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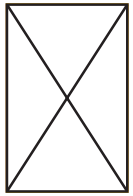

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ARBITRATION ACT, 1940—Condonation of delay in refiling the appeal against order passed by the Hon'ble Single Judge dismissing the objections preferred by the appellant—Delay of 67 days in refiling the appeal sought to be condoned on the grounds of dislocation of the original file in the office of the Advocate—Held, since it is not disclosed as to when and how the file got dislocated and when and how it was relocated and the application not being supported by affidavit of the Advocate, and it remaining unexplained as to how the general manager of the appellant could claim personal knowledge of such facts, the delay in refiling the appeal beyond 30 days cannot be condoned as the law prescribes is strict period of limitation—However, even on merits the impugned order found to be suffering no infirmity.

National Project Construction Corporation Ltd. v. *Sadhu Singh & Co.* *99*

— Section 30 & 33—Parties voluntarily entered into a settlement after the appellant negotiated with the respondent with regard to the deductions to be made on account of defective work—after two and a half month of recording of the settlement, the respondent released an amount larger than what was initially settled in full and final settlement—thereafter, the appellant invoked arbitration agreement—learned arbitrators passed arbitration award, which was challenged and the Hon'ble Single Judge set aside the award—Appeal—Held, in view of the law laid down by the Hon'ble Supreme Court in the case of *National Insurance Co. Ltd. vs. Boghara Plyfab Pvt. Ltd.,* there is no error in the decision of the Hon'ble single in concluding the there was no surviving disputes remaining between the parties which could be referred to arbitration in view of the full and final settlement of the accounts of the appellant.

Gursharan Singh v. *Bharat Petroleum Corporation Ltd.* *285*

ARBITRATION AND CONCILIATION ACT, 1996—Section 8—Plaintiff filed suit for recovery—Defendants in written statement, took number of preliminary objections including that suit was hit by Section 8—He relied upon one purchase order which contained arbitration agreement, whereas plaintiff raised plea that there was no arbitration clause between parties. Held: Arbitration Act does not oust the jurisdiction of Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps, as contemplated under sub-Section (1) and (2) of Section 8 of the Act—Since defendant filed written Statement disclosing all defences and without making any prayer for referring of dispute to arbitration, S. 8 cannot be invoked—Also, arbitration clause contained only in one of the two purchase orders.

R.R. Enterprises v. *C.M.D of Garware-Wall Ropes Ltd. & Ors.* *248*

— Section 34 of the ('Act') is to an Award dated 10 August 2001 passed by the learned Arbitrator in the dispute between the Housing and Urban Development Corporation ('HUDCO') and Unitech Limited ('Unitech') arising out of a contract entered into between them for construction of civil works of HUDCO Bazar, Plot No. 25, Bhikaji Cama Place, New Delhi (since named as August Kranti Bhawan). To the extent that the learned Arbitrator rejected Unitech's Claim 3 (g) for escalation/ compensation, Unitech has filed OMP No. 3 of 2001. To the extent Unitech's claims have been allowed, HUDCO has filed OMP No. 391 of 2001—Section 28 (3) of the Act mandates that the Arbitrator has to decide the disputes in terms of the contract. As explained by the Supreme Court in *New India Civil Erectors (P) Ltd. v. Oil and Natural Gas Corporation* (1997) 11 SCC 75, "the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it"—While discussing Additional Claim 5A, the learned Arbitrator noted the there was delay in grant of permissions for purchase of steel, delay in handing over complete and clear site, delay in issuing of working drawings, revisions and instructions, delay in approval of samples, directions and clarifications, delay in

making payments (mobilization advance and interim bills), failure to make payment of full escalation and the effect of stay order. On an examination of the evidence, the learned Arbitrator concluded that both the parties were equally responsible for delay in completion of the project and prolongation of the contract—The question that therefore arose for decision was whether HUDCO was liable to compensate Unitech for the delay, notwithstanding that there are prohibitory clauses in the GCC which read as "Clause 55.0 Possession of Site—However, a perusal of the impugned Award shows that there is no reference to Unitech having urged that any of the prohibitory clauses was opposed to Sections 23 and 28 of the CA. Whereas while discussing Additional clauses was opposed to Sections 23 and 28 of the CA. Whereas while discussing Additional Claim 3 (g) the learned Arbitrator referred to Clause 7 and Amendment No. 3 thereto and while discussing Claim No. 6 he referred to Clause 20.1, while discussing Additional Claims 5A, 6A and A7 he did not discuss any of the other prohibitory clauses. Clause 57.2 specifically states that "the Contractor shall not be entitled to claim any compensation or overrum charges whatsoever for any extension granted." Further Clause 55.1 also clearly states that if there is delay in making available any area of work, the Contractor shall not be entitled to claim any compensation when EOT is granted as a result thereof—There was no justification for the learned Arbitrator not to have even noticed the said clauses. If the leaned Arbitrator had after noticing the said clauses, interpreted them one way or the other, it might be possible for Unitech to argue that the Court should not interfere with such conclusion only because another view is possible. However, where the said prohibitory clauses are not even noticed by the learned Arbitrator the impugned Award becomes vulnerable to invalidity on the ground that it is contrary to the clauses of the contract—In the case on hand, the question of applicability of the amended Section 28 of the CA does not arise. Admittedly, the contract was completed long prior to 8th January 1997. Clause 66 of the GCC does not prescribe a period shorter than that provided under law of limitation for making a claim. Clause 66.3 states that any

claim which is not notified in two consecutive monthly statements for two consecutive months "shall be deemed to have been waived and extinguished." In other words it extinguishes the right to make a claim. In light of the law explained in Pandit Construction Company, the said clause was perhaps not opposed to Section 28 of the CA. In any event, the fact remains the true purport of the prohibitory clauses with reference to the Additional Claims 5A, 6A and A7 was not considered by the learned Arbitrator—The next major objection to the impugned Award is to the grant of interest. Under Claim 6 the learned Arbitrator has awarded pre-reference and *pendente lite* interest and under Additional Claims 3 (a) and 3 (b) he has granted future interest—The prohibition on the payment of interest under the above clause is not only as regards "earnest money, security deposit, interim or final bills" but "any other payments due under the contract" as well—Additional Claim 3 (f) pertained the claim of Unitech. After calculating the actual quantity of *Malba* the learned Arbitrator assessed that Rs. 64 per cum was reasonable given the prevalent conditions and computed the amount payable to Unitech at Rs. 5,81,133 as against the claimed amount of Rs. 34,81,600. This Court is unable to discern any patent illegality in the decision of the learned Arbitrator as regards additional Claim 3 (f)—The objection by Unitech to rejection of its Claim 3 (g) is without merit. The learned Arbitrator has given cogent reasons why in his view the Amendment 3 to Clauses 7 does in fact restrict the total escalation payable to only plus or minus 10%. This Court finds no error in the analysis or the reasoning of he learned Arbitrator for rejecting Claim 3 (g)—In conclusion, the impugned Award dated 10th August 2001 in respect of Additional Claims 5A, 6A and A7 as well as Additional Claims 3 (a) and 3 (b) is hereby set aside. Under Claim 3 (fourth reference) it is clarified that actual encashment amount of the BG or of Rs. 28 lakhs whichever is lesser should be refunded to Unitech. The award of pre-reference and *pendente lite* interest under Claim 6 is set aside. In all other respects, the impugned Award is upheld.

ARMS ACT, 1959—Sections 25/27 of the Arms Act—It appears that after the recording of his statement under Section 313 of the Cr. P.C., Virender Singh, absconded and was declared a proclaimed offender by the learned trial Judge. On his re-surfacing, the trial against him was completed which culminated in a judgment dated 26th April, 2005 passed by the learned Additional Sessions Judge finding him guilty of commission of the offence under Section 368 of the Indian Penal Code. After hearing the petitioner, by an order dated 5th May, 2005, the petitioner was sentenced to undergo rigorous imprisonment to life and to pay fine of Rs. 1,000/- under Section 364-A read with Section 120-B of the IPC and in default of payment, he was directed to undergo simple imprisonment for three months—The petitioner had assailed his conviction and the sentence imposed upon him by way of Criminal Appeal No. 668/2005 which came to be dismissed by a judgment dated 11th December, 2006 after detailed consideration by this Court—It is trite that the judgment would be law for the issue specifically raised and decided by the Court. In *A.R. Antulay Vs. R.S. Nayak & Anr.* AIR 1988 SC 1531, the Supreme Court in 1984 had referred the petitioner's trial for offences under the Indian Penal Code and Prevention of Corruption Act, to a single Judge of the High Court of Bombay. The petitioner had challenged the reference by way of a petitioner before the High Court of Bombay which rejected the same. The judgment of the Bombay High Court was assailed before the Supreme Court where the Court was primarily concerned with its power to transfer the cases against the petitioner under the Indian Penal Code as well as the Prevention of Corruption Act to the High Court and whether the same was authorized by law. Learned counsel for the petitioner is placing reliance on certain observations made in the minority view and not the binding dicta laid down in the said judgment which cannot guide adjudication of the issue before this Court—Before us, there is no dispute at all that there is no provision of the Code of Criminal Procedure which confers power of review on this Court. The judgment of this Court rendered on 11th December, 2006 was passed upholding the judgment of conviction passed by the learned

trial Court. The judgments are based on a careful scrutiny of the evidence which had been recorded in the petitioner's trial. *Rajesh Adhikari's* case was decided on evidence recorded in his trial. In this view of the matter, it is certainly not open to us at this stage to assum review jurisdiction which is not conferred on us by the Statute—It needs no elaboration that so far as the jurisdiction of a Court after disposal of an appeal on merits is concerned, the same can only be the limited extent as statutorily prescribed by Section 362 of the Cr.P.C.—We may note that if we were to agree with the petitioner, it can give rise to a situation where co-accused may at will abscond from justice and re-surface after pronouncement(s) against the co-accused to cloud the evidence which has already been recorded of particular witness or who is otherwise before the Court. The same is clearly not legally permissible—The reference in the caption of this petition to Articles 226 and 227 of the Constitution, is clearly misconceived inasmuch as this Court is not sitting in writ jurisdiction. The review petition has been filed in a disposed of criminal appeal—In view of the fact that we have held that this Court does not have the power of review in view of the fact that statute does not prescribe limitation for filing a review this application for condonation of delay is misconceived and is not maintainable.

Virender v. *The State of Delhi* *20*

CCS (CCA) RULES, 1965—Petitioner convicted and sentenced for offence under Section 7 Prevention of Corruption Act r/w Section 120B IPC—In appeal, the sentence of petitioner was suspended—Disciplinary Authority adopted the procedure under Rule 19 and issued show cause notice whereafter, petitioner submitted representation and after considering the same the Disciplinary Authority, levied the penalty of dismissal from service with a disqualification for further employment in the government—Original application of petitioner dismissed by Central Administrative Tribunal—Challenged—Held: The procedure laid down under Rule 19 must be scrupulously followed and in the present case, since the Disciplinary Authority did not apply its mind fully to the representation made by petitioner and went merely by the case of the co-

process of Court—As far as the contention that Petitioner No.7 cannot be arrayed as an accused, this Court is of the opinion that the trial Court while framing charges should consider her argument for discharge. This Court is confident that the trial Court at that stage would keep in mind the observations of the Supreme Court in *Sunita Jha vs. State of Jharkhand & Anr.,* (2010) 10 SCC 190 wherein it has been held that neither a girlfriend nor concubine is a relative of husband within meaning of Section 498A IPC. Needless to say, any observation in this order would not be an expression on merit and trial Court would take an independent view of the matter—Before parting with this matter, the Court would like to observe that today in nearly all criminal matters, as a matter of routine, at least at three stages, namely at the time of filing of FIR, framing of charges and an interlocutory stage of the trial, petitions for quashing and stay of the trial are being filed under Section 482 Cr. P.C. and Articles 226 and 227 of the Constitution of India. This is not only an unhealthy practice, but is burdening the Courts with unnecessary litigation. The litigants must realise that the power vested in this Court under Articles 226 and 227 of the Constitution of India and Section 482 Cr. P.C. is to be used sparingly and for rare and compelling circumstances as mentioned in *State of Haryana & Ors. vs. Bhajan Lal & Ors.*— Dismissed.

Udai Chand Bhardwaj & Ors. v. *State Govt. of N.C.T. of Delhi* *148*

CONSTITUTION OF INDIA, 1950—Rule 19, CCS (CCA) Rules, 1965—Petitioner convicted and sentenced for offence under Section 7 Prevention of Corruption Act r/w Section 120B IPC—In appeal, the sentence of petitioner was suspended—Disciplinary Authority adopted the procedure under Rule 19 and issued show cause notice whereafter, petitioner submitted representation and after considering the same the Disciplinary Authority, levied the penalty of dismissal from service with a disqualification for further employment in the government—Original application of petitioner dismissed by Central Administrative Tribunal—Challenged—Held: The procedure laid down under Rule 19 must be scrupulously followed and in the

present case, since the Disciplinary Authority did not apply its mind fully to the representation made by petitioner and went merely by the case of the co-accused, which was not even required, petitioner being group B employee, order of the Disciplinary Authority was not in consonance with Rule 19—Disciplinary Authority directed to pass appropriate orders on the representation already filed by petitioner.

Ravinder Kumar Mirg v. *Union of India & Ors.*..... *105*

— Article 226—Petitioner cleared class XII and applied for admission in Delhi University under Sports Quota, being a chess player—Criteria for sports admission provides for Fitness Test—By way of writ petition, petitioner approached High Court for quashing communication prescribing fitness test mandatory and precondition for appearing in sports trial test—Plea taken, chess does not involve any physical strain or activity—There is no rationale for holding such a fitness test for games like chess, which does not require strict standard of body fitness—Per contra plea taken, game of chess requires not only mental sharpness but physical prowess to be able to withstand stress and develop stamina, so to be able to maintain composure for long duration and keep mind active throughout—Held: While laying down physical fitness standard in impugned communication, University of Delhi has not specifically taken into consideration 'game specific fitness' which varies for different sports—Rigorous standard may not be totally justified for those who are into Indoor Games like Carom and Chess, which do not involve even least physical activity—Mandamus issued to University of Delhi to revisit and reconsider issue and if necessary, formulate standards for such sports which may be applicable from next academic year—Aforesaid exercise, may consume some time—Academic session has started for this year—Unless there is re-examination reconsideration of issue and fresh standards are prescribed by university for such indoor sports including chess, it is difficult to give any relief to petitioner—Laying down all those standards is not function of Courts—This Court can only direct University to reconsider matter in light of our observations made in this judgment and after in depth

deliberations, come out with physical standards that are required for these games.

Chetna Karnani v. *University of Delhi and Others ... 202*

DELHI RENT CONTROL ACT, 1958—Section 25-B(8)—Revision preferred against the order dated 01.06.2011, whereby the eviction petition was dismissed by the Additional Rent Controller as it suspected the bona-fide need of the petitioner. Held: Relying on the case of *Sarla Ahuja vs. United India Insurance Co. Ltd.* (AIR 1999 SC 100) wherein the Apex Court had held that satisfaction of the High Court when perusing the records of the case must be confined to the limited sphere that the order of the Rent Controller is "accordingly to law", the Court examined the impugned order and found no infirmity in the impugned order.

Puran Chand v. *Bhagwan Singh Verma 82*

— Section 14(1)(e)—Bonafide Requirement—Brief Facts—Respondent filed a petition for eviction against the petitioner and his mother and sisters for seeking eviction form the tenanted premises comprising of a shop on the ground floor of premises no .7/33, Ansari Road, Darya Ganj on the ground of bonafide requirement of the tenanted shop for the office of sushil Kumar jain S/o of the respondent/landlord—case that was set up by the respondent/ landlord is that he has three sons, and his son sushil kumar did not have any office space in the suit premises or anywhere else. But is sharing with his younger brother sunil in a rented premises of Yogesh Kumar Jain—They both have their separate businesses—Members of the family of the respondent are having their offices within the compound of suit premises which solves their problems—It is averred that Sushil would establish his independent office in the tenanted shop which is within the compound of the main premises—Petitioner sought leave to defend which was declined by the learned ARC vide the impugned order—Hence the present revision petition. Held: Landlord is the best judge to decide about his requirement and the choice of the place, and neither the tenant nor this Court can distate to him as to how else he can adjust himself without getting possession of

the tenanted premises—But, at the same time, it is also settled law that mere assertion that landlord requires the premises, occupied by the tenant, for his personal occupation, is not decisive and it is for the Court to determine the truth of the claim and also to see as to whether the claim is bonafide—In determining as to whether the claim is bonafide or not, the Court is under an obligation to examined, evaluate and adjudicate the bonafide of the learned—A claim founded on abnormal predilections of the landlord cannot be regarded as bonafide—In this regard the observations of the Supreme Court in *Shiv Sarup Gupta and of Delhi High Court in M/s. John Impex (Pvt.) Ltd. Vs. Dr. Surinder Singh & Ors.* 2007 (1) RCR 509, are relevant wherein it was held that the requirement of a landlord not being a mere whim or fanciful but that it should be a genuine need of the landlord—It is only then that the requirement can be said to be bona fide within the meaning of under Section 14(1) (e) of the said Act—This would naturally require all the necessary matrix in terms of the factual averments and the evidence to be adduced in that behalf—Simultaneously it has to be kept in mind that the landlord is the best judge of his requirement and a tenant cannot dictate the terms on which the landlord should live—The bona fide requirement of the landlord would also depend on his financial status and his standard of living—The ARC found in favour of the landlord/owner and thus what has to be considered is whether there is any illegality or jurisdictional error in the impugned order and not to sit as an appellate Court though the scope of scrutiny in a rent revision would be more than a revision petition under Section 115 of the Code of Civil Procedure, 1908—Petitioner has raised several triable issues, which could not have been out-rightly brushed aside at the threshold—Respondent ought to have been called upon to prove his bonafide requirement of the suit premises, and the Petitioner/tenant be afforded opportunity to test his claims—Petition is allowed.

Harsh Sabharwal v. *Sheetal Prasad Jain 234*

DELHI HIGH COURT ACT, 1966,—Letters Patent Clause 10—Letter Patent Appeal—Question in reference was as to

whether an order passed by Hon'ble Single Judge in exercise of Ordinary original Civil Jurisdiction, which is not appealable under the Code of civil Procedure can b impugned under Section 10(1) Delhi High Court Act, 1966 or under Clause 10 of Letters Patent Held, in case such a non-appealable order passed by the Hon'ble Single Judge meets the test of a "judgment" that besides matters of moment of affects vital and valuable rights of parties and which works serious injustice to the parties as per the parameters laid down by the Hon'ble supreme Court in the case of *Shah Babulal Khimji vs Jayaben D. Kania* an appeal to the Division Bench would lie exclusively under Section 10 of the Delhi High Court Act, 1966 and not under clause 10 of the Letters Patent.

Jaswinder Singh v. *Mrigendra Pritam Vikram Singh Steiner & Ors.* *436*

EMPLOYEE'S COMPENSATION ACT, 1923—Brief Facts—It is admitted position that the deceased Banti @ Jai Kishan was in the employment of respondent no.2 who was the owner of truck bearing no.HR-69-0441 and his death had occurred on 08.12.2009 during the course of employment as he was crushed under the wheels of aforesaid truck—Before the Commissioner, appellant had admitted its liability—The present appeal is filed against the impugned order dated 30th August, 2011 passed by the Commissioner, Employee's Compensation under the Employee's Compensation Act, 1923 wherein the Commissioner had by taking the salary of the deceased at Rs.4500/- per month and by taking into consideration the age of the deceased and the relevant factor as provided under the Act directed the appellant—Oriental Insurance Company to pay compensation of Rs. 5,04,000 along with simple interest @ 12% per annum from the date of accident i.e., 08.12.2009 till its realization to the respondent—Appellant has contended that the Commissioner has calculated the compensation on the basis of the amended Act by taking the wages of the deceased Rs. 4500/- per month—It is contended that as per the settled law laid down by the of the Supreme Court, the compensation in the present case ought to have been calculated on the basis of provisions which were applicable on the date of accident—

It is contended that under the unamended provisions applicable on the date of accident, the calculation was to be made on the basis of wages not exceeding Rs. 4000/- per month—In support of his contention, learned counsel for the appellant has relied upon *KSEB vs. Valsala:* II (1999) ACC 656 (SC)—It is further contended that the order grievance is that the interest on compensation is awarded by the Commissioner from the date of accident whereas it ought to be awarded from the date of adjudication of the claim petition. Held: What is relevant date for determining the rights and liabilities of the parties under the Act has been dealt with by the Supreme Court in the *Kerala State Electricity Board & Anr. vs. Valsala K and Anr.:* II (1999) ACC 656 wherein relying on the four Judges' Bench of the Supreme Court in *Pratap Narain Singh Deo v. Srinivas Sabata & Anr.:* 1976(1) SCC 289, it has been held that the relevant date for determination of date of compensation is the date of accident and not the date of adjudication of claim—Date of accident is 8th December, 2009—The amendment to the Act came into effect on 18th January, 2010, by which explanation II to Section 4 was to be taken into consideration for calculating the amount of compensation was not to exceed Rs. 4000/- whereas in the present case the Accordingly, excess amount of Rs.56000/- has been awarded—Let the excess amount of Rs.56000/- along with interest which has accrued on the same and which is lying deposited with the Commissioner be released in favour of the appellant.

Oriental Insurance Co. Ltd. v. *Bimlesh & Ors.* *132*

EMPLOYEE'S PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952—Section 7Q, 8, 8B to 8G and 14 B—Petitioner had not paid provident fund contribution and other contribution including administration charges payable under different provisions of Act in time and because of late payment, APFC initiated proceedings for recovery of damages under Section 14-B of Act—Damages in sum of Rs. 7,10,989/- were imposed under Section 14B of Act—APFC further ordered that petitioner is liable to remit a sum of Rs. 4,53,886/- towards interest payable under Section 7Q of PF Act @ 12%

per annum—Order attaching current account of petitioner, recovering a sum of Rs. 4,53,886/-, challenged before High Court—Plea taken, once damages under Section 14B of Act are recovered, there cannot be any payment of interest under Section 7Q of Act as interest component is already included in damages imposed under Section 14B of Act—Per Contra plea taken, Section 7Q of Act was introduced in year, 1997 which prescribes payment of interest on late damages of provident contribution—Unlike Section 14B of Act which provides for damages, this provision is compensatory in nature and there is no need to provide any adjudication or give any hearing—Legislative intent was that as soon as any amount becomes due, interest will accumulate automatically till such time amount is paid—Held: Interest on delayed contribution of provident fund became payable statutorily—After 26.09.2008, damages are now reduced by 12% at every earlier table is applied, interest payable under Section 7Q of Act was already included—Period for which damages under Section 14B of Act are levied is from June, 1999 to October, 2008—For almost entire period, interest stands charged by imposing damages under Section 14B of Act with application of rates mentioned in table prevailing prior to 26.09.2008—Clarification issued by Department that interest is to be charged separately would be of no avail—Mechanism to charge interest separately was not enforced by modifying existing table, which step was taken only in issuing fresh table making effective from 26.09.2008—In M/s. System and Stamping, Division Bench took correct view that damages under Section 14B of Act were inclusive of interest chargeable under Section 7Q of Act; as present case covers that very period, respondent had no right to charge interest under Section 7Q of Act additionally, when it already stood payable in order passed under Section 14B of Act—PF Department directed to refund that amount of Rs. 4,53,886/- along with interest @ 12% till date of payment.

Roma Henny Security Services Pvt. Ltd. v. *Central Board of Trustees, E.P.F. Organization Through Assistant P.F. Commissioner, Delhi (North)* *190*

EXPLOSIVE SUBSTANCE ACT, 1908—Sec. 5 read with Sections 18 & 23 of the Unlawful Activities (Prevention) Act, 1957 (in short UAP Act) and Indian Penal Code, 1860—Section 120B and the order on sentence—A perusal of Section 18 UAP Act shows that it punishes conspiracy and acts to attempt, abet, advise the commission of a terrorist act or any act preparatory to the commission of a terrorist act. The possession and supply of large quantity of RDX with detonators is certainly an act preparatory to and to aid the commission of a terrorist act. Section 23 UPA Act provides for the enhanced penalty if a person is found in possession of explosive substance with intent to aid a terrorist—It is thus apparent even if the fact that the co-accused Abu Hamza was discovered at the instance of the Appellants is not admissible in evidence under Section 27 the Evidence Act, the same is admissible under Section 8 of the Evidence Act. Further the factum of the co-accused abu Hamza waiting for the accused near Jawahar Lal Nehru Stadium is also admissible under Section 27 of the Evidence Act. PW1 and PW7 have clearly deposed that after the recovery of the explosives the Appellants disclosed that they were to deliver the explosives to one Abu Hamza, a Pakistani national who was waiting for them at Jawaharlal National Stadium. When the police party reached the spot they found the said Abu Hamza at Jawaharlal Nehru Stadium who died in the encounter. PW13 has categorically deposed that during the personal search of Abu Hamza one internal connection slip was recovered in the name of Rajesh Kumar, R/o 44/9 Ballabhgarh, Haryana. The recovery of huge cache of arms was effected from the above mentioned house at Ballabhgarh, Haryana. PW4, the landlord has identified the deceased Abu Hamza as the same person who had taken his house on rent impersonating him as Rajesh Kumar are also admissible and relevant pieces of evidence—The contention of the learned counsel for the Appellant that the recovery of arms is not sufficient to prove that the accused had to use the same the terrorist activity holds no grounds. The act of accused being in possession of explosive (RDX) with live detonators which were to be supplied to Abu Hamza and subsequent recovery of cache of arms and ammunitions from

the house where he stayed on rent clearly shows the intention of the Appellants. From the quality and quantity of explosives with the Appellants, a clear inference can be drawn that they entered into a conspiracy as well as committed acts preparatory to commission of a terrorist act and facilitate some terrorist activity. Thus the ingredients of the act of conspiracy stand duly proved. Under Section 5 of ES Act the onus shifted on the Appellants to show that the possession was for a lawful object, after the initial burden of proving the possession of explosive substance had been discharged by the prosecution. The Appellants have failed to discharge the said burden—Learned counsel for the Appellants is also concerned with the fine imposed and sentence awarded in default of payment of fine as the Appellants have almost undergone the substantive sentences. According to learned counsel the fine amount of Rs. 25,000/- Rs. 50,000/- and Rs. 50,000/- for offences under Sections 5 ES Act and Sections 18 and 23 UAP Act respectively are excessive. I do not find any infirmity on this count in the order on sentence passed by the learned Additional Sessions Judge—Dismissed.

Firoz Abdul Latif Ghaswala & Anr. v. *State Govt. of NCT of Delhi* *1*

FAMILY COURTS ACT, 1984—Section 19—Family Court By Impugned Order Granted Interim Maintenance Under Section 125 Cr.P.C.—Challenged In Appeal—Maintainability of Appeal Examined In View of Section 19 of The Act—Held, In Respect of Orders passed Under Section 24-27, Hindu Marriage Act, Appeals would lie in view of section 19(6) of the act as such orders are intemediate orders—also held, no appeal would lie against orders passed under Section 125-128 Cr.P.C.—Further held ,remedy of criminal revision would be available against both the interim and final orders under section 125-128 Cr.P.C—further held, all orders passed by the family court which are intermediate orders and not merely interlocutory order would be amenable to the appellate jurisdiction under Section 19 of the Act—finally held, the present appeal not maintainable.

Manish Aggarwal v. *Seema Aggarwal & Ors.* *210*

GUARDIANS AND WARDS ACT, 1890—Section 7 and 26—Brief Facts—The appellant as a single lady—She had filed a petition under Section 7 and 26 of the Act for her appointment as guardian of the person of minor girl Urmila born on 21.11.2001 under the care of respondent no.2 Society, with permission to adopt her as per local Court of her country—The said petition was filed through Mrs. Vijay Raina, Director SOS children's Villages of India i.e. respondent No. 2 before the learned District Judge, Delhi—At the time, appellant was 37 years of age—Appellant is permanent resident of USA being its citizen/national—The appellant was earlier married to Anthony F. Hawk on 28.09.1996—Due to irreconcilable differences between them, they could not live together and their marriage ended on 01.09.2004—From the said wedlock, there are two male children viz., Spencer Anthony Howk and Keepan Wesley Hawk born on 26.03.1999 and 18.07.2001, respectively—Appellant is having joint custody of the children along with her earlier husband—It is stated in the petition that appellant is medically and physically fit and wishes to adopt a minor child to expend her family—She is self-employed for the past 5 years as a property manager—Her average annual income in the year 2008 $323,000—She has a high status and sufficient means of livelihood—Before the learned District Judge, it was argued that the appellant was the most suitable person to adopt the child Urmila and it was in the welfare and interest of the child to appoint appellant as her guardian with necessary permission to adopt the said child as per local laws of the country—After considering the material on record, the learned District Judge dismissed the application mainly on the ground that in the absence of appellant at home, presence of female child in the company of two male children of almost same age might not be conducive—It was further observed that appellant is already having two male children from the previous marriage—She is open to idea of remarriage—In these circumstances, it was not a fit case to appoint the appellant as guardian for female child Urmila and to adopt her as per laws of country—Aggrieved with the same, the present appeal under Section 47 of the Guardians and Wards Act, 1890 was filed. Held—As per Section 7, District Judge appoints the

guardian of the person and properties of minor—If the District Judge finds that the appointment will not be in the welfare of the minor, the petition will be rejected—In making orders as to the guardianship; the prime consideration is the welfare of the child—The welfare has to be measured not only in terms of money and physical comforts—The word "welfare" must be taken in its widest sense—The moral and ethical welfare of the child must also weigh with the Court as well as its physical sell being—The reference is made to the judgment of the Madras High Court titled *D. Ranaj v. Dhana Pal and Anr.;* AIR 1986 Mad. 99—The welfare includes healthy upbringing of the child in a congenial atmosphere—Section 17 deals with the matters to be considered by the Court in appointing guardian—The Supreme Court in *Laxmi Kant Pandey vs. UOI* 1984 (2) SCC 244, while supporting the inter-country adoptions, has held that while supporting inter-country adoption, it is necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the child, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation that in his own country.

Erin Jennifer Hawk v. *State & Anr.* *357*

INCOME TAX ACT, 1961—Section 142(1), 147 and 148—In respect of Assessment year (AY) 2005-06, Assessing Officer (AO) issued notice on ground that income chargeable to tax for AY 2005-06 has escaped assessment and called upon petitioner to deliver return of income—Petitioner filed return of income and sought reasons from AO for issuance of impugned notice of reassessment—AO provided reasons and on same day also issued a notice seeking information in connection with petitioner's assessment—Petitioner filed objections questioning jurisdiction of AO to reopen assessment—Till date of filing writ petition, objections were

not disposed of and hence, petitioner filed present writ petition—Plea taken, reassessment proceedings commenced are malafide and without jurisdiction—Per contra plea taken, reasons recorded do make out a prima facie case of escapement of income and therefore notice cannot be said to be without jurisdiction—Held—Ground on which assessment has been reopened is that petitioner did not disclose expenditure incurred by her in her foreign travels during relevant previous year—AO has formed a prima facie of tentative belief that there was escapement of income as a result of failure of petitioner to furnish fully and truly all primary and material facts relating to her assessment—In absence of any document or evidence filed alongwith her return of income explaining expenditure incurred by her on her foreign travels during relevant year, AO was justified in invoking first proviso to Section 147 and coming to prima facie belief there was escapement of income on account of assessee's failure to satisfy requirements of explanation below section 147—Notice issued under section 148 of Act for assessment year 2005-06 was within jurisdiction of AO—AO directed to dispose of objections filed by petitioner within a reasonable time, if not already disposed.

Shumana Sen v. *Commissioner of Income Tax XIV & Ors.* *426*

INDIAN PENAL CODE, 1860—Section 364-A/368 and under Arms Act, 1959—Sections 25/27 of the Arms Act—It appears that after the recording of his statement under Section 313 of the Cr. P.C., Virender Singh, absconded and was declared a proclaimed offender by the learned trial Judge. On his re-surfacing, the trial against him was completed which culminated in a judgment dated 26th April, 2005 passed by the learned Additional Sessions Judge finding him guilty of commission of the offence under Section 368 of the Indian Penal Code. After hearing the petitioner, by an order dated 5th May, 2005, the petitioner was sentenced to undergo rigorous imprisonment to life and to pay fine of Rs. 1,000/- under Section 364-A read with Section 120-B of the IPC and in

default of payment, he was directed to undergo simple imprisonment for three months—The petitioner had assailed his conviction and the sentence imposed upon him by way of Criminal Appeal No. 668/2005 which came to be dismissed by a judgment dated 11th December, 2006 after detailed consideration by this Court—It is trite that the judgment would be law for the issue specifically raised and decided by the Court. In *A.R. Antulay Vs. R.S. Nayak & Anr.* AIR 1988 SC 1531, the Supreme Court in 1984 had referred the petitioner's trial for offences under the Indian Penal Code and Prevention of Corruption Act, to a single Judge of the High Court of Bombay. The petitioner had challenged the reference by way of a petitioner before the High Court of Bombay which rejected the same. The judgment of the Bombay High Court was assailed before the Supreme Court where the Court was primarily concerned with its power to transfer the cases against the petitioner under the Indian Penal Code as well as the Prevention of Corruption Act to the High Court and whether the same was authorized by law. Learned counsel for the petitioner is placing reliance on certain observations made in the minority view and not the binding dicta laid down in the said judgment which cannot guide adjudication of the issue before this Court—Before us, there is no dispute at all that there is no provision of the Code of Criminal Procedure which confers power of review on this Court. The judgment of this Court rendered on 11th December, 2006 was passed upholding the judgment of conviction passed by the learned trial Court. The judgments are based on a careful scrutiny of the evidence which had been recorded in the petitioner's trial. *Rajesh Adhikari's* case was decided on evidence recorded in his trial. In this view of the matter, it is certainly not open to us at this stage to assum review jurisdiction which is not conferred on us by the Statute—It needs no elaboration that so far as the jurisdiction of a Court after disposal of an appeal on merits is concerned, the same can only be the limited extent as statutorily prescribed by Section 362 of the Cr.P.C.—We may note that if we were to agree with the petitioner, it can give rise to a situation where co-accused may at will abscond from justice and re-surface after pronouncement(s) against

the co-accused to cloud the evidence which has already been recorded of particular witness or who is otherwise before the Court. The same is clearly not legally permissible—The reference in the caption of this petition to Articles 226 and 227 of the Constitution, is clearly misconceived inasmuch as this Court is not sitting in writ jurisdiction. The review petition has been filed in a disposed of criminal appeal—In view of the fact that we have held that this Court does not have the power of review in view of the fact that statute does not prescribe limitation for filing a review this application for condonation of delay is misconceived and is not maintainable.

Virender v. *The State of Delhi* *20*

— Section 302—The entire case of prosecution is based on the circumstantial evidence. The approach to be adopted and the test to be applied by the Court in cases based on circumstantial evidence, was examined by the Supreme Court in *Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh;* : 1953 Cri.L.J. 129. The Court in that case observed:- "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."—In the present case, nothing has been placed on record by appellant to show in what manner prejudice has been caused to appellant by not putting the said statement. Further even if this piece of evidence regarding motive is ignored, the case of prosecution cannot be thrown out considering the other circumstantial evidence proved against the appellant—The stand of the appellant in the statement u/s 313 Cr.P.C. is that the deceased was his *ustad*

who had trained him in tailoring. On 03.01.1993 in the early morning he had gone to attend the natural call. When he had returned home, he saw that the deceased had been murdered. He cried *"murder ho gaya, murder ho gaya"*. One Raju was also sleeping on that night with him and when he came after attending the natural call, that Raju was not there, persons apprehended him on suspicion. We have examined this stand also. No evidence is led by him to substantiate the same. Perusal of evidence of Om Prakash PW-7 shows that no suggestion was given to him that Rajesh had committed the murder. Further as per appellant, the deceased was having animosity with Rajesh and he was responsible for the occurrence as Rajesh was sleeping with deceased on that night. The said stand is not believable. If Rajesh was having animosity with the deceased, in that event the question of his sleeping with deceased did not arise. Further, Om Prakash PW7 had stated in the evidence that when on hearing the shrieks he had pushed the door, appellant told him that the deceased was prone to fits and thereafter he ran away from the room. In these circumstances, defence taken is at variance and further the same is also not believable. Further there is nothing on record to substantiate the same—The circumstantial evidence relied upon by the prosecution clearly establishes that the appellant and the deceased were living together as tenants in the house of Om Parkash PW-7. The same is also admitted by the appellant in his statement u/s 313 Cr/P.C. There id evidence of Om Parkash PW-7 that on the previous night of crime they were together in the room—The circumstantial evidence established above are of conclusive nature and from the same no other hypothesis can be drawn except that of guilt of the appellant.

Ajay Kumar v. *State* *112*

— Section 120B and the order on sentence—A perusal of Section 18 UAP Act shows that it punishes conspiracy and acts to attempt, abet, advise the commission of a terrorist act or any act preparatory to the commission of a terrorist act. The possession and supply of large quantity of RDX with detonators is certainly an act preparatory to and to aid the

commission of a terrorist act. Section 23 UPA Act provides for the enhanced penalty if a person is found in possession of explosive substance with intent to aid a terrorist—It is thus apparent even if the fact that the co-accused Abu Hamza was discovered at the instance of the Appellants is not admissible in evidence under Section 27 the Evidence Act, the same is admissible under Section 8 of the Evidence Act. Further the factum of the co-accused abu Hamza waiting for the accused near Jawahar Lal Nehru Stadium is also admissible under Section 27 of the Evidence Act. PW1 and PW7 have clearly deposed that after the recovery of the explosives the Appellants disclosed that they were to deliver the explosives to one Abu Hamza, a Pakistani national who was waiting for them at Jawaharlal National Stadium. When the police party reached the spot they found the said Abu Hamza at Jawaharlal Nehru Stadium who died in the encounter. PW13 has categorically deposed that during the personal search of Abu Hamza one internal connection slip was recovered in the name of Rajesh Kumar, R/o 44/9 Ballabhgarh, Haryana. The recovery of huge cache of arms was effected from the above mentioned house at Ballabhgarh, Haryana. PW4, the landlord has identified the deceased Abu Hamza as the same person who had taken his house on rent impersonating him as Rajesh Kumar are also admissible and relevant pieces of evidence—The contention of the learned counsel for the Appellant that the recovery of arms is not sufficient to prove that the accused had to use the same the terrorist activity holds no grounds. The act of accused being in possession of explosive (RDX) with live detonators which were to be supplied to Abu Hamza and subsequent recovery of cache of arms and ammunitions from the house where he stayed on rent clearly shows the intention of the Appellants. From the quality and quantity of explosives with the Appellants, a clear inference can be drawn that they entered into a conspiracy as well as committed acts preparatory to commission of a terrorist act and facilitate some terrorist activity. Thus the ingredients of the act of conspiracy stand duly proved. Under Section 5 of ES Act the onus shifted on the Appellants to show that the possession was for a lawful object, after the initial burden of proving the possession of

explosive substance had been discharged by the prosecution. The Appellants have failed to discharge the said burden—Learned counsel for the Appellants is also concerned with the fine imposed and sentence awarded in default of payment of fine as the Appellants have almost undergone the substantive sentences. According to learned counsel the fine amount of Rs. 25,000/- Rs. 50,000/- and Rs. 50,000/- for offences under Sections 5 ES Act and Sections 18 and 23 UAP Act respectively are excessive. I do not find any infirmity on this count in the order on sentence passed by the learned Additional Sessions Judge—Dismissed.

Firoz Abdul Latif Ghaswala & Anr. v. *State Govt. of NCT of Delhi* *1*

INDIAN SUCCESSION ACT, 1925—Sec. 63—will—Probate—This is a petition for grant of probate in respect of the Will, alleged to have been executed by late Smt. Shanti Devi on 19.07.1991. Smt. Shanti Devi, who expired on 08.03.2004, was survived by four legal heirs, including the petitioners Prithvi Sehli and Balraj Sehli. It is alleged that in her life time, she had executed the aforesaid Will dated 19.07.1991 in the presence of two attesting witnesses, namely, Vinay Shukul and Ram Das Singh—The execution of an unprivileged Will is governed by Section 63 of Indian Succession Act which, to the extent it is relevant, provides that the Will shall be attested by two or more witnesses, each of whom has seen the Testator sign or affix his mark to the Will or had seen some other person sign the Will, in the presence and by the direction of the Testator, or has received from the Testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the Testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary. Section 68 of Evidence Act, to the extent, it is relevant, provides that if a document is required by law to be attested, it shall not be used as evidence until at least one attesting witness has been called for the purpose of proving its execution if there be an attesting witness alive, and subject

to the process of the Court and capable of giving evidence. Since the Will is a document required by law to be attested by at least two witnesses, the petitioner could have proved it by producing one of the attesting witnesses of the Will. The execution of the will has been duly proved by way of affidavit of the attesting witness Mr. Vinay Shukul. The execution of the Will thus stands duly proved. There are no suspicious circumstances surrounding execution of Will in question—The respondent No.2, through his counsel, states that he has no objection to grant of probate to the petitioners. Though in the Will, Smt. Shanti Devi bequeathed her properties to the petitioners to the exclusion of her husband and son, considering the fact that the husband had given no objection and the third son of Smt. Shanti Devi, namely, respondent No. 3 Raviraj Sehli had not only executed a relinquishment deed in favour of the petitioners, but also an affidavit/NOC, admitting execution of the Will, there is no ground to suspect the genuineness and authenticity of the Will set up by the petitioners and there is no valid reason for refusing probate to the petitioners—For the reasons stated hereinabove, the petition is allowed. Probate of the Will executed by late Smt. Shanti Devi on 19.07.1991 be issued to the petitioners with copy of the Will annexed to it, as per rules, after confirming that the report of Chief Revenue Controlling Authority along with valuation report has been received.

Prithviraj Sehli @ Pracha Prachaseri & Anr. v. *State & Ors.* *127*

INDUSTRIAL DISPUTES ACT, 1947—Petitioner challenged award passed by PO Labour Court-I, whereby petitioner management was directed to reinstate respondent No. 2 with 25 percent back wages on the grounds that petitioner is not an industry and the impugned award was passed on 17.12.98, after setting aside exparte award dated 05.10.95, published on 11.12.95—Held: Since one of the authorized activity of petitioner is to purchase property and maintain the same, staff which would be employed for the purpose of maintenance of the said buildings which earn profit as well, cannot be said to be exempted from being employed in an industry and besides

that, one of the objectives of petitioner being improvement of public health and medical education, there was no infirmity in the view taken by the Labour Court that petitioner is an industry—As regards the setting aside of the impugned award after expiry of 30 days post publication, held that the award was published on 11.12.95 and the application to set aside the award was filed by respondent No.2 on 09.01.96, which is well within 30 days from its publication; as such the Labour Court had not become functus officio.

Indian Medical Association v. *Po Labour Court-I & Anr.* *272*

LEASE—Right to Conversion of the Leasehold into Freehold—Brief Facts—Four intra-Court appeals, though against separate judgments in separate writ petitions, are listed together since the judgments of the learned Single Judge under challenge in LPA Nos. 147/2007,297/2007 and 161/2009 merely follow the judgment of the learned Single Judge under challenge in LPA No.2298-99/2006—Further, all appeals are stated to entail the same question of law i.e. the right, of the lessees of land underneath disinvested hotels, to have the same converted into freehold—Though the land subject matter of LPA No.297/2007 is not underneath a disinvested hotel but underneath a cinema hall but the learned Single Judge has qua the same also, followed the dicta under challenge in LPA No. 2298-99/2006 and the counsels in LPA No. 297/2007 also have not argued the same any differently—Rather, arguments have been addressed with respect to LPA No.2298-99/2006 only, with the counsels in other matters merely adopting the arguments—LPA No. 2298-99/2006 arises from order dated 29.08.2005 allowing W.P.(C) No.15058-59/2004 preferred by the respondents therein and also impugns the order dated 25.08.2006 in review petition preferred there against—The same concerns land underneath erstwhile Kanishka Hotel and Kanishka Shopping Plaza. LPA No. 147/2007 arises from judgment dated 01.09.2006 allowing W.P. (C) No. 450/2005 preferred by the respondents therein and pertains to the land underneath erstwhile Qutub Hotel—LPA No. 297/2007 arises from the judgment dated 25.08.2006 allowing W.P.(C) No.14696/2004 preferred by the respondents therein and pertains to land underneath the Eros Cinema Building—LPA No. 161/2009 arises from judgment dated 04.12.2008 allowing W.P.(C) No. 24033-34/2005 preferred by the respondents therein and pertains to the land underneath restwhile Lodhi Hotel at Delhi—The learned Single Judge has held the leasehold land underneath the disinvested hotels and cinema to be entitled to freehold conversion under the Policy introduced by the Government and has thereby quashed the decision of the Land and Development Office (L&DO) refusing freehold conversion of such land and held L&DO to be not entitled to discriminate between the land underneath the disinvested hotels and cinema and other leasehold lands being converted into freehold—Hence the present Appeal—All that which requires determination is, whether the respondents, under the Policy floated by the L&DO, have a right to such conversion and if not, whether the appellant L&DO, in denying such conversion to the respondents, is discriminating against the respondents. Held: No challenge have been made since the year 1992 when the Scheme/Policy of freehold conversion was first introduced, on the ground of discrimination, for allowing such conversion qua one category of leases and not others—The question of discrimination in such a situation does not arise since to lessee has a right of such conversion and merely because the lessor has granted such privilege to some lessees, does not entitle others, who form a district class/category, to also claim such privilege/benefit—Under the Scheme/Policy itself, appellant L&DO had made only such commercial and mixed land use properties eligible for conversion, "for which ownership rights had been conferred"—A lease is different from ownership and a lease in which ownership rights are conferred would cease to be a lease (*Byramjee Jeejeebhoy (P) Ltd. v. State of Maharashtra* AIR 1965 SC 590).

Union of India & Anr. v. *Hotel Excelsior Ltd. & Anr.* *157*

LETTER PATENT APPEAL—Question in reference was as to whether an order passed by Hon'ble Single Judge in exercise of Ordinary original Civil Jurisdiction, which is not appealable

under the Code of civil Procedure can b impugned under Section 10(1) Delhi High Court Act, 1966 or under Clause 10 of Letters Patent Held, in case such a non-appealable order passed by the Hon'ble Single Judge meets the test of a "judgment" that besides matters of moment of affects vital and valuable rights of parties and which works serious injustice to the parties as per the parameters laid down by the Hon'ble supreme Court in the case of *Shah Babulal Khimji vs Jayaben D. Kania* an appeal to the Division Bench would lie exclusively under Section 10 of the Delhi High Court Act, 1966 and not under clause 10 of the Letters Patent.

Jaswinder Singh v. *Mrigendra Pritam Vikram Singh Steiner & Ors.* *436*

LIMITATION ACT, 1963—Section 17—Plaintiff filed suit seeking reliefs of rendition of accounts and injunction against defendants, from using technology given under licence agreement dated 27/01/1983 for manufacturing of Monocrotophos Technology including Monocrotophos 36 WSC, as defendant had not complied with terms of licence agreement—Defendants contested suit contending, technology supplied by plaintiff was defective, so it was forced to enter into another agreement seeking outside expert's help—Also, suit of plaintiff was time barred—As per plaintiff, defendant kept on filing Nil returns mentioning that commercial production did not start for commencement of payment of royalty—However, when officer of plaintiff visited premises of defendant, it transpired that defendant was selling products manufactured by technology supplied by plaintiff—Moreover, suit was within limitation which commenced from date of commercial production and defendants had malafidely and illegally concealed the said date from plaintiff. Held:- When a party conceals production of documents and the same is not brought to the notice of plaintiff/applicant, Section 17 of Act shall come into play.

National Research Development Corporation v. *National Agro-Chemicals Industries Ltd.* *88*

MOTOR VEHICLES ACT, 1988—Appeal impugns the common

order dated 18.03.2000 of the Motor Accidents Claims Tribunal (MACT). In FAO 260/2000 it was contended that the compensation awarded towards permanent disability was on the lower side and there was no compensation awarded for loss of amenities. In respect to Appellant in FAO 261/2000 it was challenged that no compensation was awarded under the pecuniary and non pecuniary heads were low. Also the claim petition was filed in the year 1983, but no interest was awarded to the appellants. Held (FAO. 260/2000)—As there was no evidence with regard to the Appellant's educational qualification, and therefore the Court assumed effect on the Appellant's work to the extent of 50% and raised the compensation towards loss of earning capacity to the tune of Rs. 40,000. Court also raised the compensation towards pain and suffering to Rs. 20,000. Also the Court awarded interest @ 7.5% per annum for five years upto the date of the decision of thee impugned judgment and thereafter the same rate of interest thereafter from date of filing of the Appeal till its payment. Held: (FAO. 261/2000): Interest @ 7.5% per annum awarded for five years upto the date of the decision of thee impugned judgment and thereafter the same rate of interest thereafter from date of filing of the Appeal till its payment.

Manorama Jain v. *DDA and Ors.* *139*

— Section 163, 163 A—Appeal filed against the Judgment of Motor Accidents Claim Tribunal whereby compensation awarded in favour of Claimant—Claimant while driving a Truck rammed against a Bus resulting into injuries to the Claimant—Question before the Tribunal was whether the Claimant, who was driving the truck himself, was entitled to compensation under the Motor Vehicles Act from the owner or the authorized insurer or under the Workmen's Compensation Act for having suffered as injury as an employee—Held: That no evidence produced by the Claimant to show that accident resulted on account of some mechanical failure which was driven by Claimant himself—Petition under Section 163 A is not maintainable since accident caused by Claimant's negligence and that the entitlement of Claimant could be under the Workman's Compensation Act.

— Section 168—Appeal by the Insurance Company for reduction of compensation awarded to Respondents for death of the Constable in Delhi Police on the ground that since his wife. Respondent No. 1 appointed as Constable on compassionate grounds. Her incomes is liable to be deducted from the compensation payable to the legal heirs of the deceased—Held: That the legal heir who accepts the appointment on compassionate grounds, sweats for the payment of the salary and such, the same is not liable to be deducted from the amount of compensation payable to the legal heirs.

— Section 67, Indian Evidence Act on question of liability of pay compensation, the tribunal relied upon testimony of RW1 who simply stated that the report Ex.R1 was obtained by the insurance company from Cuttack Transport Authority and as per the said report the driving licence of the offending driver was fake- held even if Ex.R1 is assumed to be a public, document, it ought to have been proved by summoning a witness from the transport authority in terms with Section 67 of the Evidence Act and in the absence of formal proof, it could not be said that the offending driver did not hold valid driving licence and accordingly insurance company cannot avoid liability.

PUBLIC PREMISES (EVICTION OF UNAUTHORIZED OCCUPANTS) ACT, 1971—Section 15—Code of Civil Procedure, 1908—Section 9, 11 order 7 Rule 11—Plaintiff filed suit claiming declaration of ownership in land situated in Baghraoji, Delhi alleging that land was given to it in exchange for another piece of land, which was acquired by DDA for re-aligning Daryai Nala—Estate Officer had already passed order in consolidated petition filed by defendant for eviction of plaintiff and for mesne profit. Held: The jurisdiction of civil

Court is completely barred in respect to eviction of a person, who is in unauthorized occupation of the public premises.

REVIEW PETITION—RFA(OS) 23/1998 was decided by a Division Bench of this Court vide judgment dated 23.11.2001, wherein area of various allottees was reduced including that of the applicant from decretal area to 4822 sq.ft. Thereafter the applicant M/s William Jacks and Company xs(India) Ltd. filed Review Application No. 162/2003 seeking review of this judgment as vide judgment dated 23.11.2001, the applicant was allotted 4822 sq.ft. area on the 12 Bara Khambha Road, New Delhi - 110001 whereas it had obtained the decree dated 5.9.1997 in Suit No. 728/1987 allotting an area of 7460.342 sq.ft. on the 11th floor which decree had become final as no appeal was filed there against. The plea, therefore, was that such a decree could not be varied in the aforesaid proceedings in which applicant was not a party. Held: That the Respondent was constructing the said building, advertised the proposed construction and solicited buyers. However, the Respondent booked more space than which was available in the building, and led to buyers filing suit. When these suits started piling up, the learned Single Judge appointed a Committee which could consider the claims of all the flat buyers and suggest the areas which could be allotted to each of them. The Committee filed exhaustive report before the learned Single Judge who was seized of all the suits. However, when the suits came up for hearing and dealt with by another Single Bench, he took the view that each suit for specific performance was to be dealt with on its own merits. Thereafter a spate of appeals came to be filed. Lead appeal was RFA(OS) 23/1998 as filed by Skipper Bhavan Flat Buyers Association. The Division Bench was of the opinion that in a situation like this, the report should not have been discarded and should have been acted upon and it was doing substantial and complete justice to all the flat buyers.

SMUGGLERS AND FOREIGN EXCHANGE MANIPULATORS (FORFEITURE OF PROPERTY) ACT, 1976—Section 12(4)—The competent authority under SAFEMA passed an order dated 14.07.1998 for forfeiture of several properties under Section 7 of SAFEMA—The common appeal filed on behalf of the appellants herein before the said Tribunal was filed on 20.10.1998. It is obvious that the appeal was beyond the period of 60 days from the passing of the order dated 14.07.1998 by the competent authority. We may point out, at this stage, that the appellants had admitted in their said appeal before the Tribunal that the order dated 14.07.1998 was served upon them on 29/30th July, 1998—A condonation of delay application was also filed along with the said appeal before the said Tribunal —The Tribunal took up the application for condonation of delay and disposed of the same by its order dated 26.10.1998—By an order of the same date, the said application had been dismissed—Thereafter, both the appellants filed an application for review of the said order dated 26.10.1998, whereby the condonation of delay application was rejected and the appeal was held to be barred by limitation—The said review application was disposed of by an order dated 10.02.1999 by holding that proper service had been effected and that there were no grounds for reviewing the order dated 26.10.1998—he review petition was dismissed—The only issue that arises for consideration is whether the Appellate Tribunal for Forfeited Properties had not committed an error in law in dismissing the appellants common appeal filed purportedly under Section 12(4) of 'SAFEMA' on the ground that the said appeal was beyond the time prescribed under the said provision—Hence the present Appeal. Held: There is no provision for review in SAFEMA—Therefore, the Tribunal ought not to have even entertained the review petition—It is a well settled principle that the power of review is the creature of statute and unless and until the statute provides for a review, any authority, other than a Court of plenary jurisdiction, such as a High Court, would not have ant inherent power of review—If any authority is needed for this purpose, the decision of the Supreme Court in the case of *Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya, Sitapur* (O.P) & Ors: (1987) 4 SCC 525 would be sufficient—An order purportedly passed in exercise of a review jurisdiction, which an authority does not have, would be a nullity—This is also clearly established in the said decision of the Supreme Court—Consequently, all arguments which were considered and raised and disposed of by the review order dated 10.02.1999 would be of no consequence—The review petition was not maintainable and the review order dated 10.02.1999 was also a nullity.

SPECIFIC PERFORMANCE—Mesne profits—Suit for possession and mesne profits—Counter claim for specific performance of Agreement of Sale—Brief Facts—Appellant vide Agreement of sale of 23rd January, 1984 had agreed to sell his leasehold residential premises to the respondent for a consideration of 14 lacs only, out of which sum of 13 lacs only was received by appellant from respondent and upon obtaining of requisite permission from the authorities concerned to transfer the leasehold rights in the subject premises—Respondent was to pay the balance sale consideration of Rupees one lac only and to also pay the unearned increase of 8 lacs only or any such amount as determined by the DDA—At the time of execution of Agreement of sale, possession of the subject premises was handed over by appellant to respondent—Vide communication of 3rd June, 1987, DDA informed appellant that the unearned increase payable was 15,28,556/- and next very day, appellant had called upon respondent orally as well as vide letter of 4th June, 1987 to pay unearned increase—Since aforesaid dues were not cleared, therefore, DDA vide its communication of 27th November, 1987 informed appellant that permission for transfer stood revoked—Aforesaid demand of unearned increase by DDA was challenged by the respondent by way of C.W. No. 3846/1990, in which there was no interim order staying the impugned demand—As respondent was not willing to pay the unearned increase as demanded by the DDA and so appellant vide notice of 24th January, 1988 terminated the

Agreement of sale as fresh period for completion of the sale transaction stipulated by the appellant vide letter of 17th May, 1988 stood expired, thus, suit for possession of the subject premises along with claim of mesne profits was filed by appellant before the Trial Court—Respondent in her written statement raised a counter claim for specific performance of Agreement of sale of 23rd January, 1984—During the pendency of suit before the Trial Court, the verdict returned in CW No. 3846/1990 on 20th October, 2003, in respect of the unearned increase was that it was a non-issue, thus not payable and conversion of the leasehold rights into freehold in respect of the subject premises were to await the outcome of this Civil Suit—The parties led their evidence before the Trial Court and thereafter vide impugned judgment of 17th October, 2006, it was held that respondent is entitled to specific performance of Agreement of sale as there was no violation of the Agreement in question by either side and the delay in its specific performance was due to exorbitant unearned increase demanded by DDA and since the requirement of payment of unearned increase has been dispensed with by virtue of the decision in CW No. 3846/ 1990, so upon payment of the balance sale consideration of Rupees one lac only and on payment of charges for conversion of the subject premises from leasehold to freehold, the Agreement in question be performed—Hence the present Appeal—Contended by appellant that Agreement of sale became unenforceable as respondent had refused to pay the unearned increase without which permission for sale of the subject premises could not be obtained and so, appellant is entitled to recover possession of the subject premises and the mesne profits as claimed—Section 39 of the Indian Contract Act, 1872, and decisions in *K. Narendra vs. Riviera Apartments (P) Ltd.* (1999) 5 SCC 77; *Nirmala Anand vs. Advent Corp. (P) Ltd. & Ors.* (2002) 5 SCC 481; and *Dayal Singh vs. Collector of Stamps,* AIR (1972) Delhi 131, were pressed into service to contend that appellant was entitled to cancel the agreement in question, as it was impossible for appellant to have obtained the requisite permission from DDA on account of respondent defaulting in paying the unearned

increase—Relying upon the decision in *Manjunath Anandappa vs. Tammanasa and Ors.* (2003) 10 SCC 390, it was contended that the respondent had failed to prove that she had means to pay the balance sale consideration and as per the dictum in *N.P. Thirugnanam (D) by Lrs vs. Dr. R. Jaganmohan Rao & Ors.,* JT 1995 (5) SC 553; *M. Meenakshi and Ors. vs. Metadin Agarwal (D) & Ors.* (2006) 7 SCC 470, readiness and willingness to perform the agreement has to be proved but respondent's willingness to perform her part of the agreement does not stand proved—The decision in *Rambhau Namdeo Gajre vs. Narayan Bapuji Dhotra (D),* (2004) 8 SCC 614 was relied upon by appellant's counsel to assert that doctrine of part performance could not be invoked in favour of the respondent who had not paid the unearned increase—Further contended that the ingredients of Section 20 of the Specific Relief Act, 1963 have to be satisfied before specific performance of sale agreement can be ordered and in the instant case, there was clear lack of willingness on the part of respondent to pay the unearned increase, thereby frustrating the Agreement of sale of 23rd January, 1984—Vehemently urged by the appellant that the impugned judgment of 17th October, 2006 deserves to be set aside and the suit of appellant ought to be decreed and the counter claim of respondent be dismissed—Respondent contended that appellant had supported the respondent in questioning the quantum of unearned increase and so, there is no question of the Agreement of sale being frustrated on account of non-payment of unearned increase as the same was subject matter of challenge before the Court of law—It is seriously disputed by the respondent that there was lack of willingness and readiness to pay the balance sale consideration as it was to be paid after the appellant had obtained the sale permission in respect of the subject premises and the decision in CW No. 3846/1990 facilitates the specific performance of the Agreement of sale—Respondent being in possession of the subject premises in part performance of the Agreement of sale of 23rd January, 1984 is entitled to its specific performance as there was a specific covenant in the Agreement of sale entitling respondent to get the specific performance of this agreement and time was

plaintiff filed suit, praying for specific performance of the agreement as well as MOU entered into between parties, along with other reliefs. Held: Specific performance of an agreement cannot be allowed if an agreement is vague and incomplete, requires consensus, decisions or further agreement on several minute details—The performance of the obligations of a developer/builder in a collaboration agreement, cannot be compared to the statutory liability of a landlord to reconstruct and deliver a shop premises to a tenant under a Rent Control legislation, which is enforceable under the statutory provisions of the special law—A contract which involves performance of continuous duty which the Court cannot supervise, cannot be allowed to be specifically performed.

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UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1957—(in short UAP Act) and Indian Penal Code, 1860—Section 120B and the order on sentence—A perusal of Section 18 UAP Act shows that it punishes conspiracy and acts to attempt, abet, advise the commission of a terrorist act or any act preparatory to the commission of a terrorist act. The possession and supply of large quantity of RDX with detonators is certainly an act preparatory to and to aid the commission of a terrorist act. Section 23 UPA Act provides for the enhanced penalty if a person is found in possession of explosive substance with intent to aid a terrorist—It is thus apparent even if the fact that the co-accused Abu Hamza was discovered at the instance of the Appellants is not admissible in evidence under Section 27 the Evidence Act, the same is admissible under Section 8 of the Evidence Act. Further the factum of the co-accused abu Hamza waiting for the accused near Jawahar Lal Nehru Stadium is also admissible under Section 27 of the Evidence Act. PW1 and PW7 have clearly deposed that after the recovery of the explosives the Appellants disclosed that they were to deliver the explosives to one Abu Hamza, a Pakistani national who was waiting for them at Jawaharlal National Stadium. When the police party reached the spot they found the said Abu Hamza at Jawaharlal Nehru Stadium who died

in the encounter. PW13 has categorically deposed that during the personal search of Abu Hamza one internal connection slip was recovered in the name of Rajesh Kumar, R/o 44/9 Ballabhgarh, Haryana. The recovery of huge cache of arms was effected from the above mentioned house at Ballabhgarh, Haryana. PW4, the landlord has identified the deceased Abu Hamza as the same person who had taken his house on rent impersonating him as Rajesh Kumar are also admissible and relevant pieces of evidence—The contention of the learned counsel for the Appellant that the recovery of arms is not sufficient to prove that the accused had to use the same the terrorist activity holds no grounds. The act of accused being in possession of explosive (RDX) with live detonators which were to be supplied to Abu Hamza and subsequent recovery of cache of arms and ammunitions from the house where he stayed on rent clearly shows the intention of the Appellants. From the quality and quantity of explosives with the Appellants, a clear inference can be drawn that they entered into a conspiracy as well as committed acts preparatory to commission of a terrorist act and facilitate some terrorist activity. Thus the ingredients of the act of conspiracy stand duly proved. Under Section 5 of ES Act the onus shifted on the Appellants to show that the possession was for a lawful object, after the initial burden of proving the possession of explosive substance had been discharged by the prosecution. The Appellants have failed to discharge the said burden—Learned counsel for the Appellants is also concerned with the fine imposed and sentence awarded in default of payment of fine as the Appellants have almost undergone the substantive sentences. According to learned counsel the fine amount of Rs. 25,000/- Rs. 50,000/- and Rs. 50,000/- for offences under Sections 5 ES Act and Sections 18 and 23 UAP Act respectively are excessive. I do not find any infirmity on this count in the order on sentence passed by the learned Additional Sessions Judge—Dismissed.

Firoz Abdul Latif Ghaswala & Anr. v. *State Govt. of NCT of Delhi* *1*

ILR (2013) I DELHI 1
CRL. A.

FIROZ ABDUL LATIF GHASWALA & ANR. ....APPELLANTS

VERSUS

STATE GOVT. OF NCT OF DELHI ....RESPONDENT

(MUKTA GUPTA, J.)

CRL. A. NO. : 1411/2010 DATE OF DECISION: 03.09.2012

Explosive Substance Act, 1908 (in short ES Act)—Sec. 5 read with Sections 18 & 23 of the Unlawful Activities (Prevention) Act, 1957 (in short UAP Act) and Indian Penal Code, 1860—Section 120B and the order on sentence—A perusal of Section 18 UAP Act shows that it punishes conspiracy and acts to attempt, abet, advise the commission of a terrorist act or any act preparatory to the commission of a terrorist act. The possession and supply of large quantity of RDX with detonators is certainly an act preparatory to and to aid the commission of a terrorist act. Section 23 UPA Act provides for the enhanced penalty if a person is found in possession of explosive substance with intent to aid a terrorist—It is thus apparent even if the fact that the co-accused Abu Hamza was discovered at the instance of the Appellants is not admissible in evidence under Section 27 the Evidence Act, the same is admissible under Section 8 of the Evidence Act. Further the factum of the co-accused abu Hamza waiting for the accused near Jawahar Lal Nehru Stadium is also admissible under Section 27 of the Evidence Act. PW1 and PW7 have clearly deposed that after the recovery of the explosives the Appellants disclosed that they were to deliver the explosives to one Abu Hamza, a Pakistani national who was waiting for them at Jawaharlal National Stadium. When the police party

reached the spot they found the said Abu Hamza at Jawaharlal Nehru Stadium who died in the encounter. PW13 has categorically deposed that during the personal search of Abu Hamza one internal connection slip was recovered in the name of Rajesh Kumar, R/o 44/9 Ballabhgarh, Haryana. The recovery of huge cache of arms was effected from the above mentioned house at Ballabhgarh, Haryana. PW4, the landlord has identified the deceased Abu Hamza as the same person who had taken his house on rent impersonating him as Rajesh Kumar are also admissible and relevant pieces of evidence—The contention of the learned counsel for the Appellant that the recovery of arms is not sufficient to prove that the accused had to use the same the terrorist activity holds no grounds. The act of accused being in possession of explosive (RDX) with live detonators which were to be supplied to Abu Hamza and subsequent recovery of cache of arms and ammunitions from the house where he stayed on rent clearly shows the intention of the Appellants. From the quality and quantity of explosives with the Appellants, a clear inference can be drawn that they entered into a conspiracy as well as committed acts preparatory to commission of a terrorist act and facilitate some terrorist activity. Thus the ingredients of the act of conspiracy stand duly proved. Under Section 5 of ES Act the onus shifted on the Appellants to show that the possession was for a lawful object, after the initial burden of proving the possession of explosive substance had been discharged by the prosecution. The Appellants have failed to discharge the said burden—Learned counsel for the Appellants is also concerned with the fine imposed and sentence awarded in default of payment of fine as the Appellants have almost undergone the substantive sentences. According to learned counsel the fine amount of Rs. 25,000/- Rs. 50,000/- and Rs. 50,000/- for offences under Sections 5 ES Act and Sections 18 and 23 UAP Act

respectively are excessive. I do not find any infirmity on this count in the order on sentence passed by the learned Additional Sessions Judge—Dismissed.

Important Issue Involved: Under Section 5 of ES Act the onus shifted on the Appellants to show that the possession was for a lawful object, after the initial burden of proving the possession of explosive substance had been discharged by the prosecution.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANTS : Mr. N.D. Pancholi and Mr. Kahorwgam Zimik, Advocate.

FOR THE RESPONDENT : Mr. Manoj Ohri, APP for the State.

CASES REFERRED TO:

1. *State of Rajasthan* vs. *Ajit Singh and ors.* 2008 Crl.L.J. 364 (SC).
2. *Pulin Das* vs. *State of Assam* (2008) 2 SCC (Crl.) 520.
3. *State (NCT of Delhi)* vs. *Navjot Sandhu @ Afsan Guru,* (2005) 11 SCC 600.
4. *State of Maharashtra* vs. *Damu* [(2000) 6 SCC 269 : 2000 SCC (Cri) 1088].
5. *Mohd. Inayatullah* vs. *State of Maharashtra* [(1976) 1 SCC 828 : 1976 SCC (Cri) 199].
6. *Udai Bhan* vs. *State of U.P.* [1962 Supp (2) SCR 830 : AIR 1962 SC 1116 : (1962) 2 Cri LJ 251]).
7. *Pulukuri Kottaya* vs. *Emperor* [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65].

RESULT: Dismissed.

MUKTA GUPTA, J.

1. By this appeal the Appellants challenge the judgment dated 15th December, 2009 passed by the Learned Additional Sessions Judge

convicting the Appellants for offences under Section 5 of the Explosive Substance Act, 1908 (in short ES Act) read with Sections 18 & 23 of the Unlawful Activities (Prevention) Act, 1957 (in short UAP Act) and Section 120B IPC and the order on sentence dated 16th December, 2009 directing them to undergo rigorous imprisonment for a period of 5 and 6 years respectively & fine of Rs.25,000/- each for offence under Section 5 of the ES Act, and 7 years rigorous imprisonment & fine of Rs.50,000/- for each offence under Section 18 & 23 of UAP Act and 5 years rigorous imprisonment under Section 120B IPC. In default of payment of fine they have been directed to undergo rigorous imprisonment for a period of one year on each count.

2. Learned counsel for the Appellant submits that the Appellants are not liable to be convicted for offences punishable under Section 18 & 23 of the UAP Act. The said provisions are attracted only if the accused have committed terrorist attack punishable under Section 15 of the UAP Act. Reliance is placed on **Pulin Das Vs. State of Assam** (2008) 2 SCC (Crl.) 520 to contend that only if the ingredients of terrorist attack are satisfied then one can be held guilty of committing such offences. The prosecution has failed to prove that there was any intention on the part of the Appellants as required by Section 15 of the UAP Act. Mere recovery of arms or explosive material is not the proof of intention to threaten sovereignty, integrity etc. of India. Reliance is placed on **State of Rajasthan Vs. Ajit Singh and ors.** 2008 Crl.L.J. 364 (SC) to contend that mere recovery of arms is not sufficient to prove that accused intended to use the same for terrorist activity. Further no case for enhanced penalty under Section 23 UAP Act is made out as there is no evidence that there was any intention to aid any terrorist. Further, there is no admissible evidence to show existence of any 'terrorist' which may come within the definition of Section 15 read with Section 2(k) of the UAP Act. The disclosure made by Appellant No.1 Firoz Abdul Latiff Ghaswala that they were going to deliver the explosive material to one Abu Hamza, the alleged Pakistani national at Jawahar Lal Nehru stadium and the consequent encounter in which the alleged Abu Hamza was killed by the Police party is not admissible in evidence. There is evidence led qua the alleged encounter. Further, no documents regarding the same have been placed on record. The public witnesses PW-2 and PW3 who allegedly witnessed the recovery and the disclosure statements have not supported the prosecution case that an information about alleged terrorist

Abu Hamza was given to the Police in their presence. It is the case of the prosecution that Abu Hamza was residing as a tenant under the assumed name of Rajesh in the house of Uttam Chand Bareja PW-4 at Ballabhgarh, Haryana and huge recovery of arms and explosives was allegedly made from the said house within few hours of the said encounter on the night of 8th May, 2006 itself. However, the dead body of Abu Hamza has not been got identified by the said landlord Uttam Chand Bareja. There is no evidence to prove that the said Abu Hamza was a terrorist or a Pakistani national. The Appellants cannot be held guilty under Section 5 of the ES Act as the recovery is not reliable. The alleged public witnesses PW-2 and PW-3 were joined in the investigation only after the Appellants were apprehended. No effort was made to join public witnesses by the raiding party, though there was an advance information. Even while allegedly following the Appellants to the Railway quarter from where they were apprehended, no efforts were made to join any independent person. Reliance in this regard is placed on **Vijay Kumar vs. State** 2007 (1) JCC 16 DB Delhi. Further the testimony of the two public witnesses is not convincing and is contrary to the statements of the police witnesses. There is contradiction in the statement of the Police witnesses as well. Further, there is no evidence for conviction under Section 120B IPC as the allegations of conspiracy are vague in nature. It is therefore prayed that appeal be allowed. In the alternative it is stated that the total fine amount and sentence in default thereof being highly excessive, the same be reduced.

3. Learned APP on the other hand contends that every effort was made to join the public witnesses. PW-1 in his testimony has stated that 10 to 12 public persons were requested to join the investigation, however they refused. When the Appellants were apprehended, two public witnesses, who reached there, were made to join and they witnessed the search and seizure proceedings. Both the public witnesses have fully supported the case of the prosecution. They have identified the Appellants and the case property. The disclosure of the Appellants leading to the discovery of the co-accused Abu Hamza near Jawahar Lal Nehru stadium, who died in the encounter and the recoveries made pursuant thereto are relevant and admissible under Section 27 of the Indian Evidence Act. The quantity of arms and ammunitions, the Appellants were carrying to supply to a Pakistani national clearly shows the intention. In a case of conspiracy the intention has to be inferred from the attending facts and circumstances.

There is no contradiction in the testimonies of the police witnesses or between the public witnesses and the Police witnesses. Hence there is no merit in the appeal and the same be dismissed.

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

5. Briefly the prosecution case is that on 6th May, 2006 at about 4.30 PM a secret information was received in the office of Special Cell, Lodhi Colony that one Abdullah and one Mohd. Ali would be arriving by train Golden Temple Express at Hazrat Nizamuddin Railway Station and they would be in possession of explosive material. The said information was reduced in writing and information in this regard was sent to the senior officers. A team was constituted under the supervision of PW-1 Inspector Mohan Chand Sharma. At 6.50 PM the train arrived at Nizamuddin Railway Station. The informer identified the Appellants No.1 & 2 as Abdullah and Mohd. Ali respectively. PW-1 & PW-7 apprehended Appellant no.1 while S.I. Vinay Tyagi and Const. Balwant apprehended Appellant No.2 when they reached in front of the Railway quarters of block 22 & 26. They were also accompanied by PW-14 and PW-19 who were the members of the raiding party. Two public witnesses PW-2 Jai Prakash Kashyap and PW-3 Jai Prakash Singh, who reached at the spot, were also associated in the investigation. During the search a blue colour bag Ex. P-3 was recovered from Appellant No.1 besides Rs. 50,000/-. The blue colour bag contained a sweet box containing 2 kg black colour explosive material. Samples were taken from the plastic container and marked as S1 & S2. The remnant and the samples were seized vide seizure memo Ex. PW1/A and sealed with the seal of RSS.

6. From the Appellant No.2 an orange colour bag Ex. P-5 was seized which contained 4 electronic detonators covered in white envelopes. They were sealed in plastic bottle with seal of RSS. A sweet box was also found wrapped containing 2 Kg of black colour explosive material. Two samples of 10 grams each were taken and sealed in separate pullandas with seal of RSS and marked as S3 & S4. The seizure memo Ex.PW1/B was prepared in this regard. Seizure memos were signed by the public witnesses. Seal of RSS after use was given to PW-7 which was returned on 24th May, 2006.

7. The Appellants disclosed that the explosive material was meant for one Abu Hamza, a Pakistani national who was to take delivery at 7.15

PM at Jawahar Lal Nehru Stadium. Senior officers were informed and a raid was conducted at Jawahar lal Nehru stadium where Abu Hamza came in a santro car. In an encounter Abu Hamza died. From the personal search of Abu Hamza one pocket diary containing slip of Rajesh Kumar and his address and one driving license in the name of Rajesh Kumar were also found. On a raid being conducted at the address mentioned in the slip, huge recoveries of arms and ammunitions were done. PW-4 Uttam Chand Bareja, the landlord of the premises identified the photo of Abu Hamza as Rajesh who was living in his house. On a rukka being sent an FIR was registered. After completion of investigation and grant of sanction for prosecution for offences under Section 4/5 ES Act and under Section 196(1) Cr.P.C. for offences under Section 121/121A/122 and 123 IPC a charge-sheet was filed. PW-6 proved the time of arrival of the Golden Temple Express vide certificate Ex.PW5/ A. As per the report Ex.PW-12/A the material recovered was of special category explosive substance.

8. The Police witnesses PW1 SI Rajender Sahrawat, PW7 SI Dalip Kumar, PW10 Inspector Raj Pal Dabbas, PW13 SI Ravinder Tyagi and PW14 Inspector Ramesh Lamba have deposed that on 8th May, at about 4.30 p.m. specific information was received in the office of special cell, Lodhi Colony regarding one Abdulla and Mohd. Ali who were active members of Let, that they were arriving from Golden Temple Express Train which would reach Hazarat Nizamuddin Railway Station and they were in possession of Explosive material. The information was recorded in the roznamacha. The matter was discussed with the Senior Officers of the Cell. Under the supervision of Inspector Mohan Chand Sharma, a team consisting of Inspector Sanjay Dutt, Inspector Badrish Dutt, SI Rahul, SI Vinay Tyagi, SI Ravinder Tyagi, SI Ramesh Lamba, SI Dharmender, SI Dalip, SI Pawan, SI Ashok Sharma, ASI Shahjan, ASI Sanjeev Lochan, ASI Anil Tyagi, HC Ajeet, HC Hansraj and other officials was constituted. At about 6.00 p.m. they reached in front of comsom restaurant outside Nizamuddin Railway Station. Informer also met them there. PW1 and Inspector Mohan Chand Sharma requested 10-12 public persons to join the raiding party but they refused to join the raiding party after giving some genuine excuses. They made enquiries from the Enquiry Counter about the arrival of the train and platform number. PW1 came to know that the train will come at 6.45 p.m. at platform no. 3. They took position on platform no. 3. PW1 along with Inspector Mohan Chand

Sharma and secret informer were standing near stairs of foot over bridge. The train arrived at 6.50 p.m. Accused Feroz Abdul Latif Ghaswala @ Abdulla was pointed out by the informer as Abdulla and accused Mohd. Ali Chipa as Mohd Ali, when they reached near the stairs of the foot over bridge. They followed both these accused persons till the accused came out from the railway station and started walking on foot towards Ashram. When both the accused persons reached in front of railway quarters of block 22 and 26 they overpowered both the accused persons. Recovery of explosive substance as detailed above was made.

9. PW2 and PW3 have deposed that on 8th May, 2006 they were strolling in the boundary of Railway Colony, where their quarter were situated. They heard some noise at a distance of about 10 meter away on the road. They found that two accused persons (Appellants) Feroz Abdul Latif Ghaswala @ Abdulla and Mohd. Ali Chhipa were apprehended by the police team. The bags of the accused persons were taken from them and were being checked. On checking those bags, some black colour material were recovered from the two bags and it was told to them that the same was explosive. Some other articles such as clothes, tooth paste etc. were also found. Two samples each of the black colour explosive material from each bag were taken and the remaining black colour explosive material was sealed in a pullanda with the seal of RSS. The other recovered articles were also seized and sealed in a pullanda with seal of RSS. One white envelope was also found in the orange bag containing four tubes having wires seems to be electronic device having wires wrapped around each such tube. Both the sweet boxes from which the material was recovered were found containing 2 kg each black colour explosive material. Each electronic device was wrapped in cotton wool to avoid contact with each other and all the four electronic devices were put in a plastic container collectively and were sealed in a pullanda with the seal of RSS. Further accused Feroz Abdul Latif Ghaswala @ Abdulla was taken by the police team towards Jawahar Lal Nehru Stadium because someone was waiting there to whom the said black colour explosive material was to be handed over. Despite the lengthy cross-examination nothing material could be elicited from the testimony of the these witnesses.

10. PW8, the expert witness has deposed that on 22nd May, 2006 he was posted at CFSL, CBI, CGO Complex, Lodhi Road, New Delhi as Senior Scientific Officer, Grade-I (Ballistics)-cum-Assistant Chemical Examiner. On that day, 13 sealed parcels were received in CFSL, in

connection with this case, which were marked to him for analysis. The parcels were marked as A, B, F, S1, S2, I and J1 to J7 and all were sealed with the seal of SKY. Various types of examinations were conducted in the Laboratory with the help of scientific aides. On the basis of physical examination, chemical analysis of barrel wash and test firing, he opined that two 7.62 mm/AK 56 assault rifles marked W1 and W2 contained in parcels no. A and B respectively were fire arms as defined in Arms Act and were in working order and these were used and fired. Six 7.62 mm/AK 56 assault rifle magazines marked M1 to M6 contained in parcel No. F were in working order and could be fitted in two 7.62 mm assault riffles marked W1 and W2 in question. One hundred and eight (180) 7.62 mm/AK 56 assault riffle cartridges marked C1 to C180 contained in parcel No. F were ammunitions as defined in Arms Act and were live ones. Parcel No. S1 contained Nitro Glycerin based high explosive present. Parcel No. S2 contained urea. Parcel No. J1 to J6 contained Nitric Acid and parcel No. J7 contained Glycerin which are not explosive nor form competent improvised explosive device individually or collectively. Parcel No.I contained electronic gadgets namely fuses, resistances, ICs and printed circuit boards etc. and these items can be used to form components of improvised explosive devices. He exhibited his report as Ex.PW8/A.

11. Similarly, PW12 has deposed that on 22nd May, 2006 he was posted at CFSL, CBI, CGO Complex, Lodhi Road, New Delhi, as SSO (Ballistic) Grade II. On that day, five sealed parcels, out of which four parcels were marked from S1 to S4 and one parcel was marked D and they were sealed with the seal of RSS were received in CFSL and were marked to him for examination. He examined all the five parcels. Parcels S1 to S4 were found to contain black granules like material and parcel D contain four electric detonators. After examination, it was found that S1 and S4 contain RDX and PETL, which are high explosives as defined in ES Act. Parcel D was having live detonators and therefore, they are explosive substance as defined in ES Act. The report was exhibited as Ex.PW12/A. In his cross examination PW12 though stated that he did not remember to whom the letter dated 18th May, 2006 was referred to or who received the said five parcels for examination and from whom. The facts brought in cross-examination do not go to the root of the matter or effect the veracity of this witness.

12. The testimony of PW1 SI Rajender Sherawat and PW29 IO ACP Sanjeev Kumar Yadav is clear and cogent as they have stated that PW29 arrived at spot at about 7.50 when the custody of the Appellants was handed over to him. It is relevant to note that PW2 and PW3 the public witnesses have deposed that on the relevant date they were present at the spot and 2kg of black colour material which was told to be an explosive was recovered from each of the Appellant, that is, Firoz Abdul and Mohd. Ali. This testimony is clear and cogent. Further the contradictions pointed out by the learned counsel for the defence is the testimony of PW2 and PW3 as regards the counting of money recovered from the Appellant is not material to dent the prosecution case.

13. Reliance on **Pulin Das @ Panna Koch vs. State of Assam,** 2008 Cri.L.J 2070 SC is misconceived. In the said decision the Hon'ble Supreme Court was dealing with a conviction under Sections 3(1) & 3(2) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short 'TADA'). In the light of the facts therein and the ingredients of Section 3 of TADA their Lordships held that mere possession of arms and ammunitions cannot lead to the inference that a terrorist activity has been committed. In the present case the Appellants have been convicted for offences punishable under Section 18 and 23 of UPA Act which provide as under:-

> "18. Punishment for conspiracy, etc.-Whoever conspires or attempts to commit, or advocates, abets, advises or incites, directs or knowingly facilitates the commission of, a terrorist act or any act preparatory to the commission of a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.
>
> 23. Enhanced penalties - (1) If any person with intent to aid any terrorist or a terrorist organisation or a terrorist gang contravenes any provision of, or any rule made under the Explosives Act, 1884 (4 of 1884) or the Explosive Substances Act, 1908 (6 of 1908) or the Inflammable Substances Act, 1952 (20 of 1952) or the Arms Act, 1959 (54 of 1959), or is in unauthorised possession of any bomb, dynamite or hazardous explosive substance or other lethal weapon or warfare, he shall, notwithstanding anything contained in any of the aforesaid Acts

or the rules made thereunder, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Any person who with the intent to aid any terrorist, or a terrorist organisation or a terrorist gang attempts to contravene or abets, or does any act preparatory to contravention of any provision of any law or rule specified in sub-section (1), shall be deemed to have contravened that provision under sub-section (1) and the provisions of that sub-section in relation to such person, have effect subject to the modification that the reference to 'imprisonment for life' therein shall be construed as a reference to .imprisonment for ten years..

14. A perusal of Section 18 UAP Act shows that it punishes conspiracy and acts to attempt, abet, advise the commission of a terrorist act or any act preparatory to the commission of a terrorist act. The possession and supply of large quantity of RDX with detonators is certainly an act preparatory to and to aid the commission of a terrorist act. Section 23 UPA Act provides for the enhanced penalty if a person is found in possession of explosive substance with intent to aid a terrorist.

15. The disclosure statements of the Appellants leading to the encounter of the deceased Abu Hamza and the recoveries of arms and ammunition from the flat where he resided are also relevant. Section 27 of the Indian Evidence Act reads as under:

"27. How much of information received from accused may be proved.-Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

16. In **State (NCT of Delhi) vs. Navjot Sandhu @ Afsan Guru,** (2005) 11 SCC 600 it was observed:

"114. The interpretation of Section 27 of the Evidence Act has loomed large in the course of arguments. The controversy centred round two aspects:

(i) Whether the discovery of fact referred to in Section 27 should be confined only to the discovery of a material object and

the knowledge of the accused in relation thereto or the discovery could be in respect of his mental state or knowledge in relation to certain things - concrete or non-concrete.

