the amendment on the

ground that it is unreasonable, discriminatory and therefore, unconstitutional. It is also prayed that the respondents be directed to refund the tax deposited *suo motu* by the petitioner on 30.10.2009 as a result of the retrospective amendment along with applicable interest.

7. Counsel for the petitioner put forward the following arguments in support of the challenge to the retrospectivity of the amendment: -

(a) the insertion of clause (i) by the Finance (2) Bill, 2009 to Explanation I below Section 115 JB has in effect imposed a new tax; it is not clarificatory provision and therefore, cannot be made retrospective;

(b) no justification has been shown as to why the clause should be inserted retrospective;

(c) the legislature cannot take back with retrospective effect any benefit which it had granted;

(d) the retrospective amendment affects different assessees differently and is discriminatory;

(e) the amendment travels far beyond the scope of Section 115 JB and hence invalid.

8. There is no merit in the contention of the petitioner that the amendment has brought into effect a new tax or a new levy which is outside the scope of Section 115JB. As pointed out earlier, Explanation 1 below section 115JB contains several clauses. If the profit and loss account prepared by the company contains any debit which answers to the description of any of those clauses, the amount of the debit can be added to the book profit and the book profit shall stand increased by the said amount. The purpose of the Explanation is to broaden the base amount on which tax is payable by the company. No new levy is imposed. The tax-base stands widened by the amendment in as much as the amount or amounts set aside as provision for diminution in the value of any asset and debited to the profit and loss account shall be added to the book profit. It is well settled that income tax is only one tax on the total income of the assessee. The book profit of a company as shown in the profit and loss accounts prepared in accordance with the Companies Act, 1956 and as adjusted by the various clauses of Explanation 1 is deemed to be the total income of the company on which tax is payable. It is,

therefore, a misnomer to refer to the amendment as imposing a new tax or levy. Since the amendment does not provide for any new levy of income tax, there is no question of it being struck down on the ground of retrospectivity.

9. The argument of the petitioner that no justification has been shown for introducing the amendment is also unacceptable. It was pointed out that the "statement of objects and reasons" to the Finance (No.2) Bill, 2009 did not contain anything to show why clause (i) was introduced into the Explanation. The memorandum explaining the provisions of the Finance Bill, 2012 (2012) 342 ITR (St) 234 at page 265 contained a detailed justification as to why certain amendments were being proposed in section 9 of the Act in order to rationalise the international taxation provisions. There is, it was pointed out, reference, to judicial pronouncements which had created doubts about the scope and purpose of sections 9 and 195. It was further stated in the memorandum that there were certain other issues in respect of the income deemed to accrue or arise in India on which there were conflicting decisions of various judicial authorities and, therefore, there was a need to make a clarificatory retrospective amendment to restate the legislative intent and to provide for certainty in law. It is submitted that in contrast, the statement of objects and reasons to the Finance (No.2) Bill, 2009 did not contain any reason nor did it justify the introduction of clause (i) to Explanation 1. The contention, therefore, was that the amendment was arbitrary and whimsical.

10. The petitioner is right to the extent that the statement of objects and reasons did not contain any justification or reason for making the amendment. Not only the statement of objects and reasons, but the memorandum explaining the provisions of the Bill and the notes on clauses appended to the Bill too did not show any justification or reasons for the amendment. The question, however, is whether this invalidates the amendment. That takes us to the question as to what is the importance and relevance accorded to the statement of objects and reasons in the process of examination of the constitutional validity of an amendment. There can be no doubt that the statement of objects and reasons may be employed as an external aid to construe the statute; it can also be referred to for the purpose of comprehending the factual background, the prior state of legal affairs, the surrounding circumstances in respect of the statute and the evil which it seeks to remedy. The usefulness of the

statement of objects and reasons is limited to these aspects and no authority has been cited before us to show that the absence of any reason or justification given in the statement of objects and reasons for an amendment would invalidate the legislative action and would render the amendment unconstitutional on that ground alone. It would be relevant to refer to the judgment of the Supreme Court in **Bakhtawar Trust & Ors. Vs. M.D. Narayan & Ors.** (2003) 5 SCC 298. That was not a case where the statement of objects and reasons did not say anything with regard to the reason for the amendment. In that case it was urged that the statement of objects and reasons for the validation Act under challenge showed that the intention of the legislature was rather to render the decision of the High Court infructuous than to correct any infirmity in the legal position. Rejecting the argument, the court observed as under:-

> It was then urged on behalf of the respondents that a perusal of the Statement of Objects and Reasons for the Validation Act shows that the intention of the legislature was rather to render the decision of the High Court infructuous than to correct any infirmity in the legal position. For this, reliance was sought to be placed on the Statement of Objects and Reasons of the impugned enactment. It is well settled by the decisions of this Court that when a validity of a particular statute is brought into question, a limited reference, but not reliance, may be made to the State of Objects and Reasons. The Statement of Objects and Reasons may, therefore, be employed for the purposes of comprehending the factual background, the prior state of legal affairs, the surrounding circumstances in respect of the statute and the evil which the statute has sought to remedy. It is manifest that the Statement of Objects and Reasons cannot, therefore, be the exclusive footing upon which a statute is made a nullity through the decision of a Court of law.

11. The aforesaid observations were applied and followed by the Supreme Court in **ITW Signode India Ltd. v. Collector of Central Excise** (2004) 3 SCC 48 and it was held that the statement of objects and reasons for enacting a statute can be read for a limited purpose. The following passage from the judgment of **Patanjali Sastri, J.** (as he then was) in **Rex v. Basudeva** AIR 37 1950 FC 67 (a judgment of 5 judges of the Federal Court) clinches the point:-

"Stress was laid on the reference in the preamble of the Act to the maintenance of public order as showing that the Legislature was not unmindful of the limitation on its power with respect to preventive detention, and it was urged that, if the Legislature thought that prevention of a particular activity was expedient in the interest of maintenance of public order, it was not for the court to canvass the degree of connection between the two, as that was a matter of policy and not of vires. We cannot accept this wide proposition. Whilst a statement in the preamble of a statute as to its ultimate objective may be useful as throwing light on the nature of the matter legislated upon and must undoubtedly be taken into consideration, it cannot be conclusive on a question of vires, where the Legislature concerned has powers to legislate on certain specified matters only. The court must still see, in such cases, whether the subject-matter of the impugned legislation is really within those powers. For the reasons indicated we are of opinion that s. 3 (1) (i) of the Act is not within the power of the Provincial Legislature to enact, and we accordingly dismiss the appeal."

12. The legal position that emerges appears to be that the constitutionality of a law has to be examined and judged on its own terms having regard to the judicially well-recognised limitations on the legislative powers. If the law offends any provision of the Constitution, it is liable to be struck down. Several other limitations on the legislative powers have been judicially recognised and the law has to fall within those limitations. The statement of objects and reasons may be looked into merely to ascertain the intention of the legislature, the mischief sought to be remedied, and the state of affairs prevailing prior to the amendment. It is thus only an external aid to construction and by no means a touchstone to judge the validity or constitutionality of the statute. That should be decided on the terms of the statute and the statement of objects and reasons can have no decisive influence on the question. Reading more into the statement of objects and reasons would lead to this absurd result, namely, that if sufficient justification for the law is shown in the statement of objects and reasons, then the law must be held to be valid and constitutional irrespective of the question whether it offends the relevant provisions of the Constitution or exceeds the judicially recognised limitations on the legislative powers. It would result in an absurd situation which

cannot be countenanced, as pointed out in the judgment of the **Federal Court** (supra).

13. A statutory amendment may be brought into force either prospectively or retrospectively. A retrospective taxation, by its very nature, is intended to operate on conditions that were already existing. In **Rai Ramkishna v. State of Bihar** (1963) 50 ITR 171=AIR 1963 SC 1667, a Constitution bench of the Supreme Court was dealing with the challenge to a retrospective amendment to a taxing statute by a validation enactment. **Gajendragadkar, J.**, as he then was, speaking for the Constitution Bench made the following comprehensive observations:-

"The other point on which there is no dispute before us is that the legislative power conferred on the appropriate legislatures to enact law in respect of topics covered by the several entries in the three Lists can be exercised both prospectively and retrospectively. Where the legislature can make a valid law, it may provide not only for the prospective operation of the material provisions of the said law, but it can also provide for the retrospective operation of the said provisions. Similarly, there is no doubt that the legislative power in question includes the subsidiary or the auxiliary power to validate laws which have been found to be invalid. If a law passed by a legislature is struck down by the Courts as being invalid for one infirmity or another, it would be competent to the appropriate legislature to cure the said infirmity and pass a validating law so as to make the provisions of the said earlier law effective from the date when it was passed. This position is treated as firmly established since the decision of the Federal Court in the case of **The United Provinces v. Mst. Atiqa Begum** (1940) F.C.R. 110.

12. It is also true that though the Legislature can pass a law and make its provisions retrospective, it would be relevant to consider the effect of the said retrospective operation of the law both in respect of the legislative competence of the legislature and the reasonableness of the restrictions imposed by it. In other words, it may be open to a party affected by the provisions of the Act to contend that the retrospective operation of the Act so completely alters the character of the tax imposed by it as to take it outside the limits of the entry which gives the legislature competence to

enact the law; or, it may be open to it to contend in the alternative that the restrictions imposed by the Act are so unreasonable that they should be struck down on the ground that they contravene his fundamental rights guaranteed under Art. 19(1)(f) & (g). This position cannot be, and has not been, disputed by Mr. Sastri who appears for the respondent, vide **The State of West Bengal v. Subodh Gopal Bose** MANU/SC/0018/1953 : [1954]1SCR587 , and **Express Newspapers (Private) Ltd. v. The Union of India** (1954) 12 S.C.R. 139".

13. In view of the recent decisions of this Court Mr. Sastri also concedes that taxing statutes are not beyond the pale of the constitutional limitations prescribed by Articles 19 and 14, and he also concedes that the test of reasonableness prescribed by Art. 304(b) is justiciable. It is, of course, true that the power of taxing the people and their property is an essential attribute of the Government and Government may legitimately exercise the said power by reference to the objects to which it is applicable to the utmost extent to which Government thinks it expedient to do so. The objects to be taxed so long as they happen to be within the legislative competence of the legislature can be taxed by the legislature according to the exigencies of its needs, because there can be no doubt that the State is entitled to raise revenue by taxation. The quantum of tax levied by the taxing statute, the conditions subject to which it is levied, the manner in which it is sought to be recovered, are all matters within the competence of the legislature, and in dealing with the contention raised by a citizen that the taxing statute contravenes Art. 19, courts would naturally be circumspect and cautious. Where for instance, it appears that the taxing statute is plainly discriminatory, or provides no procedural machinery for assessment and levy of the tax, or that it is confiscatory, Courts would be justified in striking down the impugned statute as unconstitutional. In such cases, the character of the material provisions of the impugned statute is such that the Court would feel justified in taking the view that, in substance, the taxing statute is a cloak adopted by the legislature for achieving its confiscatory purposes. This is illustrated by the decision of this Court in the case of **Kunnathet Thathunni Moopil Nair v. State of Kerala** MANU/SC/0042/1960 : [1961]

3 SCR 77, where a taxing statute was struck down because it suffered from several fatal infirmities. On the other hand, we may refer to the case of **Raja Jagannath Baksh Singh v. State of Uttar Pradesh** MANU/SC/0184/1962 : [1962]46 ITR 169(SC), where a challenge to the taxing statute on the ground that its provisions were unreasonable was rejected and it was observed that unless the infirmities in the impugned statute were of such a serious nature as to justify its description as a colourable exercise of legislative power; the Court would uphold a taxing statute."

14. These observations were followed and applied by the Supreme Court in **M/s. Krishnamurthi & Co. v. State of Madras** AIR 1972 SC 2455. We will notice this judgment in some detail later.

15. Even otherwise, the argument of the petitioner that no justification has been shown for the retrospectivity is not correct. The sequence of events leading to the retrospective amendment cannot be ignored. There was no provision in Explanation 1 to section 115JB permitting an upward adjustment of the book profit by the amount debited to the provision for bad and doubtful debts. However, the revenue authorities had sought to include the said provision in the book profit. Their attempt failed right up to the Supreme Court which pointed out that a provision for bad and doubtful debts is in fact a provision for diminution in the value of an asset which does not fall under clause (c) of Explanation 1. Having had the benefit of the view expressed by the highest court of the land and realising that the existing clause (c) in the Explanation was inadequate to cover a provision made for the diminution in the value of an asset, Parliament in its wisdom thought that its intention to impose a Minimum Alternate Tax (MAT) on companies which earned profits and declared dividends but did not pay any tax (after availing of all the allowances and reliefs permitted under the Income Tax Act) would be better effectuated by introducing a provision to the effect that even a provision made for diminution in the value of any asset would be added to the book profit. The statutory basis of the judgment of the Supreme Court in **HCL Comnet** (Supra) was changed; whereas the Supreme Court pointed out the inadequacy of the existing clause (c) to cover a provision for the diminution in the value of any asset, the legislature sought to plug the lacuna by inserting clause (i) which permitted an upward adjustment of the book profit by the provision made for diminution in the value of any

asset, which obviously included a debt. It is not unusual for the legislature to make amendments with retrospective effect to cure the lacuna pointed out by judicial decisions. In **ITW Signode India Ltd.** (supra) it was observed by the Supreme Court as follows:-

> "A statute, it is trite, must be read as a whole. The plenary power of legislation of the Parliament or the State Legislature in relation to the legislative fields specified under Seventh Schedule of the Constitution of India is not disputed. A statutory act may be enacted prospectively or retrospectively. A retrospective effect indisputably can be given in case of curative and validating statute. In fact curative statutes by their very nature are intended to operate upon and affect past transaction having regard to the fact that they operate on conditions already existing. However, the scope of the validating act may vary from case to case."

16. In order to successfully challenge the retrospectivity of the amendment it is necessary for the petitioner to show that the retrospective operation so completely alters the character of the tax as to take it outside the limits of the entry which gives the legislature competence to enact the law. We do not think that the present amendment is open to such criticism. As already pointed out, all it does is to widen the base upon which the levy operates by adding one more category of a debit to the profit and loss account by which the book profit of the company can be increased. The nature of the tax has not undergone any change and it still remains a tax on the book profit of the company. It is in our opinion perfectly open to the legislature to prescribe how the book profit of a company can be computed and this it has done by first enacting that the book profit should be the figure of the profit as per the profit and loss account prepared in accordance with parts II and III of the Companies Act and then by prescribing, in Explanation 1, the items by which the said book profit may either be increased or reduced. Section 4 of the Income Tax Act, 1961 lays the charge of tax on the total income of the previous year of every person. Section 2(45) defines "total income" as meaning "the total amount of income referred to in section 5, computed in the manner laid down in this Act". We have already seen that under sub-section (1) of section 115JB the book profit of a company shall be deemed to be its total income. Sub-section (1) is as follows:-

> "(1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after [the 1st day of April, 2012] is less than [eighteen and one-half per cent] of its book profit, [such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of eighteen and one-half per cent."

17. Explanation 1 to the Section prescribes the manner in which the book profit of a company shall be computed and it is upon the book profit so computed, after giving effect to the said Explanation, that the tax is payable by the company. In other words it is the book profit adjusted in the manner prescribed by the Explanation 1 that is deemed to be the total income of the company. If this is the true position, it is difficult to accept the argument that the insertion of clause (i) with retrospective effect into Explanation 1 so completely alters the nature and character of the tax that it falls beyond the entry 82 in the Union List of the Constitution ("Taxes on income other than agricultural income") and consequently is beyond the competence of the legislature.

18. A case of some relevance to the present writ petition is that of the Constitution bench of the Supreme Court in **Chhotabhai Jethabhai Patel v. Union of India,** AIR 1962 Supreme Court 1006. An amendment to the excise law was the subject of challenge before the Supreme Court. Section 7(2) of the Finance Act, 1951 sought to impose an excise duty on tobacco retrospectively before the date of its enactment, i.e., 28.4.1951. One of the arguments in support of the challenge before the Supreme Court was that if the retrospective levy of the tax/ duty altered its essential nature and identity, then the power to legislate retrospectively would be open to Parliament only if the tax in the altered form was open to Parliament to impose. It was further contended that the duty of excise was an indirect tax and once imposed retrospectively, it deprived itself of all the essential characteristics of being an indirect tax and became a personal tax and had the effect of imposing a tax on a person merely because he happened to produce goods at an antecedent date. The Parliament, it was contended, did not have such a power. After examining in depth the nature of excise duty in other countries as well as in India, **N. Rajagopala Ayyangar, J.** speaking for the court held that in considering

the validity of the retrospective levy of the tax, the court was not so much concerned as to whether the tax was a direct or indirect tax as upon the transaction or activity on which it was imposed. It was held that the nature and character of the levy of tax/duty with retrospective effect was the same as the nature and levy of the duty with prospective effect and observed that *"it would seem to be rather a strange result to achieve, that the tax imposed satisfies every requirement of a duty of an excise in so far as the tax operates from and after April 28, 1951, but is not a duty of excise for the duration of two months before that date"*. The ratio of this judgment appears to us to apply to the case before us. The tax which was essentially a tax on the book profit and consequently a tax on the total income of the petitioner does not cease to be such a tax or become a new or different tax in nature and character merely because one more item of debit to the profit and loss account is prescribed to be added to the book profit shown in the profit and loss account from a retrospective date. The tax was always on the book profit and on the total income of the company; it continues to remain so even after the retrospective amendment, the change being not in the nature and character of the tax, but on the quantum of the book profit/total income of the company on which it is charged.

19. Three judgments were predominantly relied upon by the counsel for the petitioner in the course of his arguments. The first judgment is that of **A.N. Sen, J.** in **Lohia Machines Ltd. & Anr. vs. Union of India & Ors.,** 152 ITR 308. It is in fact the judgment of the minority. However, on the point relied upon by the counsel for the petitioner, the judgment of A.N. Sen, J, cannot be considered as a dissenting or minority judgment because on this point, no opinion was expressed by the majority, which opinion was articulated by **Bhagwati, J.** In that case, two questions fell for determination. The first was the validity of Rule 19A of the Income Tax Rules, 1962, which according to the assessee in that case, went far beyond Section 80J by excluding borrowed capital from the capital employed in the industrial undertaking. The second question which fell for consideration was the validity of the retrospective amendment made to Section 80J by the Finance (No.2) Act, 1980, with effect from 1.4.1972. We are concerned only with the second point that fell for determination in that case and the observations of **A.N.Sen, J.** with regard to this point. After a very elaborate examination of the question of retrospectivity – if we may say so with respect – the learned Judge

held that the retrospectivity of the amendment was invalid. Holding that the principal question to be decided when considering the validity of the retrospectivity of an amendment was to inquire as to how the retrospective effect of the amendment operates, the learned Judge expressed the view that by enacting the retrospective amendment in question in that case, *"Parliament is seeking to validate not any provision of the statute declared invalid because of any flaw or defect, as there was none but is seeking to validate an invalid rule which had sought to deprive the assessee of the benefit which Parliament had clearly bestowed on the assessee by the Section"*. It was further observed that .if any fiscal statute grants relief to any assessee and the assessee enjoys the benefit of that relief, as the assessee is legally entitled under the statute, the withdrawal of the relief validly and unequivocally granted and enjoyed by any assessee must necessarily in the absence of proper grounds be held to be unreasonable and arbitrary.. These observations were strongly relied upon by the petitioner before us and in fact one more judgment of the Supreme Court has been cited in ground 'F' of the writ petition in support of the contention: **Virender Singh Hooda vs. State of Haryana,** (2004) 12 SCC 588. It must, however, be remembered that the above observations were made with reference to Section 80J, which had been enacted to grant relief for the purpose of promoting industrial growth of the country by affording incentives for the setting up of new undertakings. When Parliament enacted Section 80J, it was done in the larger public interest. It is, therefore, proper to consider the right granted by the Parliament to an assessee, who had set up a new industrial undertaking in the notified area, as a vested right, and it was so considered by the learned Judge. What Section 80J did, when it was amended by the Finance (No.2) Act, 1980, with retrospective effect from 1.4.1972, was to withdraw the benefit which had already accrued to the assessee as a vested statutory right and it was this kind of retrospective amendment which sought to defeat an accrued statutory right that was perceived to be *"likely to affect the sanctity of any statutory provision and may create a state of confusion"*. It is also well to remember that in that case the legislature had earlier made an attempt to deny the relief granted by the Section, by enacting Rule 19A which was held to be invalid as being a case of excessive delegation. It was this rule that was sought to be validated by making a retrospective amendment to the Section itself and the Section was so amended as to take away the benefit that had earlier accrued to the assessee, in precisely the same manner in which Rule 19A had done

albeit invalidly. Several assessees had planned their affairs in such a manner as to obtain the benefit of Section 80J, more so when Rule 19A had been held to be invalid as being a case of excessive delegation. In the majority of the cases, the assessees had succeeded and were allowed the relief under Section 80J in respect of the capital employed which included the borrowed capital also, which Rule 19A had unsuccessfully sought to exclude. The inequitable and onerous nature of the retrospective amendment was brought out by the learned Judge in the following paragraph:-

> "On the other hand, it is quite clear that if the relief granted is to be withdrawn with retrospective operation from 1972, the assessees who have enjoyed the relief for all those years will have to face a very grave situation. The effect of the withdrawal of the relief with retrospective operation will be to impose on the assessee a huge accumulated financial burden for no fault of the assessee and this is bound to create a serious financial problem for the assessee. Apart from the heavy financial burden which is likely to upset the economy of the undertaking, the assessee will have to face other serious problems. On the basis that the relief was legitimately and legally available to the assessee, the assessee had proceeded to act and to arrange its affairs. If the relief granted is now permitted to be with-drawn with retrospective operation, the assessee may be found guilty of violation of the provisions of other statutes and may be visited with penal consequences. This position cannot be and is not disputed by the learned Attorney-General who has, however, argued that taking into consideration the peculiar facts and circumstances, penal provisions may not be enforced. This argument does not impress me. The assessee has, in any event, to run the risk and for no fault on his part has to place itself at the mercy of the authorities for facing consequences of violation of the statutory provisions, which but for the introduction of retrospective amendment, would not have been violated by the assessee."

20. The further observations on this aspect are as under:-

> 'Before concluding I wish to emphasise that the withdrawal with retrospective effect by the amendment of any financial benefit or relief granted by a fiscal statute must ordinarily be held to be

> unreasonable and arbitrary. Such withdrawal makes a mockery of a beneficial statutory provision and leads to chaos and confusion. Such withdrawal in effect results in the imposition of a levy at a future date for past years for which there was no such levy in the relevant years. The imposition of any fresh tax with retrospective effect for years for which there was no such levy is bound to operate unduly harshly on every assessee who is entitled to arrange and normally arranges his financial affairs on the basis of the law as it exists. Such retrospective taxation imposes an unjust and unwarranted accumulated burden on the assessee for no fault on his part and the assessee has to face unnecessarily without any just reason very serious financial and other problems. Imposition of any tax with retrospective effect for years which no such tax was there, cannot also be considered to be just and reasonable from the point of view of the Revenue. The years for which levy is sought to be imposed with retrospective effect had already passed and there cannot be any proper justification for imposition of any fresh tax for those years. Such retrospective taxation is likely to disturb and unsettle the settled position; and because of such imposition of retrospective levy for the years for which there was no such levy, assessments for those years which might already have been completed and concluded will get upset. If the State is in need of more funds, the State, instead of seeking to levy any tax with retrospective effect, can always take appropriate steps to collect any larger amount so required by the imposition of higher taxes or by other appropriate methods. I have already observed that Validating Acts which seek to validate the levy of any tax with retrospective effect do not in effect impose any fresh tax with retrospective effect and Validating Acts stand on an entirely different footing. I, therefore, hold that the impugned amendment in so far as it is sought to be made retrospective with effect from the 1st day of April, 1972, is invalid and unconstitutional, though the amendment in so far as it operates prospectively is valid."

21. We cannot possibly have a different opinion when the section of the statute concerned is a beneficial provision intended to give a fiscal incentive to the assessee. Section 115JB can hardly fit into this description.

We have earlier referred to the *raison d'etre* of the introduction of Chapter XII B which is titled "Special provision relating to certain companies". This Chapter was introduced into the Act by the Finance Act, 1987. As per the CBDT Circular No.495 dated 22.9.1987 explaining the provisions of the Finance Act, 1987, Chapter XII B which provided for a Minimum Alternate Tax (MAT) on certain companies was introduced with the following object:-

"New provisions to levy minimum tax on 'book profit' of certain companies:

36.1 It is an accepted canon of taxation to levy tax on the basis of ability to pay. However, as a result of various tax concessions and incentives certain companies making huge profits and also declaring substantial dividends, have been managing their affairs in such a way as to avoid payment of income-tax.

36.2 Accordingly, as a measure of equity, section 115J has been introduced by the Finance Act. By virtue of the new provisions, in the case of a company whose total income as computed under the provisions of the Income-tax Act is less than 30 per cent of the book profit computed under the section, the total income chargeable to tax will be 30 per cent of the book profit as computed. For the purposes of section 115J, book profits will be the net profit as shown in the profit and loss account prepared in accordance with the provisions of Schedule VI to the Companies Act, 1956, after certain adjustments. The net profit as above will be increased by income-tax paid or payable or the provision thereof, amount carried to any reserve, provision made for liabilities other than ascertained liabilities, provision for losses of subsidiary companies, etc., if the amounts are debited to the profit and loss account. Liabilities relating to expenditure which has been incurred or which has accrued in respect of expenses which are otherwise deductible in computing income will not be added back. The amount so arrived at is to be reduced by –

(i) amounts withdrawn from reserves if any, such amount is credited to the profit and loss account;

(ii) the amount of income to which any of the provisions of Chapter III applies, if any such amount is credited to the profit and loss account; and

(iii) the amount of any brought forward losses or unabsorbed depreciation whichever is less as computed under the provisions of section 205(1)(b) of the Companies Act, 1956, for the purpose of declaration of dividends. Section 205 of the Companies Act requires every company desirous of declaring dividend to provide for depreciation for the relevant accounting year. Further, the company is required under section 205 to set off against the profit of the relevant accounting year, the depreciation debited to the profit and loss account of any earlier year(s) or loss whichever is less.

36.3 Section 115J, therefore, involves two processes. Firstly, an assessing authority has to determine the income of the company under the provisions of the Income-tax Act. Secondly, the book profit is to be worked out in accordance with the Explanation to section 115J(1) and it is to be seen whether the income determined under the first process is less than 30 per cent of the book profit. Section 115J would be invoked if the income determined under the first process is less than 30 per cent of the book profit. The Explanation to sub-section (1) of section 115J gives the definition of the 'book profit' by incorporating the requirement of section 205 of the Companies Act in the computation of the book profit. Brought forward losses or unabsorbed depreciation whichever is less would be reduced in arriving at the book profits. Sub-section (2), however, provides that the application of this provision would not affect the carry forward of unabsorbed depreciation, unabsorbed investment allowance, business of losses to the extent not set off, and deduction under section 80J, to the extent not set off as computed under the Income-tax Act."

22. Section 115JB was introduced by the Finance Act, 2000 w.e.f. 1.4.2001 and according to the CBDT Circular No.794 dated 9.8.2000, the following was the object for which it was introduced:-

"43. Minimum Alternate Tax on companies:

43.1 In recent years, as the number of zero tax companies and companies paying marginal tax had grown, minimum alternate

tax was levied under section 115JA of the Income-tax Act from the assessment year 1997-98. The efficacy of the existing provision, however declined in view of the exclusions of various sectors from the operation of MAT and the credit system. The Act has, therefore, modified the scheme of MAT. The existing section 115JA has been made inoperative with effect from 1st April, 2001. In its place, the Act inserts a new provision, section 115JB of the Income-tax Act.

43.2 The new provisions provide that all companies having book profits under the Companies Act, prepared in accordance with Part II and Part III of Schedule VI to the Companies Act, shall be liable to pay a minimum alternate tax at a lower rate of 7.5 per cent as against the existing effective rate of 10.5 per cent, of the book profits. These provisions will be applicable to all corporate entities without any exception.

43.3 The new provisions further provide that for purposes of MAT, the company shall follow same accounting policies and standards as are followed for preparing its statutory account.

43.4 The amended provision discontinues the system of allowing credit for MAT in future. However, the taxes paid under the existing provisions of section 115JA shall get the credit.

43.5 The export profits under sections 10A, 10B, 80HHC, 80HHE and 80HHF are kept out of the purview of this provision as these are being phased out. The new provisions also exempt companies registered under section 25 of the Companies Act.

43.6 Certificate from an auditor has also been prescribed with a view to ascertaining the extent of book profits.

43.7 These amendments will take effect from 1st April, 2001, and will, accordingly apply in relation to the assessment year 2001-2002 and subsequent years."

23. There is a marked difference in the nature and character of a Section such as Section 80J which was considered by **A.N. Sen, J.** in **Lohia Machines** (supra) and those of Section 115J/115JB of the Act. Whereas Section 80J was a Section intended to give a fiscal incentive or relief for assessees who set up industrial undertakings in notified backward

areas, Section 115J/115JB targeted corporate entities for imposing a Minimum Alternate Tax on their book profit. It was noticed by the legislature that as a result of various tax concessions and incentives certain companies making huge profits and also declaring substantial dividends have been managing their affairs in such a way as to avoid payment of income tax. Recognizing that it was an accepted canon of taxation to levy tax on the basis of the ability to pay, Section 115J was enacted as a measure of equity to impose tax on profit-making, dividend-distributing companies. The object of Section 115J was thus quite different from the object for which Section 80J was enacted. Section 115JB was inserted having regard to the background that at the relevant time, the number of zero-tax companies and companies paying only marginal tax had grown and, therefore, the efficacy of the existing provision i.e. Section 115JA which had been introduced from 1.4.1997, had declined in view of the exclusion of various sectors from the operation of MAT. It was, therefore, thought by the Parliament that with effect from 1.4.2001, a new provision should take the place of Section 115JA. This Section was made applicable to all corporate entities without any exception. The attempt was to widen the tax base in respect of these zero-tax companies as indicated by the discontinuance of the system of allowing MAT credit in the future and the phasing out of the deductions under Sections 10A, 10B, 80HHC, 80HHE and 80HHF from the purview of Section 115JB.

24. It would be incorrect to treat the provisions of Section 80J and the provisions of Section 115JB on par and require the same standards to be fulfilled to enact a valid legislative amendment with retrospective effect in both of them. It is apparent from Section 115JB that the object was to tax the so-called zero-tax companies who did not pay any income tax though they earned huge profits and even distributed dividends. By imposing such a tax on the book profit of such companies, Parliament was widening its revenue collection and it can hardly be suggested that it was granting any benefit to those companies. On the contrary, whatever benefits such companies were earlier enjoying were sought to be withdrawn or severely curtailed by the introduction of Chapter XII B and the Minimum Alternate Tax provisions. It would be erroneous and inaccurate to consider any deduction allowed while computing the book profit of the company as a benefit or relief granted to it in the same manner in which Section 80J conferred a benefit upon an assessee who set up an industrial undertaking in a notified backward area. The scheme and purpose are so

different that a comparison of both the provisions would be totally off the mark. Explanation 1 provided for computation of the book profit and initially there was admittedly no provision to add back the provision made in the profit and loss account for diminution in the value of an asset. It was wrongly assumed by the tax authorities that a provision for bad and doubtful debts was a provision for meeting an unascertained liability. The true position in law was pointed out by the Supreme Court in its judgment in **HCL Comnet** (supra); thereafter the legislature stepped in by introducing Clause (i). The reason was to take a lesson out of the judgment of the Supreme Court and to deny the deduction of a provision made not only for bad and doubtful debts but also for the diminution in the value of any asset. It must be recalled that the argument of the companies, accepted by the Supreme Court, was that a provision for doubtful debts is not a provision for meeting an unascertained liability but was a provision for diminution in the value of the debt due to non-recovery or the debt becoming bad. It is of some significance that the retrospective amendment did not confine itself to adding back the provision for bad and doubtful debts; it authorized the Assessing Officer to add back the provisions made for the diminution in the value of "any asset". This reflects the anxiety of the legislature to curb the tendency of companies to make downward revisions in the value of their assets – both movable and immovable – so as to neutralise or reduce the book profit. The amendment is thus an attempt to prevent companies from making use of the absence of any provision in Section 115JB permitting the adding back of a provision made for diminution in the value of any asset in order to offset or reduce the book profit. The amendment must be visualized in the larger perspective i.e. that the legislature thought it inequitable that companies earning huge profits and even declaring dividends were not paying any income tax. The basis of computing the total income of such companies was changed. They were no longer entitled to compute their total income in accordance with the other provisions of the Income Tax Act, which are normally applicable. They were to pay tax on their book profit which was deemed to be the total income. If regard is had to the broader canvass of Chapter XII B, as we must, it would be difficult to hold that the absence of any provision in Explanation 1 to add back the provision for doubtful debts (on the footing that it was a provision for meeting an ascertained liability) was not an incentive or relief consciously allowed to the zero-tax companies in the same manner in which the relief under Section 80J was allowed.

The *sequitur* of this conclusion is that the very weighty observations of **A.N. Sen, J,** made in the context of Section 80J and the retrospective amendment made by the Finance (No.2) Act, 1980 with effect from 1.4.1972, would be out of place in the context of Chapter XII B of the Income Tax Act. If it is not a benefit, deduction or relief allowed by the legislature, there is no question of applying those observations by saying that the benefit etc. cannot be taken away retrospectively.

25. We will now turn to the second judgment strongly relied upon by the counsel for the petitioner. That is a decision of the Bombay High Court in **CIT v. Hico Products (P.) Ltd.,** (1991) 187 ITR 517. A Division Bench of the High Court conceded that a taxing statute which validates the imposition of a tax earlier held invalid by a court of law or an amendment to remove the lacuna and clarify the legislative intent, even if it is enacted retrospectively can be considered as justified. It however, held that there should be compelling reasons for making a retrospective amendment in public interest and in the absence of reasons of public interest it runs the risk of being unreasonable or arbitrary and violative of Articles 14 and 19(1)(g) of the Constitution. That was also a case of retrospective amendment made w.e.f. 1.04.1962 by an amending act passed in 1980, to amend Section 35 of the Income Tax Act. This judgment of the Bombay High Court was reversed in appeal by the Supreme Court in **CIT Vs. Hico Products (P) Ltd.,** (2001) 247 ITR 797 (SC). The Supreme Court held that the retrospective amendment which provided that where a deduction for scientific expenditure had been allowed in respect of a capital asset to an assessee under Section 35, no depreciation shall be allowed on the said capital asset for the same or any other previous year, was merely clarificatory and valid. The Supreme Court placed reliance on its earlier judgment in the case of **Escorts Ltd. Vs. Union of India,** (1993) 199 ITR 43. In the judgment of **Escorts Ltd.** (supra) it was held that even before the 1980 amendment the section did not permit depreciation in respect of a capital asset acquired for the purpose of scientific research and which had been written off entirely. It was opined that the amendment did not effect any change. Even conceding that, having regard to the view expressed by the Supreme Court in **Escorts Ltd.** (supra), the Supreme Court had not occasion to examine the other part of the judgment of the Bombay High Court (supra) which invalidated the retrospective amendment (on the ground that the amendment brought about a change in the law by denying retrospectively

the right of an assessee to claim depreciation for a long period of 18 years and that no public purpose was shown justifying the retrospective taking away of the benefit which was available to the assessees from 1946 and further that it would result in a heavy financial burden on the assessees as also unreasonably affect the right of the assessee to carry on business) the distinction pointed out earlier between a provision which confers a benefit or allowance to an assessee and a provision which essentially imposes a tax on a class of assessees who were considered by the legislature to be unjustly falling outside the ambit of the tax would hold good and would answer the views expressed by the Bombay High Court. It is emphasised here that there is considerable difference between provisions conceived as incentive or relief provisions, (enacted with a view to foster industrial growth and scientific research activities in the country) and those which essentially seek to bring within the purview of the fiscal legislation companies which did not pay any tax, though earning substantial profits and also dividends. If this essential difference between the two types of provisions is kept in mind, it will be apparent that there can be no question of the retrospective amendment under challenge before us not serving the larger public interest. The provisions of Chapter XII B of the Income Tax Act seek to achieve a larger public interest by removing the inequalities in the tax regime by making companies with the ability to pay tax on account of earning substantial profits, to pay tax and thereby contribute to the fiscal health of the economy. If this is not in the larger public interest, we do not see what can be.

26. We may now turn to the third decision on which heavy reliance was placed on behalf of the petitioner. That is the judgment of the Gujarat High Court in **Avani Exports and Ors. Vs. CIT & Ors.,** (2012) 348 ITR 391. The amendment made to section 80HHC of the Income Tax Act by the Taxation Laws (2nd Amendment) Act, 2005 was challenged to the extent of its retrospectivity. Several grounds were argued before the Gujarat High Court but so far as the present petition before us is concerned we need to refer only to the challenge to the retrospectivity of the amendment. The High Court upheld the prospective nature of the amendment but struck it down to the extent that it operated retrospectively. It observed that although in a taxing statute laxity is permissible and a benefit already given to the assessees can be taken away or curtailed, that can be done only with prospective effect and not retrospectively. The Court noticed that a citizen has a right to arrange his business in a

manner which accorded with the law and claim a benefit accordingly; the benefit cannot be taken away by law with retrospective effect by imposing a new condition which the citizen at that stage is incapable of complying, whereas if such promise (by the legislature) was not there, the citizen could have arranged his affairs in a different way to get the same or at least some part of the benefit. In that case, the view taken by the assessees on the interpretation of the statutory provisions was upheld by the Income Tax Appellate Tribunal which interpreted those provisions in a way beneficial to the assessees. According to the Finance Minister, it was never the intention of the legislature to give such a benefit to the assessees. Therefore, a retrospective amendment was made taking away the benefit if certain conditions are not fulfilled. In this factual background, the High Court held that it was open to the revenue to challenge the decision of the Tribunal before a higher forum but simply because there would be a delay in disposal of such an appeal and without actually filing an appeal to the High Court or the Supreme Court, the revenue cannot curtail the benefit by proposing an amendment incorporating new conditions from an earlier date. It was further noted that wrong orders passed by the Tribunal under the statutory provisions which were also enacted by the Parliament, should be challenged by the aggrieved party before the appropriate High Court and still if it is aggrieved, it should carry the matter to the Supreme Court. In effect what the High Court held was that an order of a judicial Tribunal such as the Income Tax Appellate Tribunal was not final on a matter of interpretation of the statutory provisions and that its orders could be challenged before the High Court and the Supreme Court, before proceeding to make a retrospective amendment. This was actually articulated by the High Court by saying that ..... *such curtailment with retrospective effect cannot be made for overcoming the effect of a judicial decision without taking recourse to the provision of appeal prescribed by law on the plea of delay.*"

27. We are not sure if this decision can avail of the petitioner before us. Again it needs to be pointed out that Section 80HHC is a Section which grants deduction in respect of profits earned from exports. A particular view canvassed by the assessees on the interpretation of the Section was upheld by the Tribunal. That view was sought to be nullified by an amendment with retrospective effect, on the ground that it was never the intention of the Parliament to allow such a benefit. Some

further conditions which were not there at the earlier date were sought to be imposed by the retrospective amendment. The main objection of the High Court, with respect, appears to be that the order of the Tribunal could have been challenged by the revenue before the High Court and the Supreme Court before proceeding to change the law and to impose further conditions with retrospective effect. We do agree that the view expressed by the Income Tax Appellate Tribunal on the interpretation of statutory provisions may not be final and may not enjoy the same authority as that of a High Court or Supreme Court, and this we say with due respect to the Tribunal, but we are not able to take the proposition forward by saying that the revenue is bound to wait till the last word is said by the High Court or Supreme Court before changing the law with retrospective effect. It need not be so uniformly in all cases. Section 80HHC was a very important relief provision and with booming exports the tax implications of the Section were very high. Parliament may have very well thought that considering the revenue implications the earlier the law is changed the better it would be for all, and for the sake of certainity and clarity it may be desirable that a retrospective amendment to the law is made as expeditiously as possible. If the suggestion is that the legislature has to necessarily wait till the Supreme Court pronounced its view and assuming the Supreme Court endorsed the view of the Tribunal, only then can the legislature make a retrospective amendment, then there would be a long lapse of time covering several years causing delay in the collection of tax and consequential burden of interest. There is nothing which prevents the legislature from giving effect to its intention at the earliest point of time so that there is certainty and clarity in the law. The Court cannot impose its moral standards in such matters as there is no equity about a tax.

28. So far as the other aspects are concerned, we may examine them now.

29. We shall now consider the judgment of the Supreme Court in **M/s. Krishnamurthi & Co. v. State of Madras** (supra). Entry 47 of the First Schedule to the Madras General Sales Tax Act levied sales tax on all kinds of mineral oils, including non-lubricants, at the rate mentioned in that entry. The Madras High Court in a judgment reported in **Burmah Shell Oil Storage and Distributing Company of India Ltd. v. State of Tamil Nadu,** (1968) 21 STC 227 held that this entry did not include furnace oil which was a non-lubricant mineral oil, since the language

used in the entry was inappropriate for levying tax on sale of non-lubricant mineral oils. The First Schedule was, therefore, amended by an Amending Act of 1967 to rectify and remove the defect in the language therein as pointed out by the High Court and to validate the past levy and collection of tax in respect of all kinds of non-lubricating mineral oils, including furnace oil at the appropriate rate with retrospective effect from 1.4.1964. Entry 47A was inserted in the Schedule to provide for the rate of sales tax in respect of all kinds of mineral oils (other than those falling under item 47 and not otherwise provide for in this Act) including furnace oil. The retrospective amendment was challenged unsuccessfully before the Madras High Court and on further appeal to the Supreme Court, one of the principal contentions advanced on behalf of the dealer was that the retrospective operation of entry 47A was violative of article 19(1)(g) of the Constitution as it imposed an unreasonable restriction on the right of the appellants to carry on their trade and business. Rejecting the contention, **H.R. Khanna, J,** speaking for the Bench of three judges noted that the amending act was intended to cure an infirmity as revealed by the judgment of the High Court and to validate the past levy and collection of tax in respect of certain kinds of non-lubricating mineral oils, including furnace oil. The legislature, it was noticed, for this purpose split the original entry 47 into two entries, i.e., 47 & 47A and made the position clear that furnace oil would also suffer the same rate of tax as non-lubricating mineral oil. Rejecting the other argument that the tax levied by entry 47A was a fresh tax, it was held that since the object of the amending act was *"to remove and rectify the defect in phraseology or lacuna of other nature and also to validate the proceedings, including realization of tax, which have taken place in pursuance of the earlier enactment which has been found by the court to be vitiated by an infirmity"*, it was a permissible mode of legislation. It was observed that such an amending and validating Act in the very nature of things has a retrospective operation. An earlier judgment of the Supreme Court in the case of **Union of India vs. Madan Gopal Kabra,** AIR 1954 SC 158 was noticed, in which it was held by the Supreme Court that the power to impose taxes on income comprehended the power to impose income tax with retrospective operation even for a period prior to the Constitution.

30. The facts of the present case bear close resemblance to the facts in the case of **M/s. Krishnamurthi & Co.** (supra). Just as the

Madras High Court in that case found that entry 47 in the First Schedule to the MGST Act was not wide enough to include furnace oil which necessitated a retrospective amendment by insertion of entry 47A to clearly provide for sales tax at the same rate on all mineral oils including furnace oil, in the case under consideration too after the Supreme Court pointed out in **HCL Comnet** (supra) that clause (c) of Explanation 1 was inadequate to bring within its fold a provision for diminution in the value of any asset, the legislature stepped in to cure the lacuna by adding, with retrospective effect, clause (i) to the aforesaid Explanation to unambiguously provide for a provision for the diminution in the value of an asset to be added back to the book profit. On the question whether, in the absence of anything in the statement of objects and reasons to show the intention or to otherwise justify the amendment, it can be said that the legislature always intended to add-back any provision made for diminution in the value of any asset, we have already expressed our view.

31. In **Government of AP vs. Hindustan Machine Tools Ltd.,** AIR 1975 SC 2037 the question arose as to the validity of a retrospective amendment in the definition of the word "house" appearing in Section 2(15) of the Andhra Pradesh Gram Panchayat Act, 1964. The definition of the word "house" as it originally stood for the purpose of levy of house tax did not include certain buildings. An amendment was made in the year 1974 to amend the definition so as to include buildings not originally included in the definition. A building which did not have a main entrance on the common way was included in the definition by the amendment. The amending Act was made retrospective to validate – notwithstanding any judgment, decree or order to the contrary – as if the definition as amended was always enforced. It was held that the amendment was not an encroachment on the judicial power by the legislature. The Supreme Court held that the amendment removed the basis of the decision rendered by the High Court so that the decision could not have been given in the altered circumstances. The present case is also not one of encroachment of the legislature upon the judicial power. Parliament did not attempt to validate the add-back of the provision for bad and doubtful debts by validating the action of the income tax authorities without changing the statutory basis. The provision for bad and doubtful debts, which was described by the Supreme Court in HCL Ltd. (supra) as one for diminution in the value of an asset, i.e., debt, was provided for as a separate item to be added to the book profit of the

company by insertion of clause (i) with retrospective effect. If clause (i) had always been there in Explanation 1, the Supreme Court would not have held that the provision for bad and doubtful debts cannot be added back. The amending Act cured the statutory provision of the vice from which it suffered and it was given retrospective effect which was quite within the competence of the legislature.

32. The judgment of the Supreme Court in **National Agricultural Co-operative Marketing Federation of India Ltd. Vs. Union of India,** (2003) 260 ITR 548 was strongly relied upon by the Standing Counsel appearing for the revenue. He contended that this judgment covered almost all aspects of the matter. A careful perusal of the judgment confirms the claim of the learned Standing Counsel; in addition it was observed in this case that the test of the length of time covered by the retrospective operation cannot by itself necessarily be a decisive test. It was held that notice must be taken of the surrounding facts and circumstances relating to the taxation and the legislative background of the provision.

33. In view of the forgoing discussion, we hold that the amendment made to Explanation 1 to Section 115JB of the Income Tax Act, 1961 by the Finance (No.2) Act, 2009 by insertion of clause (i) with retrospective effect from 1.4.2001 is not ultra vires or unconstitutional.

34. The only other contention which calls for our attention is the one based on different treatment given to different assessment years. It is pointed that the amended provision could not even be applied in the ordinary course in respect of the assessment years 2001-02 and 2002-03 for the reason that the time limit for reopening these assessments ended on 31.3.2008 and 31.3.2009 respectively. It is further pointed out that the amendment was introduced after these dates and only affects assessees in whose case some reassessment or appellate proceedings were pending at the time of introduction of the Bill. On this basis, it is argued that the sole reason for the amendment "appears to arm some assessing officers with a tool to support a prima face erroneous action of adding the provision for bad and doubtful debts to the book profit without any statutory support for the same". This aspect of the matter has been dealt with in the judgment of Supreme Court in **National Agricultural Co-operative Marketing Federation of India Ltd.** (Supra). The following passage from the judgment is relevant:-

"It is hardly likely on the given facts, that assessments had been concluded on the basis of the decision in Kerala Marketing case MANU/SC/2021/1998 : [1998]231ITR814(SC) and the period for reopening such assessments had become time barred. In any event the 1998 amendment cannot be construed as authorizing the revenue authorities to reopen assessments when the reopening is already barred by limitation. The amendment does not seek to touch on the periods of limitation provided in the Act, and in the absence of any such express provision or clear implication, the legislature clearly could not be taken to intend that the amending provision authorises the Income Tax Officer to commence proceedings which before the new Act came into force, had, by the expiry of the period provided become barred- **S.S. Gadgil v. Lal & Co.** MANU/SC/0122/1964 : [1964]53ITR231(SC) ; see also **J.P. Jani, ITO v. Induprasad Devshanker Bhatt** (supra); **K. M. Sharma v. ITO** MANU/SC/0312/2002: [2002] 254 ITR 772 (SC). Different considerations would arise if, by the amendment even final assessments were unambiguously sought to be opened- **Commercial Tax Officer v. Biswanath Jhunjhunwalla,** MANU/SC/0097/1997 : AIR1997SC357. That is not the case here."

These observations are a recognition of the consequence that is inevitable in the case of all retrospective amendments, which by their very nature, can be lawfully applied only to assessments that are open and pending either before the Assessing Officer or in appeal proceedings. In the case of completed assessments the amendment can be invoked only if reopening of the assessments under Section 147 of the Act or modification of the assessments under any other provision of the Act is permissible. The provisions relating to limitation and finality of assessments cannot be disturbed, as they are also the result of legislation by Parliament as the Supreme Court itself has recognised. Different considerations would, therefore, arise if by the amendment even final assessments are sought to be reopened. The petitioner can have a grievance and it can be successfully ventilated, only if the revenue authorities seek to disturb the finality of a completed assessment, overlooking the provisions of the Act relating to reopening of assessments. We, therefore, do not think that there is any substance in the contention of the petitioner.

35. With regard to the claim of the petitioner for refund of the tax paid on the basis of the revised computation of the income, the contention is that this was neither advance tax nor self-assessment tax. It is further contended that the petitioner did not file any revised returns for any of the three assessment years for which taxes were paid on 30.10.2009; for the assessment years 2002-03 and 2003-04 there is no provision in the Income Tax Act enabling the petitioner to *suo motu* file a return and pay the tax. It is therefore, contended that the amount deposited on 30.10.2009 cannot be appropriated as tax by the Government and the same ought to be refunded.

36. This contention is not sought to be linked to the challenge to the validity of the retrospective amendment because the claim for refund can be independently raised even if the amendment is held to be valid, on the ground that there is no provision in the Act for a voluntary payment of the tax without filing a return or a revised return or pursuant to an order of assessment of the income accompanied by a notice of demand. However, the prayer cannot be entertained in these proceedings since there is a separate remedy prescribed in Chapter XIX of the Act. Section 237 deals with refunds and states that if any person satisfies the assessing officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under the Act for that year, he shall be entitled to a refund of the excess. Section 239 says that the claim for refund shall be made in the prescribed form, verified in the prescribed manner. Under clause (c) of sub-section (2), the claim has to be preferred within a period of one year from the last day of the assessment year. In the petitioner's case such periods have expired in respect of the three assessment years i.e. 2002-03, 2003-04 and 2009-10. The petitioner however, is not without remedy as Section 119(2)(b) empowers the CBDT, if it considers desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order, authorise any income tax authority (other than CIT(Appeals)) to admit an application or claim for any exemption, deduction, refund or any other relief under this Act after the expiry of the period specified by or under this Act for making such application or claim and deal with the same on merits in accordance with law. It is open to the petitioner to avail of this remedy, if so advised. We refrain from making any observation touching upon the merits of the claim, if and when made. We may also add that

we have no information as to any further proceedings relating to the three assessment years.

37. For the above reasons the writ petition is dismissed but in the circumstances with no order as to costs.

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LPA

PREM KISHORE .....APPELLANT

VERSUS

CENTRAL WAREHOUSING CORPORATION ....RESPONDENT

(S. RAVINDRA BHAT & SUDERSHAN KUMAR MISRA, JJ.)

LPA NO. : 808/2004 & C.M. APPL. NO. : 10564/2004 **DATE OF DECISION: 08.04.2013**

Service Law—CWC Staff Regulations, 1996—Regulation 10 Sub-Regulation (1)—Petitioner appointed as Junior Technical Assistant in December 1983—On probation for one year—Suspended on 6.9.1984—Pending initiation of disciplinary proceedings—However in disciplinary proceedings initiated against him—His suspension revoked on 16.2.1985—Instead one P.P. Singh was charged and in the enquiry proceedings, P.P. Singh held guilty in regular D.E. However, in the report, the enquiry officer made certain observations qua the working of petitioner as well. Meanwhile, probation period of petitioner ended in December 1984—No formal order of extension of probation or confirming the petitioner—Petitioner's services terminated on 22.10.1983 under Sub-Regulation (1) of Regulation (10) of CWC (Staff) Regulations 1966 held the petitioner was examined as a witness in the

departmental proceedings against P.P. Singh an his credibility was Doubted by the enquiry officer. The genuiness of warnings/memos issued against the petitioner by P.P. Singh was doubted in the enquiry by the enquiry officer—Thus, the warning/memos could not have been relied against the petitioner to terminate the services of petitioner. The comments of enquiry officer about any creditworthiness of the petitioner in the DE cannot be characterised as evidence to judge suitability of petitioner. The comments of enquiry amended to findings of misconduct without any notice or hearing to the petitioner. No other material to support termination order as based on bonafide assessment of petitioners suitability—The innocuously word termination order was not reality based on allegations of serious misconduct, for which the petitioner was not even charged or made to face any form of inquiry and was not granted hearing—Termination set aside. However, since termination order was 28 years old, balancing the two seemingly competing public interest the petitioner awarded 40% of the back salary and allowances that would have been paid to the petitioner, had he continued in the same post from the date of his termination at all.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Sh. G.D. Gupta, Sr. Adv. with Sh. Sanjiv Joshi and Sh. Piyush Sharma Adv.

FOR THE RESPONDENT : Sh. K.K. Tyagi and Sh. Iftikhar Ahmad, Adv.

CASES REFERRED TO:

1. *State Bank of India* vs. *Palak Modi* 2012 (11) SCALE 542).
2. *Rajesh Kumar Srivastava* vs. *State of Jharkhand* (2011) 4 SCC 447.

3. *Progressive Education Society* vs. *Rajendra* (2008) 3 SCC 310.

4. *Pavanendra Narayan Verma* vs. *Sanjay Gandhi PGI of Medical Sciences* (2002) 1 SCC 520.

5. *Krishnadevaraya Education Trust* vs. *L.A. Balakrishna* (2001) 9 SCC 319.

6. *Dipti Prakash Banerjee* vs. *Satyendra Nath Bose National Centre for Basic Sciences* (1999) 3 SCC 60.

7. *Anoop Jaiswal* vs. *Union of India* 1984 (2) SCC 369.

8. *State of U.P.* vs. *Ram Chandra Trivedi* (1976) 4 SCC 52.

9. *Shamsher Singh* vs. *State of Punjab* 1975 (1) SCR 814.

10. *R.S. Sial* vs. *State of U.P.* (1974) 3 SCR 754.

11. *I.N. Saksena* vs. *State of M.P.* (1967) 2 SCR 496.

RESULT: L.P.A. Allowed.

S. RAVINDRA BHAT, J.

1. The present appeal - by an unsuccessful writ petitioner (referred to as "the petitioner") is directed against the judgment and order of a learned Single Judge, dated 20-2-2004, dismissing WP 662/1984.

2. The Petitioner was selected for appointment to the post of Junior Technical Assistant. His letter of appointment, dated 17.10.1983, stated that:

> "(iii) For probation and other terms and conditions his, her services will be governed by the CWC (Staff) Regulations as enforced from time to time."

3. The Petitioner accepted the letter of offer; consequently, sometime in December, 1983, the respondent (hereafter "CWC") issued an office order appointing him to the post of Junior Technical Assistant. The office order indicated that the petitioner would be "on probation for a period of one year which may be further extended for a period not exceeding one year in all."

4. By order dated 15th June, 1984, the Petitioner was given additional charge of Godown Nos. III and IV in addition to the charge of Godown

Nos. I and II, which was already with him. On 28th June, 1984, a Memo was issued to him, demanding explanation that some damaged empty burnt tins had been thrown out of the godown by him on 27th June, 1984. This Memo, dated 28th June 1984 was received by him with second memo dated 2nd August, 1984 wherein an explanation regarding some allegations was asked from the petitioner. The allegations here were that the petitioner had refused to receive the Zinc Ingots in Godown No. IA to which he gave his reply on 24th August denying allegations made in the first Memo. By an order dated 6th September 1984, issued by the CWC, the petitioner was placed under suspension initially pending the initiation of the disciplinary proceedings. However, none were initiated and the said suspension order was revoked on 16th February, 1985. A regular departmental enquiry was thereafter held against Shri P. P. Singh, Superintendent, Central Warehousing Corporation, Patparganj. In the said proceedings against Shri P. P. Singh, the petitioner appeared as a witness and the Enquiry Officer held Shri P. P. Singh guilty in the report and made certain observations qua the working of the petitioner as well.

5. In the meanwhile, a year's probationary period of the petitioner ended in December, 1984. No formal order was issued extending the probation, nor was one confirming the petitioner's service, issued by CWC. In this background, after the suspension order was revoked on 16th February, 1985, the CWC, on 22.10.1985 acting under sub Regulation (1) of Regulation 10 CWC (Staff) Regulations 1966, terminated his services. The office order dated 22.10.1985 reads as under:-

> "OFFICE ORDER
>
> In terms of the provisions contained in Sub Regulation (1) of Regulation 10 of Central Warehousing Corporation (Staff) Regulation 1966. Shri Prem Kishore, Jr. Tech.Asstt. Central Warehouse. Gurgaon, is hereby terminated from the service of the Corporation with immediate effect in public interest. He is also paid a cheque bearing No. OS-100-922961 dated 18.10.1985 for Rs.1116/-(Rs.one thousand one hundred sixteen only) being the amount equivalent to one month's pay in lieu of one month's notice required there-under."

6. The petitioner represented against termination of his service, but without any success. He challenged the order of termination in the writ petition, filed before this court, urging that as no order was passed

extending his probation period, which was initially for a period of one year as per the office order dated December, 1983, he would be deemed to have been confirmed w.e.f. December, 1984. It was argued also, that the termination order was ex facie penal in as much as it cast a stigma upon the petitioner. The words *'in public interest'* used in the order of termination would cast aspersion upon the capability of the petitioner and therefore is penal. Alternatively, it was contended that the facts preceding the issuance of the order revealed that what has motivated and was the foundation of the order was a finding of guilt against the petitioner in an enquiry without any notice to him and without given him an opportunity of being heard.

7. The CWC resisted the petition, and contended that the order impugned was not penal. It also contended that the termination order was an innocuous one, and entirely based on the petitioner's unsuitability, determined on the basis of a *bona fide* evaluation of his work and performance. The CWC relied on Regulation 7 of the CWC (Staff) Regulations 1966 which stipulated that:

> "7. PROBATION;
>
> (1) Every employee shall, on appointment to any post, be on probation in that post for a period of one year commencing from the date of appointment. Provided that such period may be further extended for a period not exceeding one year in all at the discretion of the appointing authority.
>
> Provided further that any continuous service rendered by an employee immediately before being placed on probation in a post may be counted towards the probationary period.
>
> (2) Nothing in this regulation shall apply to the post of Managing Director or persons employed on deputation from the Central Govt. or any State Govt. or an Institution."

8. It was also argued that the CWC invoked its power under Regulation 10 and there were no facts or circumstances which could lead to the inference that the termination order was for anything other than the Petitioner's performance, which the employer had a right to assess, and objectively decide not to continue him further in its service. Regulation 10 of the CWC (Staff) Regulations 1966 reads as under:

> "10. TERMINATION OF SERVICE BY THE CORPORATION
>
> "(1) The Corporation may, at any time and without assigning any reasons, terminals the services of any temporary employee after giving one month's notice or one month's pay in lieu thereof."

9. The learned Single Judge, after considering the submissions of the parties, and taking note of the materials on record, held that the petitioner's arguments were meritless, and that the enquiry proceedings held against someone else did not amount to holding an inquiry into his conduct. It was held that the overall circumstances revealed that the CWC exercised its power *bona fide*, and terminated the petitioner from its employment, on the basis of its assessment of his unsuitability.

10. Counsel for the petitioner contended that the impugned judgment is in error of law. The learned Single Judge, it was contended, failed to look into the circumstances surrounding and leading up to the termination order. Reliance was placed on the decision reported as **Shamsher Singh v State of Punjab** 1975 (1) SCR 814, and other decisions of the Supreme Court, to say that courts should not be guided by the face of an innocuous termination order made against a probationer or a temporary government servant, but should satisfy themselves that the real basis or foundation of the order is not assumed misconduct. If so, a termination order not preceded by any fair procedure entailing opportunity of hearing to rebut such charges would be unjustified and illegal. It was emphasized that the illegality and unfairness in the present case were self-evident, because the petitioner was asked to depose in an inquiry against his superior officer, P.P. Singh. The inquiry report which led to the imposition of penalty against that official contained findings adverse to the petitioner; these formed the basis of the termination order. It was also stressed that the Memos said to be the real basis for termination of the petitioner (allegedly indicating his unsuitability) had been adversely commented by the Inquiry Officer, who discarded them as false, and issued by Shri. P.P Singh to save himself.

11. Counsel for the CWC had urged that the termination order in this case was not based on any allegation of misconduct, but on the assessment of suitability of the writ petitioner, to be continued in its services. It was urged that there was no obligation in the Regulations of the CWC, or any rule or condition governing the service of the writ petitioner to hold an inquiry. If during the career and service of an

employee, the employer received reports, which could be acted upon, no inference can be drawn that such genuine and bona fide assessment of lack of suitability had to necessarily be preceded by some formal inquiry. Imposition of such preconditions would hamper decision making and fetter broad discretionary power which extends to deciding not to retain officers or employees who are unsuitable for public employment with the Corporation.

12. Learned counsel relied on the decisions reported as **Krishnadevaraya Education Trust v. L.A. Balakrishna** (2001) 9 SCC 319, **Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences** (2002) 1 SCC 520, **Progressive Education Society v. Rajendra** (2008) 3 SCC 310 and **Rajesh Kumar Srivastava v. State of Jharkhand** (2011) 4 SCC 447. In Pavanendra Narayan Verma it was held that:

> "29. ... Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic. The decisions cited by the parties and noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job."

13. Similarly, in **Progressive Education Society** (supra), the Court held that:

> "The assessment has to be made by the appointing authority itself and the satisfaction is that of the appointing authority as well. Unless a stigma is attached to the termination or the probationer is called upon to show cause for any shortcoming which may subsequently be the cause for termination of the probationer's service, the management or the appointing authority is not required to give any explanation or reason for terminating the services except informing him that his services have been found to be unsatisfactory."

14. Learned counsel sought to stress that the petitioner's termination was not preceded by any inquiry; he was a witness in the inquiry held into an incident of misconduct in respect of charges levelled against one P.P. Singh, a godown Superintendent, under whom he (the petitioner) had worked. The inquiry officer's report revealed some materials which led the competent authority to conclude that retaining the petitioner in its services did not benefit the interests of the corporation. No preliminary or formal inquiry was held; it was not even essential to do so. The Corporation therefore took a *bona fide* decision to dispense with Petitioner/ Petitioner's employment. Therefore, the learned Single Judge did not commit any error of law which warrants this Court's interference in the present appeal.

15. The issue whether an innocuously worded order terminating the services of a probationer, even if based on allegations of misbehaviour which may necessitate an inquiry, was addressed by a seven judge larger Constitution Bench of the Supreme Court, in **Shamsher Singh** (supra), where it was held that:-

> "The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may, in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311. In such a case, the simplicity of the form of the order will not give any sanctity. That is exactly what has happened in the case of Ishwar Chand Agarwal. The order of termination is illegal and must be set aside"

Other decisions in **R.S. Sial v. State of U.P.** (1974) 3 SCR 754, **State of U.P. v. Ram Chandra Trivedi** (1976) 4 SCC 52 and **I.N. Saksena v. State of M.P.** (1967) 2 SCR 496 were considered, along with **Shamsher Singh,** in **Anoop Jaiswal v Union of India** 1984 (2) SCC 369, where the Supreme Court held that if after examining the attendant circumstances of an order of termination served on probationer, it the "court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee."

16. Much later, in **Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences** (1999) 3 SCC 60, a two Judge Bench of the Supreme Court considered a challenge to the termination of services after adverting to the various communications sent by the Head of the Organization to the petitioner and while considering the circumstances surrounding the termination of a probationer's services can be said to be "founded" on misconduct held that:

> "If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as "founded" on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid."

17. In a recent judgment of the Supreme Court (**State Bank of India v Palak Modi** 2012 (11) SCALE 542) the Court considered the law declared in all the previous rulings, and held that:-

> "20. The ratio of the above noted judgments is that a probationer has no right to hold the post and his service can be terminated at any time during or at the end of the period of probation on account of general suitability for the post held by him. If the competent authority holds an inquiry for judging the suitability of the probationer or for his further continuance in service or for confirmation and such inquiry is the basis for taking decision to terminate his service, then the action of the competent authority cannot be castigated as punitive. However, if the allegation of misconduct constitutes the foundation of the action taken, the ultimate decision taken by the competent authority can be nullified on the ground of violation of the rules of natural justice."

Speaking about **Progressive Education Society** (supra), the Court held (in Palak Modi) that:

> "33. The proposition laid down in none of the five judgments relied upon by the learned counsel for the appellants is of any assistance to their cause, which were decided on their own facts. We may also add that the abstract proposition laid down in paragraph 29 of the judgment in **Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences** (supra) is not only contrary to the Constitution Bench judgment in **Samsher Singh v. State of Punjab** (supra), but large number of other judgments **-State of Bihar v. Shiva Bhikshuk Mishra** (supra), **Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha** (supra) and **Anoop Jaiswal v. Government of India** (supra) to which reference has been made by us and to which attention of the two-Judge Bench does not appear to have been drawn. Therefore, the said proposition must be read as confined to the facts of that case and cannot be relied upon for taking the view that a simple order of termination of service can never be declared as punitive even though it may be founded on serious allegation of misconduct or misdemeanor on the part of the employee."

18. Besides the above ruling, this court notices that in **Pavanendra Narayan Verma** (supra), the factual backdrop appeared to be that the employer had held some form of inquiry to assess or evaluate suitability of the candidate, before terminating him from its services. The Court had commented in that case as follows: "We are also not prepared to hold that the enquiry held prior to order of termination turned this otherwise innocuous order into one of punishment. An employer is entitled to satisfy itself as to the competence of a probationer to be confirmed in service and for this purpose satisfy itself fairly as to the truth of any allegation that may have been made about the employee. A charge sheet merely details the allegations so that the employee may deal with them effectively. The enquiry report in this case found nothing more against the appellant than an inability to meet the requirements for the post."

19. The facts of the present case are that the petitioner was appointed as a probationer, in the CWC, on in 1983. His probationary service would have ended in December, 1984. However, some aspersions were cast on his conduct, and his complicity in an incident in a godown he was

working in, under the supervision of one P.P. Singh. Consequently, the petitioner was placed under suspension, by order dated 06-09-1984. A full-fledged disciplinary proceeding was initiated against Shri. P.P. Singh; the petitioner was cited as a witness. Before the conclusion of those disciplinary proceedings, the petitioner's suspension was revoked, (on 16th February, 1985) and he was reinstated in the services. He had been served with some warnings, by the said P.P. Singh. The Inquiry officer submitted his report to the Corporation, on. At this stage, it would be relevant to notice some of the observations of the Inquiry officer, made in his Inquiry Report, as to allegations against P.P. Singh. These observations were adverse to the petitioner, and in the nature of findings. The petitioner, it must be emphasized, had not been issued with any charge sheet, or asked to explain his conduct; rather he was asked to depose about the fire incident, as the subordinate officer who worked under the charged official, Shri. P.P. Singh. The relevant observations in the Inquiry Report, dated 18th October 1985, which were made available to this Court, at the stage of hearing of this appeal, are extracted below:

> "11.4 The next matter to be considered is the fire incident. The prime witness, in this regard is Prem Kishore. He deposed in a manner that leaves much to desire about. Perhaps he tried to conceal some information and he had not given the full information, of which he should have knowledge. He had stated that he was asked by the C.O. to take out the tins and destroy it, but he had refused to do so. However, at one stage he said he was with the labourer when they took out the oil tins and burnt them. At a later stage he said that he went to the spot along with other staff members. He had stated that he had noticed some excesses tins and the same was informed to the W.M. Later he stated that he does not know as to why they were taken out and destroyed. Kapil Dev and Sadhu Ram have stated that Prem Kishore was in the godown when the said material was taken out by the labourer and Prem Kishore closed the shutters after this. The witnesses have also stated that one of the Surveyors present there, confronted Prem Kishore as to why they were being taken out and to that Prem Kishore had replied that he should ask the W.M. The other witness, N.K. Sharma, has stated when he and other staff questioned Prem Kishore, he replied that as per WM's orders, he was destroying them.

> 11.5 So in the light of these evidence it has to be concluded that Prem Kishore has been responsible for taking out these tins and burning them and also that this was done with the knowledge of the W.M. His claim that he was not responsible, cannot be given full credit as the nature of his deposition would show that he had tried to hide some information. Further the witnesses tried to hide some information. Further the witnesses from CW, Sahibabad have conveniencingly stated that they have witnessed this incident, in which Prem Kishore had a major role.
>
> XXX XXX XXX
>
> 11.9 It is also to be noted that the C.O. did not report the fire incident to the higher authorities either on the same date or on the next date. As per the standing instructions, the details of excess stocks are to be intimated to RO/HO and to be brought in suspense A/c; which was not done by him either before the incident on the basis of report of Birpal Singh or after the fire incident on the basis of report of STC officials. He also did not sent any report subsequently about this incident would show that Shri P.P. Singh was involved in this incident and as such bitten by guilty consciousness he mention one day leave and remained on unauthorized absence till 14.7.1984. Perhaps when he was confronted by such a situation, he did not know what to do. Had he no part in this incident he could have definitely taken the only possible step of intimating the higher ups and the police immediately and asking for suitable directions. As none of this was done by him, it is obvious that he was involved in this incident.
>
> 11.10 The C.O. argued in his defence brief, that the evidence of STC witnesses was false, because why 16 excess tins should have been left out, when Prem Kishore destroyed other tins; that had the CO had bad intention, he would have destroyed the excess tins by himself after office hours, instead of directing Prem Kishore to do so. This type of argument does not sound logical. It has been made clear by the evidences available, that Prem Kishore was directed by the C.O. to destroy the excess tins, when he could do only partially; because while he was remaining there with the help of labourers, he was questioned by

two Chowkidars and STC surveyors and subsequently by other staff members; so obviously he had left the job unfinished. One, who does an unauthorized work, would not prefer to do it by himself; this is applicable here in the case of the C.O; here he found an accomplice in Prem Kishore, and that explains why he did not do the work himself.

11.11 The next part of the charge is that he tried to create false record by issuing a memo dated 28.6.1984 regarding burnt tins to Prem Kishore on 30.6.1984 and wanted the same to be acknowledged by Prem Kishore as if he received it on 28.6.84. It has been stated by Prem Kishore that the WM asked him to acknowledge the memo by putting the date as 28.6.1984, on 30.6.1984 and he did the same. But after going through the memo he asked for a copy. He was not given and the original was retained by the W.M. The argument of the P.O. is that this memo, produced by the C.O. during the inquiry, shows that this was the original and the same was retained by P.P. Singh and was not at all issued to Prem Kishore. The C.O. argued that the acknowledgement used to be given only in the office copy. This claim cannot be agreed to as it was not marked as office copy; further on a perusal, it appears as the original and not copy; and there was also no signature of Prem Kishore. As such the CO's argument that he came to know about the incident only on 28.6.1984 and immediately issued memo to Prem Kishore does not hold any water. It has also not been established that the same was sent to RM, RO, Lucknow, through a copy of this was shown marked to R.M. Even the matter found in D-I, the memo in question, would show that this was prepared in a haphazard manner. The matter, which was certainly serious in nature, definitely does not deserve to be treated in this manner. In the Chargesheet it is also alleged that on 2.8.1984 he issued a second memo to Prem Kishore and asking for a reply to the first memo enclosing there with a copy of the first memo, under reference. C.O. has also not contested this point. As such it is to be held that he has created a false record in this regard."

20. The CWC, in its counter affidavit filed in response to the writ petition inter alia, alleged that:

"4. In response to para-4 it is stated that during the course of Preliminary investigation, it was revealed that 23 tins of Palm Oil belonging to STC were excess in his godown and instead of taking these into account an attempt was made to get these tins burnt to dispose off the excess stocks in connivance with Shri Prem Kishore, JTA who was the godown incharge having got to know this incident the Corporation placed him under charge. Having got to know this incident the Corporation placed him under suspension vide order No. CWC/XIII-8/64/84/AV dt.6.9.1984 as a prima-facie case existed against him. The Disciplinary Authority has also ordered, subsequently to revoke the suspension order in respect of Shri Prem Kishore, JTA as the departmental inquiry initiated against WH Manager may take some time. The suspension was revoked vide order dt. 16.2.85 with the conditions that this revocation of suspension order is without prejudice to the final orders that may be passed by the DA in the departmental proceedings against the WH Manager incidentally Shri Prem Kishore was made the prosecution witness.

The Inquiry Officer submitted his report against the WH Manager on 18.10.85. The Disciplinary Authority in the above case while analyzing the report and passing the orders against the WH Manager had arrived at a finding wherein the complicity of Prem Kishore was also found in the incident of taking out and burning the tins who later on put the blame on WH Manager to save himself. IT would not be out of place to mention here that Shri Prem Kishore was under probation during the period when this incident had taken place and the Appointing Authority had all the rights under Regulation 10 (1) of CWC (Staff) Regulations, 1966 to terminate his services in public interest and accordingly the services of Shri Prem Kishore, JTA were terminated vide order no. CWC/106590/Estt. Dated 22.10.85 without casting any stigma."

21. During the hearing, it was argued by Counsel for the CWC that Shri P.P. Singh, against whom the disciplinary action was taken, was dealt with much later, when he was imposed with penalty of stoppage of two increments. However, the Petitioner's services were terminated much earlier, on 22 October, 1985, without reference to any action proposed against Shri P.P. Singh, on the basis of his unsatisfactory

service record, which included warnings administered, to him.

22. The extracts of the Inquiry Report, though ostensibly issued in respect of the conduct of Shri P.P. Singh, show that there were allegations of serious misconduct of setting certain stock on fire, against the petitioner; the inquiry officer also recorded that this appeared to be at the behest of Shri. P.P. Singh. He doubted the credibility of the petitioner, who had deposed as a witness. The petitioner had no notice of the fact that such findings would even be contemplated, much less returned against his conduct and functioning; he was merely asked to depose as a witness in a departmental proceeding. These materials cannot be characterised as evidence to judge suitability. If such explanation were to be uncritically accepted, every material or proceeding – even if it pertains to alleged misconduct, would ultimately reflect on an employee's suitability. The issue which has escaped notice of the learned Single Judge in this case, is that the Inquiry report which definitely was part of the material, commented adversely on the conduct, character and behaviour of the petitioner; the comment was directly relatable to what undeniably were allegations of misconduct. The petitioner was a witness, and not the employee asked to face charges. Such comments amounted to findings of misconduct and were not preceded by any kind of notice or hearing.

23. The Corporation's argument that the reason for the Petitioner's termination was not the so-called misconduct, but his performance – by relying on the warnings given to him, reflects a similar non application of mind. The extract of the inquiry report in the preceding part of this judgment shows that the memos and warnings administered upon the petitioner were by the charged official, Shri. P.P. Singh. The Inquiry Officer rejected the genuineness of those memos/ warnings, by the said P.P. Singh, as an attempt by him to conceal his role in the fire incident, and lay the blame upon the petitioner. Those findings against P.P. Singh were accepted, and a penalty was imposed on him. In the circumstances, reliance on those warning memos, against the petitioner, betrayed complete non-application of mind. The Court is further of the opinion that there is no material on the record to otherwise support the impugned termination order as having been made on a *bona fide* assessment of the petitioner's suitability. In fact, the sections of the counter affidavit reproduced in a preceding portion of this judgment would show that the serious allegations and findings which are unmistakable findings of misconduct, without following any rudimentary fair hearing proceeding against the petitioner,

were the basis for his termination.

24. In view of the above discussion, this Court is of the opinion that the impugned termination order was not an innocuous one, nor was it based on a genuine or *bona fide* evaluation of the Petitioner's suitability; the surrounding circumstances reveal that the innocuously worded order was in reality based on allegations of serious misconduct, for which the petitioner was not charged, or made to face any form of inquiry or granted hearing. The other officer, whose complicity was alleged, was in fact afforded a hearing and a penalty of withholding of two increments was imposed. Consequently, the impugned judgment of the learned Single Judge is set aside.

25. As to the relief, in ordinary circumstances, the natural relief would have been quashing of the termination order, with an attendant direction to reinstate the petitioner with all consequential benefits. However, the Court would have to, in a case like this, take into consideration several factors. The petitioner had worked for barely two years, and the order of termination was issued about 28 years ago. A direction to reinstate and grant full arrears of salary and consequential benefit would undoubtedly address the petitioner's plea for full restitution. At the same time, the Corporation's concern of having to pay a colossal amount (towards arrears of back salary and continuity of service) and also grant higher pay scales and subsequent promotions, without the employee having worked at all, or shown that he deserved such promotions, cannot be brushed aside altogether. Another overriding concern which the Court should not ignore is that the petitioner's not being in public employment does create complications as to his suitability to discharge functions attached to the higher posts, third party rights to seniority, etc.

26. Taking into account all these factors, and balancing the two seemingly competing public interests, this Court is of the opinion that the most equitable course would be to award 40% of the back salary and allowances that would have been paid to the petitioner, had he continued in the same post from the date of his termination, till date. The back salary and allowances shall be calculated by adding the total emoluments admissible in respect of the post which the petitioner occupied, on the assumption that he would continue to occupy it all these years – and granting him increments. 40% of the amount of such aggregate would be given to the petitioner, who shall have no right to reinstatement or any

other benefit. These amounts shall be paid to the petitioner, within six weeks from today; an affidavit of compliance shall be filed in Court, immediately thereafter.

27. The appeal, LPA No. 808/2004 is allowed in the above terms. There shall be no order as to costs.

ILR (2013) III DELHI 2243
LPA

THE DIRECTOR GENERAL OF WORKS ....PETITIONER

VERSUS

REGIONAL LABOUR COMMISSIONER & ORS. ....RESPONDENT

(S. RAVINDRA BHAT & SUDERSHAN KUMAR MISRA, JJ.)

LPA NO. : 622/2001 DATE OF DECISION: 10.04.2013

Labour Law—Industrial Disputes Act, 1947—S. 33C(2)—SC in the case of *Surender Singh vs. CPWD,* AIR 1986 SC 584 directed payment to Daily Wagers in CPWD w.e.f. initial date of engagements, the same salary and allowances paid to permanent/regular employees of G.O.I.—Computation of entitlements u/s 33C(2) by Labour Court upheld by Supreme Court—Payment not made by appellant—Recovery certificate issued—Challenged. Held:- although the principle "equal pay for equal work" has subsequently changed, but in the present case the directions in *Surender Singh's* case were binding because of principle of finality.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Sewa Ram. Advocate.

FOR THE RESPONDENTS : Mr. Naresh Kaushik with Ms. Amita Kalkal and Ms. Aditi Gupta, Advocates.

CASES REFERRED TO:

1. *Punjab State Electricity Board* vs. *Jagjivan Ram,* 2009 (3) SCC 661.
2. *Secretary, State of Karnataka & Ors.* vs. *Uma Devi & Ors.* AIR 2006 SC 1806.
3. *Shri Rakesh Kumar & Ors.* vs. *Municipal Corporation of Delhi,* 2006 (86) DRJ 550.
4. *State of Haryana* vs. *Jasmer Singh,* AIR 1997 SC 1788.
5. *Municipal Corporation of Delhi* vs. *Ganesh Razak and Anr.* (1995 (1) SCC 235).
6. *Surinder Singh & Anr.* vs. *Engineer-in-Chief, CPWD & Ors.* 1986 (1) SCC 839.
7. *Surender Singh* vs. *CPWD,* reported as AIR 1986 SC 584.

RESULT: Appeal Dismissed.

S. RAVINDRA BHAT, J.

1. The appellant challenges a judgment and order dated 25.09.2001 of the learned Single Judge in WP (C) 5471/2000 which dismissed its Writ Petition. The appellant had sought to challenge the recovery notice pursuant to a certificate issued by the Central Labour Commissioner, demanding deposit in the sum of Rs.4,84,19,918/-.

2. The facts of the case are that the Supreme Court by its judgment in **Surender Singh v. CPWD,** reported as AIR 1986 SC 584, directed payment to daily wagers in the Central Public Works Department, (CPWD) with effect from their initial date of engagements, the same salary and allowances that were paid to the permanent/regular employees of the Government of India. The appellant moved a Review Petition seeking recall of the directions on various grounds; the Review Petition was dismissed by the Supreme Court by an order dated 21.03.1997. In these circumstances, several daily rated workmen (totaling 1113), who were to be given the benefit of the directions of the Supreme Court, moved

the Central Government Labour Court under Section 33C (2) of the Industrial Disputes Act, for computation of their entitlements. They were represented by their Union. The respondents/workmen contended that besides the basic salary, which was admissible to regularly appointed employees, they were to be paid allowances, and that the arrears of such allowance, as well as arrears of some portion of the salary due, were not paid. The Central Government Labour Court, by an order dated 20.06.1989, after noticing the contentions of the appellant -including the issuance of an order dated 16.02.1988 by which the difference between wages already paid to muster roll workers and the payment to be made in accordance with the order of the Supreme Court and subsequent revisions,-allowed the applications under Section 33C(2). The Labour Court held that with the dismissal of the Review Petition by the Supreme Court, there was no justification in not giving effect to the judgment of the Supreme Court in Surender Singh's case and that the workmen were entitled to the same salary and allowances as were paid to the employees in work charged permanent establishment. The Labour Court accordingly allowed the applications under Section 33C (2) and observed as follows:-

> "After the dismissal of the review petition, there is no justification whatsoever for not giving effect to the order of the Hon'ble Supreme Court in Surinder Singh's case which is manifestly clear about the date from which it is to be effective and that date is the date of employment of the workman. Under these circumstances there is merit in the applications of the workmen and it is held that the workmen are entitled to the same pay and allowances as were paid to the employee engaged in work charged permanent establishment on the principle of equal pay for equal work from the date of their employment.
>
> 6. The Management was given opportunity to file assumed charges of its calculations with regard to the amounts payable to the workmen on the basis of equal pay for equal work with effect from the date of employment without admitting the claim of the workmen, but the Management has chosen not file any such charge except in case of 39 applications. The calculations made by the Management in these 39 applications are accepted as correct. In all other cases the calculations made/submitted by the workmen are accepted as correct and the claims of the workmen are computed accordingly.

> 7. In so far as the claim for interest is concerned, the claim for the period prior to 21.8.1987 when the review petition of the Management was dismissed by the Hon'ble Supreme Court is declined. However, the workmen are eminently entitled to interest w.e.f. 21.3.87 when the matter relating to equal pay for equal work to the category of workmen ton which applicants belong, was finally disposed of by the Hon'ble Supreme Court of India. The rate of interest claimed @ 18% appears to be on the higher side. The workmen are allowed interest to be on the higher side. The workmen are allowed interest @ 12% w.e.f. 21.8.87. The details of amounts computed on account of pay and allowances, interest and the total amount, are given in the statement annexed with this order as Annexure-I, (wherever, necessary, the amounts have been rounded of to the nearest rupee). The Management is also burdened with costs of Rs.10,000/- which shall be paid to CPWD Mazdoor Union. The Management is directed to make payment of the total amounts computed as also the costs, to the applicants and the Union within two months of this order failing which the workmen and the Union shall be entitled to interest @ 15% per annum w.e.f. the date of this order till actual payment.
>
> 8. However, in the interest of the workmen, lest the amount be surrendered away and also to reduce the inflationary pressure on the national economy, it is directed that the entire amount of arrears, along with interest, if any, shall be invested in national Savings Scheme to the extent of nearest hundred and the balance if any, shall be paid in cash to the workmen. For example, in the case of Shri Ashok Kumar (LCA No.267/88), the amount to be invested is Rs.16,400/- and the amount to be paid in cash is Rs.67/-, in case of Shri Rakesh Kumar (LCA No.268/88) it shall be Rs.11,900/- and Rs.95/- respectively, and so on. The amount to be invested in National Savings Scheme shall be remitted to this Court by means of separate A/c Payee Cheques/Drafts for each workman drawn in favour of Post Master Parliament Street, New Delhi within the stipulated period."

3. The appellant was aggrieved by the Labour Court's order and directly approached the Supreme Court under Article 136 of the Constitution of India. The appellant raised various contentions including the lack of jurisdiction of the Labour Court in proceeding to allow the application

without first deciding the entitlement as to allowances. However, by order dated 11.2.1999, the said appeals by Special Leave (CA 283-1395/1996) of the appellant, i.e., Director General, were dismissed. The order of the Supreme Court reads as follows:-

> "Pursuant to this Court's judgment in **Surinder Singh & Anr. v. Engineer-in-Chief, CPWD & Ors.** 1986 (1) SCC 839, the appellants admittedly have been paying salary to the daily-rated employees in the regular scale of pay. This dispute in this case, however, is confined to the period from the date of the employment till 31st March 1987, i.e., the period prior to the date on which the decision in Surinder Singh's case was implemented.
>
> Mr. P.P. Malhotra, learned Senior Counsel appearing on behalf of the appellant contended that unless there was an adjudication of the rights of the respondents to receive their salary in the regular scale of pay, their application under Section 33-C (2) of the Industrial Disputes Act could not have been terminated and the Labour Court was not justified in allowing the application. He has relied upon the decision of this Court in **Municipal Corporation of Delhi Vs. Ganesh Razak and Anr.** (1995 (1) SCC 235) in which it was laid down that the Labour Court has no jurisdiction to first decide the workmen's entitlement and then proceed to compute the benefits so adjudicated on that basis in exercise of its power under Section 33-C (2) of the Act. It was also pointed out that it is only when the entitlement has been earlier adjudicated or recognized by the employer that the application under Section 33-C (2) would lie.
>
> Since in the instant case, the appellant himself had implemented the decision of this court in **Surinder Singh's** case (supra) and had been paying salary to the respondents in the regular scale of pay in which employees of the work charged Establishment are being paid, it cannot urge today that the respondents right to receive salary in the regular scale of pay should first be adjudicated upon by the Labour Court before they are given the salary in the regular scale of pay in which the employees of the work charged Establishments are being paid. We are not prepared to accept the said argument made by learned counsel. We, therefore, see no reason to interfere with the order passed by the Labour Court.

> The appeals are dismissed. There shall be no order as to costs."

4. In the above background of circumstances, the workmen's application for execution and implementation of the said order of the Central Government Labour Court resulted in issuance of a recovery notice dated 19.4.2000. This was challenged in the Writ Petition. The learned Single Judge, after considering the contentions and submissions of the parts, held that the High Court while exercising its jurisdiction under Article 226 of the Constitution would be unjustified in going behind the decree arising out of the order dated 17.1.1986 of the Supreme Court. Having regard to the observations of the learned Single Judge, this appeal was dismissed at the first hearing on 8.11.2001. Aggrieved, the appellant preferred an appeal through Special Leave – CA 1071/2002 before the Supreme Court. On 4.2.2008, the Supreme Court set aside the said Division Bench order and held that there was no factual finding that the work done in the present case by the workmen was identical to that in the case of **Surender Singh & Ors**.

5. Learned counsel for the appellant argued that the respondent workmen had been paid their dues in accordance with the directions in **Surender Singh's** case (supra). It was submitted that the minimum in the regular scale was directed to be paid to the said workmen by an order dated 16.2.1988, pursuant to the judgment of the Supreme Court. Learned counsel relied upon paragraph-3 of the said order which specifically mentioned **Surender Singh's** case and stated that the muster roll workers of CPWD *"will get the same wages which are admissible to the regular and permanent counter parts in work charged establishment/regular classified establishment. The wages of the workers will be calculated in the manner indicated in paragraph-2 of this Directorate's OM of even number dated 19.4.1987 and further clarifications issued in OMs dated 28.4.1987 and 3.8.1987"*. It was submitted that the above clearly indicated that the directions in **Surender Singh's** case had been complied with in letter and spirit. The Labour Court committed an error in accepting the submissions of the workers with regard to the entitlement to other allowances in respect of uniform, overtime, bonus, increments etc. Learned counsel submitted that the question of making any further payment did not arise since the services of many of these workers were subsequently regularized.

6. Learned counsel for the appellant also argued that the view taken in **Surender Singh's** case with regard to entitlement to same pay scales, especially, in respect of allowances is no longer good law. Counsel relied upon the Constitution Bench's judgment reported as **Secretary, State of Karnataka & Ors. v. Uma Devi & Ors.** AIR 2006 SC 1806; **Shri Rakesh Kumar & Ors. v. Municipal Corporation of Delhi,** 2006 (86) DRJ 550; **State of Haryana v. Jasmer Singh,** AIR 1997 SC 1788 and **Punjab State Electricity Board v. Jagjivan Ram,** 2009 (3) SCC 661.

7. Learned counsel for the respondents/workmen argued that the appeal is without merit. Counsel highlighted the fact that Section 33(C)(2) application was made in order to implement the directions in **Surender Singh's** case, more so after the dismissal of the Government's Review Petition. In those proceedings, the workmen had clearly claimed entitlement to not only basic salary but also all other heads of allowances. The Labour Court after considering all the submissions including the reply of the Central Government, which at no stage denied that the present workmen were covered by the law declared in **Surender Singh's** case as they were working in the Central Public Works Department (CPWD) as daily rated workers, proceeded to accept the calculations to the extent they were made by the appellant in respect of 39 workers and applied the same to all workers. This was because the appellant did not reply or indicate any response as regards the other thousand workers. If that order had been challenged, this Court could possibly have gone into the merits. However, the appellant – Director General chose to appeal to the Supreme Court directly against the determination of the Labour Court under Section 33C (2) by filing Special Leave Petitions. These were later converted into appeals and by order dated 11.2.1999 Supreme Court upheld the order of the Labour Court. The rights of the respondent workers to the amounts claimed by them stood crystallized. In other words, the calculations of the Labour Court were upheld by the Supreme Court and all that remained was to make payments. Since the appellant did not make the payment, a recovery certificate was issued. The learned Single Judge acted within his rights and was perfectly justified in dismissing the appellant's writ petition.

8. Invoking the principle of finality, it was argued that since the rights of the parties stood crystallized, firstly by the order of the Labour Court which was in turn upheld by the Supreme Court on 11.2.1999, the appellant could not have withheld the payment. It was urged that the

subsequent change in law did not, in any manner, alter the circumstances or change the rights of the workers and their entitlement arising out of the Award and order of the Labour Court which merged with the judgment of the Supreme Court dated 11.2.1999.

9. It is evident from the above narration that the Supreme Court's judgment dated 17.1.1986 declared the law in respect of the entitlement to wages and emoluments, of a class of workmen i.e. daily rated employees of the CPWD. The respondents sought to get the declaration effected and applied to the Labour Court for computation and calculation of their monetary payments which had to be made to them under Section 33C (2) of the Act. The said provision reads as follows:-

> "(2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government; [within a period not exceeding three months:] [Provided that where the presiding officer of a Labour Court considers it necessary or expedient so to do, he may, for reasons to be recorded in writing, extend such period by such further period as he may think fit.]"

10. Before the Labour Court, the Central Government raised various contentions including the fact that it had complied with the directions of the Supreme Court and paid whatever was due to the respondent workers. It also apparently contended that other amounts were not due and payable to the respondent workers. However, the Labour Court rejected the appellant Director General's contentions and held the workers to be entitled to the amounts claimed and computed by the Labour Court in its order. The appellant chose to challenge that order -which was in the form of an execution order -directly to the Supreme Court. Special leave was granted and the civil appeals which were registered in 1996 were ultimately dismissed by an order dated 11.2.1999.

11. No doubt, subsequent judgments of the Supreme Court as to what is the content of the *"equal pay for equal work"* principle, has changed the law. The broad sweep of the directions in **Surender Singh's**

case and other cases have been narrowed to a certain extent. In contending so, the appellants are undoubtedly correct. However, this Court is also mindful that the principle of finality binds the parties as well as the Courts. The Labour Court's computation of the respondents/workmen's rights was pursuant to the judgment in **Surender Singh's** case. There is no doubt that the respondents were entitled to the benefit of judgment and its implementation and consequently approached the Labour Court under Section 33C (2). The appellant's contentions were rejected in those proceedings (filed by 1113 workers). The appellant chose to approach the Supreme Court and elected for a remedy, against the said determination and computation of allowance and arrears of salary by the Labour Court. The Supreme Court by its order dated 11.2.1999 in Civil Appeal Nos.283-1395/1996 (i.e. exactly 1113 appeals) rejected their contentions and upheld the Labour Court's order. Since the Supreme Court's judgment was a reasoned one, and made in the course of a regular appeal after the grant of special leave, the directions and orders of the Labour Court had to be read along with the orders of the Supreme Court. The rights of the parties, therefore, stood crystallized; the workers were clearly entitled to the various allowances and amounts specifically mentioned by them in their applications and in the order of the Labour Court.

12. The principle of finality has been described in several judgments as one whereby even the overruling of a decision would only revise the underlying law in a previous decision, and modify its precedential value but cannot disturb the finality attached to the determination vis-a-vis the litigants before the Court or the parties in the *lis*. In **Madan Mohan Pathak v. Union of India,** (1978) 3 SCR 334 a larger, seven-member Bench of the Supreme Court held that:

> "If by reason of retrospective, alteration of the factual or legal situation, the judgment is rendered erroneous, the remedy may be by way of appeal or review, but so long as the judgment stands, it cannot be disregarded or ignored and it must be obeyed by the Life Insurance Corporation."

In its opinion under *Special Reference under Article* 143 of the Constitution (rendered on 27th September, 2012), the Supreme Court stated the position in law as follows:

> "the operative decree can only be opened in review. Overruling the judgment -as a precedent - does not reopen the decree.."

In the present case, the finality attached to the determination of the Labour Court with regard to the entitlement of the respondent-workers remained undisturbed and cannot be unsettled by this Court despite the subsequent change in law as to the meaning and content of the "equal pay for equal work" principle. This Court consequently finds no reason to interfere with the impugned judgment and order of the learned Single Judge. The appeal is, therefore, dismissed as without merit and without any order as to costs.

ILR (2013) III DELHI 2252
FAO (OS)

WISHWA MITTAR BAJAJ & SONS ....APPELLANTS

VERSUS

UOI ....RESPONDENT

(S. RAVINDRA BHAT & SUDERSHAN KUMAR MISRA, JJ.)

FAO (OS) NO. : 224/2009 DATE OF DECISION: 10.04.2013

Arbitration and Conciliation Act, 1996—Section 34—Parties to petition entered into contract for construction of infrastructure for breeding and training of dogs at Meerut—Contract was completed three days before stipulated period and appellants submitted final bill—Respondent made payment towards bill but withheld certain amount which led to dispute and matter was referred to arbitration—Out of 10 claims put forth by appellants in petition, arbitrator disallowed claims no. 3, 6 & 8 and against other claims allowed different amounts—Aggrieved respondent filed petition U/s 34 of Act and challenged award raising main grievance, arbitrator awarded amounts beyond the contract—Petition was allowed and award was set

aside—Aggrieved appellant preferred appeal alleging, objections under section 34 of Act are bases on limited grounds to challenge awards and evidence cannot be reappreciated by Court as if sitting as Court of appeal over decision of arbitrator. Held:- The arbitrator has the jurisdiction to interpret the contract, and unless that is shown to be manifestly unreasonable, or based on an untenable interpretation of the law, the Court would be slow in substituting its opinion.

It is settled position legal position that the Court while exercising jurisdiction under Section 34 of the Act does not second guess the arbitrator's decision as if in an appeal to re-assess the material evidence and the terms of the contract assessed and interpreted by the arbitrators. It is also established that the court, while exercising jurisdiction under Section 34 of the Act, would not substitute its opinion for that of the arbitrators. **(Para 18)**

Important Issue Involved: The arbitrator has the jurisdiction to interpret the contract, and unless that is shown to be manifestly unreasonable, or based on an untenable interpretation of the law, the Court would be slow in substituting its opinion.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Raghavendra M. Bajaj, Advocate.

FOR THE RESPONDENT : Mr. R.V. Sinha, Advocate.

CASES REFERRED TO:

1. *Madhya Pradesh Housing Board* vs. *Progressive Writers and Publishers;* AIR 2009 SC 1585.
2. *National Insurance Co. Ltd.* vs. *Boghara Polyfab Pvt. Ltd.* AIR 2009 SC 170.

3. *BOC India Limited* vs. *Bhagwati Oxygen Limited;* 2007 (9) SCC 503.
4. *McDermott International Inc.* vs. *Burn Standard Co. Ltd. and Ors.* 2006 (11) SCC181.
5. *Chairman and M.D., N.T.P.C. Ltd.* vs. *Reshmi Constructions, Builders and Contractors;* AIR 2004 SC 1330.
6. *State of U.P.* vs. *Allied Constructions;* (2003) 7 SCC 396.
7. *Indu Engineering and Textile Limited* vs. *Delhi Development Authority;* (2001) 5 SCC 691.
8. *Ajmer Singh Cotton & General Mills* AIR 1999 SC 3027.
9. *Trustees of the Port of Madras* vs. *Engineering Constructions Corporation Ltd.* (1995) 5 SCC 531
10. *Hindustan Construction Co. Ltd.* vs. *Governor of Orissa* AIR 1995 SC 2189.
11. *Sudarsan Trading Co.* vs. *Government of Kerala;* (1989) 2 SCC 38.
12. *Hindustan Iron Co.* vs. *K. Shashikant & Co.* AIR 1987 SC 81.
13. *Majhati Jute Mills* vs. *Khavalirsa* [1968] 1SCR 821.
14. *Union of India* vs. *Kishorilal Gupta* [1960] 1SCR 493.

RESULT: Appeal allowed.

S. RAVINDRA BHAT, J.

1. The appellant (hereafter "the claimant") is aggrieved by the judgment and order of a learned Single Judge, allowing the respondent's Petition under Section 34 of the Arbitration and Conciliation Act, ("the Act") setting aside an award, made in its (i.e the appellant's) favour.

2. The Appellant was awarded a lump sum contract, for construction of infrastructure for breeding and training of dogs at RVC Centre and School at Meerut. The total contract sum was Rs. 2,79,44,098.10 and work was to be completed by 15.04.2003. It was completed on 12.04.2003 and the Appellant submitted the final bill. The payment towards final bill

was made on 11.02.2004. At the stage of payment, certain amounts were withheld by the Respondent. This led to disputes and the matter was referred to arbitration. In the arbitral proceedings, the appellant claimed amounts towards 10 heads. Claim no. 1 sought compensation on account of delay in payment of running bills and final bill; Claim no.2 was for reimbursement of additional expenditure incurred for providing extra work; Claim no.3 was for reimbursement of payment made to idle labour; Claim no.4 was for reimbursement for charges paid for testing of steel; Claim no.5 sought release of bank guarantee against retention money; Claim no. 6 was for refund of amounts deducted on account of STE from the final bill; Claim no.7 sought reimbursement of expenditure incurred on renewal of bank guarantee; Claim no.8 sought refund of testing charges; Claim no.9 for reimbursement of extra expenditure incurred on watch and ward of the building due to delay in taking over possession and Claim no.10 was towards interest.

3. The Arbitrator disallowed claims no. 3, 6 & 8 and against other claims allowed different amounts. The learned Arbitrator allowed 12% interest for pre-arbitration period and 9 % interest for pendente lite and future periods.

4. Claiming to be aggrieved, the Respondent filed a petition under Section 34 of the Act, seeking setting aside the award. The main ground of challenge was that the Arbitrator had awarded amounts beyond the contract and the claims raised were neither tenable nor could be adjudicated in view of specific terms of the contract. It was also argued that the claims by the Appellant were not raised during currency of the contract or at the time of presentation of the bill; the Appellant had furnished a no claim certificate and accepted the final bill without reservation.

5. The learned Single Judge held that the work was completed on 12.04.2003 and possession was taken by the Respondent-Objector on 14.04.2003 subject to rectification of defects by 5.5.2003. After rectification of defects, a final bill was entertained and a 'no claim certificate' was issued by the appellant. In these circumstances, it was held that the Appellant-Claimant could have raised only those disputes before the Arbitrator which had arisen during currency of the contract. After the Claimant submitted its Bill to the Respondent, it could not have projected disputes which were not highlighted in the bill or in other words claimed amounts over and above those claimed in the bills. While

raising the bills the Claimant had not made any claim for additional items; the Contractor knew that a lump sum contract had been awarded. The Single Judge relied on Clause 11.2.4 and held that it specifically provided that the hardware for the doors/windows etc, though not included in the drawings, but essential for functioning (and entire completion, even if missed out) shall be provided by the contractor and the building shall be complete in all respects from utility point of view. This was deemed to be included in the lump sum quote. It was concluded that though payment was made by Union of India, the Appellant-Claimant would have at the most been allowed interest on the delayed part of the final bill and not in respect of other claims. Consequently, it was held that the award was contrary to the contract; he could not draw a new contract for the parties. The award in respect of all claims, except return of bank guarantee and interest on the unpaid final bill amount from May '03 to February '03 @ 12%, was thus set aside as rendered beyond jurisdiction.

6. It was argued, on behalf of the appellant, that Objections under Section 34 are based on limited grounds to challenge awards. The Respondent-Objector wished re-appreciation of findings of fact arrived by the Arbitrator. The Single Judge erred in re-appreciating the evidence, virtually as a court of appeal over the decision of the Arbitrator. The award in question is well reasoned and clearly indicates the thought process of the Arbitrator. It was submitted that there was nothing in the award, indicative of the findings being contrary to the public policy of India, or violation of the contract between parties.

7. It was argued that the Objector cannot object to the appointment of an arbitrator or his qualification in terms of Section 11 of the Act. The matter was referred to the Sole Arbitrator with the consent of the objector. A writ petition was filed challenging that appointment. After finding that the Division bench was not agreeable to the challenge it was withdrawn. The objector was therefore estopped from questioning the appointment.

8. The Appellant denied that any *'no claim certificate'* was given. The *'no claim certificate'* was part of the printed final bill proforma given in advance; it had no sanctity in law. It was alternatively argued that the document was given under circumstances which amounted to undue influence exercised by the objector as it had withheld huge amounts from the claimant. The final bill prepared by the Respondent was signed by the Appellant on 17.2.03 along with the standard certificate and only

then was it accepted for processing. It was only on 11.2.2004, that the appellant noticed that the final bill amount was paid without including the cost of additional items executed over and above the contract as per the tender that provided for such deviations. It was argued further, that even otherwise, the appellant had protested immediately after the payment, in a letter, and sought for release of amounts towards the extra work, required of by the respondents. In these circumstances, it could not be said that the appellant was estopped, by reason of any no-claim or no-objection certificate from demanding full payment of amounts that were due to it. It was argued that in any event, the Single Judge fell into error in not appreciating that at the time of receiving the payment, the appellant made an endorsement over the bill itself that it was received in protest, and therefore the said certificate cannot be used to deny the lawful claim of the Appellant. Reliance was placed on the decisions reported as **National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.** AIR 2009 SC 170, **Ajmer Singh Cotton & General Mills** AIR 1999 SC 3027 and **Chairman and M.D., N.T.P.C. Ltd. v. Reshmi Constructions, Builders and Contractors;** AIR 2004 SC 1330 to say that documents of the variety which were relied on by the respondent-objectors, cannot be said to estop the appellant from claiming the amounts which were due to it, for the work admittedly done.

9. Learned Counsel, Mr. Raghavendra M. Bajaj submitted that the materials on record showed that the claim for ' 5.8 lakhs allowed by the arbitrator, to the appellant was justified in the circumstances of the case. It was argued that the amounts were payable towards deviation orders, which had been placed upon the contractor by the respondent employer. These had been included in the final bill, and the so called objection was in a printed format. Counsel highlighted the fact that at the stage of accepting payment on 12th April 2004, the Claimant/Contractor had registered protest, and elaborated upon it, in the letter written the very next day. In these circumstances, it could not be said that the claimant had forgone its demand and entitlement for payment for the extra work done. Learned counsel also relied on the standard conditions governing such contracts. The Appellant argued that the said document does not preclude or absolve the respondent from its liability to pay for the amounts concededly billed towards works directed to be performed by it. In this regard, the appellant placed reliance on the deviation orders, which had been brought on record, and emphasizes that the Bills in respect of each

such deviation order had been furnished to the respondent. The appellant argues that when the "no objection" certificate was in fact given, it was labouring under tremendous pressure, because a considerable amount of the sums due and payable by the respondent were outstanding. This alone indicated pressurization by the respondent employer. Further, argued counsel, the payment towards the final bill was released only on 12-4-2004; even at that time, while accepting the cheque, the appellant recorded that the payment was received under protest; it also wrote to the respondent employer the very next day, recording a similar protest. In these circumstances, says the appellant, the amount of ' 5.8 lakhs awarded by the Arbitrator was justified.

10. It was contended further that the impugned judgment is in clear error, as it rejects the reimbursement of expenses awarded by the Arbitrator, (incurred for renewal of bank guarantee). On this aspect, counsel highlighted that the Single Judge upheld the award in respect of Claim No. 5, i.e. release of bank guarantee. The rejection of the reimbursement claimed was therefore without any reason. Likewise, argued counsel, for Claim No. 4, i.e. steel testing charges (Rs. 60,000/-), the respondent agreed in the arbitration proceedings to pay the amount. The pleading to that effect was relied on by counsel for the Appellant/contactor.

11. Counsel for the respondent/ objector did not dispute that in respect of claim No. 4, i.e. steel testing charges, the pleading in the arbitration proceedings had clearly admitted its liability to pay the sum of Rs. 60,000/-. However, the respondent objector relies on the "No o bjection" certificate, dated 17-05-2003, in respect of the claim for Rs. 5,80,000/-:

> "It is certified that I have prepared the final bill for claiming entire payment due to me from the contract agreement. This FB (Final Bill) includes all claims raised by me from time to time irrespective of the fact whether they are admitted/accepted by the department or not. I am now categorically certify that, I do not have more claim in r/o this contract by found these already included in this FB by me this amount so claimed by me shall be in full and final satisfaction of all claim to the extent disallowed to me from this Final Bill.
>
> Dated S/d Sharad Saigal
> Contractor WM Bajaj & Sons"

It was contended that there was no material to justify the award by the arbitrator, in respect of these amounts, which were not part of the contracted services, and at any rate for which the Appellant had foregone its claims while submitting the final bill. The Appellant contractor was accordingly estopped from claiming them and the learned Single Judge correctly set aside the award under Section 34 of the Act.

Analysis and findings

12. In the present case, a plain reading of the award would reveal that the arbitrator did not accept all contentions and claims pressed by the appellant. Even in respect of items which were paid, the arbitrator accepted claims in part, and wherever untenable, or not proved, rejected the claim. It is not as if the amounts awarded were without reason or justification. The extracts of the award, in respect of Claim No. 2 are reproduced below:

> "25. Claim No. 2 for reinforcement of additional expenditure incurred on provision of extra work over and above contract provisions such as:
>
> a. Provn. of fixed glazing
> b. Provn of beams, LB, FB-2, PB-2 not shown in drawings
> c. Additional reinforcement in RCC Cols C-1 C-2 and C-3
> d. Provn of copper conductor in lieu of Aluminum Conductor Amount of Claim Rs. 4,93,393.00 amended to Rs. 5,38,000.00
>
> After hearing both the parties and going into details of documents, verification of drawings and contract provisions, I conclude as under:
>
> a. Fixed Glazing is not shown in the main plan of Admin block
> b. Structural Plan BZ/MRT/87 Sheet 7/8 does not indicate provision of LB-1, Plinth Beam and FB-2 (additional) which has been provided by the Claimant
> c. There was a discrepancy in reinforcement details of RCC col's C-1, C-2 and C-3. Union of India resorted to remove the discrepanc with the provision of additional Reinforcement.

> d. The contract provisions regarding aluminum conductor cables is clear where as copper conductor has been provided by Claimant.
>
> I therefore give my final award against Claim No. 2: Rs. 5,38,000.00"

13. The materials on record showed that in support of these claims, Bills and reminders had been furnished to the Objector/Employer.

These were:

i. Letter No. WMB/MES/MRT/07/36 dated 4-5-2002 (Ex. C-17)

ii. Letter No. WMB/MES/MRT/07/49 dated 11-2-2002 (Ex. C-06)

iii. Letter No. WMB/MES/MRT/07/91 dated 27-11-2003 (Ex. C-14)

iv. Letter No. WMB/MES/MRT/07/95 dated 19-12-200 (Ex. C-15)

The final Bill in this case was submitted on 12-4-2003; it shows that the date of measurement was 1-05-2003. This final bill itself contains recital of deviation orders -no less than 17 in number. The description of amounts in regard to these bills also reveals that certain adjustment of amounts paid towards running bills were indicated and verified. The signature of the two counter signing officers was affixed on 28-08-2003. Yet, the cheque was handed over to the Appellant on 12-04-2004; its signature on that day reveals that the payment was accepted under protest.

14. In **Boghara Polyfab** (supra), the Supreme Court held that mere execution of a discharge certificate did not disentitle the party concerned from claiming amounts:

> "The mere execution of the discharge voucher would not always deprive the consumer from preferring claim with respect to the deficiency in service or consequential benefits arising out of the amount paid in default of the service rendered. Despite execution of the discharge voucher, the consumer may be in a position to satisfy the Tribunal or the Commission under the Act that such discharge voucher or receipt had been obtained from him under the circumstances which can be termed as fraudulent or exercise

of undue influence or by misrepresentation or the like. If in a given case the consumer satisfies the authority under the Act that the discharge voucher was obtained by fraud, misrepresentation, undue influence or the like, coercive bargaining compelled by circumstances, the authority before whom the complaint is made would be justified in granting appropriate relief.

27. Let us consider what a civil court would have done in a case where the defendant puts forth the defence of accord and satisfaction on the basis of a full and final discharge voucher issued by plaintiff, and the plaintiff alleges that it was obtained by fraud/coercion/undue influence and therefore not valid. It would consider the evidence as to whether there was any fraud, coercion or undue influence. If it found that there was none, it will accept the voucher as being in discharge of the contract and reject the claim without examining the claim on merits. On the other hand, if it found that the discharge voucher had been obtained by fraud/undue influence/coercion, it will ignore the same, examine whether plaintiff had made out the claim on merits and decide the matter accordingly. The position will be the same even when there is a provision for arbitration. The Chief Justice/his designate exercising jurisdiction under Section 11 of the Act will consider whether there was really accord and satisfaction or discharge of contract by performance. If the answer is in the affirmative, he will refuse to refer the dispute to arbitration. On the other hand, if the Chief Justice/his designate comes to the conclusion that the full and final settlement receipt or discharge voucher was the result of any fraud/coercion/undue influence, he will have to hold that there was no discharge of the contract and consequently refer the dispute to arbitration. Alternatively, where the Chief Justice/his designate is satisfied prima facie that the discharge voucher was not issued voluntarily and the claimant was under some compulsion or coercion, and that the matter deserved detailed consideration, he may instead of deciding the issue himself, refer the matter to the arbitral tribunal with a specific direction that the said question should be decided in the first instance.

28. Some illustrations (not exhaustive) as to when claims are arbitrable and when they are not, when discharge of contract by

accord and satisfaction are disputed, to round up the discussion on this subject:

(i) A claim is referred to a conciliation or a pre-litigation Lok Adalat. The parties negotiate and arrive at a settlement. The terms of settlement are drawn up and signed by both the parties and attested by the Conciliator or the members of the Lok Adalat. After settlement by way of accord and satisfaction, there can be no reference to arbitration.

(ii) A claimant makes several claims. The admitted or undisputed claims are paid. Thereafter negotiations are held for settlement of the disputed claims resulting in an agreement in writing settling all the pending claims and disputes. On such settlement, the amount agreed is paid and the contractor also issues a discharge voucher/no claim certificate/full and final receipt. After the contract is discharged by such accord and satisfaction, neither the contract nor any dispute survives for consideration. There cannot be any reference of any dispute to arbitration thereafter.

(iii) A contractor executes the work and claims payment of say Rupees Ten Lakhs as due in terms of the contract. The employer admits the claim only for Rupees six lakhs and informs the contractor either in writing or orally that unless the contractor gives a discharge voucher in the prescribed format acknowledging receipt of Rupees Six Lakhs in full and final satisfaction of the contract, payment of the admitted amount will not be released. The contractor who is hard pressed for funds and keen to get the admitted amount released, signs on the dotted line either in a printed form or otherwise, stating that the amount is received in full and final settlement. In such a case, the discharge is under economic duress on account of coercion employed by the employer. Obviously, the discharge voucher cannot be considered to be voluntary or as having resulted in discharge of the contract by accord and satisfaction. It will not be a bar to arbitration.

(iv) An insured makes a claim for loss suffered. The claim is neither admitted nor rejected. But the insured is informed during discussions that unless the claimant gives a full and final voucher for a specified amount (far lesser than the amount claimed by the insured), the entire claim will be rejected. Being in financial

difficulties, the claimant agrees to the demand and issues an undated discharge voucher in full and final settlement. Only a few days thereafter, the admitted amount mentioned in the voucher is paid. The accord and satisfaction in such a case is not voluntary but under duress, compulsion and coercion. The coercion is subtle, but very much real. The 'accord' is not by free consent. The arbitration agreement can thus be invoked to refer the disputes to arbitration.

(v) A claimant makes a claim for a huge sum, by way of damages. The respondent disputes the claim. The claimant who is keen to have a settlement and avoid litigation, voluntarily reduces the claim and requests for settlement. The respondent agrees and settles the claim and obtains a full and final discharge voucher. Here even if the claimant might have agreed for settlement due to financial compulsions and commercial pressure or economic duress, the decision was his free choice. There was no threat, coercion or compulsion by the respondent. Therefore, the accord and satisfaction is binding and valid and there cannot be any subsequent claim or reference to arbitration."

In the earlier judgment **Reshmi Construction** (supra), the Supreme Court while recognizing that there cannot be any finality precluding the party from making claims, when such discharge (or "no objection") certificates are claimed to be issued by the employer, observed that:

"18. Normally, an accord and satisfaction by itself would not affect the arbitration clause but if the dispute is that the contract itself does not subsist, the question of invoking the arbitration clause may not arise. But in the event it be held that the contract survives, recourse to the arbitration clause may be taken. [See **Union of India v. Kishorilal Gupta** [1960] 1 SCR 493 and **Majhati Jute Mills v. Khavalirsa** [1968] 1 SCR 821.

19. In **Bharat Heavy Electricals Limited** (supra) this court observed that whether there was discharge of the contract by accord and satisfaction or not is a dispute arising out of a contract and is liable to be referred to arbitration.

.....

27. Even when rights and obligations of the parties are worked out the contract does not come to an end inter alia for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in the cases where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a 'No Demand Certificate' is signed. Each case, therefore, is required to be considered on its own facts.

28. Further, necessities non habet legem is an old age maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of other party to the bargain who is on a stronger position."

15. Here, in this case, though the final bill was furnished in April, 2003, and verified on 1.5.2003, yet the cheque was issued only on 12.4.2004. In between, the noting/certificate relied on by the employer/ respondent was written. However, the form – which was signed earlier – contained a printed clause to the effect that *"I/We have no further claim..."* under the Contract, beyond the net amount of the Bill. Yet, on 12-4-2004, the Appellant, while receiving the cheque, clearly stated that the payment was received *"under protest"*. It followed up this with a detailed letter on 13-4-2004; a copy of that letter was placed on the record. Having regard to the law declared and the surrounding circumstances, it is clear that even though the works were executed long before, some-time in end 2002, in respect of which the final bill was submitted in April, 2003, the Appellant had no option but to execute and claim the amounts in terms of the printed "no claim" format. However, even this bill reflects the items of works which had been done, and in respect of which the sum of Rs. 5,38,000/ was claimed; there is no dispute on that, since the bills were verified, though amounts were not paid as being beyond the scope of the works awarded. That aspect would be dealt with by the Court hereafter. Having regard to all these aspects, this Court is of the view that the Arbitrator did not err, or act

contrary to public policy or the substantive law in India, as to entail setting aside of the award in respect of the claim of Rs. 5,38,000/- by the learned Single Judge.

16. As regards the argument that the above sum could not have been awarded since it was in respect of works for which damages could not be claimed – on the ground that the work awarded was on lump sum basis, the Appellant had relied on Clause 7 of the General Conditions of Contracts, applicable for Lump sum contracts. The said condition reads as follows:-

> "7. **Deviations (Applicable specifically to Measurement and Lump sum Contracts and generally to Term Contracts)**-The contractor shall not make any alteration, in addition to or omission from the Works as described in the tender documents except in pursuance of the written instructions of the GE."

It was submitted that in the present case, the written instructions and approval of the competent authority was the basis for the deviation orders, each of which was on the file of the employer/objector. The appellant had no choice, but to execute the works, on account of the above condition. As a result, it could not be said that the claims were non arbitrable, or beyond the jurisdiction of the arbitrator.

17. This Court is conscious of the fact that in the present case, the arbitrator had first to rule on the scope and jurisdiction of his proceeding, and held that on 29-5-2005, the agreement in question did not prohibit him from entertaining such claims, in respect of works under deviation orders. The court is mindful that the arbitrator has the jurisdiction to interpret the contract, and unless that is shown to be manifestly unreasonable, or based on an untenable interpretation of the law, the Court would be slow in substituting its opinion. In **Madhya Pradesh Housing Board Vs. Progressive Writers and Publishers;** AIR 2009 SC 1585 it was held that:-

> "Interpretation of a contract, it is trite, is a matter for the arbitrator to determine. Even in a case where the award contained reasons, the interference therewith would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or award is based on wrong proposition of law. An error apparent on the face of the records would not imply close

> scrutiny of the merits of documents and materials on record. 'Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from interfering'. [see **Sudarsan Trading Co. Vs. Government of Kerala;** (1989) 2 SCC 38 and **State of U.P. Vs. Allied Constructions;** (2003) 7 SCC 396]."

Likewise, in **BOC India Limited Vs. Bhagwati Oxygen Limited;** 2007 (9) SCC 503 the Court held that when the Arbitrator had taken a plausible view on the interpretation of contract, it was not open to the court to set aside the Award on the ground that the Arbitrator had misconducted himself in the proceedings and, therefore, the Award was liable to be set aside. The Supreme Court relied on **Indu Engineering and Textile Limited Vs. Delhi Development Authority;** (2001) 5 SCC 691 to say that when a plausible view had been taken by the Arbitrator and unless the Award of the Arbitrator was vitiated by a manifest error on the face of the award or was wholly improbable or perverse, it was not open to the court to interfere with the Award. Although this Court is conscious of the decisions of the Supreme Court which deal with excluded matters, here, the determination of the arbitrator, based on a reading of the conditions of the contract, which obliged the contractor to follow the directions of the Garrison Engineer, and complete the extra works, cannot be faulted. There is consequently, no infirmity in the approach adopted in the Award. The Single Judge, in the opinion of this court, should not have set aside the award on this aspect.

18. It is settled position legal position that the Court while exercising jurisdiction under Section 34 of the Act does not second guess the arbitrator's decision as if in an appeal to re-assess the material evidence and the terms of the contract assessed and interpreted by the arbitrators. It is also established that the court, while exercising jurisdiction under Section 34 of the Act, would not substitute its opinion for that of the arbitrators. In **Hindustan Iron Co. v. K. Shashikant & Co.** AIR 1987 SC 81 the Court held that the award of the Arbitrator ought not to be set aside for the reason that, in the opinion of the Court, the Arbitrator reached wrong conclusions or failed to appreciate the facts. It is only an error of law and not a mistake of fact, committed by the arbitrator, which is justiciable in the application/objection before the Court. If there is no legal proposition either in the award, or in any document annexed with the award, which is erroneous; and the alleged mistakes or alleged errors, are only mistakes of fact; and if the award is made fairly, after

giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement, the award is not amenable to corrections of the Court. **Hindustan Construction Co. Ltd. v. Governor of Orissa** AIR 1995 SC 2189 it was reiterated that the Court cannot re-appreciate the material on the record. In **Trustees of the Port of Madras v. Engineering Constructions Corporation Ltd.** (1995) 5 SCC 531, the decision of a Division Bench of the High Court of Madras, which reversed the Award on a question of fact and not a question of law, was set aside by the Supreme Court. As to what can be valid ground to interfere with an award was succinctly spelt out in **McDermott International Inc. v. Burn Standard Co. Ltd. and Ors.** 2006 (11) SCC 181, in the following terms:

> "31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case it is required to be held that the award could be set aside if it is patently illegal. The result would be -award could be set aside if it is contrary to:
>
> (a) fundamental policy of Indian law; or
>
> (b) the interest of India; or
>
> (c) justice or morality, or
>
> (d) in addition, if it is patently illegal.
>
> Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

19. Following the above judgments, this Court holds that the questions whether the claims were tenable or not are based on the contract itself and were arbitrable. The question whether there has been a full and final settlement of a claim under the contract is itself a dispute arising 'upon' or 'in relation to' or 'in connection with' the contract. These words are wide enough to cover the dispute sought to be referred. The interpretation or construction of a contract or a contractual clause is the province of the Arbitrator to whom a dispute is referred for final determination by the parties. The construction imparted by the Arbitral Tribunal to a contract or a contractual clause should remain impervious to another view which may happen to be preferred by the Court. Though the condition 65 of IAFW-2249 (General Conditions of Contract) forming part of the contract agreement states that no further claims shall be made by the contractor after the submission of the final bill, whether the no claim certificate and acceptance of final payment was under protest or not is a question of fact. Once the Arbitrator found that these were arbitrable, and the claims tenable, the Court did not have the jurisdiction to examine the merits, re-appreciate the evidence on record and arrive at contrary findings; clearly, there was nothing in the award disclosing that it was contrary to public policy in the sense understood by the law, to warrant interference under Section 34. In the present case the award is sufficiently reasoned and is not without application of mind. The Single Judge should not have interfered with it. The impugned judgment is consequently set aside and the award is also upheld. Since, the award is upheld, the post award interest till date of payment shall be in accordance with Section 31 (7) (b) of the Arbitration and Conciliation Act. In addition, the Appellant shall be entitled to costs throughout, quantified at Rs. 55,000/-. These amounts shall be paid to the Appellant, by the respondent/objector, within six weeks from today. The appeal is allowed in these terms.

ILR (2013) III DELHI 2269
CUS A.A.

BASUDEV GARG ....APPELLANT

VERSUS

COMMISSIONER OF CUSTOMS ....RESPONDENT

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

CUS. A.A. NO. : 7/2010, 10/2010, 12/2010 & 13/2010
C.M. NO. : 21740/2010, 21751/2010 & 21754/2010

DATE OF DECISION: 12.04.2013

Customs Act, 1962—Section 138B—Appellants in the aforementioned four appeal petitions raised a common question with respect to the admissibility, in adjudication proceedings, of certain statements recorded u/s 138B of the Act—Principle allegation against appellants was that they had imported ball bearings of Chinese origin but showed them as having been imported from Sri Lanka, in order to evade anti-dumping duty—Show cause notices issued to the appellants contained references to several statements of various individuals recorded u/s 138B of the Act, 1962 but a request made by the appellants for summoning the said individuals during adjudication proceedings denied by the Commissioner of Customs—Adjudication proceedings concluded on 14.10.2004 and the Commissioner of Customs, in its impugned order dated 30.11.2005, not only relied upon the statements recorded u/s 138B of the Act but also on a report dated 20.07.2005 of Sri Lankan Custom Authority, which was based on an investigation conducted after the conclusion of the hearing on 14.10.2004—On appeal, Tribunal upheld the order of the Commissioner on the ground that the evidence led by the agency was

credible the trustworthy. Held: There can be no denying that when any statement is used against an assessee, an opportunity of cross-examining the persons who made those statements ought to be given to the assessee, Right of cross-examination, of the person who had given a statement against the assessee, even in a quasi judicial proceeding is a valuable right given to the accused/notice which cannot be taken away unless the circumstances relating to the unavailability of such person referred to, in section 138B exist. Matters remitted to the Tribunal to have a fresh look at the cases keeping in mind the provisions of section 138B and the fact of non supply of the report obtained from Sri Lanka after conclusion of the proceedings.

Insofar as the general propositions are concerned, there can be no denying that when any statement is used against the assessee, an opportunity of cross-examining the persons who made those statements ought to be given to the assessee. This is clear from the observations contained in **Swadeshi Polytex Ltd.** (supra) and **Laxman Exports Limited** (supra). Apart from this, the decision of this court in **J & K Cigarettes Ltd.** (supra) clinches the issue in favour of the appellant. In that case, the validity of Section 9D of the Central Excise Act, 1944 was in question. The said Section 9D of the Central Excise Act, 1944 reads as under:-

> "9D. Relevancy of statement under certain circumstances – (1) A statement made and signed by a person before any Central Excise Officer of a gazette rank during the course of any inquiry or proceedings under this Act shall be relevant, for the purpose of proving, an any prosecution for an offence under this Act, the truth of the facts which it contains:
>
> (a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is incapable of giving evidence, or is kept out of the

way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceedings under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

(Para 10)

The Division Bench also observed that though it cannot be denied that the right of cross-examination in any quasi judicial proceeding is a valuable right given to the accused/ Noticee, as these proceedings may have adverse consequences to the accused, at the same time, under certain circumstances, this right of cross-examination can be taken away. The court also observed that such circumstances have to be exceptional and that those circumstances have been stipulated in Section 9D of the Central Excise Act, 1944. The circumstances referred to in Section 9D, as also in Section 138B, included circumstances where the person who had given a statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay and expense which, under the circumstances of the case, the Court considers unreasonable. It is clear that unless such circumstances exist, the Noticee would have a right to cross-examine the persons whose statements are being relied upon even in quasi-judicial proceedings. The Division Bench also observed as under:-

"29. Thus, when we examine the provision as to whether the provision confers unguided powers or

not, the conclusion is irresistible, namely, the provision is not uncanalised or uncontrolled and does not confer arbitrary powers upon the quasi judicial authority. The very fact that the statement of such a person can be treated as relevant only when the specified ground is established, it is obvious that there has to be objective formation of opinion based on sufficient material on record to come to the conclusion that such a ground exists. Before forming such an opinion, the quasi judicial authority would confront the assessee as well, during the proceedings, which shall give the assessee a chance to make his submissions in this behalf. It goes without saying that the authority would record reasons, based upon the said material, for such a decision effectively. Therefore, the elements of giving opportunity and recording of reasons are inherent in the exercise of powers. The aggrieved party is not remediless. This order/opinion formed by the quasi judicial authority is subject to judicial review by the appellate authority. The aggrieved party can always challenge that in a particular case invocation of such a provision was not warranted."

(Para 14)

The observations and conclusions arrived at by the Division Bench in the case of **J & K Cigarettes Ltd.** (supra) would apply with equal vigour to the provisions of Section 138B of the Customs Act, 1962. We find that this aspect of the matter has not been considered by any of the authorities below. In fact, section 138B of the Customs Act, 1962 has not been examined at all. **(Para 15)**

For this reason, we feel that the Tribunal should have a fresh look at these cases keeping in mind the provisions of Section 138B as also the decision of this court in **J & K Cigarettes Ltd.** (supra). The Tribunal will also consider the fact of non-supply of the report and other documents which were obtained by the concerned authorities from Srilanka after hearing had been concluded on 14.10.2004.

Consequently, we set aside the impugned order and remit the matters to the Tribunal for a fresh consideration in the light of the observations and directions given above. Parties shall be at liberty to raise all issues available to them in law.

(Para 16)

Important Issue Involved: The proposition that whenever any statement is relied upon by the Revenue, an opportunity of cross- examining the maker of the statement should be given to the noticee, is equally applicable to quasi judicial adjudication proceedings conducted under the Customs Act, 1962 and therefore even in such proceedings, the valuable right of an accused/noticee to cross-examine a person who has given a statement against him and is available, cannot be taken away.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. C. Hari Shankar and Mr. S. Sunil.

FOR THE RESPONDENT : Mr. Kamal Nijhawan, Senior Standing Counsel with Mr. Sumit Gaur, Advocate.

CASES REFERRED TO:

1. *J & K Cigarettes Ltd.* vs. *Collector of Central Excise* reported in 2011 (22) S.T.R. 225 (Del.).
2. *Laxman Exports Limited* vs. *Collector of Central Excise* reported in 2002 (143) E.L.T. 21 (SC).
3. *Swadeshi Polytex Ltd.* vs. *Collector* reported in 2000 (122) E.L.T. 641 (S.C.).

RESULT: Appeals stands Disposed of.

BADAR DURREZ AHMED, J.

1. These appeals are directed against the order dated 15th March, 2010 passed by the Customs, Excise & Service Tax Appellate Tribunal,

New Delhi. In all these appeals, the common issue that has been sought to be raised by the appellants is that the appellants have made a request of cross-examination of the persons whose statements have been referred to in the show-cause notice dated 30th April, 2004 as also relied upon by the Commissioner in the Order-in-Original dated 30th November, 2005 as also by the Tribunal in its order dated 15th March, 2010 but that request has not been acceded to. The result being that the appellants have been deprived of their right to cross-examine the makers of the statements. Therefore, there has been a violation of the principles of natural justice. Furthermore, it is contended that the statements, unless the exceptions carved out in Section 138 (B) of the Customs, 1962 are clearly made out, cannot be regarded as being relevant and therefore cannot form the basis of proving the truth of the facts contained in the statements.

2. In all these appeals except CUSAA No. 7/2010, an additional issue has also raised and that is with regard to the non-supply of the enquiry report conducted after the conclusion of hearing by the Srilankan authorities. Before we address these issues, it would be necessary to set out some facts.

3. The principle allegation against the appellants is that they imported Ball Bearings of Chinese origin but showed by them as having been imported from Srilanka in order to evade anti-dumping duty. Show-cause notices were issued to the appellants on 30th April, 2004. Those show-cause notices contained references to several statements of various individuals. In the case of the appellant, Sh.Anil Goel, there is a list of the statements which had been referred to and relied upon in the show-cause notice and that appears in para 5 of the reply to the show-cause notice dated 05.06.2004. The said para reads as under:-

> "5. The above allegations against our client, Sh. Anil Goel are based on the testimony of the following witnesses recorded under Section 108 of the Customs Act, 1962 or certain documents obtained by DRI, during the investigation.
>
> 1. Statement of Sh. Ashok Pathak (Para 2 of SCN)
> 2. Statement of Shri. Dalbir Singh (Para 4 of SCN)
> 3. Statement of Shri. Sureshkumar, Driver of M.K. Transports (Para 5 of SCN).
> 4. Statement of Shri. Jaipal Singh, owner of the shop. (Para

7 of SCN).

5. Statement of Sh. Mukesh Kumar Gupta (Para 13 : 14/11/03 of SCN).
6. Statement of Shri. H.L. Arora (Para 15 if SCN).
7. Statement of Shri. Raj Kumar Parcha (Page 16 of SCN).
8. Statement of Shri. Ravinder Uniyal (Para 19 of SCN).
9. Statement of Shri. Dinesh Kumar, Driver (Para 20 of SCN).
10. Statement of Shri. Dalbir Singh, Driver (Para 21 of SCN).
11. Statement of Shri. Gulab Singh, Driver (Para 23 of SCN).
12. Statement of Shri. Gulab Singh, Driver (Para 23 if SCN).
13. Statement of Shri. Basant Sharma, owner of the truch (Para 24 of SCN).
14. Statement of Shri. Tutul Mondal, Driver (Para 25 of SCN).
15. Statement of Shri. Gautam Chatterjee (Para 26 of SCN).
16. Statement of Shri. Yusuf Khan, Driver (Para 27 of SCN).
17. Statement of Shri. Gajender Singh Uniyal (Para 28 of SCN).
18. Reference to DRI, Chennai letter dt. 14.11.2003 (Para 29 of SCN).
19. Statement of Shri. Mohan Lal Thapar (Para 31 of SCN).
20. Letter dt. 3.2.04 of Shri. Suresh Pal Gupta of Dubai (Para 32 of SCN).
21. Statement of Shri. Dilip F. Mehta (Para 34 of SCN).
22. Statement of Shri. Kamlesh Jain, Chennai (Para 37 of SCN).
23. Enquiries with Dept. of Commerce, DRI, Chennai (Para 37 of SCN).
24. Letter dated 8.03.04 from Asma Noor, Executive Secretary (Para 39 of SCN).
25. Statement of Shri. Kapur Chand (Para 40 of SCN)."

4. From the above, it is apparent that 21 statements of different

individuals have been referred to in the show-cause notice. It is also clear from paragraph 6 of the very same reply dated 05.06.2004 to the show-cause notice that a request for summoning the persons who made those statements were clearly made. Paragraph 6 of the said reply reads as under:-

> "6. From the above narration and evidence relied upon in the Show Cause Notice it would be seen that the entire case is built on the basis of statements of certain witnesses and the report sent by DRI, Chennai on the basis of enquiries conducted by Central Intelligence Unit of Sri Lankan Customs. Therefore, Your Honour is requested to summon all the above referred witnesses including the Customs Officers of Sri Lanka who have verified the premises in Sri Lanka and have done enquiries without recording statements of the landlord. If any report including final report in writing has been sent by Sri Lankan Customs, copy of the same may be made available as the same is relied upon in DRI, Chennai's letter dated 14.11.2003. However, in the interest of justice our client would like to have entire communication received from Sri Lankan Customs."

5. It has further been pointed out that the request for summoning the witnesses has been noted in the Order-in-Original dated 30.11.2005 itself. This is apparent from paragraph 50 of the Order-in-Original which clearly reveals that there was a request to summon all the persons who allegedly made these statements including the Custom Officers of Srilanka for cross-examination. The Order-in-Original, in paragraph 61 records that the request for cross-examination of witnesses and DRI Officers was denied. This would be apparent from paragraph 61 which is re-produced herein below:

> "(61) The request of noticees namely S/Shri. Anil Goel, Suresh Pal Gupta, Gagan Thapar and Mukesh Kumar Gupta for cross-examination of witnesses and DRI officers was denied and the date of personal hearing was fixed for 14.10.2004. All the notices were informed about the date of personal hearing accordingly, Shri. Gagan Thapar vide letter dated 15.10.2004 was informed that his request for cross examination of witnesses was not accepted by the Competent Authority. He was also directed to submit the reply to the show cause notice within 15 days,

however, no reply was submitted by him."

6. Furthermore, the right to cross-examine had been denied by the Commissioner of Customs on the understanding that no right of cross-examination of witnesses and Officers of Customs exists in the noticees in the course of adjudication proceedings. This contention is recorded in paragraph 67 of the Order-in-Original.

7. The appellants were aggrieved by the Order-in-Original dated 30.11.2005 and, therefore, they preferred appeals before the Tribunal. In the said appeals, specific points with regard to denial of opportunity of cross-examination were also taken. However, the Tribunal by virtue of the impugned order dated 15.03.2010 brushed aside the said point in the following manner:-

"64. Overseas enquiry was not challenged to be motivated. Result of enquiry remained uncontradicted except bald plea of denial of cross examination when the goods recovered by search operation proved motive of appellants as well as their ill will and part of goods smuggled was proved to be without proof of import. The case of mis-declaration was proved beyond doubt by cogent evidence gathered by Investigation. Natural justice did not appear to have been violated when cogent evidence brought out by Investigation left no doubt about involvement of the group promoting smuggling through various conduits. The appellants lead their defence and their case was in entirety considered by the learned Adjudicating Authority considering their reply to show cause notice. When the Investigation in Sri Lanka by the Intelligence Authority of that country supported the case of Investigation in India, credibility of evidence gathered by Investigation remained undoubted. Evidence act not being applicable to quasi judicial proceeding, preponderance of probability came to rescue of Revenue and Revenue was not required to prove its case by mathematical precision. Exposing entire modus operandi through allegations made in the show cause notice on the basis of evidence gathered by Revenue against the appellants was sufficient opportunity granted for rebuttal. Revenue discharged its onus of proof and burden of proof remained un-discharged by appellants. They failed to lead their evidence to rule out their role in the offence committed and prove their case with clean

hands. Nothing was repelled by them to show that "KG: brand ball bearings were not of Chinese origin. They failed miserably to prove their bonafide. The import documents misdeclared the imported goods to be of Sri Lankan origin. The duty free exemption scheme available to goods manufactured in Sri Lanka was abused by appellants and customs duty was evaded on the Ball Bearings imported. Abuse of Notification benefit granting exemption to goods manufactured in Sri Lanka was proved by Investigation.

65. xxxxx xxxxx xxxxx

66. Principal grievance of the learned counsel Sri. Pradeep Jain was violation of principles of natural justice. That did not weigh consideration when material on record suggested that oral evidence recorded in the course of investigation were neither recorded under whims and fancies nor caprice. Allegations were properly brought out by show cause notice bringing the modus operandi for leading defence. None of the evidence was gathered behind back of the appellants. The report from Sri Lankan Customs was a follow up of the Investigation itself. The outcome of Investigation was exposed in the Show Cause Notice bringing out the chain of smuggling activities. Appellants failed to rule out questionable role of each other, but contributed to the promotion of smuggling. None of the evidence gathered by Investigation were liable to be discarded merely because those gave rise to adverse consequence against the appellants, in view of their credence and trustworthiness as well as reasonability. Entire argument of revenue on the point of law relating to cross examination and nature of evidence as well as concealed nature of smuggling activities were forceful. Therefore, there is no scope to hold that the adjudication proceedings suffered from violation of natural justice when the unfair deal of appellant surfaced. Accordingly the citations made by the appellants in the course of hearing were misplaced by them who failed malafide of Investigation of the Investigation by any means was liable to be vitiated."

8. Another point which was raised in some of these appeals was that the show-cause notices were issued on 30.04.2004 and the Noticees

were supposed to respond to the show-cause notice on the basis of the material available with the Noticees on that date. Even hearing in the matter was concluded on 14.10.2004. Yet, the Commissioner of Customs placed reliance on the subsequent report dated 20.07.2005 which was based on an investigation/enquiry conducted after the conclusion of the hearing on 14.10.2004. That report/documents pertaining thereto had not been supplied to the appellant in order to ascertain the response to the same. It was submitted that in the absence of the said report and documents, the appellants had been denied the valuable right to answer to and meet the points raised in the report/documents. The fact that the report, subsequent to the hearing on 14.10.2004 was considered is clear from the following extract of paragraph 70 (iv) of the Order-in-Original.

> (70)(iv) Similarly, as regards imports of bearings by M/s Maya Trading Co. and Devsons, it has been submitted by Shri Anil Goel that he is not concerned with these imports. However, he seems to make all efforts to establish the bonafide of the imports Made by M/s Maya Trading Co. and Devsons. It has been submitted by him in written brief submitted at the time of personal hearing on 14.10.2004 that the matter of authenticity of Country of Origin Certificates filed by M/s Maya Trading Co. and Devsons for clearance of goods at ICD Patpargani, was taken up by his advocate with the Board of Investment, Sri Lanka vide letter dated 10.05.2004 and it has been confirmed by the Department of Commerce , Sri Lanka vide letter dated 28.07.2004 that the certificate of origins referred to in Advocate's letter were issued by the Department of Commerce, Sri Lanka. On this basis, it has been claimed by him that the manufacturing activity of bearings was undertaken in Sri Lanka and the Country of Origin Certificate were issued by the Department of Commerce. As per the records placed before me, the Advocate M/s V.M.Doiphode vide letter dated 10.05.2003 had made the following request to the Department of Commerce Sri Lanka:
>
> "I will he highly obliged if the Department of Commerce furnish to us the following information to enable us to defend our client. Shri Anil Goel: Whether the following Certificates of Origin is issued by the Deptt.of Commerce or their authorised signatory Certificate of origin Nos.

> (i) CO/ISFTA/03/2748 dated 09.05.2003
>
> (ii) CO/ISFTA/03/3618 dated 16.06.2003
>
> (iii) CO/ISFTA/03/2 i 38 dated 03.04.2003
>
> These certificate of origin were issued in respect of bearings exported from Sri Lanka by M/s Aurea Industries Pvt. Ltd.. You are therefore requested to confirm regarding the issue of above referred certificates at an early date."
>
> In reply to this letter, M/s Bogollagama & Co., Bar-at-Law and Legal Consultants vide letter dated 11.06.2004 forwarded a letter dated 28.07.2004 claimed to be from Mr. R.D. Kulatilleke, Deputy Director of Commerce, Department of Commerce, Sri Lanka to Shri V.M. Doiphode.
>
> This letter No. COM/ISFTA/C00/04 dated 28.07.2004 contains the following information:
>
> "With reference to your letter of 10th May 2004, we are pleased to confirm that the certificate of origin referred to in your letter were issued by the Department of Commerce." In this matter, it would not be out of place to mention here that it was already been verified by DRI during investigations and clearly brought out in the Show Cause Notice that the three certificates of origin as mentioned hereinabove were forged documents: However, in view of the noticee's aforesaid fresh submissions, the matter was taken up by DRI to verify authenticity of the said correspondence, submitted to the Adjudicating authority, as the contents thereof appeared to be quite vague and misleading. Verification were conducted through Sri Lankan Customs. Sri Lanka Customs, after conducting verifications with Deptt. of Commerce, Sri Lanka, informed vie letter No. CIU/WROA/05/07 dated 20.07.2005 that the certificate of origin nos. CO/ISFTA/03/2748 and CO/ISFTA/03/3618 though issued by Deptt. of Commerce , Sri Lanka, have not been issued to M/s Aurea Industries Pvt. Ltd. but instead have been issued to M/s Celetron Ltd., Kandy, Sri Lanka for computer parts manufactured by them. The copies of original certificates issued by the Department of Commerce were also enclosed with the said letter of Sri Lankan Customs. It was also informed by Sri Lankan Customs

that certificate no. CO/ISFTA103/2138 is under investigation by them. The said correspondence is before me. These independent investigations made by the DRI through Sri Lankan Customs , thus, fully demolish the conclusion sought to be drawn by the noticee that the bearings were manufactured in Sri Lanka and the certificate of origin were genuine. Thus, the noticee is trying to mislead the Deptt. by misrepresentation of facts. In these circumstances, I hold that the three forged certificates of origins as mentioned hereinabove are forged certificates."

9. We have considered both the aspects of the matter and have heard counsel of both sides. The learned counsel for the appellants have placed reliance on the decision of the Supreme Court in the case of **Swadeshi Polytex Ltd. Vs. Collector** reported in 2000 (122) E.L.T. 641 (S.C.) as well as on **Laxman Exports Limited Vs. Collector of Central Excise** reported in 2002 (143) E.L.T. 21 (SC) for the proposition that whenever any statement is relied upon by the Revenue, an opportunity of cross-examining the maker of the statement should be given to the Noticee. Learned counsel for the appellants also placed reliance upon a decision of a Division Bench of this court in the case of **J & K Cigarettes Ltd. Vs. Collector of Central Excise** reported in 2011 (22) S.T.R. 225 (Del.).

10. Insofar as the general propositions are concerned, there can be no denying that when any statement is used against the assessee, an opportunity of cross-examining the persons who made those statements ought to be given to the assessee. This is clear from the observations contained in **Swadeshi Polytex Ltd.** (supra) and **Laxman Exports Limited** (supra). Apart from this, the decision of this court in **J & K Cigarettes Ltd.** (supra) clinches the issue in favour of the appellant. In that case, the validity of Section 9D of the Central Excise Act, 1944 was in question. The said Section 9D of the Central Excise Act, 1944 reads as under:-

"9D. Relevancy of statement under certain circumstances – (1) A statement made and signed by a person before any Central Excise Officer of a gazette rank during the course of any inquiry or proceedings under this Act shall be relevant, for the purpose of proving, an any prosecution for an offence under this Act, the truth of the facts which it contains:

(a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceedings under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

11. We may straightaway say that the provisions of Section 9D of the Central Excise Act, 1944 are identical to the provisions of Section 138B of the Customs Act, 1962 which would be applicable in the present case.

12. Section 138B of the Customs Act, 1962 reads as under:-

"138B. Relevancy of statements under certain circumstances – (1) A statement made and signed by a person before any gazette officer of customs during the course of any inquiry or proceeding under this Act shall be relevant for the purpose of proving, an any prosecution for an offence under this Act, the truth of the facts which it contains,

(a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable or

(b) When the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

(2) The provisions of sub-section (1) shall so far as may be apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court."

It is apparent that both the provisions are identical.

13. This court while upholding the validity of Section 9D of the Central Excise Act, 1944 interpreted its provisions as under:

"12. Bare reading of the above section manifests that under certain circumstances, as stipulated therein, statement made and signed by those persons before any Central Excise Officer of a gazette rank during the course of inquiry or proceedings under this Act can be treated as relevant and taken into consideration if under the given circumstances such a person cannot be produced for cross-examination. Thus, this provision makes such statements relevant for the purposes of proving the truth of the facts which it contains, in any prosecution for an offence under the Act in certain situations. Sub –Section (2) extends the provision of sub-section (1) to any proceedings under the Act other than a proceeding before the Court. In this manner, Section 9D can be utilized in adjudication proceedings before the Collector as well. In the present case, provisions of Section 9-D of the Act were invoked by the Collector holding that it was not possible to procure the attendance of some of the witnesses without undue delay or expense. Whether such a finding was otherwise justified or not can be taken up in the appeal."

14. The Division Bench also observed that though it cannot be denied that the right of cross-examination in any quasi judicial proceeding is a valuable right given to the accused/Noticee, as these proceedings may have adverse consequences to the accused, at the same time, under certain circumstances, this right of cross-examination can be taken away. The court also observed that such circumstances have to be exceptional and that those circumstances have been stipulated in Section 9D of the Central Excise Act, 1944. The circumstances referred to in Section 9D, as also in Section 138B, included circumstances where the person who had given a statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay and expense

which, under the circumstances of the case, the Court considers unreasonable. It is clear that unless such circumstances exist, the Noticee would have a right to cross-examine the persons whose statements are being relied upon even in quasi-judicial proceedings. The Division Bench also observed as under:-

"29. Thus, when we examine the provision as to whether the provision confers unguided powers or not, the conclusion is irresistible, namely, the provision is not uncanalised or uncontrolled and does not confer arbitrary powers upon the quasi judicial authority. The very fact that the statement of such a person can be treated as relevant only when the specified ground is established, it is obvious that there has to be objective formation of opinion based on sufficient material on record to come to the conclusion that such a ground exists. Before forming such an opinion, the quasi judicial authority would confront the assessee as well, during the proceedings, which shall give the assessee a chance to make his submissions in this behalf. It goes without saying that the authority would record reasons, based upon the said material, for such a decision effectively. Therefore, the elements of giving opportunity and recording of reasons are inherent in the exercise of powers. The aggrieved party is not remediless. This order/ opinion formed by the quasi judicial authority is subject to judicial review by the appellate authority. The aggrieved party can always challenge that in a particular case invocation of such a provision was not warranted."