(ii) Whether it is necessary that the discovery of fact should be by the person making the disclosure or directly at his instance. The subsequent event of discovery by the police with the aid of information furnished by the accused - whether can be put against him under Section 27.

These issues have arisen especially in the context of the disclosure statement (Ext. PW-66/13) of Gilani to the police. According to the prosecution, the information furnished by Gilani on certain aspects, for instance, that the particular cellphones belonged to the other accused, Afzal and Shaukat, that the Christian Colony room was arranged by Shaukat in order to accommodate the slain terrorist Mohammed, that police uniforms and explosives 'were arranged' and that the names of the five deceased terrorists were so and so are relevant under Section 27 of the Evidence Act as they were confirmed to be true by subsequent investigation and they reveal the awareness and knowledge of Gilani in regard to all these facts, even though no material objects were recovered directly at his instance.

115. The arguments of the learned counsel for the State run as follows:

(i) The expression 'discovery' of fact. should be read with the definition of .fact. as contained in Section 3 of the Evidence Act which defines the 'fact' as meaning and including 'any thing, state of things, or relation of things, capable of being perceived by the senses' and also includes 'any mental condition of which any person is conscious' (emphasis supplied). Thus, the definition comprehends both physical things as well as mental facts. Therefore, Section 27 can admit of discovery of a plain mental fact concerning the informant accused. In that sense, Section 27 will apply whenever there is discovery (not in the narrower sense of recovery of a material object) as long as the discovery amounts to be confirmatory in character guaranteeing the truth of the information given, the only limitation being that

the police officer should not have had access to those facts earlier.

(ii) The application of the section is not contingent on the recovery of a physical object. Section 27 embodies the doctrine of confirmation by subsequent events. The fact investigated and found by the police consequent to the information disclosed by the accused amounts to confirmation of that piece of information. Only that piece of information, which is distinctly supported by confirmation, is rendered relevant and admissible under Section 27.

(iii) The physical object might have already been recovered, but the investigating agency may not have any clue as to the "state of things" that surrounded that physical object. In such an event, if upon the disclosure made such state of things or facts within his knowledge in relation to a physical object are discovered, then also, it can be said to be discovery of fact within the meaning of Section 27.

(iv) The other aspect is that the pointing out of a material object by the accused himself is not necessary in order to attribute the discovery to him. A person who makes a disclosure may himself lead the investigating officer to the place where the object is concealed. That is one clear instance of discovery of fact. But the scope of Section 27 is wider. Even if the accused does not point out the place where the material object is kept, the police, on the basis of information furnished by him, may launch an investigation which confirms the information given by the accused. Even in such a case, the information furnished by the accused becomes admissible against him as per Section 27 provided the correctness of information is confirmed by a subsequent step in investigation. At the same time, facts discovered as a result of investigation should be such as are directly relatable to the information.

120. The history of case-law on the subject of confessions under Section 27 unfolds divergent views and approaches. The divergence was mainly on twin aspects: (i) Whether the facts contemplated by Section 27 are physical, material objects or the mental facts of which the accused giving the information could

be said to be aware of. Some Judges have gone to the extent of holding that the discovery of concrete facts, that is to say material objects, which can be exhibited in the Court are alone covered by Section 27. (ii) The other controversy was on the point regarding the extent of admissibility of a disclosure statement. In some cases a view was taken that any information, which served to connect the object with the offence charged, was admissible under Section 27. The decision of the Privy Council in *Kottaya case* [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] which has been described as a *locus classicus*, had set at rest much of the controversy that centred round the interpretation of Section 27. To a great extent the legal position has got crystallised with the rendering of this decision. The authority of the Privy Council's decision has not been questioned in any of the decisions of the highest court either in the pre-or post-independence era. Right from the 1950s, till the advent of the new century and till date, the passages in this famous decision are being approvingly quoted and reiterated by the Judges of this Apex Court. Yet, there remain certain grey areas as demonstrated by the arguments advanced on behalf of the State.

121. The first requisite condition for utilising Section 27 in support of the prosecution case is that the investigating police officer should depose that he discovered a fact in consequence of the information received from an accused person in police custody. Thus, there must be a discovery of fact not within the knowledge of police officer as a consequence of information received. Of course, it is axiomatic that the information or disclosure should be free from any element of compulsion. The next component of Section 27 relates to the nature and extent of information that can be proved. It is only so much of the information as relates distinctly to the fact thereby discovered that can be proved and nothing more. It is explicitly clarified in the section that there is no taboo against receiving such information in evidence merely because it amounts to a confession. At the same time, the last clause makes it clear that it is not the confessional part that is admissible but it is only such information or part of it, which relates distinctly to the fact discovered by means of the information furnished. Thus, the information

conveyed in the statement to the police ought to be dissected if necessary so as to admit only the information of the nature mentioned in the section. The rationale behind this provision is that, if a fact is actually discovered in consequence of the information supplied, it affords some guarantee that the information is true and can therefore be safely allowed to be admitted in evidence as an incriminating factor against the accused. As pointed out by the Privy Council in Kottaya case [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] : (AIR p. 70, para 10)

"clearly the extent of the information admissible must depend on the exact nature of the fact discovered"

and the information must distinctly relate to that fact.

Elucidating the scope of this section, the Privy Council speaking through Sir John Beaumont said: (AIR p. 70, para 10)

"*Normally* the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused."

(emphasis supplied)

We have emphasised the word 'normally' because the illustrations given by the learned Judge are not exhaustive. The next point to be noted is that the Privy Council rejected the argument of the counsel appearing for the Crown that the fact discovered is the physical object produced and that any and every information which relates distinctly to that object can be proved. Upon this view, the information given by a person that the weapon produced is the one used by him in the commission of the murder will be admissible in its entirety. Such contention of the Crown's counsel was emphatically rejected with the following words: (AIR p. 70, para 10)

> "If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of

> the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect."

Then, Their Lordships proceeded to give a lucid exposition of the expression 'fact discovered' in the following passage, which is quoted time and again by this Court: (AIR p. 70, para 10)

> "In Their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that =I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. *It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge,* and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant..
>
> (emphasis supplied)

125. We are of the view that *Kottaya case* [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] is an authority for the proposition that 'discovery of fact' cannot be equated to the object produced or found. It is more than that. The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant

as to its existence at a particular place.

126. We now turn our attention to the precedents of this Court which followed the track of *Kottaya case* [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] . The ratio of the decision in *Kottaya case* [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] reflected in the underlined [Ed.: Herein italicised] passage extracted supra [Ed.: In para 121, p. 701, above] was highlighted in several decisions of this Court.

127. The crux of the ratio in *Kottaya case* [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] was explained by this Court in **State of Maharashtra v. Damu** [(2000) 6 SCC 269 : 2000 SCC (Cri) 1088]. Thomas J. observed that: (SCC p. 283, para 35)

"The decision of the Privy Council in **Pulukuri Kottaya v. Emperor** [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] is the most quoted authority for supporting the interpretation that the 'fact discovered' envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

In **Mohd. Inayatullah v. State of Maharashtra** [(1976) 1 SCC 828 : 1976 SCC (Cri) 199], Sarkaria, J. while clarifying that the expression 'fact discovered' in Section 27 is not restricted to a physical or material fact which can be perceived by the senses, and that it does include a mental fact, explained the meaning by giving the gist of what was laid down in *Pulukuri Kottaya* case [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] . The learned Judge, speaking for the Bench observed thus: (SCC p. 832, para 13)

> "Now it is fairly settled that the expression 'fact discovered' includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see **Pulukuri Kottaya v. Emperor** [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65]; **Udai Bhan v. State of U.P.** [1962 Supp (2) SCR 830 : AIR 1962 SC 1116 : (1962) 2 Cri LJ 251]).'

132. The following observations are also crucial:

> "As explained by this Court as well as by the Privy Council, normally Section 27 is brought into operation where a person in police custody produces from some place of concealment some object said to be connected with the crime of which the informant is the accused. The concealment of the fact which is not known to the police is what is discovered by the information and lends assurance that the information was true. No witness with whom some material fact, such as the weapon of murder, stolen property or other incriminating article is not hidden, sold or kept and which is unknown to the police can be said to be discovered as a consequence of the information furnished by the accused. These examples however are only by way of illustration and are not exhaustive. What makes the information leading to the discovery of the witness admissible is the discovery from him of the thing sold to him or hidden or kept with him which the police did not know until the information was furnished to them by the accused. A witness cannot be said to be discovered if nothing is to be found or recovered from him as a consequence of the information furnished by the accused and the information which disclosed the identity of the witness will not be admissible."

Then follows the statement of law:

> "But even apart from the admissibility of the information under Section 27, the evidence of the Investigating Officer and the panchas that the accused had taken them to PW 11 and pointed him out and as corroborated by PW 11 himself would be admissible under Section 8 of the Evidence Act as conduct of the accused."

17. It is thus apparent even if the fact that the co-accused Abu Hamza was discovered at the instance of the Appellants is not admissible in evidence under Section 27 the Evidence Act, the same is admissible under Section 8 of the Evidence Act. Further the factum of the co-accused Abu Hamza waiting for the accused near Jawahar Lal Nehru Stadium is also admissible under Section 27 of the Evidence Act. PW1 and PW7 have clearly deposed that after the recovery of the explosives

the Appellants disclosed that they were to deliver the explosives to one Abu Hamza, a Pakistani national who was waiting for them at Jawaharlal National Stadium. When the police party reached the spot they found the said Abu Hamza at Jawaharlal Nehru Stadium who died in the encounter. PW13 has categorically deposed that during the personal search of Abu Hamza one internal connection slip was recovered in the name of Rajesh Kumar, R/o 44/9 Ballabhgarh, Haryana. The recovery of huge cache of arms was effected from the above mentioned house at Ballabhgarh, Haryana. PW4, the landlord has identified the deceased Abu Hamza as the same person who had taken his house on rent impersonating him as Rajesh Kumar are also admissible and relevant pieces of evidence.

18. The contention of the learned counsel for the Appellant that the recovery of arms is not sufficient to prove that the accused had to use the same for terrorist activity holds no ground. The act of accused being in possession of explosive (RDX) with live detonators which were to be supplied to Abu Hamza and subsequent recovery of cache of arms and ammunitions from the house where he stayed on rent clearly shows the intention of the Appellants. From the quality and quantity of explosives with the Appellants, a clear inference can be drawn that they entered into a conspiracy as well as committed acts preparatory to commission of a terrorist act and facilitate some terrorist activity. Thus the ingredients of the act of conspiracy stand duly proved.

19. Under Section 5 of ES Act the onus shifted on the Appellants to show that the possession was for a lawful object, after the initial burden of proving the possession of explosive substance had been discharged by the prosecution. The Appellants have failed to discharge the said burden.

20. Learned counsel for the Appellants is also concerned with the fine imposed and sentence awarded in default of payment of fine as the Appellants have almost undergone the substantive sentences. According to learned counsel the fine amount of Rs.25,000/-Rs.50,000/- and Rs.50,000/ for offences under Sections 5 ES Act and Sections 18 and 23 UAP Act respectively are excessive. I do not find any infirmity on this count in the order on sentence passed by the learned Additional Sessions Judge.

21. The appeal is accordingly dismissed.

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CRL. A.

VIRENDER ....APPELLANT

VERSUS

THE STATE OF DELHI ....RESPONDENT

(GITA MITTAL & J.R. MIDHA, JJ.)

CRL. A. NO. : 668/2005 & CRL. M.A. NOS. : 15800-15803/2012 **DATE OF DECISION: 03.09.2012**

Indian Penal Code, 1860—Section 364-A/368 and under Arms Act, 1959—Sections 25/27 of the Arms Act—It appears that after the recording of his statement under Section 313 of the Cr. P.C., Virender Singh, absconded and was declared a proclaimed offender by the learned trial Judge. On his re-surfacing, the trial against him was completed which culminated in a judgment dated 26th April, 2005 passed by the learned Additional Sessions Judge finding him guilty of commission of the offence under Section 368 of the Indian Penal Code. After hearing the petitioner, by an order dated 5th May, 2005, the petitioner was sentenced to undergo rigorous imprisonment to life and to pay fine of Rs. 1,000/- under Section 364-A read with Section 120-B of the IPC and in default of payment, he was directed to undergo simple imprisonment for three months—The petitioner had assailed his conviction and the sentence imposed upon him by way of Criminal Appeal No. 668/2005 which came to be dismissed by a judgment dated 11th December, 2006 after detailed consideration by this Court—It is trite that the judgment would be law for the issue specifically raised and decided by the Court. In *A.R. Antulay Vs. R.S. Nayak & Anr.* AIR 1988 SC 1531, the Supreme Court

in 1984 had referred the petitioner's trial for offences under the Indian Penal Code and Prevention of Corruption Act, to a single Judge of the High Court of Bombay. The petitioner had challenged the reference by way of a petitioner before the High Court of Bombay which rejected the same. The judgment of the Bombay High Court was assailed before the Supreme Court where the Court was primarily concerned with its power to transfer the cases against the petitioner under the Indian Penal Code as well as the Prevention of Corruption Act to the High Court and whether the same was authorized by law. Learned counsel for the petitioner is placing reliance on certain observations made in the minority view and not the binding dicta laid down in the said judgment which cannot guide adjudication of the issue before this Court—Before us, there is no dispute at all that there is no provision of the Code of Criminal Procedure which confers power of review on this Court. The judgment of this Court rendered on 11th December, 2006 was passed upholding the judgment of conviction passed by the learned trial Court. The judgments are based on a careful scrutiny of the evidence which had been recorded in the petitioner's trial. *Rajesh Adhikari's* case was decided on evidence recorded in his trial. In this view of the matter, it is certainly not open to us at this stage to assum review jurisdiction which is not conferred on us by the Statute—It needs no elaboration that so far as the jurisdiction of a Court after disposal of an appeal on merits is concerned, the same can only be the limited extent as statutorily prescribed by Section 362 of the Cr.P.C.—We may note that if we were to agree with the petitioner, it can give rise to a situation where co-accused may at will abscond from justice and re-surface after pronouncement(s) against the co-accused to cloud the evidence which has already been recorded of particular witness or who is otherwise before the Court. The same is clearly not

legally permissible—The reference in the caption of this petition to Articles 226 and 227 of the Constitution, is clearly misconceived inasmuch as this Court is not sitting in writ jurisdiction. The review petition has been filed in a disposed of criminal appeal—In view of the fact that we have held that this Court does not have the power of review in view of the fact that statute does not prescribe limitation for filing a review this application for condonation of delay is misconceived and is not maintainable.

Important Issue Involved: There is no dispute at all that there is no provision of the Code of Criminal Procedure which confers power of review on this Court. So far as the jurisdiction of a Court after disposal of an appeal on merits is concerned, the same can only be to the limited extent as statutorily prescribed by Section 362 of the Cr.P.C.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. Bankim Kulshreshtha, Advocate Mr. Vivek Sharma, Mr. Harish Nautiyal, for the Advocate.

FOR THE RESPONDENT : Ms. Ritu Gauba, APP.

CASES REFERRED TO:

1. *Kunhayammed & Ors.* vs. *State of Kerala & Anr.* reported at (2006) 6 SCC 359.
2. *Rupa Ashok Hurra* vs. *Ashok Hurra & Anr.* AIR 2002 SC 1771.
3. *Hari Singh Mann* vs. *Harbhajan Singh Bajwa* 2001 (1) SCC 169.
4. *A.R. Antulay* vs. *R.S. Nayak & Anr.* AIR 1988 SC 1531.

RESULT: Dismissed.

GITA MITTAL, J. (Oral)

Crl.M.A. Nos.15800-15802/2012

1. Allowed, subject to just exceptions.

Review Petition No.502/2012 & Crl.M.A. No.15803/2012 (for condonation of delay)

2. Thirteen persons including the petitioner Virender were charged under Section 364-A/368 of the Indian Penal Code (IPC) and under Sections 25/27 of the Arms Act for which they stood trial in the case arising out of FIR No.238/97 which was registered by the Police Station Tughlak Road, New Delhi under the same sections. The trial resulted in the judgment dated 17th May, 2002 of conviction of 11 persons including one Virender Singh, the present petitioner who was thereafter sentenced to rigorous imprisonment.

3. It appears that after the recording of his statement under Section 313 of the Cr.P.C., Virender Singh, absconded and was declared a proclaimed offender by the learned trial Judge. On his re-surfacing, the trial against him was completed which culminated in a judgment dated 26th April, 2005 passed by the learned Additional Sessions Judge finding him guilty of commission of the offence under Section 368 of the Indian Penal Code. After hearing the petitioner, by an order dated 5th May, 2005, the petitioner was sentenced to undergo rigorous imprisonment to life and to pay fine of Rs.1,000/- under Section 364-A read with Section 120-B of the IPC and in default of payment, he was directed to undergo simple imprisonment for three months.

4. The petitioner had assailed his conviction and the sentence imposed upon him by way of Criminal Appeal No.668/2005 which came to be dismissed by a judgment dated 11th December, 2006 after detailed consideration by this court.

5. Leave to petition against the dismissal of said appeal was filed before the Supreme Court of India and came to be listed as SLP (Crl.) No.1145/2007. By the order dated 2nd March, 2007, this special leave was dismissed in limine.

6. The present petition has been filed by Virender Singh who is undergoing the sentence of rigorous imprisonment, seeking review of the judgment dated 11th December, 2006 passed by this court.

7. It is contended that one Rajesh Adhikari was also arrayed as a co-accused to stand trial with the present writ petitioner but he had been absconding and had been declared as proclaimed offender. He surfaced after the petitioner's appeal had been dismissed by the judgment dated 11th December, 2006. It is urged that Rajesh Adhikari had filed an application under Section 311 of the Cr.P.C. for summoning of Smt. Shashi in the trial against him, which was not granted by the learned trial Judge. It is urged that a judgment of conviction dated 15th September, 2009 was passed against Rajesh Adhikari by the learned trial Court which was assailed before this court in Crl.Appeal No.1365/2011. The appeal was allowed by a judgment dated 2nd January, 2012. The petitioner submits that he is entitled to acquittal and the same judgment as has been passed in favour of Rajesh Adhikari.

8. The present petition has been couched as an application under Articles 226, 227, 21 & 14 of the Constitution of India read with Sections 482 & 374 of the Cr.P.C.. Along with, the petitioner has filed Criminal Miscellaneous Appeal No.15803/2012 praying for condonation of delay in filing the review petition.

9. Given the well settled principle of law that the power of review has to be specifically statutorily conferred, we have right at the outset put a question to learned counsel representing the petitioner with regard to the maintainability of the present petition. Learned counsel for the petitioner has placed reliance on the observations of the Supreme Court in para 114 of the pronouncement reported at AIR 1988 SC 1531 **A.R. Antulay Vs. R.S. Nayak & Anr** which reads as follows:-

> "114. In both the judgments it has been clearly observed that judicial order of this Court is not amenable to a writ of certiorari for correcting any error in the judgment. It has also been observed that the jurisdiction or power to try and decide a cause is conferred on the courts by the Law of the Lands enacted by the Legislature or by the provisions of the Constitution. It has also been highlighted that the court cannot confer a jurisdiction on itself which is not provided in the law. It has also been observed that the act of the court does not injure any of the suitors. It is for this reason that the error in question is sought to be corrected after a lapse of more than three years. I agree with the opinion expressed by Justice Mukharji in the judgment as well as the additional opinion

given by Justice Misra in his separate judgment."

10. It is trite that the judgment would be law for the issue specifically raised and decided by the court. In **A.R. Antulay** (supra), the Supreme Court in 1984 had referred the petitioner's trial for offences under the Indian Penal Code and Prevention of Corruption Act, to a single Judge of the High Court of Bombay. The petitioner had challenged the reference by way of a petition before the High Court of Bombay which rejected the same. The judgment of the Bombay High Court was assailed before the Supreme Court where the court was primarily concerned with its power to transfer the cases against the petitioner under the Indian Penal Code as well as the Prevention of Corruption Act to the High Court and whether the same was authorized by law. Learned counsel for the petitioner is placing reliance on certain observations made in the minority view and not the binding dicta laid down in the said judgment which cannot guide adjudication of the issue before this court.

11. Before us, there is no dispute at all that there is no provision of the Code of Criminal Procedure which confers power of review on this court. The judgment of this court rendered on 11th December, 2006 was passed upholding the judgment of conviction passed by the learned trial Court. The judgments are based on a careful scrutiny of the evidence which had been recorded in the petitioner's trial. Rajesh Adhikari's case was decided on evidence recorded in his trial. In this view of the matter, it is certainly not open to us at this stage to assum review jurisdiction which is not conferred on us by the Statute.

12. Our attention has been drawn to a pronouncement of the Supreme Court reported at 2001 (1) SCC 169 **Hari Singh Mann Vs. Harbhajan Singh Bajwa** wherein the Supreme Court has criticized the court entertaining any application in a disposed of criminal matter in the following terms:-

> "8. We have noted with disgust that the impugned orders were passed completely ignoring the basic principles of criminal law. No review of an order is contemplated under the Code of Criminal Procedure. After the disposal of the main petition on 7-1-1999, there was no lis pending in the High Court wherein the respondent could have filed any miscellaneous petition. The filing of a miscellaneous petition not referable to any provision of the Code of Criminal Procedure or the rules of the Court, cannot be resorted

to as a substitute of fresh litigation. The record of the proceedings produced before us shows that directions in the case filed by the respondents were issued apparently without notice to any of the respondents in the petition. Merely because the respondent 1 was an Advocate, did not justify the issuance of directions at his request without notice of the other side. The impugned orders dated 30-4-1999 and 21-7-1999 could not have been passed by the High Court under its inherent power under Section 482 of the Code of Criminal Procedure. The practice of filing miscellaneous petitions after the disposal of the main case and issuance of fresh directions in such miscellaneous petitions by the High Court are unwarranted, not referable to any statutory provision and in substance the abuse of the process of the court.

9. There is no provision in the Code of Criminal Procedure authorising the High Court to review its judgment passed either in exercise of its appellate or revisional or original criminal jurisdiction. Such a power cannot be exercised with the aid or under the cloak of Section 482 of the Code. This Court in **State of Orissa v. Ram Chander Agarwala** held:

> "20. Before concluding we will very briefly refer to cases of this Court cited by counsel on both sides. Talab Haji Hussain relates to the power of the High Court to cancel bail. The High Court took the view that under Section 561A of the Code, it had inherent power to cancel the bail, and finding that on the material produced before the Court it would not be safe to permit the appellant to be at large cancelled the bail, distinguishing the decision in **Lala Jairam Das v. King-Emperor** and stated that the Privy Council was not called upon to consider the question about the inherent power of the High Court to cancel bail under Section 561A. In **Sankatha Singh v. State of U.P.** this Court held that Section 369 read with Section 424 of the Code of Criminal Procedure specifically prohibits the altering or reviewing of its order by a court. The accused applied before a succeeding Sessions Judge for rehearing of an appeal. The learned Judge was of the view that the appellate court had no power to review or restore an appeal which has been disposed of. The

Supreme Court agreed with the view that the appellate court had no power to review or restore an appeal. This Court, expressing its opinion that the Sessions Court had no power to review or restore an appeal observed that a judgment, which does not comply with the requirements of Section 367 of the Code, may be liable to be set aside by a superior court but will not give the appellate court any power to set it aside itself and re-hear the appeal observing that "Section 369 read with Section 424 of the Code makes it clear that the appellate court is not to alter or review the judgment once signed, except for the purpose of correcting a clerical error. Reliance was placed on a decision of this Court in Supdt. and Remembrancer of Legal Affairs **W.B. v. Mohan Singh** by Mr.Patel, learned Counsel for the respondent wherein it was held that rejection of a prior application for quashing is no bar for the High Court entertaining a subsequent application as quashing does not amount to review or revision. This decision instead of supporting the respondent clearly lays down, following Chopra case that once a judgment has been pronounced by a High Court either in exercise of its appellate or revisional jurisdiction, no review or revision can be entertained against that judgment as there is no provision in the Criminal Procedure Code which would enable the High Court to review the same or to exercise revisional jurisdiction. This Court entertained the application for quashing the proceedings on the ground that a subsequent application to quash would not amount to review or revise an order made by the Court. The decision clearly lays down that a judgment of the High Court on appeal or revision cannot be reviewed or revised except in accordance with the provisions of the Criminal Procedure Code. The provisions of Section 561A of the Code cannot be invoked for exercise of a power which is specifically prohibited by the Code.""

(underlining by us)

13. It needs no elaboration that so far as the jurisdiction of a court after disposal of an appeal on merits is concerned, the same can only be

to the limited extent as statutorily prescribed by Section 362 of the Cr.P.C.

14. Learned counsel for the petitioner has also relied on the pronouncement of the Supreme Court reported at (2006) 6 SCC 359 **Kunhayammed & Ors. Vs. State of Kerala & Anr.** In this case, the court has laid down the law on the effect of dismissal of a special leave petition by a non-speaking order or a dismissal where no reasons were given that it does not constitute res judicata in the context of exercise of powers under the Kerala Private Forest (Vesting & Assignment) Act, 1971. In the present case as well, the Special Leave Petition has been dismissed in limine. However, we still are unable to hold that this court has powers of review so far as exercise of criminal appellate jurisdiction is concerned.

15. Learned counsel for the petitioner has also placed reliance on the judgment reported at AIR 2002 SC 1771 **Rupa Ashok Hurra Vs. Ashok Hurra & Anr.** and connected petitions. This judgment was rendered in the context of Article 142 of the Constitution of India and it was held that the Supreme Court could exercise inherent power and re-consider the final judgment in cases of gross abuse of the process of the court or gross miscarriage of justice in rarest of the rare case. We may note that exercise of even such power was carefully confined to a very narrow area by the Supreme Court placing reliance on the doctrine of ex debito justitiae.

16. In the instant case, the judgment against the petitioner rests on the evidence led before the Trial Court in the trial against him.

17. We may note that if we were to agree with the petitioner, it can give rise to a situation where co-accused may at will abscond from justice and re-surface after pronouncement(s) against the co-accused to cloud the evidence which has already been recorded of a particular witness or who is otherwise before the court. The same is clearly not legally permissible.

18. The reference in the caption of this petition to Articles 226 and 227 of the Constitution, is clearly misconceived inasmuch as this court is not sitting in writ jurisdiction. The review petition has been filed in a disposed of criminal appeal.

19. Learned counsel for the petitioner has submitted that he had filed a petition under the Right to Information Act before the Supreme

Court and that a letter dated 24th February, 2012 was received from the court directing the petitioner to proceed in the matter in accordance with law. It is contended that the present petition had been filed as a result thereof.

20. We are unable to see as to how the response to a petition under the Right to Information Act could render the present review petition maintainable. The petitioner was merely directed to examine the matter and take steps in accordance with law. The present petition is certainly not 'in accordance with law'. For all these reasons, this petition is dismissed as not maintainable.

Crl.M.A. No.15803/2012

21. In view of the fact that we have held that this court does not have the power of review in view of the fact that statute does not prescribe limitation for filing a review, this application for condonation of delay is misconceived and is not maintainable. Dasti.

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CMS

SKIPPER BHAWAN FLAT BUYERS ASSN. & ORS. **....APPELLANTS**

VERSUS

SKIPPER TOWERS PVT. LTD. **....RESPONDENTS**

(A.K. SIKRI, ACJ. & RAJIV SAHAI ENDLAW, J.)

RP. 162/2007,
CMS. NO. : 7332/2009,
21202/2011 IN RFA
(OS) NO. : 23/1998

DATE OF DECISION: 03.09.2012

(A) Review Petition—RFA(OS) 23/1998 was decided by a Division Bench of this Court vide judgment dated 23.11.2001, wherein area of various allottees was

reduced including that of the applicant from decretal area to 4822 sq.ft. Thereafter the applicant M/s William Jacks and Company xs(India) Ltd. filed Review Application No. 162/2003 seeking review of this judgment as vide judgment dated 23.11.2001, the applicant was allotted 4822 sq.ft. area on the 12 Bara Khambha Road, New Delhi - 110001 whereas it had obtained the decree dated 5.9.1997 in Suit No. 728/ 1987 allotting an area of 7460.342 sq.ft. on the 11th floor which decree had become final as no appeal was filed there against. The plea, therefore, was that such a decree could not be varied in the aforesaid proceedings in which applicant was not a party. Held: That the Respondent was constructing the said building, advertised the proposed construction and solicited buyers. However, the Respondent booked more space than which was available in the building, and led to buyers filing suit. When these suits started piling up, the learned Single Judge appointed a Committee which could consider the claims of all the flat buyers and suggest the areas which could be allotted to each of them. The Committee filed exhaustive report before the learned Single Judge who was seized of all the suits. However, when the suits came up for hearing and dealt with by another Single Bench, he took the view that each suit for specific performance was to be dealt with on its own merits. Thereafter a spate of appeals came to be filed. Lead appeal was RFA(OS) 23/1998 as filed by Skipper Bhavan Flat Buyers Association. The Division Bench was of the opinion that in a situation like this, the report should not have been discarded and should have been acted upon and it was doing substantial and complete justice to all the flat buyers.

As already pointed out above, applicant had filed Suit No.728/1987 before the original side of this Court. In this suit, it was stated that applicant had booked certain area in the Skipper House and Agreement for Sale dated 29.6.1982

was entered into between the applicant and Skipper Towers Pvt. Ltd. Area booked was measuring 10,000 sq.ft. @ Rs.550/- per sq.ft. in installments. Balance amount was to be paid by 30.9.1987. As certain disputes arose, the applicant filed aforesaid suit for specific performance. It was decreed vide order dated 5.9.1997 allotting an area of 7460.342 sq.ft. Judgment debtor had not filed any appeal thereagainst and, therefore, this decree has attained finality. **(Para 2)**

However, RFA(OS) 23/1998 was filed by Skipper Bhawan Flat Buyers Association and Ors. against judgment dated 5.9.1997 before the Division Bench of this Court in which judgment dated 23.11.2001 was passed. Vide this judgment, area of various allottees was reduced including that of the applicant from decretal area to 4822 sq.ft. The submission was that once the decree had been passed which had attained finality, that could not be altered in some other appeal in which not only the applicant was not a party, but the applicant was not even heard in the matter. It is submitted that the aforesaid proceedings in RFA could not be treated as representative suit as permission of the court under Order 1 Rule 8 of the CPC is mandatory and was not taken. Reference is made to the judgment of the Supreme Court in **Kalyan Singh v. Smt. Choti & Ors.** (1990) 1 SCC 266. It is also submitted that public notice dated 19.11.2000 issued in the RFA by the Division Bench was of no consequence. Main argument, thus, is that once the decree had become final between the parties, it could not be varied. For this purpose, judgment of the Apex Court in **Premier Tyres Ltd. v. Kerala State Road Transport Corporation,** AIR 1993 SC 1202 is referred wherein it is held as under:

> "1. The short and the only question of law that arises for consideration in this appeal is the effect of non filing of appeal in the connected suit tried together with common issues.
>
> xxx xxx xxx

3. The validity of this finding has been assailed by Shri Raja Ram Aggarwal, the learned Sr. Advocate appearing on behalf of the appellant. It is urged that Section 11 of the Civil Procedure Code does not apply as such. According to him since both the suits were connected and decided by a common order the issue in neither suit can be said to have been decided in a former suit. Therefore, the basic ingredient of Section 11 of the C.P.C. was not satisfied. The submission derives some support from observations in **Narhari v. Shanker** [1950] 1 SCR 754, that, 'even when there are two suits it has been held that decision given simultaneously cannot be a decision in the former suit'. But this decision was distinguished in **Sheodan Singh v. Smt. Daryao Kunwar** : [1966] 3 SCR 300, as it related to only one suit, therefore, the observations extracted above were not relevant in a case where more than one suit were decided by a common order. The Court further held that where more than one suit were filed together and main issues were common and appeals were filed against the judgment and decree in all the suits and one appeal was dismissed either as barred by time or abated then the order operated as res judicata in other appeals, 'In the present case there were different suits from which different appeals had to be filed. The High Court's decision in the two appeals arising from suits Nos. 77 and 91 was undoubtedly earlier and therefore the condition that there should have been a decision in a former suit to give rise to res judicata in a subsequent suit was satisfied in the present case. The contention that there was no former suit in the present case must therefore fail'. In **Shri Ramagya Prasad Gupta v. Sri Murli Prasad** : [1974] 3 SCR 915, an effort was made to get the decision in **Sheodan Singh** : [1966] 3 SCR 300 (supra) reconsidered. But the Court did not consider it necessary to examine the matter as the subject matter

of two suits being different one of the necessary ingredients for applicability of Section 11 of the C.P.C. were found missing.

4. Although none of these decisions were concerned with a situation where no appeal was filed against the decision in connected suit but it appears that where an appeal arising out of connected suits is dismissed on merits the other cannot be heard, and has to be dismissed. The question is what happens where no appeal is filed, as in this case from the decree in connected suit. Effect of non filing of appeal against a judgment or decree is that it become final. This finality can be taken away only in accordance with law. Same consequences follows when a judgment or decree in a connected suit is not appealed from."

(Para 3)

The aforesaid argument appears to be attractive when it is taken in isolation and without the context of the present proceedings. Once the background in which judgment dated 23.11.2001 in RFA (OS) 23/1998 and other connected case is taken note of, it would become apparent that these arguments have no merit. This is stated so in detail in the judgment and the salient aspects thereof are recapitulated in brief. **(Para 5)**

(B) It would also be pertinent to mention that Skipper Bhawan Flat Buyers Association had come to the Court in a representative capacity. Others who had filed the appeals were those whose suits had either not been decreed by the learned Single Judge or the decree was not to their satisfaction. What is emphasized is that in none of the cases, Skippers filed the appeals as nobody was there to filed those appeals. That was the reason that where the suits were decreed, in which category the applicant belong to, no appeals were filed.

It would also be pertinent to mention that Skipper Bhawan Flat Buyers Association had come to the Court in a representative capacity. Others who had filed the appeals were those whose suits had either not been decreed by the learned Single Judge or the decree was not to their satisfaction. What is emphasized is that in none of the cases, Skippers filed the appeals as nobody was there to file those appeals. That was the reason that where the suits were decreed, in which category the applicant belong to, no appeals were filed. **(Para 7)**

(C) The Division Bench, in such circumstances, felt that since others can be affected, let there be a public notice issued. Public notice was issued. Even specific notices to all the parties including applicant were issued.

Accepting the report would have meant affecting those also in whose favour decrees were passed but which were not under challenge. Reason for not challenging, as already stated above, is Sardar Tejwant Singh, who was the anchor of Skipper Group was behind the bars. The Division Bench, in such circumstances, felt that since others can be affected, let there be a public notice issued. Public notice was issued. Even specific notices to all the parties including applicant were issued. It would be significant to state that even the Committee while doing its exercise had issued notices to all the flat buyers. The justification for adopting this course of action was given in the detailed judgment in the following words:

"...This opinion of ours is influenced by the following considerations:

1) Order dated 1st October, 1991 passed by the learned Single Judge and the terms of reference mentioned therein gave power to the Committee to consider the cases of all the flat buyers for allotment/ equitable allotment of the space.

2) This order was challenged in appeal. The Division Bench affirmed this order and dismissed the appeal. The learned Single Judge was bound by the interim order dated 1st October, 1991 passed earlier in the suit which was even the stamp of approval from the Division Bench.

3) The Committee invited all the flat buyers to lodge their claims and considered the claims on merits. Therefore, there was legitimate expectation in the mind of the flat buyers that once the Committee had been appointed by this court with directions to look into the claims of all flat buyers and they succeed before the Committee, they would be allotted the space. The court was, thereafter, required only to accepted Report with or without modifications having regard to the objections which were filed by some flat buyers.

4) In a matter like this where the skippers created problems for the flat buyers by booking the space more than the available space, the court cannot confine itself to the case of those only who filed the suits. What would be the position if, in respect of one particular flat the Skippers entered into agreement with two or more persons? If only one of them files the suit for specific performance although he entered into agreement with Skippers at a later date and paid lesser money that was paid by another person who entered into an agreement at an earlier date and paid full consideration before the agreement? Would it be equitable in such circumstance to decree the suit of the person who had filed the suit, ignoring the claim of the person who failed to do so. Answer is obviously, No. This example in respect of one flat can be magnified in the instant case as similar problem would emerge in respect of other flats. Therefore, it was but proper, in a situation like this, to consider the claims of all persons even when the claims of those flat

buyers who filed the suits had to be decided. Otherwise, it would create inequitable results.

5) Even technical problem can also be taken care of. After all, the Committee considered the cases of all the claims and submitted the Report. Depending upon the outcome of the Report and the ultimate decision thereon by the court with modifications, if any, those claimants who are held entitled to allotment of the space could be given the space subject to their filing requisite application with court fee as if it was a suit filed by such person.

6. The approach of the learned Single Judge vide order dated 1st October, 1991 and confirmed by the Division Bench was, therefore, reasonable, just and proper. It was adopted with the purpose of doing justice in the broader sense of the matter keeping aside narrow and pedantic approach. Situation may arise when, to do complete justice in the matter courts have to ignore the technicalities of law. As aforesaid, even if claims of those who filed the suits had to be decided, it could not be done in isolation and without considering the entire gamut, amplitude and peculiarity of the nature of problems being faced in such cases. As is clear by now that these cases relating to this building have posed a peculiar problem. It has to be dealt with by adopting an approach which is justice oriented. Imparting justice has to be the prime consideration with the growing complexity of social relations, new types of problems would come in the courts. There may not be perfect precedent to follow. If following an old principle yields wrong results or leads injustice, occasion would be ripe to formulate new principle. New situation demand new solutions. By treading the beaten path, one may not reach the goal. The goal is to do justice. In such situations social engineering has to be the guiding factor. It would be opportune to quote from the book **"The**

Nature of the Judicial Process" which is a compilation of the Storrs lectures delivered by **Benjamin N.Cardozo** at Yale University. Quoting various eminent Jurists, Cardozo makes the following remarks:

"It is true, I think, today in every department of the law that the social value of a rule has become a test of growing power and importance. This truth is powerfully driven home to the lawyers of this country in the writings of Dean pound. "Perhaps the most significant advance in the modern science of law is the change from the analytical to the functional attitude" (Refer :Pound, "Administrative Application of Legal Standards" Proceedings American Bar Association, 1919, pp. 441, 449). "The emphasis has changed from the content of the precept and the existence of the remedy to the effect of the precept in action and the availability and efficiency of the remedy to attain the ends for which the precept was devised. (Refer: p.451, of. Pound, "Mechanical Jurisprudence, "Columbia L.R. 603. Foreign Jurists have the same thought: "The whole of the judicial function," says Gmelin, (Refer: Sociological method," trnasl., 9, Modern Legal philosophy Series, P. 131.) "has... been shifted. The will of the State expressed in decision and judgment is to bring about a just determination by means of the subjective sense of justice inherent in the judge, guided by an effective weighing of the interests of the parties in the light of the opinions generally prevailing among the community regarding transactions like those in question. The determination should under all circumstances be in harmony with the requirements of good faith in business intercourse and the needs of practical life, unless a positive statute prevents it; and in weighing conflicting interests, the interest that is better founded in reason and more worthy of protection should be helped to achieve victory."(Refer: Gmelin, supra; of. Ehrlich, "Die

juristische Logik," p. 187; Duguit, "Les Transformations due profit deputies le Code Napolean, "transl., Continental Lega Hist. Series, Vol.XI pp. 72, 70.) "On the other hand, "says Geny, (Refer :Op.cit., Vol II, p.92 Section 159) "We are to interrogate reason and conscience, to discover in our inmost nature, the very basis of justice; on the other, we are to address ourselves to social phenomena, to ascertain the laws of their harmony and the principles of order which they exact." And again: (Refer: Vol. II, p.91) "Justice and general utility, such will be the two objectives that will direct our course."

It may also be added that one has to be more liberal while dealing with the procedural aspects of the case. In the field of procedure, major changes have been witnessed over a period of time. The tendency today is in the direction of a growing liberalism. Cardozo in the aforesaid lectures, taking note of this tendency has also stated:

"The new spirit has made its way gradually; and its progress, unnoticed step by step, is visible in retrospect as we look back upon the distance traversed. The old forms remain, but they are filled with a new content. We are getting away from what Enrich calls "die spielerische und die mathematische Entischeidunig" (Refer:Enrich, "Die juristinsche Logik," p.295; cf.pp.294, 296). The conception of a lawsuit either as a mathematical problem or as a sportsman's game. Our own Wigmore has done much to make that conception out of date. (Refer: Treaties on Evidence). We are thinking of the end which the law servers, and fitting its rules to the task of service."

We must adopt an active posture and view in a larger perspective the functionalism of legal humanism. If the situation demands adoption of a broad principle to meet the ends of justice, the court should not feel shy

in adopting the same. 'The history of law is the history of the effort to mould legal institutions and doctrines to meet the felt necessities of each period in the Nation's development'. Access to justice is the demand of the day. The problem of access to justice has many dimensions. What is crucial is that people should be the participants and beneficiaries in the administration of justice. The Supreme Court has already given new dimensions to the access jurisprudence in expanding the principle of locus standi which led to the introduction of public interest litigation in this country.

Cappelletti clarified his view on the crucial aspect of access to court in the Administration of Justice thus:

"The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement-the most basic 'human right'- of a system which purports to guarantee of legal rights. (Australian law Reform Commission, Discussion Paper No.4, p.3)."

Once we are able to find the way that too within the existing norms, of course, by giving it a new meaning, and more so when it advances the justicing process, there should not be any difficulty in adopting the same. Afterall it has also to be seen in the present case that it is not in the nature of adversary litigation any longer. We are dealing with class action.

It is not necessary to indulge in a detailed jurisprudential exercise. Our purpose would be served by mentioning that even our own Supreme Court has

shown the path by holding repeatedly that the procedure is the hand maid of justice. It is to facilitate justice and further its end. It is the means designed for furtherance of justice and not to frustrate the same. (Refer: **Sangram Singh v. Election Tribunal, Kota,** AIR 1955 SC 422).

It may be interesting to note at this stage that the Committee in the concluding paragraph of its Report itself indicated the peculiar nature of the problem, the approach adopted by it and advised the flat buyers not to indulge in conventional litigation. This is what it observed:

"Our task was both exciting and innovative. We are not required to try suits for specific performance, as we have said. Our commission was to facilitate a just settlement between hostile parties. Out of the conflicting and opposing claims we had to find what was just and equitable. In the final analysis, we have tried to make the best of a bad bargain.

We have reached the end of our report. Before we close we will added a word of advice to the flat buyers. The disputes will have to be settled within an openness to compromise on the lines suggested by us or as may be suggested by the court. Because the final word is with the court. But one thing is clear. Conventional litigation will not avail the flat buyers. They should avoid lawsuits. The Poet John Prom fret in 1700 wrote:

"Law-suits I'd shun, with as much studious care.

As I would dens where hungry lions are".

If some of the flat buyers were convinced by the aforesaid advice and did not file individual suits after the recommendation of the Committee allotting them certain area believing that they would get the same

now from the court on the basis of this recommendation, they cannot be faulted with. Rejecting their claims only because they adhered to the aforesaid advice, would amount to causing gross injustice to such persons.

We may hasten to add that this approach is adopted keeping in view the peculiar nature of these cases and the magnitude of the problem involved. By no means we are suggesting that even in routine problems of trivial types, such procedural requirements are to be given go-by." **(Para 8)**

(D) It was also pointed out that the applicant had the knowledge of the proceedings. However, it stayed away from the proceedings when the appeals were being heard. Therefore it was held that the applicant is precluded from filing such an application for review.

We would also like to point out that the applicant had the knowledge of the proceedings. However, it stayed away from the proceedings when the appeals were being heard. On this ground also, we say that the applicant is precluded from filing such an application for review. In **N.K. Prasada v. Government of India & Ors.,** (2004) 6 SCC 299, the Apex Court has observed as under:

"24. The principles of natural justice, it is well-settled, cannot be put into a strait-jacket formula. Its application will depend upon the facts and circumstances of each case. It is also well-settled that if a party after having proper notice chose not to appear, he a later stage cannot be permitted to say that he had not been given a fair opportunity of hearing. The question had been considered by a Bench of this Court in **Sohan Lal Gupta (Dead) through LRs. and Ors. Vs. Asha Devi Gupta** : (2003) 7 SCC 492 of which two of us (V.N. Khare, C.J. and Sinha, J.) are parties wherein upon noticing a large number of decisions it was held:

(SCC p.506, para 29)

"29. The principles of natural justice, it is trite, cannot be put in a straitjacket formula. In a given case the party should not only be required to show that he did not have a proper notice resulting in violation of principles of natural justice but also to show that he was seriously prejudiced thereby.

25. The principles of natural justice, it is well settled, must not be stretched too far." **(Para 10)**

Important Issue Involved: Principles of natural justice are not rigid or immutable and hence they cannot be imprisoned in a straight-jacket and must yield to and change with exigencies of situations.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. D. Verma, Mrs. Neha S. Verma, Advocates.

FOR THE RESPONDENTS : Mr. Mukul Rohtagi, Sr. Advocate with Mr. R.K. Sanghi, Mr. Satyendra Kumar, Advocates for applicants Mr. Rajiv Bahl, Advocate for OL.

CASES REFERRED TO:

1. *Harbans Singh & Ors.* vs. *Sant Hari Singh & Ors.,* JT 2009 (2) SC 32.
2. *Ajit Kumar Nag* vs. *General Manager (PJ), Indian Oil Corporation Ltd., Haldia & Ors.,* (2005) 7 SCC 764.
3. *N.K. Prasada* vs. *Government of India & Ors.,* (2004) 6 SCC 299.
4. *Sohan Lal Gupta (Dead) through LRs. and Ors.* vs. *Asha Devi Gupta* : (2003)7SCC492.
5. *Premier Tyres Ltd.* vs. *Kerala State Road Transport Corporation,* AIR 1993 SC 1202.

6. *Kalyan Singh* vs. *Smt. Choti & Ors.* (1990) 1 SCC 266.
7. *Shri Ramagya Prasad Gupta* vs. *Sri Murli Prasad* : [1974] 3 SCR 915.
8. *Sheodan Singh* vs. *Smt. Daryao Kunwar* : [1966] 3 SCR 300.
9. *Sangram Singh* vs. *Election Tribunal, Kota,* AIR 1955 SC 422).
10. *Narhari* vs. *Shanker* [1950] 1 SCR 754.
11. *Charan Lal Sahu* vs. *Union of India, (Bhopal Gas Disaster),* SCC p.705, para 124.

RESULT: Review Petition dismissed.

A.K. SIKRI (Acting Chief Justice)

RP 162/2003

RFA(OS) 23/1998 was decided by a Division Bench of this Court vide judgment dated 23.11.2001 and one of us (A.K. Sikri, Acting Chief Justice) was a member of that Bench. Thereafter the applicant M/s William Jacks and Company (India) Ltd. filed Review Application No.162/2003 seeking review of this judgment. Main reason for filing the application for review was that vide judgment dated 23.11.2001, the applicant was allotted 4822 sq.ft. area on the 12th floor of Skipper House at 22, Bara Khambha Road, New Delhi û 110001 whereas it had obtained the decree dated 5.9.1997 in Suit No.728/1987 allotting an area of 7460.342 sq.ft. on the 11th floor which decree had become final as no appeal was filed thereagainst. The plea, therefore, was that such a decree could not be varied in the aforesaid proceedings in which applicant was not a party and more so when the decree obtained by it had become final. This application was disposed of vide order dated 26.5.2004. While rejecting the application, the Division Bench, however, referred the matter back to the Committee appointed by it to determine the question of calculation of cost of area as booked by the applicant. According to the applicant, certain issues were not decided by that order. Aggrieved by this order, the applicant approached the Supreme Court by way of Special Leave Petition. In this Special Leave Petition, the Supreme Court passed orders dated 31.3.2009 with direction to hear the review application filed by the applicant on the merits of the case. This is how the aforesaid application

has come up for hearing. During the pendency of this review petition, the applicant has also filed CM 21202/2011 seeking allotment of space on the 12th floor on the ground that on this floor, there is going to be further construction under the supervision of the Committee and, therefore, applicant can be allotted space therein. After remand from the Supreme Court, the applicant also filed CM 7932/2009 with a request to hear the review petition.

2. As already pointed out above, applicant had filed Suit No.728/1987 before the original side of this Court. In this suit, it was stated that applicant had booked certain area in the Skipper House and Agreement for Sale dated 29.6.1982 was entered into between the applicant and Skipper Towers Pvt. Ltd. Area booked was measuring 10,000 sq.ft. @ Rs.550/- per sq.ft. in installments. Balance amount was to be paid by 30.9.1987. As certain disputes arose, the applicant filed aforesaid suit for specific performance. It was decreed vide order dated 5.9.1997 allotting an area of 7460.342 sq.ft. Judgment debtor had not filed any appeal thereagainst and, therefore, this decree has attained finality.

3. However, RFA(OS) 23/1998 was filed by Skipper Bhawan Flat Buyers Association and Ors. against judgment dated 5.9.1997 before the Division Bench of this Court in which judgment dated 23.11.2001 was passed. Vide this judgment, area of various allottees was reduced including that of the applicant from decretal area to 4822 sq.ft. The submission was that once the decree had been passed which had attained finality, that could not be altered in some other appeal in which not only the applicant was not a party, but the applicant was not even heard in the matter. It is submitted that the aforesaid proceedings in RFA could not be treated as representative suit as permission of the court under Order 1 Rule 8 of the CPC is mandatory and was not taken. Reference is made to the judgment of the Supreme Court in **Kalyan Singh v. Smt. Choti & Ors.** (1990) 1 SCC 266. It is also submitted that public notice dated 19.11.2000 issued in the RFA by the Division Bench was of no consequence. Main argument, thus, is that once the decree had become final between the parties, it could not be varied. For this purpose, judgment of the Apex Court in **Premier Tyres Ltd. v. Kerala State Road Transport Corporation,** AIR 1993 SC 1202 is referred wherein it is held as under:

"1. The short and the only question of law that arises for

consideration in this appeal is the effect of non filing of appeal in the connected suit tried together with common issues.

xxx xxx xxx

3. The validity of this finding has been assailed by Shri Raja Ram Aggarwal, the learned Sr. Advocate appearing on behalf of the appellant. It is urged that Section 11 of the Civil Procedure Code does not apply as such. According to him since both the suits were connected and decided by a common order the issue in neither suit can be said to have been decided in a former suit. Therefore, the basic ingredient of Section 11 of the C.P.C. was not satisfied. The submission derives some support from observations in **Narhari v. Shanker** [1950] 1 SCR 754, that, 'even when there are two suits it has been held that decision given simultaneously cannot be a decision in the former suit'. But this decision was distinguished in **Sheodan Singh v. Smt. Daryao Kunwar** : [1966] 3 SCR 300, as it related to only one suit, therefore, the observations extracted above were not relevant in a case where more than one suit were decided by a common order. The Court further held that where more than one suit were filed together and main issues were common and appeals were filed against the judgment and decree in all the suits and one appeal was dismissed either as barred by time or abated then the order operated as res judicata in other appeals, 'In the present case there were different suits from which different appeals had to be filed. The High Court's decision in the two appeals arising from suits Nos. 77 and 91 was undoubtedly earlier and therefore the condition that there should have been a decision in a former suit to give rise to res judicata in a subsequent suit was satisfied in the present case. The contention that there was no former suit in the present case must therefore fail'. In **Shri Ramagya Prasad Gupta v. Sri Murli Prasad** : [1974]3SCR915, an effort was made to get the decision in **Sheodan Singh** : [1966] 3 SCR 300 (supra) reconsidered. But the Court did not consider it necessary to examine the matter as the subject matter of two suits being different one of the necessary ingredients for applicability of Section 11 of the C.P.C. were found missing.

4. Although none of these decisions were concerned with a

situation where no appeal was filed against the decision in connected suit but it appears that where an appeal arising out of connected suits is dismissed on merits the other cannot be heard, and has to be dismissed. The question is what happens where no appeal is filed, as in this case from the decree in connected suit. Effect of non filing of appeal against a judgment or decree is that it become final. This finality can be taken away only in accordance with law. Same consequences follows when a judgment or decree in a connected suit is not appealed from."

4. It is also submitted that the aforesaid judgment of Supreme Court in **Premier Tyres Ltd.** (supra) has been relied upon in the subsequent judgment in the case of **Harbans Singh & Ors. v. Sant Hari Singh & Ors.,** JT 2009 (2) SC 32.

5. The aforesaid argument appears to be attractive when it is taken in isolation and without the context of the present proceedings. Once the background in which judgment dated 23.11.2001 in RFA (OS) 23/1998 and other connected case is taken note of, it would become apparent that these arguments have no merit. This is stated so in detail in the judgment and the salient aspects thereof are recapitulated in brief.

6. The judgment debtor (hereinafter referred to as 'the Skippers') who were constructing commercial building at 22, Bara Khambha Road, New Delhi (hereinafter referred to as 'the Skipper Tower') advertised the proposed construction and solicited buyers. The bookings started in the year 1976 and went on for a long period. Many persons booked the flats. Admittedly the space booked by the Skippers was much more than the space which was ultimately constructed and available in the building. The land on which the Skipper Tower was to be constructed belonged to six persons/group of persons having 1/6th share each who had all entered into collaboration agreement with the Skippers. Disputes arose between the Skippers and the owners of the land. Even thereafter, the Skippers kept on making bookings. Because of the disputes, complete construction could not be made. Buyers, on the other hand, started filing suits for specific performance. Number of suits were filed and the idea of that can be gauged from the fact that along with RFA No.23/1998, 219 other RFAs were also decided which had arisen from the judgment and decree passed in those suits. Crisply said, the area available was less than the subject matter of the area covered by all the suits. Thus, had

all the suits been decreed, no way the decrees could be executed. When these suits started piling up before the learned Single Judge, the learned Single Judge thought it appropriate to appoint a Committee which could consider the claims of all the flat buyers and suggest the areas which could be allotted to each of them depending upon the area booked by these flat buyers and payments made. The Committee did detailed exercise and filed exhaustive report before the learned Single Judge who was seized of all the suits. However, when the suits came up for hearing and dealt with by another Single Bench, he took the view that each suit for specific performance was to be dealt with on its own merits. The report was thus discarded and separate orders passed in each of the suits, albeit by common judgment. That is how spate of appeals came to be filed. Lead appeal was RFA(OS) 23/1998 filed by Skipper Bhavan Flat Buyers Association which association was formed by many flat buyers. The Division Bench was of the opinion that in a situation like this, the report should not have been discarded and should have been acted upon and it was doing substantial and complete justice to all the flat buyers. Obviously in this report, area which was suggested to be given to each of the buyers stood reduced as full area, as booked, could not have been given to any buyer.

7. It would also be pertinent to mention that Skipper Bhawan Flat Buyers Association had come to the Court in a representative capacity. Others who had filed the appeals were those whose suits had either not been decreed by the learned Single Judge or the decree was not to their satisfaction. What is emphasized is that in none of the cases, Skippers filed the appeals as nobody was there to file those appeals. That was the reason that where the suits were decreed, in which category the applicant belong to, no appeals were filed.

8. Accepting the report would have meant affecting those also in whose favour decrees were passed but which were not under challenge. Reason for not challenging, as already stated above, is Sardar Tejwant Singh, who was the anchor of Skipper Group was behind the bars. The Division Bench, in such circumstances, felt that since others can be affected, let there be a public notice issued. Public notice was issued. Even specific notices to all the parties including applicant were issued. It would be significant to state that even the Committee while doing its exercise had issued notices to all the flat buyers. The justification for adopting this course of action was given in the detailed judgment in the

following words:

> "…This opinion of ours is influenced by the following considerations:
>
> 1) Order dated 1st October, 1991 passed by the learned Single Judge and the terms of reference mentioned therein gave power to the Committee to consider the cases of all the flat buyers for allotment/equitable allotment of the space.
>
> 2) This order was challenged in appeal. The Division Bench affirmed this order and dismissed the appeal. The learned Single Judge was bound by the interim order dated 1st October, 1991 passed earlier in the suit which was even the stamp of approval from the Division Bench.
>
> 3) The Committee invited all the flat buyers to lodge their claims and considered the claims on merits. Therefore, there was legitimate expectation in the mind of the flat buyers that once the Committee had been appointed by this court with directions to look into the claims of all flat buyers and they succeed before the Committee, they would be allotted the space. The court was, thereafter, required only to accepted Report with or without modifications having regard to the objections which were filed by some flat buyers.
>
> 4) In a matter like this where the skippers created problems for the flat buyers by booking the space more than the available space, the court cannot confine itself to the case of those only who filed the suits. What would be the position if, in respect of one particular flat the Skippers entered into agreement with two or more persons? If only one of them files the suit for specific performance although he entered into agreement with Skippers at a later date and paid lesser money that was paid by another person who entered into an agreement at an earlier date and paid full consideration before the agreement? Would it be equitable in such circumstance to decree the suit of the person who had filed the suit, ignoring the claim of the person who failed to do so. Answer is obviously, No. This example in respect of one flat can be magnified in the instant case as similar problem would emerge in respect of other flats. Therefore, it was but proper, in a

situation like this, to consider the claims of all persons even when the claims of those flat buyers who filed the suits had to be decided. Otherwise, it would create inequitable results.

5) Even technical problem can also be taken care of. Afterall, the Committee considered the cases of all the claims and submitted the Report. Depending upon the outcome of the Report and the ultimate decision thereon by the court with modifications, if any, those claimants who are held entitled to allotment of the space could be given the space subject to their filing requisite application with court fee as if it was a suit filed by such person.

6. The approach of the learned Single Judge vide order dated 1st October, 1991 and confirmed by the Division Bench was, therefore, reasonable, just and proper. It was adopted with the purpose of doing justice in the broader sense of the matter keeping aside narrow and pedantic approach. Situation may arise when, to do complete justice in the matter courts have to ignore the technicalities of law. As aforesaid, even if claims of those who filed the suits had to be decided, it could not be done in isolation and without considering the entire gamut, amplitude and peculiarity of the nature of problems being faced in such cases. As is clear by now that these cases relating to this building have posed a peculiar problem. It has to be dealt with by adopting an approach which is justice oriented. Imparting justice has to be the prime consideration with the growing complexity of social relations, new types of problems would come in the courts. There may not be perfect precedent to follow. If following an old principle yields wrong results or leads injustice, occasion would be ripe to formulate new principle. New situation demand new solutions. By treading the beaten path, one may not reach the goal. The goal is to do justice. In such situations social engineering has to be the guiding factor. It would be opportune to quote from the book **"The Nature of the Judicial Process"** which is a compilation of the Storrs lectures delivered by **Benjamin N.Cardozo** at Yale University. Quoting various eminent Jurists, Cardozo makes the following remarks:

> "It is true, I think, today in every department of the law that the social value of a rule has become a test of growing

power and importance. This truth is powerfully driven home to the lawyers of this country in the writings of Dean pound. "Perhaps the most significant advance in the modern science of law is the change from the analytical to the functional attitude" (Refer :Pound, "Administrative Application of Legal Standards" Proceedings American Bar Association, 1919, pp. 441, 449). "The emphasis has changed from the content of the precept and the existence of the remedy to the effect of the precept in action and the availability and efficiency of the remedy to attain the ends for which the precept was devised. (Refer: p.451, of. Pound, "Mechanical Jurisprudence, "Columbia L.R. 603. Foreign Jurists have the same thought: "The whole of the judicial function," says Gmelin, (Refer: Sociological method," trnasl., 9, Modern Legal philosophy Series, P. 131.) "has... been shifted. The will of the State expressed in decision and judgment is to bring about a just determination by means of the subjective sense of justice inherent in the judge, guided by an effective weighing of the interests of the parties in the light of the opinions generally prevailing among the community regarding transactions like those in question. The determination should under all circumstances be in harmony with the requirements of good faith in business intercourse and the needs of practical life, unless a positive statute prevents it; and in weighing conflicting interests, the interest that is better founded in reason and more worthy of protection should be helped to achieve victory."(Refer: Gmelin, supra; of. Ehrlich, "Die juristische Logik," p. 187; Duguit, "Les Transformations due profit deputies le Code Napolean, "transl., Continental Lega Hist. Series, Vol.XI pp. 72, 70.) "On the other hand, "says Geny, (Refer :Op.cit., Vol II, p.92 Section 159) "We are to interrogate reason and conscience, to discover in our inmost nature, the very basis of justice; on the other, we are to address ourselves to social phenomena, to ascertain the laws of their harmony and the principles of order which they exact." And again: (Refer: Vol. II, p.91) "Justice and general utility, such will be the two objectives that will direct our course."

It may also be added that one has to be more liberal while dealing with the procedural aspects of the case. In the field of procedure, major changes have been witnessed over a period of time. The tendency today is in the direction of a growing liberalism. Cardozo in the aforesaid lectures, taking note of this tendency has also stated:

> "The new spirit has made its way gradually; and its progress, unnoticed step by step, is visible in retrospect as we look back upon the distance traversed. The old forms remain, but they are filled with a new content. We are getting away from what Enrich calls "die spielerische und die mathematische Entischeidunig" (Refer:Enrich, "Die juristinsche Logik," p.295; cf.pp.294, 296). The conception of a lawsuit either as a mathematical problem or as a sportsman's game. Our own Wigmore has done much to make that conception out of date. (Refer: Treaties on Evidence). We are thinking of the end which the law servers, and fitting its rules to the task of service."

We must adopt an active posture and view in a larger perspective the functionalism of legal humanism. If the situation demands adoption of a broad principle to meet the ends of justice, the court should not feel shy in adopting the same. 'The history of law is the history of the effort to mould legal institutions and doctrines to meet the felt necessities of each period in the Nation's development'. Access to justice is the demand of the day. The problem of access to justice has many dimensions. What is crucial is that people should be the participants and beneficiaries in the administration of justice. The Supreme Court has already given new dimensions to the access jurisprudence in expanding the principle of locus standi which led to the introduction of public interest litigation in this country.

Cappelletti clarified his view on the crucial aspect of access to court in the Administration of Justice thus:

> "The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes

> mechanisms for their effective protection. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement-the most basic 'human right'-of a system which purports to guarantee of legal rights. (Australian law Reform Commission, Discussion Paper No.4, p.3)."

Once we are able to find the way that too within the existing norms, of course, by giving it a new meaning, and more so when it advances the justicing process, there should not be any difficulty in adopting the same. Afterall it has also to be seen in the present case that it is not in the nature of adversary litigation any longer. We are dealing with class action.

It is not necessary to indulge in a detailed jurisprudential exercise. Our purpose would be served by mentioning that even our own Supreme Court has shown the path by holding repeatedly that the procedure is the hand maid of justice. It is to facilitate justice and further its end. It is the means designed for furtherance of justice and not to frustrate the same. (Refer: **Sangram Singh v. Election Tribunal, Kota,** AIR 1955 SC 422).

It may be interesting to note at this stage that the Committee in the concluding paragraph of its Report itself indicated the peculiar nature of the problem, the approach adopted by it and advised the flat buyers not to indulge in conventional litigation. This is what it observed:

> "Our task was both exciting and innovative. We are not required to try suits for specific performance, as we have said. Our commission was to facilitate a just settlement between hostile parties. Out of the conflicting and opposing claims we had to find what was just and equitable. In the final analysis, we have tried to make the best of a bad bargain.
>
> We have reached the end of our report. Before we close we will added a word of advice to the flat buyers. The disputes will have to be settled within an openness to compromise on the lines suggested by us or as may be suggested by the court. Because the final word is with the

court. But one thing is clear. Conventional litigation will not avail the flat buyers. They should avoid lawsuits. The Poet John Prom fret in 1700 wrote:

"Law-suits I'd shun, with as much studious care.

As I would dens where hungry lions are".

If some of the flat buyers were convinced by the aforesaid advice and did not file individual suits after the recommendation of the Committee allotting them certain area believing that they would get the same now from the court on the basis of this recommendation, they cannot be faulted with. Rejecting their claims only because they adhered to the aforesaid advice, would amount to causing gross injustice to such persons.

We may hasten to add that this approach is adopted keeping in view the peculiar nature of these cases and the magnitude of the problem involved. By no means we are suggesting that even in routine problems of trivial types, such procedural requirements are to be given go-by."

9. Report submitted by the Committee was thus made the basis. Each case was also discussed separately. This is how the final orders came to be passed. Once we take that into account, we are of the opinion that there is no merit in this review application filed by the applicant inasmuch as what is now sought to be argued was all before the Division Bench but the Division Bench adopted the aforesaid approach in consonance with justice.

10. We would also like to point out that the applicant had the knowledge of the proceedings. However, it stayed away from the proceedings when the appeals were being heard. On this ground also, we say that the applicant is precluded from filing such an application for review. In **N.K. Prasada v. Government of India & Ors.,** (2004) 6 SCC 299, the Apex Court has observed as under:

"24. The principles of natural justice, it is well-settled, cannot be put into a strait-jacket formula. Its application will depend upon the facts and circumstances of each case. It is also well-settled that if a party after having proper notice chose not to appear, he a later stage cannot be permitted to say that he had not been given a fair opportunity of hearing. The question had been

considered by a Bench of this Court in **Sohan Lal Gupta (Dead) through LRs. and Ors. Vs. Asha Devi Gupta** : (2003)7SCC492 of which two of us (V.N. Khare, C.J. and Sinha, J.) are parties wherein upon noticing a large number of decisions it was held: (SCC p.506, para 29)

"29.The principles of natural justice, it is trite, cannot be put in a straitjacket formula. In a given case the party should not only be required to show that he did not have a proper notice resulting in violation of principles of natural justice but also to show that he was seriously prejudiced thereby.

25. The principles of natural justice, it is well settled, must not be stretched too far."

11. The justice oriented approach adopted by the Division Bench also finds support from the judgment of Supreme Court in **Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corporation Ltd., Haldia & Ors.,** (2005) 7 SCC 764 wherein the Supreme Court observed as under:

"44. We are aware of the normal rule that a person must have a fair trial and a fair appeal and he cannot be asked to be satisfied with an unfair trial and a fair appeal. We are also conscious of the general principle that pre-decisional hearing is better and should always be preferred to post- decisional hearing. We are further aware that it has been stated that apart from Laws of Men, Laws of God also observe the rule of audi alteram partem. It has been stated that the first hearing in human history was given in the Garden of Eden. God did not pass sentence upon Adam and Eve before giving an opportunity to show cause as to why they had eaten forbidden fruit. (See **R. v. University of Cambridge**). But we are also aware that principles of natural justice are not rigid or immutable and hence they cannot be imprisoned in a straight-jacket. They must yield to and change with exigencies of situations. They must be confined within their limits and cannot be allowed to run wild. It has been stated: "To do a great right after all, it is permissible sometimes to do a little wrong". [Per Mukharji, C.J. in **Charan Lal Sahu v. Union of India, (Bhopal Gas Disaster),** SCC p.705, para 124]. While

interpreting legal provisions, a court of law cannot be unmindful of hard realities of life. In our opinion, the approach of the Court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than 'precedential'."

(emphasis supplied)

12. We do not, therefore, find any merit in this review application which is accordingly dismissed. CM 7932/2009 also stands disposed of.

CM 21202/2011

13. In this application, the applicant has pointed out that space is admittedly available on 12th floor. No allotment has been made to anybody on the 12th floor. Therefore, if the area is granted to the applicant on this floor, it will not prejudice any other allottee and no other allotment would be disturbed. Since the matter is now pending before the Supreme Court and Supreme Court has appointed a Committee, replacing the committee appointed by this Court, which is headed by Justice S.K. Mahajan (Retd.), it would be open to the applicant to make such a request to that Committee as such an exercise is being undertaken by the said Committee. This application is disposed of with these observations.

All pending applications shall also stand disposed of in view of the above.

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SHUMITA DIDI SANDHU ….PLAINTIFF

VERSUS

SANJAY SINGH SANDHU & ORS. ….DEFENDANTS

(V.K. JAIN, J.)

IAS NO. : 8442/2005 AND 12914/2008 IN CS (OS) 41/2005

DATE OF DECISION: 03.09.2012

Code of Civil Procedure, 1908—Order 6 Rule 17, Order 39 Rule 2 A & Order I Rule 10—Plaintiff filed suit seeking injunction restraining defendants from committing acts of violence and intimidation against her and dispossessing her forcibly from her matrimonial home, without due process of law—Plaintiff further moved applications seeking amendment and prayed to plead that suit property was owned by joint family, thereby retracting from her admission earlier made in suit that property was owned by defendant no. 2 & 3 alone. Held: An amendment which has the effect of withdrawal of an admission, should not be allowed particularly when there is no explanation as to how the admission came to be made.

It is settled preposition of law that an amendment which has the effect of withdrawal of an admission should not be allowed particularly when there is no explanation as to how the admission came to be made. The plaintiff has not offered any explanation for not disputing the ownership of defendants no.2 and 3 in the original plaint.

In **M/s. Modi Spinning & Weaving Mills Co. Ltd. and another v M/s Ladha Ram & Co.** [AIR 1977 SC 680], the Apex Court disallowed the proposed amendment on the

ground that if the amendment is allowed, the plaintiff would be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. In that case, the question which came up before the Supreme Court was as to whether defendant can be allowed to amend his written statement by an inconsistent plea as compared to the admitted plea which contained an admission in favour of the plaintiff. It was held that such an inconsistent plea, which would displace the plaintiff completely from the admission made by defendant in the written statement, cannot be allowed. In that case, the suit was filed by the plaintiff for claiming a decree of Rs. 1,30,000/- against the defendants. The defendants in their written statement admitted that by virtue of an agreement dated 7th April, 1967 the plaintiff worked as their stockiest-cum- distributor. After three years the defendants by application under Order VI Rule 17 sought amendment of written statement by substituting paragraphs 25 and 26 with a new paragraph in which they took the fresh plea that plaintiff was mercantile agent-cum-purchaser, meaning thereby they sought to go behind their earlier admission that plaintiff was stockiest-cum-distributor. Such amendment was rejected by the trial court and the said rejection was affirmed by the High Court in revision. The decision of the High Court was upheld by three Judges Bench of the Apex Court.

This judgment came to be followed in **Heeralal v Kalyan Maland & Ors.** [AIR 1998 SC 618] the plaintiff filed a suit in respect of ten immovable properties mentioned in Schedule A of the plaint, and also for partition of other properties listed in Schedule-B of the plaint. In the written statement defendants alleged that out of the listed properties in Schedule-A, three properties exclusively belonged to them and were not joint family properties. This was taken as an admission to the effect that the remaining properties were joint and family properties. The defendants later on sought amendment of the written statement stating therein that the so-called admission regarding five out of the seven properties listed in Schedule A was on account of incomplete information

submitted to him and that he suffered an heart-attack and therefore the error crept in when the written statement was filed. The amendment was refused by the Supreme Court holding that as far as Schedule-A properties were concerned, a clear admission was made in the written statement that seven properties out of the ten properties were joint family properties wherein the plaintiff had 1/3rd share and others had 2/3rd undivided share. It was observed that once such a stand was taken, it must be held that there was no contest between the parties regarding seven items of the suit properties mentioned in Schedule-A.

In the case before this Court, since the plaint contained an implied admission that the property bearing number 18A, Ring Road, Lajpat Nagar-IV, New Delhi was owned by defendants no.2 and 3, there was no dispute between the parties as regards title of the said property. Now, by way of proposed amendment, the plaintiff wants to dispute the title of defendants no.2 and 3, which would have the effect of withdrawal of an admission already made by her in this regard. Same is the position with respect to possession of portions other than the first floor. **(Para 10)**

Important Issue Involved: An amendment which has the effect of withdrawal of an admission should not be allowed particularly when there is no explanation as to how the admission came to be made.

[Sh Ka]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Salam Inamdar, Advocate.

FOR THE DEFENDANTS : Mr. S.S. Jauhar, Adv. For D-1 to 3.. Mr. Sanjeev Mahajan, Adv. For D-4 to 7.

CASES REFERRED TO:

1. *Sampath Kumar* vs. *Ayyak Annu and another* [(2002) 7

SCC 559].

2. *Eastman Collaborator* vs. *S.K. Mehta:* 91(2001) DLT 401.

3. *Heeralal* vs. *Kalyan Maland & Ors.* [AIR 1998 SC 618].

4. *S. Anand Deep Singh* vs. *Ranjit Kaur and Ors.* ILR (1991) Delhi.

5. *M/s. Modi Spinning & Weaving Mills Co. Ltd. and another* vs. *M/s Ladha Ram & Co.* [AIR 1977 SC 680].

RESULT: Application dismissed.

V.K. JAIN, J.

1. The plaintiff is the wife of defendant no.1 and daughter-in-law of defendants no.2 and 3. The property bearing number 18A, Ring Road, Lajpat Nagar-IV, New Delhi was leased out in the name of defendant no.3. The relations between the plaintiff and the defendant no.1 are far from cordial. It is alleged that initially the plaintiff and defendant no.1 were living on the ground floor of the aforesaid property along with defendants no.2 and 3 but, due to violence from defendant no.1, she moved out to Defence Colony, New Delhi in May, 1996. Defendant no.1 joined her at Defence Colony. Thereafter, defendants no.2 and 3 pressurized them to return to the suit property and eventually the plaintiff moved to the first floor of the aforesaid property. It is alleged in the plaint that the plaintiff had learnt that the defendants were trying to sell the aforesaid house so as to throw the plaintiff out of the matrimonial house. The plaintiff sought an injunction restraining the defendants from committing acts of violence and intimidation against her and dispossessing her forcibly from her matrimonial home without due process of law.

2. Vide order dated 2.7.2007 passed in IA No.291/2005 and 8444/2005, this Court held that the plaintiff has no right to stay in the aforesaid property belonging to her parents-in-law. The Court, however, recorded the statement of defendant no.2 who stated that he or his wife (defendant no.3) had no intention to throw the plaintiff out of the aforesaid premises in question without due process of law. It was directed that the defendants shall remain bound by the said statement, but this would not prevent the defendants from taking recourse to law in dispossessing the plaintiff. The plaintiff preferred an appeal against the order dated 2.7.2007. The said appeal came to be dismissed by a Division Bench of this Court vide order

dated 26.10.2010. A perusal of the order passed by the Division Bench would show that the learned counsel for the plaintiff contended, before the Division Bench, that the plaintiff had nowhere admitted that the defendants no.2 and 3 to be the sole and exclusive owners of the suit property. He also submitted that there was a dispute as to whether the defendants no.2 and 3 or defendant no.3 alone was the exclusive owner of the said property and that it was a joint family property also needed to be looked into. The following observations made by the Division Bench while dismissing the appeal filed by the plaintiff are pertinent in this regard:

> "30. Two things are clear from the averments made in the plaint. The first is that it is nowhere alleged in the plaint by the appellant / plaintiff that the said property, which the appellant / plaintiff was referring to as her matrimonial home belonged to or was owned by her husband (defendant No.1). In fact, there is no averment in the plaint that the defendant No.1 had any right, title or interest or share in the said property. There is no averment that the property did not belong to the defendant No.3 exclusively. As pointed out above, it can be inferred that the appellant / plaintiff was of the view that the property actually belonged to the defendant Nos. 2 and 3. The other point which emerges from the averments contained in the plaint is that the suit was filed to protect her rights in her "matrimonial home" as she feared that she would be summarily thrown out without due process of law inasmuch as she had learnt that the defendants were trying to sell the house. It is in this context that the prayer (b) of the plaint, which seeks the grant of a decree of a permanent injunction restraining the defendants from forcibly dispossessing the plaintiff out of her "matrimonial home" without due process of law, gains importance and significance.
>
> 31. Thus, looking at the totality of the circumstances and the pleadings as well as the order X, CPC statements, it cannot be said that the learned single Judge was off the mark when he observed that there is no dispute that the suit property belongs to the defendant Nos. 2 and 3. Therefore, the first point of attack that the conclusion of the learned single Judge was founded on a wrong premise, falls to the ground. We must emphasise once again that the right of residence which a wife undoubtedly

has does not mean the right to reside in a particular property. It may, of course, mean the right to reside in a commensurate property. But it can certainly not translate into a right to reside in a particular property. It is only in that property in which the husband has a right, title or interest that the wife can claim residence and that, too, if no commensurate alternative is provided by the husband."

3. The plaintiff filed an application under Order 39 Rule 2A of CPC, alleging therein that by executing two sale deeds in respect of part of the suit property, the defendants had disobeyed the interim order of this Court dated 18.01.2005. Rejecting the application, this Court vide order dated 24.08.2012, inter alia, held as under:

3. IA No. 291/2005 was filed for an interim injunction claiming the following reliefs:-

"(a) Pass an ad interim ex parte injunction restraining the defendant from committing the acts of adultery and the acts of violence and intimidation against the plaintiff;

(b) Pass an ad interim ex parte injunction directing the defendant not to through the plaintiff out of her matrimonial home and live there peacefully"

4. Vide order dated 18.01.2005, this Court noted the statement of the plaintiff that she was in possession of the first floor of the suit property and directed status quo with regard to the suit property to be maintained till the next date of hearing.

5. The contention of the learned counsel for the plaintiff is that the status quo order prevented the defendants from selling the suit property and that is why they committed breach of the said order by executing two separate sale deeds with respect to the suit property. In my view, the contention is wholly misconceived. The order of status quo passed by the Court has to be read in the context of the prayer made in the suit and the application for interim injunction. If read out of the context, an order directing status quo can be interpreted to mean anything and may result in different interpretations of the same order by various parties to the suit.

A similar question came up for consideration before this Court in **S. Anand Deep Singh v. Ranjit Kaur and Ors.** ILR (1991) Delhi. In that case, in a suit for partition, rendition of accounts and declaration, the plaintiff had obtained an interim order directing status quo to be maintained in relation to the properties mentioned in the two Schedules, annexed to the plaint. The plaintiff filed a Civil Contempt Petition stating therein that one of the Defendants had carried out construction activity in one of the properties mentioned in one of the Schedules and had thereby violated the status quo order passed by the Court. The prayer made by the plaintiff in the application for grant of interim injunction was confined to restraining the Defendants from alienating or parting with possession of the disputed property. Dismissing the Contempt Petition, this Court, inter alia, held as under:

"There is no doubt that in IA 4224/89 status quo orders were passed regarding properties in Schedules I & II on 26th May, 1989. However, the exact import of the words "status quo' will have to be judged in the light of the prayer made in IA 4224/89. The prayer in this application is that the Defendants should be restrained from selling, alienating, encumbering or in any manner parting with the possession of the properties. There is no prayer in the entire application that the Respondents/Defendants 1 to 5 should be restrained from proceeding with the construction in GK property. None of the words used in IA4224/89 can be stretched to mean that the plaintiff ever desired by means of this application a restraint order against the Respondents/Defendants 1 to 5 from proceeding with the construction on the Gk property. Therefore, the argument of Mr. Lekhi that under status quo orders, the Respondents/Defendants 1 to 5 should not have proceeded further with the construction of the GK property does not seem to be tenable."

A similar issue arose in Suit No. 1547/1999, **Eastman Collaborator v. S.K. Mehta:** 91(2001) DLT 401 where the parties were directed to maintain status quo in the light of the report of the Local Commissioner who had inspected the property to identify the occupation of the premises. Another Local Commissioner was appointed by the Court on an application filed by the Defendant. The Local Commissioner found that changes

have been made in the suit premises and gave description of those changes in his report. Noticing that the dispute between the parties was with regard to the possession of the suit property and it was in this context that the Court had passed an order directing the Local Commissioner to visit the disputed premises and identify the occupant of those premises, it was held by this Court that the Court did not intend the suit property to remain as it was and, therefore, status quo was to be maintained only with respect to the possession. It was held that the Defendant was not correct in his contention that no changes could be made in the suit premises.

4. IAs No.8442/2005 and 12914/2008 have been filed by the plaintiff under Order 6 Rule 17 read with Order 1 Rule 10 of CPC. It stated in IA No. 8442/2005 that subsequent to filing of the suit, the plaintiff came to know that part of the property bearing number 18A, Ring Road, Lajpat Nagar-IV, New Delhi has been sold by the defendants during operation of the status quo order against them. The purchaser Smt. Neelam Bhutani is sought to be impleaded as a party to the suit. It is also alleged in the application that the Barsati Floor inclusive two rooms, toilet, terrace garden etc over and above the first floor is generally considered as part and parcel to the first floor as the basement, garden and backyard is considered as part and parcel to the ground floor and the same had always been in possession of the plaintiff from the time she moved to the suit property along with defendant no.1. It is stated that one out of the two garages on the ground floor in the annexe wing and one servant quarter above the garages is generally and normally used by the person occupying the first floor and above and in the present case also one garage and servant quarter on the second floor above the garage was being used by the plaintiff since the time she occupied the first floor but the defendants have succeeded in taking possession of the servant quarter on the second floor above the garage. The plaintiff, therefore, has sought to add declaration to the title of the suit so as to convert it into a suit for declaration and permanent injunction. She also seeks to add the words "and two small rooms, toilet, bathroom, terrace garden, etc. on second floor/Barsati floor", in para 2 of the plaint. Yet another change sought to be made is in the last line of para 2 of the plaint. The change is also sought to be made in line 8 of para 5 of the plaint. It has been stated in para 5 of the original plaint that the plaintiff and defendant no.1

moved to the first floor of the house bearing number 18A, Lajpat Nagar-IV, Ring Road, New Delhi. The plaintiff wants to add that this was done when the sister of defendant no.1 and her husband moved out of the first floor and barsati floor/second floor of the suit property at the behest of defendants no.2 and 3. Some minor corrections are also sought to be made in para 7 of the plaint. The plaintiff also seeks to add para 12A, para 12B and para 12C. The proposed paragraphs read as under:

"12A. The plaintiff who is the daughter of a veteran labour leader Mr. Madan Lal Didi and Mrs. Sheila Didi who is a respected Barrister and social worker based at Chandigarh. The plaintiff who is a qualified director and producer having done a course of film production from Saint Xavier's College, Bombay and having education from West Michigan University and City University in New York, Mt. Molyoke College, MA is holding a Kenyan passport and having person of Indian Origin Card granted by the Govt. of India. If the plaintiff is uprooted from her matrimonial home, she will not be having any other place to live in..

12B. That during the pendency of the present suit when the status quo order was operating regarding the whole property bearing Municipal No.18-A, Main Ring Road, Lajpat Nagar-IV, New Delhi. The defendant no.3 in collusion with other defendants has transferred part of the above said property in the name of defendant no.4 falsely claiming this to be her absolute property, knowing fully well that the said property is the joint ancestral property making false averments regarding possession and consideration. The defendant no.2 and 3 were not in possession of the first floor and Barsati Floor, one garage on the ground floor and one servant quarter on the Second Floor over and above the garages since the time she along with her husband had moved in and the same was in exclusive possession of the plaintiff from the last more than one year and she is still in possession of the said portion of the suit property.

12C. That the defendant no.4 has not taken physical possession of even the ground floor and the basement of the suit property herself till date i.e.18.10.2005 and strange persons are visiting the property number of times and a servant /care taker has been

put by the defendant no.4. The plaintiff has strong appreciation that after the physical occupation of the ground floor by the defendant no.4, plaintiff's ingress and egress shall be blocked as the above said suit property is a single residential unit and the plaintiff being a single lady will face untold difficulties and miseries of living with strangers. The plaintiff has further apprehensions that the way the renovation and additions are being made by the defendants, the ground floor and the basement of the suit property is going to be used for commercial purposes making it impossible for the plaintiff to live in the same premises with peace. It has further come to the knowledge of the plaintiff that defendant no.4 in collusion with other defendants is again planning to sell or create third party interest in the part of the suit property."

The prayer clause is also sought to be amended by claiming a declaration thereby declaring the sale deed dated 5.5.2005 executed by defendant no.5 in favour of defendant no.4 as null as void. The following reliefs have been sought by way of amendment:

"(b1) grant a decree of declaration thereby declaring that the sale deed dated 5.5.2005 executed by defendant no.3 in favour of defendant no.4 is null and void;

(b2) grant a decree of declaration thereby declaring that the property no.18-A, Ring Road, Lajpat Nagar-IV, New Delhi is the matrimonial home of the plaintiff;

(b3) grant decree of permanent injunction against the defendants injuncting them not to transfer, sell, lease, alienate or create third party interest in respect of the first floor of the property bearing municipal no.18A, Ring Road, Lajpat Nagar-IV, New Delhi.

(b4) grant decree of permanent injunction against the defendants thereby injuncting them, there agents, friends, representatives and persons claiming through them from using any part of the property bearing Municipal No.18A, Ring Road, Lajpat Nagar-IV, New Delhi for commercial purposes and from making any addition or alteration in the said property.

(b5) grant a decree of permanent injunction against the defendant no.4 restraining her from selling, leasing and creating any third party interest in the suit property."