15. The observations and conclusions arrived at by the Division Bench in the case of **J & K Cigarettes Ltd.** (supra) would apply with equal vigour to the provisions of Section 138B of the Customs Act, 1962. We find that this aspect of the matter has not been considered by any of the authorities below. In fact, section 138B of the Customs Act, 1962 has not been examined at all.

16. For this reason, we feel that the Tribunal should have a fresh look at these cases keeping in mind the provisions of Section 138B as also the decision of this court in **J & K Cigarettes Ltd.** (supra). The Tribunal will also consider the fact of non-supply of the report and other documents which were obtained by the concerned authorities from Srilanka after hearing had been concluded on 14.10.2004. Consequently, we set aside

the impugned order and remit the matters to the Tribunal for a fresh consideration in the light of the observations and directions given above. Parties shall be at liberty to raise all issues available to them in law.

17. The parties shall appear before the Tribunal on 7th May, 2013 in the first instance. No further notice would be necessary to any of the parties. The appeals stand disposed of.

ILR (2013) III DELHI 2285
FAO (OS)

DAULAT RAM INDUSTRIES ....APPELLANT

VERSUS

UNION OF INDIA ....RESPONDENT

(S. RAVINDRA BHAT & SUDERSHAN KUMAR MISRA, JJ.)

FAO (OS) NO. : 280/2009 DATE OF DECISION: 18.04.2013

Arbitration Act, 1940—Section 34—Appellant entered into contract with respondent to supply certain material after processing tender floated by respondent—In between, appellant sought for extension of time to supply remaining items and there were further negotiations between parties on rate of items—Disputes could not be resolved inter se parties and appellant invoked arbitration clause—Aggrieved by Award passed by Sole Arbitrator, respondent preferred objections under the Act contending award was contrary to public policy and Indian Law—Court upheld contentions of respondent and held award contrary to law and set it aside—Aggrieved appellant challanged findings by way of appeal—It was urged on behalf of appellant, in absence of any contractual term or legal provision enabling one party to change the term of

contract without consent of other it was not open to respondent to pay lower consideration in respect of part of contract—Whereas on behalf of respondent it was argued, extension was granted to appellant on condition that unit price would be different for balance quantity. Held:- If a clause in contract is so vague and uncertain as to be incapable of any precise meaning. It is clearly severable from the rest of the contract. It can be rejected without impairing the sense or reasonableness of the contract as a whole and it should be rejected. The contract should be held good and the clause ignored.

On the date of the grant of extension and the so called counter offer, therefore, the consideration itself was unknown. Thus, the offer itself was an uncertain one, and it could not be said that the counter offer led to a concluded contract, because the consideration was unknown to the parties. **(Para 12)**

In the present case too, the mention of an uncertain and unascertainable consideration, at the time of extension could not be held to be decisive as regards the consideration payable for the balance of the additional units to be supplied (24). The facts reveal that the consideration was finally conveyed after the contract was performed, belying the respondent's stand that the price was ascertainable as on 31.3.2001. **(Para 14)**

Important Issue Involved: If a clause in contract is so vague and uncertain as to be incapable of any precise meaning. It is clearly severable from the rest of the contract. It can be rejected without impairing the sense or reasonableness of the contract as a whole and it should be rejected. The contract should be held good and the clause ignored.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Sh. Dhruv Mehta, Sr. Advocate with Ms. Tamali Wad, Advocate.

FOR THE RESPONDENT : Sh. Krishna Kumar, Advocate.

CASES REFERRED TO:

1. *Arosan Enterprises Limited* vs. *UOI* (1999(9)SCC 449).
2. *Nicolene Ltd.* vs. *Simmonds* (1953) 1 QB 543.

RESULT: Appeal allowed.

S. RAVINDRA BHAT, J.

1. The Appellant firm's claim had been accepted, and award made in its favour, and against the respondent (hereafter "employer"), in arbitration proceedings. The employer preferred a petition objecting to the award under Section 34 of the Arbitration and Conciliation Act, which was allowed by a learned Single Judge of this Court. Consequently, the present appeal.

2. By the Purchase order dated 22.7.1999, the Appellant, M/s. Daulat Ram Industries agreed to supply 180 nos. of Rheostatic Dynamic Braking Resistors (DBR) with other accessories to the Union of India (UOI) at the rate of Rs.5,48,000.00 + Excise Duty 16% + Central Sales Tax 4% + freight, for each DBR and the associated accessories; it was also agreed that these were subject to a warranty of 24/36 months, delivery of 60% of quantity by 31.03.2000 and 40% of the quantity between 01.04.2000 and 30.4.2000 but not later than 30.4.2000. Clause 19 entitled the purchaser, Union of India to exercise option to procure an enhanced quantity of 30% over and above the contracted amount, which was exercised by letter dated 15.09.2000. As a consequence, the appellant had to supply 54 additional items, by an extended period ending on 31.3.2001. In the meanwhile, the original contract delivery period was extended, at the appellant's request, by the employer/Union of India, through a letter dated 06.06.2000. This extension of Delivery Period in respect of the originally contracted quantity (180 items) was granted by the purchaser i.e. Union of India upto 31.12.2000 with Liquidated Damages. The supply of 180 nos. – the initially contracted quantity – and the associated accessories was completed within the extended Delivery Period i.e. 31.12.2000.

3. In the meanwhile, even during the currency of this contract, the appellant participated in a tender floated by Chittaranjan Locomotive Works (hereafter "Chittaranjan Loco tender") as per specifications for the same item, and quoted a rate of Rs.5.78 lakhs + taxes, packing, freight charges, Price Variation Clause and warranty of 12/18 months. The Chittaranjan Locomotive Works made a counter offer to the appellant for supply of the material (in the tender opened on 17.11.2000) of Rs.4.66 lakhs plus duties, Price Variation Clause, Rs.9000/- as freight and warranty of 12/18 months. In response to this counter offer, the appellant by its letter of 9.3.2001, offered to supply at Rs.5.48 lakhs plus duties, etc. and warranty of 24/36 months which is identical to the contracted rate in Railway Board contract.

4. Of the 54 Dynamic Braking Resistors, (the increased quantity in terms of the letter of Railway Board dated 15.9.2000, exercising its option under Clause 19) 30 items were delivered by the appellant within the time fixed, i.e. 31.3.2001. It sought extension – which was granted – for the supply of the balance 24 items, through letter dated 30.4.2001. The employer/Union of India granted extension up to 31.7.2001 by letter which in para 4 indicated that the extension would be subject to the condition that if the Chittaranjan Loco tender was finalized for lower rates after 30.4.2001, that rate would apply for supplies made during the extended period. As a matter of fact, the balance 24 units were supplied during the extended period. The appellant, by its letter of 1.8.2001 requested the employer to regularize the extended delivery period (in respect of the initial and additional contracted quantity) up to 31.12.2000 without payment of liquidated damages. The employer/Union of India, by letter of 3.10.2001 indicated that no liquidated damages would be recovered from the amount payable for the balance additional quantity (24) supplied by 17.7.2001, provided the consideration was Rs.4.66 lakhs plus duties, Price Variation Clause, Rs.9000/-as freight.

5. The resultant dispute which arose between the parties, encompassed the question of what was correctly payable in addition to other issues, such as the justification for deduction of Rs.25 lakhs made by the employer/Union of India from the running bills submitted by the appellant. Since these disputes were not resolved inter se by the parties, the appellant invoked the arbitration clause. The Sole Arbitrator by his award, held the Appellant/claimant entitled to payment to the extent of Rs.21,60,958.20 (Rupees twenty one lakh sixty thousand nine hundred

fifty eight and paise twenty only). The Union of India preferred objections before the Court, contending that the award was contrary to public policy and Indian law, in as much as the appellant had accepted the extension given for the supply of the balance additional quantity, in terms of the employer's letter dated 30.4.2001, which had clearly indicated that the unit cost would be in accordance with what was to be finalized under the Chittaranjan Loco tender. The Court accepted those contentions, and held that the award was contrary to law and set it aside. The appellant has consequently approached the Division Bench.

6. The appellant argues that the learned Single Judge failed to see that there was no discretion with the employer/Union of India to unilaterally revise the consideration in respect of the supplies made, in terms of the contract, or in the general terms and conditions, i.e. the Indian Railways Standard Conditions of Contract (IRS) which was to be considered as part of the contract. Counsel particularly relied on the letter of 15.9.2000, which, while increasing the quantity to be supplied from 180 units to 234 units, stipulated in effect that the cost of the increased supplies would be the same, by stating that the total cost was increased from Rs.9,86,40,000/-to Rs.12,82,32,000/-. That letter also stated that all other terms and conditions of the contract would remain unaltered. In these circumstances, the respondent/Union of India could only have sought recourse to the terms of the contract, and recovered liquidated damages in the event of any loss caused to it due to delayed supply, but could not have unilaterally revised the cost price of the balance units to be supplied, downwards.

7. It was argued that in the absence of any contractual term, or legal provision enabling one party to change the terms of contract, without consent of the other, it was not open to the respondent to pay lower consideration in respect of a part of the contract, on the pretext that the appellant did not protest the condition in this regard, indicated in the letter of 30.4.2001. It was argued in this context that even that letter did not, in fact, indicate any price; the cost price was finally indicated after the contract was performed, i.e. on 3.10.2001, when the entire supplies were completed. Counsel further argued that in the absence of a firm price, there was no concluded contract, which superseded the previous terms. It was highlighted that the learned Single Judge erred in not seeing that there could have been no fresh contract through the letter dated

30.4.2001, since the price had not been agreed; such contract would be void for uncertainty. In these circumstances, the previous agreement which stipulated the price – in the letter dated 15.9.2000, was acted upon, and bound the parties.

8. Learned counsel for the respondent/Union of India argued that the impugned judgment is in order, and does not disclose any error of law, or appreciation of fact, calling for interference. It was argued that when the appellant sought extension for supply of the balance additional items, and was given the extension conditional upon revision of the unit cost, with its linkage to the Chittaranjan Loco tender, it was aware of this fact. It chose to accept that downward revision, since it had bid in that tender process. Consequently, having accepted that offer, and acted upon it, the appellant could not complain that the contract term was contrary to law, since the finalization of the Chittaranjan Loco tender was not to its advantage.

9. It was argued that the extension granted to the appellant was on the condition that the unit price would be different for such balance quantity. To that extent, there was no uncertainty in the contract. It was argued that the award was clearly contrary to law and unjustified to the extent it directed the respondent to pay over Rs.21 lakhs, when all the materials on record suggested that the appellant elected to and acquiesced for payment of a lower unit cost, in line with the finalization of the Chittaranjan Loco tender.

10. The relevant part of the award made in the appellant's favour reads as follows:

> "5.0 Reason for award:
>
> 5.1 The essence of dispute in this case, as would appear from the above, is that a lower price was unilaterally applied by the respondents based on the lower contracted price obtained in CLW's tender for a similar (not identical) stores, with different terms and conditions, which came to the notice of the respondents after the delayed supplies of 24 nos. Dynamic Braking Resistors were completed by the claimant.
>
> 5.2 It is a matter of record that the material in the subject contract were as per specification No. CLW/ES/R-29Alt. J as against the material under Chittaranjan Locomotive Works contract

being as per specification No.CLW/ES/R-29/K with VAPCON blower with resisters or VDM/Germany and motor from ABB. The warranty/guarantee in Chittararijan Locomotive Works contract was for 12/18 months and that in the subject contract was 24/36 months. The payment in Chittaranjan Locomotive Works contract was 98% as against 95% in subject contract against proof of dispatch in both the cases.

5.3 It is further reflected from records that the contracted price obtained in Chittaranjan Locomotive Works tender was based on the counter offer by Chittaranjan Locomotive Works and the rates offered by the claimant in the Chittaranjan Locomotive Works tender were same as that in the subject contract.

5.4 The respondent's counsel vide para 3 of written submission has quoted the judgment in case of **Kulupara Sriramulu vs A.S. Sathyanarayana** AIR 1968 SC 1028 as under:

> "Acceptance must be signified by some act or acts agreed on by the parties or from which the law raised presumption of acceptance".

He has contended that the new condition imposed vide letter dated 30.4.2001 although not accepted formally by claimant can be construed to be the acceptance by the act of supply of material by the claimant. This does not sound very convincing as the case is not identical to a contract having been formed by his signifying acts of fall of hammer in an auction or compliance of the requirements in a reward notice for a lost article to be deposited back to its owner. Further, it is also noted that acceptance has been signified by express formal documents jointly signed as envisaged in IRS 3603 at previous stages in the same contract.

5.5 Indian Railways Standard Conditions of Contract condition 0700 which stipulate time and date of delivery being the essence of the contract also envisages extension of delivery. Indian Standard Conditions of Contract condition 0800 also envisages extension for time of delivery arising from any cause which the purchaser may admit as a reasonable ground for extension. The contention of respondents counsel that the right of representation

was available during the extension granted overlooks the fact that even the respondents got the knowledge of lower rates on 13.9.2001 and the copy of the purchase order placed by Chittaranjan Locomotive Works was received on 28.9.2001 as indicated in para 12.0 of respondent's written brief. It is a matter of record that while granting extension vide letter dated 30.4.2001 the respondent had provided for liquidated damages for the delayed supplies vide para 2 of the letter which was part of the original contract and lower prices (if obtained) in the Chittaranjan Locomotive Works tender vide para 1 & 4 which came to the knowledge of the respondents on 13.9.2001 and got applied unilaterally vide respondent's letter dated 3.10.2001.

5.6 The counsel for claimant sited the apex court judgment In the matter of **Arosan Enterprises Limited Vs UOI** (1999(9)SCC 449).

> "Incidentally, the law is well said on this store on which no further dilation is required in this judgment to the effect that when the contract itself provides for extension of time, the same cannot be turned to be the essence of contract and default however in such a case does not make the contract voidable either"

5.7 Further the apex court's observation as given in Pollock and Muller's 'Indian Contract and Specific Relief Act' cited by counsel for claimant highlights "time being the essence of contract" It would be observed from para 0702 of Indian Railways Standard Conditions of Contract conditions that the established contract between the claimant and the respondent vide mutual acceptance signified through signature on the Purchase Order dated 22.7.99 and amended for enhancement of 30% of quantity at the same terms and conditions and notified vide respondent's letter dated 15.9.2000 did not become voidable due to supply of 24 Dynamic Braking Resistors after 31.3.2001 . The failure of the claimant to supply 24 Dynamic Braking Resistors by 31.3.2001 was subject to para 0702 of Indian Railways Standard Conditions of Contract and if the reasons indicated for extension beyond 31.3.2001 is not admitted as reasonable grounds under IRS 800 the default on the part of the claimant in completing the delivery within the

contracted period would be established. The purchaser may without prejudice to his other rights recover from the claimant the agreed liquidated damages and not by way of penalty a sum equivalent to 2% of price of any stores (including element of taxes duties freight) which the claimant failed to deliver within the period fixed for delivery in the contract or as extended, for each month or part of a month during which the delivery of such stores may be in arrears as the delivery thereof was accepted after expiry of the aforesaid period.

6.0 Award:

6. 1 Accordingly, the claim of M/s. Daulat Ram Industries is allowed subject to application of Liquidated Damages as per Indian Railways Standard Conditions of Contract 0702(a). Based on the records available, the amount of award has been worked out by calculating the Liquidated Damages for the deliveries made after 31.3.2001 and the claim awarded would thus be Rs.21,60,958.20 (Rupees twenty one lakh sixty thousand nine hundred fifty eight & paise twenty only) (details at Annexure OI) against the claim of Rs.23,74,195.20 made vide para 33(a) of the Claim Petition."

11. The learned Single Judge, in the impugned judgment, was persuaded to hold that the appellant's conduct, in not protesting the downward revision, indicated by the respondent/Union of India, when it extended the time for delivery of the balance of additional quantity (24 units) bound it to the lower amount, ultimately indicated by the respondent, based on the Chittaranjan Loco tender finalization. It was additionally reasoned that the arbitrator could not write or alter the terms of contract entered into voluntarily between the parties.

12. The above discussion would show that there is no dispute about the facts pertaining to the award of contract, the extension of time granted for supply of the basic or initial quantity (180 units), exercise of option by the purchaser/Union of India to buy 30% extra quantity, by letter dated 15.9.2000 (i.e 54 additional items). Significantly, this letter-issued in terms of clause 19 of the contract, which enabled the option – expressly stated the quantity and also that "other terms and conditions" of the contract would remain the same. In other words, the terms

including the amount payable, towards consideration, for each item, were fixed. That being the case, the question is whether the extension for supply of balance additional items (24 remaining out of 54 units, 30 having been supplied by the time agreed, i.e. 31.3.2001) could be an occasion for the respondent/Union of India to indicate another price in respect of an already concluded contract. There is no doubt that the Union of India, in its letter of 30.4.2001, indicated that it would accept the balance 24 units at the price to be settled in respect of another contract, i.e the Chittaranjan Loco tender. Equally, the appellant did supply the balance 24 items after this was made known. That seems to have been the decisive factor with the learned Single Judge, who held that the fresh consideration could be indicated and that the appellant could not complain or fall back on the original consideration agreed. On this aspect, this Court is of the opinion that the principle of election, or estoppel could not have been invoked in the circumstances of the case. Having opted to purchase the additional items for a particular known price on 15.9.2000, the contract for those quantities stood concluded. The appellant in fact acted on that contract – indivisible so far as 54 additional units were concerned – and even supplied 30 units. The respondents, therefore, could not have, at the stage of considering the issue of extension of time for supply, imposed a fresh unknown price. No stipulation in the contract, or the IRS was brought to the notice of this Court, in support of such action. As far as the appellant's action in not protesting the respondent's intimation that it would accept the additional items at a price to be indicated later, is concerned, this Court notices that the letter of 30.4.2001 itself mentioned a provisional price of Rs.5.47 lakh per unit. Besides, the materials on record show that the price for the Chittaranjan Loco tender was finalized and intimated to the appellant only on 3.10.2001 after the entire supplies had already been made earlier in July 2001. On the date of the grant of extension and the so called counter offer, therefore, the consideration itself was unknown. Thus, the offer itself was an uncertain one, and it could not be said that the counter offer led to a concluded contract, because the consideration was unknown to the parties.

13. Section 29 of The Indian Contract Act is as follows:

"29. Agreements void for uncertainty

Agreements, the meaning of which is not certain, or capable of being made certain, are void"

Illustration (f) to the above provision reads as follows:

> "f) A agrees to sell to B "my white horse for rupees five hundred or rupees one thousand". There is nothing to show which of the two prices was to be given. The agreement is void."

In **Nicolene Ltd. v. Simmonds** (1953) 1 QB 543, a contract for sale of a quantity of reinforcing steel bars was expressed as subject to "the usual conditions of acceptance". The seller repudiated the contract whereupon the buyers claimed and were awarded by the trial judge damages for the breach of contract. On appeal, the seller contended that the contract was not concluded there being no consensus ad idem in regard to the conditions of acceptance. It was held that, there being no "usual conditions of acceptance", the condition was meaningless and should be ignored. Dealing with the relevant clause, Denning L. J. observed,

> "that clause was so vague and uncertain as to be incapable of any precise meaning. It is clearly severable from the rest of the contract. It can be rejected without impairing the sense or reasonableness of the contract as a whole, and it should be so rejected. The contract should be held good and the clause ignored".

Then, the Court pointed out that:

> "the parties themselves treated the contract as subsisting. They regarded it as creating binding obligations between them and it would be most unfortunate if the law should say otherwise".

The Court also held that in such cases then, one would find

> "defaulters all scanning their contracts to find some meaningless clause on which to ride free".

14. In the present case too, the mention of an uncertain and unascertainable consideration, at the time of extension could not be held to be decisive as regards the consideration payable for the balance of the additional units to be supplied (24). The facts reveal that the consideration was finally conveyed after the contract was performed, belying the respondent's stand that the price was ascertainable as on 31.3.2001. The learned Single Judge, in our opinion, fell into clear error in overlooking this aspect, and ignoring that no term of the contract empowered the respondent to unilaterally alter the term of a concluded contract, which had even been performed substantially, by the supply of 30 out of the 54 additional items. Therefore, this Court has no doubt that the award in this case did not disclose any manifest error of law, or was not contrary to the public policy in India, as to warrant interference under Section 34. The impugned judgment and order is consequently set aside; the award is restored, and shall bind the parties. The post award interest shall be in terms of Section 31(7) of the Arbitration Act. The appeal is allowed in these terms.

ILR (2013) III DELHI 2296
ST. REF.

PENTEX SALES CORPORATION ....PETITIONER

VERSUS

COMMISSIONER OF SALES TAX, DELHI ....RESPONDENT

(BADAR DURREZ AHMED & VIBHU BAKHRU, JJ.)

ST. REF. NO. : 1/1998 DATE OF DECISION: 06.05.2013

The Delhi Sales Tax Act, 1975—Section 2(o)/4/50/21/23&27 read with Rule 7&8 of the Delhi Sales Tax Rules, 1975—Assessing Authority made a demand of Rs. 1,98,590/- including interest, on the ground that nine ST-1 Forms submitted by the petitioner were invalid as the said forms were issued by a purchasing dealer who did not hold a registration certificate in respect of the goods sold by the petitioner. The Assessing Authority thus did not allow deduction of Rs. 11,30,478 from the 'taxable turnover' of the petitioner—The Assessing Authority assessed sales tax at the rate of 10% of the said disallowance and also imposed interest on such tax from the date of filing of the return.

Petitioner's appeal under Section 43 of the Act before the Deputy Commissioner, Sales Tax and Appeal before the Appellate Tribunal dismissed. The Appellate Tribunal held that the return made by a dealer must be correct and complete and to the best of his knowledge and belief and without any willful omission on the part of the dealer and the return made by the petitioner could not be stated to be without any willful omission as the petitioner ought to have been vigilant and aware that ST-1 Forms, on the basis of which the petitioner had claimed deduction from the taxable turnover, were invalid and the same could have been discovered by the petitioner with little care and due diligence. The Tribunal further held that as the petitioner was guilty of willful omission in paying the correct sales tax, the petitioner was also liable to pay interest under Section 27 of the Delhi Sales Tax Act from the date of submission of the return. The first question whether the petitioner is guilty of willful omission?, answered in the negative. It was held that, ST-1 Forms are printed under the Authority of the Commissioner and are issued by the Assessing Authority of the purchasing dealer on an application made to him by the purchasing dealer. An application for issuance of forms may also be rejected by the Assessing Officer, if the Assessing Officer if satisfied that the declaration forms have not been used bonafide or if the conditions in sub-rule (4) of Rule 8 of the Rules are not satisfied. Further, the declarations made in the ST Forms are unequivocal and the purchaser is liable to be subjected to punitive action if the same are found to be untrue. Thus, in the normal course, there would be no reason for the selling dealer to doubt the declaration made by the purchasing dealer, in the Form ST-1. In the present case too, the petitioner has relied upon such Forms and there is no material on record to suggest that the petitioner accepted the ST-1 Forms with the knowledge

that the declarations made there under by the purchasing dealer were wrong. We are, thus, unable to agree with the view that there was any "willful omission" on the part of the petitioner in making his return or that the return was made by the petitioner knowing that the particulars in the ST-1 Forms on the strength of which deduction in the taxable turnover was claimed were inaccurate. The Second question whether the claim for deduction of sales against prescribed ST-1 Forms, furnished by the purchasing dealer, in respect of goods which are not specified in the Registration Certificate of the purchasing dealer, would dis-entitle the selling dealer to the deduction in respect of those sales within the meaning of proviso-II to sub-clause (V) of clause (a) of sub-Section (2) of Section 4 of the Delhi Tax Act, 1975, answered in the affirmative and the petitioner held disentitled to reduce his taxable turnover in respect of sale of goods made to a dealer who does not hold a registration certificate in respect of goods purchased by him. The third question whether interest under section 27(1) is payable on the tax as assessed or as returned by the assessee, answered in the negative, being covered by the decision in the case of Pure Drinks (New Delhi) Ltd.

[Di Vi]

APPEARANCES:

FOR THE PETITIONER : Mr. P.P. Mittal with Mr. P.K. Mittal.

FOR THE RESPONDENT : Mr. Sushil Dutt Selwan with Mr. Vineet Bhatia.

CASES REFERRED TO:

1. *J.K. Synthetics* vs. *Commercial Tax Officer:* (1994) 94 STC 422 (SC).
2. *M/s Pure Drinks (New Delhi) Limited* vs. *The Member, Sales Tax Tribunal & Ors:* W.P.(C) 1638/1994.

3. *State of Madras* vs. *Radio Electrical Ltd. and Anr.*: 1966 (18) STC 222.

4. *State of Rajasthan* vs. *Ghasilal:* AIR 1965 1454.

5. *Cape Brandy Syndicate* vs. *Inland Revenue Commissioners* : (1921) 1 KB 64.

RESULT: Reference Answered.

VIBHU BAKHRU, J

1. The present matter arises from a reference made by the Sales Tax Appellate Tribunal wherein the following questions have been referred:

> "Whether in the facts and circumstances of the case, the claim for deduction of sales against prescribed Forms ST-1, furnished by the purchasing dealer in respect of goods found during enquiry by the Assessing Authority, not specified in the Registration Certificate of the purchasing dealer, would render the selling dealer in law:
>
> (a) guilty of wilful omission;
>
> (b) dis-entitled for deduction in respect of those goods within the meaning of proviso-II to sub-clause (v) of clause (a) of sub-Section(2) of Section 4 of the Delhi Sales Tax Act, 1975 and rules framed thereunder; and
>
> (c) liable for imposition of interest also within the meaning of Section 27 on the amount of 'due tax' assessed under Section 23 of the Delhi Sales Tax Act, 1975 and Rules framed thereunder in respect of those goods from the date of submission of return itself?"

2. The petitioner was assessed to sales tax by the Assessing Authority for the assessment year 1984-85 under the Delhi Sales Tax Act, 1975 (hereinafter also referred to as 'the Act'). The Assessing Authority made a demand of Rs..1,98,590/- including interest in the sum of Rs. 85,053/-. The above demand was raised on the ground that nine ST-1 Forms submitted by the petitioner were held to be invalid as an inquiry had revealed that the said forms were issued by the purchasing dealer who did not hold a registration certificate in respect of the goods sold by the petitioner. The petitioner who is a dealer in electronic goods had declared

sales of Rs. 11,30,478/- against the said nine ST-1 Forms furnished by one M/s New Standard Foam Manufacturing Company who was a registered dealer albeit with respect to hosiery goods only and did not hold a registration certificate with respect to electronic goods. The Assessing Authority thus did not allow deduction of Rs..11,30,478/- on account of sales made by the petitioner to M/s New Standard Foam Manufacturing Company from the 'taxable turnover' of the petitioner for the relevant assessment year. The Assessing Authority assessed sales tax at the rate of 10% of the said disallowance and also imposed interest on such tax from the date of filing of the return.

3. Aggrieved by the order dated 19.03.1989 passed by the Assessing Authority, the petitioner preferred an appeal under Section 43 of the Act before the Deputy Commissioner, Sales Tax. The Deputy Commissioner of Sales Tax held that the declaration issued in Form ST-1 by M/s New Standard Foam Manufacturing Company was not valid in view of the second proviso to Section 4(2)(a) of the Act and dismissed the appeal. Aggrieved by the dismissal of the first appeal, the petitioner preferred an appeal before the Appellate Tribunal which was also dismissed by an order dated 12.02.1996. The Appellate Tribunal further held that the return made by a dealer must be correct and complete and to the best of his knowledge and belief and without any wilful omission on the part of the dealer. The Appellate Tribunal held that the return made by the petitioner could not be stated to be without any wilful omission as the petitioner ought to have been vigilant and aware that ST-1 Forms, on the basis of which the petitioner had claimed deduction from the taxable turnover, were invalid and the same could have been discovered by the petitioner with little care and due diligence. The Tribunal further held that as the petitioner was guilty of wilful omission in paying the correct sales tax, the petitioner was also liable to pay interest under Section 27 of the Delhi Sales Tax Act from the date of submission of the return.

4. Admittedly M/s New Standard Foam Manufacturing Company i.e. the purchasing dealer did not hold a registration certificate in respect of electronic goods and the purchasing dealer could not have issued the ST-1 Forms. It is contended on behalf of the petitioner that the petitioner was under no obligation to verify whether the purchasing dealer issuing the ST-1 Forms in fact held a registration certificate in respect of the goods specified in the ST-1 Forms as the ST-1 Forms contained the declaration by the purchasing dealer that the goods purchased were

covered under the registration certificate. The ST-1 Forms also contained the verification by the purchasing dealer that the statement made in the Forms was true to the best of his knowledge and belief. It is contended on behalf of the petitioner that once the ST-1 Forms had been issued by a registered dealer, it was not incumbent upon the selling dealer to make any further inquiry and the seller was entitled to rely on the declaration made by the purchasing dealer in the ST-1 Form that the purchasing dealer held a registration certificate in respect of the goods sought to be transacted. The counsel for the petitioner has also drawn our attention to Section 50(1)(d) of the Act which provides that whoever, being a registered dealer, falsely represents, while purchasing any goods that such goods are covered by a certificate of registration, is liable to be punished with rigorous imprisonment for a term which may extend to six months or with a fine or with both. It has thus been contended on behalf of the petitioner that the authorities would have, in cases of false declarations by the purchasing dealer, recourse to recover penalty from the offending dealer and that would compensate any loss of revenue that may have resulted on account of the false representations made in the ST-I forms. It is contended that the Assessing Authorities would be required to pursue the matter against the purchasing dealer and cannot seek to recover tax from the selling dealer.

5. The petitioner had further relied on the decision of the Supreme Court in the case of **State of Madras v. Radio Electrical Ltd. and Anr.:** 1966 (18) STC 222 wherein it has been held that, where C-Forms submitted by a purchasing dealer state that the goods are intended to be used for a particular purpose and the purchasing dealer misapplies the goods, the selling dealer is under no obligation to ensure that the goods are applied for the purposes as represented by the purchasing dealer and the selling dealer is entitled to rely upon the Forms submitted by the purchasing dealer for claiming exemptions of concessional rate of tax. The counsel for the petitioner has further relied on Circular No. 30 of 1979-80 issued by the Sales tax authorities in support of his contention that ST-1 Forms issued by the purchasing dealer are, prima facie, taken as correct and the law does not cast any duty on the seller to verify the correctness of the Form issued by the purchasing dealer.

6. With regard to the question whether the petitioner is liable to pay interest under Section 27 of the Act on the amount of Tax as assessed under Section 23, it is urged on behalf of the petitioner that the expression

"tax due" appearing in section 27(1) of the Act has to be read in conjunction with Section 21(3) of the Act and the expression "tax due" is the amount of tax payable as per the return and, since, according to the petitioner no tax was payable on the sales made against ST-1 Forms, no interest could be charged under section 27(1) of the Act from the date of submission of the returns. It has been further contended that the petitioner was entitled to rely on the declaration made by the purchasing dealer in the ST-I Forms and thus there was no omission on his part.

7. Section 4 of Act provides for the levy of Sales Tax on the taxable turnover of the assessee. The expression "turnover" is defined under Section 2(o) as under:

> "(o) "turnover" means the aggregate of the amounts of sale price receivable, or, if a dealer so elects, actually received by the dealer, in respect of any sale of goods, made during prescribed period in any year after deducting the amount of sale price, if any, refunded by the dealer to a purchaser in respect of any goods purchased and returned by the purchaser within the prescribed period:
>
> Provided that an election as aforesaid once made shall not be altered except with the permission of the Commissioner and on such terms and conditions as he may think fit to impose."

8. Sub-section (2) of Section 4 of the Act provides for certain deductions from the dealer's turnover to arrive at the "taxable turnover" for the purposes of the Act. Section 4(2)(a)(v) of the Act provides for excluding certain sales made by a registered dealer to another registered dealer from the "taxable turnover" of the selling dealer. Section 4(2)(a)(v) of the Act is quoted below :

> "4. **Rate of Tax –**
>
> (1) xxxx xxxx xxxx xxxx xxxx
>
> (2) For the purposes of this Act, "taxable turnover" means that part of a dealer's turnover during the prescribed period in any year which remains after deducting therefrom,-
>
> (a) his turnover during that period on – xxxx xxxx xxxx xxxx xxxx

(v) sale to a registered dealer -

(A) of goods of the class or classes specified in the certificate of registration of such dealer, as being intended for use by him as raw materials in the manufacture in Delhi of any goods, other than goods specified in the Third Schedule or newspapers,-

(1) for sale by him inside Delhi; or

(2) for sale by him in the course of inter-State trade or commerce, being a sale occasioning, or effected by transfer of documents of tile to such goods during the movement of such goods from Delhi; or

(3) for sale by him in the course of export outside India being a sale occasioning the movement of such goods from Delhi, or a sale effected by transfer of documents of title to such goods effected during the movement of such goods from Delhi, to a place outside India and after the goods have crossed the customs frontiers of India; or

(B) of goods of the class or classes specified in the certificate of registration of such dealer as being intended for resale by him in Delhi, or for sale by him in the course of inter-State trade or commerce or in the course of export outside India in the manner specified in sub-item (2) or sub-item (3) of item (A), as the case may be; and

(C) of containers or other materials, used for the packing of goods, of the class of classes specified in the certificate of registration of such dealer, other than goods specified in the Third Schedule, intended for sale or resale;"

9. The purchasing dealer had made a declaration in the prescribed form (i.e. ST-1 Form) that the goods were for resale by him in Delhi and in terms of Section 4(2)(a)(v)(B) of the Act, the petitioner would be entitled to reduce his taxable turnover by the quantum of sales made to the purchasing dealer subject to compliance of the rules.

10. Rule 7 of the Delhi Sales Tax Rules, 1975 (hereinafter referred to as 'the Rules') specifies the conditions subject to which a dealer may claim deduction from his turnover on account of sales made to a registered dealer. The relevant extract of Rule 7(1) of the Rules is quoted below:

"7. Conditions subject to which a dealer may claim deduction from his turnover on account of sales to registered dealers.- (1) A dealer who wishes to deduct from his turnover the amount in respect of sales on the ground that he is entitled to make such deduction under the provisions of sub-clause (v) of clause (a) of sub-section (2) of section 4, shall produce-

(a) copies of the relevant cash memos or bills according at the sales are cash sales or sales on credit; and

(b) a declaration in Form ST-1 duly filled in and signed by the purchasing dealer or a person authorized by him in writing:

Provided that no single declaration in Form ST-1 shall cover more than one transaction of sale except in cases where the total amount of sales made in a year covered by one declaration is equal to or less than Rs.50,00,000/- or such other amount as the Commissioner may, from time to time, specify in this behalf in the Official Gazette:

Provided further that where, in the case of any transaction of sales, the delivery of goods is spread over different years it shall be necessary to furnish a separate declaration in respect of goods as delivered in each year."

11. Rule 8 of the Rules mandates that the declaration referred to in the second proviso to clause 4(2)(a) of the Act should be in 'Form ST-1' which would be printed under the Authority of the Commissioner and could be obtained from the appropriate Assessing Authority by the registered dealer intending to purchase goods on the strength of his certificate of registration. The relevant portions of Rule 8 of the Rules are quoted below:

"8. Authority from whom the declaration form may be obtained, and use, custody and maintenance of records of such forms and matters incidental thereto.

(1) The declaration referred to in the second proviso to clause (a) of sub-section (2) of section 4 shall be in Form ST-1 which shall be printed under the authority of the Commissioner and shall be obtained from the appropriate assessing authority by the registered dealer intending to purchase goods on the strength of

his certificate of registration.

(2) No selling dealer shall accept any declaration from a purchasing registered dealer unless it is furnished in Form ST-1 and not declared invalid or obsolete by the Commissioner:

Provided that the declaration Form ST-1 issued to a dealer before the 1stFebruary, 1978 and remaining unused shall become invalid and obsolete except for the purpose of a transaction of sale effected before the 31st January, 1978:

Provided further that all invalid and obsolete Form ST-1 covered by the foregoing proviso shall be surrendered by the registered dealer to the appropriate assessing authority upto the 31st March, 1979 with an up to date account of the forms received, used and surrendered.

(2A) If the space provided in Form ST-1 is not sufficient for making the entries, the particulars specified in the said form may be given in a separate annexure attached to that form so long as it is indicated in the form that the annexure forms part thereof and such annexure is also signed by the person signing the declaration in Form ST-1.

(3) For obtaining declaration Form ST-1, a registered dealer

(i) shall submit a Requisition Account of statutory form in Form ST-2A together with his last return in each assessment year; and

(ii) shall apply for issue of forms to appropriate assessing authority in Form ST-2C, whenever such forms are required.

(4)(a) If, for reasons to be recorded in writing the appropriate assessing authority is satisfied that the declaration forms have not been used *bona fide* by the applicant or that he does not require such forms *bona fide*, the appropriate assessing authority may reject the application or it may issue such lesser number of forms as it may consider necessary.

(b) If the applicant for declaration forms has, at the time of making the application, failed to comply with an order

demanding security from him under sub-section (1) of section 18, the appropriate assessing authority shall reject the application.

(c) If applicant for declaration forms has, at the time of making application–

(i) defaulted in furnishing any return or returns in accordance with the provisions of the Act or these rules, or in payment of tax due according to such return or returns; or

(ii) defaulted in making the payment of the amount of tax assessed or penalty imposed by assessing authority, in respect of which no orders for instalments/stay have been obtained from the competent authority under the provisions of law; or

(iia) not filed proper Requisition Account of the declaration forms required by him; or

(iib) not filed proper utilization account in Form ST-2B of forms issued to him in advance together with the returns for the period during which the form were utilized; or

(iii) been found by an appropriate assessing authority having some adverse material against him, suggesting any concealment of sale or purchase or of furnishing inaccurate particulars in the returns,

the appropriate assessing authority shall, after affording the applicant an opportunity of being heard, withhold, for reasons to be recorded in writing, the issue of declaration forms to him and the appropriate assessing authority shall make a report to the Commissioner about such withholding within a period of three days from the date of its order:"

xxxx xxxx xxxx xxxx xxxx

"(d) Where the appropriate assessing authority does not proceed under clause (a), clause (b), or clause (c), it shall issue the requisite number of declaration forms to the applicant.

(5) The counterfoil of the form shall be retained by the purchasing dealer and the other two portions marked

'original' and 'duplicate' shall be made over to the selling dealer."

12. It is also relevant to examine 'Form ST-1'. The said form is in two parts. While the part marked as "DUPLICATE / ORIGINAL" is furnished by the purchasing dealer to the selling dealer, the counter foil is retained by the purchasing dealer. The Form ST-1 is as under:

"COUNTER FOIL	DUPLICATE/ORIGINAL
FORM ST-1	**FORM ST-1**
(See rule 7)	(See rule 7)
FORM OF DECLARATION FOR PURCHASES BY REGISTERED DEALERS	**FORM OF DECLARATION FOR PURCHASES BY REGISTERED DEALERS**
Seal of the issuing authority	Issued to holder of Serial No.....
Serial No.	Registration Certificate Seal of the issuing No..... authority
To	To
..... (Seller)	..... (Seller)
..... (Address)	..... (Address)
Declaration given against:	Certified that the goods purchased from you as per bill / cash memos stated below are covered by *my/ our Registration Certificate No..... dated..... Which is valid with effect from..... and are for:
	*(i) Sale or resale
	*(ii) Use of raw materials

	*(iii) Packaging of goods in terms of section 4(2)(a)(v) of the Delhi Sales Tax Act, 1975. * Strike out the words/ expressions not applicable.
Bill(s)/Cash memo(s) Description Value of No. and date of goods goods	
	Bill(s)/Cash memo(s) Description Value of No. and date of goods goods
Date..... Signature.....	TOTAL..... The above statements are true to the best of my knowledge and belief. Date..... Signature..... Name of the person signing the declaration and his status in relation to the purchasing dealer. Name and address of the purchasing dealer."

13. A bare perusal of Rule 8 does indicate that there are checks to ensure that the same are issued to bonafide dealers and can be relied upon by the selling dealers. In the first instance, ST-1 Forms are printed under the Authority of the Commissioner and are issued by the Assessing Authority of the purchasing dealer on an application made to him by the purchasing dealer. An application for issuance of forms may also be rejected by the Assessing Officer, if the Assessing Officer is satisfied that the declaration forms have not been used bonafide or if the conditions in sub-rule (4) of Rule 8 of the Rules are not satisfied. Further, the declarations made in the ST Forms are unequivocal and the purchaser is liable to be subjected to punitive action if the same are found to be untrue. Thus, in the normal course, there would be no reason for the selling dealer to doubt the declaration made by the purchasing dealer, in

the Form ST-1. In the present case too, the petitioner has relied upon such Forms and there is no material on record to suggest that the petitioner accepted the ST-1 Forms with the knowledge that the declarations made thereunder by the purchasing dealer were wrong. We are, thus, unable to agree with the view that there was any "willful omission" on the part of the petitioner in making his return or that the return was made by the petitioner knowing that the particulars in the ST-1 Forms on the strength of which deduction in the taxable turnover was claimed were inaccurate.

14. The Tribunal held that the petitioner could have discovered that the purchasing dealer did not have a registration certificate in respect of the goods sold to him and that the petitioner ought to have been aware of the law and, as ignorance of law is no excuse, the petitioner was guilty of "wilful omission". We are unable to agree with the Tribunal in this regard. The adage that ignorance of law is no excuse will have little application in determining whether the assessee is guilty of "wilful omission" or not unless it is found that the contention raised by the assessee in his defence is moonshine or a subterfuge.

15. The reference to the decision of the Supreme Court in the case of **J.K. Synthetics v. Commercial Tax Officer:** (1994) 94 STC 422 (SC) in the impugned judgment also does not support the view that there has been any wilful omission on the part of the petitioner. On the contrary the Supreme Court holds that if a dealer has furnished particulars without wilfully omitting or withholding any particular information which has bearing on the assessment of tax, which he honestly believes to be correct and complete, it would be difficult to hold that the dealer has not acted bona fide in depositing of tax due on that information. It has been further held that the legislature desires to be harsh with wilful defaulters or those guilty of wilful omission and not with dealers who have failed to supply information under a bona fide belief that the same was not necessary or with those who have failed to pay full tax due, not with a view to evading the liability to pay tax, but because they believed that they were liable to pay the tax as assessed by them. The relevant extract from the said judgment in the case of **J.K. Synthetics** (supra) is quoted below:

> "5.... In sub-section (2-A), by Amending Act 4 of 1979, the words "tax according to his accounts" were substituted for the

> words "proportionate tax on the basis of the last return" and the latter part of the sub-section was restructured by deleting the words "[t]he difference, if any, of the tax payable according to the return and the advance tax paid shall be deposited with the return" and making the sentence a running one. Sub-section (3) permits a dealer who discovers any error or omission in his return to submit a revised return in the prescribed manner before the time prescribed for the submission of the next return but not later.
>
> 6. Now Section 7(2) says that every 'such' return, meaning thereby the return referred to in Section 7(1), shall be accompanied by a receipt showing the deposit of the full amount of tax due "on the basis of the return". In other words the dealer is required to pay the full amount of tax that becomes due on the basis of the particulars in regard to the turnover and taxable turnover disclosed in the return. Sub-section (2-A) begins with a non obstante clause, namely, notwithstanding anything contained in sub-section (2), and provides that any dealer or class of dealers specified in the notification may pay the tax at intervals shorter than those prescribed under sub-section (1), in which case the tax shall be deposited at the intervals specified in the notification in advance of the return and the return shall be accompanied by the receipt for the full amount of tax due "shown in the return". Although the phraseology used in sub-sections (2) and (2-A) of Section 7 is not the same, the content and purport of the two subsections is more or less identical, namely, both the sub-sections require that the return shall be accompanied by a receipt evidencing the deposit of the "full amount of tax due" on the basis of the return or on the basis of the information shown in the return. The full amount of tax due and payable prior to the submission of the return is clearly relatable to the information furnished in the return. Undoubtedly, the information to be furnished in the return must be "correct and complete", that is, true and complete to the best of knowledge and belief; without the dealer being guilty of wilful omission. This is the essence of the verification clause found at the foot of Form ST 5. Rule 25 expects the verification of the return to be in the manner indicated in Form ST 5. Therefore, on a conjoint reading of Section 7(1),

(2) and (2-A), Rule 25, the information to be furnished under Form ST 5 and the form of verification, it becomes clear that the dealer must deposit the full amount of tax due on the basis of information furnished, which information must be correct and complete to the best of the dealer's knowledge and belief without he being guilty of wilful omission. If the dealer has furnished full particulars in respect of his business, without wilfully omitting or withholding any particular information which has a bearing on the assessment of tax, which he honestly believes to be "correct and complete", it would be difficult to hold that the dealer had not acted "bona fide" in depositing the tax due on that information before the submission of the return. Of course the tax so deposited is to be deemed to be provisional and subject to necessary adjustments in pursuance of the final assessment. Section 7-AA empowers levy of penalty if the assessing authority is satisfied that any dealer has "without reasonable cause" failed to furnish the return under Section 7(1) within the time allowed. The use of the words "without reasonable cause" clearly implies that if the dealer can show reasonable cause for his lapse he cannot be visited with the penalty prescribed by Section 7-AA. To put it differently if reasonable cause is shown by the dealer for the lapse, he cannot be visited with penalty under this provision. This is also suggestive of the fact that the legislature desired to be harsh with wilful defaulters or those guilty of wilful omission of material information and not with dealers who failed to supply some information under the "bona fide" belief that the same was not necessary or those who had failed to pay the full tax due not with a view to evading or avoiding the liability to pay the tax but because they bona fide believed that they were liable to pay the tax assessed by them on the basis of the return and no more. If at a later date on the basis of a different interpretation put on the language of the relevant provisions of the law, the dealer becomes liable to pay tax in excess of that already paid, he may be called upon to make good the difference but he cannot be visited with penalty under Section 7-AA unless it is shown that the dealer had withheld payment of the differential tax by wilfully withholding material information or had acted without reasonable cause in committing the default....."

(underlining added)

16. Following the aforesaid judgment, it cannot be held that the petitioner was guilty of wilful omission in filing his return on the basis of the ST-1 Form which was duly furnished to him by the purchasing dealer. Thus, in our view the answer to the first question whether the petitioner is guilty of willful omission must be answered in the negative.

17. The second question to be considered is whether the claim for deduction of sales against prescribed ST-1 Forms, furnished by the purchasing dealer, in respect of goods which are not specified in the Registration Certificate of the purchasing dealer, would dis-entitle the selling dealer to the deduction in respect of those sales within the meaning of proviso-II to sub-clause (v) of clause (a) of sub-Section (2) of Section 4 of the Delhi Sales Tax Act, 1975.

18. One of the pre-conditions which is required to be satisfied for deduction of sales made to a registered dealer from a taxable turnover of a assessee, under Section 4(2)(a)(v)(B) of the Act, is that the sale to the registered dealer must be of a class or classes of goods as specified in the certificate of registration of such a dealer. Indisputably, this condition is not satisfied in the present case and as such the deduction as contemplated under Section 4(2)(a)(v)(B) of the Act is not available to the petitioner. The learned counsel for the petitioner has contended that the scheme of the Act does not contemplate that the selling dealer should make any enquires as to the validity of the forms submitted by the purchasing dealer and a selling dealer is required to accept the declaration as submitted and the only exception to this is specified in sub-rule (2) of rule 8 of the Rules, that is, where the declaration from a purchasing registered dealer is not furnished in Form ST-1 or where such Forms have been declared to be invalid or obsolete by the Commissioner. The learned counsel for the petitioner has relied on the decision of the Supreme Court in the case of **Radio and Electricals Ltd** (supra) and strongly urged that the ratio of the decision of the Supreme Court is that a selling dealer can rely on the declaration (in that case, Form C) and that the selling dealer has no duty to examine the correctness of the forms submitted. The scheme of claiming reduction in tax, under the Central Sales Tax Act, on account of sales made against Form C is similar to the scheme of reducing the taxable turnover on account of sales made against ST-1 Forms under the Act. It is contended, as the Supreme

Court has held that a misrepresentation made in Form C as to application of the goods by the purchasing dealer would not disable the selling dealer from claiming deduction in respect of the sales made against such forms subsequently found to be inaccurate, the petitioner would also be entitled to deduct the sales made against ST-1 Forms without any further enquiry.

19. We are unable to agree with this contention. In our view the reliance placed by petitioner on the decision of the Supreme Court in the case of **Radio and Electricals Ltd.** (supra) also does not further the case of the petitioner. First of all, it has been clearly held by the Supreme Court in the case of **Radio and Electricals Ltd.** (supra) that it would be the duty of the selling dealer to verify that the purchasing dealer is (a) a registered dealer and (b) holds a registration certificate in respect of the goods sold to him. Once a selling dealer has complied with the same, his duty does not extend any further. Before a registered dealer can accept the declaration made by the purchasing dealer, he must satisfy himself that the declaration is true in so far as the purchasing dealer does hold a certificate of registration in respect of the goods which are being transacted. Secondly, misapplication of goods which the purchasing dealer may be guilty of obviously takes place after the forms have been submitted and thus a selling dealer would have no control over the same. Contrary to this, the selling dealer can verify whether the purchaser is a registered dealer and holds the requisite registration certificate and it is within the control of the selling dealer to verify this at the time of the sale. The decision in the case of **Radio and Electricals Ltd.** (supra) is based on the reasoning that the seller cannot be prejudiced on account of misapplication of goods by the purchasing dealer as he has no control over the same. This reasoning cannot be extended to a seller not verifying whether the purchaser is a dealer having the requisite registration certificate. The relevant extract from the decision of the Supreme Court in the case of **Radio and Electricals Ltd** (supra) is quoted below:

> "The Act seeks to impose tax on transactions, amongst others, of sale and purchase in inter-State trade and commerce. Though the tax under the Act is levied primarily from the seller, the burden is ultimately passed on to the consumers of goods because it enters into the price paid by them. Parliament with a view to reduce the burden on the consumer arising out of multiple taxation has provided in respect of sales of declared goods which have special importance in inter-State trade or commerce, and other

> classes of goods which are purchased at an intermediate stage in the stream of trade or commerce, prescribed low rates of taxation, when transactions take place in the course of inter-State trade or commerce. Indisputably the seller can have in these transactions no control over the purchaser. He has to rely upon the representations made to him. He must satisfy himself that the purchaser is a registered dealer, and the goods purchased are specified in his certificate: but his duty extends no further. If he is satisfied on these two matters, on a representation made to him in the manner prescribed by the Rules and the representation is recorded in the certificate in Form 'C' the selling dealer is under no further obligation to see to the application of the goods for the purpose for which it was represented that the goods were intended to be used. If the purchasing dealer misapplies the goods he incurs a penalty under section 10. That penalty is incurred by the purchasing dealer and cannot be visited upon the selling dealer...."
>
> (underlining added)

20. Thirdly, we must add that the third proviso to section 4(2) of the Act makes an express provision for collecting tax from the purchaser, in the event goods are purchased by him for the purposes mentioned in Section 4(2)(a)(v) of the Act but are not so utilized by him. Thus, whereas in the case of misutilization of goods by the purchaser, the amount of tax payable can be collected from the purchaser, there is no such provision in the Act which enables collection of tax from the purchaser, in the event, he makes a false declaration regarding holding of registration certificate with respect to the goods so purchased.

21. We also are unable to agree with the contention of the petitioner that the interest of the revenue can be protected by the imposition of penalty for offence of misrepresentation under Section 50(1)(d) of the Act. The provision to take punitive action and impose penalty cannot be equated to collecting the tax payable. Imposition of penalty is only a punitive measure to ensure that there is compliance with the law and persons not complying with provisions of the statute are proceeded against. Penalty provisions are a part of the machinery to ensure compliance for collection of tax levied and the same cannot be equated to exacting tax from an assessee. We may also add that the quantum of penalty as

contemplated under Section 50(1) of the Act is also not equal to the quantum of tax which is levied under Section 4 of the Act.

22. Thus, in our view the second question must be answered in the affirmative and the petitioner would be disentitled to reduce his taxable turnover in respect of sale of goods made to a dealer who does not hold a registration certificate in respect of goods purchased by him.

23. The third question to be considered is whether the petitioner is liable to pay interest under section 27 of the Act from the date of submission of the return, on the amount of tax assessed under section 23 of the Act?

24. Having held that there is no wilful omission on the part of the petitioner in filing a true return, it is not necessary to consider whether interest is payable by an assessee, who wilfully files an inaccurate return to avoid payment of tax. The only aspect that remains to be considered is whether interest under section 27(1) is payable on the tax as assessed or as returned by the assessee.

25. In terms of section 27 of the Act, interest is payable if a dealer fails to pay the tax due as per section 21(3) of the Act or where a dealer or a person is in default or is deemed to be in default. The relevant portions of section 21 and section 27 of the Act are quoted below:

> **"Section 21 -Periodical payment of tax and filing of returns** -(1) Tax payable under this Act shall be paid in the manner hereinafter provided at such intervals as may be prescribed.
>
> (2) Every registered dealer and every other dealer who may be required so to do by the Commissioner by notice served in the prescribed manner shall furnish such returns of turnover by such dates and to such authority as may be prescribed.
>
> (3) Every registered dealer required to furnish returns under subsection (2) shall pay into a Government Treasury or the Reserve Bank of India or in such other manner as may be prescribed, the full amount of tax due from him under this Act according to such return, and shall where such payment is made into a Government Treasury or the Reserve Bank of India furnish alongwith the return a receipt from such Treasury of Bank showing the payment of such amount."

> xxxx xxxx xxxx xxxx xxxx
>
> **"Section 27 – Interest** (1) If any dealer fails to pay the tax due as required by sub-section (3) of section 21, he shall, in addition to the tax (including any penalty) due, be liable of pay simple interest on the amount so due at one per cent per month from the date immediately following the last date for the submission of the return under sub-section (2) of the said section for a period of one month, and at one and a half per cent per month thereafter for so long as he continues to make default in such payment or till the date of completion of assessment under section 23, whichever is earlier.
>
> (2) When a dealer or a person is in default or is deemed to be in default in making the payment of tax, he shall, in addition to the amounts payable under section 23 or section 24, be liable to pay simple interest on such amount at one per cent per month from the date of such default for a period of one month, and at one and a half per cent per month thereafter for so long as he continues to make default in the payment of the said amount.
>
> xxxxx xxxxx xxxxx xxxxx xxxxx"

26. It is trite law that the fiscal statutes must be interpreted as per the plain language of the statute. In the oft-quoted words of Rowlatt, J., in **Cape Brandy Syndicate v. Inland Revenue Commissioners** : (1921) 1 KB 64, the rule of interpretation in case of a fiscal statute is stated as under:

> "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

27. A plain reading of section 27(1) indicates that interest is payable on "tax due" as required by section 21(3) and the plain words of section 21(3) indicate that a dealer is required to pay the full amount of tax due from him under the Act "according to such return". Thus, the expression "tax due" as used in section 27(1) and 21(3) can, on a plain reading of the language, only mean the amount of tax due as per the returns filed by him.

28. It is also relevant to refer to the decision of a Constitution Bench of the Supreme Court in the case of **State of Rajasthan v. Ghasilal:** AIR 1965 1454, wherein the Supreme Court held that till the tax is ascertained by the assessee or the assessing authority, no tax can be said to be due. In the case of **J.K. Synthetics** (supra), while considering the provisions of Rajasthan Sales Tax Act, 1954 which are similar to the provisions of the Delhi Sales Tax Act, 1975 the Constitution Bench of the Supreme Court held that a provision made in the statute for charging interest on delayed payment of tax must be construed as substantive law and not as adjectival law and further that "tax due" is that amount which is payable on the taxable turnover as shown in the return. The relevant extract of the decision of the Supreme Court in the case of **J.K. Synthetics** (supra) is quoted below:

> "16. It is well-known that when a statute levies a tax it does so by inserting a charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. Provision is also made for charging interest on delayed payments, etc. Ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same. (See Whitney v. IRC, CIT v. Mahaliram Ramjidas, India United Mills Ltd. v. Commissioner of Excess Profits Tax, Bombay and Gursahai Saigal v. CIT, Punjab). But it must also be realised that provision by which the authority is empowered to levy and collect interest, even if construed as forming part of the machinery provisions, is substantive law for the simple reason that in the absence of contract or usage interest can be levied under law and it cannot be recovered by way of damages for wrongful detention of the amount. (See Bengal Nagpur Railway Co. Ltd. v. Ruttanji Ramji and Union of India v. A.L. Rallia Ram). Our attention was, however, drawn by Mr. Sen to two cases. Even in those cases, C.I.T. v. M. Chandra

> Sekhar and Central Provinces Manganese Ore Co. Ltd. v. C.I.T., all that the Court pointed out was that provision for charging interest was, it seems, introduced in order to compensate for the loss occasioned to the Revenue due to delay. But then interest was charged on the strength of a statutory provision, may be its objective was to compensate the Revenue for delay in payment of tax. But regardless of the reason which impelled the legislature to provide for charging interest, the Court must give that meaning to it as is conveyed by the language used and the purpose to be achieved. Therefore, any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law. So construed and applying the normal rule of interpretation of statutes, we find, as pointed out by us earlier and by Bhagwati, J. in the **Associated Cement Co.** case, that if the Revenue's contention is accepted it leads to conflicts and creates certain anomalies which could never have been intended by the legislature.
>
> 17. Let us look at the question from a slightly different angle. Section 7(1) enjoins on every dealer that he shall furnish prescribed returns for the prescribed period within the prescribed time to the assessing authority. By the proviso the time can be extended by not more than fifteen days. The requirement of Section 7(1) is undoubtedly a statutory requirement. The prescribed return must be accompanied by a receipt evidencing the deposit of full amount of 'tax due' in the state Government on the basis of the return. That is the requirement of Section 7(2). Section 7(2A), no doubt, permits payment of tax at shorter intervals but the ultimate requirement is deposit of the full amount of 'tax due' shown in the return. When Section 11-B(a) uses the expression 'tax payable under Subsections (2) and (2A) of Section 7', that must be understood in the context of the aforesaid expressions employed in the two subsections. Therefore, the expression 'tax payable' under the said two sub-sections is the full amount of tax due and 'tax due' is that amount which becomes due ex-hypothesi on the turnover and taxable turnover 'shown in or based on the return'. The word 'payable' is a descriptive word, which ordinarily means 'that which must be paid or is due, or may be paid' but its correct meaning can only be determined if

the context in which it is used is kept in view. The word has been frequently understood to mean that which may, can or should be paid and is held equivalent to 'due'. Therefore, the conjoint reading of Sections 7(1), (2) and (2A) and 11B of the Act leaves no room for doubt that the expression 'tax payable' in Section 11B can only mean the full amount of tax which becomes due under Sub-sections (2) and (2A), of the Act when assessed on the basis of the information regarding turnover and taxable turnover furnished or shown in the return. Therefore, so long as the assessee pays the tax which according to him is due on the basis of information supplied in the return filed by him, there would be no default on his part to meet his statutory obligation under Section 7 of the Act and, therefore, it would be difficult to hold that the 'tax payable' by him 'is not paid' to visit him with the liability to pay interest under Clause (a) of Section 11-B. It would be a different matter if the return is not approved by the authority but that is not the case here. It is difficult on the plain language of the section to hold that the law envisages the assessee to predicate the final assessment and expect him to pay the tax on that basis to avoid the liability to pay interest. That would be asking him to do the near impossible.

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19. In the result we are of the view that the majority opinion expressed by Venkataramiah, J. in the Associated Cement Company case does not, with respect, state the law correctly and in our view the legal position was correctly stated by Bhagwati, J. in his minority judgment. We, therefore, overrule the majority view in that decision and affirm the minority view as laying down the correct law....."

29. The question of chargeability of interest under section 27(1) of the Delhi Sales Tax Act has also been considered by this court in the case of **M/s Pure Drinks (New Delhi) Limited vs. The Member, Sales Tax Tribunal & Ors:** W.P.(C) 1638/1994 decided on 21.03.2013. This Court has, following the decisions of the Supreme Court, inter alia, in the cases of **Ghasilal** (supra) and **J.K. Synthetics** (supra) held that the expression "tax due" as appearing in section 27(1) of the Act has to be read in conjunction with provisions of section 21(3) of the Act and

interest under section 27(1) is payable only on the "tax due according to the return filed". The tax which is finally assessed becomes due on assessment and if the demand in relation to the same is not satisfied, interest will become payable by virtue of section 27(2) of the Act. The relevant extract of the said judgment dated 21.3.2013 is quoted below:

"21. From an examination of the aforesaid decisions it is apparent that the expression "tax due" as appearing in section 27(1) of the said Act would have to be read in relation to the provisions of section 21(3) thereof. Section 21(3) of the said Act has clear reference to the furnishing of a return. Moreover, it has reference to the full amount of tax due from a dealer under the Act "according to such return". In other words, the tax which is said to be due under section 27(1) of the said Act must be the tax which is due "according to a return". It is obvious that if no return is filed then there could be no tax due within the meaning of section 27(1) of the said Act read with section 21(3) thereof. The tax which is ultimately assessed is the tax which becomes due on assessment and if this tax so assessed is not paid even after the demand is raised then the dealer would be deemed to be in default and would be liable to pay interest under section 27(2) of the said Act. But till such tax is assessed no interest can be levied on such a dealer, who has not filed a return under section 27(1) of the said Act."

30. The issue whether the petitioner is liable to pay interest on the taxes assessed under Section 23 of the Act from the date of submission of the return is thus covered by the decision of this court in the case of **Pure Drinks (New Delhi) Ltd.** (supra) and has to be answered in the negative.

31. Consequently, the impugned order, to the limited extent it requires the petitioner to pay interest under section 27(1) of the said Act, is set aside. The reference is answered in favour of the petitioner to the aforesaid extent. There shall be no order as to costs.

ILR (2013) III DELHI 2321
ITA

COMMISSIONER OF INCOME TAX-III ....APPELLANT

VERSUS

SUREN INTERNATIONAL PVT. LTD. ....RESPONDENT

(BADAR DURREZ AHMED & VIBHU BAKHRU, JJ.)

ITA NO. 289/2012 DATE OF DECISION: 07.05.2013

Income Tax Act, 1961—Section 148—Assessee filed its return of income on 31.03.2003 w.r.t the assessment year 2002-03—On scrutiny of the books of account of the assessee, which revealed that he had received a sum of Rs. 4,82,01,000/- as share application money from various persons and same was outstanding, pending allotment of shares, the Assessing Officer conducted a detailed inquiry to determine the genuineness of the transactions relating to the share applications and vide order dated 30.03.2005 concluded that a sum of Rs. 42 lacs on account of share application money was liable to be taxed as unexplained credit in the books of account u/s 68 of the act—The said assessment was carried in appeal and CIT in the light of the evidence produced before it, deleted the additions made by the Assessing Officer to the extent of Rs. 37 lacs—On 25.03.2009 Assessing Officer again issued notice dated 25.03.2009 u/s 148 of the Act, seeking to reassess the income of the assessee pertaining to the assessment year 2002-03, on the basis of a statement of one person recorded on 25.09.2004, that he had been providing accommodation entries to the assessee and on the basis that information had also been received that goods of the assessee had been seized by DRI and penalty of Rs. 2 crore had been levied by Commissioner, Customs—

Based on the said reassessment proceedings, vide order dated 24.12.2009 Assessing Officer made an addition of app. Rs. 4 crores 75 lacs in relation to the share application and another amount of Rs. 3 crore 46 lacs on the alleged ground of concealment of goods—On appeal CIT upheld the order of the Assessing Officer but on further appeal Tribunal held reassessment proceedings as illegal and without jurisdiction. Held:- It is well settled that in order to reopen an assessment by invoking the provisions of Section 147 of the Act, after a period of four years from the end of the relevant assessment year, in addition to the Assessing Officer (AO) having reason to believe that any income had escaped assessment, it must also be established that the income had escaped assessment on account of the assessee failing to make returns under Section 139 or on account of failure on the part of the assessee to disclose, fully and truly, the necessary material facts. In the reasons furnished by the AO there is neither any allegation that the assessee had failed to make any disclosure at the time of assessment nor the same can be inferred in view of the fact that a detailed inquiry with regard to the genuineness of the transactions in relation to the share application money, had been conducted by the AO in the first round of assessment and therefore it was not open for the AO to reopen the assessment. Further in view of the failure on part of the AO to record a belief that some income had escaped assessment on account of seizure of certain goods of the assessee by the DRI, the said seizure or the penalty levied by DRI cannot also be stated to be a reason for reopening of the assessment.

Having stated the above, we are also unable to accept the contention that there has been failure on the part of the assessee to disclose all material facts in his return as, first of all, there is no such allegation in the reasons as furnished to the assesse; secondly, we cannot ignore the fact that the

enquiry into the share application money had been conducted in detail by the Assessing Officer in the first round of assessment. Having framed his assessment after enquiry into the identity, genuineness and the creditworthiness of the share applicants, it would not be open for the Assessing Officer to re-examine the same without there being any material allegation of failure, on the part of the assesse, to make a full and true disclosure. It is well-settled that in order to invoke the provisions of Section 147 of the Act, after a period of four years from the end of the relevant assessment year, in addition to the Assessing Officer having reason to believe that any income has escaped assessment, it must also be established that the income has escaped assessment on account of the assessee failing to make returns under Section 139 or on account of failure on the part of the assessee to disclose, fully and truly, the necessary material facts. This Court in the case of **Wel Intertrade P. Ltd. & Anr. v. ITO:** (2009) 308 ITR 22 (Del) and **Haryana Acrylic Manufacturing Company v. CIT &Anr.:** (2009) 308 ITR 38 (Del) held that it would not be open for the Assessing Officer to reopen the assessment already done beyond the period of four years unless the income has escaped assessment on account of failure, on the part of the assesse, to disclose all the material facts. In the case of **Wel Intertrade P. Ltd.** (supra) it has been held as under:

> "A plain reading of the said proviso makes it more than clear that where the provisions of section 147 are being invoked after the period of four years from the end of the relevant assessment year, in addition to the Assessing Officer having reason to believe that any income chargeable to tax has escaped assessment, it must also be established as a fact that such escapement of assessment has been occasioned by either the assessee failing to make a return under section 139, etc., or by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, for that

assessment year. In the present case, the question of making of a return is not in issue and the only question is with regard to the second portion of the proviso, which relates to failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Insofar as this precondition is concerned, there is not a whisper of it in the reasons recorded by the Assessing Officer. In fact, as indicated above, the Assessing Officer could not have made this a ground because the Assessing Officer had required the petitioner to furnish details with regard to loss occasioned by foreign exchange fluctuation which the petitioner did by virtue of the reply dated February 5, 2002. Since the petitioner had fully and truly disclosed all the material facts necessary for the assessment, the pre-condition for invoking the proviso to section 147 of the said Act had not been satisfied.

In this connection, it may be relevant to note one decision, although there are several others. The said decision is that of the Punjab and Haryana High Court in the case of Duli Chand Singhania v. Asstt. CIT : (2004) 269 ITR 192. In the said decision, the High Court of Punjab and Haryana was faced with a similar situation. The court noted that there was not even a whisper of an allegation that the escapement in income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. The court observed that absence of this finding, which is the sine qua non for assuming jurisdiction under section 147 of the Act in a case falling under the proviso thereto, makes the action taken by the Assessing Officer wholly without jurisdiction. We agree with these observations of the Punjab and Haryana High Court and are of the view that in the present case also, the Assessing Officer has acted wholly without jurisdiction. The invocation of section 147, the issuance of the notice under section

148 and the subsequent order on the objections are all without jurisdiction. The impugned notice as well as the proceedings pursuant thereto are quashed."

(Para 15)

In the reasons as furnished by the Assessing Officer, we find that there is neither any allegation that the assessee had failed to truly disclose any material facts at the time of assessment, nor can we readily infer the same in view of the fact that a detailed enquiry had been conducted by the Assessing Officer with regard to the identity and creditworthiness of the share-applicants and genuineness of the transactions in relation to the share application money received by the assessee. Further the mere statement that the DRI has seized certain goods of the assessee and levied a penalty also cannot be stated to be a reason for reopening of assessment of the assessee as the said statement made is neither followed by the recording of a belief that the income escaped on that count or that the assessee has failed to disclose all relevant material, fully and truly, at the stage of the first assessment. **(Para 16)**

Important Issue Involved: In order to invoke the provisions of section 147 of the Income Tax Act, for reopening an assessment, it is mandatory that the Assessing Officer must record a belief not only that some income had escaped assessment, but it was on account of the failure of the assessee to make returns or to disclose, fully and truly, the necessary material facts that the income had escaped assessment.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Amol Sinha, Sr. Standing Counsel with Mr. Deepak Anand, Mr. Anshum Jain & Mr. Rahul Kochar, Advocates.

FOR THE RESPONDENT : Mr. S. Krishnan, Advocate.

CASES REFERRED TO:

1. *Wel Intertrade P. Ltd. & Anr.* vs. *ITO:* (2009) 308 ITR 22 (Del).
2. *Haryana Acrylic Manufacturing Company* vs. *CIT &Anr.*: (2009) 308 ITR 38 (Del).

RESULT: Appeal Dismissed.

VIBHU BAKHRU, J.

1. This appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the said Act") has been filed on behalf of the revenue challenging the order dated 23.12.2011 passed by the Income Tax Appellate Tribunal, in ITA No. 2941/D/2010, pertaining to the assessment year 2002-03. The Tribunal has, by its order dated 23.12.2011, quashed the proceedings initiated, by the Assessing Officer, on the basis of a notice under Section 148 of the said Act issued for reopening the assessment pertaining to the said assessment year 2002-03. The notice under Section 148 of the said Act was issued on 25.03.2009 which is beyond the period of 4 years from the end of the relevant assessment year. The Tribunal held that as there has been no failure on the part of the assessee to disclose material facts and the same is also not alleged either in the notice under Section 148 or in the reasons recorded for initiating reassessment proceedings, the reassessment proceedings are illegal and without jurisdiction. In absence of failure, on the part of the assesse, to disclose fully and truly all material facts necessary for the proceedings, the Assessing Officer would lack the jurisdiction to initiate reassessment proceedings. Consequently, the Tribunal has quashed the reassessment order.

2. The challenge on the part of the revenue to the order passed by the Tribunal has to be considered in light of the following facts.

3. The assessee filed its return of income on 31.03.2003 declaring an income of Rs. 30,18,779/-. The said return was initially accepted under Section 143(1) on 30.05.2003. However, subsequently on 20.10.2003, the same was taken up for scrutiny. The balance sheet and the books of account of the assessee disclosed that, during the relevant previous year, the assessee had received an aggregate sum of Rs. 4,82,01,000/- as share application money from various persons and the

same was outstanding, pending allotment of shares. The Assessing Officer issued a detailed questionnaire to inquire into the said share application money and sought details of the share applicants who had paid the share application money to the assessee company. The Assessing Officer thereafter conducted an inquiry to determine the genuineness and creditworthiness of the transactions relating to the share applications. The assessee produced confirmations from the concerned share applicants during the course of the assessment proceedings. In order to make further inquiries, the Assessing Officer issued summons under Section 131 of the Act to 25 parties from whom the share application money had been received. Initially, some of the summons were received back unserved and the assessee was asked to furnish fresh addresses, which were provided by the assessee. However even thereafter summons to certain persons were received back and the assesse again provided a fresh set of addresses with respect to those persons. The hearings for examining the noticees under Section 131 were fixed on 07.03.2005, 22.03.2005 and 23.03.2005. One of the persons examined under Section 131 declined to acknowledge any relationship with the assessee and consequently the amount of share application money deposited by the said party amounting to Rs. 5,00,000/ was added as income in the hands of the assesse, as unexplained credit in the books of accounts, in terms of Section 68 of the Income Tax Act. Whilst some of the parties to whom summons under section 131 were issued remained unserved, in certain other cases the share-applicants did not come forward on the scheduled dates of hearing for being examined. The Assessing Officer, thereafter, concluded that a sum of Rs. 42,00,000/- on account of share application money was liable to be taxed as unexplained credit in the books of accounts under Section 68 of the Income Tax Act.

4. The assessment made by the Assessing Officer by the order dated 30.03.2005 was carried in appeal by the assessee. The assessee contested the assessment made by the Assessing Officer and in support of his contentions furnished letters of confirmation, photocopies of share application forms, photocopies of income tax returns, balance sheets, pan cards and bank statements of the share applicants in respect of whom the additions were made in the assessment order dated 30.03.2005. The assessee further produced evidence to show that in some cases, the share application money had since been refunded. The CIT (Appeals) forwarded the additional evidence produced by the assessee to the Assessing Officer for examining the same and furnishing a report thereon.

The Assessing Officer submitted a report dated 07.10.2005 reiterating the issues mentioned in the assessment order. The CIT (Appeals) concluded that some of the persons to whom summons had been issued could not appear before the Assessing Officer due to paucity of time and, in the light of the subsequent evidence, deleted the additions made by the Assessing Officer to the extent of Rs. 37 lacs. The addition of Rs. 5 lacs in relation to the share applicant who had categorically stated that she had no link with the assesse was upheld by the CIT(A).

5. It can be seen from the above facts that the assessee furnished all particulars relating to the share application money including confirmations from the share applicants as well as other evidence in relation to those persons, who the Assessing Officer had found to be suspect.