5. It is alleged in IA No. 12914/2008 that on 5.5.2005, defendant no.5 had also executed an agreement to sell in favour of Mr. Hemant Bhutani and Mr. Sunny Bhutani sons of Smt. Neelam Bhutani and she had also executed a general power of attorney in favour of husband of Smt. Neelam Bhutani. The plaintiff, vide this application, is seeking to implead Shri Hemant Bhutani, Mr. Sunny Bhutani and Mr. Ravinder Kumar Bhutani as parties to the suit. Additional paragraph is sought to be added as para 12D which read as under:-

"That apart from the breaches mentioned hereinabove, the plaintiff has subsequently learnt that defendant no.3 in collusion with the other defendants no.5 and 6 with respect to the First Floor, 18A, Ring Road, Lajpat Nagar IV, New Delhi. Not stopping here, the defendant no.3, in collusion with the other defendants has executed a general power of attorney with respect to the First Floor, 18A Ring Road in favour of defendant no.7. This General Power of Attorney empowers the defendant no.7 to do all things with respect to the First Floor, 18A Ring Road, Lajpat Nagar-IV, New Delhi including executing sale deed, alienating, raising constructions and in all manners dealing with the said property. it is apparent that the defendants sought to transfer the entire property being 18A Ring Road, Lajpat Nagar IV, New Delhi to the various members of the Bhutani family being defendants no.4,5,6 and 7 on the same day, in this piecemeal manner, in conscious pursuance of a particular object. This object was the defeating and frustrating of the plaintiff's present suit. The plaintiff is claiming the suit premises to be her matrimonial home, being the joint family home, and therefore her consequential right to reside therein. Since she is claiming her rights through defendant no.1,2 and 3, who are her husband and in-laws respectively, by alienating the suit property and transferring it to third parties, it would completely defeat and frustrate the present suit. It is essential that these documents be declared null and void in order to prevent injustice and in order to invalidate these acts which smack of gross disregard for the law as well as the orders of this Hon'ble Court. These two documents, being the 'Agreement to Sell' and 'General Power of Attorney' have been executed in blatant disobedience and contravention of the unambiguous status quo order dated 18.1.2005. The defendants were fully aware of the

operation of the status quo order as is evident from the fact that the presence of defendants counsel has been recorded in the order of 18.1.2005. Besides this the order was to be duly served on the defendants 1,2 and 3 through this Hon'ble Court. Further, the plaintiff, apprehending such a move by the defendants had affixed the status quo order at several prominent places around the property. The fact of the status quo order being within the knowledge of the defendants 4,5,6 and 7 is evident from the plaint of defendant no.4 in her suit for possession and mesne profits, being CS(OS) 587/2008, filed against the plaintiff herein. The defendants no.5, 6 and 7 being the two sons and husband of defendant no.4, and who all reside together, it is an obvious conclusion that they too were fully aware of the status quo order operating with regard to the suit property. The conduct of defendants no.1 to 7 is highly deplorable an they have suppressed crucial documents detrimentally affecting the plaintiff's rights not only in the present suit but other actions as well, clearly establishing their lack of bonafides. The plaintiff reserves her right to take appropriate steps in accordance with law in regard to the abovementioned acts of defendants no.1 to 7."

The prayer clause is also sought to be granted by claiming following additional reliefs:

"(b6) grant a decree of declaration thereby declaring that the 'Agreement to Sell' dated 5.5.2005 executed between defendant no.3 and defendant nos. 5 and 6 is null and void, non est and inoperative in law;

(b7) grant a decree of declaration thereby declaring that the General Power of Attorney executed by defendant no.3 in favour of defendant no.7 is null and void, non est, and inoperative in law.

(b8) grant a decree of declaration thereby declaring that the plaintiff has the right to reside in and use the first floor including the terrace barsati, one garage and one servant quarter in the Annexe, as this being the joint family house of defendant no.1 constitutes the matrimonial home of the plaintiff.

(b9) grant a decree of permanent injunction against the defendant

nos. 5,6 and 7 restraining them from alienating, creating third party interest, or in any manner dealing with the suit property.

(b10) grant a decree of permanent injunction against the defendant nos. 5, 6 and 7 restraining them from acting in any manner on the strength of the 'Agreement to Sell' and 'General Power of Attorney' dated 5.5.2005 respectively."

6. Primarily, by way of proposed amendment, the plaintiff wants to plead that (i) the suit property is a joint family property and (ii) transfer of the suit property by defendants no.2 and 3 to Smt. Neelam Bhutani and execution of agreement to sell in favour of her sons and a power of attorney in favour of her husband are illegal, and (iii) She is in possession of not only of the first floor but also of the entire second floor/barsati floor including the terrace garden.

7. In the original plaint, the plaintiff did not allege that the property bearing number 18-A, Ring Road, Lajpat Nagar-IV, New Delhi was a joint family property. She did not claim that her husband, defendant no.1, Mr. Sanjay Singh Sandhu was one of the co-owners of the said property. As noted by the Division Bench, she did not claim in the plaint that her husband had any legal right or interest in the said property. This was also not the case of the plaintiff that the aforesaid property belonged to someone other than defendants. The only inference which one can draw from these averments made in the plaint is that the case of the plaintiff in the original plaint has been that the aforesaid property belonged to defendants no.2 and 3. The plaint, therefore, contained an admission that the ownership of the suit property vested in defendants no.2 and 3.

8. In the original plaint, the plaintiff specifically alleged in para 5 of the original plaint that she along with defendant no.1 had moved to the first floor of the property bearing number 18A, Ring Road, Lajpat Nagar-IV, New Delhi. This averment made with respect to the extent of the portion alleged to be occupied by the plaintiff in the suit property contained a clear admission that rest of the portions of this property were not in possession of the plaintiff and/or defendant no.1.

9. By way of proposed amendment, the plaintiff seeks to plead that the suit property was owned by joint family. The proposed amendment, if allowed would have the effect of taking away the admission which the plaintiff impliedly made in the plaint, to the effect that the suit property

was owned by defendants no.2 and 3 alone.

10. It is settled preposition of law that an amendment which has the effect of withdrawal of an admission should not be allowed particularly when there is no explanation as to how the admission came to be made. The plaintiff has not offered any explanation for not disputing the ownership of defendants no.2 and 3 in the original plaint.

In **M/s. Modi Spinning & Weaving Mills Co. Ltd. and another v M/s Ladha Ram & Co.** [AIR 1977 SC 680], the Apex Court disallowed the proposed amendment on the ground that if the amendment is allowed, the plaintiff would be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. In that case, the question which came up before the Supreme Court was as to whether defendant can be allowed to amend his written statement by an inconsistent plea as compared to the admitted plea which contained an admission in favour of the plaintiff. It was held that such an inconsistent plea, which would displace the plaintiff completely from the admission made by defendant in the written statement, cannot be allowed. In that case, the suit was filed by the plaintiff for claiming a decree of Rs. 1,30,000/- against the defendants. The defendants in their written statement admitted that by virtue of an agreement dated 7th April, 1967 the plaintiff worked as their stockiest-cum- distributor. After three years the defendants by application under Order VI Rule 17 sought amendment of written statement by substituting paragraphs 25 and 26 with a new paragraph in which they took the fresh plea that plaintiff was mercantile agent-cum-purchaser, meaning thereby they sought to go behind their earlier admission that plaintiff was stockiest-cum-distributor. Such amendment was rejected by the trial court and the said rejection was affirmed by the High Court in revision. The decision of the High Court was upheld by three Judges Bench of the Apex Court.

This judgment came to be followed in **Heeralal v Kalyan Maland & Ors.** [AIR 1998 SC 618] the plaintiff filed a suit in respect of ten immovable properties mentioned in Schedule A of the plaint, and also for partition of other properties listed in Schedule-B of the plaint. In the written statement defendants alleged that out of the listed properties in Schedule-A, three properties exclusively belonged to them and were not joint family properties. This was taken as an admission to the effect that the remaining properties were joint and family properties. The defendants

later on sought amendment of the written statement stating therein that the so-called admission regarding five out of the seven properties listed in Schedule A was on account of incomplete information submitted to him and that he suffered an heart-attack and therefore the error crept in when the written statement was filed. The amendment was refused by the Supreme Court holding that as far as Schedule-A properties were concerned, a clear admission was made in the written statement that seven properties out of the ten properties were joint family properties wherein the plaintiff had 1/3rd share and others had 2/3rd undivided share. It was observed that once such a stand was taken, it must be held that there was no contest between the parties regarding seven items of the suit properties mentioned in Schedule-A.

In the case before this Court, since the plaint contained an implied admission that the property bearing number 18A, Ring Road, Lajpat Nagar-IV, New Delhi was owned by defendants no.2 and 3, there was no dispute between the parties as regards title of the said property. Now, by way of proposed amendment, the plaintiff wants to dispute the title of defendants no.2 and 3, which would have the effect of withdrawal of an admission already made by her in this regard. Same is the position with respect to possession of portions other than the first floor.

11. The learned counsel for the plaintiff has placed reliance upon the decision of the Supreme Court in **Sampath Kumar v Ayyak Annu and another** [(2002) 7 SCC 559]. In the case before the Supreme Court, the plaintiff /appellant filed a suit in the year 1998 for issuance of permanent prohibitory injunction claiming his possession over the suit property, an agricultural land. Before commencement of the trial, in 1999 the plaintiff moved an application under Order 6 Rule 17 CPC for amendment in the plaint alleging therein that during pendency of the suit, the defendant in 1989 had forcibly dispossessed the plaintiff. On such averment, the plaintiff sought for relief of declaration of title to the suit property and consequential relief of delivery of possession. The amendment was refused by the trial court and the order passed by it was maintained by the High Court. Allowing the appeal filed by the plaintiff, the Supreme Court, inter alia, held as under:

> "7. In our opinion, the basic structure of the suit is not altered by the proposed amendment. What is sought to be changed is the nature of relief sought for by the plaintiff. In the opinion of

the Trial Court it was one to the plaintiff to file a fresh suit and that is one of the reasons which has prevailed with the Trial Court and with the High Court in refusing the prayer for amendment and also in dismissing the plaintiffs revision. We fail to understand, if it is permissible for the plaintiff to file an independent suit, why the same relief which could be prayed for in a new suit cannot be permitted to be incorporated in the pending suit. In the facts and circumstances of the present case, allowing the amendment would curtail multiplicity of legal proceedings.

11. In the present case the amendment is being sought for almost 11 Years after the date of the institution of the suit. The plaintiff is not debarred from instituting a new suit seeking relief of declaration of title and recovery of possession on the same basic facts as are pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction and which is pending. In order to avoid multiplicity of suits it would be a sound exercise of discretion to permit the relief of declaration of title and recovery of possession being sought for in the pending suit. The plaintiff has alleged the cause of action for the reliefs now sought to be added as having arisen to him during the pendency of the suit. The merits of the averments sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for amendment."

The facts of the case before this Court, however, are altogether different. No admission made in the plaint was sought to be withdrawn in the case of **Sampath Kumar** (supra), whereas in the case before this Court, the effect of proposed amendment, if allowed in toto, would be withdrawal of the admissions contained in the original plaint.

12. As noted earlier, the proposed amendment, to the extent plaintiff wants to plead that the first floor including second floor/ barsati floor including terrace garden, if allowed, would have the effect of taking away an admission contained in the original plaint to the effect that the portion other than the first floor of the property bearing number 18A, Ring Road, Lajpat Nagar-IV, New Delhi was not in possession of the plaintiff. The averment that the barsati floor/second floor is considered to be a part of the first floor, is wholly unacceptable and preposterous.

As stated earlier, the plaintiff cannot be allowed to dispute the

ownership of the defendants no.2 and 3 with respect to the suit property. Amendment of the plaint so as to challenge the sale deed, agreement to sell and power of attorney executed by defendant no.3 also therefore cannot be allowed. The proposed impleadment of defendants also needs to be refused for this very reason.

13. For the reasons given hereinabove, both the applications seeking amendment of the plaint are hereby dismissed.

CS(OS) 41/2005

14. List on 18.02.2013.

ILR (2013) I DELHI 72
RFA

AIR MARSHAL SHIV DEV SINGH ....APPELLANT

VERSUS

SWADESH BHARDWAJ ....RESPONDENT

(SUNIL GAUR, J.)

RFA NO. : 82/2007 & C.M. NO. : 2011/2007 **DATE OF DECISION: 03.09.2012**

Specific Performance—Mesne profits—Suit for possession and mesne profits—Counter claim for specific performance of Agreement of Sale—Brief Facts—Appellant vide Agreement of sale of 23rd January, 1984 had agreed to sell his leasehold residential premises to the respondent for a consideration of 14 lacs only, out of which sum of 13 lacs only was received by appellant from respondent and upon obtaining of requisite permission from the authorities concerned to transfer the leasehold rights

in the subject premises—Respondent was to pay the balance sale consideration of Rupees one lac only and to also pay the unearned increase of 8 lacs only or any such amount as determined by the DDA—At the time of execution of Agreement of sale, possession of the subject premises was handed over by appellant to respondent—Vide communication of 3rd June, 1987, DDA informed appellant that the unearned increase payable was 15,28,556/- and next very day, appellant had called upon respondent orally as well as vide letter of 4th June, 1987 to pay unearned increase—Since aforesaid dues were not cleared, therefore, DDA vide its communication of 27th November, 1987 informed appellant that permission for transfer stood revoked—Aforesaid demand of unearned increase by DDA was challenged by the respondent by way of C.W. No. 3846/1990, in which there was no interim order staying the impugned demand—As respondent was not willing to pay the unearned increase as demanded by the DDA and so appellant vide notice of 24th January, 1988 terminated the Agreement of sale as fresh period for completion of the sale transaction stipulated by the appellant vide letter of 17th May, 1988 stood expired, thus, suit for possession of the subject premises along with claim of mesne profits was filed by appellant before the Trial Court—Respondent in her written statement raised a counter claim for specific performance of Agreement of sale of 23rd January, 1984—During the pendency of suit before the Trial Court, the verdict returned in CW No. 3846/1990 on 20th October, 2003, in respect of the unearned increase was that it was a non-issue, thus not payable and conversion of the leasehold rights into freehold in respect of the subject premises were to await the outcome of this Civil Suit—The parties led their evidence before the Trial Court and thereafter vide impugned judgment of 17th October, 2006, it was held that respondent is entitled to specific performance of

Agreement of sale as there was no violation of the Agreement in question by either side and the delay in its specific performance was due to exorbitant unearned increase demanded by DDA and since the requirement of payment of unearned increase has been dispensed with by virtue of the decision in CW No. 3846/1990, so upon payment of the balance sale consideration of Rupees one lac only and on payment of charges for conversion of the subject premises from leasehold to freehold, the Agreement in question be performed—Hence the present Appeal—Contended by appellant that Agreement of sale became unenforceable as respondent had refused to pay the unearned increase without which permission for sale of the subject premises could not be obtained and so, appellant is entitled to recover possession of the subject premises and the mesne profits as claimed—Section 39 of the Indian Contract Act, 1872, and decisions in *K. Narendra vs. Riviera Apartments (P) Ltd.* (1999) 5 SCC 77; *Nirmala Anand vs. Advent Corp. (P) Ltd. & Ors.* (2002) 5 SCC 481; and *Dayal Singh vs. Collector of Stamps,* AIR (1972) Delhi 131, were pressed into service to contend that appellant was entitled to cancel the agreement in question, as it was impossible for appellant to have obtained the requisite permission from DDA on account of respondent defaulting in paying the unearned increase—Relying upon the decision in *Manjunath Anandappa vs. Tammanasa and Ors.* (2003) 10 SCC 390, it was contended that the respondent had failed to prove that she had means to pay the balance sale consideration and as per the dictum in *N.P. Thirugnanam (D) by Lrs vs. Dr. R. Jaganmohan Rao & Ors.,* JT 1995 (5) SC 553; *M. Meenakshi and Ors. vs. Metadin Agarwal (D) & Ors.* (2006) 7 SCC 470, readiness and willingness to perform the agreement has to be proved but respondent's willingness to perform her part of the agreement does not stand proved—The decision in *Rambhau Namdeo*

Gajre vs. Narayan Bapuji Dhotra (D), **(2004) 8 SCC 614 was relied upon by appellant's counsel to assert that doctrine of part performance could not be invoked in favour of the respondent who had not paid the unearned increase—Further contended that the ingredients of Section 20 of the Specific Relief Act, 1963 have to be satisfied before specific performance of sale agreement can be ordered and in the instant case, there was clear lack of willingness on the part of respondent to pay the unearned increase, thereby frustrating the Agreement of sale of 23rd January, 1984—Vehemently urged by the appellant that the impugned judgment of 17th October, 2006 deserves to be set aside and the suit of appellant ought to be decreed and the counter claim of respondent be dismissed—Respondent contended that appellant had supported the respondent in questioning the quantum of unearned increase and so, there is no question of the Agreement of sale being frustrated on account of non-payment of unearned increase as the same was subject matter of challenge before the Court of law—It is seriously disputed by the respondent that there was lack of willingness and readiness to pay the balance sale consideration as it was to be paid after the appellant had obtained the sale permission in respect of the subject premises and the decision in CW No. 3846/1990 facilitates the specific performance of the Agreement of sale—Respondent being in possession of the subject premises in part performance of the Agreement of sale of 23rd January, 1984 is entitled to its specific performance as there was a specific covenant in the Agreement of sale entitling respondent to get the specific performance of this agreement and time was never the essence of the agreement in question—Thus, it is submitted on behalf of the respondent that there is no substance in these appeals, which merit outright dismissal. Held: When appellant filed the suit, there was some**

substance in it as DDA was demanding the unearned increase from appellant but due to supervening circumstance of onerous condition of payment of unearned increase being lifted by virtue of the decision in CW No. 3846/1990, it cannot be said that the justification to terminate the Agreement of sale remains and in fact it provides a cause for ensuring that the Agreement of sale is performed by the parties upon payment of balance sale consideration of Rupees one lac and the requisite charges as ordered by the Trial Court—In the aforesaid view of this matter, no substance in the contentions raised on behalf of appellant in the face of the evidence on record, which remains unassailable and so, the decisions relied upon by the appellant are of no avail, as the decision in CW No. 3846/1990 takes out the wind from the sails of the appellant, requiring specific performance of the Agreement of sale—Finding no illegality or infirmity in the impugned judgment, both the appeals and the pending application are dismissed.

Having considered the submissions advanced, the record of this case and the decisions cited, this court finds that when appellant had filed the suit, there was some substance in it as DDA was demanding the unearned increase from appellant but due to supervening circumstance of onerous condition of payment of unearned increase being lifted by virtue of the decision in CW No.3846/1990, it cannot be said that the justification to terminate the *Agreement of sale of 23rd January,* 1984 (Ex.DW-1/1) remains and infact it provides a cause for ensuring that the *Agreement of sale of 23rd January,* 1984 (Ex.DW-1/1) is performed by the parties upon payment of balance sale consideration of Rupees one lac and the requisite charges as ordered by the Trial Court.

(Para 12)

In the aforesaid view of this matter, I do not find any substance in the contentions raised on behalf of appellant in the face of the evidence on record, which remains

unassailable and so, the decisions relied upon by the appellant are of no avail, as the decision in CW No.3846/1990 takes out the wind from the sails of the appellant, requiring specific performance of the *Agreement of sale of 23rd January, 1984* (Ex.DW-1/1). **(Para 13)**

Important Issue Involved: When due to supervening circumstance of onerous condition of payment of unearned increase being lifted by virtue of the decision, it cannot be said that the justification to terminate the Agreement of sale remains and in fact it provides a cause for ensuring that the Agreement of sale is performed by the parties upon payment of balance sale consideration.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Rajive Sawhney, Sr. Advocate with Mr. Vineet Jhanji, Advocate.

FOR THE RESPONDENT : Mr. Kailash Vasudev, Sr. Advocate Mr. K.B. Rohtagi, Ms. Aparna Rohtagi Jain, Mr. Mahesh Kasana, Advocates.

CASES REFERRED TO:

1. *Aasman Investments* vs. *Shri K.L.Suneja & Anr,* 2011(181) DLT 156.
2. *Boots Pharmaceuticals Ltd.* vs. *Rajinder Mohindra,* 177(2011) DLT 260.
3. *J.L.Gugnani (HUF)* vs. *O.P.Arora & Ors.,* (2011) IX AD (Delhi).
4. *Man Kaur (Dead) by LRs* vs. *Hartar Singh Sangha,* JT 2010 (10) SC 565.
5. *Spring Valley Finance* vs. *Smt. Prakash Kaur,* 148(2008) DLT 767.
6. *M. Meenakshi and ors.* vs. *Metadin Agarwal (D) & ors.,* (2006) 7 SCC 470.

7. *Man Kaur (Dead) by LRs* vs. *Hartar Singh Sangha,* JT 2010 (10) SC 565.
8. *Rambhau Namdeo Gajre* vs. *Narayan Bapuji Dhotra (D),* (2004) 8 SCC 614.
9. *Manjunath Anandappa* vs. *Tammanasa and ors.,* (2003) 10 SCC 390.
10. *Nirmala Anand* vs. *Advent Corp.(P) Ltd. & ors.,* (2002) 5 SCC 481.
11. *K. Narendra* vs. *Riviera Apartments (P) Ltd.,* (1999) 5 SCC 77.
12. *Ravi Sood & anr* vs. *Veer Bala Sharma,* 71(1998) DLT 254.
13. *N.P.Thirugnanam (D) by lrs* vs. *Dr.R.Jaganmohan Rao & ors.,* JT 1995 (5) SC 553.
14. *Dayal Singh* vs. *Collector of Stamps,* AIR (1972) Delhi 131.

RESULT: Appeal dismissed.

SUNIL GAUR, J.

1. The above titled two appeals assail common impugned judgment of 17th October, 2006 vide which appellant's suit for possession and *mesne* profits stands dismissed whereas, respondent's counter claim for specific performance of *Agreement of Sale of 23rd January,* 1984 stands decreed. Since the arguments addressed by both the sides in the above titled two appeals were the same, therefore, by this common judgment, the above titled two appeals are being disposed of.

2. Appellant vide *Agreement of sale of 23rd January,* 1984 had agreed to sell his leasehold residential premises, i.e., D-1/53, Vasant Vihar, New Delhi (*henceforth referred to as the subject premises*) to the respondent for a consideration of Rs.14 lacs only, out of which sum of Rs. 13 lacs only was received by appellant from respondent and upon obtaining of requisite permission from the authorities concerned to transfer the leasehold rights in the subject premises, respondent was to pay the balance sale consideration of Rupees one lac only and to also pay the unearned increase of Rs. 8 lacs only or any such amount as determined by the DDA.

3. At the time of execution of *Agreement of sale of 23rd January,* 1984 (Ex.DW-1/1), possession of the subject premises was handed over by appellant to respondent. Vide communication of 3rd June, 1987, DDA had informed appellant that the unearned increase payable was Rs. 15,28,556/- and next very day, appellant had called upon respondent orally as well as vide letter of 4th June, 1987 to pay unearned increase. Since aforesaid dues were not cleared, therefore, DDA vide its communication of 27th November, 1987 (Ex.PW-1/2) had informed appellant that permission for transfer stood revoked. Aforesaid demand of unearned increase by DDA was challenged by the respondent by way of C.W. No.3846/1990, in which there was no interim order staying the impugned demand.

4. As respondent was not willing to pay the unearned increase as demanded by the DDA and so, appellant vide notice of 24th January, 1988 (Annexure A-11), terminated the *Agreement of sale of 23rd January,* 1984 (Ex.DW-1/1) as fresh period for completion of the sale transaction stipulated by the appellant vide letter of 17th May, 1988 (Ex.P-8) stood expired, thus, suit for possession of the subject premises alongwith claim of mesne profits was filed by appellant before the Trial Court. Respondent in her written statement to the suit of appellant had raised a counter claim for specific performance of *Agreement of sale of 23rd January, 1984* (Ex.DW-1/1). During the pendency of suit before the Trial Court, the verdict returned in CW No.3846/1990 on 20th October, 2003, in respect of the unearned increase was that it was a non-issue, thus not payable and conversion of the leasehold rights into freehold in respect of the subject premises were to await the outcome of this Civil Suit.

5. The parties had led their evidence before the Trial Court and thereafter, finding returned vide impugned judgment of 17th October, 2006 is that respondent is entitled to specific performance of Agreement of sale of 23rd January, 1984 (Ex.DW-1/1) as there was no violation of the Agreement in question by either side and the delay in its specific performance was due to exorbitant unearned increase demanded by DDA and since the requirement of payment of unearned increase has been dispensed with by virtue of the decision in CW No.3846/1990, so upon payment of the balance sale consideration of Rupees one lac only and on payment of charges for conversion of the subject premises from leasehold to freehold, the Agreement in question be performed.

6. The challenge laid to the impugned judgment by learned senior counsel for appellant is on the premise that Agreement of sale of 23rd January, 1984 (Ex.DW-1/1) became unenforceable as respondent had refused to pay the unearned increase, without which permission for sale of the subject premises could not be obtained and so, appellant is entitled to recover possession of the subject premises and the mesne profits as claimed.

7. Senior counsel for appellant had drawn the attention of this Court to Section 39 of the Indian Contract Act, 1872, and to the decisions in **K.Narendra vs. Riviera Apartments (P) Ltd.,** (1999) 5 SCC 77; **Nirmala Anand vs. Advent Corp.(P) Ltd. & ors.,** (2002) 5 SCC 481; and **Dayal Singh vs. Collector of Stamps,** AIR (1972) Delhi 131, to contend that appellant was entitled to cancel the agreement in question, as it was impossible for appellant to have obtained the requisite permission from DDA on account of respondent defaulting in paying the unearned increase.

8. While relying upon the decision in **Manjunath Anandappa vs. Tammanasa and ors.,** (2003) 10 SCC 390, it was contended that the respondent had failed to prove that she had means to pay the balance sale consideration and as per the dictum in **N.P.Thirugnanam (D) by Lrs vs. Dr.R.Jaganmohan Rao & ors.,** JT 1995 (5) SC 553; **M.Meenakshi and ors. Vs. Metadin Agarwal (D) & ors.,** (2006) 7 SCC 470, readiness and willingness to perform the agreement has to be proved but respondent's willingness to perform her part of the agreement does not stand proved. The decision in **Rambhau Namdeo Gajre vs. Narayan Bapuji Dhotra (D),** (2004) 8 SCC 614 was relied upon by appellant's counsel to assert that doctrine of part performance could not be invoked in favour of the respondent who had not paid the unearned increase.

9. Finally, reliance was placed on behalf of the appellant upon decisions in **N.P.Thirugnanam (D) by lrs vs. Dr.R.Jaganmohan Rao & ors.,** JT 1995 (5) SC 553; **Aasman Investments vs. Shri K.L.Suneja & Anr,** 2011(181) DLT 156; **Boots Pharmaceuticals Ltd. Vs. Rajinder Mohindra,** 177(2011) DLT 260; **J.L.Gugnani (HUF) vs. O.P.Arora & Ors.,** (2011) IX AD (Delhi); **Spring Valley Finance vs. Smt. Prakash Kaur,** 148(2008) DLT 767; and **Ravi Sood & anr vs. Veer Bala Sharma,** 71(1998) DLT 254, to contend that the ingredients of Section 20 of the Specific Relief Act, 1963 have to be satisfied before specific

performance of sale agreement can be ordered and in the instant case, there was clear lack of willingness on the part of respondent to pay the unearned increase, thereby frustrating the Agreement of sale of 23rd January, 1984 (Ex.DW-1/1). Thus, it was vehemently urged by learned senior counsel for the appellant that the impugned judgment of 17th October, 2006 deserves to be set aside and the suit of appellant ought to be decreed and the counter claim of respondent be dismissed.

10. Submission of senior counsel for the respondent is that appellant had supported the respondent in questioning the quantum of unearned increase and so, there is no question of the Agreement of sale of 23rd January, 1984 (Ex.DW-1/1) being frustrated on account of non-payment of unearned increase as the same was subject matter of challenge before the court of law.

11. It is seriously disputed by learned senior counsel for the respondent that there was lack of willingness and readiness to pay the balance sale consideration as it was to be paid after the appellant had obtained the sale permission in respect of the subject premises and the decision in CW No.3846/1990 facilitates the specific performance of the Agreement of sale of 23rd January, 1984 (Ex.DW-1/1), as payment of conversion charges was never an issue and the decisions relied upon on behalf of appellant have no application to the facts of instant case. While relying upon the decision in **Janaki Vashdeo Bhojwani and Anr. vs. Indusind Bank,** (2005) 2 SCC 217; **Man Kaur (Dead) by LRs vs. Hartar Singh Sangha,** JT 2010 (10) SC 565, it was contended that respondent being in possession of the subject premises in part performance of the *Agreement of sale of 23rd January,* 1984 (Ex.DW-1/1) is entitled to its specific performance as there was a specific covenant in the *Agreement of sale of 23rd January,* 1984 (Ex.DW-1/1) entitling respondent to get the specific performance of this agreement and time was never the essence of the agreement in question. Thus, it is submitted on behalf of the respondent that there is no substance in these appeals, which merit outright dismissal.

12. Having considered the submissions advanced, the record of this case and the decisions cited, this court finds that when appellant had filed the suit, there was some substance in it as DDA was demanding the unearned increase from appellant but due to supervening circumstance of onerous condition of payment of unearned increase being lifted by virtue

of the decision in CW No.3846/1990, it cannot be said that the justification to terminate the *Agreement of sale of 23rd January,* 1984 (Ex.DW-1/1) remains and infact it provides a cause for ensuring that the *Agreement of sale of 23rd January,* 1984 (Ex.DW-1/1) is performed by the parties upon payment of balance sale consideration of Rupees one lac and the requisite charges as ordered by the Trial Court.

13. In the aforesaid view of this matter, I do not find any substance in the contentions raised on behalf of appellant in the face of the evidence on record, which remains unassailable and so, the decisions relied upon by the appellant are of no avail, as the decision in CW No.3846/1990 takes out the wind from the sails of the appellant, requiring specific performance of the *Agreement of sale of 23rd January, 1984* (Ex.DW-1/1).

14. Finding no illegality or infirmity in the impugned judgment of 17th October, 2006, I dismiss both the appeals and the pending application while refraining to impose costs.

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RC. REV.

PURAN CHAND ....PETITIONER

VERSUS

BHAGWAN SINGH VERMA ....RESPONDENT

(M.L. MEHTA, J.)

RC. REV. NO. : 351/2011 DATE OF DECISION: 04.09.2012

Delhi Rent Control Act, 1958—Section 25-B(8)—Revision preferred against the order dated 01.06.2011, whereby the eviction petition was dismissed by the Additional Rent Controller as it suspected the bona-fide need of the petitioner. Held: Relying on the case of *Sarla*

***Ahuja vs. United India Insurance Co. Ltd.* (AIR 1999 SC 100) wherein the Apex Court had held that satisfaction of the High Court when perusing the records of the case must be confined to the limited sphere that the order of the Rent Controller is "accordingly to law", the Court examined the impugned order and found no infirmity in the impugned order.**

Before adverting to the submissions made by the learned counsel for the parties, this Court must reiterate that the power of this Court under section 25-B(8) of the Act are not as wide as those of Appellate Court and in case it is found that the impugned order is according to law and does not suffer from any jurisdictional error, the High Court must refrain from interfering with the same. The power under this provision is limited and supervisory in nature. Only when it is evident that the Rent Controller has committed grave illegality or came to a conclusion which was not possible, based on the material produced, should this Court interfere in the orders passed by the Rent Controller. In **Sarla Ahuja Vs. United India Insurance Co. Ltd.,** AIR 1999 SC 100 the Apex Court has held as under:

> "The satisfaction of the High Court when perusing the records of the case must be confined to the limited sphere that the order of the Rent Controller is "according to law". In other words, the High Court shall scrutinize the records to ascertain whether any illegality has been committed by the Rent Controller in passing the order under Section 25B. It is not permissible for the High Court in that exercise to come to a different fact finding unless the finding arrived at by the Rent Controller on the facts is so unreasonable that no Rent Controller should have reached such a finding on the materials available." **(Para 6)**

Important Issue Involved: The power of High Court under Section 25-B(8) of the Delhi Rent Control Act are not as wide as those of Appellate Court and in case it is found that the impugned order is accordingly to law and does not suffer from any jurisdictional error, the High Court must refrain from interfering with the same.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Pradeep Sharma, Advocate.

FOR THE RESPONDENT : Mr. Tarun Sondhi, Advocate.

CASE REFERRED TO:

1. *Sarla Ahuja* vs. *United India Insurance Co. Ltd.,* AIR 1999 SC 100.

RESULT: Revision dismissed.

M.L. MEHTA, J.

1. This is a revision petition under Section 25B(8) of the Delhi Rent Control Act (for short 'the Act'). It is directed against judgment dated 01.06.2011 of Additional Rent Controller, West District, Delhi whereby eviction petition filed by the petitioner seeking eviction of his tenant, the respondent, was dismissed.

2. The petitioner, being the owner/landlord of the tenanted premises comprising of two rooms, kitchen and bath room on the second floor of the suit premises FB-10, Tagore Garden, New Delhi-110027, had filed an eviction petition against the respondent-tenant, seeking his eviction therefrom on the ground of bonafide requirement thereof by himself and his family members.

3. His case in short was that he along with his wife and married daughter with her husband and three daughters were residing on the first floor of the suit premises. The accommodation available with him on the first floor comprised of only two bed rooms set and the same was not sufficient for their needs. It was averred that his only daughter, along with her husband and three daughters, was residing with him and his

three grand-daughters were studying and the accommodation available for them was not sufficient. It was averred that he and his wife, being old and ill, could not afford to share their room with anyone and required a separate room. It was also averred that one room was required by his daughter and her family for daily needs and in addition, the entire family also required one living room for visiting guests and relatives.

4. On being noticed, the respondent filed leave to defend application, which was allowed and the matter proceeded for trial. The respondent had taken specific plea in the written statement that during the pendency of the petition ground floor premises consisting of two room set fell vacant on 13th May, 2007 and the same was lying vacant and was available for the use by the petitioner. In addition, to the two room set on the ground floor, there was verandah and the shop available with the petitioner. It was denied that the daughter of the petitioner was residing with him or was dependent upon him for her residence or otherwise.

5. In the trial before the ARC, the petitioner was able to prove from the statements of officials of New Indian Assurance Company examined as PW-2 and PW-3 that as per their official record, Geeta, daughter of the petitioner, and her husband Manohar Lal had given their address as FB-10, Tagore Garden, New Delhi i.e. the address of the suit premises. From the statement of official of the school, examined as PW-1, also it was established that the addresses of the daughters of Geeta, as given in the school, were that of the suit premises. From the statement of the aforesaid three witnesses there remained no doubt that Geeta and her husband with three daughters had been residing with the petitioner in the suit premises. That being so, it could be said that the daughter of the petitioner and her family were dependent upon the petitioner for their residential need. It was not in dispute that at the time of filing of the petition, there was only first floor that was available with the petitioner for residence for self and other family members. The petitioner examined himself as PW-4 and while admitting that the ground floor of the premises had been got vacated on 13.05.2007, he stated that the same had been let out to another tenant. Taking note of the fact that the petition was filed on 10th August, 2006 for eviction of the respondent from the second floor, whereas the ground floor had been got vacated on 13.05.2007 and was re-let to another tenant, during the pendency of the eviction petition, the ARC suspected doubt in the bonafide need of the petitioner of the suit premises. The learned ARC also observed that the

petitioner, having claimed to be a senior citizen, could have occupied the ground floor premises, instead of letting out and seeking eviction of the tenanted second floor accommodation and that all this created doubt in his banafide need.

6. Before adverting to the submissions made by the learned counsel for the parties, this Court must reiterate that the power of this Court under section 25-B(8) of the Act are not as wide as those of Appellate Court and in case it is found that the impugned order is according to law and does not suffer from any jurisdictional error, the High Court must refrain from interfering with the same. The power under this provision is limited and supervisory in nature. Only when it is evident that the Rent Controller has committed grave illegality or came to a conclusion which was not possible, based on the material produced, should this Court interfere in the orders passed by the Rent Controller. In **Sarla Ahuja Vs. United India Insurance Co. Ltd.,** AIR 1999 SC 100 the Apex Court has held as under:

> "The satisfaction of the High Court when perusing the records of the case must be confined to the limited sphere that the order of the Rent Controller is "according to law". In other words, the High Court shall scrutinize the records to ascertain whether any illegality has been committed by the Rent Controller in passing the order under Section 25B. It is not permissible for the High Court in that exercise to come to a different fact finding unless the finding arrived at by the Rent Controller on the facts is so unreasonable that no Rent Controller should have reached such a finding on the materials available."

7. The learned counsel appearing for the petitioner submitted that the tenanted premises on the second floor was more suitable for the petitioner as that would provide more safety and security for the young grand-daughters of the petitioner, than the accommodation on the ground floor. The petitioner who had examined himself as PW-4 had also stated to the effect that first and second floor would provide security as he could keep the main gate closed throughout the day. The statement of the petitioner to this effect is found to be beyond the pleadings. It was nowhere his case that the tenanted premises on the second floor was to be more suitable in terms of security and safety. His case as set up in the eviction petition is that he required the tenanted premises for the need

of his family and that of his daughter. This plea of the second floor providing more security than the ground floor has been taken to cover up re-letting of the ground floor premises after it was vacated in May 2007, during the pendency of the present petition. Similarly, the plea that the ground floor portion was re-let to generate some additional income to meet expenses towards property tax, electricity and water charges etc., rather goes to create doubt in his bonafide need. It was his case that he and his wife were aged and ailing and required a separate room. If he was running a shop on the ground floor, the portion of the ground floor was certainly suitable at least for him and his wife and also for his guests and relatives. In that scenario, his afterthought wish of security could also be taken care by providing first floor to his daughter and her family. It was no where his case that he also required the ground floor as well as second floor of the premises. If it was so, he would not have re-let the ground floor to another tenant during the pendency of this petition against the respondent. The finding of fact, as recorded by the ARC, cannot be faulted with on any count.

8. In view of my above discussion, I do not find any merit in the petition. The same is hereby dismissed.

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CS (OS)

NATIONAL RESEARCH DEVELOPMENT CORPORATION **....PLAINTIFF**

VERSUS

NATIONAL AGRO-CHEMICALS INDUSTRIES LTD. **....DEFENDANTS**

(VALMIKI J. MEHTA, J.)

CS (OS) NO. 2687/1997, CM NO. : 15733-34/2012 **DATE OF DECISION: 06.09.2012**

Limitation Act, 1963—Section 17—Plaintiff filed suit seeking reliefs of rendition of accounts and injunction against defendants, from using technology given under licence agreement dated 27/01/1983 for manufacturing of Monocrotophos Technology including Monocrotophos 36 WSC, as defendant had not complied with terms of licence agreement—Defendants contested suit contending, technology supplied by plaintiff was defective, so it was forced to enter into another agreement seeking outside expert's help—Also, suit of plaintiff was time barred—As per plaintiff, defendant kept on filing Nil returns mentioning that commercial production did not start for commencement of payment of royalty—However, when officer of plaintiff visited premises of defendant, it transpired that defendant was selling products manufactured by technology supplied by plaintiff—Moreover, suit was within limitation which commenced from date of commercial production and defendants had malafidely and illegally concealed the said date from plaintiff. Held:- When a party conceals production of documents and the same is not brought to the notice of plaintiff/ applicant, Section 17 of Act shall come into play.

Before proceeding ahead in the facts of the present case, Section 17 of the Limitation Act, 1963 would be relevant and I, therefore, reproduce the same as under:

> **"17. Effect of fraud or mistake**-(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act.-
>
> (a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or
>
> (b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as a aforesaid; or
>
> (c) the suit or application is for relief from the consequences of a mistake; or applicant has been fraudulently concealed from him;
>
> the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the mean of production the concealed document or compelling its production: ....." **(Para 9)**

As per Section 106 of the Evidence Act, 1872, the onus of proving a fact which is in the special knowledge of the person, is on that person. This is logical because what is established within knowledge of a person, cannot be in the knowledge of another person. The issue in this case is, when did commercial production begin. This fact surely would only be in the knowledge of the defendant. I have not been shown any document on behalf of the defendant of intimation being given to the plaintiff as to when the commercial production begins. On the contrary, counsel for the plaintiff has drawn my attention to the nil returns qua commercial production filed by the defendant, and which are Ex. P2 to Ex.P12, and which show that at least till 1987 the

defendant itself took up the stand that the commercial production did not begin. **(Para 10)**

The plaintiff has filed and proved on record through PW-2, Sh.A.K.Kohli, his inspection report dated 9-10/10/1995 as Ex.PW2/3. This is a detailed inspection report and which shows as to how the defendant company had changed its name without any intimation to the plaintiff. The report further shows that efforts were made to conceal documents of production, however, on some documents being given, it transpired from the balance sheet that in fact production of Monocrotophos Technical had at least commenced from the financial year ending 31.3.1992. The inspection by Sh. A.K.Kohli went on for two days, and which showed how the defendant had mala fidely and illegally concealed the date of commercial production from the plaintiff. I may, at this stage, on the issue of mala fides also state that the plaintiff was in fact forced to approach the Court earlier even for premium payable under the licence agreement as the defendant had failed to pay the total premium amount of Rs. 5,00,000/-. That suit was decreed in favour of the plaintiff, and whereafter the amount was paid. Once the defendant has failed to show any intimation given to the plaintiff of a specific date for commencement of commercial production, I hold that the defendant is guilty of concealing the date of commencement of commercial production and therefore the date of commencement of limitation, thus bringing into play Section 17 of the Limitation Act, 1963. Limitation would therefore only begin with effect from 9.10.1995 and therefore the suit filed on 27.11.1997 is within limitation. Issue no.2 is therefore decided in favour of the plaintiff and against the defendant. **(Para 11)**

Important Issue Involved: When a party conceals production of documents and the same is not brought to the notice of plaintiff/applicant, Section 17 of Act shall come into play.

[Sh Ka]

APPEARANCES:

FOR THE PLAINTIFF : Mr. P.N. Bhardwaj, Mr. Ashutosh Bhardwaj, Advocates.

FOR THE DEFENDANT : Ms. Surbhi Mehta, Ms. Ashwin Kumar, Ms. Chandrika Gupta, Advocates.

CASES REFERRED TO:

1. *Ramrameshwari Devi and Others* vs. *Nirmala Devi and Others,* (2011) 8 SCC 249.
2. *United Bank of India* vs. *Naresh Kumar* AIR 1997 SC 3.

RESULT: Suit decreed.

VALMIKI J. MEHTA, J. (ORAL)

1. The subject suit has been filed by the plaintiff M/s. National Research Development Corporation (NRDC) seeking reliefs of rendition of accounts and injunction against the defendant from using the technology given under the licence agreement dated 27.01.1983 for manufacturing of Monocrotophos Technical including Monocrotophos 36 WSC without complying with the terms of the licence agreement.

2. Vide licence agreement dated 27.01.1983, Ex. P-1, plaintiff gave to the defendant the knowhow for the manufacture of Monocrotophos Technical including Monocrotophos 36 WSC as right in the said invention was granted to the plaintiff. The detailed terms and conditions on which licence is granted are mentioned in Ex. P-1, and of which the clauses pertaining to consideration payable to the plaintiff are clauses 1 & 3. Plaintiff was to get a premium of Rs. 5 lakhs and thereafter royalty @ 2% of the net ex-factory sale price of the material manufactured. The case of the plaintiff is that the defendant kept on filing nil returns i.e. commercial production did not start for commencement of payment of royalty, however, when an officer of the plaintiff Sh. Ashwani Kumar Kohli, PW-2 visited the premises of the defendant in 1995, it transpired that the defendant was selling products manufactured by the technology supplied by the plaintiff at least w.e.f. financial year ending 31.3.1992. The visit of this officer to the premises of the defendant is dated 9-

10.10.1995. The subject suit thereafter came to be filed on 25.11.1997.

3. In the written statement the defendant has contended that the technology supplied by the plaintiff was defective and, therefore, the defendant was not liable to make any payment to the plaintiff. The defendant claims that on account of the fault of the plaintiff in not giving the requisite technology the defendant had to enter into another agreement seeking outside expert's help and only whereafter trial production commenced in around 1988. In para 12 of the preliminary objection in written statement it is pleaded that the plaintiff at best entitled to royalty for the year ended 31.3.1993. The grant of the licence Ex. P-1 in favour of the defendant by the plaintiff is not disputed. It is also pleaded in the written statement that the licence agreement stood frustrated by the acts of the plaintiff because the invention given by the plaintiff was of no use to the defendant. It was pleaded that in fact because of the inadequate/ faulty technology defendant suffered losses.

4. On the pleadings of the parties, the following issues were framed in this case on 05.05.2000:

"(1) Whether the plaint has been signed and verified by an authorized person on behalf of the plaintiff?

(2) Whether the suit is barred by limitation?

(3) Whether the suit is bad for non-joinder of the parties? If so to what effect?

(4) Whether the defendant was provided with a know-how as per the licence agreements dated 21.1.183, 21.10.83 and 2.5.1995?

(5) Whether the plaintiff has committed breach of these agreements and the agreement stood abandoned and frustrated as alleged? If so to what effect?

(6) Whether the plaintiff is entitled to rendition of accounts?

(7) To what relief, if any, is the plaintiff entitled?"

Issue Nos. 4 and 5 were recasted/reframed vide order dated 23.04.2001 which read as under:

"4. Whether the defendant was provided with the know-how as

per the Licence Agreement dated 27.1.1983?

5. Whether the plaintiff is bound by the Agreements dated 20.10.1983 and 2.5.1995? If yes, whether the plaintiff has committed breach of any of these agreements?"

Issue No. 1

5. Issue No. 1 is as to whether the plaint is signed and verified by an authorized person. This issue need not detain me inasmuch the Supreme Court in the judgment reported as **United Bank of India Vs. Naresh Kumar** AIR 1997 SC 3 holds that the suits filed by companies should not be dismissed on technical grounds once the same are contested to the hilt. It also holds that the suits by the companies when filed on behalf of a principal officer should be held to be validly instituted in terms of Order 29 Rule 1 Code of Civil Procedure, 1908 (CPC). In para 1 of the plaint plaintiff has stated that the signatory Sh. N.K. Sharma is the Managing Director of the plaintiff corporation. In the written statement in reply to this para it is not disputed that Sh. N.K.Sharma is the Managing Director of the plaintiff corporation. A Managing Director is surely a principal officer of a company. I may also states that the certified copy of the resolution authorizing Sh. N. K. Sharma to sign and verify the plaint was filed and proved as Ex. PW-1/1. The suit is therefore validly signed and filed, and issue No. 1 is thus decided in favour of the plaintiff and against the defendant.

Issue No.3

6. This issue of alleged non-joinder of necessary parties is misconceived inasmuch as contractual relationship under the licence agreement was only between the plaintiff and the defendant. Plaintiff is only claiming rights in the suit on the basis of this agreement Ex. P-1 with the defendant. No other person is therefore a necessary party inasmuch the disputes which are the subject matter of the plaint are only between the plaintiff and the defendant. Merely, because the defendant may say that two other entities i.e. Council for the Scientific & Industrial Research and M/s. Indian Institute of Chemical Technology are necessary parties, they would not become so because the agreement Ex. P-1 is between the plaintiff and the defendant in the suit and the rights which are claimed in the suit arise only under this agreement in favour of the plaintiff and against the defendant. Issue No. 3 is therefore decided in favour of the

plaintiff and against the defendant.

ISSUE NO. 2

7. Ordinarily limitation commences when the plaintiff was entitled to the royalty payments. In terms of Ex. P-1, clause 3(i) royalty became due every year on 1st April, 1st October and was payable on the 1st of May and 1st of November of that year. It is a common ground of both the parties before me that royalty becomes payable after commercial production begins. The defendant claims the suit to be barred by limitation as it has been filed in the year 1997 as the trial production is said to have commenced in the year 1988. Para 12 of the preliminary objections which contained the defence of the suit being barred by limitation reads as under:

"12. Without prejudice to the above that the contracts stand frustrated, the present suit of the plaintiff is also barred by limitation. The trial production with the consultation of the RRLH was started in 1988. The same suffered a serious set back due to the insufficient assistance rendered by NRDC and its related agencies. The limited production that took place was by incurring huge losses. With the help of outside experts, production was brought to the requisite quality and efficiency levels at a huge expense of time, money and effort. This, the defendant was constrained to do as huge investments had been made and NRDC, RRLH & CSIR had completely left the defendant in the lurch. The plaintiff is, if any, at best, entitled to the royalty for the first years ended in 1993 itself. The present suit has been filed after nine years of commencement of commercial production and is, therefore, completely barred by limitation. The present suit is liable to be dismissed on this sole ground."

8. Since limitation commences from the date of the commercial production, commencement of trial production cannot in any manner commence limitation with respect to the royalty. As per the defendant, the payment of royalty became due from the year ending 31.3.1993, and so stated in para 12 of the written statement. This admission will be used while deciding issue pertaining to entitlement of the plaintiff to claim royalty, however, the issue for the present is that for what period royalty can be claimed by the plaintiff and when did the cause of action commence for claiming of royalty.

9. Before proceeding ahead in the facts of the present case, Section 17 of the Limitation Act, 1963 would be relevant and I, therefore, reproduce the same as under:

> **"17. Effect of fraud or mistake - (1)** Where, in the case of any suit or application for which a period of limitation is prescribed by this Act.-
>
> (a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or
>
> (b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as a aforesaid; or
>
> (c) the suit or application is for relief from the consequences of a mistake; or applicant has been fraudulently concealed from him;
>
> the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the mean of production the concealed document or compelling its production: ....."

10. As per Section 106 of the Evidence Act, 1872, the onus of proving a fact which is in the special knowledge of the person, is on that person. This is logical because what is established within knowledge of a person, cannot be in the knowledge of another person. The issue in this case is, when did commercial production begin. This fact surely would only be in the knowledge of the defendant. I have not been shown any document on behalf of the defendant of intimation being given to the plaintiff as to when the commercial production begins. On the contrary, counsel for the plaintiff has drawn my attention to the nil returns qua commercial production filed by the defendant, and which are Ex. P2 to Ex.P12, and which show that at least till 1987 the defendant itself took up the stand that the commercial production did not begin.

11. The plaintiff has filed and proved on record through PW-2, Sh.A.K.Kohli, his inspection report dated 9-10/10/1995 as Ex.PW2/3. This is a detailed inspection report and which shows as to how the defendant company had changed its name without any intimation to the

plaintiff. The report further shows that efforts were made to conceal documents of production, however, on some documents being given, it transpired from the balance sheet that in fact production of Monocrotophos Technical had at least commenced from the financial year ending 31.3.1992. The inspection by Sh. A.K.Kohli went on for two days, and which showed how the defendant had mala fidely and illegally concealed the date of commercial production from the plaintiff. I may, at this stage, on the issue of mala fides also state that the plaintiff was in fact forced to approach the Court earlier even for premium payable under the licence agreement as the defendant had failed to pay the total premium amount of Rs. 5,00,000/-. That suit was decreed in favour of the plaintiff, and whereafter the amount was paid. Once the defendant has failed to show any intimation given to the plaintiff of a specific date for commencement of commercial production, I hold that the defendant is guilty of concealing the date of commencement of commercial production and therefore the date of commencement of limitation, thus bringing into play Section 17 of the Limitation Act, 1963. Limitation would therefore only begin with effect from 9.10.1995 and therefore the suit filed on 27.11.1997 is within limitation. Issue no.2 is therefore decided in favour of the plaintiff and against the defendant.

ISSUE NOS. 4, 5 & 6

12. That takes me to the main issues in this case, and which are issue Nos. 4, 5 and 6. The agreement, Ex.P-1 between the parties is an admitted document. This document has also been filed by the defendant. In order to decide the present issue, a portion of the Clause 3 of the agreement is relevant and the same reads as under:-

> ".....It will not be open to the Grantee to claim any exemption from or reduction in the payment of royalty accruing under this clause of the plea of having used its own know-how or having effected any improvement upon the said invention or on the plea that the articles to be manufactured under the said invention have been manufactured by using a different process and the Grantee shall be liable for the payment of the royalties for all the articles manufactured by it and covered by this agreement irrespective of any plea whether the same have been manufactured by the said invention or otherwise. ....."

13. The reference to the above said clause makes it quite clear that

the defendant could not claim exemption or reduction from payment of royalty on the ground of having used its knowhow or effected any improvement upon the said invention or contend that the articles which have been manufactured have been done so by using a different process. Obviously, the plaintiff is required to put such clause for persons/entities such as the defendant which after receiving the technology, dishonestly and fraudulently use all excuses to avoid making payment of royalty. I may only add that surely the purchasing of technology under the license agreement was a considered act of the defendant, and the defendant would have obviously seen the requisite technology before taking license of the same under the agreement Ex.P-1. It therefore does not lie in the mouth of the defendant now to claim that no royalty payments are liable to be made to the plaintiff. If really the defendant was honest, and if it was correct that the defendant had not used the technology of the plaintiff, nothing prevented the defendant from addressing communication saying that all the technology documents are returned back to the plaintiff and the plaintiff can inspect factory of the defendant at any point of time for checking as to whether the supplied knowhow by the plaintiff was being used by the defendant or not. Obviously, the defendant did not do this. Mere fact that the defendant took expert help and may have improved the technology for its own benefit, however cannot mean that the technology supplied by the plaintiff was not taken, and the royalty fee and another charges under the agreement were not payable. Merely because the defendant takes up a case that the technology is not proper, cannot mean that the agreement stands frustrated. If I were to allow such a plea as raised by the defendant, the plaintiff will never get any royalty in almost all the cases. I therefore hold that the defendant is bound by the terms of the agreement, Ex.P-1 and it was liable to pay the necessary royalty in terms of this agreement to the plaintiff.

14. The issue is that what should be the date from when the royalty should be held to be payable to the plaintiff. Though the defendant in para 12 of the preliminary objections in the written statement has stated that the plaintiff is at best entitled to royalty for the year ending 31.3.1993, however, I am of the opinion that the defendant will be liable to pay royalty from the year ending 31.3.1989. The defendant itself has filed its balance sheet and therefore this balance sheet for the year ending 31.3.1989 can be read against the defendant. This document (colly) is exhibited as Ex.DW1/P1. As per this profit and loss account which

forms part of this balance sheet, the sales for the period ending 31.3.1989 have been given as Rs. 53,65,181/-. Therefore, if there are sales, surely, royalty became payable to the plaintiff with effect from 1.4.1989. I hold 1.4.1989 as the date for commencement of payment of royalty, and it is from this date that the defendant will be liable to render accounts to the plaintiff as per the present judgment for payment of royalty to the plaintiff. Issue nos. 4 to 6 are accordingly answered in favour of the plaintiff and against the defendant by holding that the plaintiff has not committed any breach of Ex.P-1, and it is in fact the defendant who is dishonestly refusing to make payments of royalty amount in terms of the license agreement dated 27.1.1983 (Ex.P-1) and this royalty will continue to be paid unless it is established before the Local Commissioner that commercial production of the defendant was stopped, and if stopped then with effect from which date. Plaintiff is entitled to rendition of accounts for royalty payments with effect from the financial year ending 31.3.1989 and the date of commencement of payment of the royalty will be taken as 1.4.1989.

RELIEF

15. Suit of the plaintiff is therefore decreed and the defendant is restrained from using technology/knowhow given by the plaintiff to the defendant for manufacture of Monocrotophos Technical, unless, the defendant pays the royalty in terms of the license agreement, Ex.P-1. Plaintiff is entitled to rendition of accounts from the defendant with effect from financial year ending 31.3.1989 and the first date of royalty being payable will be taken as 1.4.1989. The plaintiff will also be entitled to pendente lite and future interest at 9% per annum simple, in case of passing of the final decree in favour of the plaintiff and against the defendant with respect to royalty payments due. The plaintiff will also be entitled to costs. I may note that plaintiff has been forced into this litigation by fraudulent and dishonest acts of the defendant in not making payment of its lawful dues. In fact, the plaintiff was earlier forced to file a suit even for recovery of premium amount as already stated above. For imposing costs, I exercise my powers under Rule 14 of the Delhi High Court (Original Side) Rules 1967 so as to exempt the applicability of rules on the aspect of costs in the present case. I therefore impose actual costs which I quantify at Rs. 1,00,000/- in view of the ratio of the recent judgment of the Supreme Court in the case of **Ramrameshwari Devi and Others v. Nirmala Devi and Others,** (2011) 8 SCC 249 which

holds that it is high time that dishonesty in litigations should be visited by actual costs.

16. I appoint Sh. D.S. Paweriya (Retd. ADJ), Chamber No. 49, Tehsil Building, Tis Hazari Courts, Delhi-110054, Mob: 9999621110, as a Local Commissioner who will go into the rendition of accounts by the defendant to the plaintiff. Let the parties appear before the Local Commissioner on 19.10.2012 at 4.00 P.M. when the Local Commissioner will give the necessary directions for conducting of proceedings with respect to rendition of accounts. The fees of the Local Commissioner is fixed at Rs. 75,000/-. 50% will be paid at the commencement of the proceedings and balance 50% at the stage of arguments.

17. Decree sheet incorporating the aforesaid preliminary decree be drawn up by the Registry.

18. List this suite for directions on 14th January, 2013.

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FAO

NATIONAL PROJECT CONSTRUCTION CORPORATION LTD. ....APPELLANT

VERSUS

SADHU SINGH & CO. ....RESPONDENT

(SANJAY KISHAN KAUL & VIPIN SANGHI, JJ.)

FAO (OS) NO. : 439/2012 DATE OF DECISION: 07.09.2012

Arbitration Act, 1940—Condonation of delay in refiling the appeal against order passed by the Hon'ble Single Judge dismissing the objections preferred by the appellant—Delay of 67 days in refiling the appeal sought to be condoned on the grounds of dislocation of the original file in the office of the Advocate—Held, since it is not disclosed as to when and how the file got dislocated and when and how it was relocated and the application not being supported by affidavit of the Advocate, and it remaining unexplained as to how the general manager of the appellant could claim personal knowledge of such facts, the delay in refiling the appeal beyond 30 days cannot be condoned as the law prescribes is strict period of limitation—However, even on merits the impugned order found to be suffering no infirmity.

The appellant assails the order dated 28.03.2012 passed by the learned single Judge in CS(OS) 1421A/2006 dismissing the objections preferred by the appellant, National Projects Construction Limited (NPCC) under Sections 30 and 33 of the Arbitration Act, 1940 (the Act) to the award dated 05.06.2006. The refilling of the appeal is delayed by 67 days and the appellant has filed C.M. No.15734/2012 for seeking condonation of delay. C.M. No.15733/2012 has been filed to seek stay of the impugned order. **(Para 1)**

We have heard learned senior counsel for the appellant. We do not find any justification for condonation of delay of 67 days in refiling of the appeal. The only reason contained in the application is stereotype, i.e. the dislocation of the original file in the office of the advocate. It is not disclosed as to when and how the file got dislocated and when and how it was relocated. The application is not even supported by the affidavit of the appellant's counsel. We fail to appreciate how the General Manager of the appellant could claim any personal knowledge of such facts. We may also note that in cases involving objections to an arbitral award, the law prescribes a strict period of limitation, and delay even in the matter of filing of objections to an award cannot be condoned for a period beyond thirty days. On the same principle, in our view, delay in filing or refiling of appeal arising out of an order dismissing objections to an award cannot be taken lightly, as it seriously prejudices the rights of the award holder. **(Para 2)**

[Gi Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. R. Venkataramani, Senior Advocate with Mr. Santosh Kumar, Advocate.

FOR THE RESPONDENT : None.

CASES REFERRED TO:

1. *Union of India* vs. *Jia Lall Kishori Lall (P) Ltd. & Anr.* (FAO(OS) 334/2012).
2. *Union of India* vs. *Popular Construction Company;* (2001) 8 SCC 470.

RESULT: Appeal dismissed.

VIPIN SANGHI, J. (Oral)

1. The appellant assails the order dated 28.03.2012 passed by the learned single Judge in CS(OS) 1421A/2006 dismissing the objections preferred by the appellant, National Projects Construction Limited (NPCC) under Sections 30 and 33 of the Arbitration Act, 1940 (the Act) to the award dated 05.06.2006. The refilling of the appeal is delayed by 67 days and the appellant has filed C.M. No.15734/2012 for seeking condonation of delay. C.M. No.15733/2012 has been filed to seek stay of the impugned order.

2. We have heard learned senior counsel for the appellant. We do not find any justification for condonation of delay of 67 days in refiling of the appeal. The only reason contained in the application is stereotype, i.e. the dislocation of the original file in the office of the advocate. It is not disclosed as to when and how the file got dislocated and when and how it was relocated. The application is not even supported by the affidavit of the appellant's counsel. We fail to appreciate how the General Manager of the appellant could claim any personal knowledge of such facts. We may also note that in cases involving objections to an arbitral award, the law prescribes a strict period of limitation, and delay even in the matter of filing of objections to an award cannot be condoned for a period beyond thirty days. On the same principle, in our view, delay in filing or refiling of appeal arising out of an order dismissing objections

to an award cannot be taken lightly, as it seriously prejudices the rights of the award holder.

3. We have observed in the case of **Union of India v. Jia Lall Kishori Lall (P) Ltd. & Anr.** (FAO(OS) 334/2012) decided on 27.07.2012 as follows:

> "We may notice that the aspect of delay in re-filing in matters pertaining to objections to award has received the attention of this Court. This is so as by inordinate delay in refiling, a party cannot be permitted to do what it otherwise is not entitled i.e. the period of limitation operating in view of the provisions of the said Act. The views expressed by the Division Bench in the case of **The Executive Engineer (Irrigation and Flood Control) v. Shree Ram Construction Co.** and other connected matters; 2010 (120) DRJ 615, deal with this issue. There a finding has been reached that delay in re-filing is not to be condoned in routine. A special leave petition filed in one of the connected matters to The **Executive Engineer (Irrigation and Flood Control) v. Shree Ram Construction Co's** case (supra) against the said order stands dismissed on merits after condoning the delay. The Division Bench after taking into account the pronouncement in **Union of India v. Popular Construction Company;** (2001) 8 SCC 470 observed that in matters of condonation of delay in re-filing the petition, a stricter scrutiny, than is done while considering an application for condonation of delay filed under Section 5 of the Limitation Act, 1963, has to take place keeping in mind that the total permissible period within which the application can be permitted to be filed under Section 34 of the said Act is 3 months plus an additional 30 days under Section 34(3) of the said Act. Thus, if the delay in re-filing exceeds this period, then the scrutiny becomes more rigorous and there has to be satisfactory and credible explanation for the delay. Otherwise, the legislative object of not permitting delayed objections from being filed gets defeated."

4. In any case, we have examined the matter on merits as well. The award was originally made by the Arbitrator on 25.04.1996 which was set aside in CS(OS) 1465A of 1996 on 20.12.2005 as it was a lumpsum non-speaking award, and the matter was remanded back to the Arbitrator

for passing a fresh award giving reasons in respect of each claim after hearing the parties. Consequently, the impugned award dated 05.06.2006 was passed by the Sole Arbitrator giving detailed reasons in respect of each of the claims and counter claims.

5. The appellant challenged the award made in respect of claim Nos. 1,3 to 6, 17, 28, 36, 42, 44, 52 to 55, the grant of interest, and the award made on counter claim nos. 1 to 4. The leaned Arbitrator awarded Nil amount in respect of 33 claims of the respondent claimant. The contract in question between the parties related to construction of south side portion of the road overbridge at Sewa Nagar vide work order No.186/402 dated 14.11.1981 awarded by the appellant to the respondent. The stipulated period for completion of the work under the contract was 12 months beginning 08.04.1981 and expiring on 07.04.1982. There were inevitable delays on account of non-availability of site, delay in issue of materials by NPCC, delay in providing designs and drawings, increase in the scope of work and collapse of Span 4-B. The work was completed with delay of about 7 months. The delay in handing over of a portion of the site was admitted by the appellant vide Annexure 1/36, which was handed over as late as February, 1982. Admittedly some drawings were given as late as 01.04.1982. It appears, another Work Order was placed on the respondent by the appellant after collapse of Span 4-B for the erection and dismantling of centering of Span 1-A due to change of drawings. The learned Arbitrator held that the delay of 2 months explained by the respondent on account of change in centering and shuttering, due to collapse of Span 4-B, and the concretisation along with reinforcement was reasonable. Moreover there was increased scope of work vide letter dated 07.08.1981 issued by the appellant. The appellant took no action against the respondent on the ground that there was delay occasioned by the respondent. The arbitral tribunal held that the delay in execution of the work was on account of the aforementioned hindrances created by the appellant. The aforesaid finding of fact is based on evidence. The same has also been appreciated by the learned single Judge. It cannot be said that the said finding is not supported by evidence on record or is contrary to the evidence on record. This finding, as held by the learned single Judge cannot be held to be perverse or an error apparent on the face of the record.

6. The various claims made by the respondent and allowed by the arbitral tribunal stem out of the aforesaid finding of fact. The learned

single Judge, in the impugned order has claim wise considered the objection of the appellant and found the same to be lacking in merit. While hearing objections to an arbitral award, the Court does not sit in appeal. The Court is not required to re-appreciate the evidence and to function like an appellate court over the award made by the arbitral tribunal. The parameters within which the Court is required to examine an arbitral award are well defined. The learned single Judge has upheld the Arbitrators view that since the delay was on account of the appellant, clauses 18 and 20 of the Special Conditions of Contract (SCC) could not come to the rescue of the appellant while dealing with claim No.1, wherein the respondent had claimed the amount on account of increased cost due to increased inputs for completing the work within the reduced time available. It was held that on account of the said delays, the respondent had to employ additional labour to complete the work as it was a project of national importance which was required to be completed before the start of the Asian Games, 1982. Consequently, the respondent was held entitled to compensation under Section 73 of the Contract Act. Substantial amount of work had been done by the respondent after 09.12.1981 as was evident from the payments made by the appellant after 24.12.1981. Consequently, there was reasonable justification offered by the Tribunal for allowing claim No.1. In our view, the learned single Judge rightly rejected the objection raised by the appellant to claim No.1.

7. The learned Arbitrator also returned the finding of fact that after the collapse of Span 4-B, the work was stopped by the appellant as drawings and designs had to be revised as per the Enquiry Committee report. This resulted in the respondent keeping the labour and supervisory staff idle during the period 10.12.1981 to 28.01.1982. This finding of fact is also un-exceptional. Founded upon this finding, the Arbitrator awarded claim no.3 for idle labour. The defence of the appellant founded upon clause 29 of the contract was rejected by interpreting the said clause. The interpretation adopted by the learned Arbitrator was not shown to be contrary to the contract, or wholly unacceptable. In fact the said interpretation was a plausible interpretation and therefore did not call for interference by the Court.

8. Claim Nos. 4 and 5 stem out of the finding returned by the Tribunal in relation to the collapse of Span 4-B. In our view the learned single Judge rightly rejected the appellant's objection to the award made on these claims.

9. We have perused the impugned order and the learned senior counsel for the appellant has not been able to point out any error either in the award or in the order of the learned single Judge made in respect of any of the awarded claims of the respondent. Similarly no worthwhile argument has been advanced in respect of the rejection of the counter claims of the appellant. The learned single Judge has reduced the rate of interest to 9% simple interest per annum for all the periods for which interest has been awarded by the learned Arbitrator and to that extent the award stands modified.

10. We find the approach of the learned single Judge to be perfectly legal. Consequently, the present appeal and C.M. No.15733-34/2012 are dismissed. There shall be no order as to costs.

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W.P. (C)

RAVINDER KUMAR MIRG ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(BADAR DURREZ AHMED & SIDDHARTH MRIDUL, JJ.)

W.P. (C) NO. : 5559/2012 DATE OF DECISION: 07.09.2012

Constitution of India, 1950—Rule 19, CCS (CCA) Rules, 1965—Petitioner convicted and sentenced for offence under Section 7 Prevention of Corruption Act r/w Section 120B IPC—In appeal, the sentence of petitioner was suspended—Disciplinary Authority adopted the procedure under Rule 19 and issued show cause notice whereafter, petitioner submitted representation and after considering the same the Disciplinary Authority, levied the penalty of dismissal from service with a disqualification for further employment in the

government—Original application of petitioner dismissed by Central Administrative Tribunal—Challenged—Held: The procedure laid down under Rule 19 must be scrupulously followed and in the present case, since the Disciplinary Authority did not apply its mind fully to the representation made by petitioner and went merely by the case of the co-accused, which was not even required, petitioner being group B employee, order of the Disciplinary Authority was not in consonance with Rule 19—Disciplinary Authority directed to pass appropriate orders on the representation already filed by petitioner.

It is apparent that the present case falls within Clause (i) of Rule 19, that is, where any penalty is imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge. There is no doubt that the petitioner has been convicted in a criminal case as mentioned above. In such an eventuality notwithstanding anything contained in Rules 14 to 18, the Disciplinary Authority is permitted to consider the circumstances of the case and make such orders thereon as it deems fit. However, this is subject to a proviso that the Government servant may be given an opportunity of making a representation on the penalty proposed to be imposed before any order is made in a case under Clause (i). **(Para 9)**

In the present case we find that although the first part of the proviso has been followed inasmuch as the show cause notice dated 23.12.2004 was issued to the petitioner by the Disciplinary Authority, and the petitioner has also made a representation on the penalty proposed to be imposed, the Disciplinary Authority has not applied its mind fully to the representation made by the petitioner and has gone merely by the case of the co-accused Shib Lal as also the UPSC's advice rendered in that case. We may point out that insofar as the petitioner is concerned, he being a Group-B employee, consultation of the UPSC was not necessary. Therefore, it was not at all incumbent upon the Disciplinary Authority to

lay emphasis on the UPSC's advice rendered in the case of Shib Lal who was a Group-A employee and in whose case the UPSC was required to be consulted. **(Para 10)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Shanker Raju Advocate.

FOR THE RESPONDENTS : Mr. R.V. Sinha, Mr. R.N. Singh and Mr. A.S. Singh.

CASE REFERRED TO:

1. *Union of India and Ors.* vs. *Sunil Kumar Sarkar,* (2001) 3 SCC 414.

RESULT: Petition allowed.

BADAR DURREZ AHMED, J. (ORAL)

1. The petitioner is aggrieved by the orders dated 22.09.2011 and 19.01.2012 passed by the Central Administrative Tribunal, Principal Bench, New Delhi in O.A. No.1303/2011 and R.A. No.15/2012. By virtue of the said orders the petitioner's said O.A. and R.A. have been rejected.

2. The entire issue in this writ petition concerns the procedure to be adopted under Rule 19 of the CCS(CCA) Rules, 1965.

3. The admitted facts are that the petitioner was convicted in a criminal case under Section 120-B IPC read with Section 7 of the Prevention of Corruption Act, 1988 as also under Sections 7 and 13(2) read with Section 13(1)(d) of the said Act. By virtue of the order on sentence dated 25.03.2004 the petitioner, along with the Additional Commissioner of Income Tax, Mr Shib Lal, was sentenced to undergo two years rigorous imprisonment as also to pay a fine of Rs. 10,000/- in respect of the offence under Section 120-B IPC. Further, the petitioner was also required to undergo two years rigorous imprisonment and was subjected to a fine of Rs. 10,000/-in respect of the offence under Section 7 of the Prevention of Corruption Act, 1988 as also rigorous imprisonment of three years and fine of Rs. 30,000/- in respect of the offences under Section 7 and 13(2) read with Section 13(1)(d) of the said Act. All the sentences were directed to run concurrently. It is also relevant to note

that the petitioner has filed an appeal against the said conviction and order on sentence and the said appeal is pending before this court. In that appeal, the sentence of the petitioner has been suspended.

4. On 23.12.2004 the Disciplinary Authority sought to follow the procedure under Rule 19 of the CCS(CCA) Rules, 1965 and consequently issued a show cause notice to the following effect:

"WHEREAS Sh. RAVINDER KUMAR MIRG, Inspector of Income Tax, has been convicted on a criminal charge of demanding and accepting illegal gratification of Rs.1 lakh, vide the Special Judge Delhi's Order dated 25.3.04 in RC No.62(A)/94, CC No.75/99, and has been sentenced to (i) rigorous imprisonment for two years and to pay a fine of Rs.10,000/- for the offence punishable u/s 120-B of the IPC r/w Section 7 of the Prevention of Corruption Act, 1988, (ii) rigorous imprisonment for two years and to pay a fine of Rs.10,000/- for the offence punishable u/s 7 of the Prevention of Corruption Act, 1988 and (iii) rigorous imprisonment for three years and to pay a fine of Rs.30,000/- for the offence punishable u/s 13(2) r/w Section 13(1)(d) of the Prevention of Corruption Act; with the stipulation that all the substantive sentences shall run concurrently.

AND WHEREAS the undersigned proposes to award an appropriate penalty under Rule 19 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, taking into account the gravity of the criminal charges;

AND WHEREAS on a careful consideration the undersigned has provisionally come to the conclusion that Shri RAVINDER KUMAR MIRG is not a fit person to be retained in service/the gravity of the charge is such as to warrant the imposition of a major penalty and accordingly proposes to impose on him the penalty of Dismissal for Government Service.

NOW, THEREFORE, Shri RAVINDER KUMAR MIRG Inspector of Income Tax, is hereby given an opportunity of making representation on the penalty proposed above. Any representation which he may wish to make against the penalty proposed will be considered by the Undersigned. Such a representation, if any, should be made in writing and submitted

s as to reach the undersigned not later than fifteen days from the date of receipt of this memorandum by Sh. RAVINDER KUMAR MIRG.

The receipt of this Memorandum should be acknowledged."

5. Thereafter the petitioner filed a representation which was received in the office of the Disciplinary Authority on 24.01.2005. Apparently the Disciplinary Authority considered the said representation and passed the order dated 31.07.2009 deciding to levy penalty of dismissal from service on the petitioner with the further direction that the dismissal shall ordinarily be a disqualification for further employment under the Government.

6. The petitioner, being aggrieved by the said order dated 31.07.2009, filed the said O.A. No.1303/2011 which has been rejected by the Tribunal by virtue of the order dated 22.09.2011. The review application has also been rejected by virtue of the order dated 19.01.2012. Being aggrieved by the said orders the petitioner is before us by way this writ petition.

7. The only point urged by the learned counsel for the petitioner was that the Tribunal has erred in not considering the argument raised by the petitioner that the order dated 31.07.2009 has been passed entirely on the basis of consideration of the co-accused Shib Lal's case and that, too, on the basis of UPSC's advice rendered in Shib Lal's case. In order to fortify this submission the learned counsel for the petitioner took us through the order dated 31.07.2009 passed by the Disciplinary Authority. We find that the entire paragraph 5 which spans across six pages refers to the co-accused Shib Lal's case and the UPSC's advice rendered in that case. It appears to us that the order dated 31.07.2009 has been rendered and modeled entirely on the basis of the earlier order of the Disciplinary Authority in the case of Shib Lal. The learned counsel for the respondent submitted that the Disciplinary Authority has relied on the case of Shib Lal inasmuch as the case of the present petitioner and that of Shib Lal were identical and they were convicted by a common order and also sentenced in identical fashion. Consequently, it was the submission of the learned counsel for the respondent that there was no harm in the Disciplinary Authority considering Shib Lal's case while coming to a decision with regard to the penalty to be imposed on the petitioner inasmuch as Shib Lal's case was identical to that of the petitioner.

8. After having considered the arguments advanced by the learned

counsel for the parties we feel that the procedure laid down in Rule 19 of the CCS(CCA) Rules, 1965 ought to be followed scrupulously. The said Rule 19 reads as under:-

"19. Special procedure in certain cases

Notwithstanding anything contained in Rule 14 to Rule 18 -

(i) where any penalty is imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge, or

(ii) where the Disciplinary Authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these rules, or

(iii) where the President is satisfied that in the interest of the security of the State, it is not expedient to hold any inquiry in the manner provided in these rules.

the Disciplinary Authority may consider the circumstances of the case and make such orders thereon as it deems fit:

Provided that the Government servant may be given an opportunity of making representation on the penalty proposed to be imposed before any order is made in a case under Clause(i):

Provided further that the Commission shall be consulted, where such consultation is necessary, before any orders are made in any case under this rule."

9. It is apparent that the present case falls within Clause (i) of Rule 19, that is, where any penalty is imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge. There is no doubt that the petitioner has been convicted in a criminal case as mentioned above. In such an eventuality notwithstanding anything contained in Rules 14 to 18, the Disciplinary Authority is permitted to consider the circumstances of the case and make such orders thereon as it deems fit. However, this is subject to a proviso that the Government servant may be given an opportunity of making a representation on the penalty proposed to be imposed before any order is made in a case under Clause (i).

10. In the present case we find that although the first part of the proviso has been followed inasmuch as the show cause notice dated 23.12.2004 was issued to the petitioner by the Disciplinary Authority, and the petitioner has also made a representation on the penalty proposed to be imposed, the Disciplinary Authority has not applied its mind fully to the representation made by the petitioner and has gone merely by the case of the co-accused Shib Lal as also the UPSC's advice rendered in that case. We may point out that insofar as the petitioner is concerned, he being a Group-B employee, consultation of the UPSC was not necessary. Therefore, it was not at all incumbent upon the Disciplinary Authority to lay emphasis on the UPSC's advice rendered in the case of Shib Lal who was a Group-A employee and in whose case the UPSC was required to be consulted.

11. We may refer to a decision of the Supreme Court in the case of **Union of India and Ors. vs. Sunil Kumar Sarkar,** (2001) 3 SCC 414, wherein the correct procedure to be adopted when Rule 19 of the said Rules is invoked has been made clear. The Supreme Court observed as under:-

> "Rule 19 of the Central Rules is in conformity with the above provisions of the Constitution. This, as we see, is a summary procedure provided to take disciplinary action against a government servant who is already convicted in a criminal proceeding. The very foundation of imposing punishment under Rule 19 is that there should be a prior conviction on a criminal charge. Therefore, the question of having a predetermined mind does not arise in such cases. All that a disciplinary authority is expected to do under Rule 19 is to be satisfied that the officer concerned has been convicted of a criminal charge and has been given a show-cause notice and reply to such show-cause notice, if any, should be properly considered before making any order under this Rule. Of course it will have to bear in mind the gravity of the conviction suffered by the government servant in the criminal proceedings before passing any order under Rule 19 to maintain the proportionality of punishment."

12. We feel that the representation made by the petitioner has not been "properly considered" by the Disciplinary Authority inasmuch as the entire focus of the Disciplinary Authority was that on the case of the co-

accused Shib Lal and the UPSC's advice rendered in the Shib Lal's case.

13. Consequently, we set aside the impugned orders passed by the Tribunal as also the Disciplinary Authority's order dated 31.07.2009 and direct that the Disciplinary Authority shall consider the representation of the petitioner which is already with the Disciplinary Authority and pass an appropriate order in consonance with law. The said order be passed within three weeks. We make it clear that no other point was argued before us. The quashing of the order of the Disciplinary Authority dated 31.07.2009 will not amount to reinstatement. We are also making it clear that we have not expressed our view on the merits of the penalty order. We made it clear that the petitioner shall be under deemed suspension till the Disciplinary Authority passes the order under Rule 19.

14. The writ petition stands disposed of. There shall be not order as to costs.

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CRL. A.

AJAY KUMAR **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

(BADAR DURREZ AHMED & VEENA BIRBAL, JJ.)

CRL. A. NO. : 372/1997 **DATE OF DECISION: 07.09.2012**

Indian Penal Code, 1860—Section 302—The entire case of prosecution is based on the circumstantial evidence. The approach to be adopted and the test to be applied by the Court in cases based on circumstantial evidence, was examined by the Supreme Court in *Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh;* : 1953 Cri.L.J. 129. The Court in that case

observed:- "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."—In the present case, nothing has been placed on record by appellant to show in what manner prejudice has been caused to appellant by not putting the said statement. Further even if this piece of evidence regarding motive is ignored, the case of prosecution cannot be thrown out considering the other circumstantial evidence proved against the appellant—The stand of the appellant in the statement u/s 313 Cr.P.C. is that the deceased was his *ustad* who had trained him in tailoring. On 03.01.1993 in the early morning he had gone to attend the natural call. When he had returned home, he saw that the deceased had been murdered. He cried *"murder ho gaya, murder ho gaya"*. One Raju was also sleeping on that night with him and when he came after attending the natural call, that Raju was not there, persons apprehended him on suspicion. We have examined this stand also. No evidence is led by him to substantiate the same. Perusal of evidence of Om Prakash PW-7 shows that no suggestion was given to him that Rajesh had committed the murder. Further as per appellant, the deceased was having animosity with Rajesh and he was responsible for the occurrence as Rajesh was sleeping with deceased on that night.

The said stand is not believable. If Rajesh was having animosity with the deceased, in that event the question of his sleeping with deceased did not arise. Further, Om Prakash PW7 had stated in the evidence that when on hearing the shrieks he had pushed the door, appellant told him that the deceased was prone to fits and thereafter he ran away from the room. In these circumstances, defence taken is at variance and further the same is also not believable. Further there is nothing on record to substantiate the same—The circumstantial evidence relied upon by the prosecution clearly establishes that the appellant and the deceased were living together as tenants in the house of Om Parkash PW-7. The same is also admitted by the appellant in his statement u/s 313 Cr/P.C. There id evidence of Om Parkash PW-7 that on the previous night of crime they were together in the room—The circumstantial evidence established above are of conclusive nature and from the same no other hypothesis can be drawn except that of guilt of the appellant.

Important Issue Involved: Where the evidence is of a circumstantial nature. There must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. Avninder Singh, Advocate.

FOR THE RESPONDENTS : Mr. Pawan Narang, APP.

CASES REFERRED TO:

1. *Md. Mannan @ Abdul Mannan* vs. *State of Bihar;* (2011) 5 SCC 317.

2. *Suresh Chandra Bahri* vs. *State of Bihar:* 1995 SCC (Cri) 60.

3. *State of Haryana* vs. *Ved Prakash:* 1994 Crl.L.J. 140.

4. *Sharad Birdhichand Sarda* vs. *State of Maharashtra:* 1984 Crl.L.J. 1738.

5. *Hanumant Govind Nargundkar and Anr.* vs. *State of Madhya Pradesh;* : 1953 Cri.L.J. 129.

RESULT: Dismissed.

VEENA BIRBAL, J.

1. The present appeal is directed against the judgment and order on sentence both dated 31.10.1996 passed by the learned Addl. Sessions Judge, New Delhi, in a case arising out of FIR no. 3/1993, P.S. Okhla Industrial Area, registered under Section 302 IPC wherein the appellant had been convicted under Section 302 IPC and had been sentence to undergo imprisonment for life.

2. The case of the prosecution is that on 03.01.1993 a DD No. 60B i.e. Ex.PW1/B was recorded at P.S. Okhla Industrial Area on the information given by the PCR. A copy of the said DD was handed over to Constable Mahipal PW-1, who handed over the same to Inspector Satpal Singh PW-15 who thereupon along with other police officials i.e. constable Mahipal PW-1 and constable Chander Bhan PW-12 went to the place of occurrence i.e. RZ 192, Gali no. 16, Tuglakabad Extension at 7.15 AM. The door of the house was open and a dead body stained with blood was lying on the bed. The complainant Om Parkash PW-7 had met the IO PW-15 and made a statement Ex. PW7/A to him wherein it was alleged that he was a government servant and was resident of RZ 192, Gali no. 16, Tuglakabad Extension. On 07.12.1992 he had rented out one room of his house on rent to Ajay i.e. appellant and Kuldeep i.e. the deceased. They had been residing there since then. On 03.01.1993 at about 6.45 AM, he heard loud shrieks coming from the room which he had given on rent. At that time, he was in the house. On hearing the shrieks, he along with his wife Omvati came out and saw that the persons of neighbourhood had also collected near the house. When he had called the appellant, the light of the room was switched off. He had felt something wrong in the room. Thereupon Om Prakash (PW7) had knocked at the door repeatedly. The appellant slightly opened the room

and told that his colleague Kuldeep was proned to 'fits'. The complainant PW-7 had noticed some blood stains on his clothes. Thereupon, he pushed the door and tried to look inside, however, the appellant had pushed him back and fled outside. Thereupon, he raised the alarm *'pakro pakro'* and ran after Ajay i.e. the appellant. The other persons of neighbourhood also ran after appellant. The appellant was apprehended by Ran Singh PW6, a neighbour after a distance of about 125 paces from his house. He along with his neighbour Ran Singh, PW-6 brought him to the rented room. On going inside the room, they found that the deceased was lying in a pool of blood on the bed. He had deep wounds on the neck and his head. A closed knife was also lying there. The blood was also lying on the floor. The persons collected had started beating the appellant. The appellant had told them that the deceased had wanted to kill him. The appellant had also told that he had an apprehension that deceased had murdered his mother. In the meantime, the police came and the appellant was handed over to police. On the aforesaid statement Ex.PW7/A, Inspector Satpal Singh PW-15 had put his endorsement Ex.PW 1/V and got FIR Ex.PW15/A registered by sending a ruqqa to the police station through Constable Mahipal PW-1.