6. It is the case of the revenue that during certain investigation proceedings, a statement of one Shri Deepak Gupta was recorded on 25.09.2004 (that is, while the assessment proceedings were still pending). Shri Deepak Gupta has allegedly admitted that he was providing accommodation entries to the assessee. It has been contended on behalf of the revenue, that based on the statement made by the said Deepak Gupta, the Assessing Officer came to believe that income during the relevant previous year had escaped assessment and the Assessing Officer issued the notice dated 25.03.2009 under Section 148 of the Act, seeking to reassess the income of the assessee under Section 147 of the Act. The assessee requested for the reasons for issuance of notice under Section 148 of the said Act which were furnished by the Assessing Officer. The assessee objected to the reasons, however the same were rejected by the Assessing Officer.

7. The reasons for issuance of the notice under Section 148, inter alia, alleged that the assessee had taken certain accommodation entries. The reasons for reopening of the assessment proceedings furnished by the Assessing Officer are as under :-

> "12.03.2009 Reasons for issue of notice u/s 148 in the case of M/s Suren International Pvt. Ltd AY 2002-03
>
> Return in this case was filed at an income of Rs. 10,74,990 on 29.10.2002
>
> Enquiries were conducted by the Investigation Wing of the Dept. In this inquiry it was found that one Mr Deepak Gupta S/o Late

Shri J.N. Gupta R/o Shastri Nagar, Delhi 110052 was indulging in providing accommodation entries. In his statement recorded on 25/09/2004, he has admitted that he takes cash from various parties and gives them DD/Cheque by charging his commission. This DD/Cheque is then introduced by these parties as share Capital or Loan in their books of accounts.

M/s Suren International Pvt Ltd has taken following accommodation entries from the accounts operated by Deepak Gupta which have been credited in its account with BOP, Karol Bagh Branch in A.Y 2002-03, THE DETAILS ARE GIVEN BELOW:

VALUE OF ENTRY TAKEN	INSTRU-MENT NO BY WHICH ENTRY TAKEN	DATE ON WHICH ENTRY TAKEN	NAME OF ACCOUNT HOLDER OF ENTRY GIVING ACCOUNT	BANK FROM WHICH ENTRY GIVEN	BRANCH OF ENTRY GIVING BANK	A/C NO ENTRY GIVING ACCO-UNT
500000		26-JUL-01	B.I.C. CONSULT ANT S P LTD	SBP	DG	50088
500000		26-JUL-01	—DO—	DO—	DO-	50088
500000		26-JUL-01	—DO—	DO—	DO-	50088
500000		26-JUL-01	—DO—	DO—	DO-	50088
500000		26-JUL-01	—DO—	DO—	DO-	50088
500000		26-JUL-01	—DO—	DO—	DO-	50088
500000	495673	21-JUL-01	DINANAT H LAHURIW ALA	OBC	MINTO ROAD	19
500000	495673	21-JUL-01	—DO—	DO—	DO	19
500000	495673	21-JUL-01	—DO—	DO—	DO	19
500000	495673	21-JUL-01	—DO—	DO—	DO	19
500000	495673	21-JUL-01	—DO—	DO—	DO	19
500000	495673	21-JUL-01	—DO—	DO—	DO	19
500000	495673	21-JUL-01	—DO—	DO—	DO	19

250000	142208	30-JUN-01	DINESH GUPTA	JAILA-XMI COOP BANK	FATE-HPURI	11246
250000	142208	30-JUN-01	—DO—	DO—	DO	11246
250000	142208	30-JUN-01	—DO—	DO—	DO	11246
250000	142208	30-JUN-01	—DO—	DO—	DO-	11246
250000	142208	30-JUN-01	—DO—	DO—	DO-	11246
250000	142208	30-JUN-01	—DO—	DO—	DO-	11246
500000	257601	6-JUL-01	ENPOL (PVT)	DO—	DO-	3340
500000	257601	6-JUL-01	—DO—	DO—	DO-	3340
500000	257601	6-JUL-01	—DO—	DO—	DO-	3340
500000	257601	6-JUL-01	—DO—	DO—	DO-	3340
500000	257601	6-JUL-01	—DO—	DO—	DO-	3340
500000	257601	6-JUL-01	—DO—	DO—	DO-	3340
450000	499344	24-MAY-01	LAND MARK COMMUNI CATION PVT LTD	DO—	DO-3194	
450000	499344	24-MAY-01	—DO—	DO—	DO-	3194
450000	499344	24-MAY-01	—DO—	DO—	DO-	3194
450000	499344	24-MAY-01	—DO—	DO—	DO-	3194
450000	499344	24-MAY-01	—DO—	DO—	DO-	3194
450000	499344	24-MAY-01	—DO—	DO—	DO-	3194
500000	145084	02-JUL-01	LEELA DHAR	DO—	DO-	8644
500000	145084	02-JUL-01	—DO—	DO—	DO-	8644
500000	145084	02-JUL-01	—DO—	DO—	DO-	8644
500000	145084	02-JUL-01	—DO—	DO—	DO-	8644
500000	145084	02-JUL-01	—DO—	DO—	DO-	8644
500000	145084	02-JUL-01	—DO—	DO—	DO-	8644

500000	329725	30-JUN-01	MANO-HAR LAL MANISH KUMAR	DO—	DO-	1556	A
500000	329725	30-JUN-01	—DO—	DO—	DO-	1556	B
500000	329725	30-JUN-01	—DO—	DO—	DO-	1556	
500000	329725	30-JUN-01	—DO—	DO—	DO-	1556	
500000	329725	30-JUN-01	—DO—	DO—	DO-	1556	C
500000	329725	30-JUN-01	—DO—	DO—	DO-	1556	
480000	269479	18-MAY-01	PROFAN FINANCE & INVEST-MENT LTD	IND BAK	CH CHOK	5035	D
480000	269479	18-MAY-01	—DO—	DO—	DO-	5035	
480000	269479	18-MAY-01	—DO—	DO—	DO-	5035	
480000	269479	18-MAY-01	—DO—	DO—	DO-	5035	E
480000	269479	18-MAY-01	—DO—	DO—	DO-	5035	
480000	269479	18-MAY-01	—DO—	DO—	DO-	5035	
500000	311122	18-JUL-01	SUMA FINANCE INVEST-MENT LTD.	CORPN	KB	2919	F
500000	311122	18-JUL-01	—DO—	DO—	DO-	2919	
500000	311122	18-JUL-01	—DO—	DO—	DO-	2919	G
500000	311122	18-JUL-01	—DO—	DO—	DO-	2919	
500000	311122	18-JUL-01	—DO—	DO—	DO-	2919	
500000	311122	18-JUL-01	—DO—	DO—	DO-	2919	
500000	311122	18-JUL-01	—DO—	DO—	DO-	2919	H
500000	311122	18-JUL-01	—DO—	DO—	DO-	2919	
500000	311122	18-JUL-01	—DO—	DO—	DO-	2919	
250000	135415	30-JUN-01	SUSHIL GOYAL	JAILA-XMI COOP BANK	FATE HPURI	10081	I
250000	135415	30-JUN-01	—DO—	DO—	DO-	10081	

250000	135415	30-JUN-01	—DO—	DO—	DO-	10081	A
250000	135415	30-JUN-01	—DO—	DO—	DO-	10081	
250000	135415	30-JUN-01	—DO—	DO—	DO-	10081	
250000	135415	30-JUN-01	—DO—	DO—	DO-	10081	B
500000	503258	27-JUL-01	SWETU STONE P. LTD.	OBC	MINTO ROAD	33	
500000	503258	27-JUL-01	—DO—	DO—	DO-	33	C
500000	503258	27-JUL-01	—DO—	DO—	DO-	33	
500000	503258	27-JUL-01	—DO—	DO—	DO-	33	
500000	503258	27-JUL-01	—DO—	DO—	DO-	33	
500000	503258	27-JUL-01	—DO—	DO—	DO-	33	D
500000		25-JUL-01	TECNO-COM ASSOCI-ATES PVT.	SBP	DG	50060	
500000		25-JUL-01	—DO—	DO—	DO-	50060	E
500000		25-JUL-01	—DO—	DO—	DO-	50060	
500000		25-JUL-01	—DO—	DO—	DO-	50060	
500000		25-JUL-01	—DO—	DO—	DO-	50060	F
500000		25-JUL-01	—DO—	DO—	DO-	50060	
500000	145067	02-JUL-01	VIPIN KUMAR	JAILA-XMI COOP BANK	FATEH-PURI	9378	G
500000	145067	02-JUL-01	—DO—	DO—	DO-	9378	
500000	145067	02-JUL-01	—DO—	DO—	DO-	9378	H
500000	145067	02-JUL-01	—DO—	DO—	DO-	9378	
500000	145067	02-JUL-01	—DO—	DO—	DO-	9378	
500000	145067	02-JUL-01	—DO—	DO—	DO-	9378	
3,65,80,000	TOTAL AMOUNT						I

In this case information have been received that their goods have been seized by DRI and also penalty of Rs 2 Crores is levied by Commissioner Customs (ICD).

From the above details and the Statement of Mr. Deepak Gupta who has admitted that he has not carried out any business activity accept that of providing accommodation entries as described above that of providing accommodation entries as described above, it is seen that the assesee has diverted its own money into the business by way of taking accommodation entries. Thus the amounts stated in table above taxable u/s 68 of the Act and hence, I have reason to believe that an amount of Rs 3,65,80,000/-has escaped assessment within the meaning of section 147 of the IT Act 1961.

Since 4 years have been elapsed, the assessment record is being submitted for kind perusal and approval of the Commissioner of Income-Tax, Delhi-III, New Delhi according to section 151 (1) of the IT Act, 1961 for issuance of notice u/s 148 of I.T. Act.

-sd/
(D.D. YADAV)
Asstt. Commissioner of Income Tax
Circle 9(1), New Delhi"

8. The alleged accommodation entries, tabulated in the reasons for issuance of the notice under section 148, totaling Rs. 3,65,80,000/- formed the basis of initiating the reassessment proceedings. The Assessing Officer recorded that he had reason to believe that the amount of Rs. 3,65,80,000/-has escaped assessment. It is relevant to state that the reasons as furnished by the Assessing Officer, first of all, did not disclose any allegation that the assessee had failed to make any disclosure for the purposes of the assessment. Secondly, it would be pertinent for us to mention that a bare perusal of the entries listed in the table forming a part of the reasons indicate that most of the entries have been repeated six times to form the total of Rs. 3,65,80,000/-. The Assessing Officer has thus made an addition on the basis of certain set of alleged entries which ex facie include the same entries which have been repeated multiple times to arrive at the figure of Rs. 3,65,80,000/-. This is clearly evident from the fact that the details of instruments through which payments are alleged to have been made are also similar.

9. We may also add that although the said reasons as furnished by

the Assessing Officer contain a statement that information had been received that certain goods of the assessee had been seized by DRI and penalty had been levied by Commissioner Customs (ICD), there is no allegation that any income had escaped assessment on that count and thus the only reason for initiating proceedings under Section 147/148 are the alleged accommodation entries purportedly totaling Rs. 3,65,80,000/-.

10. The Assessing Officer once again commenced inquiries with regard to the amount received by the assessee as share application money, in the reassessment proceedings and concluded that the identity, creditworthiness of the share applicants and the genuineness of the transactions in relation to share application money totaling a sum of Rs. 4,75,01,000/-was not established and accordingly made an addition of the said amount. The Assessing Officer made a further addition of Rs. 3,46,00,000/- to the income of the assesse on the alleged ground of concealment of goods. The order of reassessment dated 24.12.2009 was carried in appeal by the assessee, however the same was dismissed by the CIT (Appeals) by an order dated 25.03.2010.

11. The assessee thereafter preferred an appeal before the Tribunal against the order dated 25.03.2010 passed by the CIT (Appeals), inter alia, on the ground that the reassessment proceedings were based on change of opinion and the same were initiated without there being a reason to believe that income had escaped assessment. The Tribunal allowed the appeal holding that no omission or failure to disclose all material facts, fully and truly, on the part of the assesse, was alleged and consequently the reassessment proceedings were illegal and without jurisdiction.

12. The Tribunal also noted that the statement of Shri Deepak Gupta was recorded on 25.03.2004 that is, prior to the framing of the first assessment and subsequently the matter had traversed its course in appeal before the CIT(A). The Tribunal also noted that a sum of Rs. 3,59,85,000/- had also been stated to be refunded by the assessee to the share applicants. The Tribunal concluded that the conditions for reopening the assessment under Section 147 were not satisfied and hence, the reassessment proceedings initiated pursuant to the notice dated 25.03.2009 were illegal and quashed the same by the impugned order.

13. We have heard counsels for the parties at length.

14. The learned counsel for the appellant contended that even though there is no specific allegation that the assessee had failed to disclose all

the material facts but the same can be gleaned from the reasons itself. We are unable to accept this contention. In the first instance, we do not find the reasons as recorded by the Assessing Officer to be reasons in law, at all. A bare perusal of the table of alleged accommodation entries included in the reasons as recorded, discloses that the same entries have been repeated six times. This is clearly indicative of the callous manner in which the reasons for initiating reassessment proceedings are recorded and we are unable to countenance that any belief based on such statements can ever be arrived at. The reasons have been recorded without any application of mind and thus no belief that income has escaped assessment can be stated to have been formed based on such reasons as recorded.

15. Having stated the above, we are also unable to accept the contention that there has been failure on the part of the assessee to disclose all material facts in his return as, first of all, there is no such allegation in the reasons as furnished to the assesse; secondly, we cannot ignore the fact that the enquiry into the share application money had been conducted in detail by the Assessing Officer in the first round of assessment. Having framed his assessment after enquiry into the identity, genuineness and the creditworthiness of the share applicants, it would not be open for the Assessing Officer to re-examine the same without there being any material allegation of failure, on the part of the assesse, to make a full and true disclosure. It is well-settled that in order to invoke the provisions of Section 147 of the Act, after a period of four years from the end of the relevant assessment year, in addition to the Assessing Officer having reason to believe that any income has escaped assessment, it must also be established that the income has escaped assessment on account of the assessee failing to make returns under Section 139 or on account of failure on the part of the assessee to disclose, fully and truly, the necessary material facts. This Court in the case of **Wel Intertrade P. Ltd. & Anr. v. ITO:** (2009) 308 ITR 22 (Del) and **Haryana Acrylic Manufacturing Company v. CIT &Anr.:** (2009) 308 ITR 38 (Del) held that it would not be open for the Assessing Officer to reopen the assessment already done beyond the period of four years unless the income has escaped assessment on account of failure, on the part of the assesse, to disclose all the material facts. In the case of **Wel Intertrade P. Ltd.** (supra) it has been held as under:

> "A plain reading of the said proviso makes it more than clear that where the provisions of section 147 are being invoked after the period of four years from the end of the relevant assessment year, in addition to the Assessing Officer having reason to believe

> that any income chargeable to tax has escaped assessment, it must also be established as a fact that such escapement of assessment has been occasioned by either the assessee failing to make a return under section 139, etc., or by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, for that assessment year. In the present case, the question of making of a return is not in issue and the only question is with regard to the second portion of the proviso, which relates to failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Insofar as this precondition is concerned, there is not a whisper of it in the reasons recorded by the Assessing Officer. In fact, as indicated above, the Assessing Officer could not have made this a ground because the Assessing Officer had required the petitioner to furnish details with regard to loss occasioned by foreign exchange fluctuation which the petitioner did by virtue of the reply dated February 5, 2002. Since the petitioner had fully and truly disclosed all the material facts necessary for the assessment, the pre-condition for invoking the proviso to section 147 of the said Act had not been satisfied.
>
> In this connection, it may be relevant to note one decision, although there are several others. The said decision is that of the Punjab and Haryana High Court in the case of Duli Chand Singhania v. Asstt. CIT : (2004) 269 ITR 192. In the said decision, the High Court of Punjab and Haryana was faced with a similar situation. The court noted that there was not even a whisper of an allegation that the escapement in income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. The court observed that absence of this finding, which is the sine qua non for assuming jurisdiction under section 147 of the Act in a case falling under the proviso thereto, makes the action taken by the Assessing Officer wholly without jurisdiction. We agree with these observations of the Punjab and Haryana High Court and are of the view that in the present case also, the Assessing Officer has acted wholly without jurisdiction. The invocation of section 147, the issuance of the notice under section 148 and the subsequent order on the objections are all without jurisdiction. The impugned notice as well as the proceedings pursuant thereto are quashed."

16. In the reasons as furnished by the Assessing Officer, we find that there is neither any allegation that the assessee had failed to truly disclose any material facts at the time of assessment, nor can we readily infer the same in view of the fact that a detailed enquiry had been conducted by the Assessing Officer with regard to the identity and creditworthiness of the share-applicants and genuineness of the transactions in relation to the share application money received by the assessee. Further the mere statement that the DRI has seized certain goods of the assessee and levied a penalty also cannot be stated to be a reason for reopening of assessment of the assessee as the said statement made is neither followed by the recording of a belief that the income escaped on that count or that the assessee has failed to disclose all relevant material, fully and truly, at the stage of the first assessment.

17. We, accordingly, do not find any merit in the present appeal and no substantial question of law has been raised for our consideration. The present appeal is, accordingly, dismissed. Parties are left to bear their own costs.

ILR (2013) III DELHI 2337
FAO (OS)

WEIZMANN LTD. ....APPELLANT

VERSUS

SHOES EAST LTD. & ORS. ....RESPONDENTS

(SANJAY KISHAN KAUL, RAJIV SHAKDHER & SURESH KAIT, JJ.)

FAO (OS) NO. : 364/2011 DATE OF DECISION: 16.05.2013

Code of Criminal Procedure, 1973—Section 340—Arbitration Act, 1940—Section 20—Several litigations ensued between appellant between appellant and respondent no.1 over business dealings—Respondent

no.1 has also filed petition U/s 20 of Arbitration Act and settlement was arrived between appellant and respondent no.1—On account of the settlement, evidently all proceedings between them came to an end—Though two years later, appellant initiated proceedings U/s 340 of New Code alleging a previous agreement arrived between them was fabricated, forged and ante-dated document—Petition U/s 340 was dismissed by Ld. Single Judge—Aggrieved appellant preferred appeal to Division Bench—However, appeal was referred to a Larger Bench in view of judgment rendered by Division Bench of the Court in another matter wherein view was taken "an appeal under clause 10 of the Letter Patent is not available to an aggrieved party to assail an order passed on an application filed U/s 340 of the Code of Criminal Procedure, 1973"—The Larger Bench, thus, was seized of the question:- 'Does a Court while taking decision on application U/s 340 of New Code exercise criminal jurisdiction'. Held:- The formation of opinion U/s 340 of New Code is not in exercise of criminal jurisdiction. The decision taken on an application under Section 340 of the New Code, involves only a formation of an opinion as to whether or not a complaint should be filed. At the stage of formation of such an opinion, the Court does not exercise criminal jurisdiction.

Having regard to the above, under clause 10 of the Letters Patent, an appeal would lie from a judgment of the Single Judge to the Division Bench, except that which is passed in revisional jurisdiction, in exercise of power of superintendence, or in criminal jurisdiction. As discussed above, the formation of opinion under Section 340 of the New Code, is not in exercise of criminal jurisdiction. This is certainly not a case where the Single Judge exercised its power of superintendence qua a judgment passed in exercise of appellate jurisdiction in respect of decree or order passed by a court exercising appellate jurisdiction. This case is also

not a case where, the learned Single Judge exercised revisional jurisdiction. Therefore, in our view, an appeal would lie to the Division Bench under the Letters Patent. That the formation of an opinion is a judgment, in our view, is discernible from the principles laid down by the Supreme Court in **Shah Babulal Khimji vs Jayaben D. Kania** (1981) 4 SCC 8. In our view, a decision either way on an application filed under Section 340 of the New Code decides valuable rights of parties and, therefore, an appeal would lie under clause 10 of the Letters Patent, as applicable to this Court. **(Para 32.3)**

Important Issue Involved: The information of opinion U/s 340 of New Code is not in exercise of criminal jurisdiction. The decision taken on an application under Section 340 of the New Code, involves only a formation of an opinion as to whether or not a complaint should be filed. At the stage of formation of such an opinion, the Court does not exercise criminal jurisdiction.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. M.L. Sharma & Ms. Suman, Advocates.

FOR THE RESPONDENT : Mr. Pavan Sachdeva, (Adv.) MD of the Respondent. Mr. A'S. Chandhiok, ASG with Mr. Ritesh Kumar, Mr. Sidharth Tyagi, Ms. Shweta Gupta, Ms. Honey Kumari, Ms. Mallika Ahluwalia & Mr. Prabhjeet Singh, Advocates. Dr. Arun Moha, Amicus Curiae (sr. Advocate) with Mr. Arvind Bhatt, Advocate.

CASES REFERRED TO:

1. *Jaswinder Singh Geetanjali Singh & Anr.* vs. *Mrigendra Pritam Vikramsingh Steiner* 2013 (196) DLT 1 (FB).

2. *Ramesh Jaiswal* vs. *Semjeet Singh Brar & Ors.* 2012 (131) DRJ 479.
3. *Fuerst Day Lawson Ltd.* vs. *Jindal Exports* (2011) 8 SCC 333.
4. *C'S. Agarwal* vs. *State* 2011 (125) DRJ 241 (FB).
5. *Indian Structural Engineering Company (P) Ltd.* vs. *Pradip Kumar* 2009 Cri. L.J. 4229.
6. *Rugmini Ammal* vs. *V. Narayana Reddiar* AIR 2008 SC 895.
7. *Dr. Subir Kumar Ghosh* vs. *Prasar Bharti Broadcasting Corporation of India* 2006 Cri.L.J. 4109.
8. *Iqbal Singh Marwah* vs. *Meenakshi Marwah* (2005) 4 SCC 370.
9. *Abdul Karim Haji Zaveri* vs. *District Magistrate* 2005 Cri.L.J. 1651.
10. *P'S. Sathappan* vs. *Andhra Bank Ltd.* (2004) 11 SCC 672.
11. *Sri Chand* vs. *State of U.P.* 2003 Cri.L.J. 4094.
12. *Pritish* vs. *State of Maharashtra* (2002) 1 SCC 253.
13. *Gangaram Kandaram* vs. *Sunder Chhkha Amin & Ors.* 2000 (2) ALT 448.
14. *V. Narayana Reddiar* vs. *Rugmini Ammal* 2000 (3) KLT 301.
15. *M/s Bajrang Lal Laxmi Narain Dadli Regd. Partnership firm, Deedwana* vs. *Jeetmal* 2000 (2) WLN 319.
16. *Sachida Nand Singh & Anr.* vs. *State of Bihar* 1998 Crl L.J. 1565.
17. *Vinita M. Khanolkar* vs. *Pragna M. Pai* 1998 (1) SCC 500.
18. *Jose Kuruvinakunnel* vs. *A.T. Jose* 1997 Cri.L.J. 816.
19. *Chennapa* vs. *Basappa* (1984) 1 KLJ 204.
20. *Hurrish Chunder Chowdhry* vs. *Kali Sundari Debia* (1882-83) 10 Ind. Appl. 4.

21. *Shah Babulal Khimji* vs. *Jayaben D. Kania* (1981) 4 SCC 8.
22. *K. Karunakaran* vs. *T.V. Eachara Warrier & Anr.* (1978) 1 SCC 18.
23. *Nimmakayala Audi Narrayanamma* vs. *State of Andhra Pradesh* AIR 1970 AP 119.
24. *Mt. Rampati Kuer & Ors.* vs. *Jadunandan Thakur & Ors.,* AIR 1968 Patna 100 (FB).
25. *Gulab Bhai* vs. *Punia* (1966) 2 SCR 102.
26. *S.A.L. Narayan Row and Anr.* vs. *Ishwarlal Bhagwandas & Anr.* AIR 1965 SC 1818.
27. *Narain Das* vs. *State of Uttar Pradesh* AIR 1961 SC 181.
28. *Swamiappa Mudaliar* vs. *K.R. Ponnammal and Anr.,* AIR 1959 Madras 107 at page 108 paragraph 2.
29. *Kuldip Singh* vs. *State of Punjab,* AIR 1956 SC 391.
30. *M'S. Sheriff* vs. *State of Madras* AIR 1954 SC 397.
31. *A.W. Meads* vs. *Emperor,* AIR 1945 FC 21.
32. *E.P. Kumaravel Nadar* vs. *T.P. Shanmuya Nadar & Ors.* AIR 1940 Madras 465 (FB).
33. *E.P. Kumaravel Nadar* vs. *Shanmuga Nadar* AIR 1940 Mad 465 (FB), AIR 1948 Pat 225 (FB).
34. *Emperor* vs. *Bhattu Sadu Mali,* AIR 1938 Bom 225 (FB).
35. *Mahomed Boyatulla* vs. *Emperor* : AIR 1931 Cal 3.
36. *Surendra Nath Maity* vs. *Susil Kumar Chakrabarty* AIR 1931 Calcutta 604.
37. *Mahendra Nath Das* vs. *Emperor:* AIR 1929 Cal4 28.
38. *Vannia Nainar* vs. *Periasami Naidu* : AIR 1928 Mad 391.
39. *Nasaruddin Khan* vs. *Emperor:* AIR 1927 Cal 98.
40. *Hamid Ali* vs. *Madhu Sudan Das :* AIR 1927 Cal 284.
41. *K.V. Muniswamy Mudaliar* vs. *Rajaratnam Pillai & Ors.* AIR 1922 Mad 495 (FB).
42. *Emperor* vs. *Har Prasad Das* [1913] 40 Cal. 477.

43. *Har Prasad Das* vs. *Emperor* 1913 (14) Cri.L.J.R 197.
44. *Salig Ram* vs. *Ramji Lal,* ILR (1906) All 554.
45. *Emperor* vs. *Har Prasad Das,* ILR 40 Cal 477.

RESULT: Reference answered accordingly.

RAJIV SHAKDHER, J.

1. This appeal has been referred to a Larger Bench in view of the judgment rendered by a Division bench of this court in the case of **Ramesh Jaiswal vs Semjeet Singh Brar & Ors.** 2012 (131) DRJ 479; wherein the view taken is that, an appeal under clause 10 of the Letters Patent is not available to an aggrieved party to assail an order passed on an application filed under Section 340 of the Code of Criminal Procedure, 1973[1] (hereinafter referred to as the New Code) as it is an order passed in exercise of criminal jurisdiction. There can be no doubt that if it is so then, on a plain reading of clause 10 read with clause 18 of the Letters Patent no appeal shall lie to the Division Bench. The question therefore is: does a court while taking a decision on application under section 340 of the New Code, exercise criminal jurisdiction.

2. It is pertinent to note that, prior to the constitution of a Larger Bench, the Division Bench was called upon to examine the maintainability of the appeal. The Division Bench at the relevant point of time comprised

1. 340. Procedure in cases mentioned in section 195. (1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub- section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,- (a) record a finding to that effect; (b) make a complaint thereof in writing; (c) send it to a Magistrate of the first class having jurisdiction; (d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non- bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and (e) bind over any person to appear and give evidence before such Magistrate. (2) The power conferred on a Court by sub- section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub- section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub- section (4) of section 195. (3) A complaint made under this section shall be signed,- (a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint; (b) in any other case, by the presiding officer of the Court. (4) In this section," Court" has the same meaning as in section 195.

of Sanjay Kishan Kaul, J and myself.

2.1 The instant appeal though is preferred under Section 10 of the Delhi High Court Act, 1966[2] (in short the 1966 Act) against an order dated 26.05.2011, passed by a Single Judge of this court. The Single Judge vide order dated 26.05.2011, dismissed the appellant's application under Section 340 of the New Code. This application was filed by the appellant in CS (OS) 1299/1997.

2.2 The said suit, in substance, was a petition under Section 20 of the Arbitration Act, 1940 (in short 1940 Act), seeking reference of disputes to arbitration. The petition, under Section 20 of the 1940 Act, was preferred by respondent no. 1, i.e., MS Shoes East Ltd. In the petition, the Delhi Stock Exchange Association Ltd. was arrayed as respondent no.1 while the appellant herein, was impleaded as respondent no.120. The petition was preferred against, 233 respondents. We will be shortly adverting to the reasons which propelled respondent no. 1 to array such a large number of respondents, to the said proceedings.

2.3 It is not in dispute that the issues raised in the petition under Section 20 of the 1940 Act, qua all respondents, were referred for arbitration to a retired judge of this court. Suffice it to say, in so far as the appellant was concerned it arrived at a settlement vide an agreement dated 18.11.2009, with respondent no.1. Consequently, respondent no. 1 withdrew its claims against the appellant. In terms of the settlement, appellant paid a sum of Rs. 9.50 lacs to respondent no. 1 in full and final settlement of all disputes and/or claims. It is not in dispute that respondent no. 1 had received the said sum of money in terms of the aforementioned agreement and that consequent thereto respondent no. 1 withdrew its claim against the appellant.

3. As to why these disputes arose in the first place and came to be referred to an arbitrator for adjudication; is briefly set out hereinafter, in

2. 10. Powers of Judge—(1) Where a single Judge of the High Court of Delhi exercises ordinary original civil jurisdiction conferred by sub-Section (2) of Section 5 on that Court, an appeal shall lie from the judgment of the single Judge to a Division Court of that High Court. (2) Subject to the provisions of sub-section (1), the law in force immediately before the appointed day relating to the powers of the Chief Justice, single Judges and Division Courts of the High Court of Punjab and with respect to all matters ancillary to the exercise of those powers shall, with the necessary modifications, apply in relation to the High Court of Delhi.

order to place in perspective, the reason for initiation of the proceedings under Section 340 of the New Code by the appellant.

3.1 Respondent no. 1, which was inter alia in the business of manufacturing and export of footwear, leather shoes, footwear components etc., took a decision to raise capital via a composite public-cum-private issue, aggregating to a sum of Rs. 6.99 crores. To achieve this end, respondent no.1 decided to float a public issue of 1,75,84,800/- zero unsecured fully convertible debentures of the face value of Rs. 199 each for cash at par which aggregated to a sum of Rs. 349,93,75,200/- . Apparently, this public issue was floated by respondent no.1 to inter alia finance the construction of a five-star and a four-star hotel.

3.2 Accordingly, respondent no. 1 appointed SBI Capital Market Limited as its lead merchant banker. The appellant which, is in the business of merchant banking, amongst others, offered to underwrite the public issue. Evidently, there were other entities as well, which underwrote the public issue. For this purpose, underwriters executed an agreement dated 10.01.1995 with respondent no.1. It is these underwriters (totalling to 233) which were arrayed as respondents to the petition filed under Section 20.

3.3 The public issue evidently opened on 14.02.1995. Since the Registrar to the Issue and its lead manager informed respondent no. 1 that, the issue was fully subscribed; a decision was taken to close the issue on 18.02.1995, which incidentally, was the earliest closing date prescribed for the issue. It is the case of respondent no. 1 that because of propaganda by business rivals, there were large scale withdrawals by applicants. Some of the applicants also, according to respondent no. 1, took steps to stop payment of cheques deposited by them alongwith their respective application forms. The net result of this was that, what was a fully subscribed issue, turned into one which fell below the minimum stipulated subscription (equivalent to 90% of the total value of the issue) as indicated in the prospectus. Consequently, respondent no. 1 was directed by SEBI to refund, the application money; the underwriters having declined to support this issue.

3.4 It is because of this reason that not only did respondent no.1 file a petition under Section 20 of the 1940 Act, but also preferred a

petition under Section 12B of the Monopolies and Restrictive Trade Practices Act, 1969 before the Monopolies and Restricted Trade Practices Commission (as it was then constituted). Consequently, respondent no. 1 lodged a claim for damages, amounting to Rs. 6,28,63,000/- against the appellant alongwith interest at the rate of 24% per annum with the MRTP Commission.

3.5 The appellant, on its part contested these proceedings inter alia on the ground that the liability of an underwriter devolved on it only if the issue was not fully subscribed. Since the issue was fully subscribed, it could not be held liable for subsequent withdrawals of the applications; a situation which occurred on account of the acts of omission and commission of the CMD and Managing Director of respondent no.1, Sh. Pavan Sachdeva. An allegation was also made that respondent no. 1 had artificially maintained the price of its shares, to ensure a greater public response.

4. However, on account of a settlement arrived at between the parties, evidently all proceedings between the two warring parties came to an end.

4.1 The appellant, though two years later, initiated proceedings under Section 340 of the New Code. Accordingly, on 24.01.2011, an application was filed on the ground that the underwriting agreement dated 10.01.1995, which was filed in CS(OS) No. 1299/1997 (i.e., the proceedings under Section 20 of the 1940 Act), was a fabricated, forged and an ante-dated document.

4.2 In order to demonstrate forgery, the appellant sought to rely upon two filings made by respondent no.1, one before the MRTP Commission and the other before the arbitrator alongwith its statement of claim. The appellant attempted to establish forgery before the learned Single Judge by relying upon the fact that while, the agreement filed with the MRTP Commission did not bear the signature of a representative of respondent no. 1 and bore only the signature and stamp appended on behalf of the appellant, the underwriting agreement filed before the learned arbitrator, had all the blank spaces filled in, which included and bore the signatures of the representatives of both the appellant as well as respondent no. 1.

4.3 The learned Single Judge, though was not, persuaded by these

assertions and consequently by order dated 26.05.2011, dismissed the appellant's application.

5. It is in this context that an appeal was preferred to the Division Bench. As indicated earlier, an objection to the maintainability of the appeal was raised by respondent no.2, i.e., Sh. Pavan Sachdeva. This is recorded by the Division bench in its order dated 21.12.2011. By a subsequent order dated 26.03.2012, Sh. Arun Mohan, learned Senior Counsel, was appointed as amicus curiae in the matter. It was only after, the matter had been referred to a Larger Bench on 05.11.2012 that, by an order dated 08.01.2013, Mr A'S. Chandhiok, learned ASG, was called upon to assist the court.

SUBMISSIONS OF COUNSELS/REPRESENTATIVES

6. With this preface in place, we will advert briefly, to the submissions made by counsels as also by Mr Pavan Sachdeva, respondent no.2, in the present proceedings.

7. Mr M.L. Sharma, learned counsel for the appellant, contended that the appeal was maintainable under Section 10 of the 1966 Act notwithstanding the exclusion of the High Court under Section 341 of the New Code[3]. It was his contention that since the application under Section 340 of the New Code was passed in a proceeding concluded under Section 20 of the 1940 Act, whereby an order was passed on 14.03.2007 for referring the disputes to arbitration, the proceedings were in the nature of civil proceedings and would thus be amenable to an appeal.

7.1 Mr. Sharma thus, in effect, made the submission that the view taken by the Division Bench of this Court in Ramesh Jaiswal case, that the proceedings under Section 340 of the New Code were in exercise of

3. 341. Appeal.

(1) Any person on whose application any Court other than a High Court has refused to make a complaint under sub- section (1) or sub- section (2) of section 340, or against whom such a complaint has been made by such Court, may appeal to the Court to which such former Court is subordinate within the meaning of sub- section (4) of section 195, and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint, or, as the case may be, making of the complaint which such former Court might have made under section 340, and if it makes such complaint, the provisions of that section shall apply accordingly.

(2) An order under this section, and subject to any such order, an order under section 340, shall be final, and shall not be subject to revision.

criminal jurisdiction was not in line with view taken in several judgments by other courts. In support of submissions, he relied upon the following judgments: **Har Prasad Das vs Emperor** 1913 (14) Cri.L.J.R 197; **Surendra Nath Maity vs Susil Kumar Chakrabarty** AIR 1931 Calcutta 604; **Kuldip Singh vs State of Punjab & Anr.** AIR 1956 SC 391; **K. Karunakaran vs T.V. Eachara Warrier & Anr.** (1978) 1 SCC 18; **Pritish vs State of Maharashtra** (2002) 1 SCC 253;

8. Dr. Arun Mohan made the submission that while Section 340 of the New Code did .not enable an appeal. in view of the exclusion of the High Court on account of the usage of the expression **'other than the High Court'** inserted in Section 341 of the New Code, it did not also prohibit an appeal, if it was otherwise available to an aggrieved party. We may note that this submission of Dr. Arun Mohan was a refinement over his earlier submission made in the course of the proceedings before us, when he took the position that no appeal was maintainable under Section 341 of the New Code against an order of a Single Judge of the High Court. As a matter of fact, Dr. Arun Mohan did argue at one stage; albeit before the Division Bench, that the issue was no longer res integra in view of the judgment of the Division Bench of this Court in the case of Ramesh Jaiswal, to which we have made a reference above.

8.1 Dr. Arun Mohan thus, sought to contend that, not to enable an appeal, where a court refuses a request to make complaint or makes a complaint under Section 340 of the New Code is not the same thing as saying that the said provision prohibits an appeal. To illustrate the point Dr. Arun Mohan submitted that there are many orders passed by a court which are not appealable under the provisions of Order 43 Rule 1 of the Code of Civil Procedure, 1973 (in short CPC) as they fall outside the purview of clauses (a) to (w) but, would otherwise be appealable, under Section 10 of the 1966 Act, as long as they fulfilled the characteristic of a judgment. In other words, Section 341 of the new Code would not prohibit an appeal if, it is otherwise maintainable under a statute.

8.2 On the other aspect, whether a decision taken on an application under section 340 of the New Code was a decision in exercise of its criminal jurisdiction, Dr. Arun Mohan submitted that it was not so, as that stage would arise, only when, a complaint is referred to the Magistrate and he takes cognizance of the same by issuing process to the accused. In other words, it was his submission that, at the stage at which a court

takes a decision, to either institute a complaint, or not to institute a complaint; there being no adjudication of guilt or innocence of the accused, it would not fall within the exclusionary part of clause 10 of the Letters Patent; which prohibits appeals, where a court exercises criminal jurisdiction. The submission was thus, that the court, at that juncture will only decide whether it is expedient in the interest of justice to initiate an inquiry against the person qua whom, the application under Section 340 of the New Code is directed. The decision is one relating to the protection of the court's process and not to adjudicate upon the guilt or innocence, so as to attract the exclusion/prohibition adverted to in clause 10 of the Letters Patent. It is only when, the Magistrate takes cognizance under Section 190 of the New Code and issues process, that the criminal jurisdiction gets triggered for the purposes of attracting the exclusion/ prohibition contained in clause 10 of the Letters Patent.

8.3 In his capacity as Amicus Curiae, Dr. Arun Mohan drew our attention to the following judgments; including those which took the contrary view: **K. Karunakaran's case; Abdul Karim Haji Zaveri vs District Magistrate** 2005 Cri.L.J. 1651; **Chennapa vs Basappa** (1984) 1 KLJ 204; **M/s Bajrang Lal Laxmi Narain Dadli Regd. Partnership firm, Deedwana vs Jeetmal** 2000 (2) WLN 319; **Dr. Subir Kumar Ghosh vs Prasar Bharti Broadcasting Corporation of India** 2006 Cri.L.J. 4109; **Indian Structural Engineering Company (P) Ltd. vs Pradip Kumar** 2009 Cri. L.J. 4229; **V. Narayana Reddiar vs Rugmini Ammal** 2000 (3) KLT 301; **Rugmini Ammal vs V. Narayana Reddiar** AIR 2008 SC 895; **P'S. Sathappan vs Andhra Bank Ltd.** (2004) 11 SCC 672; **Fuerst Day Lawson Ltd. vs Jindal Exports** (2011) 8 SCC 333; **C'S. Agarwal vs. State** 2011 (125) DRJ 241 (FB);.

9. Mr Chandhiok, learned ASG, on the other hand contended that in view of the expression **'other than the High Court'** having been inserted in Section 341 of the New Code, no appeal was maintainable from any order passed by a Single Judge of the High Court. In other words, an intra-court appeal was not available, notwithstanding the nature of jurisdiction exercised by a Single Judge of the High Court, while entertaining an application under Section 340 of the New Code.

9.1 Mr Chandhiok, further submitted that the decision of a court whether or not to institute a complaint under Section 340 of the New Code, was a decision, which the court took in exercise of a criminal

jurisdiction and, therefore, by logical corollary no appeal was maintainable either under Section 10 of the 1966 Act or under clause 10 of the Letters Patent. In this context, it was Mr Chandiok's submission that a Single Judge of the High Court was not a court subordinate to the Division Bench of the same court within the meaning of sub section (4) of Section 195 of the New Code[4]. It was thus Mr Chandiok's contention that, it is for this precise reason that the legislature had included the expression .other than the High Court. in Section 341 of the New Code. Therefore, if the Division Bench were to deal with an application under Section 340 of the New Code, the appeal would lie to the Supreme Court under Article 136 of the Constitution.

9.2 On the aspect of as to whether the decision taken on an application whether or not to file a complaint under Section 340 of the New Code was a decision taken in exercise of criminal jurisdiction by a court, Mr Chandiok contended that it was so. It was his submission that any proceedings which were initiated under the criminal procedure code, which resulted in a trial and thereafter a conviction or an acquittal, could only have attributes of a criminal proceeding. Thus, according to Mr Chandhiok, in view of the express exclusion of the High Court from the appeal provision contained in Section 341 of the New Code, no appeal could be maintained irrespective of the jurisdiction under which a Single Judge of this High Court is called upon to deal with an application under Section 340 of the New Code. In support of his submissions Mr Chandhiok relied upon following judgments: In re **D'S. Raju Gupta** AIR 1939 Madras 472; **Emperor vs Bhatu Sadu Mali** AIR 1938 Bombay 225 (FB); **Mt. Rampati Kuer and Ors. vs Jadunandan Thakur & Ors.** AIR 1968 Patna 100 (FB); **Sri Chand vs State of U.P.** 2003 Cri.L.J. 4094; **Jose Kuruvinakunnel vs A.T. Jose** 1997 Cri.L.J. 816; and C'S.

4. "195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.

xxxx

xxxx

(3) In clause (b) of sub-section (1) the term "Court" means a Civil, Revenue or Criminal Court, and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this section (4) For the purposes of clause (b) of sub-section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal court having ordinary original civil jurisdiction within whose local jurisdiction such Civil Court is situate....."

Agarwal's case;

9.3 Mr Chandhiok lastly contended that, the criminal procedure code, i.e., the New Code was a complete code and therefore the court could not look to other statutes for enabling an aggrieved party to prefer an appeal. The exclusion of the High Court in Section 341 of the New Code, barred such an examination.

9.4 Mr Pavan Sachdeva chose to adopt the submissions made by Mr Chandhiok.

10. Having heard the learned counsels for the parties, according to us, two issues arise for our consideration:

(i) whether the expression **'other than the High Court'** appearing in Section 341 of the New Code disable an appeal being preferred under other statutes/ provisions of law? and

(ii) whether a decision taken by a court, to either proceed or not to proceed in respect of a complaint filed under Section 340 of the New Code, is a decision, taken in exercise of criminal jurisdiction?

11. Before we proceed further it may be relevant to first notice the pari materia provisions which, obtained in the Code of Criminal Procedure of 1898 (in short the Old Code).

11.1 Sections 476, 476A[5] and 476B[6] found in the Old Code are pari

5. 476A. **Superior Court may complain where subordinate Court has committed to do so** The power conferred on Civil, Revenue and Criminal Courts by section 476, sub-section (1), may be exercised, in respect of any offence referred to therein and alleged to have been committed in or in relation to any proceeding in any such Court, by the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3), in any case in which such former Court has neither made a complaint under section 476 in respect of such offence nor rejected an application for the making of such complaint; and, where the superior Court makes such complaint, the provisions of section 476 shall apply accordingly.

6. 476B. **Appeals** Any person on whose application any Civil, Revenue or Criminal Court has refused to make a complaint under section 476 or section 476A, or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3), and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the subordinate Court might have made under section 476, and if its makes such complaint the provisions of that section shall apply accordingly.

materia with Section 340 and 341 of the New Code. Section 195 remains almost the same both in the Old and the New Code. The aforementioned provisions in the Old Code are found in chapter XXXV, whereas in the New Code, they are found in chapter XXVI. The heading of both chapters is more or less the same. While under the Old code the heading reads as "Proceedings in case of certain Offences Affecting the Administration of Justice", the heading in the New Code is "Provisions as to Offences Affecting the Administration of Justice".

11.2 A comparative analysis of the relevant provisions of the Old Code and the New Code would show that where a complaint is filed either under Section 476 of the Old Code[7] or under Section 340 of the New Code, the court concerned is called upon to decide whether in its opinion, it is expedient in the interest of justice that an inquiry should be made into any or all offences referred to in clause (b) of sub-section (1) of Section 195. Importantly, the offences adverted in Section 195(1)(b) had to be those which were committed in or in relation to a proceeding in that court or as the case may be in respect of a document produced or given in evidence in a proceeding in that court. It is left to the

7. 476. **Procedure in cases mentioned in section 195** (1) When any Civil, Revenue or Criminal Court is, whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in section 195, sub-section (1), clause (b) or clause (c), which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate or if the alleged offence is non-bailable may, if it thinks necessary so to do, send the accused in custody to such Magistrate, and may bind over any person to appear and give evidence before such Magistrate:

Provided that, where the Court making the complaint is High Court Division, the complaint may be signed by such officer of the Court as the Court may appoint. For the purpose of this sub-section, a Metropolitan Magistrate shall be deemed to be a Magistrate of the first class.]

(2) A Magistrate to whom a complaint is made under sub-section (1) or section 476A or section 476B shall, notwithstanding anything contained in Chapter XVI, proceed, as far as may be, to deal with the case as if it were instituted on a police report.]

(3) Where it is brought to the notice of such Magistrate or of any other Magistrate to whom the case may have been transferred, that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen, he may, if he thinks fit, at any stage adjourn the hearing of the case until such appeal is decided.

discretion of the court whether or not a preliminary inquiry should be held, for this purpose, before it arrives at an opinion whether or not to initiate a complaint under Section 340(1) of the New Code. If the court decides to initiate an inquiry it has several options. In case, a court neither rejects a complaint filed under sub section (1) of section 340 nor makes a complaint, the said power can be exercised by a court superior to that court in which such a complaint lies. The deemed subordination of the concerned court is governed by the provisions of sub section (4) of section 195 of the New Code. Under sub-section (3), if the court making the complaint is the High Court, the complaint can be signed by the officer who is appointed for the said purpose. In case of a court, other than the High Court, the complaint can be signed by the presiding officer of the court or by such officer of the court as the court may authorize in writing in this behalf. Sub section (4) of section 340 assigns the same meaning to the word 'court' as that which obtains in section 195.

11.3 In substance there is no difference in the provisions contained in the New Code and those that obtain in the Old Code. The only material difference which arises is, in the appeal provisions of the two codes. In section 341 of the new Code the words .other than the high court" are inserted which are not contained in Section 476 B of the Old Code.

11.4 Prior to the enactment of the New Code there were two significant judgments delivered by the Supreme Court on the pari materia provisions of the Old Code, i.e., Sections 476 and 476B.

11.5 The first decision was in the case of **M'S. Sheriff vs State of Madras** AIR 1954 SC 397. In this case the Supreme Court was called upon to decide inter alia as to whether an appeal under Section 476B would lie before it, against the judgment of the Division Bench of the High Court. The Supreme Court concluded, on an interpretation of the section 195(3) of the Old Code (which is pari materia with section 195(4) of the New Code), that it deemed a court to be subordinate to another court if, it was a court to which appeals ordinarily lie from appealable decrees or sentences of such former courts. The Supreme Court concluded that, the court to which an appeal would ordinarily lie from an appealable decree or sentence of a Division Bench of a High Court, would be to itself. Accordingly, it held that an appeal would lie to it from an order of a Division Bench passed under Section 476 of the

Old Code.

11.6 The other aspect on which the Supreme Court touched was that while taking a decision in an application filed under section 476 of the Old Code, the relevant consideration is: whether it is expedient in the interest of justice that an inquiry should be made and a complaint filed. The court after examining the material on record should reach a conclusion that it is a matter which requires investigation by a criminal court and, it is expedient in the interest of justice to have it inquired. See paragraphs 11 and 12 of the judgement in M'S'Sheriff's case.

11.7 The other judgment of the Supreme Court qua the Old Code is, the judgment rendered by it, in the case of **Narain Das vs State of Uttar Pradesh** AIR 1961 SC 181. This was a case in which, the petitioner before the Supreme Court had filed a writ petition under Article 226 of the Constitution in the High Court of Allahabad. In that writ petition, an application had been filed under Section 476 of the Old Code, on the ground that, an affidavit filed by one of the parties contained a false averment. The said application was dismissed. Consequently, the petitioner preferred an appeal under Section 476 B of the Old Code. The issue before the Supreme Court was whether the appeal filed before it, was competent. The Supreme Court ruled that the appeal filed before it, was not maintainable, and that, the appeal would lie with the Division Bench of the Allahabad High Court, due to the artificial meaning given to the word 'subordinate.. The Supreme Court, resultantly, held that the Single Judge of the High Court was a court subordinate to the Appellate Bench of the same High Court. The reasoning of the court is contained in paragraphs 3 and 4 of the said judgment. The same are extracted hereinbelow for the sake of convenience:

> "....3. Any person aggrieved by an order of a Court under s. 476 of the Code may appeal in view of Section 476B to the Court to which the former Court is subordinate within the meaning of s. 195(3), which provides that for the purposes of the section a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or, in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction such Civil Court is situated. The decrees of a single

> Judge of the High Court exercising civil jurisdiction are ordinarily appealable to the High Court under clause 10 of the Letters Patent of the Allahabad High Court read with clause 13 of the United Provinces High Courts (Amalgamation) Order, 1948. It is true that the decision of single Judge of the High Court is as much a decision of the High Court as the decision of the appellate Bench hearing appeals against his decrees. But the Court constituted by the single Judge is a Court subordinate to the appellate Bench of the High Court in view of the artificial judicial subordination created by the provisions of s. 195(3) to the effect 'a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees ....' In the case of a Civil Court which passes appealable decrees, that Court is deemed to be subordinate to the Court to which appeals ordinarily lie from its decrees. In the case of a civil of a Civil Court whose decrees no appeal ordinarily lies, that Court is deemed subordinate to the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction the former Court is situated, even though normally such a Court will not be subordinate to the principal Court having ordinary original civil jurisdiction within whose local limits it is situated.
>
> 4. It was urged by the learned Advocate for Narain Das that the order of the learned single Judge under s. 476 did not amount to a decree and that therefore the provisions of s. 195(3) were not applicable. It is not necessary for us to express an opinion on the question whether the order of the learned single Judge under s. 476 is appealable under clause 10 of the Letters Patent or not. A right of appeal against that order is given by the provisions of s. 476 B. The forum of appeal is also determined by the provisions of s. 476B read with s. 195(3), and the only relevant consideration to determine the proper forum for an appeal against such an order of the single Judge is as to which Court the appeals against appealable decrees of the single Judge ordinarily lie. Such appeals lie to the High Court under clause 10 of the Letters Patent of the Allahabad High Court, and therefore this appeal lies to the High Court.....

12. The matter was considered by the Law Commission of India in its 41st Report (September, 1969). The Law Commission having regard

to the judgment of the Supreme Court in **M'S. Sheriff's** case came to the conclusion that so far as the High Court was concerned, there was no need for an independent right of an appeal against its decision. The observations of the Law Commission are contained in paragraph 35.8

> .....35.8 It has been held by the Supreme Court[8] that an appeal lies under section 476B to the Supreme Court from an order of a division bench of the High Court directing a complaint under section 476. In our view, this position should be altered by excluding the High Court from the scope of section 476B. So far as the High Court is concerned, there is no need for an independent right of appeal against its decision to make a complaint....

13. It is in this background that the Law Commission had proposed that in Section 476B the words "other than the High Court" should be inserted. With the New Code being enacted, the said expression found a mention in Section 341 of the New Code.

14. It is, in our view, quite obvious that when, the Law Commission made a recommendation in its 41st Report in this behalf, it had in mind the judgment of the Supreme Court in the case of **M'S. Sheriff**. What was perhaps not brought to the notice of the Law Commission was the judgment of the Supreme Court in the case of **Narain Das**. A fair reading of the observations of the Law Commission would show that it was their considered opinion that, since a Division Bench of a High Court, did not have a court superior to it within the same High Court within the meaning of section 195(3) of the Old Code [and now Section 195(4) of the New Code], it was superfluous to provide for an appeal under Section 476B of the Old Code (and now section 341 of the New Code). This is also evident from the fact that no changes were made in sub-Section (2) of Section 476 of the Old Code, which is equivalent to sub-Section (2) of Section 340. The said provisions both in the Old and New Code allow, a superior court to withdraw an application filed under sub-section (1) of Section 476 of the Old Code, on which the court has neither ordered institution of a complaint nor rejected the application for making such a complaint. It is quite possible that such a situation could arise where an application is filed before a Single Judge and neither a

8. M.S. Sheriff, (1954) S.C.R. 1144; AIR 1954 SC 397.

complaint is made nor is the application for making the complaint, rejected. If the single judge is a court subordinate to a Division Bench under sub-section (4) to Section 195 of the New Code, the appellate court could withdraw the complaint to itself.

15. Therefore, by virtue of presence of this intrinsic evidence, the argument that the expression "other than the High Court" obtaining in section 341 sought to exclude an intra-court appeal completely, does not appear to be quite correct. What it did seek to exclude was an appeal under Section 341 of the New Code. The legislature was aware that in various High Courts intra-court appeals were available either under a statute or under the Letters Patent.

15.1 The argument of Mr Chandhiok that exclusion of the High Court in section 341 of the New Code excludes an appeal, is pivoted on the argument that Chapter XXVI of the New Code is a self-contained Code, and therefore, decisions on an application can only be challenged by way of an appeal as provided in Section 341 of the New Code.

15.2 It must be remembered that in so far as this court is concerned, it was constituted under the 1966 Act. Under Section 5 read with Section 10 of the 1966 Act, an appeal is maintainable with a Division Bench of this court against a judgment of a Single Judge of this court while exercising ordinary original civil jurisdiction as conferred by sub section (2) of Section 5. Similarly, clause 10 of the Letters Patent, as applicable to this Court, provides that an appeal shall lie to the Division Bench from a judgment of a Single Judge of this court except in circumstances specifically excluded.

15.3 In this behalf, one would also have to take notice of Section 5 of the New Code, which clearly saves all special or local laws which are in force and any special jurisdiction or power conferred or any special form of procedure prescribed by any other law for the time being in force. A conjoint reading of the same would show that the exclusion of High Court from Section 341 of the New Code, does not take away the right of an aggrieved party to file an appeal under any other statute or enactment as the same is saved by virtue of Section 5[9] of the New

9. **5. Saving.** Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

Code.

15.4 We are fortified in our view with principle enunciated in the Judgment of the Supreme Court in the case of **P'S. Sathappan**, wherein the Supreme Court was called upon to consider whether the provision of appeal provided under clause 15 of the Letters Patent of the High Court of Madras was taken away by virtue of sub-clause (2) of section 104 of the Code of Civil Procedure. The majority view, in the said case, was that, the provision of appeal in the Letters Patent could not be excluded by implication. The court took aid of Section 4 of CPC, which is pari materia, with Section 5 of the New Code. The court concluded that the appeals filed under clause 15 of the Letters Patent, would be maintainable[10]. This view of the court was inter alia based on the judgment of an earlier Constitution Bench in the case of **Gulab Bhai vs Punia** (1966) 2 SCR 102 and, the Privy Council judgment, in the case of **Hurrish Chunder Chowdhry vs Kali Sundari Debia** (1882-83) 10 Ind. Appl. 4.

16. Thus, in our view, the exclusion of the High Court under Section 341 of the New Code, does not exclude provisions of appeal if otherwise available under other Acts, Special Acts and Local Laws. Section 100A[11] of the CPC illustrates this point in no uncertain terms. Section 100A expressly excludes the applicability of the appeal provisions contained in Letters Patent issued qua High Courts in the country.

17. Mr Chandhiok had sought to distinguish the position of law stated in **P'S. Sathappan's** case by relying upon the judgement of the

10. "....It is not any subordinate piece of legislation. As set out in aforementioned two cases a Letters Patent cannot be excluded by implication. Further it is settled law that between a special law and a general law the special law will always prevail. A Letters Patent is a special law for the concerned High Court. Civil Procedure Code is a general law applicable to all Courts. It is well settled law, that in the event of a conflict between a special law and a general law, the special law must always prevail. We see no conflict between Letters Patent and Section 104 but if there was any conflict between a Letters Patent and the Civil Procedure Code then the provisions of Letters Patent would always prevail unless there was a specific exclusion. This is also clear from Section 4 Civil Procedure Code which provides that nothing in the Code shall limit or affect any special law. As set out in Section 4 C.P.C. only a specific provision to the contrary can exclude the special law. The specific provision would be a provision like Section 100A....."

11. **100A. No further appeal in certain cases.** Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge.

Supreme Court in the case of **Fuerst Day Lawson Ltd.** In our view, the judgment by a Division Bench of the Supreme Court quite clearly indicates why the principle enunciated in **P'S. Sathappan's** case was not applicable in that case. In **Fuerst Day Lawson's** case, the Supreme Court was called upon to consider as to whether an appeal under the Letters Patent of the High Court would be available, despite the fact that, certain orders passed in the course of arbitration proceedings, were not appealable under Section 50 of the Arbitration & Conciliation Act, 1996. The Court, after a detailed analysis, summed up the position in paragraph 89 at page 371 of its judgment, by observing that in so far as the 1940 Act was concerned, the Supreme Court had itself held right uptill **P'S. Sathappan's** case, that it was a **'self-contained Code'** and therefore, there was no good reason not to hold, the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration, as much as possible, in harmony with the UNCITRAL Model, as a **'self-contained Code'**. Therefore, once it is concluded that the special act is a self-contained Code, the Letters Patent Appeal, would stand excluded. The relevant observations are contained, as indicated above, in paragraph 89 which, for the sake of convenience are extracted hereinafter.

> ...89. It is, thus, to be seen that Arbitration Act 1940, from its inception and right through to 2004 (in P'S. Sathappan) was held to be a self-contained code. Now, if Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it "a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done". In other words, a Letters Patent Appeal would be excluded by application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded.....
>
> (emphasis supplied)

18. Therefore, the question is: as to whether chapter XXI of the New Code is a self-contained code. To our minds, the very fact that an application for perjury could be made in any court, whether a civil, criminal or even a revenue court each of which would be governed by their own procedural law, would show that it is not a self-contained code. Sub Section (3) of Section 195 of the New Code includes in the term "Court" not only a civil, criminal or revenue court, but also a tribunal constituted by or under a central, provincial or state Act if declared by that Act to be a court for the purpose of the said Section. Under sub section (4) of Section 195, it is indicated, that a court shall be deemed to be subordinate to a court to which appeals ordinarily lie from appealable decrees or sentences of such former courts. In case of a civil court, from whose decrees no appeal ordinarily lie, the appeal would lie to the Principal Court having ordinary original civil jurisdiction within whose local jurisdiction such civil court is situate. There can, therefore, be no doubt that for the purpose of arriving at a decision in an application filed under Section 340 of the New Code, the New Code is not a self-contained Code.

18.1 In our opinion, this argument loses sight of a very crucial aspect, which is, that a decision on an application under Section 340 of the New Code, only triggers an inquiry by a criminal Court and that too if, it is deemed expedient in the interest of justice. The court, at that stage, does not decide the guilt or innocence of the party against whom the application is directed. Once, an opinion is formed by a court to lodge a complaint then, the Criminal Procedure Code is set in motion. The procedure of inquiry carried out by the Magistrate would then be governed by the Criminal Procedure Code, i.e., the New Code. Therefore, the challenge to a decision of a court which directs filing of the complaint or rejects a request for filing a complaint is not necessarily governed by the Criminal Procedure Code, unless the court concerned is a court exercising criminal jurisdiction.

18.2 This aspect, as to nature of the decision reached on an application under Section 340 of the New Code, is articulated in the judgment of the Supreme Court in the case of **Pritish vs State of Maharashtra**. The brief facts obtaining in this case were as follows: The land of the appellants before the Supreme Court was acquired by the State Government of Maharashtra for construction of a canal. The

appellants not being satisfied with the compensation granted by the Land Acquisition Officer; filed a reference under Section 18 of the Land Acquisition Act, 1894. The Reference Court granted a substantial enhancement. Couple of years later, some persons who were residing in the same locality brought to the notice of the Reference Court the fact that the appellants had obtained enhancement by producing forged sale deeds before it. The Reference Court, after making inquiries, came to the conclusion that a complaint be filed against them under Section 340 of the New Code. The matter was carried right till the Supreme Court. One of the principal issues raised before the Supreme Court was that, the principles of natural justice had been given a go-by as the Reference Court had proceeded to make an inquiry without giving an opportunity to the appellants of being heard in the matter, and thus, causing grave prejudice to them. The Supreme Court in this context examined the attributes of the decision which is taken by the court when dealing with an application under Section 340 of the New Code. After a detailed deliberation, the Supreme Court came to the conclusion that at the stage of taking a decision on an application under Section 340 of the New Code, the court does not decide the guilt or innocence of a person, the scope of its decision is confined to arriving at a conclusion, which is that, based on the material available before it, whether the matter requires inquiry by a criminal court, and if it does, would it be expedient in the interest of justice to have it inquired into. It thus, rejected the contention of the appellants before it, that the decision to initiate proceedings against them violated principles of natural justice. While reaching this conclusion, the Supreme Court made some crucial observations with regard to the scope of the Section. These observations being relevant are extracted hereinafter:

> ".....9. Reading of the sub-section makes it clear that the hub of this provision is formation of an opinion by the court (before which proceedings were to be held) that it is expedient in the interest of justice that an inquiry should be made into an offence which appears to have been committed. In order to form such opinion the court is empowered to hold a preliminary inquiry. It is not peremptory that such preliminary inquiry should be held. Even without such preliminary inquiry the court can form such an opinion when it appears to the court that an offence has been committed in relation to a proceeding in that court. It is important

to notice that even when the court forms such an opinion it is not mandatory that the court should make a complaint. This sub-section has conferred a power on the court to do so. It does not mean that the court should, as a matter of course, make a complaint. But once the court decides to do so, then the court should make a finding to the effect that on the fact situation it is expedient in the interest of justice that the offence should further be probed into. If the court finds it necessary to conduct a preliminary inquiry to reach such a finding it is always open to the court to do so, though absence of any such preliminary inquiry would not vitiate a finding reached by the court regarding its opinion. It should again be remembered that the preliminary inquiry contemplated in the sub-section is not for finding whether any particular person is guilty or not. Far from that, the purpose of preliminary inquiry, even if the court opts to conduct it, is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed.

10. "Inquiry" is defined in Section 2(g) of the Code as "every inquiry, other than a trial, conducted under this Code by a magistrate or court." It refers to the pre trial inquiry, and in the present context it means the inquiry to be conducted by the magistrate. Once the court which forms an opinion, whether it is after conducting the preliminary inquiry or not, that it is expedient in the interest of justice that an inquiry should be made into any offence the said court has to make a complaint in writing to the magistrate of first class concerned. As the offences involved are all falling within the purview of "warrant case" [as defined in Section 2(x)] of the Code the magistrate concerned has to follow the procedure prescribed in Chapter XIX of the Code. In this context we may point out that Section 343 of the Code specifies that the magistrate to whom the complaint is made under Section 340 shall proceed to deal with the case as if it were instituted on a police report. That being the position, the magistrate on receiving the complaint shall proceed under Section 238 to Section 243 of the Code.

11. Section 238 of the Code says that the magistrate shall at the outset satisfy himself that copies of all the relevant documents

have been supplied to the accused. Section 239 enjoins on the magistrate to consider the complaint and the documents sent with it. He may also make such examination of the accused, as he thinks necessary. Then the magistrate has to hear both the prosecution and the accused to consider whether the allegations against the accused are groundless. If he finds the allegations to be groundless he has to discharge the accused at that stage by recording his reasons thereof. Section 240 of the Code says that if the magistrate is of opinion, in the aforesaid inquiry, that there is ground for presuming that the accused has committed the offence he has to frame a charge in writing against the accused. Such charge shall then be read and explained to the accused and he shall be asked whether he pleads guilty of the offence charged or not. If he pleads not guilty then the magistrate has to proceed to conduct the trial. Until then the inquiry continues before the magistrate.

12. Thus, the person against whom the complaint is made has a legal right to be heard whether he should be tried for the offence or not, but such a legal right is envisaged only when the magistrate calls the accused to appear before him. The person concerned has then the right to participate in the pre-trial inquiry envisaged in Section 239 of the Code. It is open to him to satisfy the magistrate that the allegations against him are groundless and that he is entitled to be discharged... ....

.... .16. Be it noted that the court at the stage envisaged in Section 340 of the Code is not deciding the guilt or innocence of the party against whom proceedings are to be taken before the magistrate. At that stage the court only considers whether it is expedient in the interest of justice that an inquiry should be made into any offence affecting administration of justice. In **M'S. Sheriff and Anr.: State of Madras and Ors.** AIR 1954 SC 397 a Constitution Bench of this Court cautioned that no expression on the guilt or innocence of the persons should be made by the court while passing an order under Section 340 of the Code. An exercise of the court at that stage is not for finding whether any offence was committed or who committed the same. The scope is confined to see whether the court could then decide on the materials available that the matter requires inquiry

by a criminal court and that it is expedient in the interest of justice to have it inquired into.....

19. Let us now deal with the second aspect, which is, whether the decision taken (to proceed or not to proceed with filing of a complaint under section 340 of the New Code) is a decision taken by the Court in exercise of its criminal jurisdiction. The aforesaid observations of the Supreme Court in **Pritish vs State of Mahrashtra** case gives a clue that it is not a decision in the exercise of criminal jurisdiction. This view has also been taken by certain High Courts, which would be adverting to hereinbelow.

19.1. We may also point out that there is a contra view held by certain other High Courts. Therefore, we will first advert to the cases, which take the view, though under the Old Code, that exercise of power under Section 476 of the Old Code by a civil or a revenue court would not convert, so to say, the said court into a criminal court, because if that was so the power of the revision under Section 439[12] of the Old

12. Section 439 - High Court Division's Power of Revision –

(1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court Division may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence; and, when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate 1[* * *], the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed than might have been inflicted for such offence by 2[a Metropolitan Magistrate or] a Magistrate of the first class.

(4) Nothing in this section shall be deemed to authorize the High Court Division to convert a finding of acquittal into one of conviction, or to entertain any proceedings in revision with respect to an order made by the Sessions Judge under section 439A].

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction.

Code would be available to the High Courts, as then constituted.

20. This was a view taken by a Full Bench of the Calcutta High Court, comprising of five learned Judges (Jenkins C.J. and Harrington, Stephen, Asutosh Mookerjee and Holmwood JJ.), in the case of **Har Prasad Das**. In this case, an order under Section 476 of the Old Code was passed by a Settlement Officer, dealing with proceedings under Chapter X of the Bengal Tenancy Act. This order was sought to be revised by taking recourse to Section 439 of the Old Code. A Bench of the High Court was of the view that the correctness of the order could be examined under Section 115 of the then enacted Civil Procedure Code or Section 15 of the High Court, and not, under Section 439 of the Old Code. In order to appreciate the view taken by the Full Bench, it may be relevant to refer to certain observations made by the Judge referring the question of law. The reference was made by Justice Holmwood. His observations with respect to the same were as follows:

> .....The question seems to me to depend on the construction of section 439 and as regards that I agree with the view expressed by Stanley, C.J. I cannot see how section 439 can be strained to include the proceedings of a Civil or Revenue Court. The Munsif or Revenue Officer by exercising how powers under section 476 does not thereby make himself a Criminal court. A full Bench of this Court has held that proceedings under Chapter XII, Criminal Procedure Code, can only be dealt with under the Charter and not under section 439. It, therefore, establishes the principle laid down by Stanley, C.J., that Section 435 to 439 must be read together and cannot be separated. The word 'any proceeding' occurs in section 435 exactly as it does in section 439 and the exclusion of Chapter XII and certain other sections in section 435 seems to exclude them equally from the operation of section 439. In the sections as regards contempt of court, which immediately follow, Civil and Revenue Courts are given distinct criminal powers. Yet it is enacted that the appeal lies to the Court to which decrees or orders made in such court are ordinarily appealable. Further, it is said that the provisions of Chapter XXXI, that is, the Chapter on appeals, shall apply so far as they are applicable to appeals under section 485 but the law is silent as to revision under Chapter XXXI. Now it is clear that when acting under section 476 the Civil and Revenue Courts are

not exercising in any way such direct criminal powers as they are under section 480 to 484 and it appears, therefore, anomalous that the Criminal Bench of the High Court should have revisional jurisdiction under section 476 from Civil and Revenue Courts which is apparently excluded in the case of convictions for contempt.

The Civil Court has no power to punish under section 476 and merely expresses its judicial opinion as a Civil Court that the offender has rendered himself liable to the jurisdiction of the Criminal Court. That judicial opinion is liable to revision by the High Court in its revisional powers under section 115, Civil Procedure Code, and as Sir John Stanley says under that alone. There is, however, this decided conflict of opinion in all the Courts and Banerji, J., points out that the same conflict has occurred in Bombay: Queen Empress vs Rachappa 13 B. 109 and In Re Balgangadhar Tilak 26 B. 785.

But we are only concerned with the decisions of this court and the questions, therefore, which we refer to the Full Bench are:

> (1) Was the case of **Kali Prasad Chatterjee v. Bhupan Mohini Dasi** rightly decided? Or
>
> (2) Was the case of Emperor v. Gopal Barik rightly decided?
>
> (3) Has the High Court revisional powers under section 439, Criminal Procedure Code, in the case of orders passed by Civil and Revenue Courts under section 476?
>
> (4) Can the High Court, in the exercise of its Criminal jurisdiction, look into such orders under section 15 of the Charter, or is section 115 Civil Procedure Code, the only section under which such orders can be revised?
>
> (5) If the latter, can the Bench exercising criminal jurisdiction deal with such matters under section 115, Civil Procedure Code?....
>
> (emphasis supplied)

20.1 The Full Bench answered the question as follows:

> ....'Sub-section 1 of section 476 provides that when any Civil, Criminal or Revenue Court is of opinion that there is ground for inquiring into any offence referred to in section 195 and committed before it or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary inquiry that may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the first class, and may send the accused in custody or take sufficient security for his appearance. Before such Magistrate; and may bind over any person to appear and given evidence on such inquiry or trial. On behalf of the petitioner, it has been contended, that when action is taken by a Civil Court under section 476 the proceeding before it is a proceeding within the meaning of the first sub-section either of section 435 or of section 439 of the Criminal Procedure Code. This argument, in each of its two branches, is, in our opinion, unsound. Sub-section 1 of section 435 authorises this Court to call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its jurisdiction. When a Civil Court subordinate to this Court, takes action under Section 476, it cannot plainly be deemed an inferior Criminal Court within the meaning of sub-section 1 of section 435. That section consequently has no application. Nor does section 439 touch the matter. It is clear that sections 435-439 must be read together, as pointed out by Wilson, J. In **Hari Dass Sanyals vs Saritulla**. Section 439 must, therefore, be read along with and subject to the provisions of section 435. It follows that when an order has been made by a Civil Court under section 476 of the Criminal Procedure Code, it cannot be revised by this Court under section 439. It is equally plain that the order may be revised by this Court under section 115 of the Civil Procedure Code on any of the ground mentioned therein, or may be examined under section 15 of the High Courts Act.
>
> When action is taken by a Criminal Court subordinate to this court, under section 476 of the Criminal Procedure Code, the proceeding before it is obviously a proceeding before an inferior Criminal Court within the meaning of section 435, and the order made therein is, consequently, liable to revision under section

439.

When action is taken by a Revenue court under section 476, the proceeding before it is for the reason already assigned, not a proceeding before an inferior Criminal Court within the meaning of section 435. The order made therein is accordingly not open to revision under section 439 read with section 435. But the order is open to revision under section 115 of the Civil Procedure Code on any of the grounds mentioned therein, or under section 15 of the High Courts Act, 24 and 25 vict, c. 104; the order is made by a Revenue Authority as a Court in the course of a judicial proceeding before it; with reference to such judicial proceeding, the Revenue Court is a court subordinate to this Court within the meaning of section 115 of the Civil Procedure Code, and is a Court subject to the appellate jurisdiction of this court within the meaning of section 15 of 24 and 25 Vict, c. 104.

In view of the exposition of the law, the questions submitted to this bench must be answered as follows:

1. The case of Kali Prasad Chatterjee vs Bhupan Mohini Dasi was correctly decided, in so far as it held that an order under section 476 of the Criminal Procedure Code made by a Civil Court (in that case, the Court of a Munsif) cannot be revised by this Court under section 439.

2. The case of **Emperor v. Gopal Barik** was correctly decided, in so far as it held that an order under section 476 of the Criminal Procedure Code made by a Criminal Court (in that case, the Court of a Sub-Divisional Magistrate) can be revised under section 439.

3. In the case of an order passed under section 476 by a civil or a Revenue Court, section 439 has no application.

4. In the case of an order passed by a civil or a Revenue Court under section 476, the High Court can exercise the powers vested in it by section 115 of the Civil Procedure Code or section 15 of the High Courts Act.

5. When an order under section 476 made by a Civil or a Revenue Court is sought to be revised by this Court, the Bench exercising criminal jurisdiction cannot, as such, deal with the matter, but the Judges composing that Bench may do so, if authorised by the Chief Justice under section 14 of the High Courts Act.

In the case before us, the order in question was made by a Settlement officer dealing with proceedings under Chapter X of the Bengal Tenancy Act. His order is, consequently, not open to revision under section 439 of the Criminal Procedure Code, but may be examined under section 115 of the Civil Procedure Code or section 15 of the High Courts Act. With this intimation of the opinion of the Court, the case is returned to the Referring bench in order that it may be dealt with according to law.. (emphasis supplied)

20.2 This view was adopted in the case of **Surendra Nath**. The issue arose for consideration before the High Court of Calcutta in the context of the allegation that documents filed in the title suit were forged. The Munsiff's court had rejected the application of the defendants under Section 476 of the Old Code on the ground that it was belated and that the suit having already been withdrawn, it was filed perhaps, for some ulterior motives. The matter was taken up in appeal to the District Judge, who while holding that it was not an ordinary civil matter, took the view that the Munsiff should have not allowed the case to be disposed of in a summary manner and ought to have made a complaint or at any rate ought to have held an inquiry. This is how the matter reached the High Court in a revision filed under Section 115 of the Civil Procedure Code, as it then obtained. Lort Williams, J, speaking for the Division Bench, made the following observations, in so far as they are relevant for our purposes:

"... ....The matter comes before us in revision under Section 115, Civil P.C., It has been decided in the case of **Emperor v. Har Prasad Das** [19l3] 40 Cal. 477 (Full Bench) that when an order under Section 476, Criminal P.C. is passed by a civil or revenue Court Section 439, Criminal P.C. has no application but that the High Court can exercise its revisional power under Section 115, Civil P.C. By an order made by the Chief Justice this Criminal Bench has been authorized to deal with such matters.

Our powers under Section 115, Civil P.C. are strictly limited to those mentioned therein. Substantially we cannot interfere unless the Subordinate Court has exercised a jurisdiction not vested in it or has failed to exercise a jurisdiction so vested in it or to have acted in the exercise of its jurisdiction illegally or with material irregularity.

3. The first question raised before us is that upon such an application as this we must be guided by the provisions of the Criminal P.C. Section 476 being contained within that Code. In the case of **Hamid Ali v. Madhu Sudan Das** : AIR 1927 Cal 284 the learned Judges differed upon this question Chotzner, J., being, of opinion that the Criminal Procedure Code applied and Duval, J., being of opinion that the Civil Procedure Code applied. In the case of **Nasaruddin Khan v. Emperor:** AIR 1927 Cal 98 which was decided by C. C. Ghose and Duval, JJ., it was decided that the Civil Procedure Code applied; and in the case of **Mahendra Nath Das v. Emperor:** AIR 1929 Cal 428, Suhrawardy, J. agreed with the latter view. Personally I also agree with this view and think that all such applications under Sections 476, 476-A and 476-B originating in civil Courts must be dealt with according to the provisions of the Civil Procedure Code. If that Code is applicable it is clear that there is ample power under Order 41 thereof, to enable the District Judge to make the order for further enquiry which he made in this case.

4. One of the arguments raised by the learned advocate for the petitioner was that Sections 476, 476-A and 476-B are intended to be self contained and are concerned with a special procedure which has been incorporated in the body of the Code. That, no doubt, would be a convenient view and would tend to restricted appeals in matters which essentially are for the exercise of discretion by the trial Judge. But in our opinion this cannot be a sound view, because there are a number of steps in procedure such as the proper mode of making applications and of filing appeals, details of which are not to be found in any of these sections and the provisions for which must be looked for in other sections of the Code. If therefore the provisions of the Civil Procedure Code do not apply, we are of opinion that the provisions of the Criminal Procedure Code under Ch. 31, apply

to matters arising under Section 476 or Sections 476-A and 476-B except where it is clear from the sections themselves that the provisions are restricted to matters arising solely under that chapter. For example, Section 428 (1) refers only to appeals under Ch. 31 and has no application to matters arising under Section 476. This was decided in **Vannia Nainar v. Periasami Naidu** : AIR 1928 Mad 391. But in our opinion Section 413 clearly applies and Sub-sections 1 (b) and 1 (c) gave the District Judge ample power to make the order. This view was taken by Suhrawardy and Costello, JJ. in, **Mahomed Boyatulla v. Emperor** : AIR 1931 Cal 3. The learned Judges said:

> We think that appeals under Section 476-B are subject to all provisions applicable to criminal appeals as laid down in Section 419 and the following sections or the Criminal P.C.

5. In our opinion it is obvious that Section 476-B is not intended to be exhaustive, but provides powers supplementary to those which are given under Ch. 31. Otherwise for example the appellate Court would have no power to dismiss an appeal brought under that section. Moreover Section 404 shows that the provisions of Ch. 31 with certain exceptions specified in the section itself, apply to the whole of the Criminal Procedure Code.

6. On the specified question whether the learned Judge had power to remand the case, the judgment of Suhrawardy, J. in **Mahendra's** case (supra) is an authority to the extent that he was satisfied that such power of remand existed certainly under the Civil Procedure Code, This being the position we are of opinion that we cannot interfere with the order which the learned District Judge has made, but bearing in mind the fact that this is entirely a matter of discretion, and that the Munsif had all the facts before him when coming to the conclusion to reject the application, we consider, generally speaking, that it is unwise and improper to interfere with such exercise of discretion if it has been judicially exercised... ... (emphasis supplied)

20.3. A similar view has been taken in **E.P. Kumaravel Nadar vs T.P. Shanmuya Nadar & Ors.** AIR 1940 Madras 465 (FB) and

Swamiappa Mudaliar vs. K.R. Ponnammal and Anr., AIR 1959 Madras 107 at page 108 paragraph 2.

21. Mr Chandhiok cited two judgments before us, one of the Full Bench of the Patna High Court in **Mt. Rampati Kuer & ors. vs Jadunandan Thakur & Ors.,** AIR 1968 Patna 100 (FB) and the other of the Bombay High Court in **Emperor vs Bhatu Sadu Mali,** AIR 1938 Bom 225 (FB).

21.1 Brief facts which obtained in **Mt. Rampati Kuer** are as follows: the respondent before the court had filed a money suit against the petitioners alleging that petitioner no. 1 had executed a hand note in his favour. The petitioner, however, claimed that the hand note was a forgery. This charge was based on the revenue stamp affixed on the hand note, which was of a period post the date on which the hand note had been executed. It was the case of the petitioners that the defendant having become aware that the forgery had been detected got a petition filed through his brother, who was also one of the parties in the suit, wherein it was claimed that the hand note had been paid. Accordingly, the suit was dismissed. The petitioners, however, filed an application under Section 476 of the Old Code, whereupon, the Munsiff's court (which is the court in which the original suit was filed) directed institution of complaint against the respondents under various sections of the Indian Penal Code, 1860 (in short IPC). Against one of the respondents, i.e., original plaintiffs, the learned Munsiff held that no prima facie case was made out.

21.2 Since both sides were aggrieved, two cross-appeals were filed with the District and Session Judge. These appeals were however transferred to the court of the Third Additional District & Session Judge; who disposed of the appeals by a common judgment. The Additional District and Session Judge allowed the appeal of respondent nos. 1 and 2 and upheld the order of the Munsiff declining to file a complaint against respondent no.3. Consequently, a criminal revision petition was filed before the High Court, which in the first instance was listed before the Single Judge, who referred it to the Division Bench. The Division Bench treated the petition as civil revision petition and referred the matter to the Full Bench based on an earlier precedent of the same court that an appeal under Section 476B of the Old Code could not have been transferred by the District Judge to an Additional District Judge.

21.3 It is in this background the matter came to be referred to the Full Bench of three-Judges. The Three-Judges in turn referred the matter to a larger Bench of Five Judges, as a further question arose whether a revision petition against the order of the appellate court under Section 476B of the Old Code, ought to be treated as a civil revision or a criminal revision. In other words, the issue which was required to be answered was: whether the judgment of the court below was revisable under Section 439 of the Old Code or under Section 115 of the CPC? The Full Bench of the Patna High noticing the sharp division of views, on the subject, made the following observations:

> ".....7. As regards the exercise of revisional jurisdiction there is a very sharp conflict in the views of almost all the High Courts in India. In **Emperor v. Har Prasad Das,** ILR 40 Cal 477, **E.P. Kumaravel Nadar v. Shanmuga Nadar** AIR 1940 Mad 465 (FB), AIR 1948 Pat 225 (FB) and **Salig Ram v. Ramji Lal,** ILR (1906) All 554. Full Benches of those High Courts have held that Section 115. C.P.C., alone would apply and the provisions of the Criminal Procedure Code have no application. On the other hand, a Full Bench of the Bombay High Court in **Emperor v. Bhattu Sadu Mali,** AIR 1938 Bom 225 (FB) and a Full Bench of the Punjab High Court in AIR 1957 Punj 134, after fully discussing the contrary view, held that the provisions of Section 439, Cr.P.C., would apply and not the provisions of Section 115, C.P.C. Such diametrically opposite views expressed by some of the most distinguished Judges of High Courts only show how difficult it is to solve this problem. The only solution seems to be for the Legislature to intervene or for the Supreme Court to give its authoritative pronouncement when the occasion arises. In **Kuldip Singh v. State of Punjab,** AIR 1956 SC 391, their Lord-Ships, in paragraph 40 at page 399, did not decide this question and left it open.
>
> 8. It will be futile to discuss once again the relative merits of the two opposing views which have all been fully discussed in those judgments. I may, however, deal with one aspect of the matter. The Criminal Procedure Code, as its long title indicates, is an Act "to consolidate and amend the law relating to Criminal Procedure". Sub-section (1) of Section 5 of that Code says that "all offences under the Indian Penal Code shall be investigated, inquired into,

tried, and otherwise dealt with according to the provisions hereinafter contained", Sub-section (2), however, says that offences under any other law may be tried under the provisions of the Criminal Procedure Code, but Subject to any statutory provision regulating their investigation, inquiry and trial.

The scheme of the section, therefore, is that any offence under the Penal Code must be (1) investigated, (2) inquired into, (3) tried, and (4) otherwise dealt with, only under the provisions of the Criminal Procedure Code and not under any other statutory provision. Investigation and inquiry are both defined in Clauses (1) and (k) of Section 4. Investigation is the proceeding for collecting evidence conducted either by the police or by any person other than a Magistrate. Inquiry, however, includes every inquiry other than a trial conducted under this Code by a Magistrate or Court. It will be noticed that in this definition clause the relevant word used is "Court" and not "Criminal. .Court". Hence an inquiry conducted by a Civil Court will also be an inquiry under Clause (k) of Section 4, even though such a Civil Court will not be one of the classes of Criminal Courts enumerated in Section 6,

The concept of inquiry as distinct from trial involves the idea that it is in the nature of a preliminary proceeding conducted by a Court for deciding whether a person should be placed on trial for an offence. The inquiry under Section 476, Cr.P.C., relates to offences under the Penal Code, even though such an inquiry may be made either by the Civil Court or Revenue Court, as the case may be. Hence, an inquiry under Section 476 by the Civil Court will also be an inquiry as defined in Clause (k) of Section 4 Cr. P.C. It will be a criminal proceeding, though the inquiry is conducted by the Civil Court, in view of the express provisions of Section 476, read with Section 5 (1) of the Criminal Procedure Code. As pointed out by the House of Lords in **Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government** 1943 AC 147, per Viscount Simon, L.C., at p. 156, "if the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a Court claiming jurisdiction to do so, the matter is criminal". Here the preliminary inquiry under Section 476. Cr.P.C.,

may lead to the placing on trial or the alleged offender and his subsequent punishment, and it must, therefore, be held to be a criminal proceeding irrespective of whether the inquiry is conducted by the Criminal Court or Civil Court or Revenue Court, as authorised by the section. This decision of the House of Lords was cited with approval in **A.W. Meads v. Emperor,** AIR 1945 FC 21.

9. The words "and otherwise dealt with" occurring in Sub-section (1) of Section 5, Cr.P.C., require careful consideration. What is the true import and content of those words? In Delhi Administration v. Ram Singh AIR 1962 SC 63, their Lordships, while construing these words, observed as follows at p. 67:—

> "The word 'otherwise' points to the fact that the expression 'dealt with' is all comprehensive, and that investigation, inquiry and trial were some aspects of 'dealing with' the offences."

Though their Lordships did not exhaustively enumerate what the remaining aspects were, nevertheless by declaring that these words were "all comprehensive" they have clearly indicated that even appeals, revisions and other ancillary matters will also come within the scope of that comprehensive expression. Hence, if Sub-section (1) of Section 5, Cr.P.C., is construed in the light of the aforesaid decision of the Supreme Court, the reasonable inference is that appeals and revisions against inquiries made in respect of offences under the Penal Code should be regulated only by the provisions of the Criminal Procedure Code and not by the provisions of any other statute. This is because the proceeding is essentially criminal in nature, though the Civil Court gets jurisdiction by virtue of the express provisions in the Criminal Procedure Code.

With great respect to the learned Judges who have taken the contrary view, I am inclined to prefer the view taken in AIR 1938 Bom 225 and AIR 1957 Punj 134. In the aforesaid Punjab decision, Falshaw, C. J., has given an additional reason for preferring this view which may be mentioned. He rightly points out that if the contrary view is taken, Article 14 of the Constitution

> will be infringed. A person accused of having committed forgery before a Criminal Court will have a right to move the High Court under Section 439, Cr.P.C., and to challenge the propriety of the order of the lower Court and also ask for investigation into facts if the High Court considers it advisable. But another person accused of having committed the same offence before a Civil Court will be very much handicapped in seeking the revisional jurisdiction of the High Court under Section 115, C.P.C. When there is so much ambiguity on the subject, it seems preferable to follow the view which will be more in conformity with the fundamental rights guaranteed by the Constitution .... ..
>
> (emphasis supplied)

21.4 As would be evident from the extract culled out hereinabove, the Full Bench of the Patna High Court in **Mt. Rampati Kuer,** approved the view taken by the Bombay High Court in **Bhatu Sadu Mali's** case. In Bhatu Sadu Mali case, the facts which obtained briefly; are as follows:-

21.5 The plaintiff obtained in 1933, a decree against the defendant; which was followed by *darkhast* proceedings being taken out in 1936 to execute the decree. In these proceedings, the defendant produced a receipt showing that a larger amount had been paid than what was in fact paid. It was not in dispute that the receipt was a forged document. Accordingly, the subordinate judge who tried the suit, recorded a finding under Section 476 of the Old Code that in the interest of justice the matter ought to be inquired into. Accordingly, a complaint for forgery was lodged against the defendant.

21.6 The defendant preferred an appeal against the said direction to the District and Sessions Court. The District & Session Judge referred the matter to the Assistant Judge. The Assistant Judge came to the view that the complaint against the defendant should not be proceeded with, because the defendant had admitted to the forgery. Thereupon, the District and Session Judge called for the record and disagreed with the view taken by the Assistant Judge and, accordingly, submitted the papers to the High Court recommending that under its revisional powers it should restore the complaint of the subordinate judge.

21.7 The question, which thus arose, before the High Court for consideration was whether the order made by the Assistant Judge under Section 476B of the Old Code, was an order made by a Civil Court, so

that High Court's revisional power would be governed by the provisions of Section 115 of the CPC or, was an order made by a criminal court or a court exercising criminal powers, and thus, the power to revise would be sourced under Section 439 of the Old Code. The observations of the Court[13] were relied upon by Mr. Chandhiok.

22. It must be noticed that both in Mt. Rampati Kuer as well as Bhatu Sadu Mali case, the High Court, in revision, was dealing with the orders of the appellate court passed under section 476B of the Old Code which is equivalent to Section 341 of the New Code and not those passed under Section 476 of the Old Code (now Section 340).

23. Similarly, reliance was placed on the judgment of a Single Judge in the case of Jose Kuruvinakunnel. In this case the Munsiff's court, in which the suit was being tried, an application under Section 340

13. "....In my opinion, however, the practice which has prevailed in this Court is right. The order which the appellate Court is called upon to make under Section 476B either quashing a complaint or directing a complaint to be filed is clearly an order of a criminal nature, and there is nothing in the section which enacts that the Court which passes that order is not a criminal Court. Mr. Dixit for the applicant contends that a Court acting under Section 476B is not a criminal Court as defined by Section 6 of the Criminal Procedure Code, and in certain cases that might be so, for instance, where the appellate Court is the Court of the First Class Subordinate Judge exercising appellate powers. But, on the other hand, I am not prepared to say that Section 6 is exhaustive. It is, however, in my view not essential to determine whether the Court which passes an order under Section 476B is technically a criminal Court or not. It is certainly a Court which is exercising jurisdiction in a criminal matter, and in my opinion orders passed by it can be revised by the High Court under Section 439. I agree with the view expressed in many cases, that Section 439 must be read in connection with the sections which precede it.

Section 439 enables the High Court to interfere in revision in the case of any proceedings, the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge. The expression " or other proceedings" must clearly be limited by the context. Nobody would suggest that under Section 439 a criminal Court could revise the orders of a civil Court in a civil matter. But it may well be that Section 439 goes rather further than Section 435 which refers to calling for the record of any proceeding before any inferior criminal Court. Whether or not in this case the order was technically made by an inferior criminal Court, I am clearly of opinion that it was an order made by an inferior Court exercising, under Section 476B, jurisdiction in a criminal matter. In my opinion not only does the procedure relating to criminal appeals apply to a proceeding under Section 476B, but any order made under that section can be revised by the High Court under Section 439, and the provisions of Section 115 of the Civil Procedure Code do not apply to such a case. I would, therefore, answer the first question submitted to us by saying that applications in revision from an order under Section 476B by any Court to the High Court may be heard and decided in accordance with the provisions of Section 439 of the Criminal Procedure Code.....

of the New Code was also filed. The Munsiff's court dismissed both the suit as well as application under Section 340 of the new Code. The plaintiffs filed an appeal against the said judgment of the Munsiff's Court with the District Court and a revision in respect of the order dismissing the plaintiff's application under Section 340 of the New Code. Qua the said application a preliminary objection was taken that a revision under Section 115 of CPC would not lie. The learned Single Judge accepted this limb of the argument by holding that proceedings under Section 340 of the New Code though initiated before a civil or a revenue Court are essentially criminal in nature, and therefore, against an order passed under Section 340 or under Section 341 of the New Code, a revision petition under Section 115 of the CPC, would not lie. The learned Single Judge dismissed the revision petition, on an additional ground, which was that, both the Munsiff's court and the appellate court in their wisdom had come to the conclusion based on the material placed before them that, it was not expedient in the interest of justice to initiate proceedings under Section 340 of the New Code and hence such findings could not be interfered with, by a court exercising revisionary jurisdiction.

23.1 The Single Judge inter alia relied upon the judgment of the Full Bench of the Patna High Court in **Mt. Rampati Kuer**.

24. In **Sri Chand** there is no real discussion on the issue that has been raised in the present matter, before us. There is, however, an observation made that proceedings under Section 340 of the New Code 'being penal in nature' the principles of natural justice ought to be applied and a show cause notice should be issued to the accused. This last aspect is, in our view, directly contrary to the judgment of the Supreme Court in the case of **Pritish vs State of Mahrashtra**. The learned Single Judge has placed a substantial reliance on the judgment of the Andhra Pradesh High Court in the case of **Nimmakayala Audi Narrayanamma vs State of Andhra Pradesh** AIR 1970 AP 119. In this case the Andhra Pradesh High Court was dealing with the Old Code wherein, the court seems to have come to a conclusion that proceedings under Section 476 of the Old Code, are criminal in nature.

25. The Gujarat High Court in the case of **Abdul Karim Hazi Zaveri** came to the view that the no appeal to the Division Bench would lie under Section 341 of the New Code against the order of the learned Single Judge passed in Section 340; since the words .other than a High Court. had been introduced in Section 341 of the New Code. What is

pertinent to note that at almost the end of the judgment the learned Judges while holding that an appeal would not lie to them under Section 341 of the New Code, also observed that no appeal would be maintainable under clause 15 of the Letters Patent against an order of a Single Judge of a High Court, made in exercise of criminal jurisdiction. Clearly there was no detailed discussion on this aspect of the matter, that is, what is the nature of jurisdiction exercised.

26. This brings us to the Division Bench judgment of this court in the case of **Ramesh Jaiswal**. Briefly, in this case the appellant, (who was the original plaintiff in a suit for specific performance filed by him), was aggrieved by the fact that the Single Judge had dismissed his application filed against respondent no. 1, under Section 340 of the New Code. It is relevant to note, the appeal was preferred before the Division Bench under clause 10 of the Letters Patent, as applicable to this Court. The application under Section 340 of the New Code, came to be filed against respondent no. 1 for the reason that, while in the suit a written statement had been filed claiming that the suit property had been sold to another person, by execution of an agreement to sell, and registered General Power of Attorney in favour of a person; inquiries made by the appellant, with the office of the sub-Registrar, had revealed that no such document had been registered. The Single Judge, had, however, dismissed the application, on the ground that the application adverted to a property other than property qua which, the suit was filed. In the appeal, this aspect was questioned, as it was sought to be demonstrated that the Single Judge had erred, in view of the fact that, the property referred to in the application formed part of the agreement executed between the appellant and respondent no. 1 qua which specific performance was sought. In the appeal, respondent no. 1, raised a preliminary objection qua its maintainability, on the ground that no appeal under clause 10 of the Letters Patent, was available if the court concerned, was exercising criminal jurisdiction. The Division Bench agreed with this contention[14].

14. "The only question is whether the Letters patent provides for an appeal in such a scenario. We have already explained that the order passed by the learned Single Judge; which is impugned before us, is an order passed and/or made in exercise of criminal jurisdiction. That being the case, by virtue of clause 10 of the said Letters patent itself, no Letters Patent Appeal would lie to this Court. We fully endorse the view taken by the Madras High Court and the Gujarat High Court in the decisions referred above for the reasons expressed above. We, however, respectfully do not agree with the view taken by the Division Bench of the Calcutta High Court in **Subir Kumar Ghosh** (supra) insofar as it relates to orders passed under Section 340 Cr.P.C....."

26.1 The Division Bench agreed with the view taken by the Gujarat High Court in the case of **Abdul Karim Hazi Zaveri** and that of the Madras High Court in **K.V. Muniswamy Mudaliar vs Rajaratnam Pillai & Ors.** AIR 1922 Mad 495 (FB). The Division bench, however, disagreed with the view taken by the Division Bench of the Calcutta High Court in the case of **Subir Kumar Ghosh**.

26.2 We may only point out that, in **K.V. Muniswamy Mudaliar** case, which was decided by the Madras High Court, really dealt with the issue as to whether sanction for proceedings was correctly granted. Briefly, this arose in the background of the following facts[15]: The petitioner, who occupied the shops of the respondents as a tenant, filed a suit for damages and stay of the ejectment proceedings. In the suit the petitioner set up an agreement to lease. It was the case of the petitioner/ plaintiff that the lease was for a period of five years and a certain amount had actually been paid to the respondents. In so far as the amounts paid to the respondents were concerned, a reference was made to a particular entry made in the account book, in the affidavit of documents. The petitioner withdrew the suit when, it reached trial. After the suit terminated, an application was moved by the respondent for sanctioning prosecution in relation to the said extract from the account book. The Court in the course of proceedings, in which, sanction was sought directed production of the said document. It was against the sanction, that an appeal, was filed. Both Justices, Oldfield and Court's Trotter allowed the appeal and revoked the sanction. Briefly, their view was that it was not as if, the petitioner/ plaintiff had produced the document and relied upon the same, the facts according to them, revealed that, it was the Judge who ordered the document to be produced, and then, based on a mistaken premise or otherwise that the document was a part of the suit proceedings, accorded sanction for prosecution. From the report of the case, as printed in AIR, it appears that the Advocate-General raised two issues as to the maintainability of the appeal. The first being that, an appeal under Letters

15. We have obtained the facts of the case from the report published by Manupatra, the same are set out in the Madras Law Journal. We find that in the report published by All India Reporter (AIR) these facts are not stated. The discussion though on issues of law is with regard to whether the appeal court could revoke the sanction. We may also point out that even though the appeal numbers are common which is O.S.A. No. 25/ 1992, the appeal arises out of two different original proceedings: OS No. 522/1920 and CS No. 22/1922. The date of the appellate judgment as noted in AIR is 12.04.1922, while that which is noted in MLJ is 05.05.1922 (see 1923 MLJ XLIV 774). The full judgment appears to have been reported in 1922 (XLV) ILR 929 (Madras).

Patent would not lie against the decision of the Single Judge as that decision was taken in exercise of criminal jurisdiction, and the second submission made was that, an appeal would lie under Letters Patent only against a .judgment., the order sanctioning prosecution was not a judgment. Chief Justice Schwabe after noting the submissions made the following observations:

> ...On both these points there would be some conflict of authorities; but not having heard the other side on this point, we cannot give any decision upon that. But I think it right to say that my present view is, that the Advocate-General is right on both points that this is a matter in the exercise of criminal jurisdiction and that the order is not a judgment. The third point is that under Section 195 Cr.P.C. apart altogether from the Letters patent, there is no right of appeal, the right of appeal being confined to what is given by that section..

26.3 As would be evident, the Full bench of the Madras High Court ultimately only ruled on the effect of Section 195 of the Old Code and expressed no view as a court, on the submissions of the learned Advocate-General qua maintainability of the appeal under Letters Patent, the observations of Chief Justice Schwabe was thus only an obiter. This aspect does not seem to have been noticed by the Division Bench in **Ramesh Jaiswal** case. This issue, as a matter of fact, was dealt with by another Full Bench of the Madras High Court in **E.P. Kumaravel Nadar** which followed the view taken by the Calcutta High Court in **Har Parsad Das's** case. The said Full Bench judgment of the Madras High Court, in fact, overruled the judgment of a Single Judge of its own court in the case of In re **D'S. Raju Gupta**.

27. We may also refer to a Full Bench judgment of this court in **C'S. Agarwal**. In this case, a Letters Patent appeal was filed by the appellant impugning the order passed in writ petition filed by him under Article 226 of the Constitution read with Section 482 of the New Code. The writ petition was filed for quashing a FIR lodged against the appellant and others by the Economic Offences Wing under various provisions of the IPC. An objection was taken, as to the maintainability of the LPA, on the ground that the order of the Single Judge was passed in exercise of criminal jurisdiction. The question, therefore, which arose for consideration before the Full Bench was: whether a writ petition filed for

quashing of the FIR, should be treated, as one invoking criminal jurisdiction of the High Court (see paragraph 12 of the judgment). The Full Bench came to the conclusion that in ascertaining, whether or not a court, while exercising powers under Article 226 of the Constitution was in fact exercising criminal jurisdiction, would depend upon, the nature of the right violated and the nature of the relief sought in the petition. The Full Bench relied upon the observations of the Supreme Court in the case of **S.A.L. Narayan Row and Anr. vs Ishwarlal Bhagwandas & Anr.** AIR 1965 SC 1818 where it was observed in the context of income tax proceedings that: .A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property.. The Full Bench, however, disagreed with the view taken by the Andhra Pradesh High court in **Gangaram Kandaram vs Sunder Chhkha Amin & Ors.** 2000 (2) ALT 448, which held that an appeal under Letters Patent, would lie, against an order passed in a petition under Article 226 quashing the FIR; as according to the learned Judges such an order was not passed in exercise of criminal jurisdiction[16].

28. In our view, the crucial test therefore would be as to the nature of the proceedings when, a court takes a decision either to institute a

16. ".... 29. It would be necessary to clarify here that it cannot be said that in any of the cases under Article 226 of the Constitution, the Court is exercising 'criminal jurisdiction'. It would depend upon the rights sought to be enforced and the nature of relief which the Petitioner seeks in such proceedings. For example, if a writ petition seeking writ of habeas corpus is filed, while dealing with such a petition, the Court is not exercising criminal jurisdiction as no criminal proceedings are pending. In fact, the order of preventive detention is made without any trial under the criminal law. Likewise, when a person is convicted and sentenced after the conclusion of criminal trial and such an order of conviction has attained finality and he files writ petition under Article 226 of the Constitution challenging the orders of the Government refusing to grant parole while dealing with such a petition, the Single Judge is not exercising criminal jurisdiction, as no criminal proceedings are pending.....

.... 32. The test, thus, is whether criminal proceedings are pending or not and the petition under Article 226 of the Constitution is preferred concerning those criminal proceedings which could result in conviction and order of sentence.

33. When viewed from this angle, it is clear that if the FIR is not quashed, it may lead to filing of Challan by the investigating agency; framing of charge; and can result in conviction of order of sentence. Writ of this nature filed under Article 226 of the Constitution. Seeking quashing of such an FIR would therefore be "criminal proceedings" and while dealing with such proceedings, the High Court exercises its "criminal jurisdiction"....

(emphasis supplied)

complaint on an application filed under Section 340 of the New Code or, reject a request made, in that behalf. As noticed above, these proceedings can be filed before a court, which could be a Single Judge of this court exercising Civil, Criminal or any special jurisdiction. At this stage, the court forms an opinion as to whether it is expedient in the interest of justice whether or not an inquiry should be made qua offences which, apparently are alleged to have been committed. The court is entitled to hold a preliminary inquiry, though it is not mandatory.

28.1 It is also pertinent to note that, when a court forms such an opinion, it is not mandatory to make a complaint. It is only after the court forms an opinion whether after conducting a preliminary inquiry or not and comes to a conclusion that it is expedient that an inquiry should be made into the alleged offence that the court then, makes a complaint in writing to the Magistrate First Class. In case of the High Court, such person, as may be appointed for this purpose, may make the complaint, and in a case, other than the High Court, the court itself, i.e., the presiding officer, or such other officer that the court may authorize, in writing, in that behalf.

28.2 The inquiry that the Magistrate shall make, is a pre-trial inquiry which is covered under the provisions of Section 2(g) of the New Code, which takes within its fold every inquiry other than a trial conducted by the Magistrate or Court under the New Code. The Magistrate on receiving the complaint in line with the provisions of Section 343 of the New Code is required to proceed as far as possible (and to deal with the complaint) as if, it was instituted on a police report.

28.3 Ordinarily, a Magistrate can take cognizance of any offence under Section 190 of the New Code. However, in so far as prosecution for contempt of lawful authority of public servants or, qua offences under public justice and offences relating to documents given in evidence are concerned, by virtue of Section 195 of the New Code, a court cannot take cognizance except on a complaint received in writing by that court or officer of the court, who is authorized to file a complaint in that behalf, or by a superior court to which that court is subordinate.

28.4 Thus, upon receiving a complaint, the Magistrate will trigger the provisions under Sections 238 and 242 of the New Code, as the offences involved would bring the case within the purview of a warrant

case [see Section 2(x) of the New Code].

29. Therefore, in our view, there are two stages to the proceedings; the first stage is the formation of opinion by the court as to whether or not it should proceed to institute a complaint for commencement of an inquiry by a Magistrate, qua the alleged offences. The second stage is, the commencement of the inquiry itself by the Magistrate, and the consequent steps, which may have to be taken thereof. The two stages are clearly distinct. The first stage, in our view, is not a stage at which a court exercises criminal jurisdiction. It is only at the second stage, that the court exercises criminal jurisdiction. Against the said formation of opinion, a statutory appeal is provided under Section 341 of the New Code, which appears to exclude the High Court from a statutory appeal, but that by itself, in our view, would not debar a party aggrieved by a decision taken either way, on an application filed under Section 340, to avail of a remedy outside the provisions of the New Code. The judgment of the Allahabad High Court in **Mt. Rampati Kuer and Ors.,** and that of the Bombay High Court in **Bhatu Sadu Mali** were dealing with a situation where the courts were called upon to decide as to whether the order passed under Section 476B, which is pari materia with the provisions of Section 341, was revisable under Section 439 of the Old Code or under Section 115 of the CPC. In our view, that situation would perhaps be somewhat different from a circumstance, where without taking recourse to the statutory appeal, one were to take recourse, to a remedy outside the Code, i.e., the Old/New Code. This was precisely the circumstance which arose before the Full Bench of the Calcutta High Court in **Har Prasad Das's** case, where what was sought to be revised was an order of the Settlement Officer passed under Section 476 of the Old Code. The Full Bench of the Calcutta High Court, came to the conclusion that, if the order was passed by a Civil Court, on an application under Section 476, then it could be only revised under Section 115 of the CPC and if it was otherwise, i.e., an order passed by a Criminal Court, it would be revisable under Section 439 of the Old Code.

30. The above apart, as a matter of fact, in our view, both Section 476 B of the Old Code and Section 341 of the New Code when read with corresponding Section 195 clearly provide a statutory yardstick for determination of an appeal forum. Both under Section 476B of the Old Code and now under Section 341 of the New Code read with corresponding Section 195, a decision taken under Section 476 of the

Old or under Section 340 of the New Code by a civil court would be amenable to an appeal before a civil appellate court. This to our minds is clearly indicative of the legislative intention, which is, that at this stage; neither the original court nor the appellate court is exercising criminal jurisdiction. We thus respectfully would disagree with view taken in those two judgments.

31. Before, we proceed further we may also refer to a Division Bench judgment of the Kerala High Court in **V. Narayana Reddiar'** case. This was a case, the appellant, who was a tenant and had carried out some alterations in the building in issue; was directed by the concerned municipal corporation, to demolish what according to it, was an unauthorized structure. The appellant approached the State Government against the order of the municipality. The State Government issued an order, whereby the appellant was directed to make an application before the local authority for regularization of the structure which, was threatened with demolition. The respondent, before the Court, filed a petition before the Single Judge that the agreement to lease, on which, the reliance was placed was a forged document. Consequently, an application under Section 340 of the New Code was moved, before the Single Judge of the High Court. The Single Judge directed the Registrar of the court to make a complaint. The said order was assailed before the Division Bench. A preliminary objection was taken by the respondent that, an appeal was not maintainable on the ground that under Section 341 of the New Code, the High Court stood excluded. The argument was that the legislature intended that, against the order of the Single Judge, no appeal would lie. The Division Bench, rejected this contention and, came to the conclusion that, merely because no appeal would lie under Section 341 of the Code, would not mean that if, there is another provision for an appeal from orders, passed under Section 340 of the Code, such provision would also stand excluded. The Division Bench relied upon Section 5 of the Kerala High Court Act to hold that, an appeal would lie. The Division Bench applied the principle set forth by the Supreme Court in the case of **Vinita M. Khanolkar vs Pragna M. Pai** 1998 (1) SCC 500. Pertinently, the Division Bench of the Kerala High Court disagreed with the view of the Karnataka High Court in **Chennapa vs Basappa** (1984) 1 KLJ 204. The court also noticed the decision of the Full Bench of the Madras High Court in **K.V. Muniswamy Mudaliar vs Rajaratnam Pillai & Ors.** After a detailed discussion, the court made the following crucial

observations:

> .....21. Learned counsel for the first respondent then contended that even though the matter arose in proceedings under Article 226 of the Constitution of India, the jurisdiction exercised by the learned single Judge is under Section 340 of the Code of Criminal Procedure. Hence, an appeal will not lie. We do not find any basis for this contention. According to us, merely because a provision under Section 340 of the Code of Criminal Procedure was being considered, the jurisdiction exercised by the Court cannot be said to be criminal jurisdiction. The offences cannot be tried without a complaint from the Court and before sending such complaint under Section 340 the Court has to be satisfied that a prima facie case has been made. It may arise in Criminal Court, Civil Court, Revenue Court or Tribunal. Merely because such proceedings are under Section 340 of the Code of Criminal Procedure, it cannot be said that what was being exercised is criminal jurisdiction. We are supported by the provisions under Section 341 of the Code of Criminal Procedure itself. According to Section 341 of the Code of Criminal Procedure, an order passed under Section 340 of the Code of Criminal Procedure by a Court other than a High Court, then an appeal lies to the Court to which ordinary appeal lies from such Court. Thus, if an order is passed under Section 340 of the Code of Criminal Procedure by a Munsiff's Court, appeal will lie to the District Court. But on the other hand, if such proceedings are taken before a Chief Judicial Magistrate, it lies to the Sessions Court. According to us, the proceedings are tainted with the colour of jurisdiction of the Court in which proceedings arise.....
>
> (emphasis supplied).

31.1 To be noted, the Division bench Judgment was carried in appeal to the Supreme Court. The Supreme Court dismissed the appeal, though we must point out that the discussion apparently before the Supreme Court was confined to whether the provisions of Section 195(1)(b)(ii) of the New Code, would be attracted to the facts of the case in view of the fact that the document in respect of which forgery was alleged was executed much before it was produced in court. The Supreme Court in this behalf applied the judgment of the Constitution

Bench in the case of **Iqbal Singh Marwah vs Meenakshi Marwah** (2005) 4 SCC 370 which, upheld the decision in the case of **Sachida Nand Singh & Anr. vs State of Bihar** 1998 Crl L.J. 1565. We respectfully agree with the view taken by the Kerala High Court in the case of **V. Narayana Reddiar vs Rugmini Ammal & Ors.** and consequently differ with the view taken by the Gujarat High Court in **Abdul Karim Haji Zaveri**, decision of the Karnataka High Court in **Chennapa vs Basappa**, and also the view expressed by a Division Bench of this court, in **Ramesh Jaiswal**.

32. Having regard to the aforesaid discussion, one would have to consider as to whether in the facts of the present case, against the impugned order of the learned Single Judge passed under Section 340 of the New Code, an appeal would lie to the Division Bench. As is noticed above, the application under Section 340 of the New Code is filed in respect of the alleged forgery committed by respondent no. 1, in a proceeding concluded under Section 20 of the 1940 Act. The jurisdiction exercised by the Court, is not an ordinary original jurisdiction as provided under Section 5(2) of the 1966 Act.

32.1 There is a difference between original civil jurisdiction and ordinary or even extra ordinary original jurisdiction exercised by a High Court. This court exercises civil and criminal jurisdiction. This court would be exercising original civil jurisdiction when it entertains petitions for example : for grant of probate or even as in the instant case a petition under Section 20 of the 1940 Act or a petition and / or an application under the Arbitration and Conciliation Act, 1996. However, when an action in the nature of civil suit is filed, this court would be exercising ordinary original civil jurisdiction as provided for under Section 5(2) of the 1966 Act. [See In re: **A. Kuppuswami Nayagar** AIR 1938 Madras 779]. For the aforesaid reasons, an appeal shall not lie to the Division Bench under Section 10 of the 1966 Act. As noticed above, the present appeal has been filed under Section 10 of the 1966 Act.

32.2 It would be relevant to note in this context, that another Full Bench of this Court in the case of **Jaswinder Singh Geetanjali Singh & Anr. vs Mrigendra Pritam Vikramsingh Steiner** 2013 (196) DLT 1 (FB), has taken the view that, since the Lahore High Court was a non-chartered High Court, it was not conferred with ordinary original civil jurisdiction as was the case with Letters Patents issued to the Chartered

High Courts. This High Court having inherited the Letters Patent of the Lahore High Court would have the same attributes qua the width and scope of appeals under Letter Patent, as was available to the Lahore High Court. In this context, in Jaswinder Singh case the Full Bench made the following observations:

> ".....30. In our view the issue of maintainability of an appeal under clause 10 of the Letters Patent as against Section 10(1) of the said Act is vitally connected with the nature of powers conferred under the Letters Patent to the Delhi High Court. The distinction between the Letters Patent of the Chartered High Courts and the Non-Chartered High Courts have, thus, been set out in detail aforesaid because there is a fundamental difference between the two Letters Patents. This fundamental difference arises from the jurisdictions being exercised by the then existing courts prior to the Letters Patent by which the Chartered and the Non-Chartered High Courts were established. The Chartered High Courts were preceded by the Supreme Courts established in the presidency towns. These Supreme Courts had both the original jurisdiction and the appellate jurisdiction qua the territory in question. Thus, when the Chartered High Courts were established there were two kinds of original jurisdiction which were transferred to it, i.e., one being exercised by the Supreme Court in presidency towns as well as one being exercised by the Sadar Courts in the Mofussil areas. This is also reflected in the Letters Patents qua the presidency towns where clauses 11 & 12 of the Letters Patent were included.
>
> 31. Insofar as the Non-Chartered High Courts like the Lahore High Court are concerned, there was absence of the aforesaid clauses of the Letters Patent on account of the fact that there were no prior Supreme Courts enjoying original jurisdiction but the similar system of Moffusil and Sadar Courts prevailed. Thus, the Letters Patent of the Chartered High Courts conferred only the appellate jurisdiction of the Sadar Courts and if original jurisdiction would have been conferred up to a pecuniary limit, such jurisdiction would have been created for the first time under the Letters Patent. This, however, did not arise as no such original jurisdiction was created. The similarity of clause 10 of the Non-Chartered High Courts vis-a-vis clause 15 of the Chartered High Courts would, thus, make no difference in view of the absence of existence of any original jurisdiction when the Letters Patent were established. Thus, when clause 10 of the Letters Patent refers to an appeal from the Single Judge to a Division Bench, it is not relatable to the exercise of ordinary original civil jurisdiction by the learned Single Judge of the Court. This is the reason that when writ jurisdictions are being exercised as extraordinary original civil jurisdiction, an appeal lies to the Division Bench under Clause 10 of the Letters Patent as applicable to Delhi which in turn had inherited the same from the parent Lahore High Court ..... (emphasis supplied)

32.3 Having regard to the above, under clause 10 of the Letters Patent, an appeal would lie from a judgment of the Single Judge to the Division Bench, except that which is passed in revisional jurisdiction, in exercise of power of superintendence, or in criminal jurisdiction. As discussed above, the formation of opinion under Section 340 of the New Code, is not in exercise of criminal jurisdiction. This is certainly not a case where the Single Judge exercised its power of superintendence qua a judgment passed in exercise of appellate jurisdiction in respect of decree or order passed by a court exercising appellate jurisdiction. This case is also not a case where, the learned Single Judge exercised revisional jurisdiction. Therefore, in our view, an appeal would lie to the Division Bench under the Letters Patent. That the formation of an opinion is a judgment, in our view, is discernible from the principles laid down by the Supreme Court in **Shah Babulal Khimji vs Jayaben D. Kania** (1981) 4 SCC 8. In our view, a decision either way on an application filed under Section 340 of the New Code decides valuable rights of parties and, therefore, an appeal would lie under clause 10 of the Letters Patent, as applicable to this Court.

33. To sum up: (i). the expression .other than the High Court., appearing in Section 341 of the New Code would not disable an aggrieved party to prefer an appeal, if it is otherwise maintainable, under other statutes and provisions in law; and (ii) the decision taken on an application under Section 340 of the New Code, involves only a formation of an opinion as to whether or not a complaint should be filed. At the stage of formation of such an opinion, the court does not exercise criminal

jurisdiction. Therefore, an appeal under Letters Patent would be available to the aggrieved party in this case.

34. The reference is answered accordingly. List the appeal before the roster Bench for being heard on merits, on 26.07.2013.

ILR (2013) III DELHI 2389
CRL. A.

SANJAY **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

(G.P. MITTAL, J.)

CRL. A. NO. : 1366/2012 &
CRL. M. (B) NO. : 2112/2012 **DATE OF DECISION: 16.05.2013**

Indian Penal Code, 1860—Section 366/376—Appellant convicted and sentenced by trial Court—Prosecutrix aged 15 years and 8 months—She travelled with appellant willingly in bus and train—Prosecutrix brought back to Delhi by appellant—Held:- While awarding punishment the Court has to take into consideration the mitigating and aggravating circumstances—Held:- It was a fit case for sentence less than the minimum prescribed.

The legislature in its wisdom made a provision for awarding a sentence of less than seven years when there are special and adequate reasons for the same. I have before me the prosecutrix's testimony. It goes without saying that the prosecutrix merrily proceeded with the Appellant most willingly.

She travelled with him in a bus and then in a train to Lucknow. The prosecutrix was brought back to Delhi by the Appellant himself where the Appellant and the prosecutrix were apprehended at New Delhi Railway Station by the police. Thus, although the Appellant does not want to contest the Appeal on merits, it is borne out from the record that it was a case of consensual intercourse with the prosecutrix. While awarding punishment, the Court has to take into consideration the mitigating and aggravating circumstances. The prosecutrix was aged 15 years and 08 months and she was incapable of giving the consent for sexual intercourse. I have seen numerous cases where the girls sometimes less than 16 years of age take a lead in eloping with a boy, enters into a marriage with the boy and have sexual intercourse with him. Such a predicament was noticed by this Court in several cases including in two judgments passed by the Division Benches of this Court, namely, **Manish Singh v. State Govt. of NCT & Ors.,** AIR 2006 Delhi 37 and **Bholu Khan v. State of NCT of Delhi & Ors.** (W.P.(Crl) 1442/2012) decided on 01.02.2013. **(Para 5)**

Considering the age of the prosecutrix and the facts narrated above, in my view, it is a fit case where sentence less than the minimum should be awarded. Similar view was taken and sentence less than minimum was awarded by a learned Single Judge of this Court in **Brij Pal v. State** (Crl.Appeal No.278 of 2000) decided on May 31, 2011. I accordingly sentence the Appellant to undergo RI for four years and to pay a fine of Rs. 2,500/- for each of the offences under Sections 366 and 376 IPC, and in default of payment of fine, the Appellant shall undergo SI for one month each. Both the substantive sentences shall run concurrently. **(Para 6)**

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Sumer Kumar Sethi, Advocate along with Appellant in judicial

custody.

FOR THE RESPONDENT : Ms. Rajdipa Behura, APP.

CASES REFERRED TO:

1. *Bholu Khan* vs. *State of NCT of Delhi & Ors.* (W.P.(Crl) 1442/2012) decided on 01.02.2013.
2. *Manish Singh* vs. *State Govt. of NCT & Ors.,* AIR 2006 Delhi 37.

RESULT: Appeal allowed.

G.P. MITTAL, J. (ORAL)

1. The Appeal is directed against a judgment dated 25.07.2012 and an order on sentence dated 08.08.2012 passed by the learned Additional Sessions Judge("ASJ") in Sessions Case No.90/2011 FIR No.280/2011 P.S. Burari whereby the Appellant was held guilty for the offences punishable under Sections 366 and 376 IPC. He was sentenced to undergo RI for five years and to pay a fine of Rs. 5,000/- or in default to undergo SI for one month for the offence punishable under Section 366 IPC. He was further sentenced to undergo RI for seven years and to pay a fine of Rs.10,000/- or in default to undergo SI for two months for the offence punishable under Section 376 IPC.

2. On the last date of hearing, at the request of the learned counsel for the Appellant production warrants were issued for appearance of the Appellant. The Appellant is present in custody in pursuance of the production warrants.

3. On instructions from the Appellant, the learned counsel for the Appellant does not want to address any arguments on merits. The only plea raised by the learned counsel for the Appellant is that the Appellant's case falls in the proviso to Section 376(1) IPC and a lenient view may be taken while awarding sentence to him. It is urged that the age of the prosecutrix on the date of the commission of the offence was established to be 15 years and 08 months. The prosecutrix accompanied the Appellant in a bus and in a train and then stayed with him at Lucknow for three days. She admitted that the Appellant went out to bring food for her and he also got a sari for her from the market. He urges that the prosecutrix did not raise any alarm and thus it was a case of consensual sexual

intercourse. The learned counsel urges that in fact the prosecutrix had married the Appellant but he was unable to prove the factum of marriage and thus since the prosecutrix was less than 16 years of age, the Appellant is guilty of the offence of rape but he may be awarded punishment less than the minimum prescribed.

4. The learned APP opposes the plea for taking a lenient view urging that the offence of sexual molestation is on the rise and a punishment less than the minimum prescribed should not be awarded.

5. The legislature in its wisdom made a provision for awarding a sentence of less than seven years when there are special and adequate reasons for the same. I have before me the prosecutrix's testimony. It goes without saying that the prosecutrix merrily proceeded with the Appellant most willingly. She travelled with him in a bus and then in a train to Lucknow. The prosecutrix was brought back to Delhi by the Appellant himself where the Appellant and the prosecutrix were apprehended at New Delhi Railway Station by the police. Thus, although the Appellant does not want to contest the Appeal on merits, it is borne out from the record that it was a case of consensual intercourse with the prosecutrix. While awarding punishment, the Court has to take into consideration the mitigating and aggravating circumstances. The prosecutrix was aged 15 years and 08 months and she was incapable of giving the consent for sexual intercourse. I have seen numerous cases where the girls sometimes less than 16 years of age take a lead in eloping with a boy, enters into a marriage with the boy and have sexual intercourse with him. Such a predicament was noticed by this Court in several cases including in two judgments passed by the Division Benches of this Court, namely, **Manish Singh v. State Govt. of NCT & Ors.,** AIR 2006 Delhi 37 and **Bholu Khan v. State of NCT of Delhi & Ors.** (W.P.(Crl) 1442/2012) decided on 01.02.2013.

6. Considering the age of the prosecutrix and the facts narrated above, in my view, it is a fit case where sentence less than the minimum should be awarded. Similar view was taken and sentence less than minimum was awarded by a learned Single Judge of this Court in **Brij Pal v. State** (Crl.Appeal No.278 of 2000) decided on May 31, 2011. I accordingly sentence the Appellant to undergo RI for four years and to pay a fine of Rs. 2,500/- for each of the offences under Sections 366 and 376 IPC, and in default of payment of fine, the Appellant shall

undergo SI for one month each. Both the substantive sentences shall run concurrently.

7. The Appeal is allowed in above terms.

8. Pending Applications stand disposed of.

9. A copy of the judgment be transmitted to the Superintendent Jail concerned for information.

ILR (2013) III DELHI 2393
CRL.A.

PARVEEN KUMAR **....APPELLANT**

VERSUS

STATE OF DELHI **....RESPONDENT**

(REVA KHETRAPAL & SUNITA GUPTA, JJ.)

CRL. A. NO. : 1471/2010, 1416/2010, 458/2012 & 459/2012 **DATE OF DECISION: 17.05.2013**

(A) Indian Penal Code, 1860—Section 302/34—Identification of accused during night—All four accused well known to the deceased and his eye witness brother—Incident witnessed from a distance of 2 to 10 paces—Paucity of light—Accused could be identified easily by their voices, gait, clothes, manner of speaking etc.

With regard to the identification of the accused persons, in our opinion, even assuming the light to be feeble, it cannot be lost sight of that all four accused were well known to the deceased and his family and thus their identification by PW3 Vikas cannot be doubted. It may be noted that PW3 Vikas in his cross-examination has stated that he had witnessed the incident at a distance of 2 or 3 paces and by the time

his brother was overpowered he had proceeded further and the distance between him and the assailants at that point of time was 10 paces. We see no reason why the eye witness should be disbelieved when he says that he saw the accused at such a close distance while they were assaulting his brother, more so when the accused were very well known to the witness and his family. Even otherwise, no previous enmity is alleged and, therefore, animosity as a reason for false implication is ruled out. The paucity of light regardless, as held by the Supreme Court in the case of **Kedar Singh and Others vs. State of Bihar** and **State of Uttar Pradesh vs. Manoharlal and Others** (supra), the Appellants could have very well been identified by their voice, gait, clothes, manner of speaking, etc. **(Para 20)**

(B) Improbable conduct of PW3 brother of deceased—Held, different persons react differently in different situations.

The doubt sought to be caused on the authenticity of the FIR, in our opinion, is altogether negated by the fact that the FIR contains the version of the rukka in *verbatim*. All the four accused are named in the rukka itself and thus their implication by manipulation of the FIR is ruled out. In fairness to the learned trial Judge, it also deserves to be noted that he had called for the original FIR register and found printing errors galore in the serial numbers of various FIRs and this itself renders at naught the plea of the defence that the FIR was an interpolated document. The slight delay in the dispatch of the FIR to the Ilaqa Magistrate has been satisfactorily explained by PW5 Constable Surinder, who had carried the FIR on his motorcycle and no cogent reason has been pointed out by the defence as to why this Court should doubt the veracity of his statement. Further, there does not appear to us to be any reason to doubt the eye witness account of the real brothers of the deceased PW3 Vikas and PW4 Vijay. PW3 Vikas had witnessed the assault on his brother and his account of the incident

appears to be free from exaggerations and embellishments, and in fact, is corroborated by the autopsy report which is reflective of the precise manner in which the deceased was done to death. It is correct that there was no motive for the commission of the offence other than the stealing of pigs grazing in the open, but motive itself loses significance when the oral testimony of the eye witnesses as well as medical and other evidence on record clearly establishes the commission of the crime, the manner in which it was committed and the place where it was committed (See **Yunis @ Kariya vs. State of Madhya Pradesh,** Appeal (Crl.) No.522 of 1995 decided on 10th December, 2002). The fact that all the four accused came together two of them, namely, Anil of Village Bakoli and Parveen caught hold of the deceased, Anil exhorted *"Aaj kaam tamaam kar do"* while accused Gulab stabbed 6-7 times on his face and head with knife and Anil @ Boota gave 3-4 danda blows on his head and when PW3 Vikas tried to save his brother, Anil @ Boota exhorted *"Iska bhi kaam tamaam kar do"* clearly reflects that all the appellants shared common intention. To this extent, the prosecution has been able to prove the case beyond doubt. **(Para 22)**

(C) Motive—Loses significance when ocular and medical evidence is clear to establish guilt.

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who had carried the FIR on his motorcycle and no cogent reason has been pointed out by the defence as to why this Court should doubt the veracity of his statement. Further, there does not appear to us to be any reason to doubt the eye witness account of the real brothers of the deceased PW3 Vikas and PW4 Vijay. PW3 Vikas had witnessed the assault on his brother and his account of the incident appears to be free from exaggerations and embellishments, and in fact, is corroborated by the autopsy report which is reflective of the precise manner in which the deceased was done to death. It is correct that there was no motive for the commission of the offence other than the stealing of pigs grazing in the open, but motive itself loses significance when the oral testimony of the eye witnesses as well as medical and other evidence on record clearly establishes the commission of the crime, the manner in which it was committed and the place where it was committed (See **Yunis @ Kariya vs. State of Madhya Pradesh,** Appeal (Crl.) No.522 of 1995 decided on 10th December, 2002). The fact that all the four accused came together two of them, namely, Anil of Village Bakoli and Parveen caught hold of the deceased, Anil exhorted *"Aaj kaam tamaam kar do"* while accused Gulab stabbed 6-7 times on his face and head with knife and Anil @ Boota gave 3-4 danda blows on his head and when PW3 Vikas tried to save his brother, Anil @ Boota exhorted *"Iska bhi kaam tamaam kar do"* clearly reflects that all the appellants shared common intention. To this extent, the prosecution has been able to prove the case beyond doubt. **(Para 22)**

(D) 302 IPC or 304 Part-I or Part-II of IPC—Ten injuries inflicted with knife and danda—The force with which the injuries were inflicted speaks of the intent to cause death—Danda broke into two pieces—Conviction U/s 302 IPC maintained.

Now, it is to be seen whether conviction of the Appellants is liable to be converted to Section 304, Part I or Part II as

contended by Mr. Vivek Sood, counsel for the Appellant Anil Kumar. As already noted above, reliance was placed by Mr. Sood upon the judgments of the Supreme Court in **Sunder Lal, Kalegura Padma Rao, Rakesh Singha and Kandaswamy** (supra). We have carefully perused the said decisions rendered by the Hon'ble Supreme Court and in our opinion none of the judgments relied upon by the counsel has any application to the facts of the case in hand inasmuch as it was on the peculiar circumstances of those particular cases that conviction was altered to Section 304, Part I or Part II. In the instant case, the accused persons inflicted as many as 10 injuries on the deceased with danda and knife. Injury Nos.1 and 2 are stated to have caused cranio cerebral damage resulting in the death of the deceased. The force with which these injuries were inflicted speaks of the intent of the accused persons to cause the death of the deceased. The danda itself broke into two pieces. We are, therefore, unable to persuade ourselves to interfere with the judgment of the learned trial court by altering the conviction under Section 302 IPC to one under Section 304, Part I or Part II IPC. The loopholes in the investigation and the minor discrepancies in the evidence pointed out by the defence counsel are also too inconsequential to persuade us to hold the accused persons innocent of the offence for which they have been charged. The sequence of events as unfolded by the evidence of the prosecution witnesses and the documentary evidence on record, in our considered opinion, cogently and conclusively establishes the guilt of the accused persons. **(Para 29)**

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. R.K. Burman, Mr. Medhanshu Tripathi and Mr. Harish Sharma, Advocate, Mr. S.K. Balian, Advocates.

FOR THE RESPONDENT : Ms. Richa Kapoor, APP for State with Ms. Karuna Chhatwal, Advocates.

CASES REFERRED TO:

1. *Varun Chaudhary* vs. *State of Rajasthan,* AIR 2011 SC 72.
2. *Motilal and Anr.* vs. *State of Rajasthan,* (2009) 7 SCC 454.
3. *Kandaswamy* vs. *State of Tamil Nadu,* (2008) 11 SCC 97.
4. *Kalegura Padma Rao and Anr.* vs. *State of Andhra Pradesh* (2007) 12 SCC 48.
5. *Sunder Lal* vs. *State of Rajasthan,* (2007) 10 SCC 371.
6. *State of U.P* vs. *Shri Krishan,* 2005 SCC (Crl.) 1551.
7. *Israr* vs. *State of U.P.,* AIR 2005 SC 249.
8. *Ramesh Singh @ Photti* vs. *State of A.P.,* Appeal (Crl.) 868 of 2003 decided on 25th March, 2004.
9. *State of Punjab* vs. *Sucha Singh,* AIR 2003 SC 1471.
10. *Thanedar Singh* vs. *State of M.P,* (2002) 1 SCC 487.
11. *Radhey Sham* vs. *State of Haryana,* (2001) 10 SCC 206.
12. *Kedar Singh and Others* vs. *State of Bihar,* 1999 Cri.LJ 601.
13. *Rakesh Singha* vs. *State of H.P.,* (1996) 9 SCC 89.
14. *Yunis @ Kariya* vs. *State of Madhya Pradesh,* Appeal (Crl.) No.522 of 1995.
15. *State of Gujarat* vs. *Raghunath Vamanrao Baxi,* 1985 AIR 1092.
16. *Rana Partap* vs. *State of Haryana,* 1983 (3) SCC 327.
17. *State of Uttar Pradesh* vs. *Manoharlal and Others,* 1981 Supp. SCC 35.

RESULT: Appeals Dismissed.

REVA KHETRAPAL, J.

1. Challenge in the aforesaid four appeals is to the conviction of the

Appellants for the offences under Section 302 read with Section 34 of the Indian Penal Code, 1860, awarding an imprisonment for life to all the four Appellants with the fine of Rs. 2,000/- each, in default three months simple imprisonment each.

2. The facts germane to the case of the prosecution are as follows. The first informant was Vikas, the brother of the deceased Rajesh. The version of PW3 Vikas is that he has a piggery farm. Prior to the incident two to four times his pigs were stolen but the matter was not reported to the police. On the day of the incident i.e. on 6.5.2002, he and his brother Rajesh had gone to the vicinity of Jindpur Godown at about 9.00 p.m. to take back their pigs, which happened to be grazing there at that time. When they were sitting on the stairs of a shop and were watching their pigs, at about 9.30 p.m., a white coloured Maruti Van came from the G.T. Road and stopped near the pigs. There were four persons in the van. They alighted from the van and started catching their pigs. Seeing this, Rajesh followed those four boys. He (Vikas) was behind Rajesh. Two of the boys were accused Gulab from their Village viz, Village Mukhmelpur and Anil, resident of Village Bakoli, both of whom used to work at their shop. Gulab had left their shop about one or one and a half year before the incident. Anil of Village Bakoli had left about 15-20 days before the incident. The name of the third accused was Anil Kumar, son of Hukum, who was also a resident of village Mukhmelpur. The fourth accused Parveen also resided in their village. Accused Anil of Village Bakoli and accused Parveen Kumar resident of their Village caught hold of his brother Rajesh. Accused Anil of Village Bakoli exhorted: *"Aaj inka kaam tamam kar dete hai"* while accused Gulab Singh stabbed 6-7 times on the face and head of his brother with a knife, and accused Anil of their Village gave 3-4 danda blows on the head of his brother Rajesh. When he tried to save his brother, Anil @ Boota of their village exhorted *"Iska bhi kaam tamam kar do"*. Due to their fear, he ran from there to save himself; he ran towards his village. Accused persons chased him for some distance. He came home and narrated the entire incident to his elder brother Vijay. He and his brother Vijay came back to the spot on a two wheeler scooter and searched for Rajesh, who was not found at the spot but was found lying in the bushes, at a distance of 3-4 paces from the spot, in an injured condition. He (Vikas) and his brother Vijay lifted him and put him on the scooter and he drove towards the police station. On the way just before the police station, a PCR Van met them. Thereupon,

his brother Vijay sat in the PCR Van with his injured brother Rajesh and he followed them on his two wheeler scooter to Babu Jagjivan Ram Hospital, Jahangir Puri, Delhi, where Rajesh was declared brought dead. The police recorded his statement Ex.PW3/A. He accompanied the police officers to the place of occurrence and the IO prepared the site plan at his instance. The following day, i.e., on 7th May, 2002 at about 9.00 a.m., he and his brother Vijay and others went to the hospital where they identified the dead body of Rajesh and his statement to this effect was recorded by the police. Police had seized his blood stained shirt and the blood stained clothes of his brother, which also he identified.

3. In support of its aforesaid case, the prosecution examined 17 witnesses. All the accused were examined under Section 313 Cr.P.C. Three accused persons, namely, Anil Kumar @ Boota, Parveen and Gulab Singh chose to lead evidence in their defence and examined four witnesses. After scrutinizing the testimony of the witnesses of the prosecution and those of the accused, the learned Sessions Judge held that the prosecution had successfully established its case against all the four accused and convicted them for the offence punishable under Section 302/34 IPC.

4. Assailing the judgment, Mr. S.K. Balian, the learned counsel for the Appellant Gulab Singh @ Hathi contended that the entire case of the prosecution was a manipulated one as was clear from a bare glance at the FIR itself, running into three leafs. While the first leaf of the FIR bore serial no.7, the second leaf of the FIR had serial no.17 printed on it. The writing on the first page was different from the writing on the second page and all this clearly showed that the central leaf of the FIR bearing Serial No.17 had been replaced by removal of the leaf initially recorded by the duty officer concerned. This conclusion was buttressed by the fact that Column no.11 in the FIR records *"P.M.Conducted"*. This belied the prosecution's own case that the rukka was sent at 1.55 a.m. on the night intervening 6.5.2002 and 7.5.2002 for registration of the FIR and the postmortem was conducted on 7.5.2002 at about 12.30 p.m. He further contended that the eye witness account of the solitary eye witness, namely, PW3 Vikas was replete with material discrepancies, which rendered his testimony wholly incredible. Thus, for instance, PW3's deposition that the accused had kept the headlights of the van on at the time of the occurrence was altogether unbelievable, for why would the accused expose their identity in such a manner. His statement made in cross-examination that the Maruti Van stopped at a distance of 20-25

paces from them was belied by the scaled map which reflected the distance to be 400 mtrs. between the stairs where the witness stated he was sitting with the deceased and the place where the Maruti Van stopped.

5. He contended that even otherwise the entire story of the prosecution was an improbable one as is reflected from the following:- (i) The witness (PW3 Vikas) ran away from the spot when his brother was being brutally attacked by four persons. (ii) The father and mother did not come to the spot at all though the incident was narrated in their presence by PW3 Vikas to PW4 Vijay. (iii) No dead human being can be carried on a two wheeler scooter by a pillion rider. (iv) Though the rukka was shown sent at 1.55 a.m. on 7.5.2002, the FIR was sent at 4.00 a.m. for being delivered to the Ilaqa Magistrate through a special messenger, and was eventually delivered to the Ilaqa Magistrate at 12.30-1.00p.m. (v) The dagger is shown to have been recovered from a place 200-300 mtrs. away from the place from where the danda/bat was recovered. (vi) PW4 Vijay Kumar (brother of the deceased), PW12 SI Ram Sharan and PW15 ASI Sudama Sharma stated that the accused Gulab @ Hathi and Anil @ Boota were captured in the Subzi Mandi area from a "Phad", but PW10 Constable Yashvir stated that the aforesaid two accused persons were overpowered at the railway station, where they were sitting on the last stair of the railway station.

6. On behalf of the Appellant Anil @ Boota, Mr. Medhanshu Tripathi, Advocate mounted an assault on the impugned judgment by contending that no findings/reasons as such had been recorded by the learned Additional Sessions Judge to bolster his verdict of guilt of the accused persons. He further contended that the witnesses in one voice (except the complainant) had stated that there was no light at the place of incident and even PW1 Sanjay Verma, who had taken photographs of the spot and who was a private photographer, stated that it was a dark night and that photographs were taken under the search light. No independent witness was examined by the prosecution at the time of the recovery of the alleged weapons of offence. The theory that the Appellant Gulab @ Hathi was carrying a trap in his hand when he alighted from the Maruti Van also stood demolished as no such trap or any trap at all was recovered in the course of investigation. The manipulation in the FIR is apparent on the face of it and merits rejection of the prosecution case in toto. The Supreme Court in a number of judgments including those reported in **Motilal and Anr. vs. State of Rajasthan,** (2009) 7 SCC 454, **Thanedar**

Singh vs. State of M.P, (2002) 1 SCC 487, **Mehraj Singh vs. State of U.P,** (1994) 5 SCC 188 and **State of U.P vs. Shri Krishan,** 2005 SCC (Crl.) 1551 has held that where there is fudging of the FIR, the whole case of the prosecution deserves to be rejected. This apart, the unnatural conduct of the next of kin of the deceased, namely, PW3 Vikas (brother of the deceased) and the father and mother of the deceased renders the whole prosecution story highly improbable (See **State of Punjab vs. Sucha Singh,** AIR 2003 SC 1471). At best, it was a case of theft as no previous enmity between the deceased and the Appellants is even alleged to have existed. He further contended that as per the prosecution version three or four days prior to the day of the incident the accused persons had come to steal the pigs of the deceased and this probably was the reason why they were named in the FIR. Non-disclosure at the first instance as to how the injuries had been sustained by the deceased in the MLC further takes away from the credibility of the prosecution story. Then again, as per the testimonies of witnesses the clothes of the accused were blood stained, but as per the recovery memos the clothes were not blood stained.

7. On behalf of the third accused Parveen Kumar, Mr. R.K. Burman, Advocate placing reliance upon the Punjab Police Rules, Volume III, Rule 24.5 (1)(b) and under Section 157 Cr.P.C., contended that the prosecution had fallen foul of the aforesaid provisions and Rules, which required the copy of the FIR to be immediately forwarded to the Ilaqa Magistrate and the delay in doing so lends credence to the allegation of the defence that there was interpolation of the FIR. All incriminating material had been seized and sealed by the Investigating Officer on 6.5.2002 but it was sent to the FSL on 25.6.2002, which is reflective of the falsity of the prosecution story. Relying upon the judgment of the Supreme Court rendered in **Varun Chaudhary vs. State of Rajasthan,** AIR 2011 SC 72, he further contended that adverse inference was liable to be drawn against the prosecution as in the instant case the tyre marks of the Maruti Van in which the accused persons had come to the spot were not lifted from the place of offence and compared with the tyre marks of the Maruti Van used by the accused so as to establish the presence of the said vehicle at the place of offence.

8. Mr. Vivek Sood, learned counsel for the Appellant Anil of Village Bakoli contended that even if the facts narrated by the star witness of the prosecution, viz., PW3 Vikas are accepted as gospel truth, the

conviction of the Appellants under Section 302 IPC is liable to be set aside as the mens rea required under Section 300 of the IPC is conspicuously absent. The prosecution's own case is that the primary objective of the accused persons was to steal the pigs belonging to the deceased and his family. The incident happened on the spur of the moment. It was neither pre-meditated nor pre-planned. The stabs inflicted are in the nature of indiscriminate blows on the face and head and are not aimed at the abdomen or any other vital part of the body. Mr. Sood in this context relied upon the judgment of the Supreme Court in **Sunder Lal vs. State of Rajasthan,** (2007) 10 SCC 371. In the said case, the accused was alleged to have inflicted a blow on the head of the deceased with 'gandasi' with the intention to kill him and also inflicted injuries on his hand and the co-accused had inflicted injuries on his legs with lathi while he was sleeping. The deceased succumbed to his injuries on the same day. The learned trial court relying upon the dying declaration of the deceased convicted the accused under Section 302/34 and sentenced them to life imprisonment. The Supreme Court, however, held that considering the fact that the occurrence took place in the night in almost dark conditions with feeble light and attack was made indiscriminately, the appropriate conviction would be under Section 304, Part I IPC with a custodial sentence of 10 years.

9. Reliance was also placed by Mr. Sood on the judgments of the Supreme Court in **Kalegura Padma Rao and Anr. vs. State of Andhra Pradesh** (2007) 12 SCC 48, **Rakesh Singha vs. State of H.P.,** (1996) 9 SCC 89 and **Kandaswamy vs. State of Tamil Nadu,** (2008) 11 SCC 97 to contend that the factual scenario in the instant case, in the light of the legal principles laid down in the aforesaid decisions, merited the conviction of the accused under Section 304, Part I IPC and not under Section 302 IPC.

10. Ms. Richa Kapoor, learned Additional Public Prosecutor sought to rebut the contentions of the Appellants. counsel by submitting that the case of the prosecution was fully supported by the ocular, medical and documentary evidence on record. The prosecution version delineated in the first instance by PW3 Vikas is wholly supported by the testimonies of PW8 Constable Satya Narain, PW15 ASI Sudama Sharma and PW16 Head Constable Hargobind. The argument of the Appellants. counsel that the First Information Report in the instant case was a manipulated document is rendered at naught by the rukka, which verbatim contains the version

set out in the FIR, and in which PW3 Vikas has clearly given the names of all the four accused persons. As a matter of fact, the narration of the prosecution story in the rukka Ex.PW3/A recorded at the instance of PW3 Vikas, the First Information Report Ex.PW16/A and the testimony of PW3 Vikas are wholly in tandem and there is no variation in the three versions. Since no question is raised about any interpolation in the rukka, the necessary corollary is that there is no manipulation in the FIR. This in fact is borne out by the order of the learned trial court dated 16.2.2004 and subsequent order dated 29.9.2005 passed on the application filed by the defence for examining the duty officer. The learned trial court in its order dated 29.9.2005 in fact clearly recorded that the FIR register in original which had been produced before the learned trial court clearly showed that there were printing errors in the said register at Serial nos.7 & 17 and the present was not the only case where the serial no. was wrongly printed on the second folio.

11. In the context of the fact that Column no.11 in the FIR mentioned the words *"PM conducted"*, Ms. Kapoor contended that the words *"to be"* between the words *"PM"* and *"conducted"* appear to have been skipped. The FIR was recorded at 2.25 a.m. on 7.5.2000 and the postmortem was conducted at 12.30 p.m. on the same day and this is borne out by the aforesaid two documents. Merely because the words *"Postmortem conducted"* appear in the FIR, the contents of the FIR will not be rendered false. It is trite that any act of omission or commission or an irregular act of the Investigating Officer cannot result in throwing out the entire case of the Prosecution, more so as the contents of the rukka and the FIR are identical and both the said documents bespeak of the presence of the eye witness at the time of the incident. Learned APP contended that in any event the aforesaid submission of the defence deserved no consideration for a similar plea made before the Hon'ble Supreme Court in the case of **Radhey Sham vs. State of Haryana,** (2001) 10 SCC 206 was not countenanced by the Supreme Court. In the said case, it was submitted on behalf of the Appellant that since the FIR number was mentioned on the Recovery Memo, therefore, it was apparent that the FIR was first registered and thereafter the Recovery Memo was prepared. Rejecting this contention, the Supreme Court opined:-

> "In our view, the aforesaid submissions deserve no consideration because with regard to the FIR, FIR number is mentioned on the recovery memo but that would not vitiate the recording of FIR."

12. Then again, it cannot be lost sight of that the testimonies of PW8 Constable Satya Narain and PW15 ASI Sudama Sharma clearly delineate the manner in which investigation was conducted and leave no manner of doubt about the authenticity of the rukka recorded by PW15 ASI Sudama Sharma which was sent through Constable Rohtas to the Police Station for getting the case registered.

13. Dealing with the contention of the Appellants that the delay in sending the FIR to the Ilaqa Magistrate was destructive of the case of the prosecution, learned APP contended that there was no such delay as alleged or at all, as is borne out from the testimony of PW5 Constable Surinder, who had taken the special report of this case to the senior police officers and the area Magistrate on his motorcycle. In his cross-examination, PW5 Constable Surinder, on being asked, stated that he had departed from the PS at about 4.00 a.m. on a motorcycle. It had taken him one hour in reaching Tis Hazari Court from PS Alipur. He had handed over the copy of the FIR in the Court of the learned M.M. at about 12.30 or 1.00 p.m. Significantly, a Court question was posed to this witness with regard to the delay, which along with the reply is reproduced hereunder:-

> "Court Question:- Would you explain that when you left PS at 4.00 AM and reached court premises within one hour then how you delivered the copy of FIR in the court of Magistrate at 12.30 or 1.00 PM?
>
> Ans. First I went to the office of Joint C.P. Again said at the house of Joint C.P. on Mandir Marg, New Delhi. My motorcycle went out of order at ITO, since I had taken route of Outer Ring Road for reaching Mandir Marg. I had taken that route on account of traffic jams. Since the shops were not opened, I waited there upto 10.30 AM. I got my motorcycle repaired. It was repaired at 11.30 AM. By that time office of Joint CP was opened and copy of FIR was delivered in his office. From there I came to Tis Hazari and delivered the copy of FIR in the court of Ld. MM.