3. The complainant Om Parkash PW-7 and other persons of public who were present there, had handed over the appellant to the IO PW-15. He had prepared site plan Ex. PW15/B. The crime team was also called at the spot. During the course of investigation, IO PW15 had lifted the blood from the spot. The blood stained floor was broken and a piece of blood stained earth was lifted from the spot and seized vide memo Ex.PW 6/C. The blood stained mattress and bed sheet were also seized vide seizure memo Ex.PW6/C. Before seizing, the necessary formalities concerning seizure were completed. A part of scissors measuring 10+", the handle of which was made of brass was also found at the spot. There was blood on the blade of the scissors and some hair were also struck on it. A knife Ex.P1 was also lying at the spot. The knife Ex.P-1 and part of scissors Ex.P2 were also seized vide aforesaid memo. Before seizing necessary formalities were done. On interrogation, the appellant had made disclosure statement Ex. PW6/B. Pursuant to his disclosure statement Ex. PW 6/B, the other unused part of the scissors Ex.P4 was recovered by the appellant from his "attachi" which was lying in the room. The same was seized vide memo Ex.PW6/F. The appellant was sent for medical examination. His clothes were also seized during the

investigation. The scene of occurrence was got photographed. The statement of other PWs were also recorded. The inquest proceedings were conducted before the body was sent for post mortem examination. After post mortem examination, nobody claimed the dead body. As such, the body was cremated by the police. The articles seized were first deposited in the malkhana and during the course of investigation were sent to CFSL for examination. After completion of necessary investigation, a report under Section 173 Cr.P.C. was prepared and was filed against the appellant before the concerned MM, New Delhi. Thereafter, it was assigned to the court of ld. Addl. Sessions Judge, New Delhi. A charge was framed against the appellant for having committed offence punishable under Section 302 IPC. The appellant pleaded not guilty to the same and claimed trial and was tried before Ld. Addl. Sessions Judge, Delhi.

4. The prosecution case is based on circumstantial evidence. To prove its case, the prosecution in all had examined 17 witnesses. Out of which Om Parkash PW-7 is the landlord/complainant, Ran Singh PW-6 is the neighbour who along with PW-7 Om Parkash had apprehended the appellant when he had made an attempt to escape from the spot. Dr. D.N. Bhardwaj PW-5 had conducted the post mortem examination on the body of the deceased. The remaining evidence relates to police officials.

5. The incriminating evidence was put to the appellant in the statement under Section 313 Cr.P.C. wherein he had denied the same and had stated that he was an innocent person. He had stated that the deceased was his ustad who had trained him in tailoring job and cutting. On the day of occurrence, he had gone out on the call of nature. When he returned to his room, he saw that the deceased had been murdered. Thereupon, he cried *'murder ho gaya, murder ho gaya'*. He had stated that one Raju @ Rajesh was also sleeping with the deceased in the night. The said Raju @ Rajesh was not found in the morning. On his cries, the police was informed. Public also came and they suspected that crime was committed by him and had caught hold of him. He had also stated that deceased Kuldeep was a 'wrong' man who used to bring 2/4 persons daily and had been asking him to do various things. The police had apprehended him on the pretext that he would be saved after few days. He had narrated to the police about Raju @ Rajesh but no investigation was done. The appellant stated that he had also told that the deceased had remained in Delhi jail as well as in Sonepat jail and was absconding from his house. He denied that he got the other part of the unused scissors

Ex.P4 recovered from his attachi (suit case) as is alleged. He had further stated that his clothes were stained with blood on account of his fall in the room on returning from natural call. He was an innocent person and police had falsely implicated him. No evidence was led by him in defence.

6. Taking into consideration, the evidence of Om Prakash, PW-7, Ran Singh, PW-6, recoveries effected at the spot, medical evidence including the opinion of Dr. D.N. Bhardwaj PW-5 about cause of death, CFSL reports Ex.PA to Ex.PC and other circumstantial evidence relied upon by the prosecution, ld. trial court held that the prosecution has been able to prove the circumstantial evidence relied upon against the appellant and accordingly held the appellant guilty of the occurrence and convicted him under Section 302 IPC.

7. Learned counsel for appellant has argued that there is no direct/ ocular evidence in the present case. The entire case is based on circumstantial evidence. It is contended that the circumstances relied upon by the prosecution do not tend to establish the case against the appellant beyond reasonable doubt. It is contended that on the day of occurrence in the early hours of the day, the appellant had gone to attend the natural call. When he returned, he had found the deceased in a pool of blood and on entering the room, he had a fall as a result of which his clothes were stained with blood. It is further contended that the appellant had also stated to the police about the deceased having animosity with one Rajesh, tailor. No investigation is done by the police qua that person. It is further contended that the other part of scissors Ex.P4 was not recovered at the instance of appellant. It is contended that Dr. D.N. Bhardwaj PW5 has categorically deposed in his evidence that the depth of injuries on deceased were not possible with Ex.P2. It is further contended that as per post mortem report Ex. PW-5/A possibility of more than one person could not be ruled out. It is further contended that the alleged statement of appellant to PW6 i.e., extra judicial confession made by him to PW6 to the effect that the deceased was having illicit relations with his mother and due to that reason he had committed murder of appellant cannot be used against him as the same was not put to him in his statement under Section 313 Cr.P.C. It is contended that the circumstances relied upon by the prosecution cannot be said to be sufficient to prove the guilt alleged against the appellant beyond reasonable doubt. It is further contended that it has come in the evidence that when PW7 had come on hearing the shrieks, the door of the room was open.

In these circumstances, the possibility of somebody entering the room cannot be ruled out.

8. On the other hand, learned APP for State has argued that the circumstances relied upon are that the appellant and the deceased were living together at house No. RL 192-B, Tughlakabad Extn. as tenants in the house of Om Parkash PW7. The dead body of Kuldeep was found lying in a pool of blood on the bed in the said room in the tenanted premises having deep injuries on neck and near the head. The blood was flowing on the floor of the said room. It is submitted that the aforesaid circumstances are admitted by the appellant in his statement under Section 313 Cr.P.C. The other circumstantial evidence relied upon by the prosecution is that when the landlord Om Parkash PW7 on hearing the shrieks had called the appellant, he had put off the light of the room and when the door of the room was pushed by the landlord, PW-7, appellant ran out of the house. At that time, the clothes of the appellants were stained with blood. The other circumstance relied upon is that the appellant was apprehended while he was running by Ram Singh, PW 6 and landlord Om Prakash, PW-7 who had also run after him. The evidence on record establishes that they had brought him to his room. Other persons of public had also come. It is further contended that the evidence on record also establishes that the deceased was found along with the appellant on the last night. It is contended that pursuant to disclosure statement Ex.PW6/B, appellant had also got recovered one part of the scissors Ex.P4 which was from an attachi lying in that room. It is contended that evidence on record also establishes that clothes of appellant i.e., Ex.P5, P6 & P7 were stained with blood. As per CFSL report Ex.PB, the blood found at the spot has matched with blood of the appellant. It is also stated that as per evidence on record, the appellant had the motive to commit the crime on account of alleged illicit relations of the deceased with the appellant's mother. It is contended that the prosecution witnesses have proved all the circumstantial evidence relied against the appellant beyond any reasonable doubt and the same point out towards the guilt of the appellant.

9. We have heard Mr.Avninder Singh, learned counsel for the appellant and Mr.Pawan Narang, learned APP for the State.

10. The entire case of prosecution is based on the circumstantial evidence. The approach to be adopted and the test to be applied by the

court in cases based on circumstantial evidence, was examined by the Supreme Court in **Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh;** : 1953 Cri.L.J. 129. The court in that case observed:-

> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

The above position of law has stood the test of time and has been reiterated in numerous subsequent decisions of the Supreme Court. Reference in this regard is made to the decisions in **Sharad Birdhichand Sarda v. State of Maharashtra** : 1984 Crl.L.J. 1738 and **State of Haryana v. Ved Prakash:** 1994 Crl.L.J. 140.

11. The Supreme Court in **Md. Mannan @ Abdul Mannan v. State of Bihar;** (2011) 5 SCC 317 held as under:-

> "In our opinion to bring home the guilt on the basis of the circumstantial evidence the prosecution has to establish that the circumstances proved lead to one and the only conclusion towards the guilt of the accused. In a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn are to be cogently and firmly established. The circumstances so proved must unerringly point towards the guilt of the accused. It should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else. It has to be considered within all human probability and not in fanciful manner. In order to sustain conviction circumstantial evidence must be complete and must point towards the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused but inconsistent

with his innocence. No hard and fast rule can be laid to say that particular circumstances are conclusive to establish guilt. It is basically a question of appreciation of evidence which exercise is to be done in the facts and circumstances of each case."

12. Om Parkash PW7 is the landlord of the appellant and the deceased. He has deposed that appellant and deceased became his tenant only 15-20 days prior to the incident. On 03.01.1993, at around 6.45 p.m. he had heard the shrieks. When he and his wife came out they saw a number of persons standing outside the house and were trying to find out from where the shrieks were coming. He had a doubt that the same were coming from the tenanted room. He had called the appellant. Thereupon, the appellant had switched off the light. When he pushed the door, appellant came out and escaped from the room. At that time, his clothes were stained with blood. The public ran after him. Ran Singh PW6 and his neighbours also ran after him. The appellant was apprehended at a little distance from the house. The public started beating him and brought him back to his room. The moment the room was opened, it was seen that Kuldeep i.e., deceased, was lying dead in a pool of blood on the bed. A knife Ex.P1 was lying near the dead body and one part of scissors Ex.P2 was also lying there. He had deposed having given statement Ex.PW7/A to the police.

13. On being cross-examined, he had stated that the knife Ex.P1 was lying near his head and the same was closed. He has denied that the appellant was not there when he had reached on hearing the shrieks. He had denied that some Rajesh was involved in the crime. He had deposed that he did not know any Rajesh. He had deposed that a day before the occurrence he had seen deceased Kuldeep in the room.

14. Another neighbour Ran Singh PW6 has also deposed that on 03.01.1993 at about 6.45 a.m. he heard the voice of "pakro pakro". He was standing in the gali. He had seen the appellant running. When the appellant had passed through him while running, he had caught hold of him. His clothes were stained with blood. Om Parkash PW7 was also running after him. He also deposed that appellant was a tenant of Om Parkash PW7. They had brought him to the house of Om Parkash PW7 where many people had collected and a dead body in a pool of blood was lying in the room in the house of Om Parkash PW7. In the meantime, police also reached there. Before arrival of the police, the appellant had

told Ran Singh, PW-6 that the deceased was having illicit relations with his mother. The personal search of appellant was conducted vide memo Ex.PW6/A. He has proved his signatures on the said memo. The police had also seized one knife Ex.P1, one part of scissors Ex.P2, blood stained clothes P5, P6 & P7. In his presence the police recorded disclosure statement Ex.PW6/B of appellant. In pursuance thereof the appellant got recovered the other part of the scissors Ex. P4 from an attachi lying in that room.

15. The evidence of Om Parkash PW7 establishes that the appellant and deceased were his tenants and on the day of occurrence they both were residing in his house. The appellant has also admitted the same in the statement under Section 313 Cr.P.C. The evidence of Om Parkash PW7 also establishes that on hearing the shrieks, when he went and called the appellant, the light was switched off by him. When Om Prakash (PW7) had pushed the door, appellant ran away and while he was running, Ran Singh PW6 had apprehended him and was brought to the spot by the persons of public where blood was seen on the floor and the dead body of the deceased was lying on a bed in the room. The evidence of Om Parkash PW7 and Ran Singh PW6 as is stated above is not demolished in cross-examination. They have also deposed that when they had seen the appellant, his clothes were stained with blood.

16. The evidence of Om Parkash PW7, Ran Singh PW6 also establishes that when the appellant was running, his clothes were stained with blood. Appellant had admitted the blood stains on his clothes Ex.P5 to Ex.P7 in statement under Section 313 Cr.P.C. However, as per him, the same were on account of a fall on return from natural call as there was blood in all directions, on the body as well as on the floor. The explanation given by him is not reasonable and probable. Had the blood been there on his clothes i.e. pant (Ex. P5), shirt (Ex. P6) and full sleeves sweater (Ex. P7) on account of fall as alleged, then blood would have been at one stretch and not at scattered places as is the position in the present case. The CFSL report Ex.PB shows that pant (Ex. P5), shirt (Ex. P6) and full sleeves sweater (Ex. P7) had numerous dark brown stains at places. The ld. trial court has also noted the same and found the explanation given by him under Section 313 Cr.P.C. was not reasonable and probable. The circumstance that the appellant was apprehended immediately after the occurrence while wearing blood stained clothes i.e. P5, P6 & P7, stands proved against him. The blood group on the clothes

of deceased, the blood lifted from the spot as well as blood on the clothes of appellant i.e. Ex. P5 to Ex.P7 was found to be of the same group i.e. 'AB' group as per CFSL report Ex. PB.

17. The post mortem report Ex. PW5/A is proved on record by Dr.D.N.Bhardwaj. As per aforesaid report, the following ante-mortem injuries were there on the person of the deceased Kuldip Singh :-

i) Incised wound on left side of forehead of size 2.5 x 5 x 1 C.M. with clean cut margins.

ii) Incised wound on the left mastoid region. This wound was communicating with Pinna which also pierced. Size was 2.5 x 5 x 1 C.M.

iii) Incised stab wound on the left side of neck of size 2.5 x 5 x 3.5 C.M. deep underneath muscles were cut.

iv) Incised stab wound on the left side of neck 5 C.M. medial to injury No. 3. It was cutting Jugular vein, which connects brain, on the left side. Size was 2.5 x 5.4 C.M.

v) Incised wound on the left side of neck 2.5 x 5 x 1.5 C.M.
vi) Incised wound on left side of neck 1 C.M. medial to injury No. 5 of size 2.5 x 5 x 1.5 C.M.

vii) Stab incised wound on the middle of neck placed transversely of size 2.5 x 6 x trachea deep. The trachea was exposed to the exterior with blood part in tracheal cavity.

viii) Stab incised wound on the middle of neck .5 C.M. below injury No. 7 of size 2.5 x .5 x trachea deep. ix) Incised wound in the midline in the beck of size 2.5 x .5 x 1 C.M. cutting superficial muscles.

x) Incised stab wound just below right ear lobule of size 2.5 x .5 x 3 C.M. It was also superficial.

There were other injuries 11 to 26 which were also incised wound but were superficial and caused by sharp edged weapon including injury No. 24, 25 and 26 which are as follows:-

xxiv) Incised wound on the medial aspect of left palm.

xxv) Amputation of left little finger.

xxvi) Incised wound at the root of right thumb.

Dr. Bhardawaj PW-5 gave the opinion that injuries No. 4, 7 and 8 were sufficient to cause death individually as well as collectively in the ordinary course of nature. Injuries No. 24, 25 and 26 were received in defence in semi wound. All injuries were ante-mortem caused by sharp object. The cause of death was due to asphyxia due to tracheal injuries following multiple injury.

Dr. Bhardawaj PW-5 also gave the opinion that injuries were possible by knife Ex.P1 and not by Ex.P2. After cutting of trachea and jugular vein no cry is possible, until trachea injury is received, cry is possible. All injuries are possible from single person, if one who suffered is taken unaware. Possibility of more than one person cannot be ruled out. On the palm of deceased injuries were on both palms. When he received these wounds he was aware. The other person if he was present has not used weapon.

18. The knife Ex.P1 was found lying at the spot as per evidence of the same was seized during investigation vide memo Ex.PW6/C. The evidence as regards seizure of knife Ex.P1 is not demolished in cross-examination. As per the opinion of Dr D.N. Bhardwaj, PW-5, the injuries were possible with knife Ex.P1 and not by part of scissors Ex.P-2. The injuries are also on vital part of the body. Even if the injuries are not possible with portion of scissors Ex.P2, considering the other circumstantial evidence against him, the same does not demolish the case of the prosecution in any manner.

19. The extra judicial confession made by the appellant i.e., he had admitted before Ran Singh, PW-6 that the deceased was threatening to kill him and was having illicit relationship with his mother, was not put to him in statement u/s 313 Cr.P.C and the same was not taken into consideration. The said piece of evidence was relied upon by the prosecution to prove the motive of the appellant in committing the occurrence. The stand of learned counsel for the appellant is that the same cannot be taken into consideration as the same was not put to appellant in the statement under section 313 Cr.P.C. A similar submission was made before the Supreme Court in **Suresh Chandra Bahri v. State of Bihar:** 1995 SCC (Cri) 60. The Supreme Court rejected the said

submission by observing as under:-

> "As no question had been put to the accused on motive, no motive for the commission of the crime could be attributed to the accused nor the same could be reckoned as circumstance against him that it could not be pointed out as to what in fact was the real prejudice caused to the accused by omission to question the accused on the motive for the crime. No material was placed before the Court to show as to what and in what manner the prejudice, if any, was caused to the accused. More so, the appellant-accused was aware of the accusation and charge against him."

20. In the present case, nothing has been placed on record by appellant to show in what manner prejudice has been caused to appellant by not putting the said statement. Further even if this piece of evidence regarding motive is ignored, the case of prosecution cannot be thrown out considering the other circumstantial evidence proved against the appellant.

21. The stand of the appellant in the statement u/s 313 Cr.P.C is that the deceased was his ustad who had trained him in tailoring. On 03.01.1993 in the early morning he had gone to attend the natural call. When he had returned home, he saw that the deceased had been murdered. He cried *"murder ho gaya, murder ho gaya"*. One Raju was also sleeping on that night with him and when he came after attending the natural call, that Raju was not there, persons apprehended him on suspicion. We have examined this stand also. No evidence is led by him to substantiate the same. Perusal of evidence of Om Prakash PW-7 shows that no suggestion was given to him that Rajesh had committed the murder. Further as per appellant, the deceased was having animosity with Rajesh and he was responsible for the occurrence as Rajesh was sleeping with deceased on that night. The said stand is not believable. If Rajesh was having animosity with the deceased, in that event the question of his sleeping with deceased did not arise. Further, Om Parkash PW7 had stated in the evidence that when on hearing the shrieks he had pushed the door, appellant told him that the deceased was prone to fits and thereafter he ran away from the room. In these circumstances, defence taken is at variance and further the same is also not believable. Further there is nothing on record to substantiate the same.

22. The circumstantial evidence relied upon by the prosecution clearly establishes that the appellant and the deceased were living together as tenants in the house of Om Parkash PW-7. The same is also admitted by the appellant in his statement u/s 313 Cr.P.C. There is evidence of Om Parkash PW-7 that on the previous night of crime they were together in the room. The evidence on record also establishes that on the day of occurrence at about 6.45 AM when Om Parkash PW-7 had heard the shrieks and had come out with his wife and had called the appellant, the appellant had switched off the light. The evidence of Om Parkash also establishes that when he pushed the door, the appellant had come out and at that time he was wearing blood stained clothes. The other circumstantial evidence relied upon by the prosecution that the appellant was apprehended while escaping the spot at a distance of 100 yards or so from the house of Om Parkash by Ran Singh (PW6) also stands proved from the testimony of Ran Singh (PW6) and Om Parkash PW-7. The other circumstantial evidence about seizure of blood stained clothes of appellant Ex.P5 to P7 also stands proved against him. As per CFSL report Ex. PB, the blood group of blood found on his clothes is same as that of deceased. There is no animosity of PW7 and PW6 with the appellant. There is no reason why they would falsely depose against him. It has also been proved that the appellant had also put off the light when he was called by PW7 and had stated to him that the appellant was prone to fits. Further, the knife Ex.P1 was also found at the spot. As per opinion of doctor PW5, injuries on the deceased were possible with knife Ex.P1. The doctor PW-5 has also stated in the evidence that injuries on the deceased were possible by one person. All the above circumstances clearly establish that it is the appellant who has committed the crime. As is discussed above, the explanation given by him in his statement under Section 313 Cr.P.C. is not found probable.

23. The circumstantial evidence established above are of conclusive nature and from the same no other hypothesis can be drawn except that of guilt of the appellant.

24. In view of the above discussion, the judgment of conviction and sentence of the appellant is upheld. The appeal stands dismissed.

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TEST. CAS.

PRITHVIRAJ SEHLI @ PRACHA PRACHASERI & ANR. **....PETITIONERS**

VERSUS

STATE & ORS. **....RESPONDENTS**

(V.K. JAIN, J.)

TEST. CAS. NO. : 75/2010 **DATE OF DECISION: 07.09.2012**

Indian Succession Act, 1925—Sec. 63—will—Probate—This is a petition for grant of probate in respect of the Will, alleged to have been executed by late Smt. Shanti Devi on 19.07.1991. Smt. Shanti Devi, who expired on 08.03.2004, was survived by four legal heirs, including the petitioners Prithvi Sehli and Balraj Sehli. It is alleged that in her life time, she had executed the aforesaid Will dated 19.07.1991 in the presence of two attesting witnesses, namely, Vinay Shukul and Ram Das Singh—The execution of an unprivileged Will is governed by Section 63 of Indian Succession Act which, to the extent it is relevant, provides that the Will shall be attested by two or more witnesses, each of whom has seen the Testator sign or affix his mark to the Will or had seen some other person sign the Will, in the presence and by the direction of the Testator, or has received from the Testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the Testator, but it shall not be necessary that more than one witness be present at the same

time, and no particular form of attestation shall be necessary. Section 68 of Evidence Act, to the extent, it is relevant, provides that if a document is required by law to be attested, it shall not be used as evidence until at least one attesting witness has been called for the purpose of proving its execution if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. Since the Will is a document required by law to be attested by at least two witnesses, the petitioner could have proved it by producing one of the attesting witnesses of the Will. The execution of the will has been duly proved by way of affidavit of the attesting witness Mr. Vinay Shukul. The execution of the Will thus stands duly proved. There are no suspicious circumstances surrounding execution of Will in question—The respondent No.2, through his counsel, states that he has no objection to grant of probate to the petitioners. Though in the Will, Smt. Shanti Devi bequeathed her properties to the petitioners to the exclusion of her husband and son, considering the fact that the husband had given no objection and the third son of Smt. Shanti Devi, namely, respondent No. 3 Raviraj Sehli had not only executed a relinquishment deed in favour of the petitioners, but also an affidavit/NOC, admitting execution of the Will, there is no ground to suspect the genuineness and authenticity of the Will set up by the petitioners and there is no valid reason for refusing probate to the petitioners—For the reasons stated hereinabove, the petition is allowed. Probate of the Will executed by late Smt. Shanti Devi on 19.07.1991 be issued to the petitioners with copy of the Will annexed to it, as per rules, after confirming that the report of Chief Revenue Controlling Authority along with valuation report has been received.

Important Issue Involved: Section 63 of Indian Succession Act provides that the Will shall be attested by two or more witnesses, each of whom has seen the Testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the Testator, or has received from the Testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the Testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary. Section 68 of Evidence Act, to the extend, it is relevant, provides that if a document is required by law to be attested, it shall not be used as evidence untill at least one attesting witness has been called for the purpose of proving its execution if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. Since the Will is a document required by law to be attested by at least two witnesses, the petitioner could have proved it by producing one of the attesting witnesses of the Will.

[Ch Sh]

APPEARANCES:

FOR THE PETITIONERS : Ms. Chitra Gera, Advocate for Petitioner No. 2.

FOR THE RESPONDENTS : Ms. Asha Bhalla, Advocate for R-2.

RESULT: Disposed of.

V.K. JAIN, J. (ORAL)

1. This is a petition for grant of probate in respect of the Will, alleged to have been executed by late Smt. Shanti Devi on 19.07.1991. Smt. Shanti Devi, who expired on 08.03.2004, was survived by four legal heirs, including the petitioners Prithvi Sehli and Balraj Sehli. It is alleged that in her life time, she had executed the aforesaid Will dated 19.07.1991 in the presence of two attesting witnesses, namely, Vinay Shukul and Ram Das Singh.

2. Notice of the petition has been served by the respondents 2 and 3, but there has been appearance only on behalf of respondent No. 2. The learned counsel representing respondent No. 2, states that there is no objection to grant of probate of the Will.

3. The citation was also published in 'The Statesman', which is on record. The petitioner has filed two affidavits by way of evidence.

4. In his affidavit by way of evidence, Mr Vinay Shukul has stated that Smt. Shanti Devi was ordinarily residing at 16, Soi Somdej Chao Praya 12, Klongsan Thonburi, Bangkok, Thailand, at the time of her death. He has further stated that on 19.07.1991, he went to the house of Smt. Shanti Devi on her invitation. She informed him that she had got her last Will prepared through an advocate and wanted him and Shri Ram Das Singh, who was already present there, to be the attesting witness to her Will. Thereafter, they went to the Attache (Consular), Embassy of India, Bangkok on the same day at around 11.00 A.M. for the purpose of proper execution and its attestation in the said office. He has further stated that in the aforesaid office, he saw Smt. Shanti Devi signing the Will Ex.P1W1/3. She signed on the last page in his presence. Thereafter, he and Ram Das signed the Will at points 'A' and 'C' respectively on her request and in her presence as well as in the presence of each other. The signature of Smt. Shanti Devi were got attested by the authorized officer of the Attache. The witness has further stated that Smt. Shanti Devi was in good state of health and in a sound disposing mind when she executed the Will.

5. In her affidavit by way of evidence, Ms Chiranya Prachaseri, who also happens to be the daughter and attorney of petitioner No. 1 Shri Prithviraj Sehli has stated that Smt. Shanti Devi was ordinarily residing at 16, Soi Somdej Chao Praya 12, Klongsan Thonburi, Bangkok, Thailand. She has further stated that Smt. Shanti Devi, who was a Hindu, was survived by her husband Shri Hansraj Sehli and three sons, namely, Prithviraj Sehli, Balraj Sehli and Raviraj Sehli. She has also identified the signature of Shanti Devi on Ex.P1W1/3. She has stated that the aforesaid Will was opened on 18.12.2007 in the presence of Shri Hansraj Sehli, Shri Balraj Sehli, Shri Raviraj Sehli, Shri Vinnay Bhalla and a lawyer named Sajaphong Praphangkorn. The Attache (Consular) attested the signature of Balraj Sehli and Raviraj on the memo Ex.P1W1/4. According to this witness, respondent No. 3 executed a relinquishment deed

Ex.P1W1/5 before the Consular, Embassy of India, Bangkok and also executed the affidavit/NOC Ex.P1W1/6.

6. Mr Bhalla is the last witness produced by the petitioners. He is the attorney of petitioner No. 1 Balraj Sehli. In his deposition, he has corroborated the deposition of Chiranya Prachaseri. He has also identified the signature of Smt. Shanti Devi on the Will Ex.P1W1/3. He has confirmed the signature of respondent No.3 on the Relinquishment Deed Ex.P1W1/5 and the affidavit Ex.P1W1/6. This witness has also proved the NOC Ex.P1W1/6 given by respondent No. 2.

7. The execution of an unprivileged Will is governed by Section 63 of Indian Succession Act which, to the extent it is relevant, provides that the Will shall be attested by two or more witnesses, each of whom has seen the Testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the Testator, or has received from the Testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the Testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary. Section 68 of Evidence Act, to the extent, it is relevant, provides that if a document is required by law to be attested, it shall not be used as evidence until at least one attesting witness has been called for the purpose of proving its execution if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. Since the Will is a document required by law to be attested by at least two witnesses, the petitioner could have proved it by producing one of the attesting witnesses of the Will. The execution of the will has been duly proved by way of affidavit of the attesting witness Mr Vinay Shukul. The execution of the Will thus stands duly proved. There are no suspicious circumstances surrounding execution of Will in question.

8. The respondent No.2, through his counsel, states that he has no objection to grant of probate to the petitioners. Though in the Will, Smt. Shanti Devi bequeathed her properties to the petitioners to the exclusion of her husband and son, considering the fact that the husband has given no objection and the third son of Smt. Shanti Devi, namely, respondent No. 3 Raviraj Sehli has not only executed a relinquishment deed in favour of the petitioners, but also an affidavit/NOC, admitting execution of the

Will, there is no ground to suspect the genuineness and authenticity of the Will set up by the petitioners and there is no valid reason for refusing probate to the petitioners.

9. For the reasons stated hereinabove, the petition is allowed. Probate of the Will executed by late Smt. Shanti Devi on 19.07.1991 be issued to the petitioners with copy of the Will annexed to it, as per rules, after confirming that the report of Chief Revenue Controlling Authority along with valuation report has been received.

ILR (2013) I DELHI 132
FAO

ORIENTAL INSURANCE CO. LTD. ....APPELLANT

VERSUS

BIMLESH & ORS. ....RESPONDENTS

(VEENA BIRBAL, J.)

FAO NO. : 474/2011 DATE OF DECISION: 07.09.2012

Employee's Compensation Act, 1923—Brief Facts—It is admitted position that the deceased Banti @ Jai Kishan was in the employment of respondent no.2 who was the owner of truck bearing no.HR-69-0441 and his death had occurred on 08.12.2009 during the course of employment as he was crushed under the wheels of aforesaid truck—Before the Commissioner, appellant had admitted its liability—The present appeal is filed against the impugned order dated 30th August, 2011 passed by the Commissioner, Employee's Compensation under the Employee's Compensation Act, 1923 wherein the Commissioner had by taking the salary of the deceased at Rs.4500/- per month and by taking into consideration the age of the deceased and

the relevant factor as provided under the Act directed the appellant—Oriental Insurance Company to pay compensation of Rs. 5,04,000 along with simple interest @ 12% per annum from the date of accident i.e., 08.12.2009 till its realization to the respondent—Appellant has contended that the Commissioner has calculated the compensation on the basis of the amended Act by taking the wages of the deceased Rs. 4500/- per month—It is contended that as per the settled law laid down by the of the Supreme Court, the compensation in the present case ought to have been calculated on the basis of provisions which were applicable on the date of accident—It is contended that under the unamended provisions applicable on the date of accident, the calculation was to be made on the basis of wages not exceeding Rs. 4000/- per month—In support of his contention, learned counsel for the appellant has relied upon *KSEB vs. Valsala:* II (1999) ACC 656 (SC)—It is further contended that the order grievance is that the interest on compensation is awarded by the Commissioner from the date of accident whereas it ought to be awarded from the date of adjudication of the claim petition. Held: What is relevant date for determining the rights and liabilities of the parties under the Act has been dealt with by the Supreme Court in the *Kerala State Electricity Board & Anr. vs. Valsala K and Anr.:* II (1999) ACC 656 wherein relying on the four Judges' Bench of the Supreme Court in *Pratap Narain Singh Deo v. Srinivas Sabata & Anr.:* 1976(1) SCC 289, it has been held that the relevant date for determination of date of compensation is the date of accident and not the date of adjudication of claim—Date of accident is 8th December, 2009—The amendment to the Act came into effect on 18th January, 2010, by which explanation II to Section 4 was to be taken into consideration for calculating the amount of compensation was not to exceed Rs. 4000/- whereas in the present case the

Accordingly, excess amount of Rs.56000/- has been awarded—Let the excess amount of Rs.56000/- along with interest which has accrued on the same and which is lying deposited with the Commissioner be released in favour of the appellant.

Admittedly the date of accident is 8.12.2009. It is admitted position that the deceased Banti @ Jai Kishan was in the employment of respondent no.2 who was the owner of truck bearing no.HR-69-0441 and his death had occurred during the course of employement as he was crushed under the wheels of aforesaid truck. Before the Commissioner, appellant had admitted its liability. The Commissioner has calculated the compensation by taking the salary of the deceased at Rs.4500/- per month and by taking into consideration the age of the deceased and the relevant factor as provided under the Act, the compensation has been computed as Rs.5,04,000/-. What is relevant date for determining the rights and liabilities of the parties under the Act has been dealt with by the Supreme Court in the **Kerala State Electricity Board & anr Vs. Valsala K and Anr:** II (1999) ACC 656 wherein relying on the four Judges' Bench of the Supreme Court in **Pratap Narain Singh Deo V Srinivas Sabata & anr:** 1976(1) SCC 289, it has been held that the relevant date for determination of date of compensation is the date of accident and not the date of adjudication of claim. **(Para 3)**

In the present case, the date of accident is 8th December, 2009. The amendment to the Act came into effect on 18th January, 2010, by which explanation II to Section 4 was omitted. Prior to 18.1.2010, the maximum wages under the Act which was to be taken into consideration for calculating the amount of compensation was not to exceed Rs.4000/- whereas in the present case the Commissioner has taken the wages of deceased as Rs.4500/- per month. Accordingly, excess amount of Rs.56000/- has been awarded.

(Para 4)

The Supreme Court in *Pratap Narain Singh Deo vs. Srinivas Sabata and Anr.;* (1976) 1 SCC 289 has held that the liability arises as soon as personal injury is caused to the workman and employer has to pay the compensation in accordance with Section 4 of the Act, the failure to pay entails to pay interest and penalty under Section 4A of the Act—The judgment relied upon by the appellant i.e. *National Insurance Co. Ltd. vs. Mubasir Ahmed & Ors.* 2007(2) SCC 349 to contend that the interest becomes payable not from the date of accident but after one month of adjudication by the Commissioner is of no held to the appellant as the said decision is by the two Judge Bench of the Supreme Court and does not refer to the decision of *Pratap Narain* (Supra) which has been delivered by the four Judge Bench of the Supreme Court—In view of the above discussion, no case is made out to interfere with the findings as regards interest is given by the Commissioner—The appeal stands disposed of accordingly.

As regards the contention that the interest is payable from the date of adjudication, learned counsel for the appellant has relied upon **National Insurance Co. Ltd Vs Mubasir Ahmed & Ors:** 2007(2) SCC 349. **(Para 7)**

The judgment relied upon by the learned counsel for the appellant i.e. **National Insurance Co. Ltd. vs. Mubasir Ahmed & Ors.**(supra) to contend that the interest becomes payable not from the date of accident but after one month of adjudication by the Commissioner is of no help to the appellant as the said decision is by the two Judge Bench of the Supreme Court and does not refer to the decision of **Pratap Narain** (supra) which has been delivered by the four Judge Bench of the Supreme Court.

In view of the above discussion, no case is made out to interfere with the findings as regards interest is given by the Commissioner.

The appeal stands disposed of accordingly. **(Para 9)**

Important Issue Involved: Employee's Compensation Act, 1923—Liability arisen as soon as personal injury is caused to the workman and employer has to pay the compensation in accordance with Section 4 of the Act, the failure to pay entails liability to pay interest and penalty under Section 4A of the Act. The compensation payable is as per law as on the date of accident.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. L.K. Tyagi, Advocate.

FOR THE RESPONDENTS : Mr. Sanjeev Srivastava, Advocate for respondent no.1. Mr. J.P. Verma, Advocate for respondent no.2.

CASES REFERRED TO:

1. *National Insurance Co. Ltd* vs. *Mubasir Ahmed & Ors:* 2007(2) SCC 349.
2. *KSEB* vs. *Valsala:* II (1999) ACC 656 (SC).
3. *Kerala State Electricity Board & Anr* vs. *Valsala K and Anr:* II (1999) ACC 656.
4. *Pratap Narain Singh Deo* vs. *Srinivas Sabata & Anr:* 1976(1) SCC 289.

RESULT: Appeal disposed.

VEENA BIRBAL, J. (Oral)

1. The present appeal is filed against the impugned order dated 30th August, 2011 passed by the Commissioner, Employee's Compensation under the Employee's Compensation Act, 1923 (hereinafter referred to as 'the Act') wherein the Commissioner has directed the appellant-Oriental Insurance Company to pay compensation of Rs.5,04,000 along with simple interest @ 12% per annum from the date of accident i.e., 8.12.2009 till its realization to the respondent.

2. Learned counsel for the appellant has contended that the grievance of the appellant is that the Commissioner has calculated the compensation on the basis of the amended Act by taking the wages of the deceased @ Rs.4500/- per month. It is contended that as per the settled law laid down by the of the Supreme Court, the compensation in the present case ought to have been calculated on the basis of provisions which were applicable on the date of accident. It is contended that under the unamended provisions applicable on the date of accident, the calculation was to be made on the basis of wages not exceeding Rs.4000/- per month. In support of his contention, learned counsel for the appellant has relied upon **KSEB vs Valsala:** II (1999) ACC 656 (SC). It is further contended that the other grievance is that the interest on compensation is awarded by the Commissioner from the date of accident whereas it ought to be awarded from the date of adjudication of the claim petition.

3. Admittedly the date of accident is 8.12.2009. It is admitted position that the deceased Banti @ Jai Kishan was in the employment of respondent no.2 who was the owner of truck bearing no.HR-69-0441 and his death had occurred during the course of employement as he was crushed under the wheels of aforesaid truck. Before the Commissioner, appellant had admitted its liability. The Commissioner has calculated the compensation by taking the salary of the deceased at Rs.4500/- per month and by taking into consideration the age of the deceased and the relevant factor as provided under the Act, the compensation has been computed as Rs.5,04,000/-. What is relevant date for determining the rights and liabilities of the parties under the Act has been dealt with by the Supreme Court in the **Kerala State Electricity Board & anr Vs. Valsala K and Anr:** II (1999) ACC 656 wherein relying on the four Judges' Bench of the Supreme Court in **Pratap Narain Singh Deo V Srinivas Sabata & anr:** 1976(1) SCC 289, it has been held that the relevant date for determination of date of compensation is the date of accident and not the date of adjudication of claim.

4. In the present case, the date of accident is 8th December, 2009. The amendment to the Act came into effect on 18th January, 2010, by which explanation II to Section 4 was omitted. Prior to 18.1.2010, the maximum wages under the Act which was to be taken into consideration for calculating the amount of compensation was not to exceed Rs.4000/- whereas in the present case the Commissioner has taken the wages of deceased as Rs.4500/- per month. Accordingly, excess amount of

Rs.56000/- has been awarded.

5. Mr.Sanjeev Srivastava, learned counsel for the respondent who is present has not pointed out anything to the contrary.

6. It is stated that the compensation amount on the basis of calculation of monthly wages @ Rs.4000/- per month, comes to Rs.4,48,000 and the said amount has already been paid to respondent no.1. It is not disputed by the learned counsel for the respondent no.1 that excess amount of Rs.56000/- has been awarded. In view of the above submission made, let the excess amount of Rs.56000/- along with interest which has accrued on the same and which is lying deposited with the Commissioner be released in favour of the appellant.

7. As regards the contention that the interest is payable from the date of adjudication, learned counsel for the appellant has relied upon **National Insurance Co. Ltd Vs Mubasir Ahmed & Ors:** 2007(2) SCC 349.

8. The Supreme Court in **Pratap Narain Singh Deo vs. Srinivas Sabata and Anr.;** (1976) 1 SCC 289 has held that the liability arises as soon as personal injury is caused to the workman and employer has to pay the compensation in accordance with Section 4 of the Act, the failure to pay entails liability to pay interest and penalty under Section 4A of the Act. The relevant para of the judgment is reproduced as under:-

> "It was the duty of the appellant, under Section 4A(1) of the Act, to pay the compensation at the rate provided by Section 4 as soon as the personal injury was caused to the respondent. He failed to do so. What is worse, he did not even make a provisional payment under Sub-section (2) of Section 4 for, as has been stated, he went to the extent of taking the false pleas that the respondent was a casual contractor and that the accident occurred solely because of his negligence. Then there is the further fact that he paid no need to the respondent's personal approach for obtaining the compensation. It will be recalled that the respondent was driven to the necessity of making an application to the Commissioner for settling the claim, and even there the appellant raised a frivolous objection as to the jurisdiction of the Commissioner and prevailed on the respondent to file a memorandum of agreement settling the claim for a sum which

was so grossly inadequate that it was rejected by the Commissioner. In these facts and circumstances, we have no doubt that the Commissioner was fully justified in making an order for the payment of interest and the penalty."

9. The judgment relied upon by the learned counsel for the appellant i.e. **National Insurance Co. Ltd. vs. Mubasir Ahmed & Ors.**(supra) to contend that the interest becomes payable not from the date of accident but after one month of adjudication by the Commissioner is of no help to the appellant as the said decision is by the two Judge Bench of the Supreme Court and does not refer to the decision of **Pratap Narain** (supra) which has been delivered by the four Judge Bench of the Supreme Court.

In view of the above discussion, no case is made out to interfere with the findings as regards interest is given by the Commissioner.

The appeal stands disposed of accordingly.

ILR (2013) I DELHI 139
FAO

MANORAMA JAIN **....APPELLANT**

VERSUS

DDA AND ORS. **....RESPONDENTS**

(G.P. MITTAL, J.)

FAO NO. : 253/2000 & 261/2000 DATE OF DECISION: 10.09.2012

Motor Vehicles Act, 1988—Appeal impugns the common order dated 18.03.2000 of the Motor Accidents Claims Tribunal (MACT). In FAO 260/2000 it was contended that the compensation awarded towards permanent disability was on the lower side and there was no compensation awarded for loss of amenities. In respect

to Appellant in FAO 261/2000 it was challenged that no compensation was awarded under the pecuniary and non pecuniary heads were low. Also the claim petition was filed in the year 1983, but no interest was awarded to the appellants. Held (FAO. 260/2000)—As there was no evidence with regard to the Appellant's educational qualification, and therefore the Court assumed effect on the Appellant's work to the extent of 50% and raised the compensation towards loss of earning capacity to the tune of Rs. 40,000. Court also raised the compensation towards pain and suffering to Rs. 20,000. Also the Court awarded interest @ 7.5% per annum for five years upto the date of the decision of thee impugned judgment and thereafter the same rate of interest thereafter from date of filing of the Appeal till its payment. Held: (FAO. 261/2000): Interest @ 7.5% per annum awarded for five years upto the date of the decision of thee impugned judgment and thereafter the same rate of interest thereafter from date of filing of the Appeal till its payment.

There is no evidence with regard to the Appellant's qualification. Thus, she has to be awarded compensation on the scale of minimum wages of a non- Matriculate. She was aged 34 years at the time of the accident. I would make a guess work and assume effect on the Appellant's work to the extent of 50%. The compensation payable towards loss of earning capacity thus comes to Rs.41,400/- (Rs.345 + 25% x 12 x 16 x 50%) as against the award of Rs. 20,000/ - awarded by the Claims Tribunal. **(Para 10)**

Admittedly, the Appellant did not suffer any permanent disability. The Appellant was able to prove bills worth Rs. 9,126/- as an indoor patient. He was awarded a compensation of Rs. 10,000/- towards the treatment. In his examination as PW10, the Appellant claimed his income to be Rs. 2,000/- per month. No satisfactory evidence was led, but the said income was not challenged in cross-examination. The Appellant must have taken about six months to recover from

the injuries. The compensation of Rs. 10,000/- towards pain and suffering, Rs. 10,000/- towards loss of income and Rs. 2,500/- each towards conveyance charges and special diet seems to be just and reasonable. **(Para 19)**

Important Issue Involved: In the absence of evidence as to employment, minimum wage standard is to be taken to calculate compensation under Motor Vehicles Act, 1988.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Navneet Goyal with Ms. Suman N. Rawat.

FOR THE RESPONDENTS : Mr. Vaibhav Mirg with Arun Birbal.

CASES REFERRED TO:

1. *Royal Sundaram Alliance Insurance Co. Ltd.* vs. *Master Manmeet Singh & Ors.,* MAC.APP. 590/2011.
2. *National Insurance Company Limited* vs. *Deepika & Ors.,* 2010 (4) ACJ 2221.
3. *Amar Singh Thukral* vs. *Sandeed Chhatwal,* ILR (2004) 2 Del 1.
4. *Lata Wadhwa & Ors.* vs. *State of Bihar & Ors.,* (2001) 8 SCC 197.
5. *General Manager, Kerala State Road Transport Corporation, Trivandrum* vs. *Susamma Thomas (Mrs.) and Ors.* (1994) 2 SCC 176.
6. *A. Rajam* vs. *M. Manikya Reddy & Anr.,* MANU/AP/0303/1988.
7. *Regan* vs. *Williamson* 1977 ACJ 331 (QBD England).
8. *Morris* vs. *Rigby* (1966) 110 Sol Jo 834.
9. *Gobald Motor Service Ltd. & Anr.* vs. *R.M.K. Veluswami & Ors.,* AIR 1962 SC 1.

RESULT: Appeal allowed.

G.P. MITTAL, J. (ORAL)

1. These two Appeals (FAO. 253/2000 and FAO. 261/2000) arise out of a common judgment dated 18.03.2000 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby a compensation of Rs. 1,30,000/- and Rs. 35,000/- was awarded in favour of Appellants Manorama Jain and Subhash Chand Jain respectively for having suffered injuries in a motor vehicle accident which occurred on 15.05.1983.

2. The finding on negligence has not been challenged by the Respondents (the driver and the owner of the offending vehicle); thus the same has attained finality.

3. The following contentions are raised on behalf of the Appellants:

(i) In case of Appellant Manorama Jain, she suffered permanent disability to the extent of 80%; award of lump sum compensation of Rs.20,000/- towards permanent disability is on the lower side.

(ii) No compensation was awarded towards loss of amenities.

(iii) In case of Appellant Subhash Chand Jain, it is stated that no compensation was awarded towards loss of amenities and the compensation awarded under pecuniary and non-pecuniary heads is low.

(iv) This Claim Petition was filed in the year 1983, but no interest was awarded to the Appellant.

4. The injuries in case of Appellant Manorama Jain were quite serious. She suffered compound fracture of both legs of tibia and fibula. She received injuries on the root of nose and on the lateral and middle part of her left arm. She remained admitted in Tirath Ram Hospital from 15.05.1983 to 04.06.1983, in Friends Medical Centre from 22.06.1983 to 12.08.1983 in Joshipura Jaslok Hospital, Bombay for 22 days in March, 1984, and in Ganga Ram Hospital from 21.07.1987 to 27.07.1987. The Appellant was able to prove the expenditure in the shape of bills worth Rs.70,000/-. The Claims Tribunal awarded a compensation of Rs.75,000/- towards medical expenditure. A compensation of Rs.10,000/- each was awarded towards conveyance charges and special diet and Rs.15,000/- towards pain and suffering.

5. The Appellant produced a disability certificate from a private Dr.

Lt. Col. S.Paul Gujral who opined that the Appellant suffered 80% permanent disability. The Claims Tribunal did not accept the disability as the same was not issued by any Medical Board. Moreover, she never remained under treatment of Dr. Lt. Col. S. Paul Gujral.

6. By the order of this Court dated 15.02.2012, the Appellant was ordered to be examined by the Medical Board of Hindu Rao Hospital. Medical Certificate issued by Dr. Lt. Col. S.Paul Gujral was transmitted to the Medical Superintendent. In pursuance of this Court's order, a Medical Board was constituted who issued a disability certificate Ex.AW1/1. The Appellant examined Dr. Vivek Kumar Pathak, an Orthopaedics Surgeon to prove the disability. The Medical Board assessed the disability to the extent of 50% in respect of both lower limbs on account of difficulty in squatting on floor, sitting cross-legged and loss of muscle power of both limbs.

7. This accident occurred in the year 1983. The compensation has to be awarded as per the value of money at the relevant time. As stated earlier, Appellant Manorama Jain was able to prove the bills with respect to her treatment for a sum of Rs.70,000/-. Things were very cheap in the year 1983. The Claims Tribunal was justified in awarding a compensation of Rs. 75,000/- towards the medical treatment on the assumption that some of the bills might have been lost. Considering the value of money, the award of compensation of Rs.10,000/- each towards conveyance charges and special diet is also just and reasonable.

8. During inquiry before the Claims Tribunal, it was claimed that Appellant Manorama Jain was working as a Partner in a firm and was earning Rs.2,000/- per month. In cross-examination, she admitted that she was a housewife. The learned counsel for the Respondent referred to the testimony of Dr. Vivek Kumar Pathak who testified that there could be loss of muscle power because of advanced age. The learned counsel argues that this accident took place in the year 1983 and thus the examination by the Medical Board after 29 years of the accident would lose relevance. I would not agree. A medical certificate from a private Orthopaedics Surgeon was already on record whereby the Appellant was declared to have suffered permanent disability to the extent of 80%. AW1 Dr. Vivek Kumar Pathak, Orthopaedics Surgeon from Hindu Ram Hospital testified that evaluation of the percentage of disability had been done by the Board on the basis of the guidelines published in the report

of the Committee on The Persons with Disabilities Act, 1995. There can be variation between the reports of Dr. Lt. Col. S.Paul Gujral and the Medical Board because of the guidelines issued under the Disabilities Act, 1995. In any case, I would accept the disability as given in the certificate Ex.AW1/1 issued by the Medical Board, Hindu Rao Hospital.

9. It was proved during inquiry that the Appellant was a housewife. On account of stiffness in both the legs, difficulty in squatting on the floor, sitting cross-legged and loss of muscle power in respect of both lower limbs, the Appellant would have great difficulty in carrying out day to day household activities. I would, therefore, award compensation towards loss of the gratuitous services rendered by a housewife on the scale as given by this Court in **Royal Sundaram Alliance Insurance Co. Ltd. v. Master Manmeet Singh & Ors.,** MAC.APP. 590/2011, decided on 30th January, 2012. This Court noticed the following judgments of the Supreme Court:-

(i) **General Manager, Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas (Mrs.) and Ors.** (1994) 2 SCC 176,

(ii) **National Insurance Company Limited v. Deepika & Ors.,** 2010 (4) ACJ 2221,

(iii) **Amar Singh Thukral v. Sandeed Chhatwal,** ILR (2004) 2 Del 1,

(iv) **Lata Wadhwa & Ors. v. State of Bihar & Ors.,** (2001) 8 SCC 197,

(v) **Gobald Motor Service Ltd. & Anr. v. R.M.K. Veluswami & Ors.,** AIR 1962 SC 1,

(vi) **A. Rajam v. M. Manikya Reddy & Anr.,** MANU/AP/0303/1988,

(vii) **Morris v. Rigby** (1966) 110 Sol Jo 834 and

(viii) **Regan v. Williamson** 1977 ACJ 331 (QBD England),

and laid down the principle for determination of loss of dependency on account of gratuitous services rendered by a housewife. Para 34 of the judgment in **Master Manmeet Singh** (supra) is extracted hereunder:-

"34. To sum up, the loss of dependency on account of gratuitous

services rendered by a housewife shall be:-

(i) Minimum salary of a Graduate where she is a Graduate.

(ii) Minimum salary of a Matriculate where she is a Matriculate.

(iii) Minimum salary of a non-Matriculate in other cases.

(iv) There will be an addition of 25% in the assumed income in (i), (ii) and (iii) where the age of the homemaker is upto 40 years; the increase will be restricted to 15% where her age is above 40 years but less than 50 years; there will not be any addition in the assumed salary where the age is more than 50 years.

(v) When the deceased home maker is above 55 years but less than 60 years; there will be deduction of 25%; and when the deceased home maker is above 60 years there will be deduction of 50% in the assumed income as the services rendered decrease substantially. Normally, the value of gratuitous services rendered will be NIL (unless there is evidence to the contrary) when the home maker is above 65 years.

(vi) If a housewife dies issueless, the contribution towards the gratuitous services is much less, as there are greater chances of the husband's re-marriage. In such cases, the loss of dependency shall be 50% of the income as per the qualification stated in (i), (ii) and (iii) above and addition and deduction thereon as per (iv) and (v) above.

(vii) There shall not be any deduction towards the personal and living expenses.

(viii) As an attempt has been made to compensate the loss of dependency, only a notional sum which may be upto Rs. 25,000/- (on present scale of the money value) towards loss of love and affection and Rs. 10,000/- towards loss of consortium, if the husband is alive, may be awarded.

(ix) Since a homemaker is not working and thus not earning, no amount should be awarded towards loss of estate."

10. There is no evidence with regard to the Appellant's qualification. Thus, she has to be awarded compensation on the scale of minimum

wages of a non- Matriculate. She was aged 34 years at the time of the accident. I would make a guess work and assume effect on the Appellant's work to the extent of 50%. The compensation payable towards loss of earning capacity thus comes to Rs.41,400/- (Rs.345 + 25% x 12 x 16 x 50%) as against the award of Rs. 20,000/- awarded by the Claims Tribunal.

11. Because of the disability, the Appellant would not be able to enjoy her day to day life. She is entitled to compensation of Rs. 25,000/- towards loss of amenities. The compensation of Rs. 15,000/- awarded towards pain and suffering is raised to Rs. 20,000/-.

12. Thus, the compensation stands enhanced by Rs.51,400/-.

13. The Claims Tribunal declined to award any interest to the Appellant perhaps on the ground that the Appellant was to be blamed for delay in disposal of the Claim Petition. I have perused the Trial Court record. The Claim Petition was instituted on 01.11.1983 and came to be decided by a judgment dated 18.03.2000, that is, after 17 years. A perusal of the Trial Court record reveals that the Appellant was not taking steps for service of the Respondents. Even after the pleadings were completed, the case was posted for evidence in the year 1986. The Appellant produced her evidence piecemeal and concluded it only on 18.1999. Thus, the Appellant was largely to be blamed for the huge delay in disposal of the Claim Petition. The Respondents cannot be burdened with the grant of interest for the delay caused by the Appellant. In the circumstances, I would award interest @ 7.5% per annum for five years upto the date of the decision of the impugned judgment, that is, 18.03.2000 and the same rate of interest thereafter from the date of the filing of the Appeal till its payment. The interest for five years shall also be payable on the amount awarded by the Claims Tribunal.

14. The Respondent DDA being the owner of the offending vehicle is directed to deposit the enhanced amount of compensation and the interest as stated above in the name of the Appellant within six weeks with the Claims Tribunal.

15. The Appellant is already in advanced age. 50% of the compensation awarded shall be released to her. Rest 50% shall be held in fixed deposit for a period of two years.

16. The Appeal is allowed in above terms.

17. Pending Applications stand disposed of.

FAO.261/2000

18. The Appellant in this Appeal suffered multiple fractures of both bones of his left leg, a fracture in his right hand and fracture in his chest and jaw. He remained an indoor patient from 15.05.1983 to 25.05.1983 in Tirath Ram Hospital. He remained in plaster for a period of three months. The Claims Tribunal awarded a compensation of Rs. 35,000/- which is tabulated hereunder:

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal
1.	Cost of Treatment/ Purchase of Medicine	Rs. 10,000/-
2.	Conveyance Charges	Rs. 2,500/-
3.	Special Diet	Rs. 2,500/-
4.	Pain & Suffering	Rs. 10,000/-
5.	Loss of Income	Rs. 10,000/-
	Total	Rs. 35,000/-

19. Admittedly, the Appellant did not suffer any permanent disability. The Appellant was able to prove bills worth Rs. 9,126/- as an indoor patient. He was awarded a compensation of Rs. 10,000/- towards the treatment. In his examination as PW10, the Appellant claimed his income to be Rs. 2,000/- per month. No satisfactory evidence was led, but the said income was not challenged in cross-examination. The Appellant must have taken about six months to recover from the injuries. The compensation of Rs. 10,000/- towards pain and suffering, Rs. 10,000/- towards loss of income and Rs. 2,500/- each towards conveyance charges and special diet seems to be just and reasonable.

20. For the reasons stated earlier, the Appellant ought to have been paid interest @ 7.5% per annum for a period of five years upto the date of the impugned judgment and then from the filing of the Appeal till its payment. The deficiency in interest shall be made up within six weeks and deposited in the name of the Appellant with the Claims Tribunal. The amount shall be released in favour of the Appellant on deposit.

21. The Appeal is allowed in above terms.

22. Pending Applications stand disposed of.

ILR (2013) I DELHI 148
CRL. M.C.

UDAI CHAND BHARDWAJ & ORS. ....PETITIONERS

VERSUS

STATE GOVT. OF N.C.T. OF DELHI ....RESPONDENT

(MANMOHAN, J.)

CRL. M.C. NO. : 3750/2008 DATE OF DECISION: 11.09.2012

Code of Criminal Procedure, 1973—Sec. 482—Quashing of FIR No. 1432/2004 registered with Police Station Sultanpuri, Delhi under Sections 498A/406/34 IPC—Learned counsel for petitioners states that Section 498A IPC is not attracted to the facts of the present case as petitioner No. 2 was never married to respondent No.2. He states that respondent No. 2 prior to marriage to petitioner No.2, was already married twice over. He also states that as the respondent No.2 has alleged that petitioner No.2 was impotent, the present marriage was never consummated and consequently, no case under Section 498A IPC is made out—Learned counsel for petitioners further states that there are inherent contradictions in the two complaints filed by respondent No.2 on 09th September, 2004. It is pertinent to mention that the first complaint was filed under Section 323 IPC and the second complaint was filed under Sections 498A/406 IPC. Having heard the parties at length, this Court is of the view that it is first essential to outline the parameters of the exercise of the extra-ordinary power under Article 226 as well as the inherent powers under Section 482 of the Code with regard to quashing of an FIR—The aforesaid allegations are certainly not omnibus allegation as suggested by the petitioners—Though the veracity of

the allegations can only be tested at the stage of trial, yet they raise a strong suspicion against the respondents. Accordingly, this Court in the facts of the present case is of the opinion that to allow the proceedings to continue would not constitute an abuse of process of Court—As far as the contention that Petitioner No.7 cannot be arrayed as an accused, this Court is of the opinion that the trial Court while framing charges should consider her argument for discharge. This Court is confident that the trial Court at that stage would keep in mind the observations of the Supreme Court in *Sunita Jha vs. State of Jharkhand & Anr.,* (2010) 10 SCC 190 wherein it has been held that neither a girlfriend nor concubine is a relative of husband within meaning of Section 498A IPC. Needless to say, any observation in this order would not be an expression on merit and trial Court would take an independent view of the matter—Before parting with this matter, the Court would like to observe that today in nearly all criminal matters, as a matter of routine, at least at three stages, namely at the time of filing of FIR, framing of charges and an interlocutory stage of the trial, petitions for quashing and stay of the trial are being filed under Section 482 Cr. P.C. and Articles 226 and 227 of the Constitution of India. This is not only an unhealthy practice, but is burdening the Courts with unnecessary litigation. The litigants must realise that the power vested in this Court under Articles 226 and 227 of the Constitution of India and Section 482 Cr. P.C. is to be used sparingly and for rare and compelling circumstances as mentioned in *State of Haryana & Ors. vs. Bhajan Lal & Ors.*—Dismissed.

Important Issue Involved: The parameters of the exercise of the extra-ordinary power under Article 226 as well as the inherent powers under Section 482 of the Code with regard to quashing of an FIR Neither a girlfriend nor concubine is a relative of husband within meaning of Section 498A IPC.

[Ch Sh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Anupam Tripathi, Advocate with Mr. Sunil Kumar, Advocate.

FOR THE RESPONDENT : Mr. Manoj Ohri, APP. Mr. Piyush Prabhakar, Advocates.

CASES REFERRED TO:

1. *Sunita Jha* vs. *State of Jharkhand & Anr.,* (2010) 10 SCC 190.
2. *Preeti Gupta* vs. *State of Jharkhand & Anr.,* 2010(8) Scale 131.
3. *Shri Anur Kumar Jain* vs. *Central Bureau of Investigation* W.P. (Crl.) 80/2010.
4. *Savitri Devi* vs. *Ramesh Chand & Ors.,* 2003 Crl.L.J. 2759.
5. *State of Haryana & Ors.* vs. *Bhajan Lal & Ors.,* 1992 Supp (1) SCC 335.
6. *State of Karnataka* vs. *L. Muniswamy &; Others* (1977) 2 SCC 699.

RESULT: Dismissed.

MANMOHAN, J. : (Oral)

Crl.M.A. 16274/2012 (exemption) in Crl.M.C. 3750/2008

Allowed, subject to just exceptions.

Accordingly, the application stands disposed of.

Crl.M.A. 16273/2012 (u/s 340 Cr.P.C.) in Crl.M.C. 3750/2008

Keeping in view the judgment of the Supreme Court in Iqbal Singh Marwah Vs. Meenakshi Marwah, (2005) 4 SCC 370, learned counsel for petitioners wishes to withdraw the present application with liberty to file appropriate legal proceedings in accordance with law.

With the aforesaid liberty, present application stands disposed of.

Crl.M.C. 3750/2008 & Crl.M.A. 13997/2008

1. Present petition has been filed under Section 482 Cr.P.C. seeking quashing of FIR No. 1432/2004 registered with Police Station Sultanpuri, Delhi under Sections 498A/406/34 IPC.

2. Learned counsel for petitioners states that Section 498A IPC is not attracted to the facts of the present case as petitioner No.2 was never married to respondent No.2. He states that respondent No.2, prior to marriage to petitioner No.2, was already married twice over. He also states that as the respondent No.2 has alleged that petitioner No.2 was impotent, the present marriage was never consummated and consequently, no case under Section 498A IPC is made out.

3. Learned counsel for petitioners further states that there are inherent contradictions in the two complaints filed by respondent No.2 on 09th September, 2004. It is pertinent to mention that the first complaint was filed under Section 323 IPC and the second complaint was filed under Sections 498A/406 IPC.

4. Learned counsel for petitioners submits that on the date of incident, petitioner No.7 was not a relative, but only a friend of brother of the petitioner No.2. According to him, as petitioner No. 7 was not a relative, no case under Section 498A IPC is made out against her.

5. Learned counsel for petitioners submits that only allegation against petitioner No.8 is that she had misbehaved with respondent No.2. According to him to attract Section 498A IPC, the accused have to be guilty of cruelty and not cruelty in the omnibus sense or as understood under the Hindu Marriage Act. In this connection, he places reliance upon a judgment of this Court in **Savitri Devi vs. Ramesh Chand & Ors.,** 2003 Crl.L.J. 2759 wherein it has been held as under:-

> "16. For the purpose of Section 498A IPC which is peculiar to Indian families victim spouse is always the 'wife' and guilty is the husband and his relatives-near or distant, living together or separately. Ingredients of 'cruelty' as contemplated under Section 498A are of much higher and sterner degree than the ordinary concept of cruelty applicable and available for the purposes of dissolution of marriage i.e. Divorce. In constituting 'cruelty' contemplated by Section 498A IPC the acts or conduct should

> be either such that may cause danger to life; limb or health pr cause 'grave' injury or of such a degree that may drive a woman to commit suicide. Not only that such acts or conduct should be "willful" i.e intentional. So to invoke provisions of Section 498A IPC the tests are of stringent nature and intention is the most essential factor. The only test is that acts or conduct of guilty party should have the sting or effect of causing grave injury to the woman or are likely to cause danger of life, limb or physical or mental health. Further conduct that is likely to drive the woman to commit suicide is of much graver nature than that causing grave injury or endangering life, limb or physical or mental health. It involves series of systematic, persistent and willful acts perpetrated with a view to make the life of the woman so burdensome or insupportable that she may be driven to commit suicide because of having been fed up with marital life."

6. According to him, present proceedings are an abuse of process of Court. In this connection he relies upon a judgment of the Supreme Court in **Preeti Gupta vs. State of Jharkhand & Anr.,** 2010(8) Scale 131 wherein it has been held as under:-

> "19. This court in **State of Karnataka v. L. Muniswamy &; Others** (1977) 2 SCC 699 observed that the wholesome power under section 482 Cr.P.C. entitles the High Court to quash a proceeding when it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court or that the ends of justice require that the proceeding ought to be quashed. The High Courts have been invested with inherent powers, both in civil and criminal matters, to achieve a salutary public purpose. A court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In this case, the court observed that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the legislature. This case has been followed in a large number of subsequent cases of this court and other courts."

7. Learned counsel for petitioners lastly submits that as the parties have already been divorced, no fruitful purpose would be served by allowing the present criminal proceedings to proceed.

8. On the other hand, learned counsel for respondent No.2 specifically denies that respondent No.2 was earlier married to anyone else. He points out that divorce has been granted by an ex parte order passed in a petition filed by the petitioner No.2 and an application for recall of the said order has already been filed.

9. He further states that petitioner No.7 was on the date of incident engaged to petitioner's brother namely petitioner No.6 and she has subsequently married him in the month of December, 2004.

10. Mr. Manoj Ohri, learned APP for State, has drawn attention of this Court to the charge sheet filed by the police.

11. Having heard the parties at length, this Court is of the view that it is first essential to outline the parameters of the exercise of the extra-ordinary power under Article 226 as well as the inherent powers under Section 482 of the Code with regard to quashing of an FIR. The Supreme Court in **State of Haryana & Ors. vs. Bhajan Lal & Ors.,** 1992 Supp (1) SCC 335, has held as under:-

> "102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra-ordinary power under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.
>
> 1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.
>
> 2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
>
> 3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
>
> 4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated Under Section 155(2) of the Code.
>
> 5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
>
> 6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
>
> 7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

12. A Division Bench of this Court in W.P. (Crl.) 80/2010 **Shri Anur Kumar Jain vs. Central Bureau of Investigation** while answering a reference has observed as under:

> "33. xxx xxx xxx
>
> (e) The exercise of power either under Section 482 of the Code of Criminal Procedure or under Article 227 of the Constitution

of India should be sparingly and in exceptional circumstances be exercised keeping in view the law laid down in **Siya Ram Singh** (supra), **Vishesh Kumar**(supra), **Khalil Ahmed Bashir Ahmed** (supra), **Kamal Nath & Others** (supra) **Ranjeet Singh** (supra) and similar line of decisions in the field.

(f) It is settled law that jurisdiction under Section 482 of the Code of Criminal Procedure or under Article 227 of the Constitution of India cannot be exercised as a "cloak of an appeal in disguise" or to re-appreciate evidence. The aforesaid proceedings should be used sparingly with great care, caution, circumspection and only to prevent grave miscarriage of justice.

34. Reference is answered accordingly...."

13. After having perused the charge sheet, this Court is of the view that there are specific allegations of dowry demand, physical abuse, cruelty and mental harassment against the petitioner No.1 and his family members. The relevant portion of the charge sheet filed reads as under:

"On 27.06.2004 my marriage was solemnized according to Hindu Rites and Ceremonies with Kishan Kumar, son of Udai Chand Bhardwaj, Resident of E-5, Budh Vihar, Phase-I. My husband is working as senior programmer with Escort Hospital. In my marriage my mother who is a widow, who gave dowry beyond her capacity and wishes. After two or three days of my marriage, my husband told me that I should bring a santro car from my mother, who had given a motor cycle in my marriage. I have told him that my mother is a widow and from where she can give a car. After five to seven day. My father in law Udai Chand, mother in law Chandrawati, husband Kishan Kumar, brother in law Kamal, Prem and Rahul and sister in law Preet @ Rahul and the friend of my brother in law Ruchika etc. in collusion with each other started demanding dowry and when I told that from where my brother can bring this money then my mother in law misbehaved with me and my husband gave merciless beatings to me and my brother in law and father in law also misbehaved with me. I have kept tolerating all these things because my mother is a widow and nobody to save and my brother is also very small, so I kept tolerating all these things. After 10-12 days my husband after giving a false excuse that he wants to take me

for outing took me to my parental house and thereafter he returned back after leaving me. My husband kept all my jewellery items with him in almirah and after leaving me at my mother's home told that I should live here for 2-4 days and thereafter he will bring me back. I kept waiting for him till date and I am regularly requesting him over phone to bring me back but all the time he assured me that he will bring back me after 2-4 days. Today 08.09.2004 it has come to my knowledge that my mother in law fell down due to which her leg is broken. I have reached my matrimonial house for seeing her then my father in law, brothers in law after seeing me started abusing in filthy language and told that "why you come here, nothing remains you're here" and thereafter I was thrown out from my matrimonial House by my sister in law Preeti and the said girl Ruchika and my sister in law. My father in law and brother in law gave me merciless beatings and told me that "there is nothing remains of your here, either you should bring a car otherwise we will see you in court."

14. The aforesaid allegations are certainly not omnibus allegations as suggested by the petitioners. Though the veracity of the allegations can only be tested at the stage of trial, yet they raise a strong suspicion against the respondents. Accordingly, this Court in the facts of the present case is of the opinion that to allow the proceedings to continue would not constitute an abuse of process of Court.

15. Moreover as the petitioner No. 2 has himself obtained a decree of divorce, this Court will have to draw a presumption at this stage that there was a valid marriage between petitioner No. 2 and respondent No. 2. Consequently, it is not possible to quash the FIR.

16. As far as the contention that Petitioner No.7 cannot be arrayed as an accused, this Court is of the opinion that the trial Court while framing charges should consider her argument for discharge. This Court is confident that the trial Court at that stage would keep in mind the observations of the Supreme Court in **Sunita Jha vs. State of Jharkhand & Anr.,** (2010) 10 SCC 190 wherein it has been held that neither a girlfriend nor concubine is a relative of husband within meaning of Section 498A IPC. Needless to say, any observation in this order would not be an expression on merit and trial Court would take an independent view of the matter.

17. Before parting with this matter, the Court would like to observe that today in nearly all criminal matters, as a matter of routine, at least at three stages, namely, at the time of filing of FIR, framing of charges and an interlocutory stage of the trial, petitions for quashing and stay of the trial are being filed under Section 482 Cr.P.C. and Articles 226 and 227 of the Constitution of India. This is not only an unhealthy practice, but is burdening the Courts with unnecessary litigation. The litigants must realise that the power vested in this Court under Articles 226 and 227 of the Constitution of India and Section 482 Cr.P.C. is to be used sparingly and for rare and compelling circumstances as mentioned in **State of Haryana & Ors. vs. Bhajan Lal & Ors.** (Supra).

18. With the aforesaid observations, present petition and pending application are dismissed.

ILR (2013) I DELHI 157
LPA

UNION OF INDIA & ANR. ....APPELLANTS

VERSUS

HOTEL EXCELSIOR LTD. & ANR. ....RESPONDENTS

(A.K. SIKRI, ACJ. & RAJIV SAHAI ENDLAW, J.)

LPA NO. : 2298-99/2006 & CM NO. : 16584/2006 AND LPA NO. : 147/2007 & CM NO. : 2839/2007, LPA NO. : 297/2007 & CM NO. : 6320/2007, LPA NO. : 161/2009

DATE OF DECISION: 11.09.2012

Lease—Right to Conversion of the Leasehold into Freehold—Brief Facts—Four intra-Court appeals, though against separate judgments in separate writ petitions, are listed together since the judgments of the learned Single Judge under challenge in LPA Nos. 147/2007,297/2007 and 161/2009 merely follow the judgment of the learned Single Judge under challenge in LPA No.2298-99/2006—Further, all appeals are stated to entail the same question of law i.e. the right, of the lessees of land underneath disinvested hotels, to have the same converted into freehold—Though the land subject matter of LPA No.297/2007 is not underneath a disinvested hotel but underneath a cinema hall but the learned Single Judge has qua the same also, followed the dicta under challenge in LPA No. 2298-99/2006 and the counsels in LPA No. 297/2007 also have not argued the same any differently—Rather, arguments have been addressed with respect to LPA No.2298-99/2006 only, with the counsels in other matters merely adopting the arguments—LPA No. 2298-99/2006 arises from order dated 29.08.2005 allowing W.P.(C) No.15058-59/2004 preferred by the respondents therein and also impugns the order dated 25.08.2006 in review petition preferred there against—The same concerns land underneath erstwhile Kanishka Hotel and Kanishka Shopping Plaza. LPA No. 147/2007 arises from judgment dated 01.09.2006 allowing W.P. (C) No. 450/2005 preferred by the respondents therein and pertains to the land underneath erstwhile Qutub Hotel—LPA No. 297/2007 arises from the judgment dated 25.08.2006 allowing W.P.(C) No.14696/2004 preferred by the respondents therein and pertains to land underneath the Eros Cinema Building—LPA No. 161/2009 arises from judgment dated 04.12.2008 allowing W.P.(C) No. 24033-34/2005 preferred by the respondents therein and pertains to the land underneath restwhile Lodhi Hotel at Delhi—The learned Single Judge has held the leasehold land underneath the disinvested hotels and cinema to be entitled to freehold conversion under the Policy introduced by the Government and has thereby quashed the decision

of the Land and Development Office (L&DO) refusing freehold conversion of such land and held L&DO to be not entitled to discriminate between the land underneath the disinvested hotels and cinema and other leasehold lands being converted into freehold—Hence the present Appeal—All that which requires determination is, whether the respondents, under the Policy floated by the L&DO, have a right to such conversion and if not, whether the appellant L&DO, in denying such conversion to the respondents, is discriminating against the respondents. Held: No challenge have been made since the year 1992 when the Scheme/Policy of freehold conversion was first introduced, on the ground of discrimination, for allowing such conversion qua one category of leases and not others—The question of discrimination in such a situation does not arise since to lessee has a right of such conversion and merely because the lessor has granted such privilege to some lessees, does not entitle others, who form a district class/ category, to also claim such privilege/benefit—Under the Scheme/Policy itself, appellant L&DO had made only such commercial and mixed land use properties eligible for conversion, "for which ownership rights had been conferred"—A lease is different from ownership and a lease in which ownership rights are conferred would cease to be a lease (*Byramjee Jeejeebhoy (P) Ltd. v. State of Maharashtra* AIR 1965 SC 590).

We have not come across any challenge having been made, since the year 1992 when the Scheme/Policy of freehold conversion was first introduced, on the ground of discrimination, for allowing such conversion qua one category of leases and not others. The question of discrimination in our view in such a situation does not arise since as aforesaid, no lessee has a right of such conversion and merely because the lessor has granted such privilege to some lessees, does not entitle others, who form a distinct class/

category, to also claim such privilege / benefit. **(Para 14)**

The appellant L&DO claims leases of lands under disinvested hotels to be forming a separate class/category since no ownership rights were conferred under the said leases. To support the said plea, non-payment of premium under the said lease is cited. As aforesaid, under the Scheme/Policy itself, appellant L&DO had made only such commercial and mixed land use properties eligible for conversion, "for which ownership rights had been conferred". The learned Single Judge also has noticed the paradox in the said expression. A lease is different from ownership and a lease in which ownership rights are conferred would cease to be a lease (see **Byramjee Jeejeebhoy (P) Ltd. v. State of Maharashtra** AIR 1965 SC 590). However the fact remains that the appellant L&DO while formulating the Scheme/ Policy for freehold conversion did intend to exclude certain categories of leases of commercial/mixed land use properties from eligibility for conversion. We are unable to agree with the reliance placed by learned Single Judge on **Smt. Shanti Sharma** (supra) for holding that ownership rights are conferred in a lease for 99 years. Smt. Shanti Sharma was a dispute between a landlord and a tenant in the regime of the rent control laws which protected the tenant from eviction except on the grounds mentioned in the Act; one of the said grounds was of bonafide requirement by the landlord of the tenanted premises. However, such ground was made available only to a landlord who was also the owner of the premises. It was in this context that the Supreme Court held that all that was required to be owner was to have a title better than the tenant and thus the landlord who was himself a lessee for 99 years of the land underneath the property was held to be the owner. The said judgment has been wrongly relied upon in a dispute between the lessor and lessee of the land, for holding a lessee of 99 years to be having ownership rights in the property. A lease, even if for 99 years, does not confer ownership rights on the lessee. **(Para 15)**

The Division Bench of the Bombay High Court in the *The Collector of Bombay v. Khatizabai Dharsi Somji Dossa* MANU/MH/0171/1961 held that whether the term of the lease be 5 years, 50 years, 99 years or even 999 years, the transaction is only a lease and there is always a reversion which continue to vest in the owner in the entire term of the lease and the lessee even if for 999 years does not become the owner—The Privy Council in *Subramanya Chettiar v. Subramanya Mudaliyar* AIR 1929 PC 156 held the length of the lease to be not indicative of even permanency of the lease much less of transfer of ownership—The Calcutta High Court also in *Kamal Kumar Datta v. Nandalal Dubey* AIR 1929 Cal 37 expressly held the lease for 99 years to be not qualifying as a permanent lease—Even a clause of heritability of the lease was in *Chapsibhai Dhanjibhai Danad v. Purshottam* AIR 1971 SC 1878 held to be not an indice of permanency—Thus, in law no ownership rights can be said to be conferred on the respondents for the reason of the leases in their favour being for the long term of 99 years—Even a perpetual lessee of Nazul land, in *Kiran Tandon v. Allahabad Development Authority* (2004) 10 SCC 745 was held to be not entitled to get full compensation for acquisition thereof, observing that only a full owner gets the entire amount of compensation.

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Conferment under the lease for 99 years of right to mortgage, construct and otherwise deal with the property, is not inconsistent with a lease and in fact under Section 108 of the Transfer of Property Act, 1882, in the absence of a contract to the contrary, a lessee is entitled to make accession to the property [Section 108 (B)(d)], make repairs to the property [Section 108 (B)(f)], transfer absolutely or by way of mortgage or sub-lease, the whole or any part of his interest in the property [Section 108 (B) (j)] and erect on the property any permanent structure with the consent of the lessor [108 (B) (d)]

We are similarly of the opinion that the learned Single Judge was unduly swayed by conferment under the lease dated 8th October, 2002 for 99 years of right to mortgage, construct and otherwise deal with the property, to hold ownership rights having been conferred therein. Conferment of such rights is not inconsistent with a lease and in fact under Section 108 of the Transfer of Property Act, 1882, in the absence of a contract to the contrary, a lessee is entitled to make accession to the property [Section 108 (B)(d)], make repairs to the property [Section 108 (B) (f)], transfer absolutely or by way of mortgage or sub-lease, the

whole or any part of his interest in the property [Section 108 (B) (j)] and erect on the property any permanent structure with the consent of the lessor [108 (B) (d)]. It thus cannot be said that the reasons which prevailed with the Learned Single Judge to find ownership rights to have been conferred on HEPL are anything out of the extraordinary or for the reasons whereof it can be said that something more than lease hold rights were vested in the respondent no.1.

(Para 17)

In *Mohd. Noor v. Mohd. Ibrahim* (1994) 5 SCC 562 it was held that a tenant may be entitled by law to transfer his interest in the property but that is not transfer of ownership and a lessee from a local body or a State Government may be having right to raise building and such rights may be heritable and transferable but right of transferring subordinate rights does not make it transfer of ownership and a lessee from a local body or a State Government may be having right to raise building and such rights may be heritable and transferable but right of transferring subordinate rights does not make it transfer of ownership—Similarly in *Hamidullah (Dead) v. Sheikh Abdullah* (1972) 4 SCC 800 long possession for generations and the factum of the tenant making construction on the land of permanent structures at own cost were held to be not factors capable of raising presumption of the tenancy being a permanent one—The onus of proving the lease/tenancy to be a permanent one was also held to be on the tenant—Even in *Bhatia Co-operative Housing Society Ltd. v. D.C. Patel* AIR 1953 SC 16 the reasoning of the High Court that the lessee of the land is the owner of the building constructed thereon at the lessee's cost was set aside holding that the limitations on the use of the building and the restrictions on transfer etc. indicate that the lessor has the dominant voice and the real ownership and the erection by the lessee of the building at its own cost is for the

lessor—Mark by in his "Elements of Law" explained the position succinctly by stating "however numerous and extensive may be the detached rights (in the favour of lessee), however insignificant may be the residue (with the lessor), it is the holder of this residue of right whom we always consider as the owner"—Though when a lease is for building purposes an inference of permanency is drawn (see *Sivayogeswara Cotton Press, Devangere v. M. Panchaksharappa* AIR 1962 SC 413) but the lease in favour of the respondents cannot be said to be for building purposes inasmuch as the same already has a building constructed thereon and the lease is of the land with building with the right to the respondents as lessees to make additions/alterations thereto or to reconstruct the same—Moreover, subsequently in *Chapsibhai Dhanjibhai Danad v. Purshottam* AIR 1971 SC 1878 a provision in the lease, though for building purposes but permitting the lessee to on the expiry of the term thereof remove the structures was held to be not indicative of the lease being a permanent one.

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lessee's cost was set aside holding that the limitations on the use of the building and the restrictions on transfer etc. indicate that the lessor has the dominant voice and the real ownership and the erection by the lessee of the building at its own cost is for the lessor. **(Para 18)**

Markby in his "Elements of Law" explained the position succinctly by stating "however numerous and extensive maybe the detached rights (in the favour of lessee), however insignificant may be the residue (with the lessor), it is the holder of this residue of right whom we always consider as the owner." **(Para 19)**

Though when a lease is for building purposes an inference of permanency is drawn (see **Sivayogeswara Cotton Press, Devangere v. M. Panchaksharappa** AIR 1962 SC 413) but the lease in favour of the respondents cannot be said to be for building purposes inasmuch as the same already has a building constructed thereon and the lease is of the land with building with the right to the respondents as lessees to make additions/alterations thereto or to reconstruct the same. Moreover, subsequently in **Chapsibhai Dhanjibhai Danad v. Purshottam** AIR 1971 SC 1878 a provision in the lease, though for building purposes but permitting the lessee to on the expiry of the term thereof remove the structures was held to be not indicative of the lease being a permanent one. **(Para 20)**

These are policy matters and freehold conversion is in the sole discretion of the lessor and if the lessor in its wisdom does not want to allow such conversion to certain categories of lease, no case for judicial review thereof is made out in the face of differences aforesaid—The differences in the two kinds of leases/ transactions are found to bear a just and reasonable relation to the Policy of freehold conversion—Owing to the differences, the appellant L&DO can be said to have bonafide held the view that the leases of the land underneath disinvested hotels would not be

eligible under the Policy/Scheme for conversion, since no ownership rights had been conferred thereunder—It is also worth highlighting that such policies/schemes of freehold conversion are enunciated in the exercise of executive function—It is up to the appellant L&DO as lessor of the land to grant or not grant freehold rights in the land that was granted on leasehold and to whom—However, the lessor herein being the State, cannot discriminate arbitrarily—It thus falls for consideration whether the leases in favour of respondents fall in the same category, where such conversion is being permitted and whether the appellant is discriminating against the respondents—The respondents herein do however, as aforesaid, form a class by themselves carved out by the learned Single Judge, as disinvested hotels—Though the learned Single Judge has held that the Conversion Policy does not carve out any exception qua disinvested hotels and that the exception if any to the policy has to be in the policy only and cannot be by way of executive instructions but losing sight of the fact that the policy itself is an executive instruction and does not have a legislative colour—Thus, even if it were to be held that the subsequent decision to not allow freehold conversion of land underneath disinvested hotels is not borne out from the policy, the same is at best a modification/amendment of the Policy and it is not the case of the respondents that the officials/authority who took such subsequent decision were any inferior to those who had framed the original Policy or that they were not entitled to take the subsequent decision—The appellant in the matter of implementation/working of such a policy is always entitled to exclude certain persons who may be forming a class by themselves and we are unable to find any bar to such modification/amendment of the policy.

We are of the opinion that the aforesaid differences are

sufficient to belie any case of discrimination and it is not for this Court to go into the insufficiency even if argued of the differences to mete out a different treatment to the respondents. These are policy matters and freehold conversion, as aforesaid is in the sole discretion of the lessor and if the lessor in its wisdom does not want to allow such conversion to certain categories of lease, no case for judicial review thereof is made out in the face of differences aforesaid. The Supreme Court recently in **Union of India v. Nitdip Textile Processors Pvt. Ltd.** (2012) 1 SCC 226 held that a large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the Court will be reluctant and perhaps ill-equipped to investigate. It was further observed that in this imperfect world, perfection even in grouping is an ambition hardly ever accomplished and that the question of classification is primarily for the governmental judgment and ordinarily does not become a judicial question. It was yet further held that a power to classify being extremely broad and based on diverse considerations of executive pragmatism, the judicature cannot rush in where even the legislature merely treads. Similarly, in **N. Vasundara v. State of Mysore** (1971) 2 SCC 22 it was held that once the classification is on reasonable basis, the Courts are not expected to interfere with the manner and method of classification. The differences aforesaid in the two kinds of leases/transactions are found to bear a just and reasonable relation to the Policy of freehold conversion. **(Para 25)**

We are further of the opinion that owing to the differences aforesaid the appellant L&DO can be said to have bonafide held the view that the leases of the land underneath disinvested hotels would not be eligible under the Policy/ Scheme for conversion, since no ownership rights had been conferred thereunder. It is also worth highlighting that such policies/schemes of freehold conversion are enunciated in the exercise of executive function. It is up to the appellant L&DO as lessor of the land to grant or not grant freehold

rights in the land that was granted on leasehold and to whom. However, the lessor herein being the State, cannot discriminate arbitrarily. It thus falls for consideration whether the leases in favour of respondents fall in the same category, where such conversion is being permitted and whether the appellant is discriminating against the respondents. The respondents herein do however, as aforesaid, form a class by themselves carved out by the learned Single Judge, as disinvested hotels. Though the learned Single Judge has held that the Conversion Policy does not carve out any exception qua disinvested hotels and that the exception if any to the policy has to be in the policy only and cannot be by way of executive instructions but losing sight of the fact that the policy itself is an executive instruction and does not have a legislative colour. Thus, even if it were to be held that the subsequent decision to not allow freehold conversion of land underneath disinvested hotels is not borne out from the policy, the same is at best a modification/amendment of the Policy and it is not the case of the respondents that the officials/authority who took such subsequent decision were any inferior to those who had framed the original Policy or that they were not entitled to take the subsequent decision. The appellant in the matter of implementation/working of such a policy is always entitled to exclude certain persons who may be forming a class by themselves and we are unable to find any bar to such modification/amendment of the policy. The Supreme Court in **Chairman, Ramappa Gundappa Sahakari Samyakta Besava Sangha Ltd. v. State of Mysore** (1974) 2 SCC 221 held that if everypolicy statement or direction of Government especially regarding disposal of State Property were construed as irreversibly creating right to property in prospective beneficiaries, strange consequences would follow and the government cannot be held prisoner to its administrative decisions which are required to be altered from time to time. Reference with benefit can also be made to **A.K. Kraipak Vs. UOI** (1969) 2 SCC 262 and **U.P. Financial Corp. Vs. Gem Cap (I) P. Ltd.** (1993) 2 SCC 299 laying down that if the High Court cannot sit as

an appellate authority over the decision and order of quasi judicial authorities, it follows equally that it cannot do so in the case of administrative authorities and that if there is more than one choice available to the administrative authorities they have a right to choose and the Court cannot substitute its judgment for the judgment of the administrative authorities in such cases. **(Para 26)**

What the respondents, by claiming freehold conversion are seeking is, to become absolute owners of the prime commercial properties belonging to the people at large held by the appellant L&DO in trust and which absolute ownership rights were not intended to be given at the time of disinterments of the hotels standing there on—The respondents did not come to this Court with the case that instead of lease deeds, sale deeds ought to have been executed—On the contrary, after becoming lessees, they are seeking to become owners—The appellant L&DO in the matter of disposal of public properties partakes the character of a trust an dis entitled to the best price of such properties and ownership cannot be smuggled in through the backdoor of lease—Writ Petitions filed by the respondents are dismissed.

The matter can be looked at from another aspect. What the respondents, by claiming freehold conversion are seeking is, to become absolute owners of the prime commercial properties belonging to the people at large held by the appellant L&DO in trust and which absolute ownership rights were not intended to be given at the time of disinvestment of the hotels standing thereon. The respondents did not come to this Court with the case that instead of lease deeds, sale deeds ought to have been executed. On the contrary, after becoming lessees, they are seeking to become owners. The appellant L&DO in the matter of disposal of public properties partakes the character of a trust and is entitled to the best price of such properties and ownership cannot be smuggled in through the backdoor of lease. Reference

with benefit in this context can be made to **Centre for Public Interest Litigation v. Union of India** (2012) 3 SCC 1. The Division Bench of this Court speaking through one of us (Acting Chief Justice) in **Aggarwal and Modi Enterprises (Cinema Project) Pvt. Ltd. v. New Delhi Municipal Council** 123 (2005) DLT 154 repelled the plea of discrimination observing that before a claim based on equality clause is upheld it must be established that the claim is just and legal and that the doctrine of discrimination is founded upon existence of an enforceable right. The attempt of the owners of Chanakya Cinema in that case to equate their case with small shopkeepers was held to be meaningless holding that they constitute a separate class. Interestingly, in that case the plea of the owners of Chanakya Cinema was that NDMC was giving longer leases to hotels and the same treatment should be extended to the cinema sites. This argument was also rejected. **(Para 27)**

Important Issue Involved: Right to Conversion of the Leasehold into Freehold—Whether the term of the lease be 5 years, 50 years, 99 years or even 999 years, the transaction is only a lease and there is always a reversion which continues to vest in the owner in the entire term of the lease and the lessee even if for 999 years does not become the owner—These are policy matters and freehold conversion is in the sole discretion of the lessor and if the lessor in its wisdom does not wantto allow such conversion to certain categories of lease, no case for judicial review thereof is made out in the face of differences aforesaid.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANTS : Mr. Mohan Parasaran, ASG with Ms. Aarthi Rajan, Mr. B.V. Niren, Mr. Manav Gupta, Mr. Alok Prasanna Kumar, & Mr. Meyyappa Nagappan, Advocates.

FOR THE RESPONDENTS : Mr. Harish Malhotra, Sr. Advocate with Ms. Malini Sud & Ms. Vidhi Goel, Advocates.

CASES REFERRED TO:

1. *Union of India* vs. *Nitdip Textile Processors Pvt. Ltd.* (2012) 1 SCC 226.
2. *Centre for Public Interest Litigation* vs. *Union of India* (2012) 3 SCC 1.
3. *The Commissioner Of Income Tax, Delhi-IX* vs. *Monoflex India P. Ltd.* MANU/DE/3111/2011.
4. *Municipal Corporation of Delhi* vs. *Shashank Steel Industries (P) Ltd.* (2009) 2 SCC 349).
5. *Smt. Jaikumari Amarbahadursingh* vs. *State of Maharashtra* MANU/MH/0909/2008.
6. *Aggarwal and Modi Enterprises Pvt. Ltd.* vs. *NDMC* (2007) 8 SCC 75.
7. *Bal Kishan Chhabra* vs. *UOI* 127 (2006) DLT 460.
8. *Aggarwal and Modi Enterprises (Cinema Project) Pvt. Ltd.* vs. *New Delhi Municipal Council* 123 (2005) DLT 154.
9. *Nazul land, in Kiran Tandon* vs. *Allahabad Development Authority* (2004)10 SCC 745.
10. *Ranganayaki Ammal* vs. *M. Chockalingam* (1996) II MLJ 139.
11. *Mohd. Noor* vs. *Mohd. Ibrahim* (1994) 5 SCC 562.
12. *U.P. Financial Corp.* vs. *Gem Cap (I) P. Ltd.* (1993) 2 SCC 299.
13. *Smt. Shanti Sharma* vs. *Smt. Ved Prabha* (1987) 4 SCC 193.
14. *Chairman, Ramappa Gundappa Sahakari Samyakta Besava Sangha Ltd.* vs. *State of Mysore* (1974) 2 SCC 221.
15. *Hamidullah (Dead)* vs. *Sheikh Abdullah* (1972) 4 SCC 800.

16. *N. Vasundara* vs. *State of Mysore* (1971) 2 SCC 22.
17. *Chapsibhai Dhanjibhai Danad* vs. *Purshottam* AIR 1971 SC 1878.
18. *Chief Controlling Revenue Authority* vs. *S.M. Abdul Jammal* AIR 1970 Madras 288.
19. *A.K. Kraipak* vs. *UOI* (1969) 2 SCC 262.
20. *Vinay Construction and Development Company, Hyderabad* vs. *Inspector General of Registration and Stamps, Andhra Pradesh* AIR 1967 AP 90.
21. *Commissioner of Income Tax, Assam* vs. *The Panbari Tea Company Ltd.* AIR 1965 SC 1871.
22. *Byramjee Jeejeebhoy (P) Ltd.* vs. *State of Maharashtra* AIR 1965 SC 590.
23. *Abdul Rahim* vs. *State of Madras* AIR 1962 Madras 272.
24. *Sivayogeswara Cotton Press, Devangere* vs. *M. Panchaksharappa* AIR 1962 SC 413.
25. *Bhatia Co-operative Housing Society Ltd.* vs. *D.C. Patel* AIR 1953 SC 16.
26. *Kamal Kumar Datta* vs. *Nandalal Dubey* AIR 1929 Cal 37.
27. *King* vs. *Earl Cadogan L.R.* (1915) 3 KB 485.
28. *The Collector of Bombay* vs. *Khatizabai Dharsi Somji Dossa* MANU/MH/0171/1961.

RESULT: Writ Petition dismissed.

RAJIV SAHAI ENDLAW, J.

1. These four intra-court appeals, though against separate judgments in separate writ petitions, are listed together since the judgments of the learned Single Judge under challenge in LPA Nos.147/2007, 297/2007 and 161/2009 merely follow the judgment of the learned Single Judge under challenge in LPA No.2298-99/2006. Further, all appeals are stated to entail the same question of law i.e. the right, of the lessees of land underneath disinvested hotels, to have the same converted into freehold. Though the land subject matter of LPA No.297/2007 is not underneath a disinvested hotel but underneath a cinema hall but the learned Single

Judge has qua the same also, followed the dicta under challenge in LPA No.2298-99/2006 and the counsels in LPA No.297/2007 also have not argued the same any differently. Rather, arguments have been addressed with respect to LPA No.2298-99/2006 only, with the counsels in other matters merely adopting the arguments.

2. LPA No.2298-99/2006 arises from order dated 29.08.2005 allowing W.P.(C) No.15058-59/2004 preferred by the respondents therein and also impugns the order dated 25.08.2006 in review petition preferred thereagainst. The same concerns land underneath erstwhile Kanishka Hotel and Kanishka Shopping Plaza. LPA No.147/2007 arises from judgment dated 01.09.2006 allowing W.P.(C) No.450/2005 preferred by the respondents therein and pertains to the land underneath erstwhile Qutub Hotel. LPA No.297/2007 arises from the judgment dated 25.08.2006 allowing W.P.(C) No.14696/2004 preferred by the respondents therein and pertains to land underneath the Eros Cinema Building. LPA No.161/2009 arises from judgment dated 04.12.2008 allowing W.P.(C) No.24033-34/2005 preferred by the respondents therein and pertains to the land underneath erstwhile Lodhi Hotel at Delhi.

3. The learned Single Judge has held the leasehold land underneath the disinvested hotels and cinema to be entitled to freehold conversion under the Policy introduced by the Government and has thereby quashed the decision of the Land and Development Office (L&DO) refusing freehold conversion of such land and held L&DO to be not entitled to discriminate between the land underneath the disinvested hotels and cinema and other leasehold lands being converted into freehold.

4. W.P.(C) No. 15058-59/2004 from which LPA 2298-99/2006 has arisen, was filed pleading:-

A. that by a Scheme of Demerger sanctioned by the Central Government on 5th August, 2002, Hotel Kanishka including Kanishka Shopping Plaza was hived off from Indian Tourism Development Corporation (ITDC) and merged into Hotel Excelsior Pvt. Ltd. (HEPL);

B. thereafter vide two Share Purchase Agreements dated 8th August, 2002, the shares of HEPL held by Union of India and Indian Hotels Company Ltd. were purchased by the respondent no.2 Nehru Place Hotels Ltd. for a total price of Rs. 1,01,38,22,146/- (Rupees One hundred one crores

thirty eight lakhs twenty two thousand one hundred forty six only);

C. that thereby the ownership and management of Hotel Kanishka including Kanishka Shopping Plaza stood transferred/handed over to Nehru Place Hotels Ltd.;

D. a lease deed dated 8th October, 2002 for a period of 99 years was executed by the President of India acting through the L&DO in favour of HEPL and whereunder a sum of Rs. 4,68,35,949/- was paid as security deposit;

E. that on 6thJune, 2003, L&DO came out with a policy/scheme for conversion of leasehold rights into freehold; as per Clause 1.5 of the Scheme of Conversion, all commercial and mixed land use properties allotted by L&DO "for which ownership rights had been conferred and lease deed executed and registered" could be converted into freehold;

F. as per the Master Plan for Delhi, the aforesaid property i.e. Kanishka Hotel and Kanishka Shopping Plaza falls under the category 'Commercial';

G. that HEPL being desirous of taking advantage of the said policy of conversion of leasehold rights into freehold, applied thereunder with respect to the land underneath Kanishka Hotel &Kanishka Shopping Plaza and sought adjustment of the security deposit of Rs.4,68,35,949/- in the conversion charges;

H. however neither any response was received nor were the leasehold rights converted into freehold. Accordingly the writ petition aforesaid was filed seeking mandamus for conversion of the land underneath Hotel Kanishka & Kanishka Shopping Plaza into freehold on adjustment of conversion charges of Rs.4,44,78,504/- out of the security deposit of Rs. 4,68,35,949/-.

5. Notice of the said writ petition was issued. A counter affidavit was filed by the L&DO contesting the petition. It was inter alia stated in the said counter affidavit:-

a. that the land aforesaid had been leased out to HEPL under

the Disinvestment Policy of the Government of India;

b. that the scheme for conversion was not applicable to disinvested hotels which formed a separate and distinct category;

c. that the matter was examined in consultation with the Ministry of Finance which had also affirmed that private parties which had acquired the commercial business of hotel, cinema houses etc. by way of disinvestment are a different category altogether and are not to be treated at par with the allottees of other properties eligible for conversion;

d. that conversion could not also be granted since HEPL had encroached upon service lane;

e. that conversion could also not be granted for the reason that HEPL, instead of depositing the conversion charges, had sought adjustment of the security deposit which was not permissible;

f. along with counter affidavit, a copy of the letter dated 25th February, 2005 rejecting the request for conversion was also filed.

6. Needless to state the respondents in their rejoinder to the aforesaid counter affidavit controverted the averments therein. It was pleaded that neither the conversion policy carved out any exception qua the disinvested hotels nor did the lease deed for 99 years executed in favour of HEPL restricted conversion from leasehold to freehold. It was further pleaded that the rejection of the application for conversion was after the filing of the writ petition.

7. The Learned Single Judge, holding that, i) interest in land was vested in HEPL as perpetual lessee under the lease agreement dated 8th October, 2002; ii) the conversion policy did not carve out any exception qua disinvested hotel; iii) the exceptions if any to the policy have to be in the policy only and cannot be by executive instructions; iv) the conversion policy was applicable to commercial properties, as the Kanishka Hotel & Kanishka Shopping Plaza was; v) as such the said property could not be discriminated against; and vi) the lease deed and the share purchase agreement did not prohibit freehold conversion, vide order dated

29.08.2005 allowed the writ petition and directed the L&DO to convert the leasehold rights into freehold and also allowed adjustment of the security deposit under the lease agreement into conversion charges.

8. Appellant L&DO applied for review of the aforesaid order. The judgment dated 25th August, 2006 of the Leaned Single Judge thereon records that the counsel for the respondents/writ petitioners conceded that the said review petition be decided on merits. The Learned Single Judge thereafter proceeded to decide the writ petition afresh and noticed the pleas of the L&DO in the review application to the effect that, a) the land had been leased out to HEPL only for operating and managing the commercial business of hotel by way of Disinvestment Policy of the Government; b) the reserve price for the auction (pursuant to disinvestment) was not fixed having regard to the value of the land; c) even in the lease deed dated 8th October, 2002 executed in favour of HEPL, no premium was charged and the said lease deed was as such different from leases conversion of which into freehold was being permitted.

9. Clause 1.5 of the Scheme of Conversion / Conversion Policy, relied upon by the learned Single Judge is as under:-

> "WHAT ARE THE PROPERTIES UNDER THE CONTROL OF LAND & DEVELOPMENT OFFICE ELIGIBLE FOR CONVERSION FROM LEASEHOLD TO FREEHOLD
>
> 1.5 All commercial and mixed land use properties allotted by the department of Rehabilitation, L&DO or the Dte. of Estate, for which ownership rights have been conferred and lease deed executed and registered."

The Learned Single Judge, in the judgment dated 25th August, 2006 held:-

I. that the share purchase agreements required the government to co-operate with the purchaser of shares of HEPL, in perfecting or registering ownership of the assets;

II. that out of the bid amount, a sum of Rs. 31,22,39,658/- was assigned for payment to the L&DO of 50% of the unearned increase on leased land;

III. that the lease deed dated 8th October, 2002 was executed

simultaneously with the execution of the share purchase agreements;

IV. that for Clause 1.5 aforesaid of the Conversion Policy to apply, only thing to be established was that the lease was executed either by the Department of Rehabilitation or the L&DO or the Directorate of Estates and that ownership rights were conferred under the lease deed;

V. that the concept of ownership rights would have to be understood and appreciated in the context of leasehold tenures;

VI. that the very fact that a right of sale, mortgage, construction and of dealing with the property was conferred on the lessee showed conferment of ownership rights on the lessee, even if the lease was for 99 years. Reliance in this regard was placed on **Smt. Shanti Sharma v. Smt. Ved Prabha** (1987) 4 SCC 193 where the holder of a leasehold tenure, in the matter of seeking eviction of tenant under the Delhi Rent Control Act, 1958, was viewed as the owner;

VII. that in today's world particularly in India, ownership in the sense of absolute unrestricted right to deal with the property is non-existent;

VIII. the rights to enjoy the land and the building thereon, to re-develop and re-construct as per the Master Plan, mortgage, assign, transfer or sub-lease conferred under the lease deed dated 8th October, 2002 are all facets of ownership. The argument of the L&DO that for acquiring ownership, a premium had to be paid and which had not been paid under the lease in question was negatived holding that payment of premium had no relation to the concept of ownership as understood in the contextual sense in the city of Delhi, since when premium is paid rent is less and vice versa;

IX. that out of the payments under the share purchase agreements, monies had flowed to the land owning agency i.e. L&DO which, prior to the transaction in question had given land free of cost or on notional basis to another

department of Government of India;

X. that the difference in language of the lease in question and the other leases of the L&DO was irrelevant;

XI. entitlement for conversion is to be found in the Conversion Policy and not in the lease.

Accordingly the review application was dismissed.

10. The Learned ASG appearing for the appellant L&DO has argued that, i) the land aforesaid was earlier allotted in favour of ITDC and no lease was ever executed in favour of ITDC; ii) that the stamp duty on the lease deed dated 8th October, 2002 was also computed on the basis of the ground rent payable thereunder; iii) comparison is sought to be drawn with the lease deed contemporaneously granted in favour of HUDCO with respect to the land where Ansal Plaza is situated; iv) that what was sold under the share purchase agreement was only the shares; and v) that the Learned Single Judge has wrongly confused the unearned increase with the premium.

11. Mr. Harish Malhotra, Sr. Advocate for the respondents in LPA No.2298-99/2006 has, i) invited attention to the Public Notices issued at the time of disinvestment and has contended therefrom that it was in fact the property of Kanishka Hotel which would include the land, which was offered for sale, and further contended ii) that permission was given for mortgage and sale of the property and which would have been given only when ownership rights were conferred, even though the lease was for 99 years; iii) that under the new Stamp Act, the stamp duty payable on lease of duration of over ten years is the same as a conveyance deed. Attention is also invited to the clause of the lease deed dated 8th October, 2002 giving the lessor i.e. L&DO a pre-emptive right of purchase in the event of sale/transfer of rights by the lessee and the same is also urged to be a facet of ownership.

12. We may at the outset state, that a lessee has no right to claim conversion of the leasehold into freehold or to compel the lessor to so grant conversion. The respondents also did not peg their case so high. All that which thus requires determination is, whether the respondents, under the Policy floated by the L&DO, have a right to such conversion and if not, whether the appellant L&DO, in denying such conversion to the respondents, is discriminating against the respondents.

13. It is not as if the appellant L&DO allows such conversion, with respect to all leases. Judicial notice can be taken of the fact that the Policy/Scheme for conversion, when first introduced in the year 1992, was qua residential plots only and that too of size not exceeding 500 sq. mtrs. Subsequently in the year 1999 all residential plots irrespective of size were brought within the ambit of the Scheme. It is only in the next stage in the year 2003 that the Policy/Scheme was extended to commercial/mixed use plots of land. Even now, the Scheme/Policy does not state that all leaseholds under the L&DO are eligible for conversion to freehold, as would have been the case, had the intent been so. Instead, in Clauses 1.1 to 1.5 of the Scheme/Policy, the leases eligible for freehold conversion are specified. Significantly, while mentioning (in Clause 1.1) residential plots as eligible for conversion, it is not mentioned, "for which ownership rights have been conferred", as has been mentioned in Clause 1.5 while including commercial and mixed land use properties in the list of properties eligible for freehold conversion. The only inference can be, that while leases of all residential properties were eligible for conversion, irrespective of whether the ownership rights thereunder were conferred or not, it was not so qua the commercial/mixed land use properties. Only those commercial/mixed land use properties were/are, under the Scheme/Policy, eligible for conversion, "where ownership rights have been conferred".

14. We have not come across any challenge having been made, since the year 1992 when the Scheme/Policy of freehold conversion was first introduced, on the ground of discrimination, for allowing such conversion qua one category of leases and not others. The question of discrimination in our view in such a situation does not arise since as aforesaid, no lessee has a right of such conversion and merely because the lessor has granted such privilege to some lessees, does not entitle others, who form a distinct class/category, to also claim such privilege / benefit.

15. The appellant L&DO claims leases of lands under disinvested hotels to be forming a separate class/category since no ownership rights were conferred under the said leases. To support the said plea, non-payment of premium under the said lease is cited. As aforesaid, under the Scheme/Policy itself, appellant L&DO had made only such commercial and mixed land use properties eligible for conversion, "for which ownership rights had been conferred". The learned Single Judge also has noticed the paradox in the said expression. A lease is different from ownership and

a lease in which ownership rights are conferred would cease to be a lease (see **Byramjee Jeejeebhoy (P) Ltd. v. State of Maharashtra** AIR 1965 SC 590). However the fact remains that the appellant L&DO while formulating the Scheme/Policy for freehold conversion did intend to exclude certain categories of leases of commercial/mixed land use properties from eligibility for conversion. We are unable to agree with the reliance placed by learned Single Judge on **Smt. Shanti Sharma** (supra) for holding that ownership rights are conferred in a lease for 99 years. Smt. Shanti Sharma was a dispute between a landlord and a tenant in the regime of the rent control laws which protected the tenant from eviction except on the grounds mentioned in the Act; one of the said grounds was of bonafide requirement by the landlord of the tenanted premises. However, such ground was made available only to a landlord who was also the owner of the premises. It was in this context that the Supreme Court held that all that was required to be owner was to have a title better than the tenant and thus the landlord who was himself a lessee for 99 years of the land underneath the property was held to be the owner. The said judgment has been wrongly relied upon in a dispute between the lessor and lessee of the land, for holding a lessee of 99 years to be having ownership rights in the property. A lease, even if for 99 years, does not confer ownership rights on the lessee.

16. The Division Bench of the Bombay High Court in the **The Collector of Bombay v. Khatizabai Dharsi Somji Dossa** MANU/MH/0171/1961 held that whether the term of the lease be 5 years, 50 years, 99 years or even 999 years, the transaction is only a lease and there is always a reversion which continues to vest in the owner in the entire term of the lease and the lessee even if for 999 years does not become the owner. The Privy Council in **Subramanya Chettiar v. Subramanya Mudaliyar** AIR 1929 PC 156 held the length of the lease to be not indicative of even permanency of the lease much less of transfer of ownership. The Calcutta High Court also in **Kamal Kumar Datta v. Nandalal Dubey** AIR 1929 Cal 37 expressly held the lease for 99 years to be not qualifying as a permanent lease. Even a clause of heritability of the lease was in **Chapsibhai Dhanjibhai Danad v. Purshottam** AIR 1971 SC 1878 held to be not an indice of permanency. Thus, in law no ownership rights can be said to be conferred on the respondents for the reason of the leases in their favour being for the long term of 99 years. Even a perpetual lessee of **Nazul land, in Kiran Tandon v. Allahabad**

Development Authority (2004)10 SCC 745 was held to be not entitled to get full compensation for acquisition thereof, observing that only a full owner gets the entire amount of compensation.

17. We are similarly of the opinion that the learned Single Judge was unduly swayed by conferment under the lease dated 8th October, 2002 for 99 years of right to mortgage, construct and otherwise deal with the property, to hold ownership rights having been conferred therein. Conferment of such rights is not inconsistent with a lease and in fact under Section 108 of the Transfer of Property Act, 1882, in the absence of a contract to the contrary, a lessee is entitled to make accession to the property [Section 108 (B)(d)], make repairs to the property [Section 108 (B) (f)], transfer absolutely or by way of mortgage or sub-lease, the whole or any part of his interest in the property [Section 108 (B) (j)] and erect on the property any permanent structure with the consent of the lessor [108 (B) (d)]. It thus cannot be said that the reasons which prevailed with the Learned Single Judge to find ownership rights to have been conferred on HEPL are anything out of the extraordinary or for the reasons whereof it can be said that something more than lease hold rights were vested in the respondent no.1.

18. In **Mohd. Noor v. Mohd. Ibrahim** (1994) 5 SCC 562 it was held that a tenant may be entitled by law to transfer his interest in the property but that is not transfer of ownership and a lessee from a local body or a State Government may be having right to raise building and such rights may be heritable and transferable but right of transferring subordinate rights does not make it transfer of ownership. Similarly in **Hamidullah (Dead) v. Sheikh Abdullah** (1972) 4 SCC 800 long possession for generations and the factum of the tenant making construction on the land of permanent structures at own cost were held to be not factors capable of raising presumption of the tenancy being a permanent one. The onus of proving the lease/tenancy to be a permanent one was also held to be on the tenant. Even in **Bhatia Co-operative Housing Society Ltd. v. D.C. Patel** AIR 1953 SC 16 the reasoning of the High Court that the lessee of the land is the owner of the building constructed thereon at the lessee's cost was set aside holding that the limitations on the use of the building and the restrictions on transfer etc. indicate that the lessor has the dominant voice and the real ownership and the erection by the lessee of the building at its own cost is for the lessor.

19. Markby in his "Elements of Law" explained the position succinctly by stating "however numerous and extensive maybe the detached rights (in the favour of lessee), however insignificant may be the residue (with the lessor), it is the holder of this residue of right whom we always consider as the owner."

20. Though when a lease is for building purposes an inference of permanency is drawn (see **Sivayogeswara Cotton Press, Devangere v. M. Panchaksharappa** AIR 1962 SC 413) but the lease in favour of the respondents cannot be said to be for building purposes inasmuch as the same already has a building constructed thereon and the lease is of the land with building with the right to the respondents as lessees to make additions/alterations thereto or to reconstruct the same. Moreover, subsequently in **Chapsibhai Dhanjibhai Danad v. Purshottam** AIR 1971 SC 1878 a provision in the lease, though for building purposes but permitting the lessee to on the expiry of the term thereof remove the structures was held to be not indicative of the lease being a permanent one.

21. We are further of the opinion that once the Policy/Scheme for freehold conversion had made only such commercial and mixed land use properties eligible for freehold conversion, where ownership rights had been conferred, a meaning was/is required to be given to the said words and the same cannot be rendered otiose and redundant, as would be the case if the opinion of the learned Single Judge was to prevail. To look into the mind of the framers of the said Policy, our research led us to the very constitution of the L&DO. It is an attached office of the Ministry of Urban Development and is responsible for the properties of the Government of India in Delhi. These properties fall into two broad categories i.e. Nazul Lands which were acquired in 1911 for formation of the Capital of India at Delhi and rehabilitation lands which were acquired by the Government of India for the speedy rehabilitation of displaced persons from Pakistan. These properties were given out on leases for residential, commercial and institutional purposes. Leases on old Nazul land are perpetual leases and ground rent is revisable at the option of the L&DO as lessor after every 30 years. Rehabilitation leases are for a period of 99 years and revision of ground rent is due after 20 years.

22. The Lease Deed dated 8th October, 2002 was not granted by

the L&DO in exercise of its powers of administration of the properties of the Government of India in Delhi. L&DO as aforesaid had allowed the said land to be used by ITDC, a Government company for construction of Kanishka Hotel and Kanishka Shopping Plaza. However, when the Government decided to disinvest Kanishka Hotel and Kanishka Shopping Plaza, the need arose for creation of some right in land underneath in favour of the highest bidder. This distinguishes the subject lease from the other leases granted by the L&DO.

23. Though neither the Policy/Scheme for conversion cites the objective thereof, nor has the appellant placed the same before us but we find this Court in **Bal Kishan Chhabra v. UOI** 127 (2006) DLT 460 to have observed that the properties of which leases had been granted had virtually moved out of the hands of the government because of the execution of long term leases of 99 years and the rent whereof was so nominal that even administrative costs were not recoverable. It was further observed that it would be most sanguine to expect that these lands or buildings could be resumed by the government even after the tenure of 99 years had run out inasmuch the public will be incensed to such an extent that political parties are likely to steer clear from any such attempt. The Policy/Scheme for freehold conversion was thus found to be intended to earning revenue for the government through conversion charges and at the same time reducing administrative obligations and costs. The intra court appeal being LPA No. 1659/2006 against the said judgment was dismissed on 12.08.2010. Applying the said objective of the Policy/Scheme for freehold conversion, we do not find the subject leases to be falling in the category where the rents are nominal, not enough to recover even the costs of administration of the lease. The lease deed dated 8th October, 2002 in LPA 2298-99/2006 is at a rent of Rs. 1,56,11,983/- per annum to be increased by 30% every 10 years. The position in the other leases is the same.

24. We find the following other differences between the leases of which freehold conversion is being allowed and the subject leases:-

i.) The leases of which conversion is being allowed are in the format prescribed in the L&DO Manual. We find the leases of the disinvested hotels to be not in that format and in an entirely different format;

ii.) While the leases of which conversion is being allowed are

in consideration of premium and the rent to be paid, the leases in favour of the respondents are in consideration only of payment of rent and without payment of any premium whatsoever; the unearned increase for allowing transfer of rights in land, from in favour of ITDC to HEPL, paid out of the share price, cannot be equated to premium û the same in any case was only 50% of the increase in the value of the land between the date when first leased/licensed and the date when assigned to HEPL and can by no stretch be called the price for the grant of lease. A Division Bench of the Bombay High Court recently in **Smt. Jaikumari Amarbahadursingh v. State of Maharashtra** MANU/MH/0909/2008 held that the claim towards unearned increase is essentially a levy/charge in respect of the property, legally claimable by the grantor from the grantee or the transferee in exercise of rights over the land. The claim for unearned increase was held ascribable to power of regulation and control in respect of the land and was further held referable to land revenue. It was also described as a price for enabling the grantee/ lessee to transfer his rights, the government being the real owner of the land. A Division Bench of this Court in **The Commissioner Of Income Tax, Delhi-IX v. Monoflex India P. Ltd.** MANU/DE/3111/2011 held payment of unearned increase to be a condition of leasehold rights, restricting right of lessee to make third party transfers. Unearned increase cannot partake the character of premium also for the reason that while premium is the consideration for acquisition of leasehold rights, unearned increase is payable by a lessee already holding leasehold rights and as a condition for transfer thereof. Unearned increase is thus payable by the lessee and not by the transferee of the lessee. It is a different matter that under the agreement between the lessee and its transferee, the transferee pays the same. The payment, even if by the transferee, is on behalf of the lessee and thus cannot qualify as a consideration paid by the transferee for acquisition of leasehold rights. The unearned increase cannot also be said to be premium paid by the respondents for transfer/

grant of lease in their favour for the reason that the same does not find any mention whatsoever in the leases in favour of the respondents and finds mention only in the share purchase agreements. Moreover, every payment / consideration flowing from the lessee to the lessor cannot be termed as premium or price, within the meaning of Section 105 of the Transfer of Property Act. A Full Bench of the High Court of Andhra Pradesh in **Vinay Construction and Development Company, Hyderabad v. Inspector General of Registration and Stamps, Andhra Pradesh** AIR 1967 AP 90 held that the amount required to be spent on new structures during lease term could not be considered as premium. A research in law shows that high rent or even security deposit cannot be a substitute for premium. Premium has always been treated at least in the Income Tax laws at par with price and a capital receipt as distinct from rent which is treated as a revenue/recurring receipt and refundable security deposit which is not even treated as income for taxation purposes. In **Abdul Rahim v. State of Madras** AIR 1962 Madras 272, Veeraswami, J. after referring to the well known judgment in **King v. Earl Cadogan L.R.** (1915) 3 KB 485 pointed out that the term premium as ordinarily understood is a lump sum payment made outright as a price for lease. It was further held that what is contemplated by premium is something other than the agreed rent and premium in the context of a lease is in the nature of price for the lease and money which is refundable cannot be called premium. Similarly in **Ranganayaki Ammal v. M. Chockalingam** (1996) II MLJ 139 also it was held that premium as defined in Section 105 of the Transfer of Property Act is the price paid for the lease and consideration for the lease and/or for the purposes of getting a lease. The Supreme Court in **Commissioner of Income Tax, Assam v. The Panbari Tea Company Ltd.** AIR 1965 SC 1871 was faced with the question whether the amount described as premium in the lease deed is really a rent and therefore a revenue receipt. It was held that Section 105 (supra) brings out a distinction between

the price paid for transfer of a right to enjoy the property and the rent to be paid periodically to the lessor; when the interest of the lessor is parted with for a price, the price paid is premium or salami but a periodical payments made for continuous enjoyment or benefits under the lease are in the nature of rent. Accordingly it was held that premium was not a revenue but a capital receipt. A Full bench of the Madras High Court in the **Chief Controlling Revenue Authority v. S.M. Abdul Jammal** AIR 1970 Madras 288 also held that the premium is the consideration of the conveyance implied in the lease and is quantified in lump sum whether paid outright or by way of installments over a period; that though rent is also in consideration of lease but is in lieu of enjoyment which the lessee has and particularly as consideration thererfor. Though even payment of premium does not make the lessee an owner (See **Municipal Corporation of Delhi v. Shashank Steel Industries (P) Ltd.** (2009) 2 SCC 349) but we are in these proceedings to not so dissect the differences between the premium on the one hand and high rent and security deposit on the other hand. All that we are required to determine is whether the appellant while formulating the policy of freehold conversion can be said to have held bonafide belief that leases where no premium had been paid are not eligible for freehold conversion. We are of the view that the appellant clears the said test. Significantly, the Policy was intended to cover all leases. iii.) While the leases of which conversion is being allowed do not contain any provision for payment of security deposit by the lessee to the lessor, the respondents have under the lease deed paid security deposit to the appellant L&DO which is free of interest and is to be enhanced with enhancement in rent and is refundable on expiry of the term of the lease against delivery of vacant peaceful physical possession;

iv.) While under the leases of which conversion is being allowed, the rent payable is nominal, under the leases in favour of the respondents the rent payable is not only substantial but is also subject to increase;

v.) While under the leases of which conversion is being allowed, on the expiry of the term of the lease, though the accretions on the leased land are to vest in the lessor but on payment by the lessor of value thereof to be determined, but under the leases in favour of the respondents, the accretions are to vest in the appellant L&DO, without any obligations to pay the value thereof;

vi.) While the leases, of which conversion is being allowed, are by way of a government grant and as a developmental act, the leases in favour of the respondents were in pursuance to the share purchase agreements.

25. We are of the opinion that the aforesaid differences are sufficient to belie any case of discrimination and it is not for this Court to go into the insufficiency even if argued of the differences to mete out a different treatment to the respondents. These are policy matters and freehold conversion, as aforesaid is in the sole discretion of the lessor and if the lessor in its wisdom does not want to allow such conversion to certain categories of lease, no case for judicial review thereof is made out in the face of differences aforesaid. The Supreme Court recently in **Union of India v. Nitdip Textile Processors Pvt. Ltd.** (2012) 1 SCC 226 held that a large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the Court will be reluctant and perhaps ill-equipped to investigate. It was further observed that in this imperfect world, perfection even in grouping is an ambition hardly ever accomplished and that the question of classification is primarily for the governmental judgment and ordinarily does not become a judicial question. It was yet further held that a power to classify being extremely broad and based on diverse considerations of executive pragmatism, the judicature cannot rush in where even the legislature merely treads. Similarly, in **N. Vasundara v. State of Mysore** (1971) 2 SCC 22 it was held that once the classification is on reasonable basis, the Courts are not expected to interfere with the manner and method of classification. The differences aforesaid in the two kinds of leases/transactions are found to bear a just and reasonable relation to the Policy of freehold conversion.

26. We are further of the opinion that owing to the differences aforesaid the appellant L&DO can be said to have bonafide held the view that the leases of the land underneath disinvested hotels would not be

eligible under the Policy/Scheme for conversion, since no ownership rights had been conferred thereunder. It is also worth highlighting that such policies/schemes of freehold conversion are enunciated in the exercise of executive function. It is up to the appellant L&DO as lessor of the land to grant or not grant freehold rights in the land that was granted on leasehold and to whom. However, the lessor herein being the State, cannot discriminate arbitrarily. It thus falls for consideration whether the leases in favour of respondents fall in the same category, where such conversion is being permitted and whether the appellant is discriminating against the respondents. The respondents herein do however, as aforesaid, form a class by themselves carved out by the learned Single Judge, as disinvested hotels. Though the learned Single Judge has held that the Conversion Policy does not carve out any exception qua disinvested hotels and that the exception if any to the policy has to be in the policy only and cannot be by way of executive instructions but losing sight of the fact that the policy itself is an executive instruction and does not have a legislative colour. Thus, even if it were to be held that the subsequent decision to not allow freehold conversion of land underneath disinvested hotels is not borne out from the policy, the same is at best a modification/amendment of the Policy and it is not the case of the respondents that the officials/authority who took such subsequent decision were any inferior to those who had framed the original Policy or that they were not entitled to take the subsequent decision. The appellant in the matter of implementation/working of such a policy is always entitled to exclude certain persons who may be forming a class by themselves and we are unable to find any bar to such modification/amendment of the policy. The Supreme Court in **Chairman, Ramappa Gundappa Sahakari Samyakta Besava Sangha Ltd. v. State of Mysore** (1974) 2 SCC 221 held that if every policy statement or direction of Government especially regarding disposal of State Property were construed as irreversibly creating right to property in prospective beneficiaries, strange consequences would follow and the government cannot be held prisoner to its administrative decisions which are required to be altered from time to time. Reference with benefit can also be made to **A.K. Kraipak Vs. UOI** (1969) 2 SCC 262 and **U.P. Financial Corp. Vs. Gem Cap (I) P. Ltd.** (1993) 2 SCC 299 laying down that if the High Court cannot sit as an appellate authority over the decision and order of quasi judicial authorities, it follows equally that it cannot do so in the case of administrative authorities and that if there is more than one choice available to the administrative authorities

they have a right to choose and the Court cannot substitute its judgment for the judgment of the administrative authorities in such cases.

27. The matter can be looked at from another aspect. What the respondents, by claiming freehold conversion are seeking is, to become absolute owners of the prime commercial properties belonging to the people at large held by the appellant L&DO in trust and which absolute ownership rights were not intended to be given at the time of disinvestment of the hotels standing thereon. The respondents did not come to this Court with the case that instead of lease deeds, sale deeds ought to have been executed. On the contrary, after becoming lessees, they are seeking to become owners. The appellant L&DO in the matter of disposal of public properties partakes the character of a trust and is entitled to the best price of such properties and ownership cannot be smuggled in through the backdoor of lease. Reference with benefit in this context can be made to **Centre for Public Interest Litigation v. Union of India** (2012) 3 SCC 1. The Division Bench of this Court speaking through one of us (Acting Chief Justice) in **Aggarwal and Modi Enterprises (Cinema Project) Pvt. Ltd. v. New Delhi Municipal Council** 123 (2005) DLT 154 repelled the plea of discrimination observing that before a claim based on equality clause is upheld it must be established that the claim is just and legal and that the doctrine of discrimination is founded upon existence of an enforceable right. The attempt of the owners of Chanakya Cinema in that case to equate their case with small shopkeepers was held to be meaningless holding that they constitute a separate class. Interestingly, in that case the plea of the owners of Chanakya Cinema was that NDMC was giving longer leases to hotels and the same treatment should be extended to the cinema sites. This argument was also rejected.

28. The appellant and other governmental agencies are known to grant leases viz. of markets, shops etc. Infact one such leases granted by NDMC to Chanakya Cinema at New Delhi was held to have lapsed and the eviction was upheld till the Supreme Court vide judgement reported as **Aggarwal and Modi Enterprises Pvt. Ltd. v. NDMC** (2007) 8 SCC 75. The very fact that the entitlement to freehold was confined only to those leases where ownership rights had been conferred signifies that such conversion was not intended where according to the appellant, ownership rights had not been conferred. In the light of the differences pointed out above, the appellant can well be believed to have entertained an opinion that conversion is to be granted only of those leases for which

premium had been paid and not to other leases.

29. We therefore do not find any right in the respondents to compel the appellant L&DO to convert the leasehold rights in the land underneath disinvested hotels and cinema aforesaid into freehold. We also do not find any arbitrariness or discrimination in the refusal of the appellant L&DO to grant freehold conversion sought by the respondents. Axiomatically, we are unable to uphold the judgments of the learned Single Judge under appeal and set aside the same, allowing these appeals. Resultantly, the writ petitions filed by the respondents are dismissed. However, in the circumstances, no costs.

ILR (2013) I DELHI 190
W.P. (C)

ROMA HENNY SECURITY SERVICES PVT. LTD. ....PETITIONER

VERSUS

CENTRAL BOARD OF TRUSTEES, E.P.F. ORGANIZATION THROUGH ASSISTANT P.F. COMMISSIONER, DELHI (NORTH) ....RESPONDENT

(A.K. SIKRI, ACJ. & RAJIV SAHAI ENDLAW AND RAJIV SHAKDHER, JJ.)

W.P. (C) NO. : 831/2012 DATE OF DECISION: 12.09.2012

The Employee's Provident Funds and Miscellaneous Provisions Act, 1952—Section 7Q, 8, 8B to 8G and 14 B—Petitioner had not paid provident fund contribution and other contribution including administration charges payable under different provisions of Act in time and because of late payment, APFC initiated proceedings for recovery of damages under Section 14-B of Act—Damages in sum of Rs. 7,10,989/- were

imposed under Section 14B of Act—APFC further ordered that petitioner is liable to remit a sum of Rs. 4,53,886/- towards interest payable under Section 7Q of PF Act @ 12% per annum—Order attaching current account of petitioner, recovering a sum of Rs. 4,53,886/-, challenged before High Court—Plea taken, once damages under Section 14B of Act are recovered, there cannot be any payment of interest under Section 7Q of Act as interest component is already included in damages imposed under Section 14B of Act—Per Contra plea taken, Section 7Q of Act was introduced in year, 1997 which prescribes payment of interest on late damages of provident contribution—Unlike Section 14B of Act which provides for damages, this provision is compensatory in nature and there is no need to provide any adjudication or give any hearing—Legislative intent was that as soon as any amount becomes due, interest will accumulate automatically till such time amount is paid—Held: Interest on delayed contribution of provident fund became payable statutorily—After 26.09.2008, damages are now reduced by 12% at every earlier table is applied, interest payable under Section 7Q of Act was already included—Period for which damages under Section 14B of Act are levied is from June, 1999 to October, 2008—For almost entire period, interest stands charged by imposing damages under Section 14B of Act with application of rates mentioned in table prevailing prior to 26.09.2008—Clarification issued by Department that interest is to be charged separately would be of no avail—Mechanism to charge interest separately was not enforced by modifying existing table, which step was taken only in issuing fresh table making effective from 26.09.2008—In M/s. System and Stamping, Division Bench took correct view that damages under Section 14B of Act were inclusive of interest chargeable under Section 7Q of Act; as present case covers that very period, respondent had no right to charge interest

under Section 7Q of Act additionally, when it already stood payable in order passed under Section 14B of Act—PF Department directed to refund that amount of Rs. 4,53,886/- along with interest @ 12% till date of payment.

Important Issue Involved: Damages under Section 14B of the Provident Fund Act were inclusive of interest chargeable under Section 7Q of the Act.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. S.P. Arora, Advocate.

FOR THE RESPONDENTS : Ms. Aparna Bhat with Ms. Raj Kumari Banju, Advocates.

CASES REFERRED TO:

1. *M/S System and Stampings and Anr.* vs. *Employees' Provident Fund Appellate Tribunal and Ors.* 2008 LLR 485.
2. *Organo Chemical Industries and Anr.* vs. *Union of India and Ors.* AIR 1979 SC 1803.

RESULT: Allowed.

A.K. SIKRI, ACTING CHIEF JUSTICE:

1. Vide orders dated 13.7.2012 the Division Bench referred the matter for determination of question of law, which arises in this petition, by a Larger Bench. The reason for reference of the matter to the Larger Bench was the judgment given by the earlier Division Bench in the case of **M/S System and Stampings and Anr. Vs. Employees' Provident Fund Appellate Tribunal and Ors.** 2008 LLR 485. It was argued by the respondents that certain facts/provisions could not be pointed out to the Division Bench and had that position been there before the Court, it would have changed the direction of the judgment. The Division Bench felt that in case the stand of the respondent is accepted, that would result in taking contrary view to the view taken by the Division Bench in **M/**

S System and Stampings (supra), and for this reason, it would be appropriate if the matter is referred to the Larger Bench for determination. The facts are stated in detail in the reference order dated 13.7.2012. However, for complete understanding of the issue at hand, it would be necessary to re-visit those facts and incorporate in the present order, which we now proceed to do.

2. The petitioner is an establishment engaged in supplies of manpower for the purposes of security and surveillance to different establishments and is covered by the provisions of the PF Act. It is allotted Code Number DL-27506. It appears that the petitioner had not paid provident fund contribution and other contribution including administrative charges payable under different provisions of the said Act in time and because of this late payment the Assistant Provident Fund Commissioner initiated proceedings for recovery of damages under Section 14-B of the Act. These proceedings culminated in passing of order dated 26.11.2010 holding that the establishment had failed to pay, within prescribed time limit:-

(i) The Provident Fund contribution;

(ii) The Employees. Pension contribution;

(iii) The Insurance Fund contribution; and

(iv) The Administrative charges For the period from 06/99 to 06/04, 03/05 to 05/05, 07/05 to 01/07, 05/07 to 08/08, 10/08, 10/08.

3. For this reason, damages in the sum of Rs. 7,10,989/- were imposed under Section 14-B of the Act; details of which are as under:-

For the period from 06/99 to 06/04, 03/05 to 05/05, 07/05 to 08/08, 10/08, 10/08 totalling Rs. 710989/- be recovered as per the account wise schedule indicted below from the employer in relation to M/s Roma Henny Security Services Pvt. Ltd. bearing code No. DL/27506:

Nature of damages	Amount	Account No.
P.F. contributions	Rs. 165371/-	1
Administrative Charges	Rs. 60889/-	2
FPF/EPS contributions	Rs. 456578/-	10
EDLI contributions	Rs. 27610/-	21
EDLI administrative charges	Rs. 541/-	22
	Total Rs. 710989/-	

(Rs. Seven Lac Ten Thousand Nine Hundred Eighty Nine only)

4. The order further indicated that the petitioner was also liable to remit a sum of Rs. 4,53,886/- towards interest payable under Section 7-Q of the PF Act @ 12% p.a. which provisions come into force vide notification dated 30.06.1997. The account wise detail of the amount payable towards Section 7-Q of the PF Act was furnished as follows:-

Nature of interest	Amount	Account No.
P.F. contributions	Rs. 105249/-	1
Administrative charges	Rs. 38918/-	2
FPF/EPs contributions	Rs. 291705/-	10
EDLI contributions	Rs. 17654/-	21
EDLI administrative charges	Rs. 360/-	22
	Total Rs. 4,53,886/-	

The petitioner paid the amount of damages of Rs.7,10,989/- vide cheque No. 632192 dated 28.12.2010. By a separate letter of even date, the petitioner disputed the liability of interest under Section 7-Q of the Act on the ground that this amount had already been included in the amount of damages calculated by the respondent. The respondent however, did not accept this plea and issued attachment orders under Section 8F of the PF Act and attached the current account of the petitioner and by this process recovered a sum of Rs. 4,53,886/- on 3.2.2011. The petitioner protested against this recovery vide his representation dated 12.2.2011 drawing the attention of the Division Bench judgment of this Court in the case of **M/S System and Stampings** (supra) which was upheld by the Supreme Court, as the SLP thereagainst was dismissed in limine. However, this did not have any effect on the respondent who made a further recovery of Rs. 13775.00 under Section 7-Q of the PF Act on account of late payment of Rs. 4,53,886.00. It is under these circumstances, the petitioner has preferred the instant petition.

5. From the aforesaid, it would be clear that the case of the petitioner is that once damages under Section 14-B of the Act are recovered, there cannot be any payment of interest under Section 7-Q of the Act as the interest component is already included in the damages imposed under Section 14-B of the Act. The challenge to recovery is thus, laid on the following basis:-

(a) The amount of interest payable under Section 7Q of the Act is already stand included in the slab in damages prescribed by the

respondent under Section 14B of the PF Act as specifically held by this Court in **M/s System and Stampings** (supra).

(b) The respondent does not have any statutory power to charge and calculate any amount of interest under Section 7Q of the Act as the said section is not a charging section and there is no provision in the Act for recovery of the amount of interest calculated under this provision. It is submitted that provision of Section 8 and 8-B to 8-G relating to recovery do not provide for recovery by any throaty and charge under Section 7Q of the Act.

6. In support of the first proposition namely interest payable under Section 7-Q of the Act stands included in the slab in damages prescribed by the respondent under Section 14-B of the Act, Mr. Arora, learned counsel for the petitioner has relied upon **M/S System and Stampings** (supra) and in that case the Division Bench has referred to Office Memorandum dated 29.5.1990 which reads as under:-

"Moreover, now that in the recent amendment to the Act, we have already provided for the payment of simple interest at 12% per annum (Section 7Q) payable from the date the amount has become due till the date it is actually paid, it had become necessary to revise the rates of damages and to specify the same in the scheme. Thus, a proposal to revise the rates of damages was accordingly placed before the Central Board of Trustees and the Board in its 119th meeting held on 4th April, 1989 approved the following revised rates of damages with the condition that the position with regard to the incidence of default following the revision of the rates of damages would be analysed after six months from the date the new rates come into force.

Period of Delay	Revised Rates of Damages	Interest chargeable under Section 7Q	Total	Existing rate of damages
(i) 2 months or less	5	12	17	25
(ii) Over 2 months but less than 4 months	10	12	22	25
(iii) over 4 months but less than 6 months	15	12	27	25
(iv) Over 6 months	25	12	37	25

7. From the aforesaid the Division Bench concluded that the rates of damages were revised payable under Section 14 B of the PF Act by including the payment of simple interest @ 12 p.a. payable under Section 7-Q of the PF Act. On that basis, the Court held that no additional interest under Section 7Q of the PF Act was payable once the damages were paid under Section 14B of the Act. The contention of the Provident Fund Department to the contrary was turned down observing as under:-

"6. The circular dated 29.5.1990 provides that all defaulters thereafter shall be liable to pay interest at the rate specified in column 1, that is, from 5 to 25 per cent depending upon the period of default as damages under section 14B of the Act. The defaulters in addition are liable to pay interest chargeable under Section 7Q of the Act at the rate of 12 per cent per annum as mentioned in the 2nd column. The rates mentioned in column 3 of the circular is the sum total of column nos. 1 and 2. The total amount varies between 17 to 37 per cent per annum depending upon the period of default. Thus, for default of less than two months, the defaulter becomes liable to pay damages at the rate of 5 per cent per annum under section 14B and also interest under Section 7Q of the Act at the rate of 12 per cent per annum. Therefore, the defaulter becomes liable to pay damages under Section 14B and interest under section 7Q at the rate of 17 per cent per annum. This is less than the original rate of damages of 25 per cent per annum as it existed before the circular dated 29.5.1990 was issued. Similarly, for defaults between two months less than four months the defaulter becomes liable to pay damages at the rate of 10 per cent per annum under Section 14B and interest at the rate of 12 per cent per annum under section 7Q after 1.7.1997 or 22 per cent in all. For defaults of more than four months but less than six months each defaulter

becomes liable to pay interest and damages at the rate of 27 per cent per annum and in defaults of over six months interest and damages at the rate of 37 percent per annum. Thus for defaults beyond 4 months the amount payable increased from the flat rate of 25% per annum.

7. The stand of the respondent, however, is that even after 1.7.1997 the defaulter is liable to pay "Total" mentioned in column 3 as well as interest at the rate of 12 per cent per annum under section 7Q of the Act or 29%, 34%, 39% and 49% for the respective periods of default. This stand of the respondents cannot be accepted as it is contrary to their own circular dated 29.5.1990. As per the respondent, defaulter will be made to pay interest under Section 7Q at the rate of 12 per cent even when he has paid damages as per the rate mentioned in column 3 which includes interest under Section 7Q. Thus, he will pay interest under Section 7Q twice. It is clear from the circular that once interest is chargeable under Section 7Q of the Act, the defaulter should be asked to pay damages as per the percentage specified in column 1, that is, between 5 to 25 per cent per annum depending upon the period of default. The third column mentions the total of the revised rate of damages and interest chargeable under Section 7Q. Column 3 cannot be regarded as rate of damages after 1.7.1997, when interest became payable under section 7Q of the Act".

8. It is an admitted case that Special Leave Petition was filed against this order and the Supreme Court dismissed the same on the ground of limitation as well as on merits vide order dated 16.7.2009.

9. Mr. Arora also referred to the judgment of the Supreme Court in **Organo Chemical Industries and Anr. Vs. Union of India and Ors.** AIR 1979 SC 1803. In that case the vires of Section 14-B of the Act was challenged, inter alia, on the ground that Section 14-B of the Act was unbridled and unguided power to the authority to impose damages and in the absence of guidelines in the provision, it was arbitrary in nature. It was also argued that though the purpose behind this provision was to impose damages which is compensatory in character and could not exceed the interest on the amount defaulted during the period of delay. But the respondents had gone beyond the mere quantum of interest

and were levying/imposing damages making it penal in character. Rejecting these contentions, the Court took the view that 'damages' as imposed by Section 14-B of the Act included a punitive sum as well. Submission of Mr. Arora was that while explaining the expression 'damages' contemplated under Section 14-B of the Act, the Court made it clear that there was a twin purpose behind Section 14-B of the Act namely to impose penalty as well as provide compensation for the employees by claiming interest. He thus submitted that this judgment is an indicator that provisions of Section 14-B of the Act include interest element as well. Specific reference was made to the following observations in this behalf:-

> "The expression 'damages' occurring in Section 14B is, in substance, a penalty imposed on the employer for the breach of the statutory obligation. **The object of imposition of penalty Under Section 14B is not merely to provide compensation for the employees'. We are clearly of the opinion that the imposition of damages Under Section 14B serves both the purposes.** It is meant to penalise defaulting employer as also to provide reparation for the amount of loss suffered by the employees. It is not only a warning to employers in general not to commit a breach of the statutory requirements of Section 6, but at the same time it is meant to provide compensation or redress to the beneficiaries i.e. to recompense the employees for the loss sustained by them. There is nothing in the section to show that the damages must bear relationship to the loss which is caused to the beneficiaries under the Schemes. The word 'damages' in Section 14B is related to the word 'default'. The words used in Section 14B are 'default in the payment of contribution' and, therefore, the word 'default' must be construed in the light of Para 38 of the Scheme which provides that the payment of contribution has got to be made by the 15th of the following month and, therefore, the word 'default' in Section 14B must mean 'failure in performance' ,or 'failure to act.' At the same time; the imposition of damages under Section 14B is to provide reparation for the amount of loss suffered by the employees."

10. The argument of learned counsel for the respondent, on the other hand, was same which was before the Division Bench and noted in order dated 13.7.2012. To recapitulate, it was argued that Section 7Q

of the PF Act was introduced in the year 1997 which prescribes payment of interest on the late damages of the provident contribution. It was argued that unlike Section 14B of the PF Act which provides for damages, this provision is compensatory in nature and there is no need to provide any adjudication or give any hearing. The legislative intent was that as soon as any amount becomes due, interest will accumulate automatically till such time the amount is paid. The submission was that insofar as judgment in **M/s System and Stamping** (supra) is concerned, the subsequent circulars were not taken into account which would have clarified the position and resulting into different consequences. Explaining the circumstances in which the office memorandum (taken note of by the Court in the aforesaid judgment) was issued, the respondent states that a proposal was forwarded from the Central Provident Fund Commissioner proposing certain modifications in Section 14B of the PF Act more particularly in relation to the rates of damages prescribed under para 32A of the scheme. This was a mere proposal which was apparently also accepted by the Board of Trustees but it was not accepted by the Ministry as amendments to the law was not made in line with the proposal. At that time, neither para 32 as mentioned in paragraph 6 hereinabove nor section 7Q had come into force though it was introduced. Section 7-Q of the Act was made effective only in July 1997. That in 1997 by virtue of an amendment in the law, section 7Q got introduced. She referred to the clarificatory Circular dated 12.9.1997 precisely on this aspect which made it abundantly clear that provisions of Section 7-Q of the Act were different from Section 14-B and the table stipulating the damages for default did not include interest element. She also submitted that the observations of the Supreme Court in **Organo Chemicals Industries & Anr.** (supra), as relied upon by the petitioner, were totally out of context, insofar as present case is concerned and were of no avail to the petitioner.

11. We have deliberated upon the aforesaid submission of counsel on either side.

12. It is not in dispute that if the judgment of **M/s System and Stamping** (supra) is to be followed, the case is covered in favour of the petitioner. However, we find substance in the submission of learned counsel for the respondent that in the said judgment the Division Bench entirely rest upon the Office Memorandum dated 29.5.1990 on the basis of which the Bench came to the conclusion that interest element chargeable under Section 7-Q of the Act was included in the table prescribing

damages payable under Section 14-B of the Act. As we will demonstrate hereinafter, there were various other subsequent Circulars which were not taken into account. In the first instance, it needs to be pointed out that the Office Memorandum referred to by the Division Bench was dated 29.5.1990. It was issued at the time when Section 7-Q was not made effective. Pertinently, this provision was introduced in the Act in the year 1988 but was made effective only from 1.7.1997. Since the provision was not in force as on 29.5.1990, it appears that by that mechanism which was applied administratively was to include the component of interest while imposing the damages under Section 14-B of the Act. However, the position changed after Section 7-Q of the Act was in force w.e.f. 1.7.1997. The interest on delayed contribution of provident fund became payable statutorily. While this was so, the aforesaid table continued to operate which has now been modified and replaced by the another table made effective from 26.9.2008 and the rates of damages as per the revised table are as under:-

Sl. No.	Period of default	Rate of damages (Effective 26.9.2008)
1.	Less than two months (upto 59 days)	5%
2.	Two months and above but less than four months (upto 119 days)	10%
3.	Four months and above but less than Six Months (upto 179 days)	15%
4.	Six months and above (180 days and above)	25%

13. It is clear from the above that w.e.f. 26.9.2008 the damages under Section 14-B of the Act are charged on the aforesaid basis which would show, for example if the period of default is less than two months, the damages payable are 5%. However, the table which was governing upto this date and is noted in the judgment of **M/s System and Stamping** (supra), the damages for the period of default of less than two months were 17%. Same is the position in respect of other periods of default when the two tables are kept in juxtaposition it would clearly revealed that the damages are now reduced by 12% at every stage meaning thereby

component of interest under Section 7-Q is now removed. The comparison of the aforesaid two would show that upto 26.9.2008 the earlier table continue to govern which included the element of interest under Section 7-Q of the Act. From 26.9.2008 onwards, however the two are segregated. This would clearly bolster the stand of the petitioner that if the earlier table is applied which was so done, interest payable under Section 7-Q of the Act was already included.

14. In the present case, the period for which damages under Section 14-B of the Act are levied is from June, 1999 to October, 2008. Therefore, for almost the entire period interest stands charged by imposing damages under Section 14-B of the Act with the application of rates mentioned in the table prevailing prior to 26.9.2008. It is not the case of the Department that for one month i.e. 27.9.2008 to October, 2008 damages were charged on the rates specified in the new table. When the matter is examined from this angle also we find substance in the argument of the learned counsel for the petitioner that the clarification issued by the Department that interest is to be charged separately would be of no avail. Of course, that may be the legal position. However, the mechanism to charge interest separately was not enforced by modifying the existing table which step was taken only in issuing fresh table making effective from 26.9.2008.

15. We are therefore of the opinion that in **M/s System and Stamping** (supra) the Division Bench took the correct view that damages under Section 14-B of the Act were inclusive of interest chargeable under Section 7-Q of the Act as the present case covers that very period, the respondent had no right to charge the interest under Section 7-Q of the Act additionally when it already stood payable in the order passed under Section 14-B of the Act. As the petition succeeds on this ground itself, it may not be necessary to go into the other issues raised by the petitioner.

16. We accordingly set aside the order dated 26.11.2010 insofar as it directs payment of interest under Section 7-Q of the Act in the sum of Rs. 4,53,886/- in addition to the damages payable under Section 14B of the Act which was levied to the tune of Rs. 7,10,989/- as the interest payable under Section 7-Q of the Act was already included therein. Since this amount was wrongly recovered from the petitioner on 3.2.2011, the PF Department is directed to refund that amount of Rs.4,53,886/- alongwith interest @12% to be calculated till the date of payment.

17. No order as to costs.

ILR (2013) I DELHI 202
WRIT PETITION (C)

CHETNA KARNANI ....PETITIONER

VERSUS

UNIVERSITY OF DELHI AND OTHERS ....RESPONDENTS

(A.K. SIKRI, ACJ. & RAJIV SAHAI ENDLAW, J.)

WRIT PETITION (C) NO. : 3971/2012 **DATE OF DECISION: 12.09.2012**

Constitution of India, 1950—Article 226—Petitioner cleared class XII and applied for admission in Delhi University under Sports Quota, being a chess player—Criteria for sports admission provides for Fitness Test—By way of writ petition, petitioner approached High Court for quashing communication prescribing fitness test mandatory and precondition for appearing in sports trial test—Plea taken, chess does not involve any physical strain or activity—There is no rationale for holding such a fitness test for games like chess, which does not require strict standard of body fitness—Per contra plea taken, game of chess requires not only mental sharpness but physical prowess to be able to withstand stress and develop stamina, so to be able to maintain composure for long duration and keep mind active throughout—Held: While laying down physical fitness standard in impugned communication, University of Delhi has not specifically taken into consideration 'game specific fitness' which varies for different sports—Rigorous standard may not be totally justified for those who are into Indoor Games like Carom and Chess, which do not involve even least physical activity—Mandamus issued to University of Delhi to revisit and reconsider issue and if necessary,

formulate standards for such sports which may be applicable from next academic year—Aforesaid exercise, may consume some time—Academic session has started for this year—Unless there is re-examination reconsideration of issue and fresh standards are prescribed by university for such indoor sports including chess, it is difficult to give any relief to petitioner—Laying down all those standards is not function of Courts—This Court can only direct University to reconsider matter in light of our observations made in this judgment and after in depth deliberations, come out with physical standards that are required for these games.

Important Issue Involved: While laying down the physical fitness standard for admission in Sports Quota 'game specific fitness' should only be insisted.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Rajat Aneja along with Mr. Vaibhav Jairaj, Advocate.

FOR THE RESPONDENT : Mr. Mohinder J.S. Rupal, Advocate for R-1. Mr. Rakesh Ganga along with Ms. Kanchan Bala, Advocates for R-4. Ms. Beenashaw N. Soni, Advocate for R-5. Mr. S.S. Ahluwalia, Advocate for R-6.

RESULT: Disposed of.

A.K. SIKRI (ACTING CHIEF JUSTICE)

1. The petitioner has cleared her 10+2 Examination (Class XII) under the Central Board of Secondary Education and secured an aggregate of 72.25% marks in the stream of Commerce and Mathematics. She is desirous of pursuing higher studies and aspiring to get admission in a

College under University of Delhi in English (Hons.)/B.Com. Courses. It is matter of common knowledge that now-a-days with 72.25% marks, it is difficult to secure admission, particularly, in any of the four colleges in which she applied for admission, viz., Kirori Mal College (Respondent No.3), I.P. College for Women (Respondent No.4), Gargi College (Respondent No.5) and Maitreyi College (Respondent No.6). However, there is a separate channel for admission for those students who are sports persons inasmuch as University of Delhi provides Sports Quota as well. Therefore, an outstanding sportsperson can secure admission if he/she is able to qualify therefor as per the guidelines/criteria for admission to various Undergraduate/Post Graduate courses on the basis of sports.

2. Vide communication dated 29.5.2010, the University circulated, for compliance, "Revised Guidelines for Admission to various Under-Graduate & Post-Graduate courses of the University on the basis of Sports". These guidelines are formulated with the objective of giving admission under Sports Quota (a) to encourage mass participation of students in Sports activities and general body fitness, for which colleges may organize indoor games like Yoga, Aerobic classes, games of Mass performance and inter-class competitions and (b) building team for various sports recognized by the IOA. As per these guidelines, system of points which had to be secured by an aspiring student has been devised. These points are divided into two categories, i.e., the students earlier represented at various level in a particular sports and certificate received at such level and the number of points awarded in Sports trial held by the University of Delhi. The points secured in both the categories are added and on that basis Merit List is prepared of such sports persons for their admission under the Sports Quota. However, this criteria is revised in this year. Vide communication dated 18.5.2012, the criteria for sports admission now provides as under:

"II Admission based on Sports Trials:

A. Maximum 50 Marks for Sports Certificates as per the chart enclosed.

B. It is essential for the candidate to qualify any two of the following Fitness Test items as per the standards laid down by the university (for the general fitness):

1.	Strength	Standing broad Jump: 1.65 mts. for Men 1.15 mts. for Women
2.	Endurance	1000 mts. Rn/Walk 5.00 min for Men 6.0 in for Women
3.	Speed	50 mts. Dash: 8.00 sec. for Men. 9.00 sec. for Women.

Note: The colleges not having facilities to conduct the above test can contact Delhi University Sports Council for all technical/ administrative help by giving advance Information. In this respect, so that necessary arrangements could be made for the same.

C. Maximum 50 marks for Sports Trials includes skill test, game performance test, game specific fitness, fundamentals of the game/sport etc."

3. The petitioner has no quarrel with prescription of marks as per Part A and C above. However, she feels aggrieved by the Fitness Test, that is provided in Para B. The case of the petitioner is that she is a Chess player and this game does not involve any physical strain or activity. According to her, there is no rationale for holding such a fitness test for game like Chess which does not require strict standard of body fitness. She submits that she is otherwise physically fit and healthy. However, being little obese, she is unable to meet the strict and high standard required to pass fitness test.

4. As she could not qualify the prescribed fitness test, she was not found eligible for admission under Sports Quota. She made the representation dated 27.6.2012 pleading with the respondents to permit her to participate in sports trial without insisting any fitness trial. She submitted that Chess is an indoor game and such criteria of Broad Jump, Run/Walk and 50m Dash are not application, which defeats the very purpose of inclusion of the game of Chess. The University, however, did not respond to this representation of her's and after waiting for some time, she approached this Court by way of present writ petition for quashing the aforesaid communication dated 18.5.2012 insofar as it makes prescribed fitness test mandatory and pre-condition for appearing in Sports trial test.

5. The respondent Nos.1, 5 and 6 have filed their counter affidavits.

Insofar as Respondent Nos.5 & 6 are concerned, they have stated that the petitioner could not qualify the physical fitness test and was, therefore, not allowed to give the game trials for Chess. She had applied for B. Com. and English (Hon.) in those colleges. The colleges have closed the admission process under the Sports Quota on 31.7.2012. However, there are withdrawals, etc. on later dates. It is also stated that the colleges are bound by the University directives. The respondent No.6/College has simply stated that it is governed by the rules and policies of the Universities. The petition is mainly contested by the University of Delhi/Respondent No.1. The provision for qualifying physical fitness test is sought to be justified for all classes of Sports persons wishing to get admission in the Undergraduate courses on the ground that for any game, be it indoor or outdoor, minimal fitness is required. It is also stated that the standards of physical fitness as prescribed are basic and, therefore, reasonable and justified.

6. It is submitted by the University of Delhi that in Sports College the physical fitness tests conducted on sportspersons seeking admission are far more stringent. The University of Delhi through its Sports Council has only put 30% of the basic physical fitness standard to be the minimum qualifying criteria which is not difficult to be accomplished by any serious Chess player as is reflected from the trials of these sportspersons. It is mentioned that a Chess player who has achieved some level of competence and has seriously taken this sport knows well the importance of physical fitness in the game of Chess. This was also reflected in the physical fitness tests conducted for these Chess players. Out of total 41 candidates who underwent this physical fitness tests only 9 could not succeed to clear the same and were, therefore, disqualified. None of them except the petitioner has challenged the holding of this test being well aware that physical fitness is part of the preparation to be good player of Chess. The game of Chess requires not only mental sharpness, but physical prowess to be able to withstand stress and develop stamina so to be able to maintain composure for long duration and keep mind active throughout. Several World Class champions of Chess admit the necessity of physical fitness of a Chess player as is apparent from the extracts of the interviews of few such players of Chess.

7. Counsel for both the parties argued on the same lines as adopted in the writ petition and counter affidavit respectively. We have considered their submissions and have also gone through the records.

8. No doubt, for any sport Medical Fitness is a must. Even though Chess is not a game where the body is physically used, it is important to be physically fit to get the brains work faster and longer, because the games sometimes stretch beyond 5 to 6 hours. Stamina is of almost importance for all Chess players. Without physical exercise on regular basis, it will be difficult for Chess players to perform well. All the top players go to gym regularly, or go to the swimming pool or play Tennis or some other game to keep them fully fit. It is said that for a healthy brain, it is important to have a fit and healthy body. There cannot be any denial of the fact that physical fitness is a mandatory requirement in any sports, be it outdoor or indoor. It is applicable to even those indoor games which do not involve any physical activity like Chess or Carom. They are, after all, mind games and level of stress, which is an important requisite and which a person can bear, depends upon his/her physical fitness. No doubt, playing Chess primarily causes mental fatigue rather than physical fatigue. However, studies have revealed that those who are physically fit are able to cope with the mental fatigueness much better. Therefore, being healthy becomes important even for those playing indoor games. Insofar as the game of Chess is concerned, since a player has to prepare for 7-8 hours a day to become a good player, physical fitness is an essential as mental fitness. Furthermore, to participate in various competitions on national and international levels, as the case may be, such sportsperson has to undertake frequent travels.

Vishwanathan Anand, a great Indian Chess player of international repute, puts it "even a Chess player if not healthy his/her body will not be able to keep up. Very simply, even if you have something as common as 'common cold', you can.t compete at you 100%. So we try to improve out stamina and our general resistance to withstand the strain of competing." In his opinion, "Mental fatigue is more difficult to handle than physical fatigue. When the body is tired, we can sleep really well. But it the mind is tired or worried, it is very difficult to sleep."

Therefore, physical fitness assumes importance even if tackling mental fatigue. For a Chess, who is not physically fit, it may become difficult to sit for hours together and give the concentration while playing which this game requires and demands. It is for this reason that most of the Chess players also undertake physical exercise to remain fit. So far so good.

9. However, the next poser is: whether same physical standards are required to be set for sportsperson playing different games/sports? To put it otherwise, is it rationale and appeals to common sense, to judge on the same yardstick those players who are playing outdoor games involving great physical activity and for those games, like Chess, which does not entail any physical activity at all. To put, still differently, whether University of Delhi should insist only on 'game specific fitness' which varies from different sports or have uniform fitness test across the board irrespective of nature of game.

10. We feel that while laying down the physical fitness standard in the impugned communication, the University of Delhi has not specifically taken into consideration this aspect. The standards as prescribed demand physical fitness at three levels, viz., strength, endurance and speed. For strength, men are required to achieve 1.65 mtrs. for Standing Broad Jump whereas this requirement for women is 1.15 mtrs. Likewise, 1 Kms. runs is to be accomplished by men in 5 minutes and by women in 6 minutes to pass Endurance Test. For Speed Test, 50 mts. Dash is to be covered by men in 8 seconds and by women in 9 seconds. While these standards may be basic standards and perfectly justified in respect of sports involving strenuous physical activity like Football, Tennis, Cricket, Hockey, etc., such rigourous standard may not be totally justified for those who are into Indoor games like Carom and Chess which do not involve even the least physical activity. Though it is agreed, as discussed above, physical fitness is needed also by those playing the game of Chess. However, what needs to be examined is, should their physical fitness can be seen on the application of different parameters and yardsticks, say somewhat relaxed fitness standard regarding strength, endurance and speed, coupled with appropriate medical examination test? Should the sportsperson playing sports which involve only mental skill be judged on the same standards as prescribed for outdoor sports?

11. We find that the matter is not examined by the University while laying down the standards in the impugned communication. No doubt, it is stated that the criteria laid down by some other Universities is more stringent than the one laid down by the Sports Council for the University of Delhi and that it is the basic fitness criteria. However, what we are emphasizing is that while this criteria may be apt and totally justified for outdoor games or even indoor games involving physical activity like Badminton or even Table Tennis, it may not be entirely rationale to have

this criteria for game like Chess. No doubt, it is the physical fitness which leads to mental fitness. However, it should be specifically examined as to whether for a person playing game of Chess such a level of physical fitness is appropriate.

12. Though we are of the opinion that different standards to physical fitness may be required for games like Chess or Carom or which had been required fitness while playing game, laying down all those standards is not the function of the Courts. Therefore, this Court can only direct the University to reconsider the matter in the light of our observations made in this judgment and after indepth deliberations, come out with the physical standards that are required for these games.

13. In this backdrop, we come to the question of relief to the petitioner. Unless there is re-examination/reconsideration of the issue and fresh standards are prescribed by the University for such indoors sports including Chess, it is difficult to give any relief to the petitioner. The aforesaid exercise, which is required to be undertaken by the University, may consume some time. Academic session has started for this year. By the time this exercise is completed and fresh standards laid down, the present academic session would have advanced further. That apart, the respondents had shown the performance of the petitioner in the aforesaid physical test, which is much below par and appears to be far from the satisfactory. Therefore, we are unable to give any direction to the respondents insofar admission of the petitioner in this academic session is concerned. However, mandamus is issued to the University of Delhi to revisit and reconsider the issue and, if necessary, to reformulate the standards for such sports as directed above, which may be applicable from the next academic year.

14. Writ petition is disposed of in the aforesaid manner.

ILR (2013) I DELHI 210
FAO

MANISH AGGARWAL ....APPELLANT

VERSUS

SEEMA AGGARWAL & ORS. ....RESPONDENTS

(SANJAY KISHAN KAUL & VIPIN SANGHI, JJ.)

FAO NO. : 388/2012, DATE OF DECISION : 13.09.2012
CM NO. : 15667/2012
& 15668/2012

Family Courts Act, 1984—Section 19—Family Court By Impugned Order Granted Interim Maintenance Under Section 125 Cr.P.C.—Challenged In Appeal—Maintainability of Appeal Examined In View of Section 19 of The Act—Held, In Respect of Orders passed Under Section 24-27, Hindu Marriage Act, Appeals would lie in view of section 19(6) of the act as such orders are intemediate orders—also held, no appeal would lie against orders passed under Section 125-128 Cr.P.C.—Further held, remedy of criminal revision would be available against both the interim and final orders under section 125-128 Cr.P.C—further held, all orders passed by the family court which are intermediate orders and not merely interlocutory order would be amenable to the appellate jurisdiction under Section 19 of the Act—finally held, the present appeal not maintainable.

A reading of Section 19 of the said Act shows that under sub-section (1), save as provided in sub-section (2), an appeal lies from every judgement or order of the Family Court to the High Court, both on facts and on law. This is irrespective of anything contained in the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC'),

Cr.P.C. or any other law, which would, thus, also include The Hindu Marriage Act, 1955 (hereinafter referred to as the 'HM Act'). However, this right of appeal comes with one limitation, i.e., it does not lie against an interlocutory order. A question, thus, arises as to what is the meaning of an interlocutory order. **(Para 4)**

Sub-section (2) of Section 19 of the said Act specifically prohibits any appeal from an order passed under Chapter 9 of the Cr.P.C. which contains only four provisions, i.e., Section 125 to Section 128. Thus, a conjoint reading of sub-section (1) and sub-section (2) of Section 19 of the said Act makes it clear that the appeal would not be maintainable before this Court from an order passed under Chapter 9 of the Cr.P.C. However, it is not as if a party aggrieved by an order passed under any of the provisions of Chapter 9 of the Cr.P.C. is remediless. This is so in view of sub-section (4) of Section 19 of the said Act, which provides for the revisionary power specifically qua an order passed under Chapter 9 of the Cr.P.C. making the intent of the legislature quite clear. Once again, the exception carved out is that it should not be an interlocutory order and, thus, it would have to be examined as to what is an interlocutory order in the context of Section 125 to Section 128 of the Cr.P.C. for the purpose of Section 19 (4) of the said Act. **(Para 5)**

On having examined the divergent views of different High Courts and on hearing learned counsel for the parties, we are inclined to adopt the view of the Uttarakhand, Allahabad, Madhya Pradesh, Gujarat & Calcutta High Courts while differing from the views of the Bombay, Rajasthan, Karnataka & Orissa High Courts. The reason for adopting such a course of action is the manner in which we have explained our view and understanding of the provisions of Section 19 of the said Act at the inception of the judgement. It is quite clear that qua an order or judgement of the Family Court the provision of appeal under Section 19 of the said Act would prevail, irrespective of what is contained in the Cr.P.C., CPC or any other law which would include the HM Act. The

exception to the maintainability of an appeal is an interlocutory order, and, under sub-section (2) of Section 19, an order under Chapter 9 of the Cr.P.C. and a decree or order passed on consent. As noticed above, an order passed under a provision contained in Chapter 9 Cr.P.C. has to be dealt with in accordance with sub-sections (2) & (4) of Section 19 of the said Act. **(Para 21)**

The contra view plays down the non obstante clause contained in sub-section (1) of Section 19 of the said Act. What is important is that while the amendment to Section 28 (1) of the HM Act sought to remove the provision of appeal from an order, while confining the right to an appeal only qua a decree, sub-section (2) of Section 28 made provision for appeal from orders passed under Sections 25 & 26 of the HM Act, except an interim order, sub-section (1) of Section 19 of the said Act has used both expressions .judgement. and .order.. The amendment to the HM Act in Section 28 was made in 1976, while the said Act was enacted in 1984, i.e., much later. The legislature was, thus, conscious of the consequence of providing for appeals from orders which were not interlocutory orders. This judgement in Shah Babulal Khimji case (supra) had also been delivered before the enactment of the said Act which elucidated the law qua intermediate orders as distinct from interlocutory orders. Thus, certainly the scope of appeal under sub-section (1) of Section 19 of the said Act cannot take its colour from the scope of appeal under Section 28 of the HM Act, particularly, because of the non obstante clause contained in Section 19 (1) of the said Act. **(Para 22)**

We, thus, conclude as under:

> i. In respect of orders passed under Sections 24 to 27 of the HM Act appeals would lie under Section 19 (1) of the said Act to the Division Bench of this Court in view of the provisions of sub-section (6) of Section 19 of the said Act, such orders being in the nature of intermediate orders. It must be noted that sub-section

(6) of Section 19 of the said Act is applicable only in respect of sub-section (1) and not sub-section (4) of Section 19 of the said Act.

ii. No appeal would lie under Section 19 (1) of the said Act qua proceedings under Chapter 9 of the Cr.P.C. (Sections 125 to 128) in view of the mandate of sub-section (2) of Section 19 of the said Act.

iii. The remedy of criminal revision would be available qua both the interim and final order under Sections 125 to 128 of the Cr.P.C. under sub-section (4) of Section 19 of the said Act.

iv. As a measure of abundant caution we clarify that all orders as may be passed by the Family Court in exercise of its jurisdiction under Section 7 of the said Act, which have a character of an intermediate order, and are not merely interlocutory orders, would be amenable to the appellate jurisdiction under sub-section (1) of Section 19 of the said Act. **(Para 26)**

[Gi Ka]

APPEARANCES:

FOR THE APPELLANT : Mr.J.P. Sengh, Sr. Advocate with Mr. Rajiv Saxena, Advocate.

FOR THE RESPONDENTS : Mr. Pramod Agarwal advocate.

CASES REFERRED TO:

1. *Aakansha Shrivastava* vs. *Virendra Shrivastava & Anr.* 2010 (3) MPLJ 151.
2. *Rahul Samrat Tandon* vs. *Smt. Neeru Tandon* 2010 (5) ALJ 134.
3. *Nasreen Begum* vs. *The State of Jharkhand & Ors.* 2006 Crl. L.J. 326.
4. *Saili Halder* vs. *Debaprasad Halder & State of West Bengal* (2005) 3 CHN 87.
5. *Smt. Kiran Bala Srivastava* vs. *Jai Prakash Srivastava* [2005(23) LCD 1].

6. *Manojkumar Harilal Joshi* vs. *Truptiben Manojkumar Joshi* 2004 GLH (24) 676].
7. *R. Varadaraj* vs. *Smt. V. Nirmala* AIR 2002 Karnataka 241.
8. *Mahesh Bhardwaj* vs. *Smt. Smita Bhardwaj* AIR 1995 Rajasthan 47.
9. *Sunil Hansraj Gupta* vs. *Payal Sunil Gupta* AIR 1991 Bom 423.
10. *Avadhesh Narain Srivastava* vs. *Archna Srivastava,* 1990 LLJ 183.
11. *Shah Babulal Khimji* vs. *Jayaben D. Kania & Anr.* AIR 1981 SC 1786.
12. *V.C. Shukla* vs. *State* 1980 (2) SCR 380.
13. *Madhu Limaye* vs. *State of Maharashtra* AIR 1978 SC 47.
14. *Amarnath & Ors.* vs. *State of Haryana & Ors.* AIR 1977 SC 2185.

RESULT: Appeal directed to be registered as criminal revision.

SANJAY KISHAN KAUL, J. (Oral)

1. The scope and ambit of Section 19 of The Family Courts Act, 1984 (hereinafter referred to as the 'said Act') has to be examined by us in the present appeal.

2. The said Act was enacted with a view to promote conciliation and secure speedy settlement of disputes relating to marriage and family affairs and to deal with matters connected therewith so as to have a composite statute to deal with various aspects. Though the statute was enacted much earlier, its implementation has been done in a phased manner as the pre-requisite was the establishment of the Family Courts under Section 3 of the said Act. For example, in most districts of Delhi such Family Courts now stand established but still not in all. Chapter 5 of the said Act deals with Appeals & Revisions and Section 19 of the said Act is the only Section falling under this chapter which reads as under:

"CHAPTER V - APPEALS AND REVISIONS 19. Appeal. -(1) Save as provided in sub-section (2) and notwithstanding anything

contained in the Code of Civil Procedure, 1908(5 of 1908), or in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order of a Family Court to the High Court both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974): Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974), before the commencement of the Family Courts (Amendment) Act, 1991.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.

(4) The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and as to the regularity of such proceeding.

(5) Except as aforesaid, no appeal or revision shall lie to any Court from any judgment, order or decree of a Family Court.

(6) An appeal referred under sub-section (1) shall be heard by a Bench consisting of two or more Judges."

3. The aforesaid controversy has arisen as the appellant has filed the present appeal to assail the impugned order dated 18.4.2012 passed by the Family Court in exercise of its jurisdiction to grant interim maintenance under the second proviso to Section 125 (1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.') We have examined the scope and ambit of this appeal provision qua the different nature of orders which are passed by the Family Court as no appeal can be filed against a judgement or order of the Family Court which is an interlocutory order [see Section 19 (1) of the said Act] and

no appeal lies in respect of an order, inter alia, which is passed under Chapter IX of the Cr.P.C. [see Section 19 (2) of the said Act]. We may note at the threshold that in FAO No.52/2012 titled Preety Bhardwaj Vs. Deepak Kumar Bhardwaj decided on 21.2.2012 passed by a Division Bench of this Court, wherein the judgement was authored by one of us (Sanjay Kishan Kaul, J.), the Court dealt with the impact of the absence of Rules under Section 21 of the said Act on the efficacy of the provision of Section 19 (1) read with sub-sections (5) & (6) of Section 19 of the said Act. In that context it was observed that a statutory right of appeal is created under Section 19 (1) of the said Act and such an appeal has to be heard by a Bench consisting of two or more Judges as per Section 19 (6) of the said Act, and the absence of Rules, which are to be framed by the High Court under Section 21 of the said Act, would not dilute the mandate of the legislation as contained in Section 19 of the said Act, especially in view of the use of the expression .may. in Section 21 of the said Act. In another order in FAO No.448/2011 titled Ashwani Mehta Vs. Vibha Mehta decided on 19.10.2011, once again, the scope of Section 19 (1) and 19 (6) of the said Act, which were brought to the notice of the Court was discussed. In a short order the appeal against an order under Section 125 of the Cr.P.C. was entertained, without any discussion in the light of the other provisions, and in that context a passing observation was made that the order of the Family Court is appealable under Section 19 of the said Act. This order is also authored by one of us (Sanjay Kishan Kaul, J.). However, in the present case the scope of exercise of jurisdiction by the High Court qua different kinds of orders passed by the Family Court, in the exercise of jurisdiction available under Section 19 of the said Act has been brought to our notice and considered by us, so that the principles are settled in respect of the judgements and orders of the Family Courts, from which an appeal or revision may be maintainable. Since this is a frequent issue arising, we have considered it appropriate to hear learned counsels for the parties at length to remove any ambiguity.

4. A reading of Section 19 of the said Act shows that under sub-section (1), save as provided in sub-section (2), an appeal lies from every judgement or order of the Family Court to the High Court, both on facts and on law. This is irrespective of anything contained in the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC'), Cr.P.C. or any other law, which would, thus, also include The Hindu Marriage Act, 1955 (hereinafter referred to as the 'HM Act'). However, this right of

appeal comes with one limitation, i.e., it does not lie against an interlocutory order. A question, thus, arises as to what is the meaning of an interlocutory order.