In the course of further Court questions posed to the witness, he stated that in those days the concerned Magistrate was residing at Sujan Singh Park, New Delhi and that he was not aware of any shorter route from Police Station Alipur to Mandir Marg than the one adopted by him.

14. Learned APP on the basis of the aforesaid testimony of PW5 Ct.Surinder contended that there was no such delay in the dispatch of the FIR to the Ilaqa Magistrate as could cast a shadow of doubt on the prosecution case. Relying upon the decision rendered by the Hon'ble Supreme Court in the case of **State of Gujarat vs. Raghunath Vamanrao Baxi,** 1985 AIR 1092, she contended that it would be wrong to reject the evidence of the police officers/official witnesses on the mere ground that they are interested in the success of the prosecution case. In the said decision, the Supreme Court made the following pertinent observations:-

> "For that matter it would be wrong to reject the evidence of police officers either on the mere ground that they are interested in the success of the prosecution. The court may be justified in looking with suspicion upon the evidence of officers who have been demonstrated to have displayed excess of zeal in the conduct and success of the prosecution. But to reject the evidence of all official witnesses as the High Court has done in the present case, is going far too far. We think that it is extremely unfair to a witness to reject his evidence by merely giving him a label."

15. On the aspect of identification of the accused persons and the insufficient light available for the aforesaid purpose, learned APP submitted that whereas in the instant case the eye witness had the opportunity of seeing the accused persons from a very close distance, they could have been identified by voice, by gait and by other features, clothes, manner of speaking, etc. Reference in this context was made by her to the judgments of the Supreme Court rendered in the case of **State of Uttar Pradesh vs. Manoharlal and Others,** 1981 Supp. SCC 35 and to the decision in **Kedar Singh and Others vs. State of Bihar,** 1999 Cri.LJ 601, wherein it is held that even on a dark night it is possible for the eye witnesses to identify the accused by other means through the shape of his body, clothes, gait, manner of walking etc. Identification is possible by voice too. She submitted that the assailants were well known to the deceased and the eye witnesses. Three out of the four assailants, namely, Parveen Kumar, Anil Kumar @ Boota and Gulab @ Hathi were residents of the same village as the deceased. Besides this, two of the assailants, namely, Anil Kumar of Village Bakoli and Gulab Singh @ Hathi had worked in the shop of the deceased and the eye witness.

16. Adverting to the contention of Mr. Medhanshu Tripathi on

behalf of the Appellant Anil @ Buta of village Bakoli that the only role ascribed to his client was of catching hold of the deceased Rajesh and exhortation, and for this alone he could not be held guilty of the offence punishable under Section 302 read with Section 34 IPC, learned APP submitted that it is trite that where the accused is described to have played only the role of catching hold of the deceased, thereby facilitating assault upon him by the co-accused, Section 34 IPC comes into play. Reference in this context was made by her to the decisions of the Supreme Court in **Israr vs. State of U.P.,** AIR 2005 SC 249 and **Ramesh Singh @ Photti vs. State of A.P.,** Appeal (Crl.) 868 of 2003 decided on 25th March, 2004. In both the aforesaid decisions, the Appellant had caught hold of the hands of the deceased to facilitate stabbing by the co-accused and it was held that this by itself indicated that the Appellant shared the intention of the co-accused to cause the death of the deceased.

17. In our considered view, the prosecution has successfully established the commission of the crime in the instant case through ocular, circumstantial and medical evidence. It stands proved on record that vide DD No.23A (Ex.PW16/C) recorded at 10.22 p.m., on 6.5.2002, a wireless message was received at P.S.Alipur to the effect that on the road between Bakoli and Hamirpur, the electricity wire was lying broken and on receipt of this message ASI Sudama Sharma and Constable Satya Narain departed from Police Station Alipur. On their arrival back at Police Station Alipur, another DD being DD No.28A, was recorded by the duty officer at 12.06 p.m., to the effect that information had been received through Head Constable Ramesh that Rajesh, son of Mahabir and his brother Vikas (wrongly recorded as Vijay) had been grazing pigs at their farm at Alipur Telco, when four or five persons came there with the intention of stealing pigs, who had assaulted Rajesh on his head and neck with knife, who was now admitted in BJRM Hopsital. On receipt of this information, the SHO was apprised and a copy sent to PW15 ASI Sudama Sharma, who subsequently departed for the hospital. He obtained the MLC of the deceased and on the statement of Vikas (PW3) recorded rukka (Ex.PW15/C), recording therein that the doctor had opined that the patient was brought dead to the casualty by the police at 11.40 p.m. and declared dead at 11.50 p.m. The time of the dispatch of rukka, as reflected in the rukka, is 1.55 a.m. on 7.5.2002; and the endorsement thereon shows that FIR was registered vide DD No.31A at 2.25 a.m. on 7.5.2002. As per the testimony of PW8 Constable Satya Narain, he had

taken the dead body to the mortuary for postmortem and the postmortem report Ex.PW6/A shows that postmortem was conducted by PW6 Dr. B.N. Acharya on 7.5.2002 at 12.30 p.m. At about 4.00 a.m. on the same day, i.e. on 7.5.2002, DD No.33 was recorded (Ex.PW16/D), which reflects the departure of PW5 Constable Surinder from PS Alipur, on motorcycle No.DL-1SL 5154, with the special report to the senior officials, including the Ilaqa Magistrate. At about 6.30/6.45 p.m., on receipt of secret information, accused Parveen and Anil of village Bakoli were apprehended from a fish farm in Alipur, Delhi and their arrest memos prepared (Ex.PW15/E and Ex.PW15/F). Disclosure statement was made by accused Anil resident of Village Bakoli that knife was in the possession of Gulab @ Hathi and danda was in the possession of Anil @ Boota. A disclosure statement was also made by accused Praveen. The said accused then led the policy party to the house of accused Anil from where they produced their blood stained clothes, which were seized and sealed. The blood stained clothes of Vijay (PW5) and Vikas (PW3) were seized at the police station. The Maruti Van was also seized from the fish farm from the accused Parveen and Anil were arrested. Subsequently, on 9.5.2002, Appellants Gulab @ Hathi and Anil @ Buta were apprehended by PW15 ASI Sudama Sharma from the Azadpur Mandi on the pointing out of PW4 Vijay while sitting on the last 'PHAD' Subzi Mandi, Azadpur, Delhi. Their disclosure statements were recorded (Ex.PW4/G and Ex.PW4/H) and at their instance a knife recovered from the bushes which were on the southern side from an electric pole. Appellant Anil @ Boota led the police party to a slope of the G.T.Karnal Road and from the bushes he got recovered a bat in two pieces. Accused Gulab and accused Anil @ Boota were wearing blood stained clothes, which were also seized.

18. A look now at the testimony of PW6 Dr. B.N. Acharya who conducted the postmortem. Ten external injuries are detailed in the postmortem report which are stated to have occurred 12 hours prior to the conduct of the postmortem. Death was caused due to cranio cerebral damage consequent upon head injury sustained. Injury Nos.1 and 2 are head injuries opined to have been caused possibly by the danda seized in the course of investigation. Injury Nos.3, 4, 5 and 6 mentioned in the autopsy report (stated to have been inflicted by Appellant Parveen Kumar) are cut wounds and in the course of cross-examination, it is admitted that these are not stabs or punctured wounds and are not grievous injuries. Injury Nos.1 and 2, on the other hand, are stated to have caused

cranio cerebral damage resulting in the death of the deceased.

19. The FSL reports Ex.PY and PZ further show detection of human blood on the shirts of PW3 Vikas and PW4 Vijay. Human blood was also detected on the clothes seized from all the four accused as well as on the danda and knife recovered at the instance of Appellant Gulab @ Hathi and Appellant Anil @ Boota. Report Ex.PZ also shows that the pants of Appellants Parveen, Anil of village Bakoli and Anil @ Boota were stained with blood of 'B' group while both the shirt and the pants of Appellant Gulab were stained with blood of 'B' group, which was the blood group of the deceased. Thus, there is clinching evidence to establish the case of the prosecution.

20. With regard to the identification of the accused persons, in our opinion, even assuming the light to be feeble, it cannot be lost sight of that all four accused were well known to the deceased and his family and thus their identification by PW3 Vikas cannot be doubted. It may be noted that PW3 Vikas in his cross-examination has stated that he had witnessed the incident at a distance of 2 or 3 paces and by the time his brother was overpowered he had proceeded further and the distance between him and the assailants at that point of time was 10 paces. We see no reason why the eye witness should be disbelieved when he says that he saw the accused at such a close distance while they were assaulting his brother, more so when the accused were very well known to the witness and his family. Even otherwise, no previous enmity is alleged and, therefore, animosity as a reason for false implication is ruled out. The paucity of light regardless, as held by the Supreme Court in the case of **Kedar Singh and Others vs. State of Bihar** and **State of Uttar Pradesh vs. Manoharlal and Others** (supra), the Appellants could have very well been identified by their voice, gait, clothes, manner of speaking, etc.

21. As regards the improbable conduct of PW3 Vikas and the father and mother of the deceased, we are unable to discern any abnormality in their behavior. PW3 Vikas has clearly stated that he tried to rescue his brother but had to run for fear of his own life when Anil of village Bakoli exhorted: *"ISKA BHI KAAM TAMAM KAR DO"*. Even otherwise, it needs no reiteration that to doubt the presence of the witness who did not come to the rescue of the deceased when he was in the clutches of his assailants and to discard his testimony on that ground alone, may

result in gross miscarriage of justice. The following observations made by the Supreme Court in the case of **Rana Partap vs. State of Haryana,** 1983 (3) SCC 327 are apposite in this regard:-

> "Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of witnesses on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way."

22. The doubt sought to be caused on the authenticity of the FIR, in our opinion, is altogether negated by the fact that the FIR contains the version of the rukka in *verbatim*. All the four accused are named in the rukka itself and thus their implication by manipulation of the FIR is ruled out. In fairness to the learned trial Judge, it also deserves to be noted that he had called for the original FIR register and found printing errors galore in the serial numbers of various FIRs and this itself renders at naught the plea of the defence that the FIR was an interpolated document. The slight delay in the dispatch of the FIR to the Ilaqa Magistrate has been satisfactorily explained by PW5 Constable Surinder, who had carried the FIR on his motorcycle and no cogent reason has been pointed out by the defence as to why this Court should doubt the veracity of his statement. Further, there does not appear to us to be any reason to doubt the eye witness account of the real brothers of the deceased PW3 Vikas and PW4 Vijay. PW3 Vikas had witnessed the assault on his brother and his account of the incident appears to be free from exaggerations and embellishments, and in fact, is corroborated by the autopsy report which is reflective of the precise manner in which the deceased was done to death. It is correct that there was no motive for the commission of the offence other than the stealing of pigs grazing in the open, but motive itself loses significance when the oral testimony of the eye witnesses as well as medical and other evidence on record clearly establishes the commission of the crime, the manner in which it was committed and the place where it was committed (See **Yunis @ Kariya vs. State of Madhya**

Pradesh, Appeal (Crl.) No.522 of 1995 decided on 10th December, 2002). The fact that all the four accused came together two of them, namely, Anil of Village Bakoli and Parveen caught hold of the deceased, Anil exhorted *"Aaj kaam tamaam kar do"* while accused Gulab stabbed 6-7 times on his face and head with knife and Anil @ Boota gave 3-4 danda blows on his head and when PW3 Vikas tried to save his brother, Anil @ Boota exhorted *"Iska bhi kaam tamaam kar do"* clearly reflects that all the appellants shared common intention. To this extent, the prosecution has been able to prove the case beyond doubt.

23. There is also nothing in the statements of the appellants under Section 313 of the Code of Criminal Procedure, 1973, which requires consideration or creates any doubt about the prosecution version. Appellant – Anil Kumar son of Ram Kishan has taken a plea that he had given a shop on rent to the eldest brother of deceased Rajesh, namely, Vijay. When the meat shops were sealed he got the same vacated. On this account, the complainant party developed animosity towards him and falsely implicated him in this case. He however did not choose to adduce any defence evidence in this regard.

24. Accused Anil Kumar @ Boota son of late Hukum Singh took the plea that on 08.05.2003, he was present at his house at Samaypur Badli. He received a telephone call from his brother Sunil, resident of Mukhmel Pur, Delhi, stating that he is in the police station. Thereupon he along with his elder brothers Rajender and Yogender and two other neighbours went to the police station, Alipur, where he was taken in custody, while his brother was let off.

25. Parveen took the plea of alibi by stating that on 6.5.2002 he was at village Sultanpur attending a Jagran at the house of sister of his father. Next day his father telephoned his aunt to send him alongwith Maruti Van. At around 11:30 p.m., he along with his bua Bala, Meenawati and Jagbir went to police station Alipur, where he met his father. He was assaulted by the police and falsely implicated in this case.

26. Accused Gulab Singh took the plea that on 05.05.2002 in the night they were to remove wheat from the fields. Accordingly, they harvested the wheat and put it into a tempo and transported it to their house. On the next day, they went to Samaypur at around 6-7 p.m. He was arrested from his house on 8.5.2002 and falsely implicated in this

case.

27. Accused Parveen examined DWI Ramesh Chand, his father and DW2 Jagbir, both of whom have deposed that Parveen went to village Sultanpur to attend MATA KA JAGRAN organised by his sister – Smt. Bala. Accused Gulab Singh examined DW3 Dharam Pal, his uncle, who merely deposed that about three years back when he was coming from his fields to his house at around 2 p.m. he came to know that the son of Mahavir was murdered. On that day, i.e., on 6th May, 2013 between 2.00 to 2.15 p.m., accused Anil @ Boota and accused Gulab Singh were in the gali next to his house. Thereafter DW4 Raj Singh was also examined by Gulab Singh and Anil @ Boota. He also deposed that on 6.5.2002, at around 2/2.30 p.m. he came to know that son of Mahavir was murdered. A complaint was lodged by the villagers concerning the slaughter of pigs in the street. The name of Mahavir whose son was slaughtered figured in the said list marked D-1.

28. At the outset, it may be mentioned that the pleas taken by the appellants in their statements recorded under Section 313 Cr.P.C. have seen the light of the day for the first time in their statements and no such suggestions were given to any of the prosecution witnesses. The plea taken by Anil Kumar son of Ram Kishan is that when the shop was got vacated from the eldest brother of deceased Rajesh, the complainant party developed animosity towards him and he was falsely implicated. No evidence in this regard is forthcoming as to whether any shop was given on rent to the eldest brother of deceased Rajesh or the same was got vacated. Even no suggestion to this effect was given to the material prosecution witnesses. The plea of Anil Kumar @ Boota that on receipt of telephone call from his brother Sunil that he is in the police station, he went to the police station along with his elder brothers Rajender and Yogender and neighbours, where his brother was let off and he was taken in custody does not appeal to reason. It is not explained as to why this accused would be taken in custody without any reason or fault and why his brother would be detained in police station till then. The brother Sunil has not been examined by the accused to substantiate his version. Accused Parveen has tried to take a plea of alibi by stating that he had gone to attend Jagran at the house of his aunt at village Sultanpur. This plea of alibi was required to be proved by him by cogent evidence. A vague suggestion was given to PW3 Vikas that the accused had gone to village Sultanpur in his own vehicle and to PW4 that he had gone to the

house of his father's sister in a Maruti Van, however, the reason for going to the house of his father's sister was not put to the witnesses in their cross-examination. The sister of father of the accused has not been examined by the accused in order to prove that there was any Jagran in her house or that the accused had come to her house during evening hours on 06.05.2002. As such, this plea of alibi is not proved. Similarly Gulab Singh has examined DW3 Dharam Pal and DW4 Raj Singh, however their testimonies do not in any manner help the accused in as much as they merely stated that they came to know that son of Mahavir was murdered and a complaint was lodged by the villagers regarding slaughter of pigs in the street. The complaint marked D1, however, has not been proved. Under the circumstances, none of the appellants get any benefit from the witnesses examined by them in defence. On the other hand prosecution has been able to bring home the guilt of the accused beyond any shadow of doubt.

29. Now, it is to be seen whether conviction of the Appellants is liable to be converted to Section 304, Part I or Part II as contended by Mr. Vivek Sood, counsel for the Appellant Anil Kumar. As already noted above, reliance was placed by Mr. Sood upon the judgments of the Supreme Court in **Sunder Lal, Kalegura Padma Rao, Rakesh Singha and Kandaswamy** (supra). We have carefully perused the said decisions rendered by the Hon'ble Supreme Court and in our opinion none of the judgments relied upon by the counsel has any application to the facts of the case in hand inasmuch as it was on the peculiar circumstances of those particular cases that conviction was altered to Section 304, Part I or Part II. In the instant case, the accused persons inflicted as many as 10 injuries on the deceased with danda and knife. Injury Nos.1 and 2 are stated to have caused cranio cerebral damage resulting in the death of the deceased. The force with which these injuries were inflicted speaks of the intent of the accused persons to cause the death of the deceased. The danda itself broke into two pieces. We are, therefore, unable to persuade ourselves to interfere with the judgment of the learned trial court by altering the conviction under Section 302 IPC to one under Section 304, Part I or Part II IPC. The loopholes in the investigation and the minor discrepancies in the evidence pointed out by the defence counsel are also too inconsequential to persuade us to hold the accused persons innocent of the offence for which they have been charged. The sequence of events as unfolded by the evidence of the prosecution witnesses and the

documentary evidence on record, in our considered opinion, cogently and conclusively establishes the guilt of the accused persons.

30. The Appeals are without merit and are accordingly dismissed.

ILR (2013) III DELHI 2414
CRL. A.

SANJAY KUMAR ....APPELLANT

VERSUS

STATE ....RESPONDENT

(REVA KHETRAPAL & SUNITA GUPTA, JJ.)

CRL. A. NO. : 382/2010 DATE OF DECISION: 20.05.2013

Indian Penal Code, 1860—Section 302/307—Medical evidence and forensic evidence in line with ocular evidence—PW1 real brother of deceased and also injured in the incident, named the accused at very first instance—His presence at the spot natural—Such witness would not allow real culprit to go scot free. In such circumstances not much importance can be attached to slight variation of 0.5 cm to 1 cm in the dimension of the handle and blade of knife in the two sketches prepared by IO and the doctor—Nor any importance can be attached to a stray sentence in the testimony of witness that he had snatched the knife from accused and handed it over to the IO, whereas, the case of prosecution was that knife was recovered from the roof of adjoining jhuggi.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Ajay Verma, Advocate.

FOR THE RESPONDENT : Ms. Ritu Gauba, APP.

CASES REFERRED TO:

1. *Shaukat* vs. *State of Uttaranchal,* (2010) 5 SCC 68.
2. *Chikkarangaiah and Others* vs. *State of Karnataka,* (2009) 17 SCC 497.

RESULT: Appeal Dismissed.

REVA KHETRAPAL, J.

1. On 31st August, 2004, at about 7.30 p.m., a young girl barely 20 years of age named Suman was done to death in her own jhuggi, being jhuggi no.B-181, Sanjay Colony, Okhla Phase-II, New Delhi. The author of the crime was the accused Sanjay, who, as per the prosecution's case, stabbed the deceased Suman four times. The first two blows were administered on the neck of the deceased while the other two blows were received by the deceased on her arm which she held up to shield herself. The reason which impelled the accused Sanjay, who happened to be the cousin brother of the deceased, to do away with the deceased is stated to be the infamy brought by the deceased to the family on account of her illicit relationship with some boy.

2. The case of the prosecution as unfolded in the rukka recorded by PW24 SI Sandeep Ghai on the statement of the brother of the deceased PW1 Rajesh is as follows. On 31st August, 2004 at about 7.30 p.m. Rajesh, the brother of the deceased and Vinod, the cousin brother of the deceased were sitting on the roof of the house of Rajesh and were talking to each other regarding going to their native village as their grandfather had died at Nasirabad, when they heard cries of the deceased from the first floor *"Bhaiya Bachao - Bhaiya Bachao"*. PW1 Rajesh ran to the first floor from the iron staircase and found that his cousin brother (tau's son), namely, Sanjay, who was residing in the adjoining jhuggi, was giving a knife blow to his sister Suman on her neck while shouting *"Tu mere mana karne ke bavjud us ladke se milne se baaz nahi aa rahi hai aur hamare khandaan ki naak katva rahi hai. Tere bhai to kuch nahi kar rahe – mein hi kuch karta hoon aur tera kam-tamam kar deta hoon.*" While saying so, he gave the second knife blow to the deceased. The

deceased fell to the ground while shielding herself with her left arm. PW1 Rajesh on finding that his sister had fallen pounced upon Sanjay in an attempt to disarm him, whereupon Sanjay gave a blow on the neck of PW1 Rajesh and his shoulder saying: *"Tum namard apni bahan ko nahi rok sakte ab saare kam muje hi karne padenge"*. After saying so, Sanjay ran down the iron staircase and while doing so was accosted by PW2 Rajkumar, the younger brother of the deceased, who finding his brother and sister drenched in blood gave chase. On the hue and cry created by PW2 Rajkumar, other persons of the colony joined in the chase resulting in the apprehension of Sanjay outside the gali. The crowd then administered beatings to the accused Sanjay. In the meanwhile, with the help of neighbours PW1 Rajesh alongwith PW2 Rajkumar took the deceased to the road outside the gali from where he gave a call to the PCR at No.100 and boarded a three-wheeler scooter which was passing by. The deceased was taken to AIIMS Hospital where the doctor declared her brought dead.

3. The aforesaid rukka (Ex.PW24/A), as noted above, was recorded by SI Sandeep Ghai (PW24) at the hospital and dispatched through Constable Gulab Singh (PW16) to Police Station Okhla at about 11.10 p.m., who got registered case FIR No.608/04 (Ex.PW 24/A) and returned back to the spot at about 1.20 a.m.

4. During investigation, SI Sandeep Ghai (PW24) prepared site plan (Ex.PW24/B), lifted earth control, blood stained earth, blood in gauze, pillow and hairband from the spot and seized the same vide memo Ex.PW1/D, whereafter he returned to the police station and deposited the case property in the malkhana. Thereafter, he again went to AIIMS Hospital where accused Sanjay present in the Court, who had also been taken to the hospital by the PCR, had been discharged. He was brought to the police post and formally arrested vide arrest memo Ex.PW16/F and his personal search conducted vide memo Ex.PW16/G. The accused disclosed that he had committed the murder of Suman because she was having an affair with some boy and her brothers were not doing anything in this regard. He further disclosed that he had thrown the weapon of offence, viz., the knife on the roof of the nearby jhuggi, being jhuggi No.B-182. On the aforesaid disclosure made by the accused Sanjay, which was recorded vide Ex.PW 16/H, SI Sandeep Ghai led the police party to jhuggi No.B-182 where he directed Constable Gulab Singh (PW16) to climb on the roof of the jhuggi and search for the knife. Constable Gulab

Singh thereupon recovered the blood stained knife from the roof of the aforesaid jhuggi. Sketch of the knife was prepared (Ex.PW16/B) and the knife seized vide memo Ex.PW16/C and converted into a pullanda. The blood stained clothes of accused Sanjay were got changed and sealed in a parcel, which was seized vide memo Ex.PW16/D. The blood sample of the accused was taken in the forensic department which was seized vide memo Ex.PW16/E. All the incriminating articles were deposited in the malkhana.

5. On SI Sandeep Ghai again reaching the hospital, Sub Inspector Manoj and Constable Chanderpal got conducted the postmortem on the dead body of the deceased Suman. Constable Chanderpal (PW14) handed over to SI Sandeep Ghai (PW24) the clothes, vaginal swab and blood sample of the deceased Suman, which too were seized and deposited in the malkhana. Subsequently, on 27th September, 2007, the weapon of offence, viz., the knife was sent to the forensic department for medical opinion. On 30th September, 2004, the Exhibits were sent for the opinion of the serologist to the FSL Laboratory.

6. After completion of the investigation, chargesheet was filed on the basis whereof the accused was charged for the offences punishable under Sections 302/307 IPC, to which the accused pleaded not guilty and claimed trial.

7. In the course of trial, the prosecution examined 24 witnesses. No defence evidence was adduced on behalf of the accused.

8. It is proposed to first deal with the ocular, medical and forensic evidence on record in that order before adverting to the contention of the parties.

9. As regards the ocular testimony, the crux of the testimony of PW1, Rajesh was that he was an eye witness to the assault on his deceased sister with knife by the accused Sanjay. He reiterated what he had stated before the Investigating Officer, as recorded in the rukka, except that he stated that after being assaulted by the accused with knife on his neck he called Vinod, the brother of the deceased, who came downstairs and took control of him (Rajesh). Accused ran away from there. He (Rajesh) had snatched the knife from the hands of the accused. With regard to the knife, he further stated that he had given the knife to the police at that time itself. On being cross-examined by the learned

Additional Public Prosecutor on this aspect, he reiterated that he had snatched the knife from the hand of the accused Sanjay and had handed over the same to the police and denied that he did not remember this fact correctly. We have noted this fact for the reason that learned counsel for the accused has laid great stress on this aspect of the matter to contend that the whole story of the prosecution with regard to the recovery of the knife from the roof of the adjoining jhuggi is a false one, but more about this at the relevant time.

10. The second eye witness who claims to have witnessed the commission of the crime is PW2 Rajkumar, the younger brother of the deceased. In his testimony, PW2 Rajkumar stated that at about 7.30 p.m., he was returning to his house from the house of his friend who resided in the same locality. When he reached near his house, he heard the scream of his brother Rajesh which was coming from their house. On hearing the same, he rushed to the room from where the scream had emanated. On reaching the staircase, he saw accused Sanjay present in the Court getting down from the stairs with a blood stained knife in his hand. He tried to catch the accused but the accused pushed him and ran away. He raised alarm. On hearing his alarm, the accused was apprehended by public persons of the locality. When he entered into the room, he saw his sister Suman lying on the floor blood soaked and blood was oozing from the left side of the neck of his brother Rajesh. He was told by his brother that accused Sanjay had stabbed Suman and himself. Thereafter, he alongwith his brother and other public persons took his sister to AIIMS in a scooter, where she was declared "brought dead" and treatment was provided to his brother.

11. The third witness examined by the prosecution is PW3 Panwati, the mother of the deceased, who though stated in her examination-in-chief that her daughter Suman was killed by Sanjay, retracted from her statement under Section 161 Cr.P.C. by stating that she did not know the cause of the murder. This witness although extensively cross-examined by the learned Additional Public Prosecutor denied that she was aware of the reason wherefor her daughter had been murdered by accused Sanjay. On being cross-examined by learned counsel for the accused, she stated that her son had told her that accused Sanjay had killed her daughter, but she had not witnessed the incident with her own eyes.

12. A look now at the medical evidence on record to see if the

same is in line with the ocular evidence. As per the MLC Ex.PW9/B of the accused Sanjay Kumar prepared by Dr. Kiran and proved on record by PW9 Dr. Prathmesh Jain, there was a history of assault on the accused at around 8.00 p.m. by the public. The patient had contusion and swelling on the right side of the face involving the right, upper and lower eye lid, swelling over the posterior aspect of the skull, tenderness and right ear lobe swelling over the skull on the posterior aspect, tenderness and laceration over the left eyebrow about 2 cms. in length, tenderness over left ear lobe plus swelling. We may usefully note at this juncture that the aforesaid injuries could not have been caused by a knife and appear to corroborate the prosecution case that the accused was administered beatings by the public on being caught after a chase.

13. The MLC of Rajkumar Ex.PW9/A, who was pushed by the accused, also appears to be consistent with the prosecution case, in that it shows that there was pain and swelling in the right knee of the patient; the injury was simple blunt. PW7 Dr. Kamlesh Kumar also proved on record X-ray reports of both the accused Sanjay Kumar and PW2 Rajkumar, as Ex.PW7/A and Ex.PW7/B prepared by Dr. Rohini Gupta, which showed that no fracture was seen on the aforesaid persons.

14. The MLC of the injured witness PW1 Rajesh Kumar Ex.PW8/A was prepared by Dr. Vikas and proved on record by PW8 Dr.Ram Karan Chaudhary, CMO, AIIMS. As per this MLC, there was a sharp cut injury on the left side of the neck and one sharp cut injury 3 cms. on left scapular region. This too appears to be in line with the deposition of PW1 Rajesh Kumar.

15. The MLC of the deceased Suman Ex.PW6/A was proved on record by the record clerk of AIIMS Hospital and shows that she was brought dead to the hospital by her brother Rajesh Kumar.

16. Adverting to the post mortem of the deceased, the postmortem was conducted on 1.9.2004 between 11.55 a.m. and 12.40 p.m. Detailed postmortem report has been proved in the evidence by PW19 Dr. Arvind Kumar as Ex.PW19/B. Apart from proving the postmortem report, the said witness also deposed that he had taken the blood sample of accused Sanjay, which was seized vide seizure memo Ex.PW19/A and handed over to the IO. He further deposed that on 27.9.2004, on the request of SI Sandeep Ghai for subsequent opinion in the matter, he had examined the knife in question and in his subsequent opinion rendered on 27.9.2004

vide Ex.PW19/C opined that injury Nos.1, 2, 3 and 4 mentioned in the postmortem report could be caused by the weapon produced from the pullanda, which was knife. He had also prepared a sketch of the said knife as part of his report. This fact is being mentioned for the reason that much is sought to be made by the Appellant's counsel about the fact that the dimensions of the knife in the said sketch varied from the dimensions of the knife prepared by the Investigating Officer and it is proposed to advert to this aspect later on. Suffice it to be noted at this juncture that the postmortem report and the subsequent opinion rendered by the very same doctor who conducted the postmortem corroborate the version of the prosecution with regard to the weapon of offence used for the commission of the crime, the number of injuries inflicted by the accused and the manner in which the said injuries were inflicted on the neck and hand of the deceased.

17. As per the postmortem report, the cause of death of deceased Suman was opined as haemorrhagic shock consequent upon injury No.1 mentioned in the postmortem report which is a stab wound of size 2 cms. vertically and 0.7 cms. horizontally in lower neck, 10 cms. below mentum, 2 cms. above sternal notch, directed backward, downward and rightward penetrating through the lower end of sternum, deep to right pleural cavity entering upper pole of right lung 0.5 cms. deep, lower end of sternum showing extravassation of blood, left margin of the wound showing subcutaneous fat exposed, upper end was round and lower having tailing subclavian artery showing tear. Injury No.2 was also on the left side of upper part of the neck. Injury No.3 was stab wound over ulnar side of dorsal aspect on left forearm and injury No.4 was also stab wound just below injury No.3. PW19 Dr. Arvind Kumar deposed that all the injuries except injury No.5 which was a shoulder injury were caused by sharp edged weapon.

18. The forensic report was proved on record by PW20 Anita Chhari, Senior Scientific Assistant, Biology Division, FSL, Delhi, who deposed that on 30.9.2004 she had received 11 pullandas duly sealed and had examined the contents thereof serologically. She proved on record her report as Ex.PW20/A and the serological report as Ex.PW20/B. A conjoint reading of the said reports shows that blood was detected on the knife (human blood), the clothes of the deceased (shirt, salwar, etc.), gauze cloth piece containing the blood sample of the deceased, gauze

cloth piece containing the blood sample of the accused (human blood), the clothes of the accused viz. shirt and pants, cotton wool swab having brown stains, blood stained earth piece (human blood) and pillow with cover (human blood). The gauze cloth piece containing the blood sample of the accused was detected to be of 'O' Group; the knife was detected to contain blood of 'A' Group; the pants of the accused were also found to contain blood of 'A' Group. Thus, the blood on the knife and the pants of the accused was of 'A' Group while the gauze cloth piece with the blood of the accused was of 'O' Group. The shirt of the deceased, the blood stained cemented pieces and the pillow with cover were detected to have human blood but the blood group could not be ascertained.

19. There is also on record the report of the Senior Scientific Officer, FSL, Delhi, who was examined as PW17 to prove his report Ex.PW17/A. As per the FSL report, both the parcels containing "Blood stained earth piece" and "Piece of floor as earth control" were examined and were found possessing similar characteristics.

20. Adverting now to the contentions of the counsel for the Appellant, Mr. Ajay Verma, appearing for the Appellant assailed the case of the prosecution on the following grounds. He contended that though the case of the prosecution was that PW1 Rajesh and the brother of the Appellant, namely, Vinod were present together on the roof of the house of PW1 Rajesh and were talking to each other at the time of the commission of the crime, Vinod has not been cited by the prosecution as a witness nor even examined at the time of investigation. He was a crucial witness and his non-examination casts doubt on the prosecution story. He further contended that Constable Devi Sahai, who is stated to have accompanied SI Sandeep Ghai (PW24) and ASI Pritam Singh (PW5) to the spot on receipt of a wireless message that one girl had been stabbed in Sanjay Colony, Okhla Phase-II, has also not been examined by the prosecution. Non examination of material witnesses to corroborate the case of the prosecution must prove fatal to the prosecution's case.

21. Learned counsel further contended that the prosecution's case with regard to the recovery of the knife was a false and concocted one as is evident from the discrepancy in the testimony of PW1 Rajesh Kumar and the statement of the said witness Ex.PW1/A as recorded in the rukka (Ex.PW24/A). While in his statement Ex.PW1/A, PW1 Rajesh Kumar had clearly stated that after the accused had assaulted him (PW1)

on his neck and shoulder the accused fled the spot from the iron staircase, in his testimony recorded in Court PW1 deposed that he had snatched the knife from the hand of the accused and had given the knife to the police at that time itself. Learned counsel further pointed out that as per the remaining prosecution witnesses who were police witnesses the knife was recovered pursuant to the disclosure statement of the accused from the roof of the nearby jhuggi bearing No.B-182, Sanjay Colony, Okhla Phase-II. Learned counsel also contended that the sketch of the knife allegedly recovered from the roof of the jhuggi No.B-182 prepared by the Investigating Officer (Ex.PW16/B) and the sketch of the knife prepared by PW19 Dr. Arvind Kumar (Ex.PW19/C) when placed in juxtaposition with each other showed that both the knives were different knives. In other words, the knife allegedly recovered from the accused and the knife on which the opinion of the doctor was sought were dissimilar to each other. This was so both in respect of the dimensions of the two knives and the fact that the sketch of the recovered knife Ex.PW16/B showed that the handle of the said knife was different from the handle of the knife, sketch whereof was prepared by PW19 Arvind Kumar in his subsequent opinion Ex.PW19/C.

22. Ms. Ritu Gauba, learned Additional Public Prosecutor fully supported the prosecution case and sought to contend that the contentions of the counsel for the accused were wholly untenable and in any case, were of no avail to the accused.

23. We have carefully gone through the judgment of the trial court and the evidence on record and are of the considered opinion that the said judgment deserves to be upheld. In the instant case, the criminal law machinery was put into motion on the fateful day at about 8.05 p.m., when DD No.27 (Ex.PW22/A) was registered by Head Constable Bhikamber (PW22) on receipt of information from the police control room that Suman was stabbed by her brother. The said DD Ex.PW22/A was handed over to ASI Pritam Singh (PW5). ASI Pritam Singh has deposed that on that day at about 8.05 p.m., on receipt of copy of DD No.27, he along with Constable Devi Sahai reached Sanjay Colony, Okhla Phase-II where he found many persons gathered and came to know that accused Sanjay had stabbed his cousin sister Suman and cousin brother Rajesh with knife and both the injured had been removed to the hospital; accused Sanjay had also been beaten by public persons and the PCR Van

had taken him to AIIMS. SI Sandeep Ghai also reached the place of occurrence and he along with Constable Gulab Singh and Constable Devi Sahai went to AIIMS.

24. A similar version has been given by PW24 SI Sandeep Ghai to the effect that at about 8.20 p.m. when he was on patrolling duty along with Constable Gulab Singh near Nathu Sweets, he received a wireless message that one girl had been stabbed in Sanjay Colony, Okhla Phase-II. He immediately rushed to the spot where he met ASI Pritam Singh (PW5) and Constable Devi Sahai. PW5 ASI Pritam Singh informed him that a girl named Suman and Rajesh had been shifted to AIIMS hospital and the person who had caused the injuries to Suman and Rajesh (PW1) had also been taken to AIIMS by the PCR Van. The statement of PW1 Rajesh was recorded by SI Sandeep Ghai at the hospital (Ex.PW1/A) and after making his endorsement on the same he sent Constable Gulab (PW16) to the police station to get the case registered. PW16 Constable Gulab Singh took the rukka to the police station and got registered the First Information Report at 11.10 p.m.

25. It is clear from the aforesaid evidence on record that the accused Sanjay was in the statement of PW1 Rajesh, the real brother of the deceased, named at the very first instance. The testimony of PW1 Rajesh who was an injured witness and whose testimony we have adverted hereinabove is consistent with his statement Ex.PW1/A on the basis of which First Information Report was registered and we find the same worthy of credence. Though he was subjected to extensive cross-examination, nothing could be elicited on record to detract from his statement in any manner. He was a natural witness and his presence at the place of incident cannot be doubted. He was also the real brother of the deceased and he himself had received injuries and would not allow the real culprit to go scot free. Reference in this context may be made to the case of **Shaukat vs. State of Uttaranchal,** (2010) 5 SCC 68, wherein the Supreme Court while assessing the credibility of an injured and related witness who was the real brother of the deceased held that the presence of an injured witness and that too one who is the real brother of the deceased at the place of the incident can hardly be doubted for such a person would not allow the real culprits to get away and involve innocent persons falsely. In **Chikkarangaiah and Others vs. State of Karnataka,** (2009) 17 SCC 497 also, the Supreme Court opined that the trial court had wrongly rejected the testimony of the

injured witness for there was no reason why an injured witness instead of giving the name of real assailants would unnecessarily implicate other people falsely. Thus, both as a related witness and as an injured witness the testimony of PW1 deserves to be believed, more so as his testimony in Court is in line with the initial statement made by him before the police immediately after the occurrence and has also withstood the litmus test of cross-examination.

26. It also needs to be borne in mind that the testimony of PW1 Rajesh Kumar is buttressed by the testimony of PW2 Rajkumar who was also the real brother of the deceased and who testified to the fact that he had seen the accused running away with the blood stained knife in his hand, had tried to catch hold of the accused but had been pushed away and upon entering the room had seen his sister lying on the floor blood soaked and blood was oozing out from the left side of the neck of his brother Rajesh.

27. Great emphasis has been laid by learned counsel for the accused on the fact that PW4 Smt. Panwati, mother of the deceased did not support the prosecution case. But it cannot be lost sight of that she in fact was not a witness to the crime itself and clearly stated in her examination-in-chief that at the time of the incident she was not present at her house. PW4 Panwati however emphatically stated that her daughter Suman was killed by Sanjay. On being cross-examined by the counsel for the accused she clarified that her son had told her that Sanjay had killed her daughter though she did not see the incident with her own eyes. Her testimony in our opinion has a ring of truth and to label her as a hostile witness would be, in our opinion, be a travesty of justice. True, she in her testimony is not forthcoming as regards the motive for the crime for which undoubtedly she must be having her own reasons, one of which according to us could be to provide a cover to the so-called family honour and name. Her testimony, therefore, does not help the accused in any manner. Even otherwise, it is a well settled proposition of law that motive for the commission of a crime pales into insignificance where there is clear and cogent ocular evidence with regard to the commission of the crime and the eye witness account of the manner in which the offence was committed is discerned by the Court to be otherwise credit-worthy de hors motive.

28. Great stress has also been laid by learned counsel for the

accused on the fact that Vinod though as per the case of the prosecution was present on the roof of the house at the time of the commission of the crime has not been examined by the prosecution. A look at the chargesheet, however, shows that PW Vinod was cited by the prosecution at serial No.4, but his name was subsequently scored off by the learned Additional Public Prosecutor, presumably for the reason that he being the real brother of the accused in all probability would not have supported the case of the prosecution. The defence, in our opinion, could have marshalled his evidence to shatter the prosecution case. The fact that the accused did not choose to call his real brother in the witness-box to save himself from shackles in our opinion speaks volumes.

29. For all the aforesaid reasons, we are inclined to give credence to the testimony of the two injured prosecution witnesses whose testimony is also in consonance with the medical evidence on record, as noted by us hereinabove. The manner of attack on both the deceased Suman and PW1 Rajesh was on the frontal portion of the neck. The defence would have us believe that it was PW1 Rajesh who had committed the crime and the accused had gone to the rescue of the deceased. If that be so, it stands to reason that the accused would have sustained some injury with the knife, but the medical evidence on record shows that he sustained no injury from a knife. Rather, the nature of the injuries sustained by him bespeak of the truth of the prosecution case that he was beaten by the persons who had gathered there. On the other hand, PW1 Rajesh sustained an injury on his neck as well as on the scapula. An injury on the neck and scapula could not have been self-inflicted by him nor it is so claimed by the defence. The accused was in an inebriated state as evidenced by his MLC and in such a state he attacked his cousin sister with a knife and thereafter PW1 who sought to intervene to save his sister. The knife was found stained with human blood of 'A' Group. The pant of the accused as per the report of the serologist was also found to contain human blood of Group 'A'. No explanation has been rendered by the accused to explain away these incriminating circumstances.

30. The contention of the Appellant's counsel that the sketch of the knife prepared by the IO and the sketch of the knife prepared by the doctor are at variance with each other is also untenable. A comparison of the two sketches shows that in the sketch of the knife prepared by the IO (Ex.PW16/B) the handle is shown to be of 8 cms. and the blade is 7.5 cms. The sketch of the knife prepared by the doctor (Ex.PW19/

C) shows the handle of the knife to be 7.5 cms. (instead of 8 cms.) and the blade to be 8.5 cms. (instead of 7.5 cms.). Not much importance can be attached to the fact that there is a slight variation of 0.5 cms. to 1 cm. in the dimensions of the handle and blade of the knife prepared respectively by the Investigating Officer and the forensic expert nor in our opinion much significance can be attached to a stray sentence in the testimony of PW1 Rajkumar that he had snatched the knife from the accused, more so when PW2 Rajkumar has categorically stated in his testimony that he had seen the accused running away with the knife and the knife recovered from the roof of the adjoining jhuggi was found to contain blood of the same blood group as that found on the pant of the deceased seized vide seizure memo Ex.PW16/D. Further, no suggestion was put to any witness in cross-examination that the knife produced was not the knife recovered on the disclosure of the accused or with regard to the dimensions of the knife as measured by the Investigating Officer and as measured by the forensic expert.

31. To conclude, the entire case of the prosecution hinges on the testimonies of the two brothers of the deceased, one of whom is an injured witness. We find the aforesaid testimonies worthy of credence. The medical evidence lends further credence to the ocular testimony. The report of the serologist is clinching evidence against the accused. We, therefore, see no reason to differ from the conclusions arrived at by the trial court with regard to the guilt of the accused. No evidence has been adduced by the accused in his defence and even Vinod the real brother of the deceased has not been examined by the accused to dislodge the prosecution case. The reason for his non-production does not appear to us far to seek.

32. We, therefore, dismiss the appeal upholding the conviction and sentence of the Appellant both under Sections 302 and 307 of the Indian Penal Code.

ILR (2013) III DELHI 2427
LPA

DDA **....APPELLANT**

VERSUS

ALL INDIA NAVAL DRAUGHTSMAN **....RESPONDENT**

(N.V. RAMANA, CJ. & JAYANT NATH, J.)

LPA NO. : 2007/2005 **DATE OF DECISION: 21.05.2013**

Constitution of India, 1950—Article 226—DDA floated a scheme for 7000 expendable houses vide a resolution dated 27th August, 1996, whereby 50% of the flats were proposed to be offered to the general public while 50% were proposed to be offered to PSUs/Govt. Organisations—Discount was announced for those individuals who would make payment on cash down basis and it was made clear that the said discount will not be provided to the PSUs/Govt. Organisations—Respondent association through Naval Head Quarter vide letter dated 29/4/1999 requested DDA to register 104 flats for allotment of employees of Navy—DDA informed the respondent that the houses could not be allotted in the names of employees and accordingly allotted 104 flats in favour of respondent association only and issued demand cum allotment letters—Respondent Association deposited full payment of 77 flats within a month—Vide three letters issued in June, 2001, DDA demanded additional sums from the respondent by claiming the inadvertently while computing the demand amount, discounts had been given to the allottees whereas no such discounts were to be given to the members of the Association who had not applied under the public scheme. Certain amounts as conversion charges from lease hold to free hold were also demanded—Respondent

association challenged the said demands and the Ld. Single Judge vide order dated 25/04/2005 allowed the said writ and held the demands arbitrary and illegal. Held: Appellant DDA is not entitled to recover any additional sums from the allottees. The Demand cum Allotment Letter clearly stipulated that the terms and condition in the brochures for the scheme would apply to the respondent/ allottees and the page 3 of the said brochures nowhere stipulates that the discount is confined only to allottees other than PSUs/ Government Organisations but infact clearly provided for discount to an allottee who made 100% payment before possession. In terms of the Demand cum Allotment Letter, the appellant demanded a price and gave a date of confirmation of acceptance by payment of amount demanded. The respondent accepted the offer, made the payment in terms of Demand cum Allotment Letter and thus a binding contract came into being between the parties and now the appellant cannot back track and seek to recover enhanced price based on some resolution which was never made public. The conversion charges are also arbitrary for there is nothing on record to show as to how and on what basis, DDA is demanding the said amount—Appeal dismissed.

In view of the said stipulations in the Demand-cum-Allotment letter it is but obvious that the contention of DDA that the terms and conditions of the brochure relating to Expendable Housing Scheme, 1996 by which 3500 houses were on offer do not apply to the respondent or to the allottees is a misconceived and erroneous contention. The Demand-cum-Allotment letter clearly stipulates that the allotment is subject to terms and conditions given in the brochure for EHS-96 i.e. brochure for Expendable Housing Scheme, 1996. Hence, in view of the said stipulations in the Demand-cum-Allotment letter, the terms and conditions in the brochure would clearly apply to the respondent/allottees also. Page 3 of the brochure which provides for discount of 15%/5% nowhere stipulates

that the discount is confined only to the allottees other than PSUs/Government Organisations. The said clause of the brochure which is reproduced above provides for discount subject to the only condition that the allottee must make 100% payment before taking possession. In view of the terms and conditions of the Demand-cum-Allotment letter and the brochure for Expendable Housing Scheme, 1996, it would clearly follow that the respondent/allottees would be eligible for the discount stipulated in the Brochure. The contention of DDA to the contrary is erroneous.

The next demand of DDA pertains to non-payment of conversion charges by the respondent. It is claimed that as the flats are being given on the freehold basis, the respondents/allottees are liable to pay conversion charges from leasehold to freehold basis. It is contended by DDA that the demand is payable when a flat is allotted on a freehold basis. We are unable to see the basis for this demand of conversion charges raised by DDA. There is nothing on record to show as to how and on what basis, DDA is demanding the said claim. The same is nothing but grossly arbitrary. DDA cannot claim the same. **(Para 21)**

Important Issue Involved: Once a binding contract comes into existence, a party thereto cannot be allowed to backtrack on the basis of a document not made public.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Ajay Verma, Advocate.

FOR THE RESPONDENT : Mr. A.D.N. Rao and Mr. A. Venkatesh, Advocates.

RESULT: Appeal Dismissed.

JAYANT NATH, J.

1. By the present appeal, the appellant seeks to impugn the order dated 25.04.2005 passed by learned Single Judge.

2. The contention of the appellant is that DDA had floated an Expandable Housing Scheme with facility of scope for expansion. The response to the scheme from the general public was not very enthusiastic. The DDA had about 7000 expandable houses available. Hence, vide resolution dated 27.08.1996, DDA floated a new Expandable Housing Scheme where 50% of the flats were proposed to be offered to the general public while 50% were proposed to be offered to Public Sector Undertakings/Government Organizations. It is stated that as an incentive to the general public a discount was announced for the Expandable Housing Scheme to those who make payment on cash down basis. It is urged that it was clearly stipulated in the resolution that the incentives/ discount will not be provided to Public Sector Undertakings/Govt. organizations. It is further stated that the brochure which was issued, clearly indicated that only 50% of the available houses were available for individuals. The allottees who were making 100% payment before taking possession were to be given discounts of 15% per unit located in Narela, Rohini, Kondli Gharoli and 5% per unit located in Dwarka. These discounts according to the appellant/DDA were not available to the Public Sector Undertakings/Govt. organizations.

3. It is further submitted that Naval Headquarter, for providing houses to Naval Draftsmen and certain civilian employees, had approached the DDA. It is stated that as DDA could not offer flats to individual other than those who apply in the scheme for the public and hence the petitioner/ respondent association was formed and got registered.

4. The association requested DDA through Naval Headquarter vide letter dated 29.04.1999 to register 104 flats. It was requested that the flats be allotted to the employees of Navy. In response, on 29.07.1999, the appellant DDA informed the respondent association that the houses could not to be allotted in the name of employees but in the name of the respondent association. Hence accordingly, 104 flats were allotted in favour of the respondent. In December 1999, the DDA issued the Demand-cum-Allotment letters to the association. The respondent society deposited the confirmation amount within a month and full payment of 77 flats was made. The DDA completed execution of the Conveyance Deed and handed over possession of 35 flats. For balance 25, though duly stamped conveyance deed was handed over the Conveyance Deed was not executed, however, possession was delivered.

5. Subsequently, it transpires that while this process was on, DDA demanded an additional sum vide letter dated 04.06.2001, 06.06.2001 and 13.06.2001 respectively for sums of Rs.22,025/-, Rs. 34,140/- for Type A flats and Rs. 48,820/- for Type B flats under the scheme.

6. The respondent association protested in as much as these demands were an extraordinary burden on the allottees and it was stated that the demands were contrary to the scheme. Various representations were made to various functionaries but no response was received. Under these circumstances, the writ in question was filed by the respondent seeking writ of certiorari for quashing of demand letters dated 4th/6th/13th June, 2001. By the impugned order, the learned Single Judge allowed the writ petition.

7. Learned counsel appearing for the appellant DDA has argued that under the said scheme, DDA had 7000 flats available, of which 50% were offered to the general public and 50% to the various Public Sector Undertakings. He relies on the resolution of DDA dated 27.08.1996 which deals with grant of incentives to the applicants for Expandable Housing Scheme. The said resolution stipulates that 50% of the 7000 expandable houses would be offered to various Public Sector Undertakings/Govt. organizations and the balance 50% to the general public by announcing Expandable Housing Scheme. He argued that a perusal of Clause 6 of the said resolution clearly shows that discount of 15%/5% was not available for the Public Sector Undertakings/Govt. organizations. He also relies on the brochure which is placed on record for Expandable Housing Scheme of 1996. He argued that the clause at page 4 of the Brochure states that the allottees, making 100% payment before taking possession, will be given discount of 5% /15% depending upon locality of the houses. He submits that this rebate was available only to the general public as the scheme in question which is on record clearly relates to the members of the general public and it does not relate to the Public Sector Undertakings Government organization. He further argued that when the demand-cum-allotment letter was sent, an Officer of DDA by bonafide mistake wrongly calculated the amount and had given discount to the respective allottees whereas no discount was to be given. Hence he claims that DDA is entitled to recover the discount from the respondent, as a wrong calculation, was forwarded to the respondent by mistake. He further submits that the allottees who are members of the respondent association did not apply under the Public Scheme and did not have to go through the process of

being selected under draw of lots, with the general public.

8. It is further argued that by mistake the conversion charges, which had to be paid by the respondent, had also not been stipulated in the demand-cum-allotment letters. Hence he submits that DDA is entitled to recover the said amounts.

9. It is argued that the fresh demands now sent to the respondent comprises of the discount of 5%/15% wrongly given to the allottees and the conversion charges also which were also wrongly not charged.

10. The learned counsel for DDA also relies on the affidavit of Vice Chairman, DDA filed before the learned Single Judge, dated 30.09.2003, where the total amount outstanding on account of rebate which was wrongly given is stated to be Rs. 29,97,110/- while the unrecovered amount on account of conversion charges is stated to be Rs. 10,67,250/- being a total of Rs. 40,64,360/-. It is argued that the impugned order erroneously allowed the writ petition and the appellant is entitled to recover the said amount.

11. The learned counsel appearing for the respondent on the other hand contends that the scheme which was floated was fully applicable to the different allottees of the respondent. Admittedly, though the demand-cum-allotment letters were issued in the name of respondent association, the appellant/DDA has executed and registered the conveyance deed in favour of the individual allottees/members of the respondent association. The ownership of these flats vests with individual allottees and not with the respondent association. Hence, it is argued that the allotment having been made in favour of the individuals, the Expandable Housing Scheme 1996 brochure, which stipulates the discounts, would be clearly applicable to the respondent. It is further argued that there is nothing on record or in any document to show the basis for charging the conversion charges. It is claimed that these charges are wholly arbitrary and illegal. The counsel hence submits that the present appeal is liable to be dismissed.

12. The learned Single Judge allowed the writ petition holding that since the Association was not a government organisation or PSU, the DDA cannot take a stand that its formation was on account of its insistence. It is further held that the allotment on cash down basis leading to acceptance of 100% amount, was from individuals, hence DDA is not entitled to recover what it claims its dues as the demand is arbitrary.

13. A perusal of the resolution passed by the respondent which is the basis for the allotment of the noted flats, shows that the facility of discount is only available to members of the general public. Relevant portion of the said Resolution reads as follows:-

> "4. While this facility is being given to all applicants, it is felt that we may simultaneously approve measures by which allottees are encouraged to payment ___ price of the flat before taking possession. When the purchase facility exists, ordinarily no one comes forward accept allotment on cash down basis. To provide an incentive to the allottees to pay cash-down by raising loans or otherwise arrangements to pay full price of the flat before possession, is proposed that following discount may be provided in the scheme.
>
> | Name of the locality | Discount to be provided |
> |---|---|
> | (i) Dwarka sub-City | 5% on the disposal |
> | (ii) Rohini, Nerela and Kondli | Gharoli 15% on the disposal |
>
> To balance the reduced cash in-flow because proposed discount it will be necessary to change premium in area where the real value in the market of DDA flats more than what DDA is changing as per its costing from demand letters. It would be in the fitness of things to premium of 20% over the disposal cost worked out on the South Delhi SFS.
>
> 6. This discount, however, will not be provided to Public Sector Undertaking/Government Organisations ____ flats."

14. Similarly, reference may also be made to the brochure that was issued for the Expendable Housing Scheme 1996 which as per DDA was applicable to the general public. The brochure also stipulates the discount offered to the allottees. The relevant portion reads as follows:-

> "Allottees may avail loan or pay from their own resources 100% cost of the house before taking possession. An allottee making 100% payment before taking possession will be given discount as under:
>
> | S.No. | Locality | Discount |
> |---|---|---|
> | 1. | Narela | 15% less on disposal pri |
> | 2. | Rohini | -do- |
> | 3. | Kondli Gharoli | -do- |
> | 4. | Dwarja | 5% less on disposal price" |

15. Admitted fact is that flats were allotted to the respondent-Association on the request of Naval Headquarter. Thereafter on the request of the Association, the sale deeds are being or have been executed in favour of the individual allottees.

16. The issue that arises is as to on what basis, the allotment was made by the appellant to the respondent and price was charged from the respondent. The brochure for the allotment issued for the general public provides a tentative disposal cost but as per DDA, this brochure does not apply to the respondent. In the resolution of DDA dated 07.08.1996, there is nothing to show the price of the flats allotted in favour of the respondent. The resolution is not a public document, though it may have been the basis on which appellant offered flats to PSU/Government Organisations. Hence the first document received by the respondent which contains the terms and conditions of allotment including the price was the Demand-cum-Allotment letters dated 09.12.1999 to 15.12.1999 which were issued to the respondent and one of the clause reads as follows:-

> "I am directed to inform you that you have been declared successful for allotment of a house as per details given below. The allotment is subject to terms and conditions given herein those given in the brochure of EHS-96 as also the "DDA (Management and Disposal of Housing Estates) Regulations, 1968."

17. In view of the said stipulations in the Demand-cum-Allotment letter it is but obvious that the contention of DDA that the terms and conditions of the brochure relating to Expendable Housing Scheme, 1996 by which 3500 houses were on offer do not apply to the respondent or to the allottees is a misconceived and erroneous contention. The Demand-cum-Allotment letter clearly stipulates that the allotment is subject to terms and conditions given in the brochure for EHS-96 i.e. brochure for Expendable Housing Scheme, 1996. Hence, in view of the said stipulations in the Demand-cum-Allotment letter, the terms and conditions in the brochure would clearly apply to the respondent/allottees also. Page 3 of the brochure which provides for discount of 15%/5% nowhere stipulates that the discount is confined only to the allottees other than PSUs/

Government Organisations. The said clause of the brochure which is reproduced above provides for discount subject to the only condition that the allottee must make 100% payment before taking possession. In view of the terms and conditions of the Demand-cum-Allotment letter and the brochure for Expendable Housing Scheme, 1996, it would clearly follow that the respondent/allottees would be eligible for the discount stipulated in the Brochure. The contention of DDA to the contrary is erroneous.

18. However, for a moment even if we ignore the Brochure for Expendable Housing Scheme, 1996, even otherwise in our opinion, the appellant-DDA is not entitled to recover the sum which is sought to be recovered on account alleged erroneous application of the discount scheme to the allottees. In terms of the Demand-cum-Allotment letter, the appellant demanded the price and also gave a date of confirmation of acceptance by payment of amount demanded. The letter of allotment also states as follows:

> "Automatic Cancellation of Allotment and Registration if conformation of acceptance with deposit received within 30 days — 15/01/2000"

19. Hence the offer of the appellant got confirmed and a binding contract came into being when the respondent accepted the offer and made the payments in terms of the Demand-cum-Allotment letter. The acceptance was unqualified. As far as the respondent or the allottees are concerned, this Demand-cum-Allotment letter was the first document which stipulates the price payable by respondent/allottees. This price as demanded by DDA has been paid by the said respondent/allottees. The payments have been received and in most cases, Conveyance Deed has been registered. The appellant cannot now back track and seek to recover enhanced price based on some internal document/resolution which was never made public. Hence, whether the discount was payable to PSUs or government organisations or not is an issue that does not concern the respondent or the allottees in as much as there is no communication to that effect from DDA to the respondent or the allottees prior to the building contract between the parties.

20. Hence we are in agreement with the view of the learned Single Judge that the fresh demand now being raised by DDA allegedly on the

ground that the discount had erroneously been given is wholly arbitrary or misconceived. DDA cannot recover the said amount from the allottees. Even in equity, we cannot permit DDA to back out from its commitment as contained in the letter of allotment and recover its dues from the employees of the Navy who may have retired long back.

21. The next demand of DDA pertains to non-payment of conversion charges by the respondent. It is claimed that as the flats are being given on the freehold basis, the respondents/allottees are liable to pay conversion charges from leasehold to freehold basis. It is contended by DDA that the demand is payable when a flat is allotted on a freehold basis. We are unable to see the basis for this demand of conversion charges raised by DDA. There is nothing on record to show as to how and on what basis, DDA is demanding the said claim. The same is nothing but grossly arbitrary. DDA cannot claim the same.

22. In view of the above we see no reason to interfere with the order of the learned Single Judge.

23. The present appeal is dismissed.

ILR (2013) III DELHI 2436
LPA

SHAHID BALWA ....APPELLANT

VERSUS

THE DIRECTORATE OF ENFORCEMENT .....RESPONDENT

(N.V. RAMANA, CJ. & JAYANT NATH, J.)

LPA NO. 79/2013 & CM NO. 2310/2013 **DATE OF DECISION: 29.05.2013**

Forgein Exchange Negotiable Act, 1999—Against Appellants, Complaint filed U/s 16(3) of FEMA for alleged contravention of Section 6(3) (b) of FEMA read

with Regulation 5(1) of FEM Regulations 2000—Show cause notice issued by Adjudicating Authority to A-A filed application seeking permission to cross-examine certain persons—Adjudicating Authority rejected it. Held, cross-examination of witnesses an integral part and parcel of the principles of natural justice—Refusal would normaly be an exception—If the credibility of a person who has testified or given some information is in doubt or if the version or the statement of the person who has testified is in dispute normally right to cross-examination would be inevitable—If some real prejudice is caused to the complainant, the right to cross-examine witnesses may be denied—It is not possible to lay down any rigid rules as to when in compliance of principles of natural justice opportunity to cross-examine should be given–Everything depends on the subject matter—In the application of the concept of fair play there has to be flexibility—The application of the principles of natural justice depends on the facts and circumstances of each case.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Rakesh Tiku, Sr. Advocate along with Mr. Vijay Aggarwal and Mr. Mudit Jain, Advocates.

FOR THE RESPONDENT : Mr. Vikas Garg along with Ms. Divya Jyoti Singh, Advocates and Mr. Sandeep Aggarwal, EO/ED.

CASES REFERRED TO:

1. *Ayaaubkhan Noorkhan Pathan* vs. *State of Maharashtra,* AIR 2013 SC 58.

2. *Raj Kumar Shivhare* vs. *Assistant Director, Directorate of Enforcement and Another* 2010 (4) SCC 772.

3. *Gurmeet Kaur Dhillon* vs. *Tribunal for Foreign Exchange & Anr.,* 2007 CRL.L.J. 3294.

4. *State Bank of India* vs. *Allied Chemical Laboratories and Anr.* (2006) 9 SCC 252.

5. *Union of India* vs. *Delhi High Court Bar Association,* (2002) 4 SCC 275.

6. *K.L.Tripathi* vs. *State Bank of India,* (1984) 1 SCC 43.

7. *State of Kerala* vs. *K.T. Shaduli Grocery Dealer Etc.* (1977) 2 SCC 777.

8. *Balumal Jamnadas Batra* vs. *State of Maharashtra* (1975) 4 SCC 645.

9. *Collector of Customs, Madras & Ors,* vs. *D.Bhoormall* (1974) 2 SCC 544.

10. *M/s. Kanungo & Company* vs. *Collector of Customs and Others,* (1973) 2 SCC 438.

11. *Hira Nath Mishra* vs. *Principal, Rajender Medical College, Ranchi* (1973) 1 SCC 805.

12. *Khem Chand,* vs. *Union of India and Others* AIR 1958 SC 300.

14. *Gurcharan Singh* vs. *State of Bombay,* AIR 1952 SC 221.

15. *Gurcharan Singh* vs. *State of Bombay and Anr.,* AIR 1952 SCR 737.

16. *M/s. Kanungo and Company* vs. *Collector of Customs and Others,* (73) 2 SCC 438.

RESULT: Appeal Disposed of.

JAYANT NATH, J.

1. By the present appeal, the appellants seek to impugn the order dated 24.01.2013 passed by the learned Single Judge dismissing the writ petitions of the appellants. The present order will dispose of LPA 79/2013 and LPA 80/2013 which are based on common facts. For convenience the facts of LPA 79/2013 are stated here.

2. The brief facts giving rise to the said petitions is that a complaint dated 01.07.2011 was filed under Section 16 (3) of the Foreign Exchange Management Act, 1999 (hereinafter referred to as 'FEMA') for alleged contravention of Section 6(3)(b) of FEMA read with Regulation 5(1) of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 and Para 2, 3 and 9(1) (A) & (B) of Schedule 1 of the said Regulation read with Press Note no. 3 (2007 series) issued by Ministry of Commerce and Industry, Department of Industrial Policy and Promotion (SIA) (FC Division) by M/s Etisalat DB Telecom Pvt. (formerly, M/s Swan Telecom Pvt. Ltd.).

3. According to the complaint, it is alleged that M/s Swan Telecom Pvt. Ltd , (M/s Etisalat DB Telecom Pvt. Ltd.) contravened the condition of clause (vi), (vii) and (xxi) of Para-B of Press Note No. 3(2007 series) as aforesaid and thereby contravened the provisions of para 2 of Schedule 1 of Regulation (5) (1) of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations 2000 read with section 6(3)(b) of FEMA, 1999 in issuing shares to M/s Etisalat Mauritius under automatic route facility to the tune of Rs.3228.44 Crores.

4. It was further stated in the complaint that M/s Swan Telecom Pvt. Ltd. (M/s Etisalat DB Telecom Pvt. Ltd) chose to issue 5.27% equity shows to M/s Genex Exim Ventures Pvt. Ltd and 44.73% equity to M/s Etisalat Mauritius without any FIPB approval and thus contravened the provisions of Para 3 of Schedule I of Regulation (5)(1) of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations 2000 read with section 6(3) (b) of FEMA, 1999 for the amount of Rs.380 crores plus Rs.3228.44 crores approx., by issuing shares to M/s Genex Exim and M/s Etisalat Mauritius.

5. It is further stated that M/s Swan Telecom Pvt. Ltd issued shares to M/s Etisalat Mauritius and indulged in over-valuation of its three shares issued to said Etisalat Mauritius so as to remain within the stipulated threshold of 49% equity prescribed for the automatic route. Hence the said M/s Swan Telecom Pvt. Ltd violated the provisions of para 3 of the Schedule 1 of Regulation (5) (1) of the Foreign Exchange Management (Transfer of Issue of Security by a Person Resident outside India) Regulations 2000 read with sections 6(3) (b) of FEA, 99 for the amount

of Rs.316.22 crores because the facility of automatic route was already exhausted by the said M/s Swan Telecom Pvt. Ltd in issuing shares to Foreign Investors without FIPB approval.

6. Pursuant to receipt of the said complaint dated 01.07.2011 a show cause notice dated 08.07.2011 was issued against the said M/s Etisalat Mauritius and its Directors including the appellant herein.

7. The appellant thereafter filed a preliminary reply dated 18.02.2012 to the aforesaid show cause notice and reserved the right of filing a detailed reply after receiving the documents as prayed for. On 25.05.2012, the appellants filed three applications i.e. (a) application for non-joinder of parties and for joint adjudication; (b) application under Article 20(3) of the Constitution of India for keeping the adjudication proceedings before the Court in abeyance and; (c) application for keeping in abeyance the proceedings under Rule 4(3) FEMA Rules wherein the appellants have prayed for providing necessary documents for proper adjudication of the matter. On 17.09.2012, the Adjudicating Authority dismissed the said applications filed by the appellants. Aggrieved by the said order the appellants preferred writ petitions being CWP 6360/2012 against the said order. This Court vide its order dated 05.10.2012 directed that the reply by the other noticees may be supplied to the appellants on the filing of final reply of the appellant. The appellant finally filed his reply dated 05.10.2012 before the Adjudicating Authority.

8. On 12.12.2012 the appellants filed another application seeking permission to cross-examine certain persons for effective disposal of the matter. The cross-examination was requested of Sh. Rajeshwar Singh, Assistant Director of Enforcement, Sh. Ahmed Shakir, Director of M/s/ Genex Exim Venture Pvt. Ltd., Sh. Pratap Ghosa, CFO of M/s Etisalat DB Telecom Pvt. Ltd. and Sh. K. Vasudeva, Vice President Finance of M/s Etisalat DB Telecom Pvt. Ltd. Vide order dated 03.01.2013 the Adjudicating Authority rejected the applications of the appellants. Thereafter the appellants filed the said writ petition. The learned Single Judge dismissed the said writ petitions vide order dated 24.01.2013. Hence the present appeal has been filed.

9. The learned Single Judge dismissed the writ petition. The impugned order held that the stage for leading cross examination had not been

reached and that further one would be slow to interdict proceedings before the adjudicating authority on the grounds raised in the writ petition. The learned Single Judge also observed that the appellants were attempting to derail the adjudication proceedings by filing one application or the other at various stages of the adjudication. Hence the writ petition was dismissed.

10. It is the contention of the learned senior counsel appearing for the appellant that the complaint that has been filed by the respondent relies upon the statements of the three persons namely Mr. Ahmad Shakir, Mr. Pratap Ghose and Mr. K. Vasudeva, in Annexure 'B' which gives the list of documents relied upon by the complainant. The said Annexure 'B' gives a list of 16 documents including various agreement letters and the statements of said three persons. It is claimed that cross examination is an integral part and parcel of principle of natural justice and that on a fair reading of the provisions of FEMA Act and Rules, it is permissible to cross-examine the aforesaid persons and the same would be an indefensible right. Reliance is placed on Section 16(1) of FEMA that provides that for the purposes of adjudication under Section 13, the Central Government may appoint such officers of the Central Government as it may think fit as Adjudicating Authority for holding an enquiry in the manner prescribed after giving the persons alleged to have committed contravention, a reasonable opportunity of being heard for the purpose of imposing a penalty. Reliance is also placed on Rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeals) Rules, 2000. It is stated that right of cross examination in the present case would have to be read into the aforesaid statutory provisions. It is pointed out that the respondents are relying on the said statements of the three persons and the appellant is entitled to test the veracity of the statements on the touchstone of cross examination. It is also contended that in the present proceedings unless opportunity for cross-examination is granted to the appellant, grave and irreparable loss/injury would be caused to them inasmuch as under Section 13 of FEMA a penalty upto 3 times the sum involved in the contravention can be imposed. The alleged contravention in the present case amounts to a total sum of Rs.7200 Crores. It is claimed that under Section 14, if a person fails to make full payment of the penalty imposed upon him under Section 13, he is liable for civil imprisonment as stated under Section 14 of the said Act.

11. Learned senior counsel appearing for the appellant further submits that under the Foreign Exchange Regulations Act 1973, the enquiry was conducted in exercise of power under "The Adjudication Proceeding and Appeal Rules 1974". He states that the procedure as prescribed for adjudication of the proceedings in Rule 3 of the said Rules is almost identical as Rule 4 of the Foreign Exchange Management Rules 2000, (adjudication proceedings and Appeal) Rules 2000 (hereinafter called the 'Rules of 2000')] and the present proceedings are being conducted under the said Rules of 2000.

12. He relies upon the judgment of Division Bench of the Kerala High Court in the case of **Central Govt. represented by Directorate, Enforcement Directorate, Foreign Exchange Regulation Act, New Delhi vs. Fr. Alfred Iames Fernandez,** AIR 1987 Kerala 179 and the judgment of the Single Bench of this Court in the case of Mehar Singh v. Appellate Board Foreign Exchange 1986(10) DRJ 19 to argue that under the Adjudication Proceedings and Appeal Rules, 1974" these judgments have held that the Rules in question under FERA provide for a personal hearing which includes the right to examine and cross examine the witnesses. He has also relied upon **Gurmeet Kaur Dhillon –vs- Tribunal for Foreign Exchange & Anr.,** 2007 CRL.L.J. 3294 whereby the Single Judge of Punjab and Haryana High Court relied upon the judgment of Kerala High Court and held as follows:-

> "In spite of that, the authorities took no steps to permit the appellants to cross-examine the persons said to have been examined under Section 40 of the FERA and, therefore, in view of the law laid down by the Kerala High Court in the case of Central Govt. represented by the **Director, Enforcement Directorate, Foreign Exchange Regulation Act, New Delhi v. Alfred James Fernandes** (supra), said evidence cannot be taken into account."

13. It is argued that as the Provisions of the Rules under FERA are identical to the Foreign Exchange Management Rules 2000, the appellants in view of the said judgments is entitled to cross examine the said witnesses and the impugned orders have wrongly denied them the said opportunity.

14. He further relies on the following judgments to submit that in the given facts, he would have a right to cross-examine.

(i) **State of Kerala vs. K.T. Shaduli Grocery Dealer Etc** (1977) 2 SCC 777;

(ii) **Khem Chand, vs. Union of India and Others** AIR 1958 SC 300;

(iii) **Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra,** AIR 2013 SC 58;

It is also submitted by the learned senior counsel for the appellant that the judgments relied upon in the impugned order by the learned Single Judge also support such contention of the appellant that cross-examination should have been allowed. He refers to the following judgments

(iv) **K.L.Tripathi –vs- State Bank of India,** (1984) 1 SCC 43;

(v) **Union of India –vs- Delhi High Court Bar Association,** (2002) 4 SCC 275;

(vi) **Hira Nath Mishra –vs- Principal, Rajender Medical College, Ranchi** (1973) 1 SCC 805;

15. On the other hand, learned counsel appearing for respondents states that there is no procedure prescribed under the Rules of 2000 for permitting the appellant to cross examine the witnesses which they have sought for. The learned counsel relies upon **Raj Kumar Shivhare vs. Assistant Director, Directorate of Enforcement and Another** 2010 (4) SCC 772 where the Hon'ble Supreme Court held that FEMA is a complete Code in itself and Chapter V of FEMA read with the Rules provides a complete network of provisions adequately structuring rights and remedies available to a person who is aggrieved by adjudication under FEMA. He also relies upon **Kanungo & Co. v. Collector of Customs** (1973) 2 SCC 438, where the Hon'ble Supreme Court held that principles of natural justice do not require that in the matter like this, the person who has given information should be examined in the presence of the appellant or should be allowed to be cross examined by them on the statements made before the Customs Authorities. Relying on the said

judgment, he submits that the appellant has no right to cross-examine. In the written synopsis, the learned counsel for the respondent also relies upon the judgments cited by the learned Single Judge of this Court in his order dated 24.01.2013 which are reproduced as under:-

(i) **M/s. Kanungo and Company vs. Collector of Customs and Others,** (73) 2 SCC 438;

(ii) **Balumal Jamnadas Batra vs. State of Maharashtra** (1975) 4 SCC 645;

(iii) **Collector of Customs, Madras & Ors, vs. D.Bhoormall** (1974) 2 SCC 544;

(iv) **K.L.Tripathi –vs- State Bank of India and Ors,** (1984) 1 SCC 43;

(v) **Union of India & Anr. –vs- Delhi High Court Bar Association & Ors.,** (2002) 4 SCC 275;

(vi) **Hira Nath Mishra and others –vs- The Principal, Rajendra Medical College, Ranchi and Others** (1973) 1 SCC 805;

(vii) **Gurcharan Singh –vs- State of Bombay and Anr.,** AIR 1952 SCR 737;

(viii) **State Bank of India vs. Allied Chemical Laboratories and Anr.** (2006) 9 SCC 252; and

(ix) State of Kerala vs. K.T.Shaudli Grocery Dealers;

16. The legal position regarding the right to cross examination has been well settled by a catena of judgments of Hon'ble Supreme Court. In **State of Kerala vs. K.T. Shaduli Grocery Dealer Etc** (1977) 2 SCC 777, the facts of the case related to the assessment of the assessee for sales tax for three assessment years where the return filed by him on the basis of his books of accounts appeared to the sales tax officer to be incorrect and incomplete since certain sales appearing in the books of account of one Haji Usmankutty were not accounted for in the books of accounts maintained by the assessee. The assessee applied to the sales tax officer for an opportunity to cross examine Mr. Haji Usmankutty.