5. Sub-section (2) of Section 19 of the said Act specifically prohibits any appeal from an order passed under Chapter 9 of the Cr.P.C. which contains only four provisions, i.e., Section 125 to Section 128. Thus, a conjoint reading of sub-section (1) and sub-section (2) of Section 19 of the said Act makes it clear that the appeal would not be maintainable before this Court from an order passed under Chapter 9 of the Cr.P.C. However, it is not as if a party aggrieved by an order passed under any of the provisions of Chapter 9 of the Cr.P.C. is remediless. This is so in view of sub-section (4) of Section 19 of the said Act, which provides for the revisionary power specifically qua an order passed under Chapter 9 of the Cr.P.C. making the intent of the legislature quite clear. Once again, the exception carved out is that it should not be an interlocutory order and, thus, it would have to be examined as to what is an interlocutory order in the context of Section 125 to Section 128 of the Cr.P.C. for the purpose of Section 19 (4) of the said Act.

6. We may also add that sub-section (5) of Section 19 of the said Act clearly prohibits any appeal or revision from any judgement, order or decree of the Family Court except as provided under sub-section (1) to (4) of Section 19 of the said Act. Sub-section (6) of Section 19 of the said Act provides for the appeal to be heard by a Bench of two or more Judges from every judgement or order not being an interlocutory order as is mentioned in sub-section (1) of Section 19 of the said Act.

7. Now coming to the provisions of the HM Act, Section 24 provides for Maintenance *pendente lite* and expenses of proceedings, Section 25 makes provisions for 'Permanent alimony and maintenance' at the time of passing of the decree or subsequent thereto, Section 26 deals with passing of interim orders and making provisions qua Custody, Maintenance and Education of minor children, while Section 27 deals with making provisions with respect to Disposal of property in the decree. Section 28 of the HM Act is the appeal provisions from the decrees and orders. The said provisions read as under:

"24. Maintenance pendente lite and expenses of proceedings.-

Where in any proceeding under this Act it appears to the court

that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable:

[Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.]

25. Permanent alimony and maintenance.-

(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall 1[***] pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant [, the conduct of the parties and other circumstances of the case], it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has re-married or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, [it may at the instance of the

other party vary, modify or rescind any such order in such manner as the court may deem just].

26. Custody of children.- In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

[Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.]

27. Disposal of property.- In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife. 28. Enforcement of, and appeal from, decrees and orders.-

[28. Appeals from decrees and orders. - (1) All decrees made by the court in any proceeding under this Act shall, subject to the provisions of sub-section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act under section 25 or section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders, and

every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a [period of ninety days] from the date of the decree or order.].

8. Section 28 of the HM Act underwent an amendment by Act 68 of 1976 made effective from 27.5.1976. A fundamental difference brought about by the amendment is that while earlier sub-section (1) of Section 28 of the HM Act provided for appeals from decrees and orders, post amendment appeals are provided only from decrees. This was to remedy the malice of appeals being filed from all and sundry orders passed during the progress of matrimonial proceedings from time to time, delaying the final adjudication of the matrimonial disputes. However, a specific provision was made qua Sections 25 & 26 under sub-section (2) of Section 28 of the HM Act. Thus, orders passed under these two provisions, i.e., Sections 25 & 26 were made appealable under sub-section (2) of Section 28. The qualification, once again, was that they should not be interim orders. We may note that orders passed for permanent alimony and maintenance under Section 25 per se are in the nature of final orders as they are passed at the time of passing of the decree or any time subsequent thereto, unless they are procedural in nature. This is so as issues of interim maintenance pending matrimonial proceedings are dealt with under Section 24 of the HM Act. Section 26 of the HM Act, on the other hand, deals with only passing of interim orders and making provision in the decree as may be deemed just and proper with respect to custody, maintenance and education of minor children. Orders passed under Sections 25 & 26 of the HM Act were specifically incorporated as one of the species against which an appeal would lie under sub-section (2) of Section 28 of the HM Act. The only way by which full effect can be given to the appeal provision is by construing the expression "interim orders" used in sub-section (2) of Section 28 of the HM Act to mean procedural orders passed while dealing with proceedings under Sections 25 & 26 of the HM Act.

9. We may add here that the legislature in its wisdom amended sub-section (1) of Section 28 of the HM Act in 1976 by removing the

provision of appeal against all kinds of orders [except those covered by sub-section (2) of Section 28], but subsequently enacted the said Act in the year 1984, to provide for an appeal from all judgements and orders under sub-section (1) of Section 19 of the said Act, not being interlocutory orders.

10. Now coming to the provisions of Chapter 9 of the Cr.P.C, the heading of the Chapter reads as .Order for Maintenance of Wives, Children and Parents.. The said provisions read as under:

"125. Order for maintenance of wives, children and parents.

(1) If any person leaving sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

A Magistrate of' the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate [***] as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of' sufficient means.

[Provided further that the Magistrate may, during the pendency of the Proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or

such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person]

126. Procedure.

(1) Proceedings under section 125 may be taken against any person in any district-

(a) where he is, or

(b) where he or his wife resides, or

(c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

(2) All evidence to such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases:

Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is willfully avoiding service, or willfully neglecting to attend the court, the Magistrate may proceed to hear and determine the case ex-parte and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.

(3) The Court in dealing with applications under section 125 shall have power to make such order as to costs as may be just.

127. Alteration in allowance.

[(1) On proof of a change in the circumstances of any person,

receiving, under section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the maintenance, or interim maintenance, to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance, as the case may be.]

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent civil court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that-

(a) the woman has, after the date of such divorce, remarried; cancel such order as from the date of her remarriage;

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order-

(i) In the case where such sum was paid before such order, from the date on which such order was made,

(ii) In any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to [maintenance or interim maintenance, as the case may be] after her divorce, cancel the order from the date thereof. (4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom [monthly allowance for the maintenance and interim maintenance or any of them has been ordered] to be paid under section 125, the civil court shall take into account the sum which has been paid to, or recovered by, such person [as

monthly allowance for the maintenance and interim maintenance or any of them, as the case may be, in pursuance of] the said order.

128. Enforcement of order of maintenance.

A copy of the order of [maintenance or interim maintenance and expenses of proceeding, as the case may be,] shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to his guardian, if any, or to the person to [whom the allowance for the maintenance or the allowance for the interim maintenance and expenses of proceeding, as the case may be,] is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the 3[allowance, or as the case may be, expenses, due]."

11. We may note qua Section 125 of the Cr.P.C. that the second proviso to sub-section (1) inserted by the Amending Act 50 of 2001 w.e.f. 24.9.2001 specifically empowers the Magistrate to grant interim maintenance pending consideration of the application under Section 125 of the Cr.P.C.

12. Having taken note of the relevant provisions of some of the legal provisions, we now proceed to discuss the judicial views of different Courts qua the scope of the aforesaid provision, viz., Section 19 of the said Act.

(i) **Rahul Samrat Tandon Vs. Smt. Neeru Tandon** 2010 (5) ALJ 134 [Division Bench judgement of the Uttarakhand High Court]

13. The matter pertains to an order passed by the Family Court on an application under Section 24 of the HM Act. On an objection being raised to the maintainability of the appeal under Section 19 (1) of the said Act, the conflicting views of the different High Courts were examined. The Karnataka High Court, the Rajasthan High Court and the Orissa High Court had held that an order passed under Section 24 of the HM Act was not open to appeal under Section 19 (1) of the said Act while, on the other hand, the view of the Allahabad High Court was to the contrary. The Allahabad High Court's view is predicated on the reasoning that while exercising jurisdiction under Section 24 of the HM Act, the Family

Court does not really pass an interlocutory order as the order gives finality to the issue raised in the application for interim maintenance. It may technically come under the definition of an interlocutory order, yet it has trappings of a 'judgement' as it decides the issue finally between the parties. Since it is a judgement, it would be appealable under Section 19 (1) of the said Act. The Uttarakhand High Court agreed with this view and brought out the significance of the use of both the words, 'judgement' and "order" in Section 19 (1) of the said Act. Thereafter the meaning of the expression 'judgement' as enunciated in judicial pronouncements was analyzed, more specifically with reference to the case of **Shah Babulal Khimji Vs. Jayaben D. Kania & Anr.** AIR 1981 SC 1786 where it was observed that an order, or even an interlocutory order could be called a judgement when it had the quality of attaching finality to it. After extracting the relevant portions from the said judgement it was pointed out that Section 19 (1) of the said Act provides for appeals against judgements or orders while, on the other hand, under Section 96 of the CPC appeals are only against decrees. Similarly, Section 28 (1) of the HM Act, post amendment, appeals lie only against decrees. Thus, the rationale for the conscious decision of the legislature to make a departure by providing appeal against judgements and orders under Section 19 (1) of the said Act was analyzed. It is in this context that a conclusion was reached that an order under Section 24 of the HM Act granting or declining interim maintenance is one having the quality of finality. Even though it had nothing to do with the ultimate result of the substantive proceeding, such as under Section 13 of the HM Act, it was opined that proceedings under Section 24 of the HM Act is a separate proceeding within a proceeding, and thus, an order passed thereunder cannot, simply be called an order of an interlocutory nature as it is a judgement.

14. The judgement of the Full Bench of the Allahabad High Court in **Smt. Kiran Bala Srivastava Vs. Jai Prakash Srivastava** 2005 (23) LCD 1 was relied upon which emphasized the significance of an order under Section 24 of the HM Act. Thus, a refusal of grant of maintenance, or grant of inadequate maintenance would have a serious consequence for the spouse (generally the wife) as it may have the result of him/her giving up the idea of defending himself/herself or for prosecuting the substantive proceeding for want of sufficient means. Similarly, non-payment of the amount awarded under Section 24 of the HM Act could visit the concerned party with the consequence of striking out of the

defence or of dismissal of his/her cause.

15. We consider it appropriate to extract the discussion quoted in the aforesaid judgement from **Shah Babulal Khimji** case (supra), which reads as under:

> "11. ....The Apex Court laid down that there can be three kinds of judgments. Relevant portion of the said judgment to that effect is as follows:
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> "(1) A final judgmentùA judgment which decides all the questions or issues in controversy so far as the trial Judge is concerned and leaves, nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the trial Judge indisputably and unquestionably is a judgment within the meaning of the Letters Patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench.
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> (2) A preliminary judgment - This kind of a judgment may take two forms - (a) where the trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the trial Judge would be a judgment finally deciding the cause so far as the trial Judge is concerned and, therefore, appealable to the larger Bench. (b) Another shape which a preliminary judgment may take is that where the trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g., bar of jurisdiction, res judicata, a manifest defect in the suit. Absence of notice under Sec. 80 and the like, and these objections are decided by the trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the

defendant and must, therefore, be construed to be a judgment so as to be appealable to a larger Bench.

(3) Intermediary or interlocutory judgment: Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of Order 43, Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not covered by Order 43, Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse affect on the party concerned must be direct and immediate rather than indirect or remote....

16. We may only note that the contra view of the Rajasthan, Karnataka and Orissa High Courts is reflected in para 10 of the judgement in **Rahul Samrat Tandon** case (supra), which reads as under:

"10. It is true that other cases cited by the respondent i.e. **Mahesh Bhardwaj Vs. Smt. Smita Bhardwaj** AIR 1995 Rajasthan 47 as well as **R. Varadaraj v. Smt. V. Nirmala** AIR 2002 Karnataka 241 and Full Bench of the Orissa High Court in **Swarna Prava Tripathy and another Vs. Dibyasingha Tripathy and another** AIR 1998 Orissa 173 have held that an order passed under Section 24 of 1955 Act is not open to an appeal under Section 19 of 1984 Act as the order is interlocutory in nature. On the other hand, a division bench of the Allahabad High Court in **Avadhesh Narain Srivastava v. Archna Srivastava,** 1990 LLJ 183 and subsequently a full bench of the Allahabad High Court in **Smt. Kiran Bala Srivastava vs. Jai Prakash Srivastava** [2005(23) LCD 1] after discussing all the relevant law including the law cited by the respondent came to a conclusion that an order passed by a Family Court under Section 24 of 1955 Act granting maintenance pendente lite proceeding is not an interlocutory order as it gives a finality to the issue raised in an application filed under Section 24 of 1955 Act. Although such an order technically may come under the definition of an interlocutory order, yet it has all the trappings of

a 'judgment' as it decides the issue finally between the parties and since it is a judgment, it is appealable under Section 19(1) and would not be ousted from the jurisdiction under Section 19(1) of 1984 Act, merely on the basis of its being an interlocutory order, which it is not."

(ii) **Aakansha Shrivastava Vs. Virendra Shrivastava & Anr.** 2010 (3) MPLJ 151 (Division Bench judgement of the Madhya Pradesh High Court)

17. Interim maintenance had been granted under Section 125 Cr.P.C. and the issue arose whether a revision petition could be preferred against that order, as it was alleged to be interlocutory in nature. It was held that the order of interim maintenance was an intermediate or quasi final order. Analogy was drawn from Section 397 (2) of the Cr.P.C. and the pronouncement of the Supreme Court in **Amarnath & Ors. Vs. State of Haryana & Ors.** AIR 1977 SC 2185 qua the said provision was relied upon. Thus, an order which substantially affects the rights of an accused and decides certain rights of the parties was held not to be an interlocutory order so as to bar revision. However, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in the aid of pending proceedings would amount to interlocutory orders against which no revision would be maintainable under Section 397 (2) of the Cr.P.C. On the contrary, those orders which decide matters of moment and which affect or adjudicate the rights of the accused, or a particular aspect of trial could not be labeled as interlocutory orders. The Madhya Pradesh High Court held that an application for interim maintenance is a separate proceeding, to be disposed of much earlier than the final order in the main case. Qua the said issue the matter is finally decided by the order passed by reference to the second proviso to Section 125 (1) of the Cr.P.C.. Such orders were, thus, intermediate or quasi final orders. Thus, if an order does not put an end to the main dispute, but conclusively decides the point in issue it can certainly not be said to be an interlocutory order. The judgement drew strength also from the observations of the Supreme Court in **Madhu Limaye Vs. State of Maharashtra** AIR 1978 SC 47, where the Supreme Court held that ordinarily and generally the expression "interlocutory order" has been understood and taken to mean as a converse of the term .final order.. But the interpretation, and the universal application of the principle that what is not a "final order" must be an "interlocutory order" is neither warranted

nor justified. In **V.C. Shukla Vs. State** 1980 (2) SCR 380 the Supreme Court held that the term "interlocutory order" used in the Cr.P.C. has to be given very liberal construction in favour of the accused in order to ensure complete fairness of trial, and revisional power could be attracted if the order was not purely interlocutory but intermediate or quasi final.

(iii) **Nasreen Begum Vs. The State of Jharkhand & Ors.** 2006 Crl. L.J. 326 (Division Bench judgement of the Jharkhand High Court)

18. In a short order it was held that Section 19 (4) of the said Act make special provision of revision with regard to orders passed under Section 125 Cr.P.C. and, thus, revisions would lie.

19. We may add that the Gujarat and the Calcutta High Courts hold a similar view. [See **Saili Halder Vs. Debaprasad Halder & State of West Bengal** (2005) 3 CHN 87; **Manojkumar Harilal Joshi Vs. Truptiben Manojkumar Joshi** 2004 GLH (24) 676]

(iv) **Sunil Hansraj Gupta Vs. Payal Sunil Gupta** AIR 1991 Bom 423 (Division Bench judgement of the Bombay High Court)

20. The contrary view adopted by the Rajasthan, Karnataka and Orissa High Courts has found favour in this judgement of the Division Bench of the Bombay High Court, where there is an elaborate discussion for formulating the said view. In the facts and circumstances of this case, orders were passed both under Sections 24 & 26 of the HM Act by the Family Court. Maintenance was granted to the respondent wife and the minor children pendente lite. The provisions of Sections 24 to 28 of the HM Act were discussed along with Chapter 9 of the Cr.P.C. It was observed that upon a plain reading and in view of this objective of Section 24 of the HM Act, which is to protect the weaker spouse and particularly if it is a wife to protect her from vagrancy, an order under the said provision is for a limited period namely during the pendency of the substantive petition under the HM Act and as such was in the nature of an interlocutory order. The Division Bench drew strength from the absence of any provision for appeal from an order passed under Section 24 of HM Act, under Section 28 (2) of the HM Act, which provides for appeals against orders passed under Sections 25 & 26 of the HM Act. It is further observed, not having provided for such an appeal under the HM Act the legislature could not have given the same under Section 19(1) of the said Act, more so keeping in view of the object and preamble

of the said Act which is to provide speedy disposal of matrimonial disputes. The judgement in **Shah Babulal Khimji** case (supra) was distinguished by stating that the Supreme Court was examining the scope of the appeal under clause 15 of the Letters Patent, and it was in that context the expression "judgement" was discussed and assigned a much wider meaning. It was observed that that the said Act gave its own description of the expression "judgement" and as such having regard to its scheme and in particular Section 19 (1) thereof, it would not be appropriate to assign a much wider meaning to the word judgement and include interlocutory orders. Rejecting the contention that absence of revisionary recourse to interlocutory orders in Section 19 (1) of the said Act should be construed as giving right to appeal to a litigant against an order under Section 24 of the HM Act to vindicate his grievance, the Division Bench observed that the same would lead to an anomaly since the said Act provides for an appeal/revision only against final judgement/ orders passed under HM Act and Chapter 9 of the Cr.P.C.

Conclusion:

21. On having examined the divergent views of different High Courts and on hearing learned counsel for the parties, we are inclined to adopt the view of the Uttarakhand, Allahabad, Madhya Pradesh, Gujarat & Calcutta High Courts while differing from the views of the Bombay, Rajasthan, Karnataka & Orissa High Courts. The reason for adopting such a course of action is the manner in which we have explained our view and understanding of the provisions of Section 19 of the said Act at the inception of the judgement. It is quite clear that qua an order or judgement of the Family Court the provision of appeal under Section 19 of the said Act would prevail, irrespective of what is contained in the Cr.P.C., CPC or any other law which would include the HM Act. The exception to the maintainability of an appeal is an interlocutory order, and, under sub-section (2) of Section 19, an order under Chapter 9 of the Cr.P.C. and a decree or order passed on consent. As noticed above, an order passed under a provision contained in Chapter 9 Cr.P.C. has to be dealt with in accordance with sub-sections (2) & (4) of Section 19 of the said Act.

22. The contra view plays down the non obstante clause contained in sub-section (1) of Section 19 of the said Act. What is important is that while the amendment to Section 28 (1) of the HM Act sought to remove

the provision of appeal from an order, while confining the right to an appeal only qua a decree, sub-section (2) of Section 28 made provision for appeal from orders passed under Sections 25 & 26 of the HM Act, except an interim order, sub-section (1) of Section 19 of the said Act has used both expressions 'judgement' and 'order'. The amendment to the HM Act in Section 28 was made in 1976, while the said Act was enacted in 1984, i.e., much later. The legislature was, thus, conscious of the consequence of providing for appeals from orders which were not interlocutory orders. This judgement in **Shah Babulal Khimji** case (supra) had also been delivered before the enactment of the said Act which elucidated the law qua intermediate orders as distinct from interlocutory orders. Thus, certainly the scope of appeal under sub-section (1) of Section 19 of the said Act cannot take its colour from the scope of appeal under Section 28 of the HM Act, particularly, because of the non obstante clause contained in Section 19 (1) of the said Act.

23. We may also notice that the definition of "judgement" as contained in Section 17 of the said Act only provides as what it should contain, i.e., a statement of case, the point for determination, the decision thereon and the reasons for such decision. Thus, the essentials of a judgement have been set out in Section 17 of the said Act. This, in no manner, takes away from the definition of "judgement" as elucidated in **Shah Babulal Khimji** case (supra) which not only discussed the scope and ambit of an appeal under Section 15 of the Letters Patent, but has an elaborate discussion - as extracted aforesaid, qua what is understood by a final judgement, an interlocutory order and, in that context, what would be an intermediate order. Even if the definition of an intermediate order as explained in **Shah Babulal Khimji** case (supra) is seen, it would satisfy the test as laid down in Section 17 of the HM Act. In our view, the significance of use of both the expressions 'judgement' and "order" under sub-section (1) of Section 19 of the said Act appears to have been lost while forming the contra view.

24. The view of the Uttarakhand High Court in **Rahul Samrat Tandon** case (supra) has lucidly explained the contours of the controversy and the nature of an order under Section 24 or, for that matter, even under Sections 25 & 26 of the HM Act. No doubt, it is interim maintenance which is determined under Section 24 of the said Act but the proceedings are final in its nature till the decision on the main matter (except unless modified under Section 27 of the said Act). These are, thus, proceedings

within proceedings which have the character of finality attached to them, especially as the same visit the parties with civil consequences. As to what are these civil consequences have again been set out in the opinion of the Allahabad High Court in **Smt. Kiran Bala Srivastava** case (supra). The denial of maintenance would greatly prejudice the ability of the disadvantaged spouse to contest proceedings while, on the other hand, inability to pay maintenance by the spouse has serious consequences, as it would result in striking out the defence/dismissal of the substantive cause. Orders passed under Sections 24, 25 or 26 of the HM Act fit the definition of an intermediate order, which may adversely affect valuable rights.

25. We have to also proceed to discuss not only the consequences of the aforesaid intermediate orders, but also orders which may be passed under Chapter 9 of the Cr.P.C. While specifically excluding from the ambit of appeal orders passed under Chapter 9 of the Cr.P.C. (Sections 125 to 128) as per sub-section (2) of Section 19 of the said Act, the remedy against such orders has been specifically provided thereafter under sub-section (4) of Section 19 of the said Act and, thus, clearly a criminal revision would be maintainable. However, there is an exception under sub-section (4) of Section 19 of the said Act in as much, as, interlocutory orders specifically stand excluded from the ambit of revision. We may also add here that sub-section (5) of Section 19 of the said Act clearly bars any appeal or revision against an order of the Family Court unless specifically provided for under Section 19 of the said Act. We have to, thus, examine as to what would be the meaning of the expression interlocutory order in this context. There can be procedural orders passed, against which no revision would be maintainable. The analogy may be taken from the discussion qua the provision of Section 397 (2) of the Cr.P.C. in **Aakansha Shrivastava** case (supra) which in turn had relied upon the judgement of the Supreme Court in **Amarnath & Ors.** case (supra). These procedural orders, thus, would undoubtedly be interlocutory in nature. The issue arises from the second proviso to sub-section (1) of Section 125 Cr.P.C. which provides for grant of interim maintenance, i.e., whether criminal revision would be maintainable qua such determination. Once again, the same principle would apply, as qua determination of interim maintenance under Section 24 of the HM Act, since the nature of the order is such that it would be really an intermediate order affecting the vital rights of the parties. It can even result in

consequence of civil imprisonment for violation. Thus, both kinds of orders under Section 125 Cr.P.C., i.e., interim maintenance and the final order would be amenable to the revisional jurisdiction.

26. We, thus, conclude as under:

i. In respect of orders passed under Sections 24 to 27 of the HM Act appeals would lie under Section 19 (1) of the said Act to the Division Bench of this Court in view of the provisions of sub-section (6) of Section 19 of the said Act, such orders being in the nature of intermediate orders. It must be noted that sub-section (6) of Section 19 of the said Act is applicable only in respect of sub-section (1) and not sub-section (4) of Section 19 of the said Act.

ii. No appeal would lie under Section 19 (1) of the said Act qua proceedings under Chapter 9 of the Cr.P.C. (Sections 125 to 128) in view of the mandate of sub-section (2) of Section 19 of the said Act.

iii. The remedy of criminal revision would be available qua both the interim and final order under Sections 125 to 128 of the Cr.P.C. under sub-section (4) of Section 19 of the said Act.

iv. As a measure of abundant caution we clarify that all orders as may be passed by the Family Court in exercise of its jurisdiction under Section 7 of the said Act, which have a character of an intermediate order, and are not merely interlocutory orders, would be amenable to the appellate jurisdiction under sub-section (1) of Section 19 of the said Act.

27. In view of the aforesaid, the present appeal is held not to be maintainable and is accordingly disposed of.

28. The matter be de-listed as an appeal, and be registered as a criminal revision.

29. The Registry to note the ratio of this judgement for purposes of listing of various kinds of matters in future.

30. List as per roster on 28.9.2012.

ILR (2013) I DELHI 234
R.C. REV.

HARSH SABHARWAL .... PETITIONER

VERSUS

SHEETAL PRASAD JAIN ....RESPONDENT

(M.L. MEHTA, J.)

R.C. REV. NO. : 251/2011 DATE OF DECISION: 13.09.2012

Delhi Rent Control Act, 1958—Section 14(1)(e)—Bonafide Requirement—Brief Facts—Respondent filed a petition for eviction against the petitioner and his mother and sisters for seeking eviction form the tenanted premises comprising of a shop on the ground floor of premises no .7/33, Ansari Road, Darya Ganj on the ground of bonafide requirement of the tenanted shop for the office of sushil Kumar jain S/o of the respondent/landlord—case that was set up by the respondent/ landlord is that he has three sons, and his son sushil kumar did not have any office space in the suit premises or anywhere else. But is sharing with his younger brother sunil in a rented premises of Yogesh Kumar Jain—They both have their separate businesses—Members of the family of the respondent are having their offices within the compound of suit premises which solves their problems—It is averred that Sushil would establish his independent office in the tenanted shop which is within the compound of the main premises—Petitioner sought leave to defend which was declined by the learned ARC vide the impugned order—Hence the present revision petition. Held: Landlord is the best judge to decide about his requirement and the choice of the place, and neither the tenant nor this Court can distate to him as to how else he can adjust himself without getting possession of the tenanted premises—

But, at the same time, it is also settled law that mere assertion that landlord requires the premises, occupied by the tenant, for his personal occupation, is not decisive and it is for the Court to determine the truth of the claim and also to see as to whether the claim is bonafide—In determining as to whether the claim is bonafide or not, the Court is under an obligation to examined, evaluate and adjudicate the bonafide of the learned—A claim founded on abnormal predilections of the landlord cannot be regarded as bonafide—In this regard the observations of the Supreme Court in *Shiv Sarup Gupta and of Delhi High Court in M/s. John Impex (Pvt.) Ltd. Vs. Dr. Surinder Singh & Ors.* 2007 (1) RCR 509, are relevant wherein it was held that the requirement of a landlord not being a mere whim or fanciful but that it should be a genuine need of the landlord—It is only then that the requirement can be said to be bona fide within the meaning of under Section 14(1) (e) of the said Act—This would naturally require all the necessary matrix in terms of the factual averments and the evidence to be adduced in that behalf—Simultaneously it has to be kept in mind that the landlord is the best judge of his requirement and a tenant cannot dictate the terms on which the landlord should live—The bona fide requirement of the landlord would also depend on his financial status and his standard of living—The ARC found in favour of the landlord/owner and thus what has to be considered is whether there is any illegality or jurisdictional error in the impugned order and not to sit as an appellate Court though the scope of scrutiny in a rent revision would be more than a revision petition under Section 115 of the Code of Civil Procedure, 1908—Petitioner has raised several triable issues, which could not have been out-rightly brushed aside at the threshold—Respondent ought to have been called upon to prove his bonafide requirement of the suit premises, and the Petitioner/

tenant be afforded opportunity to test his claims—Petition is allowed.

I am well aware and conscious of the fact that the landlord is the best judge to decide about his requirement and the choice of the place, and neither the tenant nor this Court can dictate to him as to how else he can adjust himself without getting possession of the tenanted premises. But, at the same time, it is also settled law that mere assertion that landlord requires the premises, occupied by the tenant, for his personal occupation, is not decisive and it is for the Court to determine the truth of the claim and also to see as to whether the claim is bonafide. Further, in determining as to whether the claim is bonafide or not, the Court is under an obligation to examine, evaluate and adjudicate the bonafide of the landlord. A claim founded on abnormal predilections of the landlord cannot be regarded as bonafide. In this regard the observations of the Supreme Court in **Shiv Sarup Gupta** (supra) can be noted as under:

> "Thus the term bonafide or genuinely refers to a state of mind. Requirement is not a mere desire. The degree of intensity contemplated by 'requires' is much more higher than in mere desire. The phrase 'required bonafide' is suggestive of legislative intent that a mere desire which is outcome of whim or fancy is not taken note of by the Rent Control Legislation. A requirement in the sense of felt need which is an outcome of a sincere, honest desire, in contra-distinction with a mere pretence or pretext to evict a tenant, on the part of the landlord claiming to occupy the premises for himself or for any member of the family would entitle him to seek ejectment of the tenant. Looked at from this angle, any setting of the facts and circumstances protruding the need of landlord and its bonafides would be capable of successfully withstanding the test of objective determination by the Court. The Judge of facts should place himself .in the arm chair of the landlord and then ask the question to

himself-whether in the given facts substantiated by the landlord the need to occupy the premises can be said to be natural, real, sincere, honest. If the answer be in the positive, the need is bonafide. The failure on the part of the landlord to substantiate the pleaded need, or, in a given case, positive material brought on record by the tenant enabling the court drawing an inference that the reality was to the contrary and the landlord was merely attempting at finding out a pretence or pretext for getting rid of the tenant, would be enough to persuade the Court certainly to deny its judicial assistance to the landlord. Once the court is satisfied of the bonafides of the need of the landlord for premises or additional premises by applying objective standards then in the matter of choosing out of more than one accommodation available to the landlord his subjective choice shall be respected by the court. The court would permit the landlord to satisfy the proven need by choosing the accommodation which the landlord feels would be most suited .for the purpose; the court would not in such a case thrust its own wisdom upon the choice of the landlord by holding that not one. but the other accommodation must be accepted by the landlord to satisfy his such need. In short, the concept of bonafide need or genuine requirement needs a practical approach instructed by realities of life. An approach either too liberal or two conservative or pedantic must be guarded against." **(Para 13)**

Referring to various decisions of the Supreme Court and our High Court, Justice Sanjay Kishan Kaul in the case of **M/s. John Impex (Pvt.) Ltd. Vs. Dr. Surinder Singh & Ors.,** 2007 (1) RCR 509, observed as under:

"21.The conspectus of the aforesaid judgments shows that the broad principles have been set down of the requirement of a landlord not being a mere whim or fanciful but that it should be a genuine need of the

landlord. It is only then that the requirement can be said to be bona fide within the meaning of under Section 14(1) (e) of the said Act. This would naturally require all the necessary matrix in terms of the factual averments and the evidence to be adduced in that behalf. Simultaneously it has to be kept in mind that the landlord is the best judge of his requirement and a tenant cannot dictate the terms on which the landlord should live. The *bona fide* requirement of the landlord would also depend on his financial status and his standard of living. The ARC found in favour of the landlord/owner and thus what has to be considered is whether there is any illegality or jurisdictional error in the impugned order and not to sit as an appellate court though the scope of scrutiny in a rent revision would be more than a revision petition under Section 115 of the Code of Civil Procedure, 1908."

(Para 14)

Important Issue Involved: Delhi Rent Control Act—Section 14(1)(e)—Bonafide Requirement—Mere assertion that landlord requires the premises, occupied by the tenant, for his personal occupation, is not decisive and it is for the Court to determine the truth o the claim and also to see as to whether the claim is bonafide—In determining as to whether the claim is bonafide or not, the Court is under an obligation to examine, evaluate and adjudicate the bonafide of the landlord—A claim founded on abnormal predilections of the landlord cannot be regarded as bonafide.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. S.N. Choudhary, Advocate.

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

CASES REFERRED TO:

1. *M/s. John Impex (Pvt.) Ltd.* vs. *Dr. Surinder Singh &*

Ors., 2007 (1) RCR 509.

2. *Inderjeet Kaur* vs. *Nirpal Singh,* JT 2001 (1) SC 308.

3. *Sarla Ahuja* vs. *United India Insurance Co. Ltd.* MANU/SC/0665/1998.

4. *Ram Narain Arora* vs. *Asha Rani and Ors.* : AIR1999 SC 100.

5. *Shiv Sarup Gupta* vs. *Dr. Mahesh Chand Gupta,* (1999) 6 SCC 222.

RESULT: Revision allowed.

M.L. MEHTA, J.

1. This revision petition under Section 25B(8) of Delhi Rent Control Act (for short 'the Act') impugns order dated 21.01.2011 whereby leave to defend application filed by the petitioner herein in the eviction petition, was dismissed by the Additional Rent Controller (ARC), Central.

2. The respondent had filed a petition for eviction against the petitioner and his mother and sisters for seeking eviction from the tenanted premises comprising of a shop on the ground floor of premises No. 7/33, Ansari Road, Darya Ganj.

3. The tenancy was initially created in favour of petitioner predecessor Virender Kumar, the sole proprietor M/s Narang Scientific Electronic Equipments. Their eviction was sought on the ground of bonafide requirement of the tenanted shop for the office of Sushil Kumar Jain S/o of the respondent/landlord. The case that was set up by the respondent/ landlord is that he has three sons, and his son Sushil Kumar did not have any office space in the suit premises or anywhere else, but is sharing with his younger brother Sunil in a rented premises of Yogesh Kumar Jain. Sushil is carrying on the business under the name and style of M/s. Arihant Udyog and Sunil under the name and style of M/s. Paper Conductors. They both have their separate businesses. A site plan of the ground floor of the suit premises was annexed with the eviction petition, showing different portions of the ground floor of the premises as A, B, C, D and E and two rooms as commercial rooms. It is averred that Sushil is having his godown in portion E, which is adjoining the tenanted shop. Room shown by Mark A is stated to be in possession of his granddaughter-in-law Bani, who is doing her business in the name and

style of Vikalp Events. The shops marked as B, C and E are stated to be in occupation of other tenants. It is also averred that all the members of the family of the respondent are having their offices within the compound of suit premises 7/33, Ansari Road, Darya Ganj, Delhi which solves their problems. It is averred that Sushil would establish his independent office in the tenanted shop, which is within the compound of the main premises. Predicated on all these averments, the respondent sought eviction of the tenanted shop, alleging the same to be bonafide required by him for the office of his son Sushil. The petitioner sought leave to defend which was declined by the learned ARC vide the impugned order. The order of ARC is assailed by the petitioners on various grounds.

4. I have heard the learned counsel for the petitioner and respondent and perused the records, including the impugned judgment.

5. Since it was the contention of learned counsel for the respondent that this Court would not interfere in the finding of fact recorded by the ARC dismissing the leave to defend application of the petitioner, I would like to reiterate the law on the point which has been laid down by various judicial pronouncements and has been reiterated by the Supreme Court in **Shiv Sarup Gupta Vs. Dr. Mahesh Chand Gupta,** (1999) 6 SCC 222 as under:

> "The revisional jurisdiction exercisable by the High Court under Section 25B(8) is not so limited as is under Section 115 C.P.C. nor so wide as that of an Appellate Court. The High Court cannot enter into appreciation or re-appreciation of evidence merely because it is inclined to take a different view of the facts as if it were a court of facts. However, the High Court is obliged to test the order of the Rent Controller on the touchstone of "whether it is according to law'. For that limited purpose it may enter into re-appraisal of evidence, that is, for the purpose of ascertaining whether the conclusion arrived at by the Rent Controller is wholly unreasonable or is one that no reasonable person acting with objectivity could have reached that conclusion on the material available. Ignoring the weight of evidence, proceeding on wrong premise of law or deriving such conclusion from the established facts as betray the lack of reason and/or objectivity would render the finding of the Controller 'not according to law' calling for an interference under proviso to

Sub-section (8) of Section 25B of the Act. A judgment leading to miscarriage of justice is not a judgment according to law. [See; **Sarla Ahuja v. United India Insurance Co. Ltd.** MANU/SC/0665/1998 : AIR1999SC100 and **Ram Narain Arora v. Asha Rani and Ors.**"

6. Learned counsel for the petitioner has assailed the impugned order on the grounds that the petitioner has made triable issues, but the learned ARC has over-looked them and not dealt with them. The submissions of the leaned counsel are that both Sushil Kumar and Sunil have their independent manufacturing industries at Tunda Nagar and Bawana Industrial Area, which the respondent has concealed to disclose in the petition. They both have their respective offices there and do not have any office or business activity in any portion of the suit premises. The accommodation, where they are alleged to be having their offices, does not belong to Yogesh Kumar Jain, who is none else but, the brother of the respondent. Referring to the leave to defend application, he also submits that Sushil is not having any godown in room mark E, but the same is lying vacant. Similarly, with regard to room mark A, he submits that this is also lying vacant and no business activity is being carried by the respondent's daughter in law Bani. He, however, admits that shops mark C and D are in occupation of the tenants. He submits that the respondent and his sons are using the suit premises only for the purpose of sitting occasionally, and not running any office therein, no employee or visitor or customer ever seen there. It is also submitted that the respondent has six rooms accommodation on the first floor, above the shops A to E, which is a declared commercial space and is lying vacant and can be used by respondent, if needed by them, for office purposes. It is next submitted that the respondent and his sons have separate independent houses at B.M. Rohatgi Apartments, Civil Lines, Delhi, where he is residing with all family members, including his sons and their families and, this also has been concealed by him in the petition.

7. The respondent chose to file reply to the leave to defend application and stated that all the family members of his three sons are living on the first floor of the suit premises, and not in their flats at B.M. Rohatgi Apartments. With regard to the space at Tunda Nagar and Bawana Industrial, it is alleged that these are manufacturing units or industries and there exists no office, nor any can be set up there in those premises. The first floor of the suit premises is alleged to be meant for residential

purpose only.

8. The learned ARC declined leave to defend to the petitioner, observing that shops shown as Mark A, B and E are in use and occupation and the same are not lying vacant as alleged by the petitioner. With regard to the six room accommodation on the first floor alleged to be lying vacant and usable for commercial activities, he believed the version of the respondent that he along with his family was residing therein. With regard to the plea of the availability of the offices in the factory premises of the sons of the respondent, the ARC observed that these are located in industrial areas and are not fit for running offices. Believing the version of the respondent that his sons Sunil and Sushil are having their offices in accommodation under the tenancy of Yogesh Kumar Jain, he recorded the said accommodation to be insufficient for their office needs. He also accepted the version of the respondent that his granddaughter in law Bani was running her business in the name and style of Vikalp Events in shop mark A and his son Sushil was having his godown in shop mark E.

9. As is noted above, ordinarily this Court under revisional power does not interfere with the findings recorded by the ARC, but, having gone through the entire material available on record, I am outrightly of the view that the learned ARC has erred in disallowing the leave to defend application to the petitioner. The law with regard to considerations of leave to defend application has been reiterated by the Supreme Court in the case of **Inderjeet Kaur Vs. Nirpal Singh,** JT 2001 (1) SC 308 and which can be reproduced as under for better understanding:

"A landlord, who bona fiddly requires a premises for his residence and occupation should not suffer for long waiting for eviction of a tenant. At the same time, a tenant cannot be thrown out from a premises summarily even though prima facie he is able to say that the claim of the landlord is not bona fide or untenable and as such not entitled to obtain an order of eviction. Hence the approach has to be cautious and judicious in granting or refusing leave to defend to a tenant to contest an eviction petition within the broad scheme of Chapter IIIA and in particular having regard to the clear terms and language of Section 25B(5).

With this background, we now turn to the facts of the case in hand. It is clear from the reading of the order of the Addl. Rent Controller that he has taken pains to write an elaborate

order as if he was writing an order after a full-dressed trial of eviction petition he has considered merits of the respective contentions at the stage of granting leave to defend under Section 25B(5) without keeping in mind the scope of the provisions and statutory duty cast on him. He exceeded the jurisdiction vested in him in refusing leave to defend to the appellant. It appears to us that he did not focus his attention to the scope and content of Section 25B(5). Having regard to the facts stated and grounds raised in the affidavit filed by the appellant seeking leave to defend which we have already narrated above, it is not possible to take a view that no triable issue arose for consideration. The facts stated in the affidavit of the appellant in support of his application seeking leave to defend prima facie do disclose that the respondent would be disentitled to obtain an order for the recovery of possession of the premises from the appellant particularly when other cases are pending between the parties and defence does not appear to be frivolous or untenable on the face of it. The Addl. Rent Controller has acted with material irregularity and committed a manifest error in accepting the case of the respondent-landlord when the facts were seriously disputed and the correctness or otherwise of the documents required to be examined. Whether the suit premises was used for residential-cum-commercial purposes from the inception and whether the respondent and his son and other members of the family are permanently and comfortably settled in U.K. and whether the requirement of the premises by the respondent was bona fide, are the matters which could not be adjudicated as has been done by the Addl. Rent Controller at the stage of dealing with the application to grant leave to defend. In this view of the matter, we have no hesitation to say that the order passed by the Addl. Rent Controller refusing leave to defend to the appellant cannot be sustained. Unfortunately, the High Court also has affirmed it without taking into consideration the correct legal position indicated above having regard to the facts of the case. We are of the view that the Addl. Rent Controller and the High Court both were in error in refusing to grant leave to the appellant to contest the eviction petition."

10. In the instant case it could be noticed that eviction was sought

primarily for the need of office for the son Sushil, who according to the respondent is sharing his office with his younger brother Sunil, in a tenanted premises owned by Yogesh Kumar Jain. Though, a receipt issued by Yogesh Kumar Jain in the name of respondent is placed on record, but much reliance cannot be placed on this at this stage as it is shown to be issued on 01.03.2008 and is for the period starting from April 2007 to March 2010 and, also in view of the fact of the same being issued in his name by none else, but his brother Yogesh Jain. The petitioner has categorically alleged this to be a forged, fabricated and manipulated document to show paucity of accommodation. In any case, the petitioner has raised a triable issue whether the respondent or his sons are having any commercial or office activities in any portion of the suit premises. Undisputedly, both the sons of the respondent are having their manufacturing units at Tunda Nagar and Bawan Industrial Area. It is not that in all cases, the offices office cannot be set up within the factory premises. It all depends upon the nature of manufacturing units/activities. It is a common knowledge that some of the manufacturing activities do essentially require to have office set ups within the factory premises. This is nowhere the case of the respondent that the nature of the activities being carried by his sons cannot permit to have offices there. Determination of this fact is essential in the backdrop of the assertion of the petitioner that there is no commercial or official activity being carried out by the respondent or his sons in any portion of the suit premises and that they are visiting there for sitting only.

11. With regard to the accommodation that is available with the respondent in the suit premises, also, the petitioner has raised triable issues by asserting that the entire first floor is lying vacant and if need be, can be used by the respondent and his sons for office purposes. In this regard, the case of the respondent is that he and the families of his three sons are residing on the first floor of this premises. This has been outrightly believed by the ARC, based on the electricity bills and also photocopy of election identity cards of the respondent, his sons Sushil and Sunil and wife of Sushil. A look at these election identify cards would show these having issued in October 2008. Though, it was pointed out by learned counsel for the respondent that the electricity bills, copies of which are placed on record, would show consumptions to be too less to dislodge the claim of the respondent that he with three sons and their families is residing there. During the course of arguments, it was submitted

by learned counsel for the respondent that the respondent with his wife and three sons and their wives is residing on the first floor, whereas his grand children are residing in the Civil Lines Apartments. These oral submissions, cannot, brush aside the pleas of the petitioner. The petitioner has also raised the plea that as per Government's notification the first floor could be used for commercial and official activities. This was not controverted by the respondent. This all, prima facie, looks improbable that the respondent would squeeze his entire family on the first floor of the suit premises, and let the grand children live alone in the apartments at Civil Lines. This certainly requires to be tested.

12. The plea that shop A was being used by his grand daughter Bani for doing her business, also needs to be tested. A look at the photograph, which is placed on record and relied upon by the respondent, showing her to be sitting in the shop, cannot make any one to, outrightly, believe her to be using this accommodation for her business. This also requires to be proved by the respondent. To prove that room mark E was being used by respondent's son Sushil for his godown, reference was made to a form purporting to have been submitted in the name of his firm Arihant Udyog to VAT department on 11.04.2007, showing addition of godown. From this alone, it cannot be ascertained that in fact this portion was being used by his son as godown. In any case, this also requires to be proved by the respondent that in fact this portion was being used as a godown and could not be used for office purposes, if at all some office space was required for Sushil. Assuming the room E to be in possession of Sushil, as averred by respondent, then the projected requirement of space for his office, would be that of additional accommodation, and in which case the leave is necessarily to be granted to the tenant.

13. I am well aware and conscious of the fact that the landlord is the best judge to decide about his requirement and the choice of the place, and neither the tenant nor this Court can dictate to him as to how else he can adjust himself without getting possession of the tenanted premises. But, at the same time, it is also settled law that mere assertion that landlord requires the premises, occupied by the tenant, for his personal occupation, is not decisive and it is for the Court to determine the truth of the claim and also to see as to whether the claim is bonafide. Further, in determining as to whether the claim is bonafide or not, the Court is under an obligation to examine, evaluate and adjudicate the bonafide of the landlord. A claim founded on abnormal predilections of the landlord

cannot be regarded as bonafide. In this regard the observations of the Supreme Court in **Shiv Sarup Gupta** (supra) can be noted as under:

> "Thus the term bonafide or genuinely refers to a state of mind. Requirement is not a mere desire. The degree of intensity contemplated by 'requires' is much more higher than in mere desire. The phrase 'required bonafide' is suggestive of legislative intent that a mere desire which is outcome of whim or fancy is not taken note of by the Rent Control Legislation. A requirement in the sense of felt need which is an outcome of a sincere, honest desire, in contra-distinction with a mere pretence or pretext to evict a tenant, on the part of the landlord claiming to occupy the premises for himself or for any member of the family would entitle him to seek ejectment of the tenant. Looked at from this angle, any setting of the facts and circumstances protruding the need of landlord and its bonafides would be capable of successfully withstanding the test of objective determination by the Court. The Judge of facts should place himself .in the arm chair of the landlord and then ask the question to himself-whether in the given facts substantiated by the landlord the need to occupy the premises can be said to be natural, real, sincere, honest. If the answer be in the positive, the need is bonafide. The failure on the part of the landlord to substantiate the pleaded need, or, in a given case, positive material brought on record by the tenant enabling the court drawing an inference that the reality was to the contrary and the landlord was merely attempting at finding out a pretence or pretext for getting rid of the tenant, would be enough to persuade the Court certainly to deny its judicial assistance to the landlord. Once the court is satisfied of the bonafides of the need of the landlord for premises or additional premises by applying objective standards then in the matter of choosing out of more than one accommodation available to the landlord his subjective choice shall be respected by the court. The court would permit the landlord to satisfy the proven need by choosing the accommodation which the landlord feels would be most suited .for the purpose; the court would not in such a case thrust its own wisdom upon the choice of the landlord by holding that not one. but the other accommodation must be accepted by the landlord to satisfy his such need. In short, the

concept of bonafide need or genuine requirement needs a practical approach instructed by realities of life. An approach either too liberal or two conservative or pedantic must be guarded against."

14. Referring to various decisions of the Supreme Court and our High Court, Justice Sanjay Kishan Kaul in the case of **M/s. John Impex (Pvt.) Ltd. Vs. Dr. Surinder Singh & Ors.,** 2007 (1) RCR 509, observed as under:

> "21.The conspectus of the aforesaid judgments shows that the broad principles have been set down of the requirement of a landlord not being a mere whim or fanciful but that it should be a genuine need of the landlord. It is only then that the requirement can be said to be bona fide within the meaning of under Section 14(1) (e) of the said Act. This would naturally require all the necessary matrix in terms of the factual averments and the evidence to be adduced in that behalf. Simultaneously it has to be kept in mind that the landlord is the best judge of his requirement and a tenant cannot dictate the terms on which the landlord should live. The *bona fide* requirement of the landlord would also depend on his financial status and his standard of living. The ARC found in favour of the landlord/owner and thus what has to be considered is whether there is any illegality or jurisdictional error in the impugned order and not to sit as an appellate court though the scope of scrutiny in a rent revision would be more than a revision petition under Section 115 of the Code of Civil Procedure, 1908."

15. In view of my above discussion, I am of the considered view that the petitioner has raised several triable issues, which could not have been outrightly brushed aside by the learned ARC at the threshold. The respondent ought to have been called upon to prove his bonafide requirement of the suit premises, and the petitioner/tenant be afforded opportunity to test his claims. Consequently, the petition is allowed; the impugned order is set aside and leave to defend is granted to the petitioner. The parties shall appear before ARC on 18.09.2012 for further proceedings.

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CS (OS)

R.R. ENTERPRISES ....PLAINTIFF

VERSUS

C.M.D OF GARWARE-WALL ROPES LTD. & ORS. ....DEFENDANTS

(V.K. JAIN, J.)

CS (OS) NO. : 2086/2010 DATE OF DECISION: 13.09.2012

Arbitration and Conciliation Act, 1996—Section 8—Plaintiff filed suit for recovery—Defendants in written statement, took number of preliminary objections including that suit was hit by Section 8—He relied upon one purchase order which contained arbitration agreement, whereas plaintiff raised plea that there was no arbitration clause between parties. Held: Arbitration Act does not oust the jurisdiction of Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps, as contemplated under sub-Section (1) and (2) of Section 8 of the Act—Since defendant filed written Statement disclosing all defences and without making any prayer for referring of dispute to arbitration, S. 8 cannot be invoked—Also, arbitration clause contained only in one of the two purchase orders.

I had an occasion to examine as to whether an application under Section 8 of Arbitration & Conciliation Act is maintainable after filing of written statement which refers to an arbitration agreement between the parties or not in, **Arti Jethani v. Daehsan Trading (India) Pvt Ltd & Ors.** 2011 (4) AD DEL 668. The following view was taken by me taking into consideration various decisions, including the decision of Supreme Court in **Sukanya Holdings Pvt. Ltd. vs.**

Jayesh H. Pandya and Anr. AIR 2003 SC 2252:-

"3. A careful analysis of Section 8 of Arbitration and Conciliation Act, 1996 would show that the following conditions are required to be fulfilled before the Court can refer the matter to arbitration;

(a) the dispute between the parties should be subject matter of an arbitration agreement;

(b) one of the parties to the suit should apply for referring the parties to arbitration;

(c) the application should be filed on or before submitting first statement on the substance of the dispute and;

(d) the application should be accompanied by the original arbitration agreement or its certified copy.

4. In the case before this Court, the application under consideration having not been filed on or before filing of written statement, but having been filed about four weeks after the written statement had been filed and after 8 days of filing of replication, one of the pre-requisite conditions for referring the parties to arbitration under Section 8 of Arbitration and Conciliation Act does not stand fulfilled in this case.

5. In **Sukanya Holdings** (supra), Supreme Court, while interpreting Section 8 of the Act, inter alia, observed as under:

"Further, the matter is not required to be referred to the arbitral Tribunal, if-(1) the parties to the arbitration agreement have no filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof."

It is true that in the above-referred case, the application under Section 8 of Arbitration and Conciliation Act appears to have been filed before the written statement was filed and, therefore, the question as to whether such an application can be filed after the written statement has already been filed, did not directly come up for consideration in this case, but, the above-referred observations made by the Court do support the view that such an application cannot be filed after the first statement on the substance of the dispute has been filed by the applicant.

6. The contention of the learned counsel for the applicant is that since the defendant had already pleaded in the written statement that there is an arbitration agreement between the parties and, therefore, this Court has no jurisdiction to adjudicate the instant suit, it is evident that the applicants did not submit to the jurisdiction of the Civil Court and, therefore, the application is maintainable even after filing of the written statement.

7. In my view, if the Court accepts the contention that an application under Section 8 of the Act can be filed even after the first statement on substance of the dispute between the parties has already been filed, this would not only be contrary to the express provisions of law but, would also defeat the very purpose behind stipulating that such an application needs to be filed not later than submitting the first statement on the substance of the dispute. If such an application is entertained after filing of the first statement, it would be possible for a party to the suit to first allow the trial to proceed by not filing the application by the stage stipulated in the Act and then come to the Court at a much later stage when the trial is substantially complete and seek reference of the dispute to arbitration. It is true that in the case before this Court the trial has not commenced as yet, but if

the interpretation sought to be given by the learned Counsel for the applicants/defendants is accepted, it would be open to a party to the suit to file such an application even after the trial has commenced.

8. The question as to whether a defendant who pleads arbitration agreement in the Written Statement, but does not file an application under Section 8 of the Act, on or before filing of the Written Statement has come up before other High Courts in some cases. In **K.Jayakumaran Nai vs. Vertex Securities Ltd.** AIR 2005 Ker. 294, the defendant filed Written Statement raising a contention that there was an arbitration agreement between the parties. After framing of issues he filed an application seeking reference of the dispute for arbitration. The High Court noted that Section 8 of the Act clearly provides that the application had to be made not later than submitting the first statement whereas the application before it had been filed after the issues were framed. The Court expressly rejected the contention that since the matter had been raised in the Written Statement that was enough. While doing so the Court noted that the Written Statement contained no prayer for referring the matter for arbitration.

In **West Bengal State Electricity Board and Ors. Vs. Shanti Conductors Private Ltd.** AIR 2004 Gau 70, the defendants filed Written Statement indicating that the dispute which had arisen between the parties and led to institution of the suit, was covered by arbitration clause. After submitting the Written Statement on 22.9.2000 the defendants filed an application under Section 8 of the Act on 7.11.2000 seeking reference of the dispute to the arbitration. The trial Court having rejected the application the matter was agitated by the defendant before the High Court and it was contended that in the plaint itself the plaintiff had admitted the existence of the arbitration

clause and the Written Statement also indicated about its existence and therefore the Court below had taken a misconceived view of law as to its jurisdiction. Rejecting the contention, the High Court inter alia held as under: "In the case at hand, the application under Section 8 was made by the defendants after the written statement stood submitted. Hence, this application was not maintainable. The fact that the existence of the arbitration clause was admitted in the plaint or asserted in the written statement is immaterial inasmuch as the Court, under Section 8, can refer for arbitration a dispute pending in a civil suit only when the party or parties concerned make application for getting the dispute referred to arbitration. If despite existence of arbitration clause, the parties choose to contest the suit, the powers under Section 8 cannot be invoked."

In this case, the defendants have already filed their Written Statement and have thereby disclosed their entire defence and that has been done in the main proceedings itself, not in the supplemental proceedings. Of course, the application under Section 8 of the Act would be maintainable if the applicant has not filed his first statement on the substance of the dispute, but when the Written Statement is filed, it can hardly be disputed that the applicant has submitted not only the first but whole of his statement on the dispute between the parties. To hold such an application to be maintainable, even after filing of the Written Statement would be contrary to the provisions contained in Section 8 of the Act. Mere disclosure of arbitration agreement in the Written Statement and claiming that Civil Court has no jurisdiction to try the suit would be of no consequences unless the Written Statement itself contains a prayer for referring the dispute for arbitration. In the case before this Court, though the defendants claimed that there is arbitration agreement between the parties and Civil Court has no jurisdiction

in the matter, no prayer was made in the Written Statement to refer the disputes between the parties for arbitration.

11. No one can dispute that a Civil Court has no jurisdiction to entertain the suit after application under Section 8 of the Act is filed but this would be subject to the application otherwise being in conformity with the requirements of the said Section. The jurisdiction of the Civil Court is not ousted on account of an arbitration agreement between the parties. It is ousted because of an application filed under Section 8 of the Act provided it otherwise confirms to the requirements laid down in the Section."

h **Sukanya Holdings Pvt. Ltd.** (supra), Supreme Court clearly held that Arbitration Act does not oust the jurisdiction of Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps as contemplated under sub-Section (1) and (2) of Section 8 of the Act. **(Para 5)**

Important Issue Involved: Arbitration Act does oust the jurisdiction of Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps, as contemplated under sub-Section (1) and (2) of Section 8 of the Act.

[Sh Ka]

APPEARANCES:

FOR THE PLAINTIFF : Mr. R.S. Rana, Advocate.

FOR THE DEFENDANTS : Mr. Ajay Kumar Gupta, Advocate.

CASES REFERRED TO:

1. *Arti Jethani* vs. *Daehsan Trading (India) Pvt Ltd & Ors.* 2011 (4) AD DEL 668.
2. *Ruchi Soya Industries Ltd.* vs. *Madan Exim (P) Ltd.* 155(2008) DLT 317.
3. *Eastern Medikit Ltd.* vs. *R.S. Sales Corporation & Anr.,* 137 (2007) DLT 626.
4. *K.Jayakumaran Nai* vs. *Vertex Securities Ltd.* AIR 2005 Ker. 294.
5. *West Bengal State Electricity Board and Ors.* vs. *Shanti Conductors Private Ltd.* AIR 2004 Gau 70.
6. *Sukanya Holdings Pvt. Ltd.* vs. *Jayesh H. Pandya and Anr.* AIR 2003 SC 2252.

RESULT: Application dismissed.

V.K. JAIN, J.

IA No. 13628/2011 (under Section 8 of Arbitration & Conciliation Act)

1. Pursuant to a meeting held on 07.03.2007, in the office of defendant No. 2 in New Delhi, defendant No. 2 placed work orders with the plaintiff for execution of civil and structural work for the secured land fill facility at Rampur in Uttar Pradesh. The plaintiff claims to have executed civil and structural work for a total sum of Rs 83,28,965.68p and claims to have received part payment, totalling Rs. 69,54,053/-, thereby leaving a balance principal sum of Rs 17,76,391.70p. This included a sum of Rs 4,16,448.28p deposited by the plaintiff with defendant No. 2 as a security deposit. The plaintiff has now filed this suit for recovery of the aforesaid amount along with interest on that amount, thereby making a total sum of Rs 24,43,139.70p.

2. The defendant filed written statement on 19.05.2011, taking a number of preliminary objections, including that the suit is hit by Section 8 of Arbitration & Conciliation Act.

3. IA No. 13628/2011 has been filed by defendant No. 2 under Section 8 of Arbitration & Conciliation Act on 26.08.2011, seeking dismissal of the suit.

The application has been opposed by the plaintiff and it has been stated in the reply that there is no arbitration clause between the parties.

4. The plaintiff has placed on record the purchase order dated

06.06.2007. There is no arbitration agreement contained in this purchase order. However, the purchase order dated 02.06.2007, a copy of which has been filed by the defendant contains the following clause:-

> "Any and all claims, disputes, questions or controversies involving the parties and arising in connection with this PO, or the execution, interpretation, validity, performance, termination hereof (collectively, "Disputes") which cannot be finally resolved by such parties negotiation shall be resolved by final and binding arbitration held in Pune in accordance with of Indian Arbitration and Conciliation Act, 1996, as amended from time to time (the "Arbitration"). The disputes shall be referred to a sole arbitrator to be appointed by Gaware-Wall ropes Limited."

5. I had an occasion to examine as to whether an application under Section 8 of Arbitration & Conciliation Act is maintainable after filing of written statement which refers to an arbitration agreement between the parties or not in, **Arti Jethani v. Daehsan Trading (India) Pvt Ltd & Ors.** 2011 (4) AD DEL 668. The following view was taken by me taking into consideration various decisions, including the decision of Supreme Court in **Sukanya Holdings Pvt. Ltd. vs. Jayesh H. Pandya and Anr.** AIR 2003 SC 2252:-

> "3. A careful analysis of Section 8 of Arbitration and Conciliation Act, 1996 would show that the following conditions are required to be fulfilled before the Court can refer the matter to arbitration;
>
> (a) the dispute between the parties should be subject matter of an arbitration agreement;
>
> (b) one of the parties to the suit should apply for referring the parties to arbitration;
>
> (c) the application should be filed on or before submitting first statement on the substance of the dispute and;
>
> (d) the application should be accompanied by the original arbitration agreement or its certified copy.
>
> 4. In the case before this Court, the application under consideration having not been filed on or before filing of written statement, but having been filed about four weeks after the written statement had been filed and after 8 days of filing of replication, one of the

> pre-requisite conditions for referring the parties to arbitration under Section 8 of Arbitration and Conciliation Act does not stand fulfilled in this case.
>
> 5. In **Sukanya Holdings** (supra), Supreme Court, while interpreting Section 8 of the Act, inter alia, observed as under:
>
> "Further, the matter is not required to be referred to the arbitral Tribunal, if-(1) the parties to the arbitration agreement have no filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof."

It is true that in the above-referred case, the application under Section 8 of Arbitration and Conciliation Act appears to have been filed before the written statement was filed and, therefore, the question as to whether such an application can be filed after the written statement has already been filed, did not directly come up for consideration in this case, but, the above-referred observations made by the Court do support the view that such an application cannot be filed after the first statement on the substance of the dispute has been filed by the applicant.

6. The contention of the learned counsel for the applicant is that since the defendant had already pleaded in the written statement that there is an arbitration agreement between the parties and, therefore, this Court has no jurisdiction to adjudicate the instant suit, it is evident that the applicants did not submit to the jurisdiction of the Civil Court and, therefore, the application is maintainable even after filing of the written statement.

7. In my view, if the Court accepts the contention that an application under Section 8 of the Act can be filed even after the first statement on substance of the dispute between the parties has already been filed, this would not only be contrary to the express provisions of law but, would also defeat the very purpose behind stipulating that such an application needs to be filed not later than submitting the first statement on the substance of the dispute. If such an application is entertained after filing of the

first statement, it would be possible for a party to the suit to first allow the trial to proceed by not filing the application by the stage stipulated in the Act and then come to the Court at a much later stage when the trial is substantially complete and seek reference of the dispute to arbitration. It is true that in the case before this Court the trial has not commenced as yet, but if the interpretation sought to be given by the learned Counsel for the applicants/defendants is accepted, it would be open to a party to the suit to file such an application even after the trial has commenced.

8. The question as to whether a defendant who pleads arbitration agreement in the Written Statement, but does not file an application under Section 8 of the Act, on or before filing of the Written Statement has come up before other High Courts in some cases. In **K.Jayakumaran Nai vs. Vertex Securities Ltd.** AIR 2005 Ker. 294, the defendant filed Written Statement raising a contention that there was an arbitration agreement between the parties. After framing of issues he filed an application seeking reference of the dispute for arbitration. The High Court noted that Section 8 of the Act clearly provides that the application had to be made not later than submitting the first statement whereas the application before it had been filed after the issues were framed. The Court expressly rejected the contention that since the matter had been raised in the Written Statement that was enough. While doing so the Court noted that the Written Statement contained no prayer for referring the matter for arbitration.

In **West Bengal State Electricity Board and Ors. Vs. Shanti Conductors Private Ltd.** AIR 2004 Gau 70, the defendants filed Written Statement indicating that the dispute which had arisen between the parties and led to institution of the suit, was covered by arbitration clause. After submitting the Written Statement on 22.9.2000 the defendants filed an application under Section 8 of the Act on 7.11.2000 seeking reference of the dispute to the arbitration. The trial Court having rejected the application the matter was agitated by the defendant before the High Court and it was contended that in the plaint itself the plaintiff had admitted the existence of the arbitration clause and the Written Statement also indicated about its existence and therefore the Court below

had taken a misconceived view of law as to its jurisdiction. Rejecting the contention, the High Court inter alia held as under:

"In the case at hand, the application under Section 8 was made by the defendants after the written statement stood submitted. Hence, this application was not maintainable. The fact that the existence of the arbitration clause was admitted in the plaint or asserted in the written statement is immaterial inasmuch as the Court, under Section 8, can refer for arbitration a dispute pending in a civil suit only when the party or parties concerned make application for getting the dispute referred to arbitration. If despite existence of arbitration clause, the parties choose to contest the suit, the powers under Section 8 cannot be invoked."

In this case, the defendants have already filed their Written Statement and have thereby disclosed their entire defence and that has been done in the main proceedings itself, not in the supplemental proceedings. Of course, the application under Section 8 of the Act would be maintainable if the applicant has not filed his first statement on the substance of the dispute, but when the Written Statement is filed, it can hardly be disputed that the applicant has submitted not only the first but whole of his statement on the dispute between the parties. To hold such an application to be maintainable, even after filing of the Written Statement would be contrary to the provisions contained in Section 8 of the Act. Mere disclosure of arbitration agreement in the Written Statement and claiming that Civil Court has no jurisdiction to try the suit would be of no consequences unless the Written Statement itself contains a prayer for referring the dispute for arbitration. In the case before this Court, though the defendants claimed that there is arbitration agreement between the parties and Civil Court has no jurisdiction in the matter, no prayer was made in the Written Statement to refer the disputes between the parties for arbitration.

11. No one can dispute that a Civil Court has no jurisdiction to entertain the suit after application under Section 8 of the Act is filed but this would be subject to the application otherwise being in conformity with the requirements of the said Section. The jurisdiction of the Civil Court is not ousted on account of an arbitration agreement between the parties. It is ousted because of

an application filed under Section 8 of the Act provided it otherwise confirms to the requirements laid down in the Section."

In **Sukanya Holdings Pvt. Ltd.** (supra), Supreme Court clearly held that Arbitration Act does not oust the jurisdiction of Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps as contemplated under sub-Section (1) and (2) of Section 8 of the Act.

6. In the present case, the defendants submitted to the jurisdiction of the Civil Court by filing a written statement which discloses not only the arbitration agreement, but also the whole of their defence on merits. No prayer was made in the written statement for referring the disputes between the parties to arbitration. As noted by me in the case of **Arti Jethani** (supra), Civil Court has jurisdiction to adjudicate upon every civil dispute between the parties to the suit and its jurisdiction is ousted not on account of existence of an arbitration agreement between the parties, but only on filing of a petition under Section 8 of Arbitration & Conciliation Act, provided the application otherwise confirms to the statutory requirements. It can hardly be disputed that despite existence of an arbitration agreement, the defendant may, either expressly or by his conduct, waive his right to seek arbitration of disputes between the parties and may consent to such disputes being decided by the Civil Court. The defendants by not filing an application under Section of Arbitration & Conciliation Act either before or simultaneous with filing of written statement, clearly waived their right to apply for arbitration in terms of Section 8 of the said Act and submitted to the jurisdiction of this Court. In fact, even in the application under consideration, no specific prayer has been made by defendant No. 2 for referring the disputes to arbitration, the only prayer being to dismiss the suit. In para 7 of the application, the defendants themselves have stated that one of the conditions required to be satisfied before the Court to exercise its power under Section 8 of the said Section is that the other party should move the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute. Since the defendants have already filed written statement on the merits of the case, this condition obviously does not get fulfilled in the present case.

7. Another reason why the disputes subject matter of this suit cannot be referred to arbitration is that the arbitration agreement is

contained only in one of the two purchase orders placed by defendant No. 2 upon the plaintiff. There is no arbitration clause in the second purchase order. A careful analysis of the arbitration clause contained in purchase order filed by the defendants would show that it applies only to claims, disputes questions and controversies arising in connection with that particular purchase order or its execution, interpretation, validity, performance, termination, etc. This arbitration clause, therefore, does not apply to the disputes which are referable to the second purchase order, which contains no such clause.

In **Sukanya Holdings Pvt. Ltd.** (supra), the following view taken by the Supreme Court is relevant in this regard:-

"Secondly, there is no provision in the Act that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators.

Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words 'a matter' indicates entire subject matter of the suit should be subject to arbitration agreement.

The next question which requires consideration is even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.

Secondly, such bifurcation of suit in two parts, one to be decided by the arbitral tribunal and other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."

8. The learned counsel for the defendant has referred to the decision of this Court in **Ruchi Soya Industries Ltd. v. Madan Exim (P) Ltd.** 155(2008) DLT 317. In the above referred case, in a suit for recovery of money, the defendant which filed an application under Section 8 of Arbitration & Conciliation Act, 1996 contended that out of various agreements between the parties only one agreement contained an arbitration clause and the suit being based on a running account to be maintained between the parties and that running account having reference only to the agreements which contained arbitration clause, the matter was referable to arbitration. The plaintiff, on the other hand, contended that the agreements dated 01.11.2000, 31.12.2001 and 01.08.2002 existed at different points of time and the final agreement dated 01.08.2002 did not contain an arbitration clause. It was also submitted by the plaintiff that disputes between the parties had arisen only later and the agreement in respect of which the suit has been filed did not contain an arbitration clause. Upholding the contention of the plaintiff, this Court, inter alia, observed and held as under:-

"The agreements were sequenced in time and the later agreements supplanted the earlier agreements even if they did not expire by efflux of time. Consequently, the surviving agreement describing the commercial relationship between the parties was the agreement dated 01.08.2002. Admittedly, that agreement did not contain any arbitration clause. The parties were conscious of the fact that the earlier agreements had contained the arbitration clause and being conscious of this, they entered into the agreement dated 01.08.2002 without insisting upon an arbitration clause. The intention of the parties is clear that they do not want arbitration. Insofar as the lease agreement is concerned, this is a separate and parallel transaction on which the plaintiff does not found his claim at all. The result of this discussion is that there

is no arbitration clause governing the dispute between the parties and consequently, this application is liable to be dismissed."

In the case before this Court, the suit is not based solely upon the purchase order dated 19.12.2007 which contains the arbitration clause. This is not as if the defendants made full payment against the first purchase order and did not make payment against the second purchase order. In the case relied upon by the learned counsel for the defendant, the later agreement supplanted the earlier agreements and the only surviving agreement governing obligations of the parties was the last agreement dated 01.08.2002. On the other hand, in the case before this Court, the second purchase order did not supplant or replace the first purchase order, both the purchase orders being separate from each other. The first purchase order was for construction of civil and structural work for the secured land fill facility, as per the scope of work given in Annexure-1 of the purchase order. The second purchase order, on the other hand, was for earth filling with compaction with all plant & machinery, including royalty and all items complete as per instructions of the engineer in-charge. Therefore, the second purchase order which contained the arbitration agreement was not in substitution or replacement of the previous purchase order. The disputes between the parties are not confined to the work which was the subject matter of the second purchase order. Therefore, it can hardly be disputed that the whole of the disputes between the parties are not covered by the arbitration clause contained in the second purchase order.

9. The learned counsel for the defendant has also relied upon the decision of this Court in **Eastern Medikit Ltd. vs. R.S. Sales Corporation & Anr.,** 137 (2007) DLT 626. In the above-referred case, the plaintiff filed a suit for recovery of money. The defendant filed written statement, *inter alia,* stating that the suit was barred under the provisions of Arbitration Act as the invoices issued by the plaintiff itself contained an arbitration clause. Thereafter, the defendant filed an application under Order 7 Rule 11 of the Code of Civil Procedure, seeking rejection/ dismissal of the plaint on various grounds, including existence of an arbitration agreement between the parties. The plaintiff agreed that in view of the arbitration agreement between the parties, the matter be referred to the arbitration. Thereupon, the defendant took summersault and stated that he did not want the matter referred to arbitration. He took an ingenious plea that the matter be referred to arbitration only when

appropriate application under Section 8 of Arbitration & Conciliation Act, 1996 was filed by him. It was in this context and on these facts that this Court observed that in such circumstances, the first preliminary objection of the defendants contained in the written statement could be treated as an application under Section 8 of Arbitration & Conciliation Act, 1996. The Court further observed that it was more, so when the plaintiff who had filed the suit had no objection for the matter to be referred for the arbitration and that the defendants, after taking such a plea, cannot be allowed to wriggle out of it. Thus, in the case relied upon by the learned counsel for the defendants, the plaintiff himself was agreeable for reference of the disputes to arbitration. On the other hand, in the case before this Court, the plaintiff is vehemently opposing the application filed under Section 8 of Arbitration & Conciliation Act. In the above-referred case, it was the defendant who, despite setting up the arbitration clause, wanted to wriggle out of the same, whereas in the case before this Court, it is the plaintiff who is opposing reference of the disputes to the arbitrator. This judgment, therefore, does not really apply to the facts of this case. Moreover, this judgment does not take into consideration the binding decision of Supreme Court in **Sukanya Holdings Pvt. Ltd** (supra), wherein Supreme Court clearly held that an application under Section 8 of Arbitration & Conciliation Act can be filed only before filing the first statement on the merits of the case.

10. For the reasons stated hereinabove, I held that the application under consideration is devoid of any merit. The application is accordingly dismissed.

ILR (2013) I DELHI 264
CS (OS)

RAMAN KUMAR **....PLAINTIFF**

VERSUS

NEELAM NAGPAL & OTHERS **....DEFENDANTS**

(V.K. JAIN, J.)

CS (OS) NO. : 1743/2010 **DATE OF DECISION: 13.09.2012**

Specific Relief Act, 1963—Section-14—Plaintiff filed suit seeking declaration to be rightful owner in possession of suit property and directions to defendants to execute sale deed in his favour—As per plaintiff, he and one Sh. K.L. Nagpal, husband of defendant no.1 and father of defendant no. 2 to 4, had entered into agreement to sell for consideration, the suit property—Whole of consideration was paid by plaintiff to Sh. K.L. Nagpal in his lifetime—Further, on payment of Rs. 3 lac, another agreement was executed between two thereby agreeing that 75% of rent which was received by Sh. K.L. Nagpal, will be paid to plaintiff—General Power of Attorney was executed in his favour—Plaintiff also moved application seeking ad-interim injunction restraining defendants from creating third party interest in suit property—Defendants contested suit and alleged that plaintiff had relied upon forged and fabricated documents and they denied transactions set up by plaintiff in plaint. Held: Every suit for specific performance need for be decreed merely because it is filed within the period of limitation, by ignoring the time limits stipulated in the agreement. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist purchasers in special

cases—Injunction application dismissed.

The case of the plaintiff is that the entire sale consideration was paid by him on 19th March, 2008. The present suit has been filed on 30th August, 2010. There is no explanation from the plaintiff as to why he waited for more than two years to come to the Court seeking specific performance of the agreement alleged to have been executed between him and late Shri K.L.Nagpal. If there is unexplained and unreasonable delay in seeking specific performance of an Agreement to Sell to an immovable property, that by itself may be a sufficient ground to deny specific performance considering the fact that the relief of specific performance is a discretionary relief and a person is not entitled to specific performance of an Agreement as a matter of right even if he is not otherwise able to prove execution of such an Agreement. The following view taken by Supreme Court in **Mrs. Saradamani Kandappan v. S. Rajalakshmi and Ors** (2011) 2 SCC 18 is pertinent in this regard:-

> "(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also 'frown' upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser."

This is yet another reason, why prima facie I am of the view that the Agreement to Sell set up in the plaint cannot be allowed to enforce through the process of the Court.

(Para 7)

Important Issue Involved: Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time limits stipulated in the agreement. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three years period is intended to assist purchasers in special cases.

[Sh Ka]

APPEARANCES:

FOR THE PLAINTIFF : Mr. V.K. Sharma, Advocate.

FOR THE DEFENDANTS : Mr. Alok Sharma, Mr. Ajit Kumar Singh, Advocate for D-1. Mr. Rajesh Anand, Advocate for D-2 to 4.

CASES REFERRED TO:

1. *Mrs. Saradamani Kandappan* vs. *S. Rajalakshmi and Ors* (2011) 2 SCC 18.

RESULT: Application Dismissed.

V.K. JAIN, J. (ORAL)

IA 11389/2010(O.39 R.1 & 2 CPC)

1. The case of the plaintiff is that late Shri K.L.Nagpal, husband of defendant No.1 and the father of defendants 2 to 4 had, vide Agreement to Sell dated 26.04.2004, agreed to sell B-105, Derawal Nagar, Delhi, to him for a consideration of Rs.25 lakhs and the whole of the consideration had been paid to him in his lifetime. In terms of the Agreement to Sell dated 7th August, 2004, the plaintiff claims to have paid Rs.15 lakhs to late Shri K.L.Nagpal on 26th April, 2004, Rs.3 lakhs on 07.08.2004, Rs.2 lakhs on 18th March, 2005, another Rs.2 lakh on 20th March, 2005, Rs.2 lakhs on 21st March, 2007 and Rs.1 lakh on 19th March, 2008.

This is also the case of the plaintiff that on payment of Rs.3 lakhs on 7th August, 2004 another agreement was executed by late Shri K.L.Nagpal in his favour thereby agreeing that 75% of the rent being received from the above property will be paid to the plaintiff. A General Power of Attorney is alleged to have been executed in favour of the

plaintiff on that date. A Will with respect to the aforesaid property is also stated to have been executed by late Shri K.L.Nagpal in favour of the plaintiff on 19th March, 2008. Shri K.L.Nagpal expired on 27th March, 2008. The plaintiff is now seeking a declaration that he is the rightful owner in possession of the aforesaid property. He has also sought a direction to the defendants to execute the sale deed in his favour.

2. The suit has been contested by the defendants who have alleged that the documents relied upon by the plaintiff are forged and fabricated documents. They have denied the transaction set up in the plaint and have also denied the payments alleged to have been made to late Shri K.L.Nagpal from time to time.

3. A perusal of the Agreement to Sell dated 26th April, 2004 filed by the plaintiff would show that the following was the schedule of payment which late Shri K.L.Nagpal is alleged to have agreed with the plaintiff:

Amount	**Month**
Rs.3 lakhs	August, 2004
Rs.2 lakhs	March, 2005
Rs.2 lakhs	March, 2007
Rs.1 lakh	March 2008

Thus, the seller, according to the plaintiff, agreed to accept the sale consideration in instalments spread-over about four years. Ordinarily, in the absence of special reasons, it is not usual for a person agreeing to sell an immovable property to accept the balance sale consideration in instalments spread over such a long duration and the sale consideration is agreed to be paid within a few months after the agreement is concluded between the parties. There is no explanation as to why late Shri K.L.Nagpal, agreed to accept the sale consideration in instalments spread over almost four years.

4. Admittedly, no payment by way of a cheque or pay order was made by the plaintiff to late Shri K.L.Nagpal. Ordinarily, in transactions for sale of immovable properties at least part-payment is made by way of cheque/draft so as to have unimpeachable documentary evidence of the transaction between the parties. Again, there is no explanation for not making even a part payment by way of cheque or demand draft.

5. During the course of arguments on last hearing, I specifically asked the learned counsel for the plaintiff as to what was the source of payments alleged to have been made by the plaintiff to late Shri K.L.Nagpal, from time to time. An affidavit has been filed today in which it is alleged that the plaintiff had deposited two chit funds scheme with late Shri K.L.Nagpal and had deposited Rs.3 lakhs with him upto September, 2003 which he had to take from him. There is no averment to this effect in the plaint or in the Agreement to Sell filed by the plaintiff. If the plaintiff had to take Rs.3 lakhs from late Shri K.L.Nagpal, at the time of execution of the Agreement to Sell in his favour in April, 2004, this amount would have been adjusted, at the time of agreement itself, towards part-payment of the sale consideration. Moreover, no document has been filed by the plaintiff to show that he had to take Rs.3 lakhs from late Shri K.L.Nagpal by September, 2003.

It has been next alleged in the affidavit that the mother of the plaintiff sold jewellery sometimes in March, for purchase of the suit property. The affidavit is silent as to whom the jewellery was sold. There is no document evidencing sale of jewellery worth Rs.6 lakhs by the mother of the plaintiff sometimes in March-April, 2004. The affidavit does not disclose whether the payment for purchase of the jewellery was received in cash or by way of a cheque/pay order. The affidavit is silent as to where the money was kept if it was received in cash, before it was paid to late Shri K.L.Nagpal.

It is next alleged in the affidavit that the plaintiff had received Rs.3 lakhs from one Ved Prakash at the time of purchase of this property. The affidavit does not disclose on which date the payment was allegedly received by him from Ved Prakash. There is no documentary proof of any payment having been received. The affidavit is silent as to whether this payment is received by cash or by way of cheque. It is also alleged in the affidavit that the plaintiff borrowed Rs.2.5 - 3 lakhs from relatives and friends. Again, the affidavit does not disclose the particulars of relatives and friends from whom he claims to have taken loan of Rs.2.5 - 3 lakhs. No break up has been given as to how much amount was received from whom and when. The affidavit is conspicuously silent as to whether the aforesaid loan was taken in cash or by way of a cheque/ draft.

It is alleged in the affidavit that the second payment of Rs.3 lakhs

in August-September, 2004 was made from the chit fund scheme being run by late Shri K.L.Nagpal. A perusal of the receipt of Rs.3 lakhs filed by the plaintiff dated 7th August, 2004 would show that there is absolutely no indication in the aforesaid document that this amount was received by way of adjustment of the amount which was payable to the plaintiff in the chit fund account. This document purports to be a receipt of payment of cash recovered from the plaintiff and not a receipt of adjustment of any amount which was payable by the seller to the purchaser. Again, there is no explanation from this apparent contradiction.

It is alleged in the affidavit that the balance amount of Rs.7 lakhs was paid by the plaintiff from his earnings by selling *namkeens* etc. and he was paying Rs.2 lakhs per annum to late Shri K.L.Nagpal. The plaintiff has not placed on record his Income-Tax Returns to indicate what was his income during the relevant years. He has not disclosed as to where the money was kept before it was paid by him to late Shri K.L.Nagpal. As noted earlier, the payment is alleged to have been made in instalments, of Rs.2 lakhs on 18th March, 2005, Rs.2 lakh on 20th March, 2005, Rs.2 lakh on 21st March, 2007 and Rs.1 lakh on 19th March, 2008. Thus, Rs.4 lakhs are alleged to have been paid in the financial year 2004-2005. If the plaintiff was not earning that much amount during the said financial year, he obviously could not have paid that amount to late Shri K.L.Nagpal. The plaintiff has not filed any bank statement or passbook to show that he had cash deposit in his bank account to make payment to late Shri K.L.Nagpal. Though it is stated in the affidavit that the plaintiff was paying Rs.2 lakh per annum to late Shri K.L.Nagpal, no payment is alleged to have been made in the financial year 2005-2006. In these circumstances, I find it difficult to accept even prima facie, that the whole of the sale consideration was paid to late Shri K.L.Nagpal, in cash.

6. There are yet another aspects of the case which needs consideration in this regard. Admittedly, documents of title of the suit property are not in possession of the plaintiff. There is no explanation as to why the plaintiff did not insist on the original documents of title being handed over to him, before paying the whole of the sale consideration agreed between the parties. The learned counsel appearing for the defendants maintains that the original documents are with the defendants and he is carrying the same to the Court. He has also pointed that even photocopies of the documents of title are not with the plaintiff. This is

yet another indicator which creates serious doubt on the truthfulness of the case set up in the plaint.

7. The case of the plaintiff is that the entire sale consideration was paid by him on 19th March, 2008. The present suit has been filed on 30th August, 2010. There is no explanation from the plaintiff as to why he waited for more than two years to come to the Court seeking specific performance of the agreement alleged to have been executed between him and late Shri K.L.Nagpal. If there is unexplained and unreasonable delay in seeking specific performance of an Agreement to Sell to an immovable property, that by itself may be a sufficient ground to deny specific performance considering the fact that the relief of specific performance is a discretionary relief and a person is not entitled to specific performance of an Agreement as a matter of right even if he is not otherwise able to prove execution of such an Agreement. The following view taken by Supreme Court in **Mrs. Saradamani Kandappan v. S. Rajalakshmi and Ors** (2011) 2 SCC 18 is pertinent in this regard:-

> "(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also 'frown' upon suits which are not filed immediately after the breach/ refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser."

This is yet another reason, why prima facie I am of the view that the Agreement to Sell set up in the plaint cannot be allowed to enforce through the process of the Court.

9. For the reasons stated hereinabove, no prima facie case has been made out by the plaintiff for grant of *ad interim* injunction restraining the defendants from creating third party interest in the suit property. The application is, therefore, dismissed. The observations made in this order being prima facie and tentative, made with a view to decide this application, would not affect the decision of the suit on merits.

IA 11716/2012(u/S.151 CPC for directions to take off w.s. of D-2 to D-4 from the record)

This is an application for taking the written statement of defendants 2 to 4 off the record on the ground that the written statement is neither signed nor verified by the defendants and that is why the Division Bench vide its order dated 4th May, 2012 in FAO(OS) No. 8082/2012 was pleased to permit the plaintiff to move this Court for taking the written statement off the record.

The learned counsel for the plaintiff states that the written statement of defendants No.2 to 4 besides being defective was also not filed within the prescribed period of ninety days and for this reason also, it is liable to be taken off the record. A perusal of the previous orders would show that IA 4558/2011(O.VIII R.10 CPC) was filed by the plaintiff for closing the rights of defendants 2 to 4 to file the written statement on the ground that they had filed the written statement on 2nd July, 2011 and, therefore, had not been filed within the prescribed time. The Court directed the written statement to be taken on record subject to payment of Rs.5,000/- as costs. The order dated 19th December, 2011 was challenged by the plaintiff by way of FAO(OS) No. 188/2012. The learned counsel for the plaintiff/appellant stated before the Division Bench that since the written statement was defective, he would like to move this Court for the written statement of defendants 2 to 4 to be taken off record. The appeal was then dismissed as withdrawn. As a result of these orders, the order dated 19th December, 2011, to the extent delay in filing the written statement by defendants 2 to 4 was condoned became final and it is no more open to the plaintiff to contend that the written statement, being delayed cannot be taken on record. The only plea which is open to the plaintiff to contend that the written statement is otherwise defective being unsigned and unverified. On a perusal of the written statement of defendants No.2 to 4, I find that it has been signed by the learned counsels and not by defendants No. 2 to 4 and has not been verified at all. The defendants 2 to 4 are permitted to file a properly and signed written statement within two weeks subject to payment of Rs.10,000/- as costs.

This application stands disposed of in terms of this order.

CS(OS) 1743/2010

Replication be filed within two weeks.

The parties to appear before the Joint Registrar on 5th November, 2012 for admission/denial of documents.

The matter be listed before Court on 28th February, 2013 for framing of issues.

ILR (2013) I DELHI 272
W.P. (C)

INDIAN MEDICAL ASSOCIATION ....PETITIONER

VERSUS

PO LABOUR COURT-I & ANR. ....RESPONDENTS

(MUKTA GUPTA, J.)

W.P. (C) NO. : 5015/1999 DATE OF DECISION: 14.09.2012

Industrial Disputes Act, 1947—Petitioner challenged award passed by PO Labour Court-I, whereby petitioner management was directed to reinstate respondent No. 2 with 25 percent back wages on the grounds that petitioner is not an industry and the impugned award was passed on 17.12.98, after setting aside exparte award dated 05.10.95, published on 11.12.95—Held: Since one of the authorized activity of petitioner is to purchase property and maintain the same, staff which would be employed for the purpose of maintenance of the said buildings which earn profit as well, cannot be said to be exempted from being employed in an industry and besides that, one of the objectives of petitioner being improvement of public health and medical education, there was no infirmity in the view taken by the Labour Court that petitioner is an industry—As regards the setting aside of the impugned award after expiry of 30 days post publication, held

that the award was published on 11.12.95 and the application to set aside the award was filed by respondent No.2 on 09.01.96, which is well within 30 days from its publication; as such the Labour Court had not become functus officio.

A perusal of the judgment and the Objects and Memorandum of Association of the Petitioner would show that though profit making is not the main object of the Petitioner, however, certainly it is an incidental object for which purpose the Petitioner has built up number of properties from which rental/license fee are being received. Thus the dominant purpose test as has been contended by the learned counsel for the Petitioner would have no application. Their Lordships held that even cooperative societies, research institutions and other kind of establishments cannot be exempted from Section 2(j) of the ID Act if they fulfill the triple test. It may be noted that absence of profit motive or gainful objective is irrelevant. One of the authorized activity of the Petitioner is to purchase properties and maintain them. Thus, the staff which would be employed for the purposes of maintaining the said buildings which earns profit as well cannot be said to be exempted from the ambit of being employed in an industry. The ideology of the Act being industrial peace, regulation and resolution of industrial disputes between the employer and the workmen, the range of this statutory ideology must inform the reach of statutory definition and be taken to the logical conclusion without any pre-conceived notions. Even professions, clubs, educational institutions, cooperatives, research institutes, charitable projects etc., if they fulfill the triple test cannot be exempted from the scope of Section 2 (j)(ii) of the ID Act. Only restricted category of professions, clubs, cooperatives and even gurukulas and little research labs may qualify such exemption if, in simple ventures, substantially and, going by the dominant nature criterion, substantively, no employees are entertained. Where there are a number of complex activities and some of which qualify for exemption and the others do not, even then the predominant nature of services and the integrated nature of

the departments will have to be looked into. This activity run by the Petitioner is certainly capable of entering into the world of 'Res-commercium' as contended by the learned counsel for the Respondent. It may be noted that the Petitioner has framed its staff services rules for employing various staff. One of the objectives of the Association is to promote improvement of public health and medical education in India. Thus in view of the fact that one of the objectives is improvement of public health and medical education and the Petitioner having staff service rules, I find no infirmity in the learned Trial Court coming to the conclusion that the Petitioner is an industry. **(Para 8)**

Learned counsel for the Petitioner placing reliance on the judgment of the Hon'ble Supreme Court in **M/s Sangham Tape Company** (Supra) has contended that the award dated 5th October, 1995 was published on 11th December, 1995 and even 30 days had expired post its publication. Thus the learned Labour Court had become functus officio and had no power to recall the award dated 5th October, 1995. However, while contending so, the learned counsel has failed to notice that the application to set aside the award dated 5th October, 1995 was filed well within the time period of thirty days post its publication. On a perusal of the records it is observed that the award dated 5th October, 1995 was published on 11th December, 1995 vide Gazette Notification No. 39512-14. The application to set aside this award was filed by the Respondent/workman on 9th January, 1996 which is well within the prescribed period of thirty days from its publication. As held in **Grindlay Bank Ltd.** (Supra) and **M/s Sangham Tape Company** (supra) the proceedings before the learned Tribunal would be deemed to be continue till the date on which the award becomes enforceable under Section 17A of the ID Act and under this section the award becomes enforceable only on the expiry of a period of thirty days from its publication. It was further held that the proceedings with regard to a reference under Section 10 of the Act are not deemed to be concluded until the expiry of 30 days from the publication of the award and till then, the

Tribunal retains jurisdiction over a dispute referred to it for adjudication and upto that date it has power to entertain an application in connection with such dispute. Clearly in the present case the learned Labour Court had not become functus officio on the date when the application to set aside the ex-parte award was filed by the Respondent/workman. Hence, in the light of the judgment aforementioned this contention of the Petitioner/Management too does not find favour with me. **(Para 11)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Rajeshwar K. Gupta, Ms. Sumati and Ms. Meenakshi, Advocates.

FOR THE RESPONDENTS : Mr. S.P. Singh Chaudhari, Advocate for Respondent No. 2.

CASES REFERRED TO:

1. *Jagbir Singh* vs. *Haryana State Agriculture Marketing Board and Anr.* (2009) 15 SCC 327.
2. *Grindlays Bank Ltd.* vs. *Central Government Industrial Tribunal and others,* AIR 1981 SC 606.
3. *University of Delhi* vs. *Ramlfath,* (1964) 2 Edition, Vol. 38 p. 11 SCR 703 : AIR 1963 SC 1873: (1963) 2 Lab LJ

RESULT: Petition Disposed of.

MUKTA GUPTA, J.

1. By the present petition the Petitioner seeks setting aside of the award dated 17th December, 1998 passed by the learned Presiding Officer, Labour Court-I, Tis Hazari Courts, Delhi in Case No. ID-044/86 wherein the learned Labour Court directed the Management/Petitioner to grant workman/ Respondent No. 2 reinstatement along with 25% back wages.

2. Learned counsel for the Petitioner contends that the impugned award was passed on 17th December, 1998 after setting aside an ex-parte award dated 5th October, 1995 published on 11th December, 1995 against the workman after the expiry of a period of thirty days of its

publication. The award is violative of Sections, 11, 17A and 10 of the Industrial Disputes Act, 1947 (in short the ID Act). Reliance is placed on the judgment of the Hon'ble Supreme Court in the case of **Sagham Tape Company vs. Hans Raj,** AIR 2004 SC 4776 in support of this contention. The learned Labour Court has committed an error of law by not holding that the Petitioner/Management is not an 'Industry' as defined under Section 2 (j) of the Industrial Disputes Act, 1947. The Petitioner is not engaged in any business or activity as defined under the ID Act, rather it is a registered society under the Societies Registration Act and as such it cannot be held to be an 'industry'. The learned Trial Court has deprived the Petitioner of its right of defence and cross-examination of witnesses. The Trial Court ought to have allowed a further opportunity to the Petitioner to cross-examine the witnesses and adduce its evidence. It is lastly contended that granting of relief of reinstatement and back wages in the facts and circumstances of the case is wholly unjustified, illegal and untenable in the eyes of law. Granting the relief of reinstatement with back wages is neither invariable rule nor automatic and depends on the facts and circumstances of each case.

3. Per contra learned counsel for Respondent No. 2 contends that the Labour Court is competent to set aside its ex-parte award if it is satisfied that the aggrieved party was prevented from appearing by sufficient cause. Reliance is placed on **Grindlays Bank Ltd. vs. Central Government Industrial Tribunal and others,** AIR 1981 SC 606. The Petitioner is earning money in various ways from its allied activities. It is letting out halls/premises and is earning rents etc. Hence, is covered under definition of "industry" under Section 2 (j) of the ID Act. Learned counsel contends that despite several opportunities given to the Petitioner and almost two years time spent in litigation before the learned Labour Court, the Petitioner failed to either cross-examine witnesses or to adduce its own evidence. The Petitioner intentionally absented itself before the learned Labour Court hence it was rightly proceeded ex-parte. The proceedings were undertaken as per law and it was the Petitioner who evaded the said proceedings. Hence, at this stage the Petitioner cannot be allowed to take advantage of its own wrong. The Petitioner has failed to point out any illegality in the award and the proceedings. It is lastly submitted that the Petitioner has also not filed any application to set aside the ex-parte award which would have been a proper course in the case where an ex-parte order is passed and hence, at this stage it cannot be

allowed to challenge the legality of the impugned award.

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

5. Briefly the case of the Petitioner is that Respondent No. 2 was initially appointed on ad-hoc basis for three months. However, his services were allowed to continue. On 17th December, 1980 Respondent No. 2 was suspended on account of gross misbehavior with the caretaker however, he was taken back after he tendered an apology in writing and assured that there would be no complaint in future. On 4th January, 1985 again, there was a complaint against the workman/Respondent for his gross misbehavior, misconduct and he was suspended pending report of the enquiry committee. He was asked to handover the keys, tools, equipments, electrical fittings etc. which were in his possession. However, he failed to handover the same. Subsequently on 13th January, 1985 he was served with a memorandum of enquiry asking him to appear before the Inquiry Officer on 11th February, 1985. The Respondent No. 2 appeared before the Inquiry Officer, when he requested for pardon along with an assurance that no such complaint would be heard in future against him. The inquiry officer examined two witnesses and their statements were recorded. Respondent No.2 was given full opportunity to explain his case. However, he failed to do so. The inquiry officer found the Respondent No. 2 guilty of misconduct and hence he was dismissed with effect from 28th February, 1985. Thereafter, Respondent No.2/workman raised an industrial dispute which was referred by the Secretary (Labour), Delhi Administration to Respondent No. 1 in the following term of reference:

> "Whether the dismissal from service of Sh. Harnam Singh is illegal and/or unjustified and if so, to what relief is he entitled and what directions are necessary in this respect?"

6. On receipt of notice from the learned Labour Court the Petitioner filed its reply to the claim of workman and contested the same. However, the workman failed to lead any evidence before the Labour Court hence vide award dated 5th October, 1995 the learned Court proceeded the workman ex-parte and held that since the workman had failed to lead evidence on the issue of enquiry and abstained from proceedings he was not entitled to any relief. The respondent/workman moved an application to set aside this ex-parte award which was allowed by Respondent No.

1, adjourning the matter to 9th December, 1996 for cross-examination of Respondent No. 2 by the Petitioner. The Petitioner could not appear on the next date of hearing hence the Petitioner was proceeded ex-parte. However, this ex-parte order was also later on set aside by the learned labour Court vide its order dated 21st February, 1997. Learned Court vide its order dated 22nd July, 1998 closed the right of the Petitioner to cross-examine or adduce evidence. Finally on 17th December, 1998 the impugned award was passed holding the enquiry to be illegal and improper thus vitiated and granting reinstatement with 25% back wages to the workman.

7. Learned counsel for the Petitioner has contended that the Petitioner is not an industry. In **Bangalore Water Supply,** 1978 (2) SCC 213 their Lordships held:

> "140. "Industry', as defined in Section 2(j) and explained in *Banerji*, has a wide import.
>
> "(a) Where (i) systematic activity, (ii) organized by cooperation between employer and employee (the direct and substantial element is chimerical) (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss e.g. making, on a large scale *prasad* or food), prima facie, there is an 'industry' in that enterprise.
>
> (b) Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector.
>
> (c) The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.
>
> (d) If the organization is a trade or business it does not cease to be one because of philanthropy animating the undertaking."
>
> 141. Although Section 2(j) uses words of the widest amplitude in its two limbs, their meaning cannot be magnified to overreach itself.
>
> "(a) 'Undertaking' must suffer a contextual and associational shrinkage as explained in *Banerji* and in this judgment; so also,

service, calling and the like. This yields the inference that all organized activity possessing the triple elements in I, although not trade or business, may still be 'industry' provided *the nature of the activity,* viz. the employer-employee basis, bears resemblance to what we find in trade or business. This takes into the fold of 'industry' undertakings, callings and services, adventures 'analogous to the *carrying* on the trade or business'. All features, other than the methodology of carrying on the activity viz. in organizing the co-operation between employer and employee, may be dissimilar. It does not matter, if on the employment terms there is analogy."

142. Application of these guidelines should not stop short of their logical reach by invocation of creeds, cults or inner sense of incongruity or outer sense of motivation for or resultant of the economic operations. The ideology of the Act being industrial peace, regulation and resolution of industrial disputes between employer and workmen, the range off this statutory ideology must inform the reach of the statutory definition. Nothing less, nothing more.

"(a) The consequences are (i) professions, (ii) clubs, (iii) educational institutions, (iv) co-operatives, (v) research institutes, (vi) charitable projects, and (vii) other kindred adventures, if they fulfil the triple tests listed in I, cannot be exempted from the scope of Section 2(j).

(b) A restricted category of professions, clubs, cooperatives and even *gurukulas* and little research labs, may qualify for exemption if, in simple ventures, substantially and, going by the dominant nature criterion, substantively, no employees are entertained but in minimal matters, marginal employees are hired without destroying the non-employee character of the unit.

(c) If, in a pious or altruistic mission many employ themselves, free or for small honoraria or like return, mainly drawn by sharing in the purpose or cause, such as lawyers volunteering to run a free legal services clinic or doctors serving in their spare hours in a free medical centre or *ashramites* working at the bidding of the holiness, divinity or like central personality, and the services are supplied free or at nominal cost and those who serve are not

engaged for remuneration or on the basis of master and servant relationship, then, the institution is not an industry even if stray servants, manual or technical, are hired. Such eleemosynary or like undertakings alone are exempt ù not other generosity, compassion, developmental passion or project."

143. The dominant nature test:

"(a) Where a complex of activities, some of which qualify for exemption, others not, involves employees on the total undertaking, some of whom are not 'workmen' as in the University of Delhi case [**University of Delhi v. Ramlfath,** (1964) 2 Edition, Vol. 38 p. 11 SCR 703 : AIR 1963 SC 1873: (1963) 2 Lab LJ 335] or some departments are not productive of goods and services if isolated, even then, the predominant nature of the services and the integrated nature of the departments as explained in the Corporation of Nagpur will be the true test. The whole undertaking will be 'industry' although those who are not 'workmen' by definition may not benefit by the status.

(b) Notwithstanding the previous clauses, sovereign functions, strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by government or statutory bodies.

(c) Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within Section 2(j).

(d) Constitutional and competently enacted legislative provisions may well remove from the scope of the Act categories which otherwise may be covered thereby."

8. A perusal of the judgment and the Objects and Memorandum of Association of the Petitioner would show that though profit making is not the main object of the Petitioner, however, certainly it is an incidental object for which purpose the Petitioner has built up number of properties from which rental/license fee are being received. Thus the dominant purpose test as has been contended by the learned counsel for the Petitioner would have no application. Their Lordships held that even cooperative societies, research institutions and other kind of establishments

cannot be exempted from Section 2(j) of the ID Act if they fulfill the triple test. It may be noted that absence of profit motive or gainful objective is irrelevant. One of the authorized activity of the Petitioner is to purchase properties and maintain them. Thus, the staff which would be employed for the purposes of maintaining the said buildings which earns profit as well cannot be said to be exempted from the ambit of being employed in an industry. The ideology of the Act being industrial peace, regulation and resolution of industrial disputes between the employer and the workmen, the range of this statutory ideology must inform the reach of statutory definition and be taken to the logical conclusion without any pre-conceived notions. Even professions, clubs, educational institutions, cooperatives, research institutes, charitable projects etc., if they fulfill the triple test cannot be exempted from the scope of Section 2 (j)(ii) of the ID Act. Only restricted category of professions, clubs, cooperatives and even gurukulas and little research labs may qualify such exemption if, in simple ventures, substantially and, going by the dominant nature criterion, substantively, no employees are entertained. Where there are a number of complex activities and some of which qualify for exemption and the others do not, even then the predominant nature of services and the integrated nature of the departments will have to be looked into. This activity run by the Petitioner is certainly capable of entering into the world of 'Res-commercium' as contended by the learned counsel for the Respondent. It may be noted that the Petitioner has framed its staff services rules for employing various staff. One of the objectives of the Association is to promote improvement of public health and medical education in India. Thus in view of the fact that one of the objectives is improvement of public health and medical education and the Petitioner having staff service rules, I find no infirmity in the learned Trial Court coming to the conclusion that the Petitioner is an industry.

9. In **Grindlays Bank Ltd.** (supra) the Hon'ble Supreme Court has held:

> "14. The contention that the Tribunal had become functus officio and therefore, had no jurisdiction to set aside the ex parte award and that the Central Government alone could set it aside, does not commend to us. Sub-section (3) of Section 20 of the Act provides that the proceedings before the Tribunal would be deemed to continue till the date on which the award becomes enforceable under Section 17A. Under Section 17A of the Act, an award

> becomes enforceable on the expiry of 30 days from the date of its publication under Section 17. The proceedings with, regard to a reference under Section 10 of the Act are, therefore, not deemed to be concluded until the expiry of 30 days from the publication of the award. Till then the Tribunal retains jurisdiction over the dispute referred to it for adjudication and upto that date it has the power to entertain an application in connection with such dispute. That stage is not reached till the award becomes enforceable under Section 17A. In the instant case, the Tribunal made the ex parte award on December 9, 1976. That award was published by the Central Government in the Gazette of India dated December 25, 1976. The application for setting aside the ex parte award was filed by respondent No. 3, acting on behalf of respondents Nos. 5 to 17 on January 19, 1977 i.e., before the expiry of 30 days of its publication and was, therefore, rightly entertained by the Tribunal. It had jurisdiction to entertain it and decide it on merits. It was, however, urged that on April 12, 1977 the date on which the impugned order was passed, the Tribunal had in any event become functus officio. We cannot accede to this argument. The jurisdiction of the Tribunal had to be seen on the date of the application made to it and not the date on which it passed the impugned order. There is no finality attached to an ex parte award because it is always subject to its being set aside on sufficient cause being shown. The Tribunal had the power to deal with an application properly made before it for setting aside the ex parte award and pass suitable orders."

10. Further, in **M/s Sangham Tape Company** (supra) the Hon'ble Supreme Court observed:

> "8. The said decision is, therefore, an authority for the proposition that while an Industrial Court will have jurisdiction to set aside an ex part award but having regard to the provision contained in Section 17A of the Act, an application therefore must be filed before the expiry of 30 days from the publication thereof. Till then Tribunal retains jurisdiction over the dispute referred to it for adjudication and only upto that date, it has the power to entertain an application in connection with such dispute."

11. Learned counsel for the Petitioner placing reliance on the judgment

of the Hon'ble Supreme Court in **M/s Sangham Tape Company** (Supra) has contended that the award dated 5th October, 1995 was published on 11th December, 1995 and even 30 days had expired post its publication. Thus the learned Labour Court had become functus officio and had no power to recall the award dated 5th October, 1995. However, while contending so, the learned counsel has failed to notice that the application to set aside the award dated 5th October, 1995 was filed well within the time period of thirty days post its publication. On a perusal of the records it is observed that the award dated 5th October, 1995 was published on 11th December, 1995 vide Gazette Notification No. 39512-14. The application to set aside this award was filed by the Respondent/workman on 9th January, 1996 which is well within the prescribed period of thirty days from its publication. As held in **Grindlay Bank Ltd.** (Supra) and **M/s Sangham Tape Company** (supra) the proceedings before the learned Tribunal would be deemed to be continue till the date on which the award becomes enforceable under Section 17A of the ID Act and under this section the award becomes enforceable only on the expiry of a period of thirty days from its publication. It was further held that the proceedings with regard to a reference under Section 10 of the Act are not deemed to be concluded until the expiry of 30 days from the publication of the award and till then, the Tribunal retains jurisdiction over a dispute referred to it for adjudication and upto that date it has power to entertain an application in connection with such dispute. Clearly in the present case the learned Labour Court had not become functus officio on the date when the application to set aside the ex-parte award was filed by the Respondent/workman. Hence, in the light of the judgment aforementioned this contention of the Petitioner/Management too does not find favour with me.

12. It can be further observed from the perusal of the records that the application to set aside the ex-parte award dated 5th October, 1995 was first taken up for hearing by the learned Trial Court on 11th January, 1996 on which date a notice of appearance was issued to the Petitioner/ Management. The said application was allowed and the matter was posted for 18th September, 1996 for workman evidence. On 18th September, 1996 the evidence by way of an affidavit was filed by the workman and the matter was posted for 9th December, 1996 for Management evidence and cross- examination of workman. However, on 9th December, 1996 the Management failed to appear and hence, was proceeded ex-parte.

This order was finally set aside on 21st February, 1997 and the matter was put up again 21st for cross-examination and Management evidence on July, 1997. Thereafter the matter was again adjourned to 9th October, 1997. On 9th October, 1997, the Management filed an application for adjournment which was allowed with cost. The matter was posted for cross-examination of the workman and Management evidence to 28th January, 1998, on which date again a joint adjournment was sought. On that date matter was adjourned to 1st nd May, 1998 and again adjourned to 22July, 1998 when the Petitioner's right to cross-examine was closed. The Petitioner/Management had been given ample opportunities to avail of its right to produce its evidence and cross-examine the workman which it has not been vigilant to pursue. Now, it cannot raise the claim that the learned Tribunal has deprived it of its right to defend and ought to have given him one more opportunity. Clearly, such an opportunity cannot be asked for as a matter of right when the conduct of the Management/Petitioner has been found lax and casual. Hence, this contention also fails.

13. As regards the relief of reinstatement with 25% back wages is concerned, the Hon'ble Supreme Court in **Jagbir Singh v. Haryana State Agriculture Marketing Board and Anr.** (2009) 15 SCC 327 held that on termination being held illegal, the relief of reinstatement and back wages does not follow automatically. The relevant factor i.e. the nature of appointment, period of appointment, availability of post/vacancy etc. should weigh with the court for determination of such an issue. Keeping in view the fact that the Respondent workman was appointed on an adhoc basis, he has served for 8 years with the management, has already reached the age of superannuation and has received last drawn salary under Section 17-B (ID Act) till his superannuation, I am of the view that Respondent no. 2 is entitled to compensation in lieu of reinstatement. It is therefore directed that the workman Respondent be paid compensation of Rs. One lakh within six weeks. The impugned award is modified to the extent aforesaid.

14. In the light of above discussion, the present petition is disposed of.

ILR (2013) I DELHI 285
FAO (OS)

GURSHARAN SINGH ....APPELLANT

VERSUS

BHARAT PETROLEUM CORPORATION LTD. ....RESPONDENT

(SANJAY KISHAN KAUL & VIPIN SANGHI, JJ.)

FAO (OS) NO. : 102/2012 DATE OF DECISION: 17.09.2012

Arbitration Act, 1940—Section 30 & 33—Parties voluntarily entered into a settlement after the appellant negotiated with the respondent with regard to the deductions to be made on account of defective work—after two and a half month of recording of the settlement, the respondent released an amount larger than what was initially settled in full and final settlement—thereafter, the appellant invoked arbitration agreement—learned arbitrators passed arbitration award, which was challenged and the Hon'ble Single Judge set aside the award—Appeal—Held, in view of the law laid down by the Hon'ble Supreme Court in the case of *National Insurance Co. Ltd. vs. Boghara Plyfab Pvt. Ltd.,* there is no error in the decision of the Hon'ble single in concluding the there was no surviving disputes remaining between the parties which could be referred to arbitration in view of the full and final settlement of the accounts of the appellant.

The issue with regard to the cases in which the Court would accept accord and satisfaction, and thus hold that the arbitration agreement does not survive have been dealt with in the decision of the Supreme Court in **National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.,** (2009) 1 SCC 267. The Supreme Court, in this decision, held as follows:

"52. 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"**. (emphasis supplied) **(Para 11)**

The appellant, it appears, invoked the arbitration agreement only thereafter. In our view, in the light of the aforesaid facts coupled with the pronouncement of the Supreme Court in **Boghara Polyfab** (supra), there is absolutely no error in the decision of the learned Single Judge in concluding that there was no surviving disputes remaining between the parties which could be referred to arbitration in view of the full and final settlement of the accounts of the appellant. **(Para 15)**

[Gi Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. B. K. Diwan, Advocate.

FOR THE RESPONDENT : Mr. Anil Kumar Batra, Advocate.

CASES REFERRED TO:

1. *The Oriental Insurance Co. Ltd* vs. *Mercury Rubber Mills,* reported as 2012 (127) DRJ 650.
2. *National Insurance Co. Ltd.* vs. *Boghara Polyfab Pvt. Ltd.,* (2009) 1 SCC 267.
3. *Nathani Steels Limited* vs. *Associated Constructions,* 1995 Supp (3) SCC 324.
4. *P.K. Ramaiah & Co.* vs. *Chairman and Managing Director, National Thermal Power Corporation,* 1994 Supp (3) SCC 126.
5. *Prasun Roy* vs. *Calcutta Metropolitan Development Authority & Anr.,* AIR 1988 SC 205.

RESULT: Appeal Dismissed.

VIPIN SANGHI, J.

1. This appeal is directed against the order dated 23.12.2011 passed by the learned Single Judge in I.A. Nos.9364/1991, 9046/2010 and C.S. (OS) No.3768A/1991 decided on 23.12.2011. By the impugned order, the learned Single Judge has allowed the objections preferred by the respondent in I.A. No.9364/1991 preferred under Section 30 and 33 of the Arbitration Act, 1940 (the Act) and consequently, the arbitral award dated 25.11.1991 passed by the learned arbitrators has been set aside.

2. The appellant was awarded the work for construction of road at LPG plant at Lucknow vide agreement dated 12.01.1988. The stipulated period of completion was four months, and the stipulated date of completion was 14.06.1988. However, the work was completed on 21.06.1988. The value of the work originally awarded to the appellant was Rs.13,64,400/-, which was increased and further time was granted to the appellant to complete the same till 25.11.1988.

3. Disputes arose between the parties in relation to the contracted work and, consequently, the appellant invoked clause 19 of the agreement which provided for resolution of disputes by arbitration. The arbitration agreement provided that any disputes or differences between the parties arising out of or connected with the contract shall, except where otherwise

specifically agreed, be referred for arbitration in terms of that agreement. The parties appointed two arbitrators in terms of their agreement. The learned arbitrators made their unanimous award on 25.11.1991. The arbitrators awarded various claims made by the appellant alongwith interest. The counter claim preferred by the respondent was rejected. Eventually, the award was filed before this Court and objections were preferred by the respondent under section 33 read with section 16 of the Act vide I.A. No.9364/1991.

4. It was, inter alia, contended by the respondent that the original work was completed on 21.06.1988 and a final bill was prepared. The respondent also contended that on 28.04.1989, a meeting was held between the parties after the completion of the work by the appellant when the record notes were prepared. As per these notes, instead of removing the defects of workmanship, the appellant agreed for deduction of Rs.1,07,301.50, and accordingly the full and final settlement of all the claims of the appellant was arrived at. A sum of Rs.2,05,724.01 was received and accepted by the appellant vide letter dated 10.07.1989, wherein the appellant stated *"I do not have any further claim"*.

5. According to the respondent, after fully and finally settling the account, the appellant raised claims before the arbitrator. The respondent contended that the claims raised by the appellant were not arbitrable in view of the full and final settlement arrived at between the parties. They contended that even in respect of a non speaking award, the Court could examine whether the arbitral tribunal had fallen into jurisdictional error. The contention of the appellant, obviously, was that the full and final settlement had been arrived at under pressure and coercion.

6. The respondent in the reply filed before the arbitral tribunal specifically raised the issue that the claim was not maintainable in view of accord and satisfaction. The preliminary objection raised in their reply by the respondent before the arbitral tribunal reads as follows:

> "1. The claim is false and fabricated and vexatious. The record Notes dated 28.04.1989 (Annexure R-1) hereto clearly states that the net payable after deduction was Rs.1,37,911.10. It was further mentioned therein that the claimant would have no further claims after receipt of this sum. This sum was thereafter paid by the respondents to the claimant on 10.07.1989 and a receipt was

executed by the claimant. This receipt clearly states, in the handwriting of the claimant himself, that the receipt of the said sum/cheque no further claims. The receipts is Annexure R-2 hereto. The false claim as mentioned in the claimant's letter dated 10.07.1989, received in the Corporation Officer on 17.07.1989 was refuted by Corporation vide its letter No.AE.13.Con. LKO dated 20.07.1989, a copy of which is annexed hereto and marked Annexure R-3".

7. A perusal of the award shows that the same is a non reasoned award made by the learned arbitrators. However, since the submission of the respondent was that arbitration was not at all maintainable on account of accord and satisfaction, the learned Single Judge looked into the relevant documents relied upon by the respondent. The most crucial document in this respect is the record note of 28.04.1989 signed by the parties jointly. The said document reads as follows:

"1. The above job was awarded to M/s Gursharan Singh as per Agreement No. AEM/87/102 dated 12.01.88.

2. The job was started on 15.02.88 and was completed on 25.11.88. Bill No. 1126 dated 12.01.89 for Rs.18,33,954.60 was submitted, which included drains, roads, earthfilling etc. out of which black carpet was of Rs. 4,03,261.44 @ 48/m2 for an area 8401=28 m2) and quality complaint was found in this item only. On measurement at site, an average thickness of the black carpet was found varying 40 mm downwards.

3. The contractor has been asked to correct the thickness to which he expressed inability and has proposed for a prorate deductions of the carpet thickness as below:-

4. (i) For average 40 mm thick carpet for an area of 6082.80 m, for 12 mm thick carpet which comes to Rs. 67,378.70 (48/52x12x6082.80)

(ii) For average 26 mm thick carpet for an area of 1663.45 m2, a deduction for balance 26 mm thick carpet which comes to Rs. 39,922.80x(48/52x26x1663.45)

(iii) Thus, total deduction is of Rs. 1,07,301.50.

(iv) The balance area of 655.03 m2 is having correct carpet thickness of 52 mm.

(v) The contractor had proposed a deduction of Rs. 1,07,301.50 against above bill and to treat it as the final bill and confirms that he has no further claims beyond the quantities mentioned in the bill.

(vi) The contractor proposed to release the balance payable amount of Rs.1,37,911.10 with details as below:-

Total amount of bill:	Rs. 18,33,954.63
Say	Rs. 18,33,954.60
Less already paid:	Rs. 15,12,000.00
Balance	Rs. 3,21,954.60
Less Retention money (as per agreement clause)	Rs. 63,349.00
Less 2% income tax	Rs. 6,439.00
Less 8% S/C on I.Tax	Rs. 515.00
Less 2% UPS Tax	Rs. 6,439.00
Payable	Rs. 2,45,212.60
DEDUCTIONS	Rs. 1,07,301.50
Net payable after deductions	Rs. 1,37,911.10

6. The contractor has confirmed that there will be no further claims against the aforesaid contract for which net payable is Rs. 1,37,911.50.

H.P. GUPTA BRIJ MOHAN

For Bharat Petroleum Corp. Ltd. For M/s Gursharan Singh

8. The learned Single Judge also takes note of the letter dated

10.07.1989 sent by the respondent to the appellant forwarding the cheque for Rs.2,05,724.12 in full and final settlement of the works in question. The said letter also has an endorsement made on behalf of the appellant acknowledging receipt of the cheque in full and final settlement. The learned Single Judge also takes note of the further communication dated 20.07.1989 of the respondent refuting the appellant's allegations and demanding interest @ 18% p.a. and raising claim for Rs.5,19,774.47 and also stating that no further amounts are payable by the respondent.

9. The learned Single Judge, while deciding the issue whether there was accord and satisfaction, has referred to and dealt with the decisions of the Supreme Court in **Nathani Steels Limited v. Associated Constructions,** 1995 Supp (3) SCC 324 and **P.K. Ramaiah & Co. v. Chairman and Managing Director, National Thermal Power Corporation,** 1994 Supp (3) SCC 126. The learned Single Judge also takes note of the various steps taken by the appellant to scuttle the hearing before the Court. The learned Single Judge also notes that the aforesaid plea was raised by the appellant after getting wind of the respondents submission founded upon the objections to the award.

10. One of the submissions of the appellant raised in I.A. No.9046/2010, which was also disposed of by the impugned order, was that the petition be transferred to the District Court as the jurisdiction in the matter is less than Rs.20 lacs. The learned Single Judge has considered the said contention and rejected the same by holding that the claim made by the appellants before the arbitral tribunal was more than Rs.30 lacs and consequently, this Court had jurisdiction in the matter. No submission has been made by the appellant to challenge the said finding before us.

11. The issue with regard to the cases in which the Court would accept accord and satisfaction, and thus hold that the arbitration agreement does not survive have been dealt with in the decision of the Supreme Court in **National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.,** (2009) 1 SCC 267. The Supreme Court, in this decision, held as follows:

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> (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"**. (emphasis supplied)

12. More recently, a Division Bench of this Court while dealing with two cross appeals, titled, **The Oriental Insurance Co. Ltd V. Mercury Rubber Mills,** reported as 2012 (127) DRJ 650, authored by one of us (Sanjay Kishan Kaul, J) had the occasion to deal with the issue of accord and satisfaction. The Court considered various earlier pronouncements of various High Courts and the Supreme Court. We are guided by the principles noticed therein as well.

13. As noticed herein above, in the present case, the parties entered into the settlement on 28.04.1989. This settlement, on its plain reading, does not show the exercise of any coercion or duress upon the appellant. In fact, it shows that the appellant negotiated with the respondent with regard to deductions to be made on account of defective work. In para 4 (v), the appellant agreed to a deduction of Rs.1,07,301.50/- against the bill No.1126 dated 12.01.1989 for Rs.18,33,954.60/-. This settlement also records as to how much amount has already been released i.e. Rs.15,12,000/-. It also reflects the various other deductions to be made on account of retention money, 2% income tax, 8% surcharge on income tax and 2% U.P. sales tax. Thereafter, an amount of Rs.1,07,301.50/- has been deducted as agreed between the parties leaving the net payable balance amount of Rs.1,37,911.50/-.

14. After about 2 + months of the recording of the aforesaid

settlement, the respondent released an amount of Rs.2,05,724.13/- in full and final settlement. It would thus be seen that a larger amount was released than what was initially settled. Even at that stage the respondent clearly stated that the amount was being paid in full and final settlement, and the same was also received by the appellant in full and final settlement.

15. The appellant, it appears, invoked the arbitration agreement only thereafter. In our view, in the light of the aforesaid facts coupled with the pronouncement of the Supreme Court in **Boghara Polyfab** (supra), there is absolutely no error in the decision of the learned Single Judge in concluding that there was no surviving disputes remaining between the parties which could be referred to arbitration in view of the full and final settlement of the accounts of the appellant.

16. Reliance placed by the appellant on the decision in **Prasun Roy v. Calcutta Metropolitan Development Authority & Anr.,** AIR 1988 SC 205, does not in any way advance the case of the appellant. In this case, the Supreme Court observed that a party which participates in the arbitration proceedings, despite being aware of the disability, cannot be permitted to question the arbitration proceedings only because the award has gone against the party. In the present case, the respondent had raised a preliminary objection in their written statement with regard to maintainability of the arbitration proceedings on account of accord and satisfaction. It was the obligation of the learned arbitrators to go into the said issue and determine the same. Merely because the arbitrators had the authority to make an unreasoned award, did not mean that they could have avoided the said fundamental issue which had a bearing on their jurisdiction.

17. In light of the aforesaid, we find no merit in this appeal and dismiss the same with costs quantified at Rs.20,000/-.

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WALCHANDNAGAR INDUSTRIES LIMITED **....DECREE HOLDER**

VERSUS

CEMENT CORPORATION OF INDIA LIMITED **....JUDGMENT DEBTOR**

(S. MURALIDHAR, J.)

EX.P. NO. : 200/2002 & E.A. NO. : 67/2007 **DATE OF DECISION: 18.09.2012**

Code of Civil Procedure, 1908—Execution Petition: Order XXI Rule 1(4): The said petition involves the execution of an Award which was passed on 26th April 1995, by the sole Arbitrator in terms of which the Judgment Debtor ('JD'), Cement Corporation of India Ltd. ('CCI') was to pay the Decree Holder ('DH') Walchandnagar Industries Ltd .(WIL') a sum of Rs.6,50,74,341 together with simple interest at 12% per annum with effect form 31st January 1989, the date on which the learned Arbitrator entered upon reference, the date on which the learned Arbitrator entered upon reference, till the date of payment.

The first is whether the DH can legitimately contend that the "awarded amount", as far as the present case is concerned, would include not only the principal amount, but *pendente lite* and pre-reference interest as on the date of the Award?

The second issue is whether with the deposit in the Court of the principal decretal amount by the JD, after filing an application under Order XXI Rule 1, no further liability to pay interest thereon arose in terms of Order XXI Rule 1 (4) CPC?

Whether in the absence of instructions to that effect by the JD and in light of the JD's description of the amount being deposited as the 'principal decretal amount', it was open to the DH to appropriate such amount first towards interest and thereafter towards the principal?

Whether on account of the scheme of revival of CCI having been approved by the BIFR with the participation of the DH in the proceedings under SICA, there was no further liability of JD towards the DH beyond Rs.11 crores? **[Para 17]**

Held: The operative portion of the Award in the present case is clear and unambiguous that interest would be payable on the principal amount for the pre-reference, pendente lite and post Award periods on Rs.5,53,32,728. At the stage of execution, it is not possible for the Court to modify the said Award after it has already attained finality. Consequently, the first issue is answered in the negative, against the DH. It is held that the principal "awarded amount", as far as the present case is concerned, is Rs.5,53,32,728 and would not, after the date of the Award include the pre-reference and pendente lite interest accrued as on the date of the Award. **[Para 21]**

In the present case on the date of the deposit of the aforementioned sum, the interest outstanding was admittedly more than Rs.11 crores, i.e nearly twice the principal sum. The total amount outstanding, therefore, was the principal decretal amount of Rs.5.5 crores and interest of over Rs.11 crores i.e. over Rs.16.5 crores. Merely because the JD labels the amount deposited as the 'principal' amount howsoever insubstantial it may be in relation to the total amount outstanding, the interest on the entire principal sum would not cease to run in terms of Order XXI Rule 1 (4) CPC. Consequently, the second issue is answered against the JD by holding that with the deposit in the Court of the amount of Rs. 5,53,32,728 by the JD, after filing an application under Order XXI Rule 1 CPC, the further liability to pay interest thereon did not cease in terms of Order XXI

Rule 1 (4) CPC. **(Para 25)**

The mere labeling by the JD of the amount deposited by it under Order XXI Rule 1 CPC is not conclusive of the nature of such deposit, irrespective of what proportion it bears to the total amount due as on the date of deposit. If the amount deposited is short of the total amount, it would be open to the DH to appropriate it first towards interest and only to the extent of the sum so set off, will the interest cease to run. Then again it is not a matter for the unilateral decision of the JD. When the JD seeks leave of the Court by applying under Order XXI Rule 1 CPC, it is for the Court to consider whether such deposit should be permitted and on what terms and to what extent interest would cease to run on such amount in terms of Order XXI Rule 1 (4) CPC. It is inconceivable that in the case, like the present one, where the principal amount is Rs.5 crores and the outstanding interest on the date of application is more than twice the principal amount, the Court will simply allow the JD to unilaterally label the amount sought to be deposited as the 'principal amount' and order that further interest on the said amount will cease to run from the date of deposit. **(Para 27)**

The submission of the JD ignores the order passed by the Appellate Authority for Industrial and Financial Reconstruction ('AAIFR'), before which a statement was made on 27th September 2006 that the JD will not insist upon the implementation of the scheme for revival by the BIFR as far as the liability owing to the DH was concerned. The JD is obviously bound by the said statement. **(Para 33)**

Important Issue Involved: In cases of execution of money decrees or award decrees, other than mortgage decrees, interest ceases to run on to amount deposited, to the extent of the deposit. It is true that if the amount falls short, the decree-holder may be entitled to apply the rule of appropriation by appropriating the amount first towards the interest, then towards the costs and then towards the principal amount due under the decree. But the fact remains that to the extent of the deposit, no further interest is payable thereon to the decree-holder and there is no question of the decree-holder claiming a re-appropriation when it is found that more amounts are due to him and the same is also deposited by the judgment-debtor.

[Sa Gh]

APPEARANCES:

FOR THE DECREE HOLDER : Ms. Maneesha Dhir and Ms. Geeta Sharma, Advocates.

FOR THE JUDGMENT DEBTOR : Mr. Sanjeev Ralli and Mr. Sandeep Anand, Advocates.

CASES REFERRED TO:

1. *Leela Hotels Limited vs. Housing and Urban Development Corporation Limited* (2012) 1 SCC 302.
2. *Gurpreet Singh vs. Union of India* (2006) 8 SCC 457.
3. *Central bank of India vs. Ravindra* AIR 2001 SC 3095.
4. *Industrial Credit & Development Syndicate Ltd. vs. Smithaben H. Patel* (1999) 3 SCC 80.
5. *Oil & Natural Gas Commission vs. M.C. Clelland Engineers S.A.* (1999) 4 SCC 327.
6. *Prem Nath Kapur vs. National Fertilizers Corpn. of India Ltd.* (1996) 2 SCC 71.
7. *Mathunni Mathai vs. Hindustan Organic Chemicals Ltd.* (1995) 4 SCC 26.
8. *Meghraj vs. Mst. Bayabai* (1970) 1 SCR 523.

9. *Garimella Suryanarayana vs. Gada Venkataramana Rao (FB)* AIR 1953 Madras 458.
10. *Jai Ram vs. Sulakhan Mal* AIR 1941 Lahore 386 (FB).
11. *Rai Bahadur Seth Nemichand vs. Seth Radha Kishen* AIR 1922 PC 26.

RESULT: Execution Petition disposed off.

S. MURALIDHAR, J.

The Background

1. This order will dispose of the remaining controversy between the parties with regard to the execution of an Award which was passed more than 17 years ago, on 26th April 1995, by the sole Arbitrator in terms of which the Judgment Debtor ('JD'), Cement Corporation of India Ltd. ('CCI') was to pay the Decree Holder ('DH') Walchandnagar Industries Ltd. ('WIL') a sum of Rs.6,50,74,341 together with simple interest at 12% per annum with effect from 31st January 1989, the date on which the learned Arbitrator entered upon reference, till the date of payment.

2. Subsequently, while disposing of the objections filed by CCI, by an order dated 16th May 2002, a learned Single Judge of this Court modified the said Award whereby the amount payable by the JD to the DH stood reduced to Rs.5,53,32,728 without any change as regards payment of simple interest on the said amount @ 12% per annum with effect from 3rd January 1989 till the date of payment. On 12th July 2002, the Court clarified the order dated 16th May 2002 and stated that simple interest at 12% would be payable on the awarded amount with effect from 3rd January 1989 till the date of payment.

Proceedings in the execution petition

3. The present execution petition was filed on 5th September 2002. On 13th September 2004 warrants of attachment in respect of immovable properties of the JD were ordered to be issued. On 26th May 2005, the JD filed E.A. No. 194 of 2005 under Order XXI Rule 1 of the Code of Civil Procedure, 1908 ('CPC') for deposit of the 'principal decretal amount' in Court and keeping the same in a fixed deposit ('FD'). Paras 3 and 4 of the said application, which are relevant for the purposes of the present dispute, read as under:

"3. Without prejudice to the objections and contentions raised by the Judgement Debtors in the above applications, the Judgement Debtor wishes to deposit the principal decretal amount of Rs.5,53,32,728 in this Hon'ble Court which has been arranged by the Judgement Debtor with the assistance of Ministry of Heavy Industry.

4. That on the deposit of the above principal decretal amount in the court, interest on the said amount shall cease to accrue any further. In view of the objections raised by the Judgement Debtor in the applications referred to in para 2 above, the aforesaid amount deposited by the Judgement Debtor may not be released till the disposal of EA No. 152/2005, whereas the Judgement Debtor has no objection if the said principal decretal amount on being deposited in court is kept in Fixed Deposit till the disposal of EA No. 152/2005 i.e. application under Order XXI Rules 19 and 26 CPC."

4. In reply to the above two paras, the DH stated:

"3-4. That in reply to the averments made in the corresponding paras it is submitted that vide order dated 26th April 2004 the Hon'ble Court directed the Judgment Debtor to deposit the principal decretal amount of Rs.5,53,32,728/-in this Hon'ble Court and the Judgment Debtor defaulted in making such deposits. It is most respectfully prayed that the decretal amount of Rs.5.53 crores deposited by the Judgment Debtor in pursuance to the order-dated 14.7.2005 be released in the favour of Decree Holder. That even after release of 5.53 crores to the Decree Holder an amount of Rs.15 crores is payable to the Decree Holder by the Judgment Debtor. It is pertinent to mention here that the Decree Holder moved an application i.e E.A. No. 304/2005 for release of money deposited by the Judgment Debtor and the Hon'ble Court was pleased to issue notice on the application and directed that the amount be kept in a fixed deposit for a term of 45 days with a nationalized bank. It is respectfully submitted that as the term of 45 days has already been expired, therefore the amount be released to the Decree Holder immediately."

5. On 14th July 2005, the Court passed the following order in the said application:

"Issue notice to the decree holder through counsel and the DDA, returnable for 18th October, 2005. Ms. Maneesha Dhir accepts notice. Notice may now go to DDA for the date fixed. Reply be filed within four weeks.

Counsel for the parties, under instructions of the parties, state that in view of the large difference in the value of the attached property of the judgment debtor e.g. Grinding Unit Property Delhi Grinding Unit, Cement Corporation of India Limited, Okhla Industrial Area, Phase-I, New Delhi as estimated by the decree holder and by the judgment debtor, an independent valuer may be appointed to assess the value of the attached property.

Accordingly, Mr. Sanjiv Jain, Architect, of M/s National Architects and Engineers, 195, Ram Vihar, Delhi-110 092, (M) 9811112620, a government approved valuer, is appointed as an Architect/ Valuer to assess the valuation of the aforesaid property and file his report within six weeks after taking into account all the relevant factors viz. lease hold nature of the property from the DDA; policy of the DDA for conversion of the lease hold property into free hold; and the factors in regard to the property being the subject matter of certain encumbrance/charges. The fee of the Architect/Valuer is fixed at Rs.1.00 lac, which shall be borne by both sides in equal shares. The Architect/Valuer will give notice to the parties/counsel in order to enable them to file relevant material before him. A copy of the order shall be forwarded to the named valuer forthwith.

Without prejudice to the rights and contentions of the parties, the judgment debtor is allowed to deposit a sum of Rs.5.53 crores i.e. the principal decretal amount in Court within four weeks.

List on 18th October, 2005."

6. Following the above order, on 12th August 2005, the JD deposited in the Court a sum of Rs.5,53,32,728. When the matter was again listed on 30th August 2005 a statement was made by the JD that it had deposited the amount. The Court then directed that the said amount should be kept in a FD. On 18th October 2005, on an application, being E.A. No. 304 of 2005, made by the DH for release of the said amount in its favour, the Court directed that the sum of Rs.4 crores be released

to the DH.

7. At this stage, it may be noted that there was an issue concerning materials still lying at the site which were to be taken over by the JD. According to the JD, the worth of those materials was over Rs.1.66 crores. In an application, being E.A. No.152 of 2005, it had contended that either the DH should hand over the said materials to the JD without delay or the said sum be adjusted against the amount payable by the JD to the DH in terms of the Award. By the said order dated 18th October 2005, while directing the release of the sum of Rs.4 crores to the DH, the Court also directed that the balance sum of Rs.1,53,32,728 should be released to the DH after it handed over the materials to the JD.

8. On 6th November 2005, the DH withdrew the sum of Rs.4 crores from the Court. Subsequently, on 24th November 2005, after the materials were handed over to the JD, the Court directed the balance sum of Rs.1,53,32,728 to be released to the DH. In para 2 of the order the Court *inter alia* observed: "This leaves the balance amount of about Rs.14.5 crores out of the decretal amount of about Rs.20 crores which still needs to be satisfied." Pursuant to the said directions, on 17th February 2006 the balance principal sum of Rs.1,53,32,728 stood withdrawn by the DH.

9. The issue as to what were the principal and interest amounts payable by the JD to the DH in terms of the Award remained to be resolved. When the 9th matter was listed before the Court on April 2008, the following submissions were noted by the Court in its order:

> "Counsel for the judgment debtor states that as against a sum of Rs.14,77,12,898.15/-as on 31.1.2002, as per the contention of the decree holder, the judgment debtor admits that it is liable to pay the decree holder a sum of Rs.11,02,94,044.54/-. Counsel for the decree holder states on instructions that without prejudice to the rights of either parties, the judgment debtor may be directed to pay the aforesaid amount to the decree holder thus leaving the issue of remaining amount payable."

10. On 2nd March 2009, the Court directed payment of interest amount of Rs.11,02,94,044.54 by the JD to the DH by 15th May 2009. The order dated 2nd March 2009 was taken up in appeal by the JD in EFA (OS) No. 17 of 2009. By order dated 11th May 2009, the said

appeal was dismissed by the Division Bench as withdrawn with liberty to the JD to approach the learned Single Judge for extension of time in making payment.

11. When the matter was listed again before the learned Single Judge on 7th August 2009, the JD offered to make payment of the admitted liability of Rs.11,02,94,044.54 in three instalments. The order passed by the Court on that date reads as under:

> "**EA(OS) No. 304/2009**
>
> Vide order dated 2nd March, 2009, this court passed a conditional order of proclamation of sale of immovable property under attachment of the judgment debtor i.e. registered office of Cement Corporation of India Ltd., Core-V, Scope Complex, Lodhi Road, New Delhi. The said order was challenged before the Division Bench by the judgment debtor by way of an appeal being EFA(OS) No. 17/2009 wherein the Hon'ble Division Bench has passed the following order:
>
> > "EFA(OS) 17/2009 and CM No. 6683/2009 (stay) After some hearing learned counsel for the appellant seeks to withdraw the appeal and the application with liberty to move the learned Single Judge in accordance with law for extension of time in making the payment in terms of the impugned order. Liberty granted.
>
> Dismissed as withdrawn."
>
> Thereafter, the present application has been filed by the judgment debtor. During the consideration of the present application, the matter was adjourned from time to time for reporting settlement, if any, between the parties.
>
> When the matter is listed today for hearing of the application, learned counsel for the judgment debtor on instructions from the representative of the judgment debtor submits that the judgment debtor is agreeable to comply with the order dated 2nd March, 2009 to pay the admitted liability of Rs. 11,02,94,044.54 in three instalments.
>
> By way of first instalment, the judgment debtor as handed over an A/c payee cheque dated 6th August, 2009 drawn on State

Bank of Hyderabad for the sum of Rs. 3,67,64,681/-. The judgment debtor is agreeable to pay the second instalment on or before the 31st October, 2009 and the third one on or before the 31st of December, 2009.

Learned counsel for the decree holder is agreeable for the said arrangement on the following terms and conditions:-

1. Subject to encashment of cheque of Rs. 3,67,64,681/issued by the judgment debtor in favour of the decree holder which has been handed over to the decree holder in court.

2. The judgment debtor shall abide by the terms as referred by paying the remaining two instalments on or before the 31st October, 2009 and 31st December, 2009 respectively. 3. The judgment debtor shall file an undertaking by way of affidavit of the judgment debtor to abide by the aforesaid arrangement. Learned counsel for the judgment debtor has no objection for the same and Mr. Sanjeev Ralli, learned counsel for the judgment debtor undertakes to file the undertaking by way of an affidavit within three days from today. Let the same be so done. Learned counsel for the judgment debtor further states that the cheque handed over to the decree holder in court today shall be encashed and the judgment debtor assures that the remaining amount by way of two instalments shall be paid by the judgment debtor in time.

In view of the agreed terms and conditions, the parties are agreeable that the order dated 2nd March, 2009 will not be acted upon any further in the matter.

List this matter on 11th August, 2009 for compliance.

Copy of this order be given dasti to the parties under the signatures of the Court Master."

12. It is not in issue that the JD has paid the aforementioned amount in three instalments of Rs.3,67,64,681 each on 6th August 2009, 31st October 2009 and 31st December 2009 respectively. It is also an admitted position that after the payment made on 31st December 2009, the JD has made no further payment to the DH.

Submissions of counsel

13. Ms. Maneesha Dhir, learned counsel appearing for the DH submitted on the strength of the decision in **Central bank of India v. Ravindra** AIR 2001 SC 3095, that the awarded amount on which interest was payable would be the principal decretal amount plus the pre-reference and pendente lite interest at the rate of 12% per annum on the said principal amount up to the date of the Award. She submitted that it was on the said 'awarded amount' that the future simple interest at the rate of 12% per annum would have to be calculated. Reliance is also placed upon the decision in **Oil & Natural Gas Commission v. M.C. Clelland Engineers S.A.** (1999) 4 SCC 327 in support of this contention. Secondly, she submitted that the interest which commenced accruing on the principal decretal amount from 3rd January 1989 did not cease to accrue till the date of actual payment of the entire decretal amount. She submits that the amount deposited by the JD in the Court i.e. Rs.5,53,32,728 was rightly appropriated by the DH first towards the interest outstanding and, thereafter, towards the principal. The learned counsel has handed over to the Court the calculation and the details showing the manner in which the payments made by the JD from time to time have been appropriated by the DH first towards the interest. With the receipt of the last instalment on 31st December 2009, the interest component as on that date was exhausted and some balance amount got adjusted towards the principal decretal amount which got reduced thereby to Rs.2,91,28,271.92. Further simple interest on the said sum at 12% per annum up to 31st October 2012 has been calculated as Rs.99,03,612.45 thus totaling Rs. 3,90,31,884.37. It is submitted that notwithstanding the deposit by the JD of the sum of Rs.5,53,32,728, pursuant to the application made under Order XXI Rule 1 CPC, the appropriation was rightly made by the DH of the said sum, first towards the interest and thereafter towards the principal amount. In support of the above submission, reliance is placed by the learned counsel on the decisions in **Leela Hotels Limited v. Housing and Urban Development Corporation Limited** (2012) 1 SCC 302, **Industrial Credit and Development Syndicate v. Smithaben H. Patel** (1999) 3 SCC 80, **Mathunni Mathai v. Hindustan Organic Chemicals Ltd.** (1995) 4 SCC 26, **Gurpreet Singh v. Union of India** (2006) 8 SCC 457 and **Meghraj v. Mst. Bayabai** (1970) 1 SCR 523.

14. Countering the above submissions, Mr. Sanjeev Ralli, learned counsel appearing for the JD, first submitted that the operative portion

of the Award as modified by the order dated 16th May 2002 of the learned Single Judge has remained unaltered by the subsequent orders of the Court. His submission was simply that the principal amount of Rs.5,53,32,728 should be paid by the JD to the DH together with simple interest at the rate of 12% per annum from 3rd January 1989 onwards. The principal sum was deposited by the JD by giving intimation to the DH in the form of an application being E.A. No. 194 of 2005 filed under Order XXI Rule 1 CPC. His submission was that where the JD has specifically stated that the amount being deposited by the JD in Court was the principal amount, the DH should appropriate the amount as indicated by the JD. If the DH was not agreeable to do that, it had the option of returning the amount to the JD. If the DH was appropriating the amount in a manner different from that indicated by the JD, the DH ought to put the JD on notice by a written intimation. In support of his submission he placed reliance on the decisions in **Jai Ram v. Sulakhan Mal** AIR 1941 Lahore 386 (FB) and **Garimella Suryanarayana v. Gada Venkataramana Rao (FB)** AIR 1953 Madras 458. He also placed reliance on the decisions in **Meghraj** (supra), **Gurpreet Singh** (supra) and **Prem Nath Kapur v. National Fertilizers Corpn. of India Ltd.** (1996) 2 SCC 71.

15. Referring to the reply filed to E.A. No. 194 of 2005, Mr. Ralli pointed out that the DH had at no point of time denied that a sum of Rs.5.53 crores was not to be treated as the principal amount or that interest would nevertheless be payable on the said sum even after its deposit in the Court. He referred to Order XXI Rule 1(4) CPC to urge that once the sum of Rs.5,53,32,728 was deposited in Court by the JD as the principal decretal amount, interest would cease to run on the said sum from that date. With no intimation to that effect from the JD, it was not open to the DH to unilaterally appropriate the amount deposited first towards interest and, thereafter, towards principal. Mr. Ralli submits that the JD was never put to notice of such appropriation till much later. He disputes the observations of the Court in para 2 of its order dated 24th November 2005, particularly since as on that date the interest amount, if any, payable to the DH was certainly not Rs.14.5 crores as contended by the DH.

16. Another contention of Mr. Ralli was that during the pendency of these proceedings, CCI was before the Board for Industrial and Financial Reconstruction ('BIFR') pursuant to the proceedings initiated under the

Sick Industrial Companies Act, 1985 ('SICA'). A scheme for revival of CCI was approved by the BIFR. Referring to the documents forming part of the scheme, which showed that before the BIFR the admitted liability of CCI towards WIL was Rs.11 crores, Mr. Ralli submitted that since WIL had participated in those proceedings and the scheme had been sanctioned by the BIFR, WIL was estopped from claiming a sum beyond Rs.11 crores as interest. Since the said sum had been paid into the Court in three instalments, with the last instalment being paid on 31st December 2009, no further amount was payable.

Four Issues

17. There are four issues that are required to be considered as a result of the above submissions. The first is whether the DH can legitimately contend that the "awarded amount", as far as the present case is concerned, would include not only the principal amount, but *pendente lite* and pre-reference interest as on the date of the Award? The second issue is whether with the deposit in the Court of the principal decretal amount by the JD, after filing an application under Order XXI Rule 1, no further liability to pay interest thereon arose in terms of Order XXI Rule 1 (4) CPC? The third issue which concerns the rule of appropriation is whether in the absence of instructions to that effect by the JD and in light of the JD's description of the amount being deposited as the 'principal decretal amount', it was open to the DH to appropriate such amount first towards interest and thereafter towards the principal? Lastly, whether on account of the scheme of revival of CCI having been approved by the BIFR with the participation of the DH in the proceedings under SICA, there was no further liability of JD towards the DH beyond Rs.11 crores?

What is the 'awarded amount' for the purpose of calculation of interest?

18. The Award dated 26th April 1995 is unambiguous as far as the amount payable by the JD to the DH is concerned. The operative portion of the Award, as contained in para 38.7 reads as under:

> "38.7. I direct that the aforesaid amount of Rupees Six Crores, fifty lakhs, Seventy-four thousand, three hundred and forty-one shall be paid by CCI to WIL with interest at 12% per annum with effect from 3.1.1989, until payment. I entered upon the

reference in this arbitration on 3.1.1989."

19. The operative portion of the Award as regards payment of interest remained unchanged even when this Court by the judgment dated 16th May 2002 made the Award as modified by it rule of the Court. The operative portion of the said judgment reads as under:

> "... The result is that award of the arbitrator is modified instead of an amount of Rs. 6,50,74,341/-, WIL shall be entitled to an amount of Rs. 5,53,32,728/(Rs. 6,50,74,341/-minus Rs. 97,41,613/-). There is no merit in other objections of CCI. The same are dismissed.
>
> Award of the arbitrator is made rule of the Court as modified above. A decree in terms thereof is passed. WIL shall be entitled to interest at the rate of 12% per annum from the date of decree till realisation."

20. When a doubt arose as to the correct interpretation of the above operative portion of the judgment, I.A. No. 5619 of 2002 was filed by the DH. The Court then clarified in its order dated 12th July 2002 as under:

> "This application has been filed by the applicant/petitioner for modification of the order passed by me on 16.5.2002. Notice of this application was issued. Reply has been filed. Counsel for the parties have agreed that there is no need for this application to be taken up for consideration as the order is very clear. Interest was awarded from the date of reference till the award was made by the arbitrator himself. Thereafter the interest has been awarded from the date of the award till realisation at the rate of 12% p.a. Arbitrator has awarded the interest from the date of the reference till the payment is made. That award has been made rule of the court by me.
>
> The petitioner shall also be entitled to interest at the rate of 12% p.a. till its realisation on the amount payable under the award as per modification made pursuant to the order passed by this Court on 16.5.2002.
>
> Application stands disposed of."

21. The understanding of the DH that, the sum of Rs. 5,53,32,728 is the principal decretal amount, has remained consistent throughout in these proceedings. Even when the JD filed E.A. No. 194 of 2005 under Order XXI Rule 1 CPC seeking permission to deposit the said principal decretal amount, the DH did not contest the fact that the principal decretal amount was Rs.5.53 crores. This is evident from its reply to paras 3 and 4 of EA No. 194 of 2005, which have been extracted earlier. Consequently, this Court is not prepared to accept the submission of the DH that in the present case the interest at the rate of 12% per annum becomes payable from the date of the Award on Rs. 5,53,32,728 plus the pre-reference and pendente lite interest on the said sum up to the date of the Award. Although, there are observations made by the Supreme Court in **Central Bank of India** (supra) and **M.C. Clelland Engineers S.A.** (supra), the operative portion of the Award in the present case is clear and unambiguous that interest would be payable on the principal amount for the pre-reference, pendente lite and post Award periods on Rs.5,53,32,728. At the stage of execution, it is not possible for the Court to modify the said Award after it has already attained finality. Consequently, the first issue is answered in the negative, against the DH. It is held that the principal "awarded amount", as far as the present case is concerned, is Rs.5,53,32,728 and would not, after the date of the Award include the pre-reference and pendente lite interest accrued as on the date of the Award.

Effect of deposit in the Court of the principal decretal amount by the JD

22. The next issue concerns the order passed by this Court permitting the JD to deposit the principal decretal amount pursuant to the order passed in E.A. No. 194 of 2005. Order XXI Rule 1 CPC reads as under:

> **"1. Modes of paying money under decree**
>
> (1) All money, payable under a decree shall be paid as follows, namely:
>
> (a) by deposit into the Court whose duty it is to execute the decree, or sent to that Court by postal money order or through a bank; or
>
> (b) out of Court, to the decree-holder by postal money order or

through a bank, or by any other mode wherein payment is evidenced in writing; or

(c) otherwise, as the Court, which made the decree, directs.

(2) Where any payment is made under clause (a) or clause (c) of sub-rule (1), the judgment-debtor shall give notice thereof to the decree-holder either through the Court or directly to him by registered post, acknowledgement due.

(3) Where money is paid by postal money order or through a bank under clause (a) or clause (b) of sub-rule (1), the money order or payment through bank, as the case may be, shall accurately state the following particulars, namely:

(a) the number of the original suit;

(b) the names of the parties or where there are more than two plaintiffs or more than two defendants, as the case may be, the names of the first two plaintiffs and the first two defendants;

(c) how the money remitted is to be adjusted, that is to say, whether it is towards the principal, interest or costs;

(d) the number of the execution case of the Court, where such case is pending; and

(e) the name and address of the payer.

(4) On any amount paid under clause (a) or clause (c) of sub-rule (1), interest, if any, shall cease to run from the date of service of the notice referred to in sub-rule (2).

(5) On any amount paid under clause (b) of sub-rule (1) interest, if any, shall cease to run from the date of such payment:

Provided that, where the decree-holder refuses to accept the postal money order or payment through a bank, interest shall cease to run from the date on which the money was tendered to him, or where he avoids acceptance of the postal money order or payment through bank, interest shall cease to run from the date on which the money would have been tendered to him in the ordinary course of business of the postal authorities or the bank, as the case may be."

23. The legislative intent in enacting the above provisions clearly is that if at any point of time during the execution proceedings the JD is willing to deposit a substantial sum towards satisfaction of the decree, then it may be possible for the Court to consider permitting the JD to do so. The result would be that to the extent of the amount deposited interest will cease to run on such amount. If the words "any amount" occurring in Order XXI Rule 1(4) CPC is not interpreted as contemplating a substantial portion of the total amount payable as on the date of deposit, then it would defeat the legislative object, as every JD would want to take advantage of the provision to avoid paying interest altogether on the sum outstanding even where the interest outstanding on the date of such deposit is more than twice the principal amount. Where the amount deposited is short of the total amount due, then it would be appropriated first towards interest as only then the provision is workable.

24. In **Gurpreet Singh** (supra) the Division Bench of the Supreme Court considered the interpretation to be placed on the above provision in detail. After considering the earlier decisions in **Meghraj** (supra), **Industrial Credit and Development Syndicate** (supra) and **Jai Ram** (supra) the Court observed in para 26 as under:

> "26. Thus, in cases of execution of money decrees or award decrees, or rather, decrees other than mortgage decrees, interest ceases to run on the amount deposited, to the extent of the deposit. **It is true that if the amount falls short, the decree-holder may be entitled to apply the rule of appropriation by appropriating the amount first towards the interest, then towards the costs and then towards the principal amount due under the decree.** But the fact remains that to the extent of the deposit, no further interest is payable thereon to the decree-holder and there is no question of the decree-holder claiming a reappropriation when it is found that more amounts are due to him and the same is also deposited by the judgment-debtor. In other words, the scheme does not contemplate a reopening of the satisfaction to the extent it has occurred by the deposit. No further interest would run on the sum appropriated towards the principal."

25. It is clear therefore from the above observations that where the amount deposited "falls short of the principal" it would be open to the

DH to appropriate the amount deposited first towards interest. In the present case on the date of the deposit of the aforementioned sum, the interest outstanding was admittedly more than Rs.11 crores, i.e nearly twice the principal sum. The total amount outstanding, therefore, was the principal decretal amount of Rs.5.5 crores and interest of over Rs.11 crores i.e. over Rs.16.5 crores. Merely because the JD labels the amount deposited as the 'principal' amount howsoever insubstantial it may be in relation to the total amount outstanding, the interest on the entire principal sum would not cease to run in terms of Order XXI Rule 1 (4) CPC. Consequently, the second issue is answered against the JD by holding that with the deposit in the Court of the amount of Rs. 5,53,32,728 by the JD, after filing an application under Order XXI Rule 1 CPC, the further liability to pay interest thereon did not cease in terms of Order XXI Rule 1 (4) CPC.

The rule of appropriation

26. The third issue is whether even after the JD has, with the leave of the Court, deposited the amount after labelling it as 'the principal decretal amount' it was open to the DH to appropriate it first towards interest?

27. To repeat, the mere labelling by the JD of the amount deposited by it under Order XXI Rule 1 CPC is not conclusive of the nature of such deposit, irrespective of what proportion it bears to the total amount due as on the date of deposit. If the amount deposited is short of the total amount, it would be open to the DH to appropriate it first towards interest and only to the extent of the sum so set off, will the interest cease to run. Then again it is not a matter for the unilateral decision of the JD. When the JD seeks leave of the Court by applying under Order XXI Rule 1 CPC, it is for the Court to consider whether such deposit should be permitted and on what terms and to what extent interest would cease to run on such amount in terms of Order XXI Rule 1 (4) CPC. It is inconceivable that in the case, like the present one, where the principal amount is Rs.5 crores and the outstanding interest on the date of application is more than twice the principal amount, the Court will simply allow the JD to unilaterally label the amount sought to be deposited as the 'principal amount' and order that further interest on the said amount will cease to run from the date of deposit.

28. What is significant, as far as the present case is concerned, is

that in its order dated 14th July 2005, the Court clearly stated that the deposit is being made by the JD "without prejudice to the rights and contentions of the parties". Therefore, the mere deposit of that amount by the JD did not constitute waiver by the DH of its contention that the said amount could not exhaust the entire principal amount outstanding as on that date. Further, there was no determination by the Court of that question. In other words by its order dated 14th July 2005 the Court did not permit appropriation of the sum of Rs.5.53 crores entirely towards the principal amount outstanding as on that date.

29. The law as far as appropriation of moneys deposited in Court is fairly well settled. In Gurpreet Singh (supra), after discussing the earlier decisions in **Industrial Credit Development Syndicate** (supra), **Meghraj** (supra) and **Mathunni Mathai** (supra), it was held as under (SCC @ p.479 & 480):

> "40. There was no contention in that case based on the scheme of the Land Acquisition Act and the Court also did not consider the question whether there was any deviation from the normal rule of appropriation by virtue of the provisions of the Land Acquisition Act. In fact, that case was concerned more with the question whether notice of deposit was necessary before interest ceased to run, rather than the mode or manner in which the amount deposited was to be appropriated even though this Court did observe that in the absence of any intimation as required by sub-rule (2) of Order 21 Rule 1 of the Code and indication of the manner of appropriation, the payment could not be deemed to have been appropriated towards principal unless the decree-holder admits it to be so."

30. In its recent decision in **Leela Hotels Limited** (supra) it was held by the Supreme Court that in the absence of any agreement to the contrary, the amount paid will be appropriated first towards interest and only thereafter towards principal. It was observed in paras 40 and 43 as under (SCC p.312313):

> "40. Admittedly, there was no agreement between the parties as to how the amounts to be paid in terms of the Award were to be appropriated by the Appellant. Accordingly, in terms of the well settled principle that in such cases it was for the creditor to appropriate such payment firstly against the interest payable,

would, in our view, be squarely attracted to the facts of this case. As was laid down by the Privy Council in **Meka Venkatadri Appa Rao Bahadur Zamindar Garu v. Raja Parthasarathy Appa Rao Bahadur Zamindar Garu** AIR 1922 PC 233 and later reiterated in **Rai Bahadur Seth Nemichand v. Seth Radha Kishen** AIR 1922 PC 26 when monies are received without a definite appropriation on the one side or the other,

> "the rule which is well established in ordinary cases is that in those circumstances, the money is first applied in payment of interest and then when that is satisfied, in payment of the capital."

.....

43. The philosophy behind the principle set out in Venkatadri case and as reiterated in Rai Bahadur Seth Nemichand case and also in **Industrial Credit & Development Syndicate Ltd. v. Smithaben H. Patel** (1999) 3 SCC 80 and then consistently followed by this Court, is that a debtor cannot be allowed to take advantage of his default to deny to the creditor the amount to which he would be entitled on account of such default, by way of elimination of the principal amount due itself, unless, of course, the provisions of Section 59 of the Contract Act, 1872, were attracted or there was a separate agreement between the parties in that regard. ..."

31. There is no need to multiply the law on the aforementioned settled legal position. Consequently, the contention of the JD that the moneys paid by it had to be first appropriated towards principal and not towards interest is rejected. The contention of Mr. Ralli that DH had to give notice to the JD as to how it was appropriating the money deposited is without merit for two reasons. In the first place, the DH has throughout been contending that the interest on the principal amount has mounted and has time and again given the calculation sheets showing that it has appropriated the sums deposited by the JD first towards the outstanding interest. Secondly, although, the statement in para 2 of the Court's order dated 24th November 2005 is not conclusive of the factual position as to the outstanding interest as on that date, clearly the JD, even as on that date, was aware that the interest amount outstanding was far more than the principal decretal amount.

32. The third issue is answered by holding that the DH was justified in appropriating the sum of Rs.5,53,32,728 and the subsequent payments made by the JD first towards the interest outstanding.

Effect of the BIFR Scheme

33. As regards the plea concerning the applicability of SICA, the submission of the JD ignores the order passed by the Appellate Authority for Industrial and Financial Reconstruction ('AAIFR'), before which a statement was made on 27th September 2006 that the JD will not insist upon the implementation of the scheme for revival by the BIFR as far as the liability owing to the DH was concerned. The JD is obviously bound by the said statement.

Conclusion

34. As a result of the above discussion, the position that emerges is that after the adjustment of the payments made by the JD thus far, the principal amount owing to the DH as on 1st January 2010 is Rs. 2,91,28,271.92. Since no payment has been admittedly made by the JD to the DH after 31st December 2009, simple interest at 12% per annum on the said sum has 31st continued to accrue and as of October 2012 it works out to Rs.99,03,612.45.

35. It is directed that the JD will pay the DH on or before 31st October 2012 the sum of Rs. 2,91,28,271.92 together with simple interest thereon at 12 % per annum from 1st January 2010 till the date of payment. Additionally, the JD will also furnish to the DH, at the time of such payment, the calculation on the basis of which it is making the payment.

36. The prayer in E.A. No. 67 of 2007 does not survive in light of the above order and it is disposed of as such.

37. List Execution Petition No. 200 of 2002 on 20th November 2012 for the JD to report compliance and for further orders.

ILR (2013) I DELHI 315
CS (OS)

A.K. NARULA ....PLAINTIFF

VERSUS

IQBAL AHMED AND ORS. ....DEFENDANTS

(VALMIKI J. MEHTA, J.)

CS (OS) NO. : 2476/1998 DATE OF DECISION: 18.09.2012

Specific Relief Act, 1963—Section 20—Plaintiff filed suit for specific performance on basis of agreement to sell with respect to five plots situated at Village Nitholi, Delhi—Suit was dismissed in default but was restored subsequently—Again, none appearance on behalf of parties and suit was decided on basis of record—Plaintiff had alleged in suit that as per agreement to sell, total consideration for purchase of plots was Rs. 20.5 lacs, out of which he had paid Rs. 2 lacs on different occasions—Defendants committed breach of agreement to sell and thus, he was entitled for decree for specific performance of said agreement. Held: If a nominal consideration is paid as advance price, then, plaintiff in such a case even assuming defendant is guilty of breach of contract, will not be entitled to specific performance.

Therefore, whether we look from the point of view of Section 20 sub-section 3 of the Specific Relief Act, 1963 or the ratio of the judgment of the Supreme Court in the case of **Saradamani Kandappan** (supra) or even on first principle with respect to equity because 10% of the sale consideration alongwith the interest will not result in the defendants even remotely being able to purchase an equivalent property than the suit property specific performance cannot be granted. In fact, on a rough estimation, the property prices would

have galloped to at least between 30 to 50 times from 1988 till date. I take judicial notice of this that in the capital of our country, like in all other megapolis, on account of the increase in population and rapid urbanization, there is a phenomenal increase in the prices of urban immovable property. **(Para 18)**

Important Issue Involved: If a nominal consideration is paid as advance price, then, plaintiff in such a case even assuming defendant is guilty of breach of contract, will not be entitled to specific performance.

[Sh Ka]

APPEARANCES:

FOR THE PLAINTIFF : None.

FOR THE DEFENDANTS : None.

CASES REFERRED TO:

1. *Shri Jinesh Kumar Jain* vs. *Smt. Iris Paintal and Ors.* in CS(OS) No.1154/1989 decided on 10.7.2012.
2. *Saradamani Kandappan* vs. *Mrs. S. Rajalakshmi,* 2011 (12) SCC 18.
3. *Fateh Chand* vs. *Balkishan Dass,* AIR 1963 SC 1405.

RESULT: Suit dismissed.

VALMIKI J. MEHTA, J. (ORAL)

1. This old suit is of the year 1998. Already this suit was once dismissed in default on 21.11.2011, and thereafter it was restored on 28.2.2012. Subsequently, on 1.5.2012, no one appeared for the parties and in the interest of justice, the case was re-notified. Today, although it is 1.00 P.M. no one appears for the parties. I have therefore perused the record and am proceeding to pass a judgment in this case.

2. The subject suit is a suit for specific performance of an agreement to sell dated 7.10.1997. The agreement to sell was with respect to five plots bearing Nos.H-3 to H-7 situated at Nilothi village (total area measuring

1000 sq. yds) falling in khasra No.16/6, Delhi. The total price agreed to be paid under the agreement to sell was Rs. 20.5 lacs and a sum of Rs. 1 lakh was paid on the date of agreement to sell. The plaintiff also claimed that an additional amount of Rs. 1 lakh on 19.10.1997 was paid to the defendant No.1 through Sh. Davinder Gulia. In the suit plaint, the plaintiff states defendant failed to obtain the necessary permissions and therefore a legal notice dated 25.8.1998 was sent, which having failed to invoke the desired response, the subject suit for specific performance was thereafter filed.

3. Defendant No.1, the proposed seller, filed his written statement. The agreement to sell was not disputed, however, defendant No.1 claimed that it was the plaintiff who had committed breach of the contract inasmuch as after entering into of the agreement to sell, in addition to Rs. 2 lacs which was received by the plaintiff, 50% of the sale consideration was to be paid within 60 days and which the plaintiff failed to do. Defendant No.1 admitted payment to him through Sh. Davinder Gulia of Rs. 1 lakh on 19.10.1997. Defendant No.1 also pleaded that the balance sale consideration was to be paid by 20.1.1998, however, plaintiff not only failed to pay the balance sale consideration but even did not make the payment of half of the sale consideration within 60 days. It is pleaded that the plaintiff therefore being guilty of breach of contract is not entitled to specific performance. It is also pleaded that plaintiff is not entitled to discretionary relief of specific performance.

4. The following issues were framed in this suit on 7.1.2008:-

"1. Whether the specific performance of the agreement to sell dated 7.10.1997 cannot be granted in view of the specific stipulation in the contract providing for seller's liability to pay double the earnest money in case of refusal to complete the bargain? OPD

2. Whether this suit is barred by limitation? OPD-3 to 5

3. Whether the plaintiff is entitled to a decree of specific performance of agreement to sell dated 7.10.1997 in respect of the suit property? OPP

4. Whether the plaintiff was ready and willing to perform his part of the contract under the agreement to sell dated 7.10.1997. OPD-4

5. Whether the plaintiff is entitled to a decree of damages in the alternative and if so, how much and against whom?

6. Whether the plaintiff is entitled to a decree of permanent injunction as prayed for in the suit? OPD

7. Relief."

Issue Nos.1 and 3

5. Issue Nos.1 and 3 can be dealt with together and are being disposed of together. The issue is as to who is guilty of breach of contract. A reference to the written statement filed by the defendant No.1 shows that there was no question of obtaining any permission inasmuch as defendant No.1 had in his favour from the previous owner only usual documents being the agreement to sell, power of attorney etc and therefore there was not to be executed any sale deed in favour of the plaintiff. Once there is no question of execution of the sale deed, there did not arise any issue of the defendant No.1 applying for any permission or sale of the suit property to the plaintiff. Also, when we refer to the admitted agreement to sell dated 7.10.1997, Ex.P1, it is nowhere specified that the defendant No.1 will be liable to take any permission from any authority. In fact, the document Ex.P1 contains a clause that the power of attorney etc can be got registered in favour of the plaintiff. Further the plaintiff has failed to prove payment of 50% of sale consideration within 60 days of the date of entering into receipt-cum-agreement to sell Ex.P1 as was mandated under the agreement to sell Ex.P1. Also, as per the agreement to sell Ex.P1, the last date of payment was 20.1.1998 and the plaintiff has failed to file any proof on record of his having the necessary capacity to pay the balance sale consideration of Rs. 18.5 lacs as a total sum of Rs. 2 lacs was paid to the defendant No.1. I therefore hold that it was the plaintiff who was guilty of breach of agreement to sell dated 7.10.1997.

6. In fact, issue Nos.1 and 3, beside the issue No.6, will also include the subject as to whether plaintiff is entitled to discretionary relief of specific performance. I have recently in the judgment in the case of **Shri Jinesh Kumar Jain Vs. Smt. Iris Paintal and Ors.** in CS(OS) No.1154/1989 decided on 10.7.2012 held that if a nominal consideration is paid as advance price, then, plaintiff in such a case even assuming defendant is guilty of breach of contract will not be entitled to specific

performance. Paras 13 to 18 of the said judgment are relevant and the same read as under:-

> "13. Now let us assume that the agreement to sell dated 26.9.1988 was not hit by the 1972 Act; the defendants were guilty of breach of their obligation to perform their part of contract; and that the plaintiff was ready and willing to perform his part; even then, can it be said that the plaintiff is yet entitled to the discretionary relief of specific performance. It will be appropriate at this stage to refer to Section 20 of the Specific Relief Act, 1963, and more particularly sub-Section 3 thereof. Section 20 reads as under:-
>
> **"20. Discretion as to decreeing specific performance.-**
>
> (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capably of correction by a court of appeal.
>
> (2) The following are cases in which the court may properly exercise discretion not to decree specific performance:-
>
> (a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or
>
> (b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or
>
> (C) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.
>
> (3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has

> done substantial acts or suffered losses in consequence of a contract capable of specific performance.
>
> (4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party."

14. Sub-Section 3 makes it clear that Courts decree specific performance where the plaintiff has done substantial acts in consequence of a contract/agreement to sell. Substantial acts obviously would mean and include payment of substantial amounts of money. Plaintiff may have paid 50% or more of the consideration or having paid a lesser consideration he could be in possession pursuant to the agreement to sell or otherwise is in the possession of the subject property or other substantial acts have been performed by the plaintiff, and acts which can be said to be substantial acts under Section 20(3). However, where the acts are not substantial i.e. merely 5% or 10% etc of the consideration is paid i.e. less than substantial consideration is paid, (and for which a rough benchmark can be taken as 50% of the consideration), and/or plaintiff is not in possession of the subject land, I do not think that the plaintiff is entitled to the discretionary relief of specific performance.

15. The Supreme Court in the recent judgment of **Saradamani Kandappan vs. Mrs. S. Rajalakshmi,** 2011 (12) SCC 18 has had an occasion to consider the aspect of payment of a nominal advance price by the plaintiff and its effect on the discretion of the Court in granting the discretionary relief of specific performance. Though in the facts of the case before the Supreme Court, it was the buyer who was found guilty of breach of contract, however, in my opinion, the observations of the Supreme Court in the said case are relevant not only because I have found in this case the plaintiff/ buyer guilty of breach of contract, but also because even assuming the plaintiff/buyer is not guilty of breach of contract, yet, Section 20 sub-Section 3 of the Specific Relief Act, 1963 as reproduced above clearly requires substantial acts on behalf of the plaintiff/proposed purchaser i.e. payment of substantial consideration. Paras 37 and 43 of the judgment in the case of **Saradamani Kandappan** (supra) are relevant and they

read as under:

"37. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and "non-readiness". The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. **Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for rupees one lakh and received rupees ten thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining rupees ninety thousand, when the property value has risen to a crore of rupees.**

xxxxxx xxxxxxx xxxxxxx

43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in *K.S. Vidyanandam*.

(i) The courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/

period prescribed cannot be ignored.

(ii) **The courts will apply greater scrutiny and strictness when considering whether the purchaser was "ready and willing" to perform his part of the contract.**

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. The courts will also "frown" upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean that a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three-year period is intended to assist the purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part-performance, where equity shifts in favour of the purchaser." (emphasis is mine)

16. A reading of the aforesaid paras shows that Courts have a bounden duty to take notice of galloping prices. Surely it cannot be disputed that the balance of convenience i.e. equity in the present case is more in favour of the defendants who have only received 10% of the consideration. If the hammer has to fall in the facts of the present case, in my opinion, it should fall more on the plaintiff than on the defendants inasmuch as today the defendants cannot on receiving of the balance consideration of Rs. 44,00,000/-, and even if exorbitant rate of interest is received thereon, purchase any equivalent property for this amount. Correspondingly, the plaintiff has had benefit of 90% of sale consideration remaining with him (assuming he has any) and which he could have utilized for purchase of assets including an immovable property. In specific performance suits a buyer need not have ready cash all the time and his financial capacity has to be seen and thus plaintiff can be said to have taken benefit of the 90% balance with him. It is well to be remembered at this stage that in a way that part of Specific Relief Act dealing with specific performance is in the nature of exception to Section 73 of the Contract Act, 1872 i.e. the normal rule with respect to the breach of a contract under Section 73 of the Contract Act, 1872 is of damages, and, the Specific Relief Act, 1963 only provides the

alternative discretionary remedy that instead of damages, the contract in fact should be specifically enforced. Thus for breach of contract the remedy of damages is always there and it is not that the buyer is remediless. However, for getting specific relief, the Specific Relief Act, 1963 while providing for provisions of specific performance of the agreement (i.e. performance instead of damages) for breach, requires discretion to be exercised by the Court as to whether specific performance should or should not be granted in the facts of each case or that the plaintiff should be held entitled to the ordinary relief of damages or compensation.

17. I have recently in the case titled as **Laxmi Devi vs. Mahavir Singh** being RFA No. 556/2011 decided on 1.5.2012 declined specific performance, one of the ground being payment of only nominal consideration under the agreement to sell. Para 11 of the said judgment reads as under:-

> "11. Besides the fact that respondent/plaintiff was guilty of breach of contract and was not ready and willing to perform his part of the contract lacking in financial capacity to pay the balance consideration, in my opinion, the facts of the present case also disentitle the respondent/plaintiff to the discretionary relief of specific performance. There are two reasons for declining the discretionary relief of specific performance. The first reason is that the Supreme Court has now on repeated occasions held that unless substantial consideration is paid out of the total amount of consideration, the Courts would lean against granting the specific performance inasmuch as by the loss of time, the balance sale consideration which is granted at a much later date, is not sufficient to enable the proposed seller to buy an equivalent property which could have been bought from the balance sale consideration if the same was paid on the due date. In the present case, out of the total sale consideration of Rs. 5,60,000/-, only a sum of Rs. 1 lakh has been paid i.e. the sale consideration which is paid is only around 17% or so. In my opinion, by mere payment of 17% of the sale consideration, it cannot be said that the respondent/plaintiff has made out a case for grant of discretionary relief or specific performance....."