The Hon'ble Supreme Court in para 5, held as follows:-

> "The question is what is the content of this provision which imposes an obligation on the Sales Tax Officer to give and confers a corresponding right on the assessee to be afforded, a reasonable opportunity "to prove the correctness or completeness of such return". Now, obviously "to prove" means to establish the correctness or completeness of the return by any mode permissible under law. The usual mode recognised by law for proving a fact is by production of evidence and evidence includes oral evidence of witnesses. The opportunity to prove the correctness or completeness of the return would, therefore, necessarily carry with it the right to examine witnesses and that would include equally the right to Cross-examine witnesses examined by the Sales Tax Officer. Here, in the present case, the return filed by the assessee appeared to the Sales Tax Officer to be incorrect or incomplete because certain sales appearing in the books of Haji Usmankutty and other wholesale dealers were not shown in the books of account of the assessee. The Sales Tax Officer relied on the evidence furnished by the entries in the books of account of Haji Usmankutty and other wholesale dealers for the purpose of coming to the conclusion that the return filed by the assessee was incorrect or incomplete. Placed in these circumstances, the assessee could prove the correctness and completeness of his return only by showing that the entries in the books of account of Haji Usmankutty and other whole- sale dealers were false, bogus or manipulated and that the return submitted by the assessee should not be disbelieved on the basis of such entries, and this obviously, the assessee could not do, unless he was given an opportunity of cross-examining Haji Usmankutty and other wholesale dealers with reference to their accounts. Since the evidentiary material procured from or produced by Haji Usmankutty and other wholesale dealers was sought to be relied upon for showing that the return submitted by the assessee was incorrect and incomplete, the assessee was entitled to have Haji Usmankutty and other wholesale dealers summoned as witnesses for cross-examination. It can hardly be disputed that cross-examination is one of the efficacious methods

> of establishing truth and exposing falsehood."

17. Reference next may be had to the case of **Khem Chand, vs. Union of India and Others** AIR 1958 SC 300. This matter related to the appellant therein who was appointed as Sub-Inspector in the Co-operative Societies Department and posted as Sub-Inspector in the Milk Scheme. A charge sheet was issued upon him formulating several charges. An Enquiry Officer was appointed. The only issue that survived to be decided was as to whether the appellant was given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. In para 19, the Hon'ble Court held as follows:-

> "(19) To summarise: the reasonable opportunity envisaged by the provision under consideration includes:
>
> (a)****
>
> (b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence, and finally"

18. The latest judgment of the Hon'ble Supreme Court in this regard is in the case of **Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra,** AIR 2013 SC 58. The said case pertains to a Caste Certificate issued to the appellant. On the basis of his being a member of the Scheduled Tribe, the appellant was appointed as a Senior Clerk in the Municipal Corporation of Aurangabad. The Scrutiny Committee to whom the matter was referred to revoked the Caste Certificate. It was the submission of the appellant before the Hon'ble Supreme Court that he was denied the opportunity to cross-examine witnesses which resulted in grave miscarriage of justice. The Hon'ble Supreme Court after noting the various previous judgments rendered on this issue recorded as follows:-

> "28. The meaning of providing a reasonable opportunity to show cause against an action proposed to be taken by the government is that the government servant is afforded a reasonable opportunity to defend himself against the charges, on the basis of which an inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so only when he is told what the charges against him are. He

can therefore, do so by cross-examining the witnesses produced against him. The object of supplying statements is that, the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against him. Unless the said statements are provided to the government servant, he will not be able to conduct an effective and useful cross-examination."

29. ***

30. The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice."

20. In view of the above judgement of the Hon'ble Supreme Court especially in the latest judgment of **Ayaaubkhan Noorkhan Pathan** (supra) it would clearly follow that cross-examination of witnesses has been held to be an integral part and parcel of the principles of natural justice. Refusal to grant permission to cross-examine witnesses would normally be an exception.

21. Learned counsel for the respondent has relied on various judgments to try and submit that there is no inherent right for cross-examination. The first judgment relied upon by him is **Gurcharan Singh –vs- State of Bombay,** AIR 1952 SC 221. Relevant paragraph 7 is reproduced as under:-

"The only point which Mr.Umrigar attempts to make in regard to the reasonableness of this procedure is that the suspected person is not allowed to cross-examine the witnesses who deposed against him and on whose evidence the proceedings were stated. In our opinion, this by itself would not make the procedure unreasonable having regard to the avowed intention of the legislature in making the enactment. The law is certainly an extraordinary one and has been made only to meet those

exceptional cases where no witnesses for fear of violence to their person or property are willing to depose publicly against certain bad characters whose presence in certain areas constitute a menace to the safety of the public residing therein. This object would be wholly defeated if a right in confront to cross-examine these witnesses was given to the suspect."

22. The said judgment pertains to an order of externment passed against the petitioner under the City of Bombay Police Act. The action of externment was done to protect the general public against the dangerous and bad characters, and in view of the purpose of the statute, the Court disallowed cross-examination.

23. Learned counsel also relied upon the judgement in the case of **Union of India –vs- Delhi High Court Bar Association,** (2002) 4 SCC 275. This matter pertains to right of cross-examination before the Debt Recovery Tribunal wherein in paragraph 23 it was held as under:-

"When the High Courts and the Supreme Court in exercise of their jurisdiction under Article 226 and Article 32 can decide questions of fact as well as law merely on the basis of documents and affidavits filed before them ordinarily, there should be no reason as to why a Tribunal, likewise, should not be able to decide the case merely on the basis of documents and affidavits before it. It is common knowledge that hardly any transaction with the bank would be oral and without proper documentation, whether in the form of letters or formal agreements. In such an event the bona fide need for the oral examination of a witness should rarely arise. There has to be a very good reason to hold that affidavits, in such a case, would not be sufficient."

24. The matter pertained to right to cross-examine before the Debt Recovery Tribunals. The Hon'ble Supreme Court noted that the reason for establishing Banking Tribunals was to expedite the disposal of the claims by the banks. The Hon'ble Court, however, recognised that in certain cases right to cross-examine the witness would be allowed.

25. The next judgment relied upon by the learned counsel for the respondent is the judgment in the case of **Hira Nath Mishra –vs-**

Principal, Rajender Medical College, Ranchi (1973) 1 SCC 805. This matter pertained to the veracity of enquiry committee constituted on account of the complaint received from some girl students regarding certain acts by the male students. In paragraph 13 the Hon'ble Court has held as follows:-

> "Rules of natural justice cannot remain the same applying to all conditions. We know of statutes in India like the Goonda Acts which permit evidence being collected behind the back of the goonda and the goonda being merely asked to represent against the main charges arising out of the evidence collected. Care is taken to see that the witness who gave statements would not be identified. In such cases there is no question of the witnesses being called and the goonda being given an opportunity to cross-examine the witnesses. The reason is obvious. No witness will come forward to give evidence in the presence of the goonda. However, unsavoury the procedure may appear to a judicial mind, these are facts of life which are to be faced. The girls who were molested that night would not have come forward to give evidence in any regular enquiry and if a strict enquiry like the one conducted in a court of law were to be imposed in such matters, the girls would have had to go under the constant fear of molestation by the male students who were capable of such indecencies."

The Hon'ble Court disallowed cross-examination keeping in view the need to protect the girls who had given their statements.

26. Reliance was also placed on the case of **K.L.Tripathi –vs- State Bank of India,** (1984) 1 SCC 43. This matter pertained to a departmental enquiry leading to dismissal of the employee. The Hon'ble Supreme Court in paragraph 32 held as follows:-

> "The basic concept is fair play in action administrative, judicial or quasi-judicial. The concept of fair play in action must depend upon the particular lis, if there be any, between the parties. If the credibility of a person who has testified or given some information is in doubt, or if the version or the statement of the person who has testified, is, in dispute, right of cross-examination must inevitable form part of fair play in action but where there is no

> lis regarding the facts but certain explanation of the circumstances there is no requirement of cross-examination to be fulfilled to justify fair play in action. When on the question of facts there was no dispute, no real prejudice has been caused to a party aggrieved by an order, by absence of any formal opportunity of cross-examination per se does not invalidate or vitiate the decision arrived at fairly. This is more so when the party against whom an order has been passed does not dispute the facts and does not demand to test the veracity of the version or the credibility of the statement."

27. The right to cross-examination was denied on the facts of the case. Further the appellant in that case never asked for cross-examination and he admitted the facts but only an explanation of the acts was given.

28. Learned counsel for the respondent has also heavily relied upon the judgment of **M/s. Kanungo & Company vs. Collector of customs and Others,** (1973) 2 SCC 438. That matter pertained to a firm carrying on business as a dealer or importer and repairer of watches. The Customs in the course of search seized certain amount of watches. On the argument of breach of principles of natural justice on account of denial of the right of cross-examination, the Hon'ble Supreme Court in para 12 noted as follows:-

> "We may first deal with the question of breach of natural justice. On the material on record, in our opinion, there has been no such breach. In the Show-Cause notice issued on August, 21, 1961 all the material on which the Custom Authorities have relied was set out and it was then for the appellant to give a suitable explanation. The complaint of the appellant now is that all the persons from whom enquiries were alleged to have been made by the authorities should have been produced to enable it to cross-examine them. In our opinion, the principles of natural justice do not require that in matters like this the persons who have given information should be examined in the presence of the appellant or should be allowed to be cross-examined by them on the statements made before the Customs Authority. Accordingly, we hold that there is no force in the third contention of the appellant."

The aforesaid judgment was rendered on the facts of the said case.

29. The legal position that would follow is that normally if the credibility of a person who has testified or given some information is in doubt or if the version or the statement of the person who has testified is in dispute normally right to cross-examination would be inevitable.If some real prejudice is caused to the complainant, the right to cross-examine witnesses may be denied. No doubt, it is not possible to lay down any rigid rules as to when in compliance of principles of natural justice opportunity to cross-examine should be given. Everything depends on the subject matter. In the application of the concept of fair play there has to be flexibility. The application of the principles of natural justice depends on the facts and circumstances of each case.

30. Now, coming to the facts of this case. In the complaint that has been filed, the statements of three witnesses have been extensively relied upon. Regarding Shri Pratap Ghosh, CFO of M/s.Etisalar DB Telecom Pvt.Ltd. his statement is relied upon in paragraph 10.2 of the complaint which para reads as follows:-

> **"10.2. Shri Pratap Ghosh, CFO of M/s. Etisalat DB Telecom Pvt.Ltd.** in his statement dated 08.04.2011 under the provisions of FEMA, 1999 inter-alia stated that he had joined this company in August, 2009 and before tht he was working in Etisalat Group head office as Director (financial consolidation and reporting) based in Abu Dhabi, that so far three investments from abroad has been received by the company totaling Rs.3543 crores approximately during the period since December, 2008 to May, 2010; that these FDI were received by the company as pr agreement(s) dated 23.09.2008; tht it is a fact that shares to M/s. Genex Exim, Chennai were allotted in December, 2008 pursuant to the agreement(s) dated 23.09.2008; that on 17.12.2008 company had issued shares to M/s.Etisalat Mauritius, M/s.Genex Exim and M/s.Tiger Trustees, that shares were allotted to M/s.Etisalat Mauitius as decided by M/s.Etisalat UAE, that as per share subscription agreement dated 23.09.2008 (under clause 2.2) after the issuance of such shares and completion of all actions; M/s. Etisalat Mauritius would be allotted 50% +10 equity shares of the company subject to FIPB approval; that there appears a delay in reporting to RBI after issue of the shares in the FORM FCGPR submitted by the company on 13.04.2009; that the total of share holding in the company held by M/s. Etisalat Mauritius and M/s. Delphi Investments Mauritius was already 49% which was the maximum limit allowed for non-resident entities under automatic route."

31. Regarding the next witness Shri Ahmad Shakir, Promotor/Director of M/s. Genex Exim Ventures Pvt. Ltd., the complaint in paragraph 11.3 relies upon the said statement to prove that the purchase of shares by Genex Exim Ventures Pvt. Ltd. was in fact a foreign investment disguised as domestic investment.

11.3 of the complaint reads as under:-

> "11.3 It is thus clear that purchase of shares by Genex Exim Ventures Pvt. Ltd. From the overseas funds received under well conceived design was foreign investment disguised as domestic investment. It is also substantiated by the statement of Shri Ahmad Shakir, Promoter/Director of M/s. Genex Exim Ventures Pvt. Ltd. He in his statement dated 07.04.2011 under FEMA stated that he had already tendered full facts regarding investment in Swan & agreement with Etisalat etc. in his statements dated 02.02.11, 17.03.11 and 07.04.11 under PMLA."

Similarly, in paragraphs 8.2 and 8.3 of the complaint again the complaint relies upon the statement of the said Shri Ahmad Shakir.

32. Further alongwith the complaint is annexure B with the heading "List of relied upon documents to complaint" at Sl.No.9 of the said annexure is the statement dated 2.2.2011, 17.3.2011 and 7.4.2011 of Shri Ahmad Shakir, at serial No.10 is the statement dated 08.04.2011 of Mr.Pratap Ghose and at serial No.11 is the statement dated 06.04.2011 of Mr.K.Vasudeva.

33. In the application that was filed by the appellants for seeking permission to cross-examine, it is stated that there is a need to cross-examine Shri Ahmad Shakir, Shri Pratap Ghose and Shri K.Vasudeva to

controvert their statements and to establish their (appellants) innocence as the charges have been denied by the said appellant. A fourth person who is sought to be cross-examined is Shri Rajeshwar Singh, Assistant Director i.e. the complainant as according to the appellant it intends to cross-examine the said person with intent to controvert the veracity of the complaint regarding contraventions of various provisions of FEMA and it is further stated that the statements made by the said complainant in the complaint are inherently false.

34. Keeping in view the facts of the present case and the nature of allegations being raised against the appellant the judgments of the Supreme Court in the case of **K.T.Shaduli** (supra), **Khem Chand vs. UOI** (supra) and **Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra** (supra) would in our view apply to the facts of this case. The respondent has failed to place on record any fact to show that prejudice would be caused to it if the appellant is permitted to cross-examine the said witness. In fact a query was posed to the learned counsel for the respondent about whether any prejudice would be caused to the respondent if the cross-examination is allowed. The learned counsel could not specify any prejudice. In our view the present appeal should be allowed to the extent that the appellants should be entitled to cross-examine the three witnesses whose statements have been relied upon by the respondent in the complaint. The respondent in the complaint have heavily relied upon the statement of Shri Ahmad Sakir, Shri Pratap Ghose and Shri K.Vasudeva. It would be in the fitness of things that to test the veracity of their statements which is relied upon by the respondent the appellants are allowed to cross-examine them.

35. However, other than the three witnesses no grounds are made out to cross-examine any other person. The request of the appellant to cross-examine Shri Rajeswhar Singh, Assistant Director, the complainant is a request without merits. The said complainant has filed the complaint based on material gathered by the respondent. No purpose would be served by putting him to cross-examination as is sought by the appellants.

36. Though we have allowed the appellant to cross-examine the witnesses, we are conscious of the fact that the appellant may be intent on delaying the proceedings. We cannot help noting that the appellant has

been filing one application or the other at various stages of adjudication as noted by the learned Single Judge. Keeping in view the nature of the matter, we direct that the appellant be permitted to cross-examine the three witnesses, namely, Shri Ahmad Shakir, Shri Pratap Ghose and Shri K. Vasudeva. The learned adjudicating authority shall fix an appropriate date for cross-examination of the said three witnesses. The said dates should be fixed within one month from today and steps for presence of the witnesses be taken. The cross-examination may be done on a day to day basis and may be concluded by the learned adjudicating authority preferably within a period of 10 working days from commencement. These directions are being made so that no unnecessary delay takes place in completion of the cross-examination of the said witnesses. Needless to add that the cross-examination would be confined to questions as permissible in law.

37. With the above directions, the above appeal is disposed of.

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(Containing cases determined by the High Court of Delhi)

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*Elevated as the Chief Justice of Punjab and Haryana High Court w.e.f. 01.06.2013.

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ARBITRATION ACT, 1940—Section 34—Appellant entered into contract with respondent to supply certain material after processing tender floated by respondent—In between, appellant sought for extension of time to supply remaining items and there were further negotiations between parties on rate of items—Disputes could not be resolved inter se parties and appellant invoked arbitration clause—Aggrieved by Award passed by Sole Arbitrator, respondent preferred objections under the Act contending award was contrary to public policy and Indian Law—Court upheld contentions of respondent and held award contrary to law and set it aside—Aggrieved appellant challanged findings by way of appeal—It was urged on behalf of appellant, in absence of any contractual term or legal provision enabling one party to change the term of contract without consent of other it was not open to respondent to pay lower consideration in respect of part of contract—Whereas on behalf of respondent it was argued, extension was granted to appellant on condition that unit price would be different for balance quantity. Held:- If a clause in contract is so vague and uncertain as to be incapable of any precise meaning. It is clearly severable from the rest of the contract. It can be rejected without impairing the sense or reasonableness of the contract as a whole and it should be rejected. The contract should be held good and the clause ignored.

Daulat Ram Industries v. *Union of India* *2285*

— Section 20—Several litigations ensued between appellant between appellant and respondent no.1 over business dealings—Respondent no.1 has also filed petition U/s 20 of Arbitration Act and settlement was arrived between appellant and respondent no.1—On account of the settlement, evidently all proceedings between them came to an end—Though two years later, appellant initiated proceedings U/s 340 of New Code alleging a previous agreement arrived between them was

fabricated, forged and ante-dated document—Petition U/s 340 was dismissed by Ld. Single Judge—Aggrieved appellant preferred appeal to Division Bench—However, appeal was referred to a Larger Bench in view of judgment rendered by Division Bench of the Court in another matter wherein view was taken "an appeal under clause 10 of the Letter Patent is not available to an aggrieved party to assail an order passed on an application filed U/s 340 of the Code of Criminal Procedure, 1973"—The Larger Bench, thus, was seized of the question:- 'Does a Court while taking decision on application U/s 340 of New Code exercise criminal jurisdiction'. Held:- The formation of opinion U/s 340 of New Code is not in exercise of criminal jurisdiction. The decision taken on an application under Section 340 of the New Code, involves only a formation of an opinion as to whether or not a complaint should be filed. At the stage of formation of such an opinion, the Court does not exercise criminal jurisdiction.

Weizmann Ltd. v. *Shoes East Ltd. & Ors.* *2337*

ARBITRATION AND CONCILIATION ACT, 1996—Section 9 and 17—Code of Civil Procedure, 1908—Order XXXVIII Rule 5—Income Tax Act, 1961—Section 163—Respondents ARPL and AIPL approached Petitioner LTL with a proposal to invest in their project of developing a retail mall—Pursuant thereto Share Subscription Agreement (SSA) was entered into between parties whereby LTL agreed to subscribe to equity shares representing 26% of total working share capital of ARPL—Funds were infused in ARPL by LTL—Simultaneous with execution of SSA, parties entered into Share Holding Agreement (SHA) where ARIL assured LTL 8 % Investment Return Rate (IRR) in every financial year—According to LTL, construction of Mall was inordinately delayed and Respondents expressed inability to adhere to 18 % preferred IRR and asked for it to be reduced—It was mutually agreed between parties Respondents would return US Dollar component of LTL's investment in ARPL with 8 % IRR on or before expiry of three year lock-in-period—Exit Agreement (EA) was executed between parties—Present petition was filed

by LTL for a direction to ARIL to secure sum equivalent to 8% IRR on LTL's investment, to cooperate and allow CA nominated by LTL to conduct regular internal financial audits of ARPL and ARIL, to direct respondent's to file records and particulars of relevant bank accounts by way of which remittance amounts where secured, to disclose details of statutory filings with Government departments, to direct ARIL not to alienate/encumber/sell/create charge on shares held by ARPL and ARIL, directing ARPL not to create charge/alienate/encumber/sell shares with respect to 26% shareholding of LTL, directing Respondents not to create any liability, mortgage, lien, encumbrance in any manner on properties and assets of ARPL until adjudication of disputes between parties—In short, argument of Petitioner is that it should be paid for its equity shares, CCPS and FCDS at face value of Rs. 2,687.83 per share—Per contra plea taken, there is no dispute between parties which requires to be referred to arbitration and in any event, arbitration clause till date has not been invoked by LTL—Claim was itself premature—Even for placing monies in a no lien account, approvals would have to be obtained. There was no pleading that ARIL was siphoning off funds in any unlawful manner—Although scope of Section 9 of Act was wide and Court could exercise all powers vested in it, pleadings in main petition were insufficient for grant of any such relief—Held—While neither ARPL nor ARIL has denied liability to honour commitments under SPA, SHA and EA, there is justification in their contention that there is no specific averment made in petition by LTL that either of them is trying to siphon off funds or transfer properties of ARPL which is one of prerequisites for grant of relief under Order XXXVIII Rule 5 CPC—No doubt Section 9 of Act gives vide powers to Court including same power for making orders as it has for purpose of and in relation to any proceedings before it—Nevertheless, that discretion is not to be exercised lightly—Court must be satisfied that essential conditions for grant of such relief have been met by party seeking it—Till date, LTL has not formally invoked arbitration clause—Court is not inclined at this stage to express any view on contentious issues which are left open

to be decided by arbitral Tribunal—Petition disposed of with directions.

Lalea Trading Limited v. *Anant Raj Projects Pvt. Ltd. & Anr.* *1679*

— Section 34—Parties to petition entered into contract for construction of infrastructure for breeding and training of dogs at Meerut—Contract was completed three days before stipulated period and appellants submitted final bill—Respondent made payment towards bill but withheld certain amount which led to dispute and matter was referred to arbitration—Out of 10 claims put forth by appellants in petition, arbitrator disallowed claims no. 3, 6 & 8 and against other claims allowed different amounts—Aggrieved respondent filed petition U/s 34 of Act and challenged award raising main grievance, arbitrator awarded amounts beyond the contract—Petition was allowed and award was set aside—Aggrieved appellant preferred appeal alleging, objections under section 34 of Act are bases on limited grounds to challenge awards and evidence cannot be reappreciated by Court as if sitting as Court of appeal over decision of arbitrator. Held:- The arbitrator has the jurisdiction to interpret the contract, and unless that is shown to be manifestly unreasonable, or based on an untenable interpretation of the law, the Court would be slow in substituting its opinion.

Wishwa Mittar Bajaj & Sons v. *UOI*..... *2252*

BORDER SECURITY FORCE ACT, 1968—Section 11—Border Security Force Rules, 1969—Rule 22—Sector HQs Hospital, Amritsar referred petitioner to Base Hospital, Jalandhar for further treatment—Petitioner neither reported in that hospital nor informed respondents and went to his home town, Moradabad—As petitioner's period of absence exceeded 30 days, a Court of Inquiry was conducted—Show cause was also dispatched to petitioner informing that it was tentatively proposed to terminate his services by way of order of dismissal—Petitioner failed to respond to respondents and vide impugned orders, petitioner dismissed from service and appeal of petitioner also rejected—Orders challanged before HC—Plea

taken, petitioner was unwell and was taking treatment for tuberculosis and for this reason has failed to report at place of duty—Held—Petitioner had gone to his home town, Moradabad instead of Base Hospital, Jalandhar consciously—Medical certificate relied upon by petitioner is after petitioner received show cause notice—There is no contemporary record of prescriptions, treatment or of any medication(s) which petitioner may have taken, if he was actually sick or was under treatment—Stand of respondents that no reply having been received from petitioner and petitioner having been given a notice to show cause in accordance with law, respondents had no option but to pronounce order recording its satisfaction that petitioner was absent without leave without any reasonable cause and his further retention in service was undesirable—Treating petitioner's absence as a period of petitioner having been on leave without pay would not impact order of punishment—Writ petition dismissed.

Pancham Singh v. *Union of India & Ors.* *1897*

CWC STAFF REGULATIONS, 1996—Regulation 10 Sub-Regulation (1)—Petitioner appointed as Junior Technical Assistant in December 1983—On probation for one year—Suspended on 6.9.1984—Pending initiation of disciplinary proceedings—However in disciplinary proceedings initiated against him—His suspension revoked on 16.2.1985—Instead one P.P. Singh was charged and in the enquiry proceedings, P.P. Singh held guilty in regular D.E. However, in the report, the enquiry officer made certain observations qua the working of petitioner as well. Meanwhile, probation period of petitioner ended in December 1984—No formal order of extension of probation or confirming the petitioner—Petitioner's services terminated on 22.10.1983 under Sub-Regulation (1) of Regulation (10) of CWC (Staff) Regulations 1966 held the petitioner was examined as a witness in the departmental proceedings against P.P. Singh an his credibility was Doubted by the enquiry officer. The genuiness of warnings/memos issued against the petitioner by P.P. Singh was doubted in the enquiry by the enquiry officer—Thus, the warning/memos

could not have been relied against the petitioner to terminate the services of petitioner. The comments of enquiry officer about any creditworthiness of the petitioner in the DE cannot be characterised as evidence to judge suitability of petitioner. The comments of enquiry amended to findings of misconduct without any notice or hearing to the petitioner. No other material to support termination order as based on bonafide assessment of petitioners suitability—The innocuously word termination order was not reality based on allegations of serious misconduct, for which the petitioner was not even charged or made to face any form of inquiry and was not granted hearing—Termination set aside. However, since termination order was 28 years old, balancing the two seemingly competing public interest the petitioner awarded 40% of the back salary and allowances that would have been paid to the petitioner, had he continued in the same post from the date of his termination at all.

Prem Kishore v. *Central Warehousing Corporation* *2227*

CENTRAL EXCISE ACT, 1944—Section 35A, 35B (1) 35EE (1A) and 35E (2)—Central Excise Rules, 2002—Rule 18—Constitution of India, 1950—Article 53, 226 and 227—General Clauses Act, 1897—Section 3(8)—Respondent lodged rebate claims in respect of excise duty paid on goods procured from manufactures initially for home consumption but subsequently exported—Claim rejected by Assistant Commissioner (Tech.) who issued a show cause notice—Accepting objections of respondent, petitioner allowed rebate claims and passed order-in-original to that effect—Commissioner, Central Excise reviewed order-in-original and took view that it was not in order and directed Assistant Commissioner (Tech.) to file appeals to Commissioner (Appeals) against order-in-original—Appeals dismissed holding that substantial benefit given to respondent cannot be taken away on ground of procedural infractions—Revision application filed before Central Government also dismissed—Writ petition filed to issue a writ of certiorari quashing impugned order and a writ of mandamus

directing GOI to pass fresh orders after re-adjudication—Preliminary objection taken by respondent that no writ can be filed by a government functionary questioning decision of Government itself, nor can UOI question its own order—Held—One cannot be said to be aggrieved by one's own order and in this view of matter Central Government cannot question its own order passed under Section 35EE of Act—If Central Government is of view that order of Commissioner (Appeals) is legal and proper and requires no interference (by way of enhancement of duty, fine or penalty), there is no right conferred upon Commissioner of Central Excise to challenge decision to drop proceedings—If Commissioner of Central Excise chooses to take appeal route against order of Commissioner (Appeals) to CESTAT, he may lawfully pursue his challenge right up to Supreme Court—But if he chooses to take revisionary route and question legality and propriety of order of Commissioner (Appeals) before Central Government under Section 35EE, he must, if decision of Central Government goes against him, accept it as final—Preliminary objection taken by respondent upheld and writ petition dismissed in limine.

Union of India Through Commissioner Central Excise Commissionerate Delhi-II v. *Ind Metal Extrusions Pvt. Ltd. & Anr.* *1641*

CINEMATOGRAPHY ACT, 1952—Section 7 (1) (C)—Copyright Act, 1957—Section 63—Case registered in P.S. Special Cell, Delhi U/s 7 (1) (C) of Cinematography Act and Section 63 of Copyright Act alleging raid was conducted at Akash Cinema, Delhi wherein movie with uncensored obscene scenes was being exhibited—On conclusion of investigation, chargesheet was presented in Court of Ld. A.C.M.M, Delhi naming three accused persons kept in column no. 4 of chargesheet and four accused persons including two petitioners were kept in column no. 2 of chargesheet—Ld. A.C.M.M. took cognizance of offence and ordered issuance of summons against accused persons—Though no specific order for taking cognizance against four accused persons kept

in column no. 2 was made but process was issued to them also—Out of said four accused persons, two challenged order taking cognizance which was set aside and case was remanded back with direction to hear the parties afresh and to pass a detail reasoned order—Ld. A.C.M.M. thereupon directed further investigation—Aggrieved petitioners challenged said order averring it to be illegal as after taking cognizance, Ld A.C.M.M. could not have ordered to further investigation of case—Per contra on behalf of State it was contended, Ld. A.C.M.M, specifically did not take cognizance against petitioners and if at all had taken, said order was set aside by Hon'ble Delhi High Court, thus, Ld. A.C.M.M, was not debarred from directing further investigation. Held:- An order of further investigation can be made at various stages including at the stage of the trial, that is, after taking cognizance of the offence.

Rishi Raj & Anr. v. *State* *2159*

CODE OF CIVIL PROCEDURE, 1908—Order XXXIX Rule 1 & 2—Interim Injunction—Plaintiff a manufacturer of the famous antiseptic liquid under the trademark 'DETTOL'—Plaintiff came out with a new product 'DETTOL HEALTHY KITCHEN' Dis and Slab Gel, a kitchen cleaner which helps kill germs. Defendant manufacturer of rival kitchen cleaner 'VIM LIQUID'—Defendant came out with an advertisement purportedly disparaging the plaintiff and its brand DETTOL, equating its product to a "Harsh Antiseptic"—Plaintiff alleged that reference in the advertisement of defendant was clearly directed to the plaintiff's brand DETTOL being referred to as a Harsh Antiseptic and that the defendant attempted to misrepresent that the plaintiff had done nothing but repackage its Antiseptic Liquid as DETTOL HEALTHY KITCHEN. Injunction Granted. Held—Prima facie the impugned advertisement subtly yet certainly targets the plaintff's brand and its product—It it common knowledge that the plaintiff's brand DETTOL is synonymous with the term antiseptic in the FMCG market in India. The public at large carry an impression in their minds that all DETTOL products are

antiseptic. Therefore, the usage of the term antiseptic in the impugned advertisement directs the viewers of the advertisement to the plaintiff's brand or product. Held, The generic disparagement of a rival product, without specifically identifying to pin-pointing the rival product is obejctionable—False, misleading, unfair and deceptive advertising is not protected under "Commercial speech"—Comparative advertising is permissible as long as while comparing own with rival/competitor's product, the latter's product is not derogated, discredited, disgraced, though while comparing some amount of 'showing down' is implicit; however the same should be within the confines of ***De Beers Abrasive v. International General Electric Co.,*** 1975 (2) All ER 599, which Courts in India have frequently referred to.

Reckit Benkciser (India) Ltd. v. *Hindustan Unilever Ltd.* *2002*

— Order XXXVIII Rule 5—Income Tax Act, 1961—Section 163—Respondents ARPL and AIPL approached Petitioner LTL with a proposal to invest in their project of developing a retail mall—Pursuant thereto Share Subscription Agreement (SSA) was entered into between parties whereby LTL agreed to subscribe to equity shares representing 26% of total working share capital of ARPL—Funds were infused in ARPL by LTL—Simultaneous with execution of SSA, parties entered into Share Holding Agreement (SHA) where ARIL assured LTL 8 % Investment Return Rate (IRR) in every financial year—According to LTL, construction of Mall was inordinately delayed and Respondents expressed inability to adhere to 18 % preferred IRR and asked for it to be reduced—It was mutually agreed between parties Respondents would return US Dollar component of LTL's investment in ARPL with 8 % IRR on or before expiry of three year lock-in-period—Exit Agreement (EA) was executed between parties—Present petition was filed by LTL for a direction to ARIL to secure sum equivalent to 8% IRR on LTL's investment, to cooperate and allow CA nominated by LTL to conduct regular internal financial audits of ARPL and ARIL, to direct respondent's to

file records and particulars of relevant bank accounts by way of which remittance amounts where secured, to disclose details of statutory filings with Government departments, to direct ARIL not to alienate/encumber/sell/create charge on shares held by ARPL and ARIL, directing ARPL not to create charge/alienate/encumber/sell shares with respect to 26% shareholding of LTL, directing Respondents not to create any liability, mortgage, lien, encumbrance in any manner on properties and assets of ARPL until adjudication of disputes between parties—In short, argument of Petitioner is that it should be paid for its equity shares, CCPS and FCDS at face value of Rs. 2,687.83 per share—Per contra plea taken, there is no dispute between parties which requires to be referred to arbitration and in any event, arbitration clause till date has not been invoked by LTL—Claim was itself premature—Even for placing monies in a no lien account, approvals would have to be obtained. There was no pleading that ARIL was siphoning off funds in any unlawful manner—Although scope of Section 9 of Act was wide and Court could exercise all powers vested in it, pleadings in main petition were insufficient for grant of any such relief—Held—While neither ARPL nor ARIL has denied liability to honour commitments under SPA, SHA and EA, there is justification in their contention that there is no specific averment made in petition by LTL that either of them is trying to siphon off funds or transfer properties of ARPL which is one of prerequisites for grant of relief under Order XXXVIII Rule 5 CPC—No doubt Section 9 of Act gives vide powers to Court including same power for making orders as it has for purpose of and in relation to any proceedings before it—Nevertheless, that discretion is not to be exercised lightly—Court must be satisfied that essential conditions for grant of such relief have been met by party seeking it—Till date, LTL has not formally invoked arbitration clause—Court is not inclined at this stage to express any view on contentious issues which are left open to be decided by arbitral Tribunal—Petition disposed of with directions.

Lalea Trading Limited v. *Anant Raj Projects Pvt. Ltd. & Anr.* *1679*

CODE OF CRIMINAL PROCEDURE, 1973—Section 374—Indian Penal Code, 1860—Section 307, 34—Appeal against conviction u/s 307/34 on the grounds that prosecution was unable to establish and prove motive to inflict injuries, weapon of offence was not recovered, victim did not disclose the name of the assailants to the doctor examining him—Held—Evidence of an injured witness cannot be disbelieved without assigning cogent reasons. Proof of motive recedes into background in cases where the prosecution relies upon eye witness account of occurrence. Non recovery of weapon of offence is not fatal. There is specific ocular and medical evidence to prove that the injuries were caused by gunshot. It is not mandatory for a doctor to record in the MLC or to make enquiry from the injured about the name of the assailant. Omission of injured to disclose the assailant's name to the doctor does not discredit his testimony—Held considering the aggravating and mitigating circumstance, sentence reduce from 8 years to 6 years. Appeal disposed off.

Noor Salam v. *The State (Govt. NCT of Delhi)*..... *1732*

— Section 378(1)—Indian Penal Code, 1860—Sections 376 and 377—Indian Evidence Act, 1872—Section 118—Statement of a child witness—Manner of conducting competency test—Insufficient attention paid; no real assessment of the capacity and capabilities children accorded special treatment—Extensive guidelines laid down by the Supreme Court and the Delhi High Court—Pronouncements bind all trial courts in Delhi—Knew no exceptions—Adherence is mandatory—Questions put should meet the requirements of law having special regard to age and circumstances of the person required to depose—Questions to be put to child witness ought to be sensitively framed—Education, socio economic background, age and capacity to be kept in mind—Directions issued.

State v. *Rahul* *1861*

— Section 438—Anticipatory Bail—Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989—Section 3—Section 18—Bar to grant anticipatory bail—Indian Penal

Code, 1860—Section 34—Sections 341/323/34—Utterance of caste remark to the complainant—Complainant and his brothers beaten up—Final report submitted against the three accused persons—Application for grant of anticipatory bail—Dismissed by the Sessions Judge—Preferred present application for anticipatory bail—Pleaded business rivalry between petitioners and complainant had filed petition alleging harassment by complainant—SHO was directed to provide adequate protection—DCP filed affidavit confirming business rivalry—FIR is an afterthough—Filed when the petitioner was in hospital having suffered beatings from the complainant—FIR is counter blast to FIR filed by the petitioner—The chain of events points to falsity of the complaint—challan filed is ambiguous—Continuous improvements made by complainant—Allegation of caste remark made after one month of the incident—Witness also made improvements—APP pleaded bar of Section 18 of the SC/ST Act to section 438 Cr. PC—Made caste remark in public view—Clear averments in the complaint—Held—Section 18 is an absolute bar to applicability of Section 438 Cr. PC—Absence of utterance in public view is the limited exception—Specific allegations against each of the accused a must—Section 34 IPC cannot be brought in aid—Accused Manjeet Singh uttered caste remark in a public street—No such charges against other two petitioners—Application of Manjeet Singh rejected—Other two petitioners admitted to bail.

Manjeet Singh & Ors. v. *State of Delhi*..... *1971*

— Section 397, 482—Respondents contend that present writ petition is not maintainable—Ought to have filed a revision petition u/s 397 or a petition u/s 482 of the CrPC—Held, as all three proceedings would lie in the High Court, as presently positioned, the mere fact that the Petitioners have chosen to approach this Court by way of a petition under Article 226 of the Constitution of India, will not come in the way of the Court entertaining petition. The power under Article 226 of the Constitution, which is available to the Court, is far wide.

As a matter of fact, the Petitioners not being a party to the criminal proceeding, would perhaps not be entertained if, a revision petition were to be filed under Section 397 of the Cr.P.C. or a petition under Section 482 of the Cr. P.C. This would, however, not fetter the Court from entertaining proceedings on its own against orders of the Court below, if deemed fit, in a given case.

Vijay Singhal & Ors. v. *Govt. of NCT of Delhi & Anr.* *1817*

— Section 327—Ban imposed on reporting of a rape trial which has a seering public interest—Interpretation of S. 327—Whether open trial a rule—Does S. 327 (2) which provides for in camera trial in a rape case envisages access and is so in what manner—Advisory was issued by the Public Relations Officer, of the Delhi Police that since the Magistrate had taken cognizance u/s 302 and 376 (2)(g) IPC in the charge sheet, the provisions of section 327(2) and (3) of the CrPC got triggered—Petitioner moved an application before the Magistrate seeking permission to report the Court proceedings which was dismissed by the Magistrate—Present writ petition filed challenging the ban—Petitioner contends that the primary object of S. 327 is to provide for a fair trial—Sub Section 2 and 3 were introduced by amendment to protect the dignity of rape victim—As victim has died, sub Section 2 and 3 will have no applicability and that the media had acted with due restraint in reporting the case—Provisions of s. 327 being used to cover the inadequacy of the State, in particular, that of the police—Blanket ban is illegal—Respondent contended that right of the media to report Court proceedings is not an absolute right as is clearly envisaged in Sub-section (3) of s. 327 CrPC—Ban was imposed taking into account the sensitivity of the case, the safety of accused and the concern of the Court to maintain anonymity qua the identity of the victim, her family as also the accused—Held: Composite and a close reading of the provisions of Section 327 of the Cr.P.C. clearly point to the fact:

— Guidelines for the mode and manner in which such discretion is to be exercised.

— Further Held—Even in a rape trial the Court is required to consider the various facets and dimensions obtaining in the case-mechanical approach is to be abjured—Directions issued in the present case.

Vijay Singhal & Ors. v. *Govt. of NCT of Delhi & Anr.* *1817*

— Section 482—Medical Termination of Pregnancy Act, 1971—Section 3—Termination of pregnancy—Victim of rape—Medically examined—Had pregnancy of 6 weeks—Living alone in Delhi; does not want to bear a child—Writ petition filed for directions to State for terminating her pregnancy and to preserve the foetus for DNA test—Status report filed—Pregnancy can be terminated with minimal know risks—State has no objection for termination of pregnancy—Enquiries made—Victim is major; has consultation with her counsel; understands the consequences of her act—Expressed willingness to terminate the pregnancy—Consent of woman essential for termination of pregnancy—Likely to face mental, physical, social and economical problems in future—Petition allowed—Directions issued.

X (Assumed name of the prosecutrix) v. *The State (N.C.T. of Delhi) & Ors.* *1813*

— Section 482; Indian Penal Code, 1860—Section 406, 420—Petition was quashing of criminal complaint against Petitioner—Inherent powers of the Court u/s 482—SCOPE HELD—Though very wide have to be invoked sparingly and with circumspection only (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of the Court and (iii) otherwise to secure the ends of justice, Inherent powers of the Court to quash an FIR or a criminal complaint can be invoked where the allegations made in the complaint even if admitted do not disclose any offence. Since there are disputed questions of fact, Court in exercise of its power u/s 482 cannot be stifled with the Petitioner's prosecution. Petition

dismissed.

Kanak Installments Pvt. Ltd. v. *State of NCT of Delhi & Anr.* *2125*

— Section 482—Negotiable Instruments Act, 1881—Section 138, 141—Cheques issued by the accused company dishonoured—Petition for quashing of summoning order by Director of the accused company—Petitioner contends that Complaint does not reveal as to how Petitioner was in charge of and responsible for the conduct of business of accused company and mere averment that the Petitioner being a Director was in charge of the and responsible for conduct of the business of the company was not enough—Held—Only bald allegations that Petitioner and other Directors were responsible for the day to day affairs of the accused company. Following law laid down in *National Small Industries Corporation Ltd., Central Bank of India* and *Anita Malhotra,* averments not sufficient to issue process against petitioner. Summoning order quashed—Petition allowed.

Chintan Arvind Kapadia & Anr. v. *State & Anr.* *2135*

— Section 161, 164, 173, 482—Allegations of rape and molestation—Magistrate's order taking cognizance not interfered with by ASJ—Petition for quashing order taking cognizance in view of the final report filed by the investigating agency—Held—The factum of withdrawal of allegations, non appearance of any misconduct in CD, delay in making complaint to police, initial reluctance to make statement u/s 164 and the contradiction about place of incidence were required to be gone into only at the stage of trial—At the time of taking cognizance, the Ld. M.M was only required to analyze whether there exists sufficient ground for summoning the accused or not. Magistrate not required to see whether the material was sufficient to convict the accused no error or illegality in the order—Petition dismissed.

D.N. Taneja v. *State NCT of Delhi* *2150*

— Section 173—Cinematography Act, 1952—Section 7 (1) (C)—Copyright Act, 1957—Section 63—Case registered in P.S. Special Cell, Delhi U/s 7 (1) (C) of Cinematography Act and Section 63 of Copyright Act alleging raid was conducted at Akash Cinema, Delhi wherein movie with uncensored obscene scenes was being exhibited—On conclusion of investigation, chargesheet was presented in Court of Ld. A.C.M.M, Delhi naming three accused persons kept in column no. 4 of chargesheet and four accused persons including two petitioners were kept in column no. 2 of chargesheet—Ld. A.C.M.M. took cognizance of offence and ordered issuance of summons against accused persons—Though no specific order for taking cognizance against four accused persons kept in column no. 2 was made but process was issued to them also—Out of said four accused persons, two challenged order taking cognizance which was set aside and case was remanded back with direction to hear the parties afresh and to pass a detail reasoned order—Ld. A.C.M.M. thereupon directed further investigation—Aggrieved petitioners challenged said order averring it to be illegal as after taking cognizance, Ld A.C.M.M. could not have ordered to further investigation of case—Per contra on behalf of State it was contended, Ld. A.C.M.M, specifically did not take cognizance against petitioners and if at all had taken, said order was set aside by Hon'ble Delhi High Court, thus, Ld. A.C.M.M, was not debarred from directing further investigation. Held:- An order of further investigation can be made at various stages including at the stage of the trial, that is, after taking cognizance of the offence.

Rishi Raj & Anr. v. *State* *2159*

— Section 173, 177 & 178—Petitioner prayed for quashing of FIR and report based on it, registered in P.S. Janakpuri averring, alleged acts of cruelty/misappropriation pleaded by complainant took place either at Faridabad or at Chandigarh—But neither offence nor any part thereof was committed within jurisdiction of NCT of Delhi, Delhi Police could not carry out investigation and was not competent to take cognizance

of charges of said offences—Per contra on behalf of State, it was urged Officer Incharge of Police Station is under obligation to investigate any case which a Court having jurisdiction over local area, within limits of such police station would have power to inquire into or try under provisions of Chapter XIII of the Code. Held:—When no part of cause of action arose in Delhi and alleged acts were committed at some other place outside Delhi, the concerned Magistrate had no jurisdiction to deal with the matter. Report U/s 173 of Code to be returned to Officer Incharge of Police Station with directions to present it to the Court of competent jurisdiction.

Puneet Chawla v. *State & Anr.* *2169*

— Section 340—Arbitration Act, 1940—Section 20—Several litigations ensued between appellant between appellant and respondent no.1 over business dealings—Respondent no.1 has also filed petition U/s 20 of Arbitration Act and settlement was arrived between appellant and respondent no.1—On account of the settlement, evidently all proceedings between them came to an end—Though two years later, appellant initiated proceedings U/s 340 of New Code alleging a previous agreement arrived between them was fabricated, forged and ante-dated document—Petition U/s 340 was dismissed by Ld. Single Judge—Aggrieved appellant preferred appeal to Division Bench—However, appeal was referred to a Larger Bench in view of judgment rendered by Division Bench of the Court in another matter wherein view was taken "an appeal under clause 10 of the Letter Patent is not available to an aggrieved party to assail an order passed on an application filed U/s 340 of the Code of Criminal Procedure, 1973"—The Larger Bench, thus, was seized of the question:- 'Does a Court while taking decision on application U/s 340 of New Code exercise criminal jurisdiction'. Held:- The formation of opinion U/s 340 of New Code is not in exercise of criminal jurisdiction. The decision taken on an application under Section 340 of the New Code, involves only a formation of an opinion as to whether or not a complaint should be filed. At the stage of formation of such an opinion, the Court does not exercise

criminal jurisdiction.

Weizmann Ltd. v. *Shoes East Ltd. & Ors.* *2337*

— Section 244 & 245—Aggrieved petitioner challenged order passed by Ld. Additional Chief Metropolitan Magistrate, Delhi in complaint case instituted by petitioner against respondent and one another accused, as respondent was discharged by Ld. A.C.M.M. stating that complaint against him was groundless—Petitioner had also challenged said order in revision petition which was dismissed by Ld. ASJ. Held:- A Magistrate can discharge an accused in a warrant case instituted otherwise than on a police report U/s 245 (2) of the Code if he finds the charge to be groundless.

M.G. Attri v. *S.K. Jain* *2176*

COMPANIES ACT, 1956—Sections 391 to 394—Scheme of Compromise and arrangement—Sanctioned and company ordered to be wound up vide order dated 25.04.2000—Scheme of compromise and arrangement proposed—Petition filed for sanction of the scheme—Order for holding of meeting of the shareholders, secured and unsecured creditors—Meeting accordingly held—shareholders, secured creditors and unsecured creditors approved the scheme—Petitioner stated the scheme will benefit all the parties concerned and will be in public interest—Notices issued to Ministry of Corporate Affairs and also the official liquidator—Objections filed by the OL and the Regional Director (RD), Ministry of Corporate Affairs—OL stated strategic investor not disclosed—The balance sheets, profit and loss accounts and re-structing of existing liabilities highly fanciful and imaginary—New plant and machinery would be quite expensive—RD stated no mention of rehabilitation of the workmen—Not stated about having obtained no objection from SEBI and Stock exchanges—Propounder filed affidavit stating no objection received from all the stakeholders—Rejoinder to objection of OL filed wherein it was stated all creditors except IFCI approved the scheme—Strategic investors paid substantial amount—Scheme viable and if given effect to, will wipe out all liabilities of TAML (TAHAPAR AGRO MILLS LTD.)—Net worth certificate

enclosed total cost of the scheme is much more than assests—Further affidavit filed by propounder updating information regarding dues of creditors—Some dues already paid in full—Some payable within 30 days of sanction of the scheme and some within 4 months of the sanction—Counter Affidavit filed by IARC—Agreed to receive the balance in 4 months—IFCI agreed to accept the balance in 6 months—IDBI acknowledged payment—Held, 90% shareholders, secured and unsecured creditors approved the scheme—Strategic investor demonstrated its bonafides—Terms of balance amount payment reasonable—Objections of OL do not survive—Points raised by RD also accounted for entire sums claimed by departments and statutory bodies—Govt. bodies served of the notice of meeting—No objections filed till date—Sanction accorded to the scheme with modifications—Petition allowed.

Gujarat State Financial Services Ltd. v. *Thapar Agro Mills Ltd.* *1798*

— Section 433(e), 434, 439—Winding up petition on the grounds of inability to pay debt—Settlement arrived at during pendency. Recorded in order and petition disposed of with direction that if there is default of even one installment, the petitioner are at liberty to take remedy of contempt and also provisional liquidator should also be appointed. Default in payment—Application for appointment of Provisional Liquidator and for reviving of Company petition filed—Affidavit filed by respondent for dropping the notice of contempt and for modification of order—Held—Despite unambiguous language of the order, Respondent did not seek directions of the Court when it became plain to it that it would be unable to adhere to the undertakings given to the Court in the event the CDR scheme was approved. Reasons stated in the affidavit are neither satisfactory nor convincing. Respondent not in a position to repay the outstanding amounts which it owes the petitioner. Applications allowed. Company petition revived and provisional liquidator appointed.

Australia and New Zealand Banking Group Ltd. v. *Tulip Telecom Ltd. Ors.* *1933*

— Section 392—Joint application by Transferor and Transferee company for dismissal of petition in which order was passed approving the scheme of demerger of NLD and ILD from Transferor Company to Transferee company. ROC apprised the Court that Central Government had no objection to Applicants withdrawing the petition subject to following conditions.

In the Matter of Vodafone Essar South Ltd. *1979*

CONSTITUTION OF INDIA, 1950—Article 226—DDA floated a scheme for 7000 expendable houses vide a resolution dated 27th August, 1996, whereby 50% of the flats were proposed to be offered to the general public while 50% were proposed to be offered to PSUs/Govt. Organisations—Discount was announced for those individuals who would make payment on cash down basis and it was made clear that the said discount will not be provided to the PSUs/Govt. Organisations—Respondent association through Naval Head Quarter vide letter dated 29/4/1999 requested DDA to register 104 flats for allotment of employees of Navy—DDA informed the respondent that the houses could not be allotted in the names of employees and accordingly allotted 104 flats in favour of respondent association only and issued demand cum allotment letters—Respondent Association deposited full payment of 77 flats within a month—Vide three letters issued in June, 2001, DDA demanded additional sums from the respondent by claiming the inadvertently while computing the demand amount, discounts had been given to the allottees whereas no such discounts were to be given to the members of the Association who had not applied under the public scheme. Certain amounts as conversion charges from lease hold to free hold were also demanded—Respondent association challenged the said demands and the Ld. Single Judge vide order dated 25/04/2005 allowed the said writ and held the demands arbitrary and illegal. Held: Appellant DDA is not entitled to recover any additional sums from the allottees. The Demand cum Allotment Letter clearly stipulated that the terms and condition in the brochures for the scheme would

apply to the respondent/ allottees and the page 3 of the said brochures nowhere stipulates that the discount is confined only to allottees other than PSUs/Government Organisations but infact clearly provided for discount to an allottee who made 100% payment before possession. In terms of the Demand cum Allotment Letter, the appellant demanded a price and gave a date of confirmation of acceptance by payment of amount demanded. The respondent accepted the offer, made the payment in terms of Demand cum Allotment Letter and thus a binding contract came into being between the parties and now the appellant cannot back track and seek to recover enhanced price based on some resolution which was never made public. The conversion charges are also arbitrary for there is nothing on record to show as to how and on what basis, DDA is demanding the said amount—Appeal dismissed.

DDA v. *All India Naval Draughtsman* *2427*

— Article 215—Contempt of Court Act, 1971—Petition is filed seeking initiation of contempt proceedings against the respondent on account of his deliberate and wilful violation of the order passed by a Single Judge of this Court dated 29.09.2011 in Contempt Petition No. 360/2011—Respondent holds the petitioners responsible for having him suspended from service from 2007-2010, nixing his chances of becoming Commissioner of Income Tax. Respondent assailed his suspension order before the CAT, which petition also made scurrilous remarks about the petitioners-Petition was allowed and suspension stayed—In the interim, the petitioners filed complaints against the respondent with the Income Tax Department citing sexual harassment—Due to no action being taken, petitioner's moved the HC by way of a writ petition—Court issued an order dated 01.03.2011 restraining the Respondent from communicating with the Petitioners—In blatant violation of this order, the Respondent wrote yet another defamatory letter consequent to which the petitioners filed contempt case No. 360/2011, in which the respondent filed a reply purporting remorse with the added caveat that he would refrain from communicating with the Petitioners—

However, respondent sent a similar defamatory letter to Sh. C.K. Jain, SIT a few months later—Notice was again issued to Respondent since aforesaid communication provided fresh cause of action—Affidavit filed by Respondent, ostensibly to explain his conduct, did not reflect any remorse—In the meanwhile, Respondent filed a writ petition bearing No. 6802/ 2012 praying that the Petitioners be removed from the office Respondents No. 1 and 2 being Department of Revenue and Chief Commissioner Income Tax, Cadre Controlling Authority, respectively, which made further defamatory remarks about the petitioners—This writ petition, while being dismissed as withdrawn, was tagged with the contempt petition to demonstrate the aggravation of the injury caused to them by the conduct of the Respondent—Counsel for Respondent pleaded mercy and acceptance of apology by the Court—Held—The Respondent is undoubtedly guilty of wilfully violating the orders of the Court—Not a matter of course that a Judge can be expected to accept any apology—Respondent's behaviour reveals his skewed mind set, no penitence or remorse visible in the demeanour of the respondent—Therefore, only conclusion is that, the respondent is guilty of wilfully and consciously violating the orders of the Court dated 01.03.2011, 29.09.2011 as also order dated 30.07.2012—The Respondent is directed to be committed to civil prison to undergo simple imprisonment for a period of 15 days. In addition, a fine of Rs. 2000 is imposed on the respondent.

X & Anr. v. *SK Srivastava & Anr.* *1649*

— Article 227—Writ of Mandamus—Whether withholding the promotion of an official for the reason of his required expertise in the speciality/department currently he's engaged with, even after rejection for fixation of basic pay which is held due to that senior post, be valid?—Held, that retention of an employee as against his promotion due to the reason of his expertise needed in the current department shall not be held against him and also, reduction of his salary, on account of late joining in the department, is wholly unjustified and arbitrary act of the

respondents and not the fault of the petitioner.

Suneel Kumar Khatri v. *Union of India & Ors.*..... *1671*

— Article 227—Service matter—Armed Forces Tribunal—Whether the Petitioner who was discharged from Indian Air Force, is entitled to pension for reserved period of service, if the services of the petitioner are terminated subsequently? Held-once appointment has been given and the service of the Petitioner has been availed, the employer is under an obligation to grant pension taking into consideration the reserve period of service, despite subsequent termination. Petition allowed.

Ex-CPL Pritam Singh v. *Union of India and Ors.* *1719*

— Article 226—Appeal against order of reinstatement with arrears of salary—Respondent appointed to the post of Junior Assistant cum Typist on direct recruitment by the Appellant, pursuant to a public advertisement which stated that the post was permanent—However, the appointment letter mentioned that the appointment was subject to outcome of a writ petition 2357/93, filed by one Shri K.N. Pandey—On the writ petition 2357/93 being allowed, the respondent's appointment was terminated—Consequently, respondent filed a petition under Article 226 before the High Court challenging her termination—Appellant's contention was that after the judgment in *K.N. Pandey's* case, it was necessary to make a reversion from the existing holders of the post—Respondent was the junior most and her appointment was made expressly subject to the outcome of the above case, she was justly terminated—Single Judge held that as a result of K.N. Pandey's writ petition being allowed, he had to be accommodated to a promotional post, which had nothing to do with the direct recruit vacancy to which the respondent had been appointed—Outcome of K.N. Pandey's writ petition held to be irrelevant to the respondent's appointment—The Respondent was reinstated into service with arrears of salary to the post of Junior Assistant (LDC). Held no interference called for—

Appeal dismissed.

The Principal Delhi College or Arts & Commerce v. *Sunita Sharma & Anr.* *1743*

— Article 226—Appellant contents that the respondent should have sought a reference before the Tribunal under Industrial Disputes Act—Held—While the doctrine of availability of alternate remedy exists to limit this Court's jurisdiction, it is ultimately the discretion of the Writ Court and not an invariable rule.

The Principal Delhi College or Arts & Commerce v. *Sunita Sharma & Anr.* *1743*

— Article 226—Writ petition—Code of Criminal Procedure, 1973—Section 482—Medical Termination of Pregnancy Act, 1971—Section 3—Termination of pregnancy—Victim of rape—Medically examined—Had pregnancy of 6 weeks—Living alone in Delhi; does not want to bear a child—Writ petition filed for directions to State for terminating her pregnancy and to preserve the foetus for DNA test—Status report filed—Pregnancy can be terminated with minimal know risks—State has no objection for termination of pregnancy—Enquiries made—Victim is major; has consultation with her counsel; understands the consequences of her act—Expressed willingness to terminate the pregnancy—Consent of woman essential for termination of pregnancy—Likely to face mental, physical, social and economical problems in future—Petition allowed—Directions issued.

X (Assumed name of the prosecutrix) v. *The State (N.C.T. of Delhi) & Ors.* *1813*

— Article 226—Code of Criminal Procedure, 1973—Section 327—Ban imposed on reporting of a rape trial which has a seering public interest—Interpretation of S. 327—Whether open trial a rule—Does S. 327 (2) which provides for in camera trial in a rape case envisages access and is so in what manner—Advisory was issued by the Public Relations Officer, of the Delhi Police that since the Magistrate had taken cognizance u/s 302 and 376 (2)(g) IPC in the charge sheet,

the provisions of section 327(2) and (3) of the CrPC got triggered—Petitioner moved an application before the Magistrate seeking permission to report the Court proceedings which was dismissed by the Magistrate—Present writ petition filed challenging the ban—Petitioner contends that the primary object of S. 327 is to provide for a fair trial—Sub Section 2 and 3 were introduced by amendment to protect the dignity of rape victim—As victim has died, sub Section 2 and 3 will have no applicability and that the media had acted with due restraint in reporting the case—Provisions of s. 327 being used to cover the inadequacy of the State, in particular, that of the police—Blanket ban is illegal—Respondent contended that right of the media to report Court proceedings is not an absolute right as is clearly envisaged in Sub-section (3) of s. 327 CrPC—Ban was imposed taking into account the sensitivity of the case, the safety of accused and the concern of the Court to maintain anonymity qua the identity of the victim, her family as also the accused—Held: Composite and a close reading of the provisions of Section 327 of the Cr.P.C. clearly point to the fact:

— Guidelines for the mode and manner in which such discretion is to be exercised.

— Further Held—Even in a rape trial the Court is required to consider the various facets and dimensions obtaining in the case-mechanical approach is to be abjured—Directions issued in the present case.

Vijay Singhal & Ors. v. *Govt. of NCT of Delhi & Anr.* *1817*

— Article 226—Code of Criminal Procedure, 1973—Section 397, 482—Respondents contend that present writ petition is not maintainable—Ought to have filed a revision petition u/s 397 or a petition u/s 482 of the CrPC—Held, as all three proceedings would lie in the High Court, as presently positioned, the mere fact that the Petitioners have chosen to approach this Court by way of a petition under Article 226

of the Constitution of India, will not come in the way of the Court entertaining petition. The power under Article 226 of the Constitution, which is available to the Court, is far wide. As a matter of fact, the Petitioners not being a party to the criminal proceeding, would perhaps not be entertained if, a revision petition were to be filed under Section 397 of the Cr.P.C. or a petition under Section 482 of the Cr. P.C. This would, however, not fetter the Court from entertaining proceedings on its own against orders of the Court below, if deemed fit, in a given case.

Vijay Singhal & Ors. v. *Govt. of NCT of Delhi & Anr.* *1817*

— Articles 14, 19(1) (g) and 265 and entry 97 of List I (Union List) of 7th Schedule—Delhi Value Added Tax Act, 2004—Section 2(1) (zc) (vi) and 84—Finance Act, 1994—Section 65 (105) (zzzq)—Commissioner, Department of Trade and Taxes to Govt. of NCT of Delhi on examination of agreement entered into between petitioner and telecom operators, held that entire amount of consideration received from sharing telecom operators for providing access to passive infrastructure would amount to consideration for transfer of right to use goods and was exigible to tax—Order challanged before HC—Plea taken, there was no transfer of right in any goods by petitioner to sharing telecom operators and therefore, levy of VAT on assumption to contrary was wholly erroneous and untenable—Held—Petitioner has not transferred possession of passive infrastructure to sharing telecom operators in manner understood in law—Limited access provided to them can only be regarded as permissive use or a limited licence to use the same—Possession of passive infrastructure always remained with Indus—Sharing telecom operators did not therefore, have any right to use passive infrastructure—Assessment order framed on basis that petitioner transferred right to use passive infrastructure to sharing telecom operators, quashed.

Indus Towers Limited v. *UOI and Ors.* *1905*

— Article 226—Respondent DDA came up with a scheme in 1970 for allotment of industrial plots to persons carrying on business in non conforming areas—Appellant applied for a plot asserting that he is carrying a business of reconditioning motor parts and using big machines, grinders, etc in a non conforming area at Nichalson Road, Delhi—On 1/2/1977 DDA sanctioned a one acre plot of land to the appellant and asked him to deposit a sum of Rs.2,33,193,.80/-—Appellant deposited only Rs. 1,06,600/- on the ground that he had not been given any description of the plot and its location and will deposit the balance only when the plot is made available—Vide communication dated 8/4/1981 and 22/2/1988 DDA conveyed to the appellant that the size of the plot was proposed to be reduced to 2000 sq. meter and he was now being considered for an allotment of an industrial plot in Okhla Industrial Area at the current market rate—Appellant protested to both the letters and pointed out that the reduction of plot area and demand for payment of a plot at current market price was unfair—Vide letter dated 31/1/1989 DDA finally rejected the application of the appellant for allotment of plot on the ground firstly that 50% of the payment had not been made by the appellant and secondly that the industry of the appellant was a service industry and no purpose would be served by shifting it—Appellant challenged the said order in the writ petition which was dismissed by the Ld. Single Judge. Held: At no stage a binding allotment came to be made by DDA to the appellant and hence no vested right accrued in favour of the appellant. Whenever DDA made an offer, the appellant came up with a counter offer and a counter offer is not an acceptance of the offer. It is also to be taken note of that the appellant has already shifted his factory out of Nicholson Road, New Delhi and his factory and trade license had all expired and the premises is only being used for storage purposes and the DDA has taken a specific stand that the area of Nicholson Road is a conforming area—Appeal dismissed. However, DDA directed to refund the amount paid by the appellant along with interest.

Punjab Motor Workshop v. *DDA and Anr.* *1986*

— Article 53, 226 and 227—General Clauses Act, 1897—Section 3(8)—Respondent lodged rebate claims in respect of excise duty paid on goods procured from manufactures initially for home consumption but subsequently exported—Claim rejected by Assistant Commissioner (Tech.) who issued a show cause notice—Accepting objections of respondent, petitioner allowed rebate claims and passed order-in-original to that effect—Commissioner, Central Excise reviewed order-in-original and took view that it was not in order and directed Assistant Commissioner (Tech.) to file appeals to Commissioner (Appeals) against order-in-original—Appeals dismissed holding that substantial benefit given to respondent cannot be taken away on ground of procedural infractions—Revision application filed before Central Government also dismissed—Writ petition filed to issue a writ of certiorari quashing impugned order and a writ of mandamus directing GOI to pass fresh orders after re-adjudication—Preliminary objection taken by respondent that no writ can be filed by a government functionary questioning decision of Government itself, nor can UOI question its own order—Held—One cannot be said to be aggrieved by one's own order and in this view of matter Central Government cannot question its own order passed under Section 35EE of Act—If Central Government is of view that order of Commissioner (Appeals) is legal and proper and requires no interference (by way of enhancement of duty, fine or penalty), there is no right conferred upon Commissioner of Central Excise to challenge decision to drop proceedings—If Commissioner of Central Excise chooses to take appeal route against order of Commissioner (Appeals) to CESTAT, he may lawfully pursue his challenge right up to Supreme Court—But if he chooses to take revisionary route and question legality and propriety of order of Commissioner (Appeals) before Central Government under Section 35EE, he must, if decision of Central Government goes against him, accept it as final—Preliminary objection taken by respondent upheld and writ petition dismissed in limine.

Union of India Through Commissioner Central Excise Commissionerate Delhi-II v. *Ind Metal Extrusions Pvt. Ltd. & Anr.* *1641*

CONTEMPT OF COURT ACT, 1971—Petition is filed seeking initiation of contempt proceedings against the respondent on account of his deliberate and wilful violation of the order passed by a Single Judge of this Court dated 29.09.2011 in Contempt Petition No. 360/2011—Respondent holds the petitioners responsible for having him suspended from service from 2007-2010, nixing his chances of becoming Commissioner of Income Tax. Respondent assailed his suspension order before the CAT, which petition also made scurrilous remarks about the petitioners-Petition was allowed and suspension stayed—In the interim, the petitioners filed complaints against the respondent with the Income Tax Department citing sexual harassment—Due to no action being taken, petitioner's moved the HC by way of a writ petition—Court issued an order dated 01.03.2011 restraining the Respondent from communicating with the Petitioners—In blatant violation of this order, the Respondent wrote yet another defamatory letter consequent to which the petitioners filed contempt case No. 360/2011, in which the respondent filed a reply purporting remorse with the added caveat that he would refrain from communicating with the Petitioners—However, respondent sent a similar defamatory letter to Sh. C.K. Jain, SIT a few months later—Notice was again issued to Respondent since aforesaid communication provided fresh cause of action—Affidavit filed by Respondent, ostensibly to explain his conduct, did not reflect any remorse—In the meanwhile, Respondent filed a writ petition bearing No. 6802/2012 praying that the Petitioners be removed from the office Respondents No. 1 and 2 being Department of Revenue and Chief Commissioner Income Tax, Cadre Controlling Authority, respectively, which made further defamatory remarks about the petitioners—This writ petition, while being dismissed as withdrawn, was tagged with the contempt petition to demonstrate the aggravation of the injury caused to them by the conduct of the Respondent—Counsel for Respondent pleaded mercy and acceptance of apology by the Court—Held—The Respondent is undoubtedly guilty of wilfully violating the orders of the Court—Not a matter of course that

a Judge can be expected to accept any apology—Respondent's behaviour reveals his skewed mind set, no penitence or remorse visible in the demeanour of the respondent—Therefore, only conclusion is that, the respondent is guilty of wilfully and consciously violating the orders of the Court dated 01.03.2011, 29.09.2011 as also order dated 30.07.2012—The Respondent is directed to be committed to civil prison to undergo simple imprisonment for a period of 15 days. In addition, a fine of Rs. 2000 is imposed on the respondent.

X & Anr. v. *SK Srivastava & Anr.* *1649*

CUSTOMS ACT, 1962—Section 138B—Appellants in the aforementioned four appeal petitions raised a common question with respect to the admissibility, in adjudication proceedings, of certain statements recorded u/s 138B of the Act—Principle allegation against appellants was that they had imported ball bearings of Chinese origin but showed them as having been imported from Sri Lanka, in order to evade anti- dumping duty—Show cause notices issued to the appellants contained references to several statements of various individuals recorded u/s 138B of the Act, 1962 but a request made by the appellants for summoning the said individuals during adjudication proceedings denied by the Commissioner of Customs—Adjudication proceedings concluded on 14.10.2004 and the Commissioner of Customs, in its impugned order dated 30.11.2005, not only relied upon the statements recorded u/s 138B of the Act but also on a report dated 20.07.2005 of Sri Lankan Custom Authority, which was based on an investigation conducted after the conclusion of the hearing on 14.10.2004—On appeal, Tribunal upheld the order of the Commissioner on the ground that the evidence led by the agency was credible the trustworthy. Held: There can be no denying that when any statement is used against an assessee, an opportunity of cross-examining the persons who made those statements ought to be given to the assessee, Right of cross-examination, of the person who had given a statement against the assessee, even in a quasi judicial proceeding is a valuable right given to the accused/notice which cannot be

taken away unless the circumstances relating to the unavailability of such person referred to, in section 138B exist. Matters remitted to the Tribunal to have a fresh look at the cases keeping in mind the provisions of section 138B and the fact of non supply of the report obtained from Sri Lanka after conclusion of the proceedings.

Basudev Garg v. *Commissioner of Customs* *2269*

DELHI SALES TAX ACT, 1975—Section 2(o)/4/50/21/23&27 read with Rule 7&8 of the Delhi Sales Tax Rules, 1975—Assessing Authority made a demand of Rs. 1,98,590/- including interest, on the ground that nine ST-1 Forms submitted by the petitioner were invalid as the said forms were issued by a purchasing dealer who did not hold a registration certificate in respect of the goods sold by the petitioner. The Assessing Authority thus did not allow deduction of Rs. 11,30,478 from the 'taxable turnover' of the petitioner—The Assessing Authority assessed sales tax at the rate of 10% of the said disallowance and also imposed interest on such tax from the date of filing of the return. Petitioner's appeal under Section 43 of the Act before the Deputy Commissioner, Sales Tax and Appeal before the Appellate Tribunal dismissed. The Appellate Tribunal held that the return made by a dealer must be correct and complete and to the best of his knowledge and belief and without any willful omission on the part of the dealer and the return made by the petitioner could not be stated to be without any willful omission as the petitioner ought to have been vigilant and aware that ST-1 Forms, on the basis of which the petitioner had claimed deduction from the taxable turnover, were invalid and the same could have been discovered by the petitioner with little care and due diligence. The Tribunal further held that as the petitioner was guilty of willful omission in paying the correct sales tax, the petitioner was also liable to pay interest under Section 27 of the Delhi Sales Tax Act from the date of submission of the return. The first question whether the petitioner is guilty of willful omission?, answered in the negative. It was held that, ST-1 Forms are printed under the Authority of the Commissioner and are issued by the

Assessing Authority of the purchasing dealer on an application made to him by the purchasing dealer. An application for issuance of forms may also be rejected by the Assessing Officer, if the Assessing Officer if satisfied that the declaration forms have not been used bonafide or if the conditions in sub-rule (4) of Rule 8 of the Rules are not satisfied. Further, the declarations made in the ST Forms are unequivocal and the purchaser is liable to be subjected to punitive action if the same are found to be untrue. Thus, in the normal course, there would be no reason for the selling dealer to doubt the declaration made by the purchasing dealer, in the Form ST-1. In the present case too, the petitioner has relied upon such Forms and there is no material on record to suggest that the petitioner accepted the ST-1 Forms with the knowledge that the declarations made there under by the purchasing dealer were wrong. We are, thus, unable to agree with the view that there was any "willful omission" on the part of the petitioner in making his return or that the return was made by the petitioner knowing that the particulars in the ST-1 Forms on the strength of which deduction in the taxable turnover was claimed were inaccurate. The Second question whether the claim for deduction of sales against prescribed ST-1 Forms, furnished by the purchasing dealer, in respect of goods which are not specified in the Registration Certificate of the purchasing dealer, would dis-entitle the selling dealer to the deduction in respect of those sales within the meaning of proviso-II to sub-clause (V) of clause (a) of sub-Section (2) of Section 4 of the Delhi Tax Act, 1975, answered in the affirmative and the petitioner held disentitled to reduce his taxable turnover in respect of sale of goods made to a dealer who does not hold a registration certificate in respect of goods purchased by him. The third question whether interest under section 27(1) is payable on the tax as assessed or as returned by the assessee, answered in the negative, being covered by the decision in the case of Pure Drinks (New Delhi) Ltd.

Pentex Sales Corporation v. *Commissioner of Sales Tax, Delhi* *2296*

— Assessing Authority made a demand of Rs. 1,98,590/- including interest, on the ground that nine ST-1 Forms submitted by the petitioner were invalid as the said forms were issued by a purchasing dealer who did not hold a registration certificate in respect of the goods sold by the petitioner. The Assessing Authority thus did not allow deduction of Rs. 11,30,478 from the 'taxable turnover' of the petitioner—The Assessing Authority assessed sales tax at the rate of 10% of the said disallowance and also imposed interest on such tax from the date of filing of the return. Petitioner's appeal under Section 43 of the Act before the Deputy Commissioner, Sales Tax and Appeal before the Appellate Tribunal dismissed. The Appellate Tribunal held that the return made by a dealer must be correct and complete and to the best of his knowledge and belief and without any willful omission on the part of the dealer and the return made by the petitioner could not be stated to be without any willful omission as the petitioner ought to have been vigilant and aware that ST-1 Forms, on the basis of which the petitioner had claimed deduction from the taxable turnover, were invalid and the same could have been discovered by the petitioner with little care and due diligence. The Tribunal further held that as the petitioner was guilty of willful omission in paying the correct sales tax, the petitioner was also liable to pay interest under Section 27 of the Delhi Sales Tax Act from the date of submission of the return. The first question whether the petitioner is guilty of willful omission?, answered in the negative. It was held that, ST-1 Forms are printed under the Authority of the Commissioner and are issued by the Assessing Authority of the purchasing dealer on an application made to him by the purchasing dealer. An application for issuance of forms may also be rejected by the Assessing Officer, if the Assessing Officer if satisfied that the declaration forms have not been used bonafide or if the conditions in sub-rule (4) of Rule 8 of the Rules are not satisfied. Further, the declarations made in the ST Forms are unequivocal and the purchaser is liable to be subjected to punitive action if the same are found to be untrue. Thus, in the normal course, there would be no reason for the selling dealer to doubt the

declaration made by the purchasing dealer, in the Form ST-1. In the present case too, the petitioner has relied upon such Forms and there is no material on record to suggest that the petitioner accepted the ST-1 Forms with the knowledge that the declarations made there under by the purchasing dealer were wrong. We are, thus, unable to agree with the view that there was any "willful omission" on the part of the petitioner in making his return or that the return was made by the petitioner knowing that the particulars in the ST-1 Forms on the strength of which deduction in the taxable turnover was claimed were inaccurate. The Second question whether the claim for deduction of sales against prescribed ST-1 Forms, furnished by the purchasing dealer, in respect of goods which are not specified in the Registration Certificate of the purchasing dealer, would dis-entitle the selling dealer to the deduction in respect of those sales within the meaning of proviso-II to sub-clause (V) of clause (a) of sub-Section (2) of Section 4 of the Delhi Tax Act, 1975, answered in the affirmative and the petitioner held disentitled to reduce his taxable turnover in respect of sale of goods made to a dealer who does not hold a registration certificate in respect of goods purchased by him. The third question whether interest under section 27(1) is payable on the tax as assessed or as returned by the assessee, answered in the negative, being covered by the decision in the case of Pure Drinks (New Delhi) Ltd.

Pentex Sales Corporation v. *Commissioner of Sales Tax, Delhi* *2296*

DELHI VALUE ADDED TAX ACT, 2004—Section 2(1) (zc) (vi) and 84—Finance Act, 1994—Section 65 (105) (zzzq)—Commissioner, Department of Trade and Taxes to Govt. of NCT of Delhi on examination of agreement entered into between petitioner and telecom operators, held that entire amount of consideration received from sharing telecom operators for providing access to passive infrastructure would amount to consideration for transfer of right to use goods and was exigible to tax—Order challanged before HC—Plea taken, there was no transfer of right in any goods by petitioner to

sharing telecom operators and therefore, levy of VAT on assumption to contrary was wholly erroneous and untenable—Held—Petitioner has not transferred possession of passive infrastructure to sharing telecom operators in manner understood in law—Limited access provided to them can only be regarded as permissive use or a limited licence to use the same—Possession of passive infrastructure always remained with Indus—Sharing telecom operators did not therefore, have any right to use passive infrastructure—Assessment order framed on basis that petitioner transferred right to use passive infrastructure to sharing telecom operators, quashed.

Indus Towers Limited v. *UOI and Ors.* *1905*

FINANCE ACT, 1994—Section 65 (105) (zzzq)—Commissioner, Department of Trade and Taxes to Govt. of NCT of Delhi on examination of agreement entered into between petitioner and telecom operators, held that entire amount of consideration received from sharing telecom operators for providing access to passive infrastructure would amount to consideration for transfer of right to use goods and was exigible to tax—Order challanged before HC—Plea taken, there was no transfer of right in any goods by petitioner to sharing telecom operators and therefore, levy of VAT on assumption to contrary was wholly erroneous and untenable—Held—Petitioner has not transferred possession of passive infrastructure to sharing telecom operators in manner understood in law—Limited access provided to them can only be regarded as permissive use or a limited licence to use the same—Possession of passive infrastructure always remained with Indus—Sharing telecom operators did not therefore, have any right to use passive infrastructure—Assessment order framed on basis that petitioner transferred right to use passive infrastructure to sharing telecom operators, quashed.

Indus Towers Limited v. *UOI and Ors.* *1905*

— Section 65(105) (s), 66, 66A, 66B, 67, 68, 93 and 94—Point of Taxation Rules, 2011—Rule 2(e) 4 (a) (ii), 7(c)—Export

of Services Rules, 2005—Rule 3(1)—Writ filed for quashing of Circular No. 158/9/2012-ST dated 08.05.2012 and Circular No. 154/5/2012-ST dated 28.03.2012 and for declaration that taxable event is rendition of service and accordingly rate of tax payable is rate in force on date of providing service—Plea taken, circulars cannot override provisions of Finance Act, 1994 or Rules made thereunder and so far as they seek to levy enhanced rate of service tax of 12% in respect of 8 specified services, though services were rendered and invoices were issued but payments were received after 01.04.2012, are *ultra vires* of Act / Rules—Question before Court was what would be rate of tax where (a) service is provided by Chartered Accountants (CAs) prior to 01.04.2012; (b) invoice is issued b CAs prior to 01.04.2012 but (c) payment is received after 01.04.2013—Held—New Rule 7 w.e.f. 01.04.2013 does not provide for determination of point of taxation in respect of services rendered by CAs—Both circulars proceed on erroneous basis that Rule 7 inserted w.e.f. 01.04.2012 covers services rendered by CAs—Circular No. 154 when it states that invoices issued on or before 31.03.2012 shall continue to be governed by Rule 7 as it stood before 01.04.2012, is erroneous because on and from 01.04.2012, old Rule 7 was no longer in existence, having been replaced by new Rule 7—Circular No. 158, insofar as it states that in case of eight specified services (which includes services of CAs), if payment is received or made, as case may be, on or after 01.04.2012, service tax needs to be paid at 12%, is again without any statutory basis—New Rule 7 does not cover services which were earlier referred to in Clause (c) of Rule 7 (including services of CAs) as it existed upto 31.03.2012—Circulars seems to have overlooked this crucial aspect—Where services of CAs were actually rendered before 01.04.2012 and invoices were also issued before that date, but payment was received after said date, rate of tax will be 10% and not 12%—Circulars quashed being contrary to Finance Act, 1994 and Point of Taxation Rules, 2011—Circulars have to be in conformity with Act and Rules and if they are not, they cannot

be allowed to govern controversy—Writ petition allowed.

Delhi Chartered Accountants Society (Regd.) v. *Union of India and Ors.* *1752*

— Taxable event—Respondent assessee company provided certain services prior to 14.05.2003 and also raised bills with respect to the same prior to 14.05.2003 but payments were received after 14.05.2003—Vide order dated 16.03.2012, CESTAT held the rate of service tax to be levied on the assessee to be 5% in as much as the service had been provided prior to 14.05.2003—Appellant aggrieved by the said order and sought to place reliance upon Rule 5B of the Service Tax Rules, 1994 and section 67A of the Finance Act to contend that the rate of tax to be levied should have been fixed at 8%. Held:- None of the provisions on which reliance is being sought are applicable in as much as the relevant period for determining the rate of tax to be levied is April, 2003 to September, 2003 and Rule 5B of the Service Tax Rules came into effect only on 01.04.2011 and section 67A of the Finance Act, 1994 was inserted only w.e.f 28.05.2012. The taxable event, as per the Finance Act, 1994 is the providing of the taxable service, which in the present case took place prior to 14.05.2003 and therefore the rate of 5% applicable prior to this date could only be levied. Appeal of revenue dismissed.

Commissioner of Service Tax v. *Consulting Engineering Services (I) Pvt. Ltd.* *2110*

FORGEIN EXCHANGE MANAGEMENT ACT, 1999—Against Appellants, Complaint filed U/s 16(3) of FEMA for alleged contravention of Section 6(3) (b) of FEMA read with Regulation 5(1) of FEM Regulations 2000—Show cause notice issued by Adjudicating Authority to A-A filed application seeking permission to cross-examine certain persons—Adjudicating Authority rejected it. Held, cross-examination of witnesses an integral part and parcel of the principles of natural justice—Refusal would normaly be an exception—If the credibility of a person who has testified or given some information is in doubt or if the version or the statement of

the person who has testified is in dispute normally right to cross-examination would be inevitable—If some real prejudice is caused to the complainant, the right to cross-examine witnesses may be denied—It is not possible to lay down any rigid rules as to when in compliance of principles of natural justice opportunity to cross-examine should be given–Everything depends on the subject matter—In the application of the concept of fair play there has to be flexibility—The application of the principles of natural justice depends on the facts and circumstances of each case.

Shahid Balwa v. *The Directorate of Enforcement* *2436*

FOREIGN EXCHANGE REGULATION ACT, 1973 (FERA)—Section 8 & 14—Code of Criminal Procedure, 1973—Section 244 & 245—Aggrieved petitioner challenged order passed by Ld. Additional Chief Metropolitan Magistrate, Delhi in complaint case instituted by petitioner against respondent and one another accused, as respondent was discharged by Ld. A.C.M.M. stating that complaint against him was groundless—Petitioner had also challenged said order in revision petition which was dismissed by Ld. ASJ. Held:- A Magistrate can discharge an accused in a warrant case instituted otherwise than on a police report U/s 245 (2) of the Code if he finds the charge to be groundless.

M.G. Attri v. *S.K. Jain* *2176*

GENERAL CLAUSES ACT, 1897—Section 3(8)—Respondent lodged rebate claims in respect of excise duty paid on goods procured from manufactures initially for home consumption but subsequently exported—Claim rejected by Assistant Commissioner (Tech.) who issued a show cause notice—Accepting objections of respondent, petitioner allowed rebate claims and passed order-in-original to that effect—Commissioner, Central Excise reviewed order-in-original and took view that it was not in order and directed Assistant Commissioner (Tech.) to file appeals to Commissioner (Appeals) against order-in-original—Appeals dismissed holding

that substantial benefit given to respondent cannot be taken away on ground of procedural infractions—Revision application filed before Central Government also dismissed—Writ petition filed to issue a writ of certiorari quashing impugned order and a writ of mandamus directing GOI to pass fresh orders after re-adjudication—Preliminary objection taken by respondent that no writ can be filed by a government functionary questioning decision of Government itself, nor can UOI question its own order—Held—One cannot be said to be aggrieved by one's own order and in this view of matter Central Government cannot question its own order passed under Section 35EE of Act—If Central Government is of view that order of Commissioner (Appeals) is legal and proper and requires no interference (by way of enhancement of duty, fine or penalty), there is no right conferred upon Commissioner of Central Excise to challenge decision to drop proceedings—If Commissioner of Central Excise chooses to take appeal route against order of Commissioner (Appeals) to CESTAT, he may lawfully pursue his challenge right up to Supreme Court—But if he chooses to take revisionary route and question legality and propriety of order of Commissioner (Appeals) before Central Government under Section 35EE, he must, if decision of Central Government goes against him, accept it as final—Preliminary objection taken by respondent upheld and writ petition dismissed in limine.

Union of India Through Commissioner Central Excise Commissionerate Delhi-II v. *Ind Metal Extrusions Pvt. Ltd. & Anr.* *1641*

HINDU MARRIAGE ACT, 1957—Section 9, 13(1)(ia): Petition filed by husband for dissolution of marriage on grounds of cruelty. On same day petition filed by wife for restitution of conjugal rights. Vide common judgment, petition for dissolution of marriage allowed and petition for restitution of conjugal rights dismissed. Appeal filed by wife-Held—Cruelty may be mental of physical. In physical cruelty there can be tangible and direct evidence, but in case of mental cruelty there is no direct evidence. The concept of proof beyond shadow of

doubt is to be applied in criminal trials no to civil matters and certainly not to matters of such delicate personal relationships as those of husband and wife. First, enquiry must begin as to the nature of cruel treatment; second, the impact of such treatment in the mind of the spouse, Ultimately it is a matter of interpretation to be drawn by taking into account the nature of conduct and is effect on the complaining spouse. Conduct has to be considered in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down precise definition or to give exhaustive description of the circumstances which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extend due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, entitling the complaining spouse to secure divorce. Filing numerous police complaints against husband and his family members with the police and in husband's office that they used to demand dowry and treated her with cruelty when she failed to fulfill their demands and that husband was having illicit relations with his colleague amounts to mental cruelty thereby entitling him to decree of divorce u/s 13(1)(ia). Trial Court's order affirmed.

Suman Singh v. *Sanjay Singh* *2045*

INCOME TAX ACT, 1961—Section 163—Respondents ARPL and AIPL approached Petitioner LTL with a proposal to invest in their project of developing a retail mall—Pursuant thereto Share Subscription Agreement (SSA) was entered into between parties whereby LTL agreed to subscribe to equity shares representing 26% of total working share capital of ARPL—Funds were infused in ARPL by LTL—Simultaneous with execution of SSA, parties entered into Share Holding Agreement (SHA) where ARIL assured LTL 8 % Investment Return Rate (IRR) in every financial year—According to LTL, construction of Mall was inordinately delayed and Respondents expressed inability to adhere to 18 % preferred

IRR and asked for it to be reduced—It was mutually agreed between parties Respondents would return US Dollar component of LTL's investment in ARPL with 8 % IRR on or before expiry of three year lock-in-period—Exit Agreement (EA) was executed between parties—Present petition was filed by LTL for a direction to ARIL to secure sum equivalent to 8% IRR on LTL's investment, to cooperate and allow CA nominated by LTL to conduct regular internal financial audits of ARPL and ARIL, to direct respondent's to file records and particulars of relevant bank accounts by way of which remittance amounts where secured, to disclose details of statutory filings with Government departments, to direct ARIL not to alienate/encumber/sell/create charge on shares held by ARPL and ARIL, directing ARPL not to create charge/alienate/encumber/sell shares with respect to 26% shareholding of LTL, directing Respondents not to create any liability, mortgage, lien, encumbrance in any manner on properties and assets of ARPL until adjudication of disputes between parties—In short, argument of Petitioner is that it should be paid for its equity shares, CCPS and FCDS at face value of Rs. 2,687.83 per share—Per contra plea taken, there is no dispute between parties which requires to be referred to arbitration and in any event, arbitration clause till date has not been invoked by LTL—Claim was itself premature—Even for placing monies in a no lien account, approvals would have to be obtained. There was no pleading that ARIL was siphoning off funds in any unlawful manner—Although scope of Section 9 of Act was wide and Court could exercise all powers vested in it, pleadings in main petition were insufficient for grant of any such relief—Held—While neither ARPL nor ARIL has denied liability to honour commitments under SPA, SHA and EA, there is justification in their contention that there is no specific averment made in petition by LTL that either of them is trying to siphon off funds or transfer properties of ARPL which is one of prerequisites for grant of relief under Order XXXVIII Rule 5 CPC—No doubt Section 9 of Act gives vide powers to Court including same power for making orders as it has for purpose of and in relation to any proceedings before it—Nevertheless, that

discretion is not to be exercised lightly—Court must be satisfied that essential conditions for grant of such relief have been met by party seeking it—Till date, LTL has not formally invoked arbitration clause—Court is not inclined at this stage to express any view on contentious issues which are left open to be decided by arbitral Tribunal—Petition disposed of with directions.

Lalea Trading Limited v. *Anant Raj Projects Pvt. Ltd. & Anr.* *1679*

— Section 142 (1), 143 (1), (2) and (3), 147, 148 and 154—Five writ petitions filed against reassessment notices issued by respondents—Plea taken, it was duty of assessing officer (AO) to show that petitioner has failed to furnish primary facts fully and truly at time of original assessment and that his duty has not been discharged by him—Held—For assessment year (AY) 2003-04, at least in respect of foreign travel expenses, no details were furnished by assessee at time of original assessment, except a bare noting that a part of such expenditure was incurred in foreign currency—No details of place visited and purpose of visit and how visit was connected to business of petitioner were furnished—Assessee was under a duty to disclose these particulars fully and truly at time of original assessment—There was thus, a failure on part of petitioner which would attract first proviso to Section 147 of Act—Contention that reopening was prompted by a mere allegation of irregularities without any tangible material or finding, is not acceptable—Complaint has been filed by one of Directors before Company Law Board (CLB) and some credibility has to be accorded to same as it was filed before a statutory authority competent to deal with complaint; it must be taken to have been filed with some responsibility—Reopening of assessment for AY, 2003-04 is not without jurisdiction—So far as AY, 2004-05 is concerned, not only did petitioner furnish all relevant details relating to purchase of fixed assets, repairs and maintenance of buildings but also details relating to foreign travel expenses—AO had raised queries regarding repairs and maintenance of building, plant and furniture which were answered by petitioner—In these

circumstances, it cannot be said that there was any failure on part of petitioner to submit full and true particulars at time of original assessment—It was for AO to examine details and draw appropriate inference—Notice under Section 148 of Act issued for AY, 2004-05 is therefore, without jurisdiction—For AY, 2005-06, AO has properly assumed jurisdiction to reopen assessment—There was no scrutiny assessment under Section 143(3) in first instance; return filed by petitioner was merely processed under Section 143 (1)—Complaint by one of Directors before CLB constitutes tangible material on basis of which action to reopen assessment can be taken in good faith, belief entertained by AO on basis of complaint which has been filed with some responsibility by one of directors of petitioner, cannot be said to be a mere pretence nor can belief be said to be divorced from material—Complaint constitutes relevant material for belief—Fact that petitioner submitted all details to AO along with return of income is not relevant where only intimation under Section 143(1) is issued after merely processing return without scrutiny—There should however, be reason to believe that income had escaped assessment and this condition has been satisfied in respect of AY, 2005-06—Notice issued under Section 148, upheld—Validity of reopening notices issued by respondent under Section 148 for AY, 2003-04 to petitioners 'MJS' and 'MPS' also upheld as one of allegations in complaint is that funds of hotel were being siphoned off by present petitioners in guise of purchase of fixed assets, repairs and maintenance expenses and foreign travel expenses—Respondent has arrived at a tentative belief that 50% of amounts allegedly siphoned off by petitioners have to be treated as income that has escaped assessment in each of their assessments—Jurisdiction of respondent to reopen assessment of petitioners, upheld.

Rambagh Palace Hotels Private Limited v. *Deputy Commissioner of Income Tax, New Delhi* *1703*

— Section 36(1)(vii)—Respondent Assessee took certain properties on lease where upon the lessors thereof were required to build a warehouse cum workshop and hand over

the same to assessee—Assessee advanced certain sums to the lessors which were liable to be adjusted against monthly rent and had also incurred substantial expenditure on the development and interiors of the property—Workshop was however demolished by the DDA on 1/6/2000 by claiming that the leased land belonged to DDA and not the lessors—Assessee claimed a write off from his taxable income, a sum of Rs. 64,60,707, on account of the advance rent of Rs. 33,82,289 paid by him to the lessors and Rs. 30,78,418/- spent by him on the property and also filed a suit for recovery for the said amounts—Assessing Officer held that the amounts incurred being of enduring nature were capital expenditure and could not be written off—In the appeal filed before the CIT, decision of the Assessing Officer to disallow the writ off of the amount spent on the workshop was upheld and with respect to the advanced amount, it was held that since the assessee had filed a civil suit for recovery for the said amount, it could not be allowed to be deducted as a revenue loss or a bad debt—On further appeal, the Tribunal granted relief with regard to the advance rent of Rs. 33,82,289 by holding that the pendency of the civil suit was not a bar on writing off the debt. Held: No infirmity in the view expressed by the Tribunal. For an assessee to claim deduction in relation to the bad debts it is now no longer necessary for the assessee to establish that the debt had become irrecoverable and it is sufficient if the assessee forms such an opinion and writes off the debt as irrecoverable in its accounts.

Commissioner of Income Tax-III v. *Samara India Pvt. Ltd.* *1995*

— Section 41 (1)—Respondent assessee company was engaged in the business of trading in agricultural commodities and for the assessment year 2008-2009 declared its taxable income as nil on the assertion that it did not conduct any business in the year 2007-2008 and suffered losses—The return was originally accepted but subsequently on finding that the liabilities due to four sundry creditors had ceased to exist, the Assessing Officer added a sum of Rs. 1,57,15,137, being the

aggregate of the amounts shown as payable to the said four sundry creditors, as income of the assessee under Section 41 (1) of the Act—On appeal, CIT agreed with the assessee that since it continued to reflect amounts payable to its creditors in its balance sheets, there would be no cessation of liability and CIT detected the additions made by the AO with respect to amounts payable to all creditors except one creditor namely M/S Elephanta Oil and Vanaspati Ltd. on the ground that the assessee had failed to establish the genuineness of the said liability—On further appeal, Tribunal accepted the plea raised by assessee that its books of accounts had been examined in the past and it would not be correct now to doubt the genuineness of its transactions. Held: It is well settled that in order to attract the provisions of Section 41 (1) of the Act, there should have been an irrevocable cessation of liability without any possibility of the same being revived and if an assessee continues to reflect amounts payable to its creditors in its balance sheets, there would be no cessation of liability. The liability of the assessee towards M/S Elephanta Oil and Vanaspati Ltd. cannot thus, be considered as having ceased and the said liability also cannot be held to be time barred for reflecting an amount as outstanding in the balance sheet by a Company amounts to the Company acknowledging the debt for the purposes of section 18 of the Limitation Act, 1963 and since the assessee Company has continued to reflect amounts payable to M/S Elephanta Oil and Vanaspati Ltd. in its balance sheets, the period of limitation would stand extended. Further, the genuineness of a credit entry can only be examined in the year when the liability was recorded as having arisen and in the present case the liability having been recorded in the year 1984-85, and the Revenue having accepted it over several years, it was not open to the CIT to doubt its genuineness, more so when no credit entry had been made in the books of the assessee in the previous year relevant to the assessment year 2008-2009.

The Commissioner of Income Tax Delhi-II v. *Jain Export Pvt. Ltd.* *2066*

— Assessee engaged in sale and purchase of shares and maintaining two separate portfolios, one for investment and other for trading and the said practice of the assessee was recognized by the revenue for earlier years prior to the assessment year 2007-08—In the said assessment year, Assessing Officer however construed the entire activity of the assessee as a business activity and made additions of certain amounts to the business income of the assessee by treating, as business income, both the short term capital gain and the long term capital gain, in relation to the sale of shares out of the assessee's investment portfolio—On appeal both the CIT and the Tribunal allowed the appeal of the assessee by relying on a CBDT circular no.4/2007 dated 15.06.2007. Held: The intent and purport of the CBDT circular in question is to demonstrate that a tax payer may have two portfolios and therefore an assessee can own shares for the purpose of investment and for the purposes of trading and once the short term and the long term capital gains are admittedly out of the investment account, they cannot be treated as profits of any business venture. Appeal filed by revenue dismissed.

Commissioner of Income Tax-VIII v. *Avinash Jain* *2092*

— Section 194C—Assessee had four trucks and was in the business of transporting goods and also acted as a commission agent by arranging for transportation of goods through other transporters and thus in his income included payments received under two heads—'lorry booking' and 'own booking' business but treated the payments received in the 'lorry booking' business as commission as in the said transactions he only acted as a facilitator and had no privity of contract with the clients for transportation of goods and therefore did not deduct TDS—Assessing Officer and Commissioner of Income Tax held that the assessee was not an intermediary or a facilitator and there was a privity of contract between him and the clients for carriage of goods—On further appeal, the Tribunal upheld the contention of the assessee. Held: No infirmity in the view expressed by the Tribunal. It is a matter

of fact that the contract was between the assessee's clients and the transporters and that the assessee mainly acted as a facilitator or as an intermediary. The assessee collected freight charges from the clients who intended to transport their goods through separate transporters and the entire amount thus collected from the clients were paid to the transporters after deducting commission therefrom. He was thus not 'the person responsible' for making payments as provided in section 194C read with section 204 of the Act and therefore he was not liable to deduct TDS.

Commissioner of income tax v. *Hardarshan Singh* *2097*

— Section 44—Common questions referred to the Court in the aforementioned five ITRs—Assessee company, being in the business of insurance, in its balance sheets of the relevant assessment years included 'export market development allowance' as a 'reserve'—Revenue sought to adjust the same as an expenditure by invoking Rule 5(a) of the First Schedule to the Act. Held:- For the purposes of income tax, the figures in the accounts of the assessee drawn up in accordance with the provisions of the First Schedule to the Income Tax Act and satisfying the requirements of the Insurance Act are binding on the Assessing Officer under the Income Tax Act and he has no power to correct the errors in the accounts of an insurance business and hence the export market development allowance shown as reserve in the accounts of the assessee company cannot be altered. Once it is recognized as a reserve it is neither an expenditure nor an allowance and therefore no adjustment can be made by invoking Rule 5 (a) of the First Schedule to the Income Tax Act.

The Oriental Insurance Co. Ltd. v. *CIT* *2114*

— Section 69—Assessee filed on 18.07.2006, his return declaring his income, including income earned from immovable properties as Rs. 39,90,410/- Search and survey operations were carried out on the properties of the assessee and during assessment proceedings, Assessing Officer referred the question of valuation of 3 immovable properties to the District

Valuation Officer (DVO) and on the basis of the Valuation report of the DVO, Assessing Officer u/s 69 of the Act, made an addition of about Rs. 59,78,938/- in the income of the assessee—On appeal, both CIT and Tribunal deleted the additions made by holding that the reference to the DVO was not in accordance with law and that even otherwise the report of the DVO was based on incomparable sales and therefore could not be relied upon. Held: When no material was found during the search and survey to justify the reference to the DVO, the view of the Tribunal that the reference to the DVO was not in accordance with law, is absolutely correct. Further DVO's valuation being based on incomparable sales is impermissible in law.

Commissioner of Income Tax v. *Abhinav Kumar Mittal* *2121*

— Section 115 J(1A)—Assessee company made a provision for payment of bonus to its employees and deducted the same in the computation of the net profit—Assessing Officer however included the same in the computation of the net profit on the basis that it was only an estimation. Held: Position of facts not clear. Hence Assessing Officer directed to determine whether the computation of the provision for bonus was on the basis of Payment of Bonus Act, 1965 and if so, the provision is to be treated as an ascertained liability. On the contrary, if the provision was not in accordance with the provisions of the said Act and was merely an estimation, then the original assessment of the Assessing Officer would hold.

O.B.C. v. *Commissioner of Income Tax-I & Anr.* *2145*

— Insertion of clause (i) to Explanation 1 in Section 115 JB—Retrospectively of the amendment—Brief Facts—Petitioner, a public limited company is engaged in the business of manufacture and trading/export of consumer items such as refrigerators, washing machines, etc.—It was assessed to income tax on the "book profit" computed in accordance with the provisions of Section 115 JB of the Act inserted into the Act by the Finance Act, 2000 w.e.f. 01.04.2001—The gist

of the section is that certain companies were liable to pay tax on their "book profit" if the total income computed in accordance with the provisions of the Act was less than 18% of its book profit—In that case, book profit was deemed to be the total income of such companies—Explanation 1 to the section permitted certain adjustments to be made to the figure of book profit as shown in the profit and loss account prepared as per the Companies Act—The first part of the Explanation provided for certain upward adjustments to the book profit—Under clause (c)—The amount or amounts set aside to provisions made for meeting liabilities, other than the ascertained liabilities was/were to be added to the book profit as shown in the profit and loss account—A controversy arose as to whether the provision for bad and doubtful debts made in the profit and loss account can be added to the book profit under the aforesaid clause—The income tax authorities took the view that such a provision was made for meeting a liability other than an ascertained liability and therefore the book profit had to be increased by the amount of the provision—The case of the companies which were liable to tax under Section 115 JB was that a provision for bad and doubtful debts cannot be regarded as a provision made for meeting a liability, let alone an company and what in effect the company does, when making the provision for bad and doubtful debts, is only to provide for a possible non-recovery of the debt—According to the companies, a provision made for the diminution in the value of the debt due to possible non-recovery or the debt going bad cannot be treated as a provision made for meeting an unascertained liability. Special Bench of Income Tax Appellate Tribunal rules in *JCIT Vs. Usha Martin Ltd.* (2006) 105 TTJ (Kol.) 543 (SB) that such a provision cannot be considered as a provision for meeting an unascertained liability and that in truth and substance it was a provision for the diminution of the value of the debt and therefore, it fell outside, clause (e) of the Explanation and the book profit cannot be increased by the amount of the provision—This view of the Special Bench of the Tribunal was upheld by the Delhi High Court in a case where a similar issue had arisen and this

judgment is reported as *CIT Vs. Eicher Ltd.* (2006) 287 ITR 170—The controversy was eventually resolved by the Supreme Court in the judgment reported as *CIT v. HCL Comnet Systems & Services Ltd.* (2008) 305 ITR 409 by observing that for the purposes of section 115JA, the Assessing Officer can increase the net profit determined as per the profit and loss account prepared as per Parts II and III of Schedule VI to the Companies Act only to the extent permissible under the Explanation thereto as per which six items, i.e., item Nos. (a) to (f) which if debited to the profit and loss account can be added back to the net profit for computing the book profit—The provision for bad and doubtful debts can be added back to the net profit only if item (c) dealing with amount(s) set aside as provision made for meeting liabilities, other than ascertained liabilities stands attracted—The assessee's case would, therefore, fall within the ambit of item (c) only if the amount is set aside as provision; the provision is made for meeting a liability; and the provision should be for other than an ascertained liability, i.e., it should be for an unascertained—A debt payable by the assessee is different from a debt receivable by the assessee—A debt is payable by the assessee where the assessee has to pay the amount to others whereas the debt receivable by the assessee is an amount which the assessee has to receive from others—In the present case, the debt under consideration is a debt receivable by the assessee—The provision for bad and doubtful debt, therefore, is made to cover up the probable diminution in the value of the asset, i.e., debt which is an amount receivable by the assessee—Therefore, such a provision cannot be said to be a provision for a liability, because even if a debt is not recoverable no liability could be fastened upon the assessee—After the judgment of the Supreme Court was rendered in favour of the company assessees amendment of section 115JB was effected by substituting with effect from the 1st day of April, 2001, namely the amount or amounts set aside as provision for diminution in the value of any asset—The amendment to section 115JB is proposed to be made effective retrospectively

from 1st day of April, 2001 and will, accordingly apply in relation to assessment year 2001-02 and subsequent assessment years—The petitioner filed its returns of income for the assessment years 2002-03, 2003-04 and 2009-10 on 31.10.2002, 28.11.2003 and 29.09.2009 respectively—It is averred in the petition that the petitioner was advised to re-compute its book profit for these years by taking into account the provision for diminution in the value of assets, including any provision made for bad and doubtful debts, in view of the retrospective amendment—The petitioner accordingly, recomputed its book profit and deposited Rs. 1,08,64,425/- on 30.10.2009 towards additional taxes for these years consequent to the re-computation—This writ petition is for quashing the retrospectivity of the amendment on the ground that it is unreasonable, discriminatory and therefore, unconstitutional—It is also prayed that the respondents be directed to refund the tax deposited suo motu by the petitioner on 30.10.2009 as a result of the retrospective amendment along with applicable interest. Held—Explanation 1 below section 115JB contains several clauses—If the profit and loss account prepared by the company contains any debit which answers to the description of any of those clauses, the amount of the debit can be added to the book profit and the book profit shall stand increased by the said amount—The purpose of the Explanation is to broaden the base amount on which tax is payable by the company—No new levy is imposed—The tax-base stands widened by the amendment in as much as the amount or amounts set aside as provision for diminution in the value of any asset and debited to the profit and loss account shall be added to the book profit—It is well settled that income tax is only one tax on the total income of the assessee—The book profit of a company as shown in the profit and loss accounts prepared in accordance with the Companies Act, 1956 and as adjusted by the various clauses of Explanation 1 is deemed to be the total income of the company on which tax is payable—It is, therefore, a misnomer to refer to the amendment as imposing a new tax or levy—Since the amendment does not provide for any new levy of

income tax, there is no question of it being struck down on the ground of retrospectivity—The memorandum explaining the provisions of the Finance Bill, 2012 (2012) 342 ITR (St) 234 at page 265 contained a detailed justification as to why certain amendments were being proposed in section 9 of the Act in order to rationalise the international taxation provisions. In order to successfully challenge the retrospectivity of the amendment it is necessary for the petitioner to show that the retrospective operation so completely alters the character of the tax as to take it outside the limits of the entry which gives the legislature competence to enact the law—Present amendment is not open to such criticism as all it does, is to widen the base upon which the levy operates by adding one more category of a debit to the profit and loss account by which the book profit of the company can be increased—The nature of the tax has not undergone any change and it still remains a tax on the book profit of the company—It is perfectly open to the legislature to prescribe how the book profit of a company can be computed and this it has done by first enacting that the book profit should be the figure of the profit as per the profit and loss account prepared in accordance with parts II and III of the Companies Act and then by prescribing, in Explanation 1, the items by which the said book profit may either be increased or reducted. In the case of completed assessments the amendment can be invoked only if reopening of the assessments under Section 147 of the Act or modification of the assessments under any other provision of the Act is permissible—The provisions relating to limitation and finality of assessments cannot be disturbed, as they are also the result of legislation by Parliament as the Supreme Court itself has recognised—Different considerations would, therefore, arise if by the amendment even final assessments are sought to be reopened—Petitioner can have a grievance and it can be successfully ventilated, only if the revenue authorities seek to disturb the finality of a completed assessment, overlooking the provisions of the Act relating to reopening of assessments—For the above reasons the writ petition is dismissed but in the circumstances with no order

as to costs.

Whirlpool of India Limited and Anr. v. *UOI and Ors.* *2183*

— Section 148—Assessee filed its return of income on 31.03.2003 w.r.t the assessment year 2002-03—On scrutiny of the books of account of the assessee, which revealed that he had received a sum of Rs. 4,82,01,000/- as share application money from various persons and same was outstanding, pending allotment of shares, the Assessing Officer conducted a detailed inquiry to determine the genuineness of the transactions relating to the share applications and vide order dated 30.03.2005 concluded that a sum of Rs. 42 lacs on account of share application money was liable to be taxed as unexplained credit in the books of account u/s 68 of the act—The said assessment was carried in appeal and CIT in the light of the evidence produced before it, deleted the additions made by the Assessing Officer to the extent of Rs. 37 lacs—On 25.03.2009 Assessing Officer again issued notice dated 25.03.2009 u/s 148 of the Act, seeking to reassess the income of the assessee pertaining to the assessment year 2002-03, on the basis of a statement of one person recorded on 25.09.2004, that he had been providing accommodation entries to the assessee and on the basis that information had also been received that goods of the assessee had been seized by DRI and penalty of Rs. 2 crore had been levied by Commissioner, Customs—Based on the said reassessment proceedings, vide order dated 24.12.2009 Assessing Officer made an addition of app. Rs. 4 crores 75 lacs in relation to the share application and another amount of Rs. 3 crore 46 lacs on the alleged ground of concealment of goods—On appeal CIT upheld the order of the Assessing Officer but on further appeal Tribunal held reassessment proceedings as illegal and without jurisdiction. Held:- It is well settled that in order to reopen an assessment by invoking the provisions of Section 147 of the Act, after a period of four years from the end of the relevant assessment year, in addition to the Assessing Officer (AO) having reason to believe that any income had escaped

assessment, it must also be established that the income had escaped assessment on account of the assessee failing to make returns under Section 139 or on account of failure on the part of the assessee to disclose, fully and truly, the necessary material facts. In the reasons furnished by the AO there is neither any allegation that the assessee had failed to make any disclosure at the time of assessment nor the same can be inferred in view of the fact that a detailed inquiry with regard to the genuineness of the transactions in relation to the share application money, had been conducted by the AO in the first round of assessment and therefore it was not open for the AO to reopen the assessment. Further in view of the failure on part of the AO to record a belief that some income had escaped assessment on account of seizure of certain goods of the assessee by the DRI, the said seizure or the penalty levied by DRI cannot also be stated to be a reason for reopening of the assessment.

Commissioner of Income Tax-III v. *Suren International Pvt. Ltd.* *2321*

INCOME TAX RULES, 1962—Rule 17—In all the aforementioned four appeals filed by the assessee association, the common fact in issue was that the assessee association had not filed Form 10 prescribed under Rule 17 of the Income Tax Rules alongwith its annual returns of the relevant assessment years, but in three of the said cases, had filed it during the course of re-assessment proceedings and in the fourth case (ITA No. 523/2012) had filed it only at the stage of the appeal before the Tribunal—Tribunal rejected the claim of the assessee for accumulation of income on the ground that Form 10 could have been only filed during the course of initial assessment proceedings. Held: The assessee could not have filed the Form 10 at the stage of appeal, for the said form has to be filed before the assessment is completed and hence ITA No. 523/2012 stands dismissed. As regards the other three ITAs, though re-opening of an assessment cannot be asked for by the assessee on the ground that he had not furnished the Form 10 during the original assessment

proceedings, however when the revenue itself reopens the assessment by invoking section 147 of the Income Tax Act, the assessee cannot be barred from furnishing Form 10 during such proceedings. The said three ITAs therefore stand allowed.

Association of Corporation & Apex Societies of Handlooms v. *Assistant Director of Income Tax* *2104*

INDIAN EVIDENCE ACT, 1872—Section 6—Appeal against conviction on the grounds that conviction based on testimony of prosecutrix and her mother without independent corroboration—Vital discrepancies and contradictions in the statements of witnesses. Doctor who examined the prosecutrix, not produced. Doctor who appeared deposed facts which were not mentioned in the MLC—Held—Prosecutrix is a child victim; has no ulterior motive to falsely implicate the accused. Despite searching cross examination no material discrepancies emerged in the statement to discard her version. Her conduct is quite reasonable and natural and is relevant under section 6 of Evidence Act—No inconsistency in the version given by her in her statements under S. 161 and 164 Cr. PC and in the Court—Ocular testimony of prosecutrix is in consonance with medical evidence—Non examination of doctor and non production of medical report would not be fatal to the prosecution case, if evidence of prosecutrix and other witnesses is worthy of credence. Conviction based upon fair appraisal of the evidence and requires no interference.

Asgar Ali v. *The State (NCT of Delhi)*..... *1772*

— Section 118—Statement of a child witness—Manner of conducting competency test—Insufficient attention paid; no real assessment of the capacity and capabilities children accorded special treatment—Extensive guidelines laid down by the Supreme Court and the Delhi High Court—Pronouncements bind all trial courts in Delhi—Knew no exceptions—Adherence is mandatory—Questions put should meet the requirements of law having special regard to age and

circumstances of the person required to depose—Questions to be put to child witness ought to be sensitively framed—Education, socio economic background, age and capacity to be kept in mind—Directions issued.

State v. *Rahul* *1861*

— S. 33C(2)—SC in the case of *Surender Singh vs. CPWD,* AIR 1986 SC 584 directed payment to Daily Wagers in CPWD w.e.f. initial date of engagements, the same salary and allowances paid to permanent/regular employees of G.O.I.—Computation of entitlements u/s 33C(2) by Labour Court upheld by Supreme Court—Payment not made by appellant—Recovery certificate issued—Challenged. Held:- although the principle "equal pay for equal work" has subsequently changed, but in the present case the directions in *Surender Singh's* case were binding because of principle of finality.

The Director General of Works v. *Regional Labour Commissioner & Ors.* *2243*

INDIAN PENAL CODE, 1860—Section 366/376—Appellant convicted and sentenced by trial Court—Prosecutrix aged 15 years and 8 months—She travelled with appellant willingly in bus and train—Prosecutrix brought back to Delhi by appellant—Held:- While awarding punishment the Court has to take into consideration the mitigating and aggravating circumstances—Held:- It was a fit case for sentence less than the minimum prescribed.

Sanjay v. *State* *2389*

— Section 302/34—Identification of accused during night—All four accused well known to the deceased and his eye witness brother—Incident witnessed from a distance of 2 to 10 paces—Paucity of light—Accused could be identified easily by their voices, gait, clothes, manner of speaking etc.

— Improbable conduct of PW3 brother of deceased—Held, different persons react differently in different situations.

— Motive—Loses significance when ocular and medical evidence

is clear to establish guilt.

— 302 IPC or 304 Part-I or Part-II of IPC—Ten injuries inflicted with knife and danda—The force with which the injuries were inflicted speaks of the intent to cause death—Danda broke into two pieces—Conviction U/s 302 IPC maintained.

Parveen Kumar v. *State of Delhi* *2393*

— Section 307, 34—Appeal against conviction u/s 307/34 on the grounds that prosecution was unable to establish and prove motive to inflict injuries, weapon of offence was not recovered, victim did not disclose the name of the assailants to the doctor examining him—Held—Evidence of an injured witness cannot be disbelieved without assigning cogent reasons. Proof of motive recedes into background in cases where the prosecution relies upon eye witness account of occurrence. Non recovery of weapon of offence is not fatal. There is specific ocular and medical evidence to prove that the injuries were caused by gunshot. It is not mandatory for a doctor to record in the MLC or to make enquiry from the injured about the name of the assailant. Omission of injured to disclose the assailant's name to the doctor does not discredit his testimony—Held considering the aggravating and mitigating circumstance, sentence reduce from 8 years to 6 years. Appeal disposed off.

Noor Salam v. *The State (Govt. NCT of Delhi)*..... *1732*

— Section 34, 308, 323—Accused arrested and challaned to trial for committing offence u/s 308/34. On appreciation of evidence, accused convicted for offence u/s 323/34. Cross appeals—Accused challenging conviction and complainant challenging acquittal of accused u/s 308—Held—Accused were residing in same premises and had property disputes. A quarrel had taken place on trivial issue. Accused were not armed with deadly weapons. Only a single brick blow was inflicted on the temporal region of the complainant and as per MLC it was a mere cut and lacerated wound. Within a few hours the complainant was discharged. No attempt was made to inflict repeated blows from the brick No harm was caused

to any other family member of complainant—These circumstances rule out intention of the accused to cause injuries which could be fatal. Conviction of accused u/s 323 maintained—Appeal filed by victim dismissed. Convicts have been sentenced to imprisonment till the rising of the Court. Considering the age, character, antecedents and the fact that two of them are government servants, instead of sentencing them at once to any punishment these are ordered to be released on probation of good conduct on furnishing personal bonds.

Vikas v. *The State of (NCT of Delhi) & Ors.*..... *1765*

— Section 376—Indian Evidence Act, 1872—Section 6—Appeal against conviction on the grounds that conviction based on testimony of prosecutrix and her mother without independent corroboration—Vital discrepancies and contradictions in the statements of witnesses. Doctor who examined the prosecutrix, not produced. Doctor who appeared deposed facts which were not mentioned in the MLC—Held—Prosecutrix is a child victim; has no ulterior motive to falsely implicate the accused. Despite searching cross examination no material discrepancies emerged in the statement to discard her version. Her conduct is quite reasonable and natural and is relevant under section 6 of Evidence Act—No inconsistency in the version given by her in her statements under S. 161 and 164 Cr. PC and in the Court—Ocular testimony of prosecutrix is in consonance with medical evidence—Non examination of doctor and non production of medical report would not be fatal to the prosecution case, if evidence of prosecutrix and other witnesses is worthy of credence. Conviction based upon fair appraisal of the evidence and requires no interference.

Asgar Ali v. *The State (NCT of Delhi)*..... *1772*

— Section 342, 452, 307, 34—Appeal against conviction and sentence u/s 342, 452, 307, 34 on the grounds that conviction based on sole testimony of complainant. Inconsistent versions as on which date and place the accused were identified by

complainant. No crime weapon recovered from accused. Statement of complainant was recorded after inordinate delay and there is discrepancy whether it was recorded at the police station or at his residence—Held—Discrepancies in versions is of no consequence as accused refused to participate in TIP proceedings and the complainant thereafter identified him in Court. Complainant has no ulterior motive to falsely recognize the accused. There was no valid reason for the accused to decline participation in TIP proceedings, adverse inference to be drawn against the accused. Complainant has offered reasonable explanation for delay in recording statement. Minor contradictions as to where the statement was recorded is not enough to throw away his entire version about the incident given in Court—Held—Prosecution unable to find motive of the accused to inflict vital injuries to the victim. It is settled legal proposition that motive has greater significance in a case, involving circumstantial evidence but where direct evidence is available, which is worth relying upon, motive loses its significance. Ocular testimony of witnesses as to the occurrence cannot be disregarded only by reason of the absence of motive. Appeal has no merits and is dismissed.

Deepak Kumar v. *State (Delhi)*..... *1780*

— Section 148, 149, 395—Appeal against conviction under section 148, 149 and 395 on the grounds that conviction based on testimonies of interested witnesses, no independent public witness was associated at any stage of the investigation—Held—Appellant could not illicit material discrepancies in the cross examination of victims who had no ulterior motive to falsely implicate the accused. There is no good reason to disbelieve the cogent and reliable testimony of the victims. Minor contradictions, discrepancies and improvements highlighted by the counsel do not effect the core issue and are insignificant. Presence of accused as member of unlawful assembly is sufficient for conviction. He was not a mute spectator or passive witness. U/s 149 IPC even if no overt act is imputed to a particular person, the presence of the accused as a part of unlawful assembly is

sufficient for conviction. Every member of an unlawful assembly is vicariously liable for the acts done by others either in prosecution of common object or members of assembly knew were likely to be committed. Conviction based upon fair appraisal of the evidence and requires no interference.

Bihari Lal & Anr. v. *State (NCT of Delhi)*..... *1791*

— Sections 376 and 377—Indian Evidence Act, 1872—Section 118—Statement of a child witness—Manner of conducting competency test—Insufficient attention paid; no real assessment of the capacity and capabilities children accorded special treatment—Extensive guidelines laid down by the Supreme Court and the Delhi High Court—Pronouncements bind all trial courts in Delhi—Knew no exceptions—Adherence is mandatory—Questions put should meet the requirements of law having special regard to age and circumstances of the person required to depose—Questions to be put to child witness ought to be sensitively framed—Education, socio economic background, age and capacity to be kept in mind—Directions issued.

State v. *Rahul* *1861*

— Section 308, 341 and 34—Probation of Offenders Act, 1958—Section 4 and 12—Petitioner was successful at selection process for post of Constable Executive in Delhi Police but was not offered appointment—Commissioner of Police took view that in view of his being guilty of having committed offence punishable under Section 308 of IPC though released on probation for which he had furnished a bond to keep good behaviour for two years, petitioner was unfit to be appointed as a Constable in Delhi Police—This led to filing of OA which was dismissed—Order challanged before HC—Plea taken, release on probation washes away finding of culpability for having committed offence punishable under Section 308—Per contra plea taken, release of petitioner would not wash away wrong conduct of petitioner—Held—Larger question which falls for consideration in this case is, whether petitioner having been released under Section 4 of

Offenders Act, does not suffer disqualification because of Section 12 of said Act—Release of petitioner under Section 4 of Offenders Act would not obliterate conduct / act which constitutes offence—Petitioner would not be entitled to any relief even on interpretation of Section 12 of Offenders Act—So when conduct / act constituting offence is not washed of, employer in this case, Delhi Police was within its right not to appoint petitioner as Constable (Executive) Male, that too, when no right is said to have accrued in favour of petitioner who was only on threshold of being appointed—In law or facts petitioner would not be entitled to get appointed as Constable Executive (Male)—Conclusion of Tribunal cannot be interfered with.

Ajit Kumar v. *Commissioner of Police and Ors.* *1921*

— Section 34—Sections 341/323/34—Utterance of caste remark to the complainant—Complainant and his brothers beaten up—Final report submitted against the three accused persons—Application for grant of anticipatory bail—Dismissed by the Sessions Judge—Preferred present application for anticipatory bail—Pleaded business rivalry between petitioners and complainant had filed petition alleging harassment by complainant—SHO was directed to provide adequate protection—DCP filed affidavit confirming business rivalry—FIR is an afterthough—Filed when the petitioner was in hospital having suffered beatings from the complainant—FIR is counter blast to FIR filed by the petitioner—The chain of events points to falsity of the complaint—challan filed is ambiguous—Continuous improvements made by complainant—Allegation of caste remark made after one month of the incident—Witness also made improvements—APP pleaded bar of Section 18 of the SC/ST Act to section 438 Cr. PC—Made caste remark in public view—Clear averments in the complaint—Held—Section 18 is an absolute bar to applicability of Section 438 Cr. PC—Absence of utterance in public view is the limited exception—Specific allegations against each of the accused a must—Section 34 IPC cannot be brought in aid—Accused Manjeet Singh uttered caste

remark in a public street—No such charges against other two petitioners—Application of Manjeet Singh rejected—Other two petitioners admitted to bail.

Manjeet Singh & Ors. v. *State of Delhi*..... *1971*

— Section 302/307—Medical evidence and forensic evidence in line with ocular evidence—PW1 real brother of deceased and also injured in the incident, named the accused at very first instance—His presence at the spot natural—Such witness would not allow real culprit to go scot free. In such circumstances not much importance can be attached to slight variation of 0.5 cm to 1 cm in the dimension of the handle and blade of knife in the two sketches prepared by IO and the doctor—Nor any importance can be attached to a stray sentence in the testimony of witness that he had snatched the knife from accused and handed it over to the IO, whereas, the case of prosecution was that knife was recovered from the roof of adjoining jhuggi.

Sanjay Kumar v. *State*..... *2414*

— Section 406, 420—Petition was quashing of criminal complaint against Petitioner—Inherent powers of the Court u/s 482—SCOPE HELD—Though very wide have to be invoked sparingly and with circumspection only (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of the Court and (iii) otherwise to secure the ends of justice, Inherent powers of the Court to quash an FIR or a criminal complaint can be invoked where the allegations made in the complaint even if admitted do not disclose any offence. Since there are disputed questions of fact, Court in exercise of its power u/s 482 cannot be stifled with the Petitioner's prosecution. Petition dismissed.

Kanak Installments Pvt. Ltd. v. *State of NCT of Delhi & Anr.* *2125*

INDUSTRIAL DISPUTES ACT, 1947—Section 33C (2)—Whether in proceedings under S. 33C(2) Industrial Disputes Act which are in the nature of execution, interest can be granted, if it was not granted in the substantive award—Held—

The Appellant raised an industrial dispute, which was referred to the Tribunal under the Industrial Disputes Act claiming the scale of Rs. 330 Rs. 560 prevailing at that time—Finding that the appellant had been discriminated against Labour Court promoted him to the pay scale of Rs. 330 Rs. 560 w.e.f. 01.01.1973—Instead of promoting the appellant w.e.f. 15.12.1962, the appellant was promoted to the revised scale only from 01.01.1973—Appellant made a claim for pay for the intervening period—Management paid an amount of Rs. 4,000 to the Appellant in 1987—Being dissatisfied, the Appellant challenged the order u/s 33C(2) in the Central Government Industrial Tribunal—Tribunal in 1996 computed the amount payable as Rs. 40,139 and invoking principle of equity and restitution, directed payment of interest. Aggrieved by the award, management approached the Court u/s 33C (2) of the Industrial Disputes Act to the extent that it directed payment of interest—Single Judge held that section 33C(2) conferred limited jurisdiction upon the Industrial Tribunal, that if the component of interest was not directed to be paid in the substantive award or rules applicable to the employee, he would be disentitled to claim the same under section 33C(2), which was in the nature of execution proceedings-Thereby, the award was modified by the Single Judge to the extent that the payment of interest at 15% was quashed—On appeal, without going into the merits of the matter held that the HC in a proceeding under Article 226 could certainly invoke substantive and residuary jurisdiction to direct payment of interest in view of the fact that the petitioner claimed that his rights had been defeated by non-implementation of the substantive award and the subsequent award—Award of Single Judge was modified and payment of interest at 9% was ordered.

Bhim Singh Bajeli v. *P.O. Central Govt. Industrial Tribunal* *1724*

LAND ACQUISITION ACT, 1894—Section 4, 6 & 14—Land of appellant was notified to be acquired—Land Acquisition Collector passed award and awarded compensation in favour

of appellant—Being dissatisfied with compensation, appellant sought reference which was forwarded by Land Acquisition Collector but with objection that reference petition was time barred—Reference petition was rejected—Reference was then made to Ld. Additional District Judge—Respondent filed written statement and raised preliminary objection of reference being barred by limitation and therefore, not maintainable—No replication to written statement was filed and no issue on plea of limitation taken by respondent, was framed—However, Ld. Additional District Judge vide impugned order rejected reference as barred by limitation—Aggrieved, appellant preferred appeal. Held If the plea of limitation can be decided without recording evidence, it may not be necessary to frame an issue before returning a finding on such a plea. If, however, the decision on a plea of limitation requires recording of evidence, it would not be appropriate to return a finding without framing an issue and giving an opportunity to the parties to lead evidence by disputing the factual aspect of the issue.

Kartar Singh v. *Union of India & Anr.* *2014*

MEDICAL TERMINATION OF PREGNANCY ACT, 1971—Section 3—Termination of pregnancy—Victim of rape—Medically examined—Had pregnancy of 6 weeks—Living alone in Delhi; does not want to bear a child—Writ petition filed for directions to State for terminating her pregnancy and to preserve the foetus for DNA test—Status report filed—Pregnancy can be terminated with minimal know risks—State has no objection for termination of pregnancy—Enquiries made—Victim is major; has consultation with her counsel; understands the consequences of her act—Expressed willingness to terminate the pregnancy—Consent of woman essential for termination of pregnancy—Likely to face mental, physical, social and economical problems in future—Petition allowed—Directions issued.

X (Assumed name of the prosecutrix) v. *The State (N.C.T. of Delhi) & Ors.* *1813*

NEGOTIABLE INSTRUMENTS ACT, 1881—Section 138, 141—Cheques issued by the accused company dishonoured—Petition for quashing of summoning order by Director of the accused company—Petitioner contends that Complaint does not reveal as to how Petitioner was in charge of and responsible for the conduct of business of accused company and mere averment that the Petitioner being a Director was in charge of the and responsible for conduct of the business of the company was not enough—Held—Only bald allegations that Petitioner and other Directors were responsible for the day to day affairs of the accused company. Following law laid down in *National Small Industries Corporation Ltd., Central Bank of India* and *Anita Malhotra,* averments not sufficient to issue process against petitioner. Summoning order quashed—Petition allowed.

Chintan Arvind Kapadia & Anr. v. *State & Anr.* *2135*

PREVENTION OF CORRUPTION ACT, 1988—Section 13(1)(e) and Section 13(2)—Delhi Special Police Establishment Act (DSPE Act)—Section 6A—Complaint forwarded by CVC to CBI—Discreet verification done—FIR registered—Official website did not disclose the status of the petitioner—Investigation started—Searches conducted—During investigation, revealed the petitioner to be joint secretary level officer—Investigation kept in abeyance ex-post facto approval sought—Approval granted—Petition filed for quashing of FIR—Contended—Petitioner being joint secretary level officer, prior approval of the Central Government was mandatory before investigation undertaken—Subsequent approval is of no avail—CBI did not register preliminary inquiry—Acted in violation of its manual—FIR itself illegal; liable to be quashed—CBI contended—Petitioner in his communications referred himself as Director and never informed about his joint secretary level status—CBI not aware of his that status when FIR registered—Approval taken once his status was known—Investigation carried only thereafter—Held—Except checking the website, no efforts made to find

out the status of the petitioner—Obligatory to obtain the consent from the Central Government—Approval can be taken ex-post facto as well on receipt of information about the status of the petitioner, investigation kept on hold—Approval taken, thereafter investigation started—Investigation cannot be accepted or quashed piecemeal—Illegality committed at the inception of investigation gets cured—No averment as to miscarriage of justice, earlier investigation cannot be quashed—Petition dismissed.

A.P. Pathak v. *CBI*..... *1958*

PROBATION OF OFFENDERS ACT, 1958—Section 4 and 12—Petitioner was successful at selection process for post of Constable Executive in Delhi Police but was not offered appointment—Commissioner of Police took view that in view of his being guilty of having committed offence punishable under Section 308 of IPC though released on probation for which he had furnished a bond to keep good behaviour for two years, petitioner was unfit to be appointed as a Constable in Delhi Police—This led to filing of OA which was dismissed—Order challanged before HC—Plea taken, release on probation washes away finding of culpability for having committed offence punishable under Section 308—Per contra plea taken, release of petitioner would not wash away wrong conduct of petitioner—Held—Larger question which falls for consideration in this case is, whether petitioner having been released under Section 4 of Offenders Act, does not suffer disqualification because of Section 12 of said Act—Release of petitioner under Section 4 of Offenders Act would not obliterate conduct / act which constitutes offence—Petitioner would not be entitled to any relief even on interpretation of Section 12 of Offenders Act—So when conduct / act constituting offence is not washed of, employer in this case, Delhi Police was within its right not to appoint petitioner as Constable (Executive) Male, that too, when no right is said to have accrued in favour of petitioner who was only on threshold of being appointed—In law or facts petitioner would not be entitled to get appointed as Constable Executive

(Male)—Conclusion of Tribunal cannot be interfered with.

Ajit Kumar v. *Commissioner of Police and Ors. 1921*

SALE—Power of Attorney and Agreement to Sell—Transfer of Ownership—Brief Facts—Respondents 2 and 3 were allotted a residential plot bearing No. 135, Block K-I, Chittranjan Park, New Delhi, and a perpetual lease deed dated 01.10.1990 was executed in their favour—Case of the petitioner is that vide Agreement to Sell dated 23.10.1990, coupled with a registered Power of Attorney of the same date, ownership of room No. 2 on the ground floor, measuring 142 squire feet was transferred to him for a consideration of Rs. 60,000/- and he is in physical possession of the same—Lease of the aforesaid property was cancelled by the Lieutenant Governor of Delhi vide order dated 10.11.1992—Pursuant to cancellation of the lease deed, an eviction order dated 16.06.2000 came to be passed by the Estate Officer against the petitioner and other occupants of the building—Appeal preferred against the order of the Estate Officer, was dismissed by the learned Additional District Judge vide his order dated 07.12.2002—During pendency of the appeal before the Estate Officer, the said property was sealed by DDA on 16.09.2002—An application is alleged to have been submitted to DDA for converting the aforesaid property from leasehold to freehold and on refusal of DDA to convert the aforesaid property into freehold a writ petition being W.P. (C) No. 4693 of 2003 was filed by the petitioner, challenging the aforesaid decision of DDA—The said petition came to be disposed of vide order dated 18.11.2003—A demand letter dated 08.12.2003 was then issued by DDA, requiring him to deposit a sum of Rs. 1,17,87,223/-, comprising Rs. 73,89,895/- towards misuse charges for the period from 31.11.1990 to 16.09.2002, Rs. 31,350/- towards restoration charges, Rs. 15,000/- towards de-sealing charges, Rs. 75,000/- towards maintenance charges, Rs. 42,35,222/- towards unearned increase, Rs. 22,695/- towards ground rent and Rs. 18,061/- towards interest on ground rent—Aggrieved from the sealing, the

petitioner preferred the present writ petition, seeking direction to the respondent to deseal the premises with immediate effect subject to the undertaking to pay the legitimate demand of misuse charges as and when raised. Held—The first question which arises for consideration in this case is as to whether the petitioner has any locus standi to maintain this writ petition—Admittedly, the land underneath building in question was allotted by DDA to respondents 2 and 3 and not to the petitioner—Though the petitioner claims to have purchased a portion of the property subject matter of the writ petition, admittedly, no sale deed has been executed in his favour—Petitioner has neither, submitted to DDA nor filed in this Court the Power of Attorney and Agreement to Sell alleged to have been executed by respondents 2 and 3 in his favour—In the absence of such documents, it is not possible to accept the case set out by the petitioner in this regard—Assuming, however, that there was an Agreement to Sell, coupled with a Power of Attorney executed by respondents 2 and 3 in favour of the petitioner in respect of a portion of the property subject matter of this writ petition, he does not become owner of the portion of the property subject matter of this writ petition, he does not become owner of the occupied by him merely on the strength of the Agreement to Sell and Power of Attorney, alleged to have been executed in his favour, nor does such a transaction constitute "sale" as held by the Supreme Court in *Suraj Lamp and Industries Pvt. Ltd. vs. State of Haryana and Anr.* (2012) 1 SCC 656—Since the petitioner is not the owner/lessee/allottee of the property subject matter of this writ petition, he has absolutely no locus standi to file a writ petition, challenging the sealing of the aforesaid property by DDA—It is only the owner/lessee/allottee of the property who can maintain such a petition—Petition has been filed in the individual capacity of the petitioner and not as attorney of the lessees/allottees who have been impleaded as respondents 2 and 3 in the writ petition—For this reason alone, the writ petition is liable to be dismissed. Even assuming that the petitioner has the locus standi to

maintain a writ petition against sealing of the property, no ground for de-sealing the property has been made by him—Property came to be sealed inter alia on account of unauthorized construction and misuse of the property, in contravention of the terms of the lease deed—This is not the case of the petitioner that there was no unauthorized construction in the property—Admittedly, the property in question was leased out for residential purpose and could not have been used for a non-residential purpose, without prior permission of the lessor—This is not the case of the petitioner that the said property is being used only for residence and no portion of the property is being used for a non-residential purpose—In fact, petitioner did not even dispute his liability to pay misuse charges till the date the property in question came to be sealed by DDA—This is also not the case of the petitioner that the misuse in the property has since been stopped altogether and the unauthorized construction has since been demolished—Therefore, there is no ground, on merits, for de-sealing the property subject matter of the writ petition—No merit in the writ petition and the same is hereby dismissed.

S.K. Bahl v. *Delhi Development Authority & Ors.* *2020*

SCHEDULE CASTES AND SCHEDULE TRIBES (PREVENTION OF ATROCITIES) ACT, 1989—Section 3—Section 18—Bar to grant anticipatory bail—Indian Penal Code, 1860—Section 34—Sections 341/323/34—Utterance of caste remark to the complainant—Complainant and his brothers beaten up—Final report submitted against the three accused persons—Application for grant of anticipatory bail—Dismissed by the Sessions Judge—Preferred present application for anticipatory bail—Pleaded business rivalry between petitioners and complainant had filed petition alleging harassment by complainant—SHO was directed to provide adequate protection—DCP filed affidavit confirming business rivalry—FIR is an afterthough—Filed when the petitioner was in hospital having suffered beatings from the complainant—FIR is counter blast to FIR filed by the petitioner—The chain of

events points to falsity of the complaint—challan filed is ambiguous—Continuous improvements made by complainant—Allegation of caste remark made after one month of the incident—Witness also made improvements—APP pleaded bar of Section 18 of the SC/ST Act to section 438 Cr. PC—Made caste remark in public view—Clear averments in the complaint—Held—Section 18 is an absolute bar to applicability of Section 438 Cr. PC—Absence of utterance in public view is the limited exception—Specific allegations against each of the accused a must—Section 34 IPC cannot be brought in aid—Accused Manjeet Singh uttered caste remark in a public street—No such charges against other two petitioners—Application of Manjeet Singh rejected—Other two petitioners admitted to bail.

Manjeet Singh & Ors. v. *State of Delhi*..... *1971*

— Industrial Disputes Act, 1947—S. 33C(2)—SC in the case of *Surender Singh vs. CPWD,* AIR 1986 SC 584 directed payment to Daily Wagers in CPWD w.e.f. initial date of engagements, the same salary and allowances paid to permanent/regular employees of G.O.I.—Computation of entitlements u/s 33C(2) by Labour Court upheld by Supreme Court—Payment not made by appellant—Recovery certificate issued—Challenged. Held:- although the principle "equal pay for equal work" has subsequently changed, but in the present case the directions in *Surender Singh's* case were binding because of principle of finality.

The Director General of Works v. *Regional Labour Commissioner & Ors.* *2243*

SERVICE LAW—Canara Bank Officer Employees (conduct) Regulations, 1976—Respondent arrested in a criminal case—Suspended—Suspension revoked—Suspension order stipulated with period under suspension spent by respondent shall not be treated as having been spent on duty and shall not be reckoned for any purpose—Respondent Superannuated on 31.10.2002—Later on acquitted in the criminal trial on 19.01.2004. Held, Regulation 15 (1) deals with departmental

proceedings only and does not apply to acquittals in criminal cases—Also held, it is only in cases where the competent authority specifically directs that such period of suspension should be treated as having been "spent on duty" with the competent authority is required to give reasons in writing—No reasons are necessary when the period of suspension in cases falling under Sub Regulation 15(2) is treated as "not spent on duty". Reliance on the case of *Union Bank of India Vs. K.V. Jankiraman & Others* 1991 (4) SCC 109 held that concerned authorities are to be vested with the power to decide whether an employee at all deserves any salary for the intervening period and if he does, the extent to which he is entitled.

General Manager, Canara Bank & Others v. *Kuldeep Raj Sharma* *2085*

— CWC Staff Regulations, 1996—Regulation 10 Sub-Regulation (1)—Petitioner appointed as Junior Technical Assistant in December 1983—On probation for one year—Suspended on 6.9.1984—Pending initiation of disciplinary proceedings—However in disciplinary proceedings initiated against him—His suspension revoked on 16.2.1985—Instead one P.P. Singh was charged and in the enquiry proceedings, P.P. Singh held guilty in regular D.E. However, in the report, the enquiry officer made certain observations qua the working of petitioner as well. Meanwhile, probation period of petitioner ended in December 1984—No formal order of extension of probation or confirming the petitioner—Petitioner's services terminated on 22.10.1983 under Sub-Regulation (1) of Regulation (10) of CWC (Staff) Regulations 1966 held the petitioner was examined as a witness in the departmental proceedings against P.P. Singh an his credibility was Doubted by the enquiry officer. The genuiness of warnings/memos issued against the petitioner by P.P. Singh was doubted in the enquiry by the enquiry officer—Thus, the warning/memos could not have been relied against the petitioner to terminate the services of petitioner. The comments of enquiry officer about any

creditworthiness of the petitioner in the DE cannot be characterised as evidence to judge suitability of petitioner. The comments of enquiry amended to findings of misconduct without any notice or hearing to the petitioner. No other material to support termination order as based on bonafide assessment of petitioners suitability—The innocuously word termination order was not reality based on allegations of serious misconduct, for which the petitioner was not even charged or made to face any form of inquiry and was not granted hearing—Termination set aside. However, since termination order was 28 years old, balancing the two seemingly competing public interest the petitioner awarded 40% of the back salary and allowances that would have been paid to the petitioner, had he continued in the same post from the date of his termination at all.

Prem Kishore v. *Central Warehousing Corporation* *2227*

— Constitution of India, 1950—Article 227—Writ of Mandamus—Whether withholding the promotion of an official for the reason of his required expertise in the speciality/department currently he's engaged with, even after rejection for fixation of basic pay which is held due to that senior post, be valid?—Held, that retention of an employee as against his promotion due to the reason of his expertise needed in the current department shall not be held against him and also, reduction of his salary, on account of late joining in the department, is wholly unjustified and arbitrary act of the respondents and not the fault of the petitioner.

Suneel Kumar Khatri v. *Union of India & Ors.*..... *1671*

— Appointment to the post of Head Constable (Ministerial) as a OBC candidate, belonging to the caste "Sonar"—Brief facts—Petitioner applied for the post of Head Constable (Ministerial) as a OBC candidate, belonging to the caste "Sonar"—He was asked to appear for the written examination, held on 10th July, 2011—At this stage, respondents made an endorsement that the OBC certificate furnished by Petitioner was not in the

prescribed format—Petitioner successfully undertook the written examination on 13th August, 2011 and was required to appear for the 2nd phase tests, i.e. typing speed/shorthand test on the 27th of September, 2011—Having successfully cleared the same, Petitioner was required to appear for the interview on 3rd October, 2011 where he again produced his caste certificate dated 28th May, 2011 issued from the office of the Deputy Commissioner, East Singhbhum, Jamshedpur, Jharkhand—This certificate was rejected by the respondents on the ground that his caste certificate was not in the prescribed format and the petitioner was told to get another caste certificate within a week—Petitioner promptly approached the District Magistrate of East Singhum, Jamshedpur but unfortunately, the Circle Officer passed an order dated 8th October, 2011 arbitrarily declining/refusing to issue a certificate to the petitioner on the ground that his family's land was not recorded in the Government record and therefore he could not be issued a domicile certificate—Document endorses the fact that the petitioner was covered within "Other Backward Category" under the "Sonar" caste and an affidavit and salary slip had been submitted—Head of the Panchayat in the village Aundi Post Chilkahr, Balia, Uttar Pradesh issued a caste certificate in the Central Government format by the Tehsildar, Rasda, balia, Uttar Pradesh to the effect that he belonged to "Sonar" caste which is covered in the Other Backward Category—This certificate submitted by the petitioner on the 5th of November, 2011 with the office of respondent no.5—In the medical examination which was conducted on 15th November, 2011, the petitioner was declared medically fit and he was informed that he would finally receive his appointment letter—Despite all these directives, nothing was done for a period of five months—After passage of five months, by a letter dated 5th March, 2012 sent by respondent no.5, the petitioner was informed that for the reasons that the OBC certificate dated 15th October, 2011 had been issued from District Balia (Uttar Pradesh) whereas his earlier certificate had been issued from

Jharkhand State, he was required to give an explanation for submitting the OBC certificate from two States—Petitioner was also required to provide domicile certificate from concerned authorities—Petitioner obtained a domicile certificate dated 23rd April, 2012 by the office of the Deputy District Officer Ballia and submitted the same to respondent no.4—In response to the report dated 5th June, 2012, was informed vide letter dated 19th July, 2012 that the matter was still under consideration—Finally a communication dated 7th August, 2012 was issued by respondent no.5 informing the petitioner that his candidature was being cancelled on the ground that despite opportunities, he had not produced the Other Backward Category/Domicile certificate from his home town—Hence, the present Writ Petition. Held—Both the certificate which have been produced by the petitioners and furnished to the respondents were genuine—Both certificates affirm the petitioner's claim that he belongs to the "Sonar" sub-caste which fell under the category of Other Backward Class—It is an admitted position before us that the petitioner's father Om Prakash Prasad is employed as Head Constable (Driver) by the Central Reserve Police Force under the OBC category—This is a material factor which was within the knowledge of the respondents—It was brought to the notice of the respondents—Yet they have chosen to deliberately overlook the same—Therefore, so far as the claim of the petitioner to the effect that he was covered under the OBC category is concerned, the same could not have been doubted—Petitioner cannot be denied employment at this stage on the specious ground that the certificate was not in the prescribed format or the certificates were submitted belatedly—Grave and unwarranted injustice has been done to the petitioner—He has been made to run from pillar to post without any fault on his part despite the admitted factual position especially with regard to the caste of his father and the fact that his father was recruited under the Other Backward category and continues to be so even on date—Petitioner's certificates were also unfairly doubted—Respondents also

unreasonably sat over the matter for several days—Writ petition is allowed.

Neeraj Kumar Prasad v. *UOI and Ors.* *2035*

— Denial of appointment to the post of Constable (GD) in the Central Armed forces—Signatures in capital letters in English—Petitioner has impugned Memorandum dated 15th March, 2013 vide which his candidature for the post of Constable (GD) in the ITBPF was cancelled on the ground that upon scrutiny of the documents, the respondents found that the petitioner has signed in capital letters of English which was not permissible as per notice of the examination. Held—Issues raised in the instant writ petition are squarely covered by the judicial pronouncements of this Court in the following cases (i) Decision dated 24th February, 2012 in W.P. (C) No. 1004/2012 titled as *Delhi Subordinate Services Selection Board and Another v. Neeraj Kumar and Another.* (ii) Decision dated 5th November, 2012 in W.P. (C) No. 6959/2012 titled as *Bittoo v. Union of India and Another,* (iii) Decision dated 4th December, 2012 in W.P. (C) No. 7158/2012 titled as Pawan Kumar and Union of India and Another—The adjudication in the above noted judgments and orders would guide adjudication of the present matter as well—It is well settled that there is no law which prohibits a person to sign in capital letters—As observed in *Pawan Kumar* (Supra), a signature is a trait which a person develops over a period of time and these traits can develop even with reference to capital letters—Petitioner cannot be denied consideration for appointment, and if otherwise eligible for the appointment, to the post of Constable (GD) in the ITBPF on the ground his signatures have been done in English capital letters—Writ petition is allowed in the above terms.

Bhagat Singh v. *UOI and Ors.* *2080*

SERVICE TAX—Finance Act, 1994–Taxable event—Respondent assessee company provided certain services prior to 14.05.2003 and also raised bills with respect to the same prior to 14.05.2003 but payments were received after

14.05.2003—Vide order dated 16.03.2012, CESTAT held the rate of service tax to be levied on the assessee to be 5% in as much as the service had been provided prior to 14.05.2003—Appellant aggrieved by the said order and sought to place reliance upon Rule 5B of the Service Tax Rules, 1994 and section 67A of the Finance Act to contend that the rate of tax to be levied should have been fixed at 8%. Held:- None of the provisions on which reliance is being sought are applicable in as much as the relevant period for determining the rate of tax to be levied is April, 2003 to September, 2003 and Rule 5B of the Service Tax Rules came into effect only on 01.04.2011 and section 67A of the Finance Act, 1994 was inserted only w.e.f 28.05.2012. The taxable event, as per the Finance Act, 1994 is the providing of the taxable service, which in the present case took place prior to 14.05.2003 and therefore the rate of 5% applicable prior to this date could only be levied. Appeal of revenue dismissed.

Commissioner of Service Tax v. *Consulting Engineering Services (I) Pvt. Ltd.* *2110*