18. Therefore, whether we look from the point of view of Section 20 sub-Section 3 of the Specific Relief Act, 1963 or the ratio of the judgment of the Supreme Court in the case of **Saradamani Kandappan** (supra) or even on first principle with respect to equity because 10% of the sale consideration alongwith the interest will not result in the defendants even remotely being able to purchase an equivalent property than the suit property specific performance cannot be granted. In fact, on a rough estimation, the property prices would have galloped to at least between 30 to 50 times from 1988 till date. I take judicial notice of this that in the capital of our country, like in all other megapolis, on account of the increase in population and rapid urbanization, there is a phenomenal increase in the prices of urban immovable property.

I therefore hold and answer issue no. 5 against the plaintiff and in favour of the defendants holding that the plaintiff is not entitled to discretionary relief of specific performance."

7. The aforesaid ratio squarely applies to the facts of the present case inasmuch as the plaintiff only paid about 9.5% of the total consideration i.e. Rs. 2 lacs out of the total sale consideration of Rs. 20.5 lacs. Even therefore assuming defendant No.1 to be guilty of breach of contract, plaintiff is not entitled to discretionary relief of specific performance.

8. Issue No.3 is therefore decided in favour of the defendant No.1 and against the plaintiff. I also hold that plaintiff is not entitled to discretionary relief of specific performance inasmuch as after the plaintiff committed breach of contract, the suit property has already been transferred by means of usual documents to the defendant Nos.4 and 5 (documents dated 16.6.1998 etc) and which have been filed and proved on behalf of these defendants as Ex. D4W1/1 and Ex.D4W1/2. Once therefore third party rights have come into existence, and more so on account of breach of the agreement to sell on the part of the plaintiff, plaintiff is not entitled to the discretionary relief of specific performance.

Issue Nos.1 and 3 are decided in favour of defendant No.1 and against the plaintiff.

Issue No.2

9. Issue No.2 pertains to limitation. The agreement to sell in question is dated 7.10.1997. The suit in the present case was filed in about November, 1998. The suit is therefore well within limitation as the period of limitation in one part for the suit for specific performance is of three years of entering into of the agreement to sell as per Article 54 of the Limitation Act, 1963. This issue is therefore decided in favour of the plaintiff and against the defendants.

Issue No.4

10. Issue No.4 is whether the plaintiff was willing to perform his part of the contract. In my opinion, the plaintiff has again miserably failed to prove this issue inasmuch as except making a self-serving statement of having the balance consideration amount, plaintiff has failed to file any concrete proof with respect to his financial capacity in the form of bank accounts, income tax returns, moveable or immovable properties and so on. Provision of Section 16(c) of Specific Relief Act, 1963 providing 'readiness and willingness' requires categorical evidence and not self-serving statements.

I accordingly hold that plaintiff has failed to prove that he was ready and willing to perform the agreement to sell dated 7.10.1997.

This issue is therefore decided against the plaintiff and in favour of defendant No.1.

Issue No.5

11. Issue No.5 is with respect to entitlement of the plaintiff to damages. Once again except a self-serving deposition, there is no evidence on record led by the plaintiff with respect to the difference in the prices of the property as on the date of the alleged breach. In any case, I have already held that it is the plaintiff who is guilty of breach of contract and therefore plaintiff will not be entitled to damages. Even assuming the plaintiff not to be guilty of breach of contract and the defendant No.1 to be guilty of breach of contract, however, since the plaintiff has failed to lead any credible evidence with respect to damages, plaintiff is not entitled to any damages. Plaintiff ought to have filed instances of sale by documents and which the plaintiff has failed to file. Though an affirmative deposition of plaintiff is evidence, however, I refuse to give the same that much weight to hold that the plaintiff has sufficiently discharged onus of proof qua damages/losses caused. Issue No.5 is therefore decided in favour of the defendants and against the plaintiff.

Issue No.6

12. In view of my aforesaid discussion, plaintiff will not be entitled to the relief of permanent injunction as prayed for and issue No.6 is decided against the plaintiff.

Relief

13. Admittedly the defendant No.1 had received a sum of Rs.2 lacs under the agreement to sell dated 7.10.1997. Defendant No.1 has not led any evidence to show as to how the amount of Rs. 2 lacs can be forfeited because in the absence of loss being caused the part price paid cannot be forfeited as per the ratio of the Constitution Bench judgment of the Supreme Court in the case of **Fateh Chand Vs. Balkishan Dass,** AIR 1963 SC 1405. Therefore, the plaintiff would be entitled to a money decree for a sum of Rs. 2 lacs alongwith pendente lite and future interest @ 12% per annum simple.

14. In view of the aforesaid discussion, suit of the plaintiff for specific performance will stand dismissed. A money decree is passed in favour of the plaintiff and against the defendant No.1 for a sum of Rs. 2 lacs alongwith pendente lite and future interest @ 12% per annum simple. Parties are left to bear their own costs. Decree sheet be prepared.

ILR (2013) I DELHI 327
MAC

NATIONAL INSURANCE COMPANY LTD. ....APPELLANT

VERSUS

THAN SINGH & ORS. ....RESPONDENTS

(G.P. MITTAL, J.)

MAC. APP. NO. : 946/2011 DATE OF DECISION: 19.09.2012

Motor Vehicles Act, 1988—Section 163, 163 A—Appeal filed against the Judgment of Motor Accidents Claim Tribunal whereby compensation awarded in favour of Claimant—Claimant while driving a Truck rammed against a Bus resulting into injuries to the Claimant—Question before the Tribunal was whether the Claimant, who was driving the truck himself, was entitled to compensation under the Motor Vehicles Act from the owner or the authorized insurer or under the Workmen's Compensation Act for having suffered as injury as an employee—Held: That no evidence produced by the Claimant to show that accident resulted on account of some mechanical failure which was driven by Claimant himself—Petition under Section 163 A is not maintainable since accident caused by Claimant's negligence and that the entitlement of Claimant could be under the Workman's Compensation Act.

Important Issue Involved: If an accident has accused by Employee in course of his employment, the entitlement to the compensation can only be under the Workman's Compensation Act.

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. L.K. Tyagi, Advocate.

FOR THE RESPONDENT : Mr. Rajneesh Kumar Jha for the R-1.

CASES REFFERED TO:

1. *Raj Kumar* vs. *Ajay Kumar & Anr.,* 2011 (1) SCC 343.
2. *National Insurance Company Limited* vs. *Sinitha & Ors.,* 2011 (13) SCALE 84.
3. *Arvind Kumar Mishra* vs. *New India Assurance Co. Ltd.* 2010 (10) SCC 254.
4. *Yadava Kumar* vs. *D.M., National Insurance Co. Ltd.* 2010 (10) SCC 341.
5. *Ningamma & Anr.* vs. *United India Insurance Company Limited,* (2009) 13 SCC 710.
6. *General Manager, Chandigarh Transport Undertaking-I, Chandigarh & Anr.* vs. *Kanwaljit Kaur & Ors.,* FAO No.1413/2000.

RESULT: Appeal allowed.

G.P. MITTAL, J. (ORAL)

1. This Appeal is directed against a judgment dated 17.09.2011 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby in a Petition under Section 163 of the Motor Vehicles Act, 1988 (the Act) a compensation of Rs. 3,27,360/- was awarded in favour of the Respondent No.1.

2. According to the case set up by the First Respondent (Petitioner before the Claims Tribunal) on 26.07.2009 he (the Claimant) was driving truck NoDL-1LE-3781 from Delhi to Kanpur. The truck rammed against a Roadways bus No.UP-91-9687 due to the failure of the steering of the truck resulting into injuries to the First Respondent (the Claimant).

3. During inquiry before the Claims Tribunal a contention was raised that since the first Respondent (the Claimant) himself was driving the truck in question, he stepped into the shoes of the owner and was not entitled to any compensation. In the alternative, it was stated that if

at all the First Respondent was to get any compensation it could be only as an employee under the Workmen's Compensation Act for having suffered an employment injury.

4. The Claims Tribunal relied on a judgment passed by the learned Single Judge of this Court in Raniya @ Rami Devi & Ors. MAC APP No.501/2000, decided on 13.07.2011 and held that in case of an employee **Ningamma & Anr. v. United India Insurance Company Limited,** (2009) 13 SCC 710 would not be applicable and the employee would be entitled to get compensation under the Workmen's Compensation Act.

5. The distinction between award of compensation on the basis of 'liability without fault' under Section 140 of the Act and payment of compensation under Section 163-A of the Act was drawn by the Supreme Court in **National Insurance Company Limited v. Sinitha & Ors.,** 2011 (13) SCALE 84. It was held that compensation under Section 140 of the Act shall be payable irrespective of the fact whether the accident takes place because of victim's own negligence whereas victim's own negligence would be a defence to a Petition under Section 163-A of the Act. I extract Paras 13, 14, 15 and 16 of the report hereunder for ready reference:-

> "13. In the second limb of the present consideration, it is necessary to carry out a comparison between Sections 140 and 163-A of the Act. For this, Section 163-A of the Act is being extracted hereunder:
>
> > **Section 163-A.** Special provisions as to payment of compensation on structured formula basis — (1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorized insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.
> >
> > Explanation - For the purposes of this Sub-section, "permanent disability" shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).

> > (2) In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.
> >
> > (3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule.

A perusal of Section 163(A) reveals that Sub-section (2) thereof is in pari materia with Sub-section (3) of Section 140. In other words, just as in Section 140 of the Act, so also under Section 163-A of the Act, it is not essential for a claimant seeking compensation, to "plead or establish", that the accident out of which the claim arises suffers from "wrongful act" or "neglect" or "default" of the offending vehicle. But then, there is no equivalent of Sub-section (4) of Section 140 in Section 163-A of the Act. Whereas, under Sub-section (4) of Section 140, there is a specific bar, whereby the concerned party (owner or insurance company) is precluded from defeating a claim raised under Section 140 of the Act, by "pleading and establishing", "wrongful act", "neglect" or "default", there is no such or similar prohibiting clause in Section 163-A of the Act. The additional negative bar, precluding the defense from defeating a claim for reasons of a "fault" ("wrongful act", "neglect" or "default"), as has been expressly incorporated in Section 140 of the Act (through Sub-section (4) thereof), having not been embodied in Section 163-A of the Act, has to have a bearing on the interpretation of Section 163-A of the Act. In our considered view the legislature designedly included the negative clause through sub-section (4) in Section 140, yet consciously did not include the same in the scheme of Section 163-A of the Act. The legislature must have refrained from providing such a negative clause in Section 163-A intentionally and purposefully. In fact, the presence of Sub-section (4) in Section 140, and the absence of a similar provision in Section 163-A, in our view, leaves no room for any doubt, that the only object of the Legislature in doing so was, that the legislature desired to afford liberty to the defense to defeat a

claim for compensation raised under Section 163-A of the Act, by pleading and establishing "wrongful act", "neglect" or "default". Thus, in our view, it is open to a concerned party (owner or insurer) to defeat a claim raised under Section 163A of the Act, by pleading and establishing anyone of the three "faults", namely, "wrongful act", "neglect" or "default". But for the above reason, we find no plausible logic in the wisdom of the legislature, for providing an additional negative bar precluding the defense from defeating a claim for compensation in Section 140 of the Act, and in avoiding to include a similar negative bar in Section 163A of the Act. The object for incorporating Sub-section (2) in Section 163A of the Act is, that the burden of pleading and establishing proof of "wrongful act", "neglect" or "default" would not rest on the shoulders of the claimant. The absence of a provision similar to Sub-section (4) of Section 140 of the Act from Section 163A of the Act, is for shifting the onus of proof on the grounds of "wrongful act", "neglect" or "default" onto the shoulders of the defense (owner or the insurance company). A claim which can be defeated on the basis of any of the aforesaid considerations, regulated under the "fault" liability principle. We have no hesitation therefore to conclude, that Section 163A of the Act is founded on the "fault" liability principle.

14. There is also another reason, which supports the aforesaid conclusion. Section 140 of the Act falls in Chapter X of the Motor Vehicles Act, 1988. Chapter X of the Motor Vehicles Act, 1988 is titled as "Liability Without Fault in Certain Cases". The title of the chapter in which Section 140 falls, leaves no room for any doubt, that the provisions under the chapter have a reference to liability "... without fault ...", i.e., are founded under the "no-fault" liability principle. It would, however, be pertinent to mention, that Section 163A of the Act, does not find place in Chapter X of the Act. Section 163A falls in Chapter XI which has the title "Insurance of Motor Vehicles Against Third Party Risks". The Motor Vehicles Act, 1988 came into force with effect from 1.7.1989 (i.e., the date on which it was published in the Gazette of India Extraordinary Part II). Section 140 of the Act was included in the original enactment under chapter X. As against the aforesaid, Section 163A of the Act was inserted

therein with effect from 14.11.1994 by way of an amendment. Had it been the intention of the legislature to provide for another provision (besides Section 140 of the Act), under the "no-fault" liability principle, it would have rationally added the same under Chapter X of the Act. Only because it was not meant to fall within the ambit of the title of Chapter X of the Act "Liability Without Fault in Certain Cases", it was purposefully and designedly not included thereunder.

15. The heading of Section 163A also needs a special mention. It reads, "Special Provisions as to Payment of Compensation on Structured Formula Basis". It is abundantly clear that Section 163A, introduced a different scheme for expeditious determination of accident claims. Expeditious determination would have reference to a provision wherein litigation was hitherto before (before the insertion of Section 163A of the Act) being long drawn. The only such situation (before the insertion of Section 163A of the Act) wherein the litigation was long drawn was under Chapter XII of the Act. Since the provisions under Chapter XII are structured under the "fault" liability principle, its alternative would also inferentially be founded under the same principle. Section 163A of the Act, catered to shortening the length of litigation, by introducing a scheme regulated by a pre-structured formula to evaluate compensation. It provided for some short-cuts, as for instance, only proof of age and income, need to be established by the claimant to determine the compensation in case of death. There is also not much discretion in the determination of other damages, the limits whereof are also provided for. All in all, one cannot lose sight of the fact that claims made under Section 163A can result in substantial compensation. When taken together the liability may be huge. It is difficult to accept, that the legislature would fasten such a prodigious liability under the "no-fault" liability principle, without reference to the "fault" grounds. When compensation is high, it is legitimate that the insurance company is not fastened with liability when the offending vehicle suffered a "fault" ("wrongful act", "neglect", or "defect") under a valid Act only policy. Even the instant process of reasoning, leads to the inference, that Section 163A of the Act is founded under the "fault" liability

principle.

16. At the instant juncture, it is also necessary to reiterate a conclusion already drawn above, namely, that Section 163A of the Act has an overriding effect on all other provisions of the Motor Vehicles Act, 1988. Stated in other words, none of the provisions of the Motor Vehicles Act which is in conflict with Section 163A of the Act will negate the mandate contained therein (in Section 163A of the Act). Therefore, no matter what, Section 163A of the Act shall stand on its own, without being diluted by any provision. Furthermore, in the course of our determination including the inferences and conclusions drawn by us from the judgment of this Court in **Oriental Insurance Company Limited v. Hansrajbhai v. Kodala,** (2001) 5 SCC 175, as also, the statutory provisions dealt with by this Court in its aforesaid determination, we are of the view, that there is no basis for inferring that Section 163A of the Act is founded under the "no-fault" liability principle. Additionally, we have concluded herein above, that on the conjoint reading of Sections 140 and 163A, the legislative intent is clear, namely, that a claim for compensation raised under Section 163A of the Act, need not be based on pleadings or proof at the hands of the claimants showing absence of "wrongful act", being "neglect" or "default". But that, is not sufficient to determine that the provision falls under the "fault" liability principle. To decide whether a provision is governed by the "fault" liability principle the converse has also to be established, i.e., whether a claim raised thereunder can be defeated by the concerned party (owner or insurance company) by pleading and proving "wrongful act", "neglect" or "default". From the preceding paragraphs (commencing from paragraph 12), we have no hesitation in concluding, that it is open to the owner or insurance company, as the case may be, to defeat a claim under Section 163A of the Act by pleading and establishing through cogent evidence a "fault" ground ("wrongful act" or "neglect" or "default"). It is, therefore, doubtless, that Section 163A of the Act is founded under the "fault" liability principle. To this effect, we accept the contention advanced at the hands of the Learned Counsel for the Petitioner."

6. Similar view was taken by the Punjab and Haryana High Court

in FAO No.1413/2000 titled **General Manager, Chandigarh Transport Undertaking-I, Chandigarh & Anr v. Kanwaljit Kaur & Ors.,** decided on 09.05.2011.

7. In the instant case, no evidence was produced by the First Respondent in the shape of any Mechanical Inspection Report to show that the accident resulted on account of some mechanical failure / defect in the vehicle which was being driven by the First Respondent himself. Thus, the accident was caused on account of the First Respondent's own negligence.

8. Applying the ratio of Sinitha, a Claim Petition under Section 163-A of the Act is not maintainable.

9. At the same time, irrespective of his own fault or negligence, the First Respondent could file a Petition for grant of compensation before the Commissioner, Workmen's Compensation for an injury suffered by him during the course of his employment.

10. Admittedly, the permanent disability suffered by the First Respondent, that is, 37% permanent locomotor impairment of right lower limb does not fall under any item in Part II of the Schedule I. Thus, the compensation would be payable as defined under Section 4 sub-Section (1) (c) (ii) of the Workmen's Compensation Act.

11. While awarding compensation in case of partial permanent disablement, the Commissioner, Workmen's Compensation has to keep in mind the loss of earning capacity of the employee and not physical incapacity. Same principle is applied in the Motor Vehicles Act, 1988 as held by the Supreme Court in **Raj Kumar v. Ajay Kumar & Anr.,** 2011 (1) SCC 343. In Raj Kumar the Supreme Court brought out the difference between permanent disability and functional disability resulting in the loss of earning capacity. It was laid down that the compensation on account of loss of earning capacity has to be granted in accordance to the nature of job undertaken by the victim of a motor accident. Paras 11 and 14 of the report are extracted hereunder:

> "11. What requires to be assessed by the Tribunal is the effect of the permanently disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the

standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this Court in **Arvind Kumar Mishra v. New India Assurance Co. Ltd.** 2010 (10) SCC 254 and **Yadava Kumar v. D.M., National Insurance Co. Ltd.** 2010 (10) SCC 341.

x x x x x x x

14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'loss of future earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity."

12. In the instant case, the First Respondent examined Dr. Dhruba Narayan Borah as PW-1. He proved the Disability Certificate Ex.PW-1/A. He testified that the patient (the First Respondent) had weakness in

the affected limbs. He could drive a motor car but with difficulty. The First Respondent was not engaged in car driving but was engaged in truck driving. He is a professional driver for a commercial vehicle. In the absence of any specific evidence with regard to the loss of earning capacity, I have to make some guess work and would hold that there is 37% loss of earning capacity. By applying the principle as given in Section 4 of the W.C. Act, the loss of earning capacity comes to Rs. 1,49,340/- (3300/- x 60% x 203.85 x 37%).

13. The Learned counsel for the First Respondent also concedes that the First Respondent is entitled to compensation only under the Workmen's Compensation Act. Although, no Petition was filed by the First Respondent before the Commissioner, Workmen's Compensation, but since this Court is an Appellate Court against any order passed by the Commissioner under the Workmen Compensation Act, I would award him a compensation of Rs. 1,49,340/- which is payable to him under the Workmen's Compensation Act. The awarded amount shall carry interest @ 7.5% per annum from the date of filing of the Petition till its payment.

14. The excess amount of Rs. 1,78,290/- along with proportionate interest and the interest accrued, if any, during the pendency of the Appeal shall be refunded to the Appellant Insurance Company.

15. The awarded amount along with interest shall be released in favour of the First Respondent in terms of the order passed by the Claims Tribunal.

16. The statutory deposit of Rs. 25,000/- be refunded to the Appellant Insurance Company.

17. The Appeal is allowed in above terms.

18. Pending Applications also stand disposed of.

ILR (2013) I DELHI 337
CS (OS)

DCM LIMITED ....PLAINTIFF

VERSUS

DELHI DEVELOPMENT AUTHORITY ....DEFENDANT

(VALMIKI J. MEHTA, J.)

CS (OS) NO. : 1085/1991 DATE OF DECISION: 19.09.2012

(A) Public Premises (Eviction of Unauthorized Occupants) Act, 1971—Section 15—Code of Civil Procedure, 1908—Section 9, 11 order 7 Rule 11—Plaintiff filed suit claiming declaration of ownership in land situated in Baghraoji, Delhi alleging that land was given to it in exchange for another piece of land, which was acquired by DDA for re-aligning Daryai Nala—Estate Officer had already passed order in consolidated petition filed by defendant for eviction of plaintiff and for mesne profit. Held: The jurisdiction of civil Court is completely barred in respect to eviction of a person, who is in unauthorized occupation of the public premises.

The issue of eviction of any person in unauthorized occupation of public premises will necessarily have to include a decision to be given by the Estate Officer on the defence of the person who pleads that he is not an unauthorized occupant of public premises. All defences therefore that the eviction proceedings cannot go on before the Estate Officer because the person who is alleged to be in an unauthorized occupation is not an unauthorized occupant will have to be raised before and to be decided by the Estate Officer acting under the Public Premises Act, 1971. **(Para 9)**

(B) Code of Civil Procedure, 1908—Order 7 Rule 11—

Plaintiff filed suit claiming declaration of ownership qua land situated in Baghraoji, Delhi—Whereas defendant filed consolidated petition for eviction of plaintiff before Estate Officer—Estate Officer passed order holding plaintiff liable for eviction and also ordered for payment of mesne profits—Defendant alleged that said order of Estate Officer operates as res judicata against plaintiff in said suit. Held—Section 11 is not exhaustive of the general doctrine of res judicata and though the rule of res judicata as enacted in Section 11, has some technical aspects, the general doctrine is founded on considerations high public policy to achieve two objectives, namely, that there must be a finality to litigation and that individuals should not be harassed twice over with the same kind of litigation.

It has been held by the Supreme Court in the judgment reported as **Gulam Abbas and Ors. Vs. State of Uttar Pradesh and Ors.** 1982 (1) SCC 71 that Section 11 CPC is not exhaustive of the doctrine of res judicata and the doctrine of res judicata is of much wider and general application. **(Para 11)**

Important Issue Involved: (A) The jurisdiction of civil Court is completely barred in respect to eviction of a person who is in unauthorized occupation of the public premises.

(B) Section 11 of the CPC is not exhausive of the general doctrine of res judicata and though the rule of res judicata as enacted in Section 11 has some technical aspects, the general doctrine is founded on considerations of high public policy to achieve two objectives, namely, that there must be a finality to litigation and that individuals should not be harassed twice over with the same kind of litigation.

[Sh Ka]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Sanjeev Anand, Advocate with Mr. Abhas Kumar, Advocates.

FOR THE DEFENDANT : Ms. Shobhan Takir, Advocate.

CASES REFFERED TO:

1. *Nandram & Ors.* vs. *Union of India,* 2000 (87) DLT 234.
2. *Ashok Marketing Ltd. and Anr.* vs. *Punjab National Bank and Ors.* 1990 (4) SCC 406.
3. *Express Newspapers Pvt. Ltd.* vs. *Union of India & Ors.* 1986(1) SCC 133.
4. *Gulam Abbas and Ors.* vs. *State of Uttar Pradesh and Ors.* 1982 (1) SCC 71.
5. *Town Municipal Council* vs. *Presiding Officer, Labour Court, Hubli & Ors.,* AIR 1969 SC 1335.
6. *T.K.Lakshmana Iyer & Ors.* vs. *State of Madras,* AIR 1968 SC 1489.

RESULT: Suit dismissed.

VALMIKI J. MEHTA, J. (ORAL)

1. On 21.8.2012, the following order was passed by this Court:-

"1. This is a suit filed by DCM Limited/plaintiff claiming rights in 5,071 square yards of land situated in Baghraoji, Delhi. The plaintiff claims that this land was given to it in exchange for another piece of land which was acquired by the DDA for re-aligning the Daryai Nala.

2. The fact of the matter however is that there is no document evidencing transfer of title in any manner i.e. subject land is in favour of the plaintiff and which is mandatory under Section 17(1)(b) of the Registration Act, 1908. I may also state that the plaint is for some inexplicable reason silent as to whether the plaintiff has or has not received complete compensation for its land which was acquired, i.e. if the plaintiff has taken complete compensation for the acquired land, then in equity prima facie,

the plaintiff would not have any right in the suit land.

3. The subject suit filed by the plaintiff claiming declaration of ownership in the land is essentially on two counts. Firstly on the ground that the land was taken in exchange by the plaintiff for some other piece of land and secondly on the ground of adverse possession. On the aspect of exchange, as already stated, there is no written document. On the aspect that the plaintiff has acquired rights in the suit land by virtue of law of prescription, I may note that a learned single Judge of this Court in the case of **Nandram & Ors. vs. Union of India,** 2000 (87) DLT 234 has held that Limitation Act, 1963 does not apply to proceedings under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereinafter referred to as 'PP Act') when the Government seeks possession of the property owned by it. The learned single Judge in the case of **Nandram** (supra) has relied upon two judgments of the Supreme Court reported as **T.K.Lakshmana Iyer & Ors. vs. State of Madras,** AIR 1968 SC 1489 and **Town Municipal Council vs. Presiding Officer, Labour Court, Hubli & Ors.,** AIR 1969 SC 1335 to hold that the Limitation Act does not apply to proceedings under the PP Act. The judgment of the learned single Judge in the case of **Nandram** (supra) has been upheld by a Division Bench of this Court in the case of **Nandram vs. Union of India,** 2000 (88) DLT 592. I am informed that an SLP against the judgment of the Division Bench was also dismissed by the Supreme Court.

4. I am informed that the Estate Officer has already passed an order in the consolidated petition filed by the defendant for eviction of the plaintiff and also for mesne profits. This order passed was called for by a Division Bench of this Court in RFA (OS) No.17/1995 in a sealed cover, and this order is still lying in a sealed cover in the said RFA (OS) No.17/1995, inasmuch as, parties at the time of disposal of the appeal did not point out this fact to the Division Bench.

5. In my opinion, if the order of the Estate Officer is in favour of the defendant holding the plaintiff liable to eviction and payment of mense profits, then said order of the Estate Officer will operate as res judicata against the plaintiff. It will also operate as an issue

of estoppel against the plaintiff. I may state that the principles of res judicata are of general application, and Section 11 CPC is not exhaustive of the doctrine of res judicata. Once the issue in question has been pronounced upon by the Estate Officer, that issue will also have a bearing on maintainability of the suit by reference to Section 15 of the PP Act.

6. I must hasten to add that the aforesaid are only prima facie observations and parties will be heard in detail on the next date of hearing.

7. For the present, hearing cannot go on inasmuch as the order passed by the Estate Officer has to be looked into as to whether the same has allowed the proceedings initiated by the defendant or whether the same have been dismissed.

8. Let the file of RFA (OS) No.17/1995 alongwith the sealed cover containing the order of the Estate Officer be sent to this Court on the next date of hearing.

9. I may also note that the entire record of the Estate Officer has also been filed in a sealed cover in this suit itself and that record has not been sent to the Court today. Let this record, filed by the defendant and lying in a sealed cover, be also sent to the Court on the next date of hearing.

10. List for further proceedings on 19th September, 2012."

2. The above order shows that plaintiff-M/s. DCM Limited claims rights in a plot of land. This plot of land admeasures 5071 sq.yds. in khasra Nos.1613/153, 1614/153 and 1615/153 Baghraoji, Delhi. In the suit plaint, various causes of action are urged to claim ownership and which include averments that the subject land was given in exchange of another land acquired by the Government which is now represented by Delhi Development Authority (DDA).

3. As the order dated 21.8.2012 shows that admittedly there is no registered title deed granted by the Government or the DDA or any other authority which had owned the land in favour of the plaintiff making the plaintiff as the owner of the suit land. In any case, as the present judgment will show I am not required to go into the merits of the matter because I am dismissing the suit on the ground that the jurisdiction of

the civil Court is barred in terms of Section 15(a) of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereinafter referred to as "Public Premises Act, 1971"). However, before I say further on this aspect, certain orders which were passed in the present suit and thereafter in an appeal against the judgment whereby the suit was rejected under Order 7 Rule 11 of Code of Civil Procedure, 1908 (CPC) would be relevant and need to be referred to.

4. The Estate Officer acting under the Public Premises Act, 1971 had issued the notice to the present plaintiff for eviction from the subject land. This notice and proceedings which took place thereafter are from the year 1990 onwards. Both the parties appeared before the Estate Officer, filed their pleadings and led evidence. The Estate Officer passed a judgment on 30.3.2001. What this judgment holds I will be referring later, after I refer to certain orders passed in the present suit and the appeal setting aside the judgment dated 8.8.1995 of the learned Single Judge.

5. On 24.8.1993, a learned Single Judge of this Court in I.A. No.2691/1993 filed by the plaintiff ordered that proceedings before the Estate Officer may go on but the final order will not be passed till further orders. Liberty was granted to the defendant in this suit to apply for variation of this order. After the suit plaint was rejected by the judgment dated 8.8.1995, the plaintiff preferred an appeal being RFA (OS) No.17/1995. In this appeal, an order was passed by the Division Bench on 15.5.1996 in C.M. No.2086/1995 directing that proceedings before the Estate Officer will go on, however, final order will not be passed. This order dated 15.5.1996 was thereafter varied by the Division Bench by its order dated 25.8.1999, as per which the Estate Officer was permitted to pass the order, but, the order was to be sent to the Court in a sealed cover. The Division Bench allowed RFA(OS) No.17/1995 by setting aside the judgment dated 8.8.1995 of the learned Single Judge and restored the suit.

6. Once the suit is restored, the interim orders which were passed in this suit and as varied by the Division Bench will continue to apply. As per the Division Bench's order dated 25.8.1999, the Estate Officer was allowed to pass a final order but the same was to be sent in a sealed cover to the Court. While disposing of the appeal, the Division Bench has not passed any further orders with respect to whether the sealed envelope

containing the judgment of the Estate Officer should or should not be opened. As already stated above, liberty was granted to the defendant in the order dated 24.8.1993 to apply for variation. I have today therefore opened the order of the Estate Officer which was sent in a sealed cover to the Division Bench. I have opened it because there is no provision of law which has been pointed out to me that if a competent authority acting under a statutory provision, and acting in a quasi judicial capacity passes a judgment which will bind both the parties to the present suit, yet, that judgment should remain in a sealed cover because one of the parties to the proceedings before the Estate Officer, i.e the plaintiff herein, wants the order to continue to remain in sealed cover. The reason why I have opened the sealed cover is to find out as to what judgment has been passed by the Estate Officer to decide the rights of the parties i.e whether the eviction order has been passed with respect to the subject land by the Estate Officer and which land is the subject matter of the present suit or the eviction proceedings have been dismissed. Either way, the judgment of the Estate Officer would apply as res judicata between the parties, subject of course to the right of the aggrieved party to challenge the judgment in appeal.

7. A Constitution Bench of the Supreme Court has had an occasion to consider the aspect as to whether an Estate Officer can go into seriously disputed questions of facts and other issues before him. The Constitution Bench judgment of the Supreme Court is reported as **Ashok Marketing Ltd. and Anr. Vs. Punjab National Bank and Ors.** 1990 (4) SCC 406. Paras 29 to 35 of the said judgment are relevant and the same read as under:-

> "29. Shri A.K. Ganguli, has urged that a person who was put in occupation of the premises as a tenant and who was continued in such occupation after the expiry or the termination of his tenancy cannot be regarded as a person in unauthorised occupation under Section 2(g) of the Public Premises Act. The submission of Shri Ganguli is that, the occupation of a person who was put in possession as a tenant is juridical possession and such an occupation cannot be regarded as unauthorised occupation. In support of this submission, Shri Ganguli has placed reliance on the decision of the Bombay High Court in Brigadier **K.K. Verma and Anr. v. Union of India and Anr.** which has been approved by this Court in **Lallu Yeshwant Singh v. Rao Jagdish Singh**.

30. The definition of the expression 'unauthorised occupation' contained in Section 2(g) of the Public Premises Act is in two parts. In the first part the said expression has been defined to mean the occupation by any person of the Public premises without authority for such occupation. It implies occupation by a person who has entered into occupation of any public premises without lawful authority as well as occupation which was permissive at the inception but has ceased to be so. The second part of the definition is inclusive in nature and it expressly covers continuance in occupation by any person of the public premises after the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy the premises has expired or has been determined for any reason whatsoever. This part covers a case where a person had entered into occupation legally under valid authority but who continues in occupation after the authority under which he was put in occupation has expired or has been determined. The words "whether by way of grant or any other mode of transfer" in this part of the definition are wide in amplitude and would cover a lease because lease is a mode of transfer under the Transfer of Property Act. The definition of unauthorised occupation contained in Section 2(g) of the Public Premises Act would, therefore, cover a case where a person has entered into occupation of the public premises legally as a tenant under a lease but whose tenancy has expired or has been determined in accordance with law.

31. Brigadier **K.K. Verma and Anr. v. Union of India and Anr.** (Supra) was decided under the provisions of the Government Premises (Eviction) Act, 1950, which did not contain the definition of the expression 'unauthorised occupation'. In that case it has been held that under the Indian law, the possession of a tenant who has ceased to be a tenant is protected by law and although he may not have the right to continue in possession, after the termination of the tenancy, his possession is juridical and that possession is protected by statute, and therefore, an erstwhile tenant can never become a trespasser and his possession cannot be regarded as unauthorised occupation. The learned Judges have also observed that unless the legislature had given indication of a clear intention that by the expression 'unauthorised occupation'

it meant not only person who had no title at all but also persons who are titled at the inception and whose title came to an end, it would not be proper to give an interpretation to the expression 'unauthorised occupation' which would run counter to the principles of law which have been accepted in this country. After this decision the legislature intervened and introduced the definition of the expression 'unauthorised occupation' in the Public Premises (Eviction of Unauthorised Occupants) Act, 1958, which definition has been reproduced in Section 2(e) of the Public Premises Act and in the said definition the legislature has taken care to make an express provision indicating that the expression 'unauthorised occupation' includes the continuance in occupation by any person of the public premises after the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy the premises has expired or has been determined for any reason whatsoever. In the circumstances the petitioners cannot derive any assistance from the decision of the Bombay High Court in Brigadier **K.K. Verma's** case (supra).

32. Shri Ganguli has placed reliance on the decision of A.P. Sen, J. in **Express Newspapers Pvt. Ltd. and Ors. v. Union of India and Ors.** and has submitted that in that case the learned Judge has held that cases involving relationship between the lessor and lessee fall outside the purview of the Public Premises Act. We have carefully perused the said decision and we are unable to agree with Shri Ganguli. In that case A.P. Sen, J. has observed that the new building had been constructed by the Express Newspapers Pvt. Ltd. after the grant of permission by the lessor, and, therefore, the Express Newspapers Pvt. Ltd. was not in unauthorised occupation of the same within the meaning of Section 2(g) of the Public Premises Act. It was also held by the learned Judge that the Express Building constructed by the Express Newspapers Ltd. with the sanction of lessor on plots Nos. 9 and 10 demised on perpetual lease can, by no process of reasoning, be regarded as public premises belonging to the Central Government under Section 2(e) of the Public Premises Act, and therefore, there-was no question of the lessor applying for eviction of the Express Newspapers Pvt. Ltd. under the provisions of the Public Premises Act. The aforesaid

observations indicate that the learned Judge did not proceed on the basis that cases involving relationship of lessor and lessee fall outside the purview of the Public Premises Act. On the other hand the said observations show that the learned Judge has held that the provisions of the Public Premises Act could not be invoked in the facts of that case.

33. Another submission that has been urged by Shri Ganguli is that the question whether a lease has been determined or not **involves complicated questions of law and the estate officer, who is not required to be an officer well versed in law, cannot be expected to decide such question** and, therefore, it must be held that the provisions of the Public Premises Act have no application to a case when the person sought to be evicted had obtained possession of the premises as a lessee. It is true that there is no requirement in the Public Premises Act that the estate officer must be a person well versed in law. But, that, by itself, cannot be a ground for excluding from the ambit of the said Act premises in unauthorised occupation of persons who obtained possession of the said premises under a lease. Section 4 of the Public Premises Act requires issuing of a notice to the person in unauthorised occupation of any Public Premises requiring him to show cause why an order of eviction should not be made. Section 5 makes provisions for production of evidence in support of the cause shown by the person who has been served with a notice under Section 4 and giving of a personal hearing by the estate officer. Section 8 provides that an estate officer, shall, for the purpose of holding any enquiry under the said Act have the same powers as are vested in a civil court under the CPC, 1908, when trying a suit in respect of the matters specified therein namely:

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring discovery and production of documents; and

(c) any other matters which may be prescribed.

34. Rule 5(2) of the Public Premises (Eviction of Unauthorised Occupants) Rules, 1971, requires the estate officer to record the

summary of evidence tendered before him. Moreover Section 9 confers a right of appeal against an order of the estate officer and the said appeal has to be heard either by the district judge of the district in which the public premises are situate or such other judicial officer in that district of not less than ten years' standing as the district judge may designate in that behalf. In shows that the final order that is passed is by a judicial officer in the rank of a district judge.

35. A similar contention was raised before this Court in **Maganlal Chhagganlal (P) Ltd. v. Municipal Corporation of Greater Bombay and Ors**. wherein the validity of the provisions of Chapter VA of the Bombay Municipal Corporation Act, 1888 and the Bombay Government Premises (Eviction) Act, 1955 were challenged before this Court and the said contention was negatived. Aligiriswami, J. speaking for the majority, has observed as under:

> "Even though the officers deciding these questions would be administrative officers there is provision in these Acts for giving notice to the party affected, to inform him of the grounds on which the order of eviction is proposed to be made, for the party affected to file a written statement and produce documents and be represented by lawyers. The provisions of the civil Procedure Code regarding summoning and enforcing attendance of persons and examining them on oath, and requiring the discovery and production of documents are a valuable safeguard for the person affected. So is the provision for appeal to the Principal Judge of the City civil Court in the city of Bombay, or to a District Judge in the district who has got to deal with the matter as expeditiously as possible, also a sufficient safe-guard as was recognised in Suraj Mall Mehta's case." (underlining added)

8. The emphasized portions of the aforesaid paras leave no manner of doubt that the Estate Officer is fully competent to decide all issues of facts and law, complicated or not, which arise between the parties to the proceedings before him. The Supreme Court has in the judgment of **Ashok Marketing Ltd.** (supra) distinguished the judgment of three Judges

Bench in the case of **Express Newspapers Pvt. Ltd. Vs. Union of India & Ors.** 1986(1) SCC 133 and which had held that civil Courts had jurisdiction.

9. In terms of Section 15(a) of the Public Premises Act, 1971, the jurisdiction of the civil Court is completely barred with respect to issues which have to be dealt with by the Estate Officer. As per Section 15(a), a civil Court will not have jurisdiction to entertain any suit or proceeding in respect of eviction of a person who is in unauthorized occupation of the public premises. Obviously, the issue of eviction of any person in unauthorized occupation of public premises will necessarily have to include a decision to be given by the Estate Officer on the defence of the person who pleads that he is not an unauthorized occupant of public premises. All defences therefore that the eviction proceedings cannot go on before the Estate Officer because the person who is alleged to be in an unauthorized occupation is not an unauthorized occupant will have to be raised before and to be decided by the Estate Officer acting under the Public Premises Act, 1971. The issue in the present suit also would have been or ought to have been raised by the present plaintiff in the proceedings before the Estate Officer. If these issues are raised which arise in this suit, the judgment of the Estate Officer, subject to any decision in the appeal will operate as res judicata. If certain issues which the present plaintiff ought to have raised but did not raise then the principles of constructive res judicata will apply against the plaintiff.

10. Let me now refer to the judgment of the Estate Officer. I have already said that I have opened the sealed cover. On opening of the sealed cover, it is seen that the judgment of the Estate Officer is dated 30.3.2001. The judgment is an 11 page judgment deciding the disputes qua the land which is also the subject matter of the present suit. Some of the paras of the judgment dated 30.3.2001 and the operative part of the judgment read as under:-

> "10.xxxxxx xxxx xxxx
>
> Therefore, in the absence of any such resolution proved on record, I am of the opinion that in fact no exchange of land took place and the disputed land is in unauthorized occupation of the DCM Ltd.
>
> 11. Even otherwise the land in question is Nazul Land as shown

in document exhibit DW-3/5, Nazul Agreement through which the Government had placed the land at the disposal of the DIT vide this agreement. It specifies that the land transferred to DIT can be conveyed by it in the form of conveyance approved by the Government. However, no exchange deed or any other form of transferring the Nazul land through exchange has been proved which lead to the irresistible conclusion that no exchange took place nor can be done without prior approval as envisaged in the Nazul Agreement.

12. Even otherwise the exchange document requires compulsory registration under Section 17 of the Indian Registration Act as there is no exchange deed or any other conveyance deed as provided and governing the Nazul land much less registered documents on record, which also proves that no exchange of land took place. Oral exchange of land has never taken place as discussed by me earlier. Non application of Section 118 or reference to Authority AIR-1989-Himachal Pradesh-23 has no bearing upon the matter in hand before me as no oral exchange took place at any time nor it was so mentioned in the objections.

13. Ownership of Khasra No.487-488 by the Company was not even proved by DCM Ltd. Except mutation entry, nobody has appeared on behalf of the DCM Ltd. or Ganesh Flour Mills to depose about the transfer of these Khasra numbers from Ganesh Flour Mills to DCM Ltd. nor any record was produced to prove the transfer of these khasra numbers inter-se between them. Thus DCM Ltd. has failed to prove its title in Khasra No.487-488 as stated in objection. Mere mutation entry does not confirm any title in DCM Ltd. Therefore, the transfer of these khasra numbers in exchange with DIT land cannot be made.

14. To me it appears that DCM Ltd. has got the building plan sanctioned in respect of their complex in 1952 including the land in question without disclosing their rights in the said land. Show Cause Notice, copy of which is exhibit DW-3/2 for claim of damages from 1.9.53 was made. Thereafter, it is in evidence that the file of this said case must have been dumped, which was traced only in 1962 as per cross examination of the witnesses proving the said notice. At no point of time the subject matter

of the notice was decided finally or otherwise. The Authorities never accepted the position of DCM Ltd. even by implication. In the objections of DCM Ltd. itself, it is stated that in other proceeding under the Act was initiated through notice issued against DCM in 1963. In para-3 of the preliminary objections, it is stated that DCM Ltd. filed an appeal against some interim order specifying the nature of order. It is further said that the appeal was also dismissed by the Learned District Judge, Delhi. Further appeal preferred by DCM Ltd. against the orders of District Jude to Hon'ble High Court of Delhi which stands dismissed. Thus, I have no reason to believe that there was any decision covering the present dispute by which general principles of res-judicata as argued by the counsel of the DCM Ltd. can be said to have been attractive. Moreover, the authorities are taking steps since 1952, therefore, no benefit can be derived by DCM Ltd. from such unauthorised occupation of Government land, however, long it may be.

15. Resolutions marked 'A' and 'B' were not proved at all nor ever implemented as discussed above. On the contrary, the deposition of Shri O.P.Anand, archivist is of no assistance as it is hearsay evidence. No material has been placed on record classifying the documents in question as of national importance. These letters even if they are existed are only a routine matter of the DIT nor any decision of the competent authority has been produced holding it to be a classified material or taking the possession of these documents as archives of national importance.

16. DDA has produced Shri Z.S. Yadav, Naib Tehsildar (Nazul) who has proved that the land in question is owned by DDA as Nazul land by proving Jamabandi and Aks-Shajra exhibit DW-2/1 and DW-2/2. In cross examination he has proved that no re-alignment of Daryai Nala took place nor there is any entry of exchange of any land.

The other witness of DDA is Shri Rajbir Singh Dahiya, Tehsildar (Nazul). He has proved that the land in question is Nazul land. He has proved ownership of the land as Government vide Jamabandi exhibit DW-2/1 and unauthorized occupation by DCM by Aks-shajra exhibit DW-2/2 showing disputed encroached

portion red in it. He has deposed that there is no other document with his department which could show that there is an exchange of land. He further says if there would have any action of exchange of transfer of above land, it must have been in existence. He has also deposed that authority to do so is always conferred upon some officers to create third party interest in Nazul land. Neither any such authority is on record nor any deed or letter effecting actual transfer/possession letter (relating to same is proved). He has also deposed that thorough search has been got conducted through his subordinates for such records, but no such record existed. He has further deposed that Daryai Nala is running in its natural water course and that no re-alignment of this nala was done. Nothing material was brought out from cross examination of this witness. No question/suggestion has been made to any of the witnesses produced by the DDA that the exchange was oral and it was being made out now in the argument for simple reason, that exchange has never materialised, moreover, no witness or other material has been placed by DCM Ltd. in this behalf on record.

Now, therefore, in exercise of powers conferred on me under Sub-Section 1 of Section 5 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, I , hereby, order that DCM Ltd. And all other persons concerned, who may be in unauthorised occupation of the said premises or any part thereof to vacate the said land/premises within 15 days from the date of issue of this order. IN the event of refusal or failure to comply with the order within the stipulated period as specified above, the said DCM Ltd. and all other persons concerned are liable to be evicted from the said premises, if need be, by use of such force, as may be necessary.

Orders in Form-B be issued accordingly."

The aforesaid judgment therefore shows that the Estate Officer has ordered eviction of the present plaintiff from the subject land.

11. It has been held by the Supreme Court in the judgment reported as **Gulam Abbas and Ors. Vs. State of Uttar Pradesh and Ors.** 1982 (1) SCC 71 that Section 11 CPC is not exhaustive of the doctrine of res judicata and the doctrine of res judicata is of much wider and general

application. Para 14 of this judgment reads as under:-

"14. Counsel for respondents 5 and 6 next contended that the decision in this litigation (Suit No. 242 of 1934) would not operate res judicata against them or the Sunni community of Mohalla Doshipura inasmuch as Munsif's Court at Banaras did not have either pecuniary or subject-wise jurisdiction to grant the reliefs claimed in the instant writ petition; in other words that Court was not competent to decide the present subject-matter and such the bar of res judicata under Section 11 of the civil Procedure Code 1908 was not attracted, and it would be open to the respondents 5 and 6 and the members of the Sunni community to agitate question of title either to the plots or to the structures thereon or even the Shias' entitlement to their customary rights over them. In support of this contention counsel relied on two decisions namely, **Rajah Run Bahadoor Singh v. Mussumut Lachoo Koer** XII I.A. 23, and Mst. Gulab Bai v. Manphool Bai. It is not possible to accept this contention for the reasons which we shall presently indicate. It is well settled that Section 11 of the CPC is not exhaustive of the general doctrine of res judicata and though the rule of res judicata as enacted in Section 11 has some technical aspects the general doctrine is founded on considerations of high public policy to achieve two objectives, namely, that there must be a finality to litigation and that individuals should not be harassed twice over with the same kind of litigation. In **Daryao and Ors. v. The State of U.P.** this Court at page 582 has observed thus:

"Now the rule of res judicata as indicated in Section 11 of the CPC has no doubt some technical aspects, for instance, the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that finality should attach to the binding decisions pronounced by Courts of competent Jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation."

Reference in this connection was made by the Court to the famous decision in the leading Duchess of Kingstori's 2 Smith Lead Case. 13th Edn. 644-645 case. Halsbury's laws of England 3rd Edition Vol. 15 para 357 at p. 185 and Corpus Juris.Vol. 34 p, 743. In **Gulab Chand Chhotalal Parikh v. State of Bombay** (now Gujarat) the question was whether after the" dismissal of a writ petition on merits after full contest by the High Court under' Article 226 of the Constitution a subsequent suit raising the same plea claiming discharge from the liability on the same ground was entertainable or not and this Court held that on general principles of res judicata the decision of the High Court on the writ petition operated as res judicata barring the subsequent suit between the same parties with respect to the same matter. On a review of entire case law on the subject, including Privy Council decisions, this Court at page 574 observed thus:

> "As a result of the above discussion, we are of opinion that the provisions of Section 11 CPC are not exhaustive with respect to an earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of res judicata, any previous decision on a matter in controvesy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as res judicata in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject mutter. The nature of the former proceeding is immaterial."

We do not see any good reason to preclude such decisions on matters in controversy in writ proceeding under Article 226 or 32 of the Constitution from operating as res judicata in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest.

The above observations were approved by this Court in a subsequent decision in the case of Union of India v. Nanak Singh. It is thus clear that technical aspects of Section 11 of

CPC, as for instance, pecuniary or subjectwise competence of the earlier forum to adjudicate the subject-matter or grant reliefs sought in the subsequent litigation would be immaterial when the general doctrine of res judicata is to be invoked. The two decisions relied upon by counsel for the respondents 5 and 6 were directly under Section 11 of CPC. Even under Section 11 the position has been clarified by inserting a new Explanation VIII in 1976. It was not disputed that the Munsif's Court at Banaras was competent to decide the issues that arose for determination before it in earlier litigation and, therefore, the decision of such competent Court on the concerned issues must operate as a bar to any subsequent agitation of the same issues between the same parties on general principles of res judicata. The contention raised by counsel for respondents 5 and 6 in this behalf, therefore, has to be rejected. It was then faintly urged by counsel for respondents 5 and 6 that the dismissal of plaintiffs' suit (No. 232 of 1934) would not confer any rights on the Shia community who were party defendants to the suit. The contention is merely required to be stated to be rejected. Not only were the Sunnis' customary rights (specified in para 4 of the plaint) over the plots and structures in question put in issue during the trial but the customary rights to perform their religious ceremonies and functions on the plots and structures thereon claimed by the Shias were also directly and substantially put in issue inasmuch as the plaintiffs (Sunni Muslim) had sought an injunction restraining the Shias from exercising their customary rights. therefore, the decision in this litigation which bore a representative character not merely negatived the Sunnis' customary rights claimed by them over the plots and structures but adjudicated, determined and declared the Shias' entitlement to their customary rights to perform their religious ceremonies and functions on the plots and structures thereon in question and this decision is binding on both the communities of Mohalla Doshipura. There is no question of there being any gap or inadequacy of the material on record in the matter of proof of Shias' entitlement to customary rights over the plots and structures in question, whatever be the position as regards their title to the plots or structures. We have already indicated that this decision even upholds their title to two main structures, Zanna Imambara and

Mardana Imambara (Barardari). In our view, therefore, this is a clear case of an existing or established entitlement to the customary rights in favour of the Shias' community to perform their religious ceremonies and functions over the plots and structures in question under the decree of competent civil Court for the enforcement of which the instant Writ Petition has been filed." (underlining added)

12. Learned counsel for the plaintiff very vehemently sought to argue that the subject suit has to be decided inasmuch as Section 9 of CPC mandates this Court to decide all civil suits. I cannot agree. Section 9 CPC itself states that a civil Court will decide a suit unless cognizance of the same is expressly or impliedly barred. Once there is a specific bar of jurisdiction of the civil Court with respect to matters which can be decided by the Estate Officer, and Section 15(a) of the Public Premises Act, 1971 clearly requires the issue with regard to the nature of occupation of a person i.e whether authorized or unauthorized, and all aspects thereto, to be decided by the Estate Officer, the civil Court jurisdiction's is barred.

13. I may note that in the earlier Public Premises Act of 1958, the Supreme Court had held the same to be constitutionally invalid because the Governmental authorities could pick and choose/discriminate between two sets of persons, by initiating civil proceedings against one set of person and approaching the Estate Officer for the other set of persons; and therefore the 1958 Act was struck down. In the present 1971 Act, the discrimination which existed in old law was removed and every proceeding which fell in the jurisdiction of the Estate Officer had necessarily and only to be tried in terms of Section 15 by the Estate Officer and not by the civil Court. I have therefore to act in furtherance of the intendment of the legislature in bringing in the Section 15 of the Public Premises Act, 1971.

14. In view of the above, the present suit is barred by principles of res judicata. Also, the present suit cannot be tried under Section 9 CPC inasmuch as there is a bar to the jurisdiction of the civil Court under Section 15(a) of the Public Premises Act, 1971. I therefore dismiss the suit as the civil Court has no jurisdiction in terms of Section 15(a) of the Public Premises Act, 1971 and also on the ground of general principles of res judicata, of course subject to any decision in appeal against the

judgment dated 30.3.2001 of the Estate Officer.

15. Before I conclude, I must give one benefit to the plaintiff. The judgment of the Estate Officer dated 30.3.2001 has continued to lie in a sealed cover pursuant to the order passed by the Division Bench. The plaintiff therefore had no knowledge that there is a judgment against it. Accordingly, I hold that limitation as against the present plaintiff with respect to the judgment of the Estate Officer dated 30.3.2001 will commence after a period of six weeks from today, and within which time the plaintiff can apply for a certified copy of the judgment of the Estate Officer. Counsel appearing for the defendant in fact states that besides giving the plaintiff certified copy of the judgment of the Estate Officer dated 30.3.2001, a copy of the judgment will be sent to the plaintiff within a period of two weeks of the file of the Estate Officer reaching back his office as the same is lying in this Court. The Registry is directed to return the entire set of files of the Estate Officer which have been lying in this Court to the counsel for the defendant in a sealed cover. I have already stated above that I have opened this sealed cover containing the judgment of the Estate Officer dated 30.3.2001 and which envelope was lying in the file of RFA(OS) No.17/1995. This original judgment I have kept in the main order sheet file of the Estate Officer. The Registry is directed to ensure that this order is put at the very end of this file which is numbered EV/BGR/DCM/90/1. Registry is directed to ensure that entire set of files in a sealed cover be handed over to the counsel for the defendant, and the counsel for the defendant within one week on receipt of the same will hand it over to the office of the Estate Officer against receipt.

16. The suit is dismissed in terms of aforesaid observations. Photocopy of the judgment of the Estate Officer be prepared by the Registry of this Court and be kept in the present suit and in the appeal file being RFA (OS) No.17/1995.

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FAO

ERIN JENNIFER HAWK ....APPELLANT

VERSUS

STATE & ANR. ....RESPONDENTS

(VEENA BIRBAL, J.)

FAO NO. : 105/2010 DATE OF DECISION: 24.09.2012

(A) Guardians and Wards Act, 1890—Section 7 and 26—Brief Facts—The appellant as a single lady—She had filed a petition under Section 7 and 26 of the Act for her appointment as guardian of the person of minor girl Urmila born on 21.11.2001 under the care of respondent no.2 Society, with permission to adopt her as per local Court of her country—The said petition was filed through Mrs. Vijay Raina, Director SOS children's Villages of India i.e. respondent No. 2 before the learned District Judge, Delhi—At the time, appellant was 37 years of age—Appellant is permanent resident of USA being its citizen/national—The appellant was earlier married to Anthony F. Hawk on 28.09.1996—Due to irreconcilable differences between them, they could not live together and their marriage ended on 01.09.2004—From the said wedlock, there are two male children viz., Spencer Anthony Howk and Keepan Wesley Hawk born on 26.03.1999 and 18.07.2001, respectively—Appellant is having joint custody of the children along with her earlier husband—It is stated in the petition that appellant is medically and physically fit and wishes to adopt a minor child to expend her family—She is self-employed for the past 5 years as a property manager—Her average annual income in the year 2008 $323,000—She has a high status and sufficient means of livelihood—Before the learned

District Judge, it was argued that the appellant was the most suitable person to adopt the child Urmila and it was in the welfare and interest of the child to appoint appellant as her guardian with necessary permission to adopt the said child as per local laws of the country—After considering the material on record, the learned District Judge dismissed the application mainly on the ground that in the absence of appellant at home, presence of female child in the company of two male children of almost same age might not be conducive—It was further observed that appellant is already having two male children from the previous marriage—She is open to idea of remarriage—In these circumstances, it was not a fit case to appoint the appellant as guardian for female child Urmila and to adopt her as per laws of country—Aggrieved with the same, the present appeal under Section 47 of the Guardians and Wards Act, 1890 was filed. Held—As per Section 7, District Judge appoints the guardian of the person and properties of minor—If the District Judge finds that the appointment will not be in the welfare of the minor, the petition will be rejected—In making orders as to the guardianship; the prime consideration is the welfare of the child—The welfare has to be measured not only in terms of money and physical comforts—The word "welfare" must be taken in its widest sense—The moral and ethical welfare of the child must also weigh with the Court as well as its physical sell being—The reference is made to the judgment of the Madras High Court titled *D. Ranaj v. Dhana Pal and Anr.;* AIR 1986 Mad. 99—The welfare includes healthy upbringing of the child in a congenial atmosphere—Section 17 deals with the matters to be considered by the Court in appointing guardian—The Supreme Court in *Laxmi Kant Pandey vs. UOI* 1984 (2) SCC 244, while supporting the inter-country adoptions, has held that while supporting inter-country adoption, it is necessary to bear in mind that the primary object

of giving the child in adoption being the welfare of the child, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation that in his own country.

As per this Section, District Judge appoints the guardian of the person and properties of minor. If the District Judge finds that the appointment will not be in the welfare of the minor, the petition will be rejected. In making orders as to the guardianship; the prime consideration is the welfare of the child. The welfare has to be measured not only in terms of money and physical comforts. The word 'welfare' must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well being. The reference is made to the judgment of the Madras High Court titled **D.Rajan v. Dhana Pal and Anr.;** AIR 1986 Mad. 99. The welfare includes healthy upbringing of the child in a congenial atmosphere.

(Para 13)

Section 17 deals with the matters to be considered by the court in appointing guardian. The same reads as under:-

"17. **Matters to be considered by the Court in appointing guardian -**

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity

of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(5) The Court shall not appoint or declare any person to be a guardian against his will." **(Para 14)**

While appointing a guardian, the court should be guided by the sole consideration of the welfare of the minor. The welfare of the minor in each case depends on facts and circumstances of each particular case. **(Para 15)**

The Supreme Court in **Laxmi Kant Pandey vs. UOI** (supra), while supporting the inter-country adoptions, has held as under:-

"9. But while supporting inter-country adoption, it is necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the child, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life of moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation that that in his own country"

In para 21 of the said judgment, it is further held that:

"We may also point out that if a child is to be given in inter-country adoption, it would be desirable that it is given in such adoption as far as possible before it completes the age of 3 years. The reason is that if a

child is adopted before it attains the age of understanding, it is always easier for it to get assimilated and integrated in the new environment in which it may find itself on being adopted by a foreign parent. Comparatively it may be somewhat difficult for a grown up child to get acclimatized to new surroundings in a different land and sometimes a problem may also arise whether foreign adoptive parents would be able to win the love and affection of such grown child. But we make it clear that when we say this, we do not wish to suggest for a moment that children above the age of three years should not be given in inter-country adoption. There can be no hard and fast rule in this connection. Even children between the ages of 3 and 7 years may be able to assimilate themselves in the new surroundings without any difficulty and there is no reason why they should be denied the benefit of family warmth and affection in the home of foreign parents, merely, because they are past the age of 3 years". **(Para 16)**

(B) The appellant is already having two sons of 13 years and 11 years of age respectively whereas the age of the child Urmila is 10 years—The elder boy is in teen age—The younger one is a pre teen—The girl child Urmila is also in growing age—She needs special protection—The appellant is a working woman—Considering age factor, in the absence of appellant at home, presence of female child with two male children of aforesaid age group will not be appropriate—In these circumstances, the chances of child Urmila being in congenial atmosphere at home cannot be ruled out—In view of above discussion, the Ld. District Judge has rightly exercised the discretion by rejecting the petition. No illegality is seen in the impugned order—The appeal is dismissed.

Perusal of the record shows that the appellant was married

to Anthony (Tony) Hawk who was having a son, namely, Riley, from his previous wife. It is stated in the report that at the time of marriage in order to give love and affection to the said child she had given up the job but after the divorce, there is no mention about the said son. There is nothing on record to show as to whether she is still in touch with that child. The Home Study Report Ex.P-2 is silent about that aspect of the matter. The appellant is already having two sons of 13 years and 11 years of age respectively whereas the age of the child Urmila is 10 years. The elder boy is in teen age. The younger one is a pre teen. The girl child Urmila is also in growing age. She needs special protection. The appellant is a working woman. Considering age factor, in the absence of appellant at home, presence of female child with two male children of aforesaid age group will not be appropriate. In these circumstances, the chances of child Urmila being in congenial atmosphere at home cannot be ruled out. **(Para 18)**

The learned District Judge in this regard has also observed as under:-

"Both the children residing with the petitioner at present are aged about 11 years and 9 years old. In the absence of the petitioner due to any reason, at home, presence of a female child from India in the company of two male children of almost same age might not be conducive." **(Para 19)**

Important Issue Involved: Guardians and Wards Act, 1890—Section 7 and 26—If the District Judge finds that the appointment of guardian will not be in the welfare of the minor, the petition will be rejected—In making orders as to the guardianship; the prime consideration is the welfare of the child—The welfare has to be measured not only in terms of money and physical comforts—The word "welfare" must be taken in its widest sense—The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Mohinder Singh along with Mr. Ankur Goel, Advocates.

FOR THE RESPONDENTS : Mr. Rajeeve Mehra, ASG along with Mr. Ashok Singh, Mr. Kunal Kahol & Mr. Madhusudan, Advocates.

CASES REFERRED TO:

1. *Craig Allen Coats & anr.* vs. *State and anr,* FAO No.32/09.
2. *Lakshmi Kant Pandey* vs. *Union of India* reported in 1984 (2) SCC 244.

RESULT: Appeal dismissed.

VEENA BIRBAL, J.

1. Present is an appeal under Section 47 of the Guardians and Wards Act, 1890 (hereinafter referred to as 'the Act') against the impugned order dated 15.02.2010 passed by the learned District Judge, Delhi whereby the petition filed by the appellant for her appointment as guardian of person of minor child Urmila born on 21.11.2001 under the care of respondent no.2 Society, under Section 7 and 26 of the Act has been dismissed.

2. The factual background of the case is as under:-

The appellant is a single lady. She had filed a petition under Section 7 and 26 of the Act for her appointment as guardian of the person of minor child Urmila born on 21.11.2001 under the care of respondent no.2 Society, with permission to adopt her as per local court of her country. The said petition was filed through Mrs. Vijay Raina, Director SOS children's Villages of India i.e. respondent No.2 before the learned District Judge, Delhi. At that time, appellant was 37 years of age. Appellant is permanent resident of USA being its citizen/national. The appellant was earlier married to Anthony F. Hawk on 28.09.1996. Due to irreconcilable differences between them, they could not live together and their marriage ended on 01.09.2004. From the said wedlock, there are two male children viz., Spencer Anthony Hawk and Keegan Wesley Hawk born on

26.03.1999 and 18.07.2001, respectively. Appellant is having joint custody of the children along with her earlier husband. It is stated in the petition that appellant is medically and physically fit and wishes to adopt a minor child to expand her family. She is self-employed for the past 5 years as a property manager. Her average annual income in the year 2008 was $323,000. She has a high status and sufficient means of livelihood.

3. Respondent no. 2 is a registered society and is licensed by the Government of NCT of Delhi to keep and maintain the abandoned, orphan and destitute children. It has been granted recognition by the Ministry of Social Justice and Empowerment, Government of India, New Delhi for submitting applications to the competent court for declaration of foreigners as guardians of Indian children under the Act. It was further alleged that on 08.10.2006, a minor female child, namely, Urmila born on 21.11.2001 was found abandoned by the police officials of P.S. Old Delhi. On that very day, the care and custody of the child was handed over to the Child Helpline, Central Zone, New Delhi which handed over the care and custody of the child to respondent no. 2 society on 09.10.2006 and since then nobody has come forward to claim the child. Respondent no. 2 society had moved an application before the Child Welfare Committee for declaring the said child as an abandoned child free for adoption and the said committee after making enquiries vide order dated 25.07.2007 had declared the child Urmila as an abandoned child free for adoption. It is further averred in the petition that every attempt was made to place the child in an Indian family but no suitable Indian family came forward to adopt and accordingly the Co-ordinating Voluntary Adoption Resource Age cy (CVARA) had cleared the child as an abandoned child free for adoption. It was further alleged that the appellant has been found to be the most suitable person for legal adoption of the child and the Central Adoption Resource Authority (CARA) has issued 'No Objection Certificate' in her favour. It was prayed that it will be in the interest of minor child that the appellant be appointed as guardian of the minor child Urmila with permission to adopt her as her daughter in accordance with local laws of her country.

4. Notice of the said petition was issued to the respondents. However, none appeared on behalf of respondents to contest the claim of appellant before the learned District Judge. The appellant examined Mrs. Vijay Raina, Director of respondent no.2 and attorney of appellant as PW-1 who led in evidence her affidavit Ex. PW1/A along with

documents Ex.P1 to P26. Mrs Surekha Pawer, Sr. Social Worker for R-2 had appeared and filed her affidavit as Ex. PW2/A and proved documents Ex.R1 to R3 i.e., Abandonment Certificate, Certificate from CVARA and No Objection Certificate issued by CARA respectively.

5. Before the learned District Judge it was argued that the appellant was the most suitable person to adopt the child Urmila and it was in the welfare and interest of the child to appoint appellant as her guardian with necessary permission to adopt the said child as per local laws of the country.

6. After considering the material on record, the learned District Judge dismissed the application mainly on the ground that in the absence of appellant at home, presence of female child in the company of two male children of almost same age might not be conducive. It was further observed that appellant is already having two male children from her previous marriage. She is open to idea of remarriage. In these circumstances, it was not a fit case to appoint the appellant as guardian for female child Urmila and to adopt her as per laws of country.

7. Aggrieved with the same, the present appeal is filed.

8. The learned counsel for appellant has contended that no Indian family has come forward to adopt the child, as such the Co-ordinating Voluntary Adoption Resource Agency (CVARA) vide Ex.R-2 has cleared the child for foreign adoption. It is contended that Central Adoption Resource Agency (CARA) under the Ministry of Women and Child Development has granted 'No Objection Certificate. vide Ex.R3 to the appellant for adopting the child in question. The appellant has also no adverse interest to that of minor. It is further contended that appellant is a well off lady. Appellant is a self-employed lady and enjoys high status and has got self sufficient means of livelihood. It is contended that in order to complete her family, she wants to adopt the child. It is contended that the learned District Judge relying on the judgment dated 31.08.2009 in FAO No. 32/2009 in the case of **Craig Allen Coats & Anr. vs. State & Anr.** of this court has dismissed the petition. It is contended that aforesaid judgment has been set aside by the Supreme Court in Civil Appeal No. 7475/2010 decided on 08.09.2010. It is contended that inter-country adoption is permitted by the Supreme Court vide judgment delivered in **Lakshmi Kant Pandey vs. Union of India** reported in 1984 (2) SCC 244 and vide the said judgment, guidelines and procedure for

adoption of abandoned children by foreigners has been laid down. It is contended that in the present case the guidelines laid down in **Lakshmi Kant Pandey** (supra) have been followed. It is further contended that it is in the welfare of the child that the appellant be appointed as a Guardian of minor child with permission to adopt her as per local laws of her country.

9. The court notice was issued to the Additional Solicitor General as well as Standing Counsel, Government of India. Pursuant thereto Mr.Rajeeve Mehra, Ld. Additional Solicitor General assisted by Mr.Ashok Singh, Standing Counsel have entered their appearance. Ld. Additional Solicitor General has submitted that the Ld. District Judge has correctly exercised the discretion taking note of all the relevant facts. It is submitted that the appellant is a working woman having two male children of the age group of 13 years and 11 years respectively. The age of the child Urmila is 10 years and it would not be appropriate for the girl child to stay alone at home when the appellant is out for work. It is further submitted that as per the study report Ex. P-2, appellant is currently dating a gentleman and is open and receptive to marriage in the near future which may put the future of the child in the dark. Ld.Addl. Solicitor General has submitted that keeping in view the totality of facts and circumstances, it will not be in the welfare of the child to appoint appellant as guardian with permission of adoption. It is further submitted that judgment in **Craig Allen Coats & Anr.** (supra), is of no help to appellant as the facts of the said case are entirely different as that of present case.

10. I have considered the submissions made and perused the material on record.

11. The appellant had filed the petition under Section 7 and 26 of the Act before the learned District Judge for her appointment as guardian of the child Urmila with permission to adopt her as her daughter in accordance with local laws of her country on 19.8.2009. At that time appellant was 37 years of age. As per her own averment, she has got two male children i.e. Spencer Anthony Hawk and Keegan Wesley Hawk who are presently of 13 + and 11 years of age respectively.

12. Section 7 of the Act deals with the power of the court to make orders as to the guardianship. The same reads as under:-

"7. **Power of the Court to make order as to guardianship -**

(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made -

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian, the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act."

13. As per this Section, District Judge appoints the guardian of the person and properties of minor. If the District Judge finds that the appointment will not be in the welfare of the minor, the petition will be rejected. In making orders as to the guardianship; the prime consideration is the welfare of the child. The welfare has to be measured not only in terms of money and physical comforts. The word 'welfare' must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well being. The reference is made to the judgment of the Madras High Court titled **D.Rajan v. Dhana Pal and Anr.;** AIR 1986 Mad. 99. The welfare includes healthy upbringing of the child in a congenial atmosphere.

14. Section 17 deals with the matters to be considered by the court in appointing guardian. The same reads as under:-

"17. **Matters to be considered by the Court in appointing guardian -**

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(5) The Court shall not appoint or declare any person to be a guardian against his will."

15. While appointing a guardian, the court should be guided by the sole consideration of the welfare of the minor. The welfare of the minor in each case depends on facts and circumstances of each particular case.

16. The Supreme Court in **Laxmi Kant Pandey vs. UOI** (supra), while supporting the inter-country adoptions, has held as under:-

"9. But while supporting inter-country adoption, it is necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the child, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life of moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation that that in his own country"

In para 21 of the said judgment, it is further held that:

"We may also point out that if a child is to be given in inter-country adoption, it would be desirable that it is given in such adoption as far as possible before it completes the age of 3 years. The reason is that if a child is adopted before it attains the age of understanding, it is always easier for it to get assimilated and integrated in the new environment in which it may find itself on being adopted by a foreign parent. Comparatively it may be somewhat difficult for a grown up child to get acclimatized to

new surroundings in a different land and sometimes a problem may also arise whether foreign adoptive parents would be able to win the love and affection of such grown child. But we make it clear that when we say this, we do not wish to suggest for a moment that children above the age of three years should not be given in inter-country adoption. There can be no hard and fast rule in this connection. Even children between the ages of 3 and 7 years may be able to assimilate themselves in the new surroundings without any difficulty and there is no reason why they should be denied the benefit of family warmth and affection in the home of foreign parents, merely, because they are past the age of 3 years".

17. Since in the present case the child is of 10 years old, to ascertain her wishes I had spoken to her also. The child is not able to make her own independent preference.

18. Perusal of the record shows that the appellant was married to Anthony (Tony) Hawk who was having a son, namely, Riley, from his previous wife. It is stated in the report that at the time of marriage in order to give love and affection to the said child she had given up the job but after the divorce, there is no mention about the said son. There is nothing on record to show as to whether she is still in touch with that child. The Home Study Report Ex.P-2 is silent about that aspect of the matter. The appellant is already having two sons of 13 years and 11 years of age respectively whereas the age of the child Urmila is 10 years. The elder boy is in teen age. The younger one is a pre teen. The girl child Urmila is also in growing age. She needs special protection. The appellant is a working woman. Considering age factor, in the absence of appellant at home, presence of female child with two male children of aforesaid age group will not be appropriate. In these circumstances, the chances of child Urmila being in congenial atmosphere at home cannot be ruled out.

19. The learned District Judge in this regard has also observed as under:-

"Both the children residing with the petitioner at present are aged about 11 years and 9 years old. In the absence of the petitioner due to any reason, at home, presence of a female child from India in the company of two male children of almost same

age might not be conducive."

20. Further at this age and the environment in which she has been brought up, it will be difficult for her to get assimilated and integrated in the new environment. In Home Study Report ExP-2, it is also stated that appellant is currently dating and is open for remarriage in future. The chance of expanding her family with another marriage also cannot be ruled out.

21. The counsel for appellant has submitted that the trial court Judge has relied on the judgment of this court in FAO No.32/09 in **Craig Allen Coats & anr. vs. State and anr,** which has been set aside by the Supreme Court in Civil Appeal No.747/10 decided on 8.9.2010. I have gone through the aforesaid judgment of the Supreme Court. The facts and circumstances of the said case are entirely different and are not applicable to the facts of present case. In the said case the appellants therein were having three children i.e. two boys of age group of 21 years and 16 years respectively and third was daughter of 19 years of age and the child to be given in adoption was a male child and the child was suffering from mental ailments i.e., development delays and difficulty with respect to learning and expressing. The Supreme Court ordered for the examination of the child by an expert committee. Thereupon the child was examined by a Committee of Medical experts. The Medical Board of AIIMS had examined the said child and a report was submitted before the Supreme Court. The relevant portion of the same is as under:-

"……

……

From all records it was apparent the child has development delays and difficulties with respect to learning and expressing and would require special care for learning needs. In the opinion of the board such a child will benefit from family based care and nurturance rather than institutional care."

"……

…… The board further examined Ms.Coates, her intentions, her professional experience and her proposed education of the child. She has had extended experience in home bases nursing and in a respite home where

she has given personal care to patients with neuro-muscular disorders, cognitive impairments and other handicaps. Her experience in home health and her sensitivity towards multicultural issues was evident in her interactions. She presented a clear vision of the family school and community resources she needs to mobilize in order to make the adoption successful. She is committed to providing physical therapy, occupational therapy, speech therapy and special education to her adopted child."

22. The Supreme Court after considering the report of Medical Board AIIMS and considering the experience of the appellants therein in home nursing found her the proper person to whom the child could be given in adoption. The said judgment has no applicability to the facts of the present case.

In view of above discussion, the Ld. District Judge has rightly exercised the discretion by rejecting the petition. No illegality is seen in the impugned order. The appeal is dismissed.

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MAC. APP.

RELIANCE GENERAL INSURANCE CO. LTD. ….APPELLANT

VERSUS

NISHA DEVI & ORS. ….RESPONDENTS

(G.P. MITTAL, J.)

MAC. APP. NO. : 910/2012 DATE OF DECISION: 27.09.2012

Motor Vehicle Act, 1988—Section 168—Appeal by the Insurance Company for reduction of compensation awarded to Respondents for death of the Constable in Delhi Police on the ground that since his wife. Respondent No. 1 appointed as Constable on compassionate grounds. Her incomes is liable to be deducted from the compensation payable to the legal heirs of the deceased—Held: That the legal heir who accepts the appointment on compassionate grounds, sweats for the payment of the salary and such, the same is not liable to be deducted from the amount of compensation payable to the legal heirs.

Important Issue Involved: The payment of salary to the legal heirs who accepts the appointment on compassionate grounds, is not liable to be deducted from the amount of compensation payable to the legal heirs.

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. Sameer Nandwani, Adv.

FOR THE RESPONDENTS : Nemo.

CASES REFERRED TO:

1. *National Insurance Co Ltd* vs. *Charanjeet Kaur @ Simmi & Ors.* MAC APP.734/2010.
2. *Sarla Verma (Smt.) & Ors.* vs. *Delhi Transport Corporation & Anr.,* (2009) 6 SCC 121.
3. *Bhakra Beas Management Board* vs. *Kanta Aggarwal & Ors.,* (2008) 11 SCC 366.
4. *State of Haryana* vs. *Jasbir Kaur,* (2003) 7 SCC 484.
5. *United India Insurance Co. Ltd. & Ors.* vs. *Patricia Jean Mahajan & Ors.,* (2002) 6 SCC 281.
6. *Helen C. Rebello (Mrs.) & Ors.* vs. *Maharashtra State Road Transport Corporation and Anr.,* (1999)1 SCC 90.
7. *Gobald Motor Service Ltd. & Anr.* vs. *R.M.K. Veluswami & Ors.,* AIR 1962 SC 1.

RESULT: Appeal allowed.

G.P. MITTAL, J. (ORAL) CM APPL.14446/2012 (delay)

1. There is a delay of 50 days in filing the Appeal. The Application

is not opposed. The delay is condoned.

2. The Application stands disposed of.

CM APPL.14447/2012 (Additional Evidence)

3. By this Application, the Appellant Insurance Company wants to prove that Respondent No.1 Smt. Nisha Devi, the deceased Shiv Kumar's widow was given employment as a Constable by Delhi Police. It is conceded by the learned counsel for the Respondents that Respondent No.1 has been given appointment as a Constable in Delhi Police.

4. In view of the admission, there is no need of additional evidence.

5. The Application stands disposed of.

MAC.APP. 910/2012

6. The Appeal is for reduction of compensation of Rs. 35,53,994/- awarded by the Motor Accident Claims Tribunal (the Claims Tribunal) in favour of Respondents No.1 to 6 for the death of Shiv Kumar, aged 43 years, who was working as a Constable in Delhi Police, died in a motor vehicle accident which occurred on 14.08.2009.

7. There is twin challenge to the judgment. First, it is urged that since the First Respondent was given an appointment as a Constable in Delhi Police on compassionate ground, the first Respondent's income as a Constable is liable to the deducted to compute the loss of dependency. Second, the liability towards the income was not deducted from the deceased's income to compute the loss of dependency.

8. Section 168 of the Motor Vehicles Act, 1988 (the Act) enjoins a Claims Tribunal to determine the amount of compensation which is just and reasonable. It can neither be a source of profit nor should it be a pittance. In **State of Haryana v. Jasbir Kaur,** (2003) 7 SCC 484, the Supreme Court held as under:

> "7. It has to be kept in view that the Tribunal constituted under the Act as provided in Section 168 is required to make an award determining the amount of compensation which is to be in the real sense 'damages' which in turn appears to it to be 'just and reasonable'. It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. But at the same time it has to be borne in mind that the compensation

> is not expected to be a windfall for the victim. Statutory provisions clearly indicate that the compensation must be 'just and it cannot be a bonanza; not a source of profit; but the same should not be a pittance. The courts and tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be 'just' compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of 'just' compensation which is the pivotal consideration. Though by use of the expression 'which appears to it to be just' a wide discretion is vested in the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression 'just' denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so it cannot be just."

9. This Court in **National Insurance Co Ltd v. Charanjeet Kaur @ Simmi & Ors.** MAC APP.734/2010 decided on 16.07.2012 distinguished the judgment in **Bhakra Beas Management Board v. Kanta Aggarwal & Ors.,** (2008) 11 SCC 366 and after referring to the various reports of the Supreme Court including **United India Insurance Co. Ltd. & Ors. v. Patricia Jean Mahajan & Ors.,** (2002) 6 SCC 281; a three Judges Bench decision in **Gobald Motor Service Ltd. & Anr. v. R.M.K. Veluswami & Ors.,** AIR 1962 SC 1; and **Helen C. Rebello (Mrs.) & Ors. v. Maharashtra State Road Transport Corporation and Anr.,** (1999)1 SCC 90, and held that appointment on compassionate ground was provided by the employer (and not by the tortfeasor) in accordance with its Service Rules and not on account of accidental death. The concerned legal heir who accepts the appointment sweats for the payment of salary and the salary paid to the said legal representative is not liable to be deducted from the amount of compensation payable to the legal heirs. Paras 4 to 9 of the report in Charanjeet Kaur are extracted hereunder:-

> "4. In **Bhakra Beas Management Board** (supra), the Supreme

Court largely relied on **United India Insurance Co. Ltd. & Ors. v. Patricia Jean Mahajan & Ors.,** (2002) 6 SCC 281, a three Judges Bench decision in **Gobald Motor Service Ltd. & Anr. v. R.M.K. Veluswami & Ors.,** AIR 1962 SC 1; and **Helen C. Rebello (Mrs.) & Ors. v. Maharashtra State Road Transport Corporation and Anr.,** (1999)1 SCC 90.

5. In **Helen C. Rebello** (supra), the question before the Supreme Court was whether the amount received under Life Insurance Policy was liable to be deducted on the principle of balancing the loss and gain. The Supreme Court referred to the Law of Torts by Fleming and differentiated between the amount received under the Life Insurance Policy and an Accident Insurance Policy. It was, thus held that the payment received under the Life Insurance Policy was not deductible whereas the payment received under the Personal Accident Insurance was deductible. The reason was that in case of payment received under the accident insurance policy, the amount was receivable only on account of death in an accident and not otherwise, whereas in case of Life Insurance Policy, the amount was receivable irrespective of the death. Thus, the fact that the payment was made under independent contract of insurance was not of much import. Moreover, the use of the word "just" in Section 168 of the Act, confers wider discretion to the Claims Tribunal. The Claims Tribunal, therefore, has to see that the compensation awarded is neither niggardly nor a source of profit. Paras 26, 27, 28, 32, 33 and 34 of the report in **Helen C. Rebello** (supra) are extracted hereunder:

> "26. This Court, in this case did observe, though did not decide, to which we refer that the use of the words, "which appears to it to be just" under Section 110-B gives wider power to the Tribunal in the matter of determination of compensation under the 1939 Act. There is another case of this Court in which there is a passing reference to the deduction out of the compensation payable under the Motor Vehicles Act. In N. Sivammal v. Managing Director, Pandian Roadways Corpn. this Court held that the deduction of Rs 10,000 receivable as monetary benefit to the widow of the pension amount, was not justified. So, though deduction of the widow's pension was not

accepted but for this, no principle was discussed therein. However, having given our full consideration, we find there is a deliberate change in the language in the later Act, revealing the intent of the legislature, viz., to confer wider discretion on the Tribunal which is not to be found in the earlier Act. Thus, any decision based on the principle applicable to the earlier Act, would not be applicable while adjudicating the compensation payable to the claimant in the later Act.

27. Fleming, in his classic work on the Law of Torts, has summed up the law on the subject in these words. This is also referred to in **Sushila Devi v. Ibrahim:**

"The pecuniary loss of such dependant can only be ascertained by balancing, on the one hand, the loss to him of future pecuniary benefit, and, on the other, any pecuniary advantage which, from whatever source, comes to him by reason of the death. ... **There is a vital distinction between the receipt of moneys under accident insurance and life assurance policies. In the case of accident policies, the full value is deductible on the ground that there was no certainty, or even a reasonable probability, that the insured would ever suffer an accident. But since man is certain to die, it would not be justifiable to set off the whole proceeds from a life assurance policy, since it is legitimate to assume that the widow would have received some benefit, if her husband had pre-deceased her during the currency of the policy or if the policy had matured during their joint lives.** The exact extent of permissible reduction, however, is still a matter of uncertainty...." (emphasis supplied)

28. Fleming has also expressed that the deduction or set-off of the life insurance could not be justifiable. When he uses the words "not be justifiable" he refers to one's conscience, fairness and contrary to what is just. In this context, the use of the word "just", which was neither in the English 1846 Act nor in the Indian 1855 Act, now brought in under the 1939 Act, gains importance. This

shows that the word "just" was deliberately brought in Section 110-B of the 1939 Act to enlarge the consideration in computing the compensation which, of course, would include the question of deductibility, if any. This leads us to an irresistible conclusion that the principle of computation of the compensation both under the English Fatal Accidents Act, 1846 and under the Indian Fatal Accidents Act, 1855 by the earlier decisions, were restrictive in nature in the absence of any guiding words therein, hence the courts applied the general principle at the common law of loss and gain but that would not apply to the considerations under Section 110-B of the 1939 Act which enlarges the discretion to deliver better justice to the claimant, in computing the compensation, to see what is just. Thus, we find that all the decisions of the High Courts, which based their interpretation on the principles of these two Acts, viz., the English 1846 Act and the Indian 1855 Act to hold that deductions were valid cannot be upheld. As we have observed above, the decisions even with reference to the decision of this Court in Gobald Motor Service where the question was neither raised nor adjudicated and that case also, being under the 1855 Act, cannot be pressed into service. Thus, these courts by giving a restrictive interpretation in computation of compensation based on the limitation of the language of the Fatal Accidents Act, fell into an error, as it did not take into account the change of language in the 1939 Act and did not consider the widening of the discretion of the Tribunal under Section 110-B. The word "just", as its nomenclature, denotes equitability, fairness and reasonableness having a large peripheral field. The largeness is, of course, not arbitrary; it is restricted by the conscience which is fair, reasonable and equitable, if it exceeds; it is termed as unfair, unreasonable, unequitable, not just. Thus, this field of wider discretion of the Tribunal has to be within the said limitations and the limitations under any provision of this Act or any other provision having the force of law....."

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32. So far as the general principle of estimating damages under the common law is concerned, it is settled that the pecuniary loss can be ascertained only by balancing on one hand, the loss to the claimant of the future pecuniary benefits that would have accrued to him but for the death with the "pecuniary advantage" which from whatever source comes to him by reason of the death. In other words, it is the balancing of loss and gain of the claimant occasioned by the death. But this has to change its colour to the extent a statute intends to do. Thus, this has to be interpreted in the light of the provisions of the Motor Vehicles Act, 1939. It is very clear, to which there could be no doubt that this Act delivers compensation to the claimant only on account of accidental injury or death, not on account of any other death. Thus, the pecuniary advantage accruing under this Act has to be deciphered, correlating with the accidental death. The compensation payable under the Motor Vehicles Act is on account of the pecuniary loss to the claimant by accidental injury or death and not other forms of death. If there is natural death or death by suicide, serious illness, including even death by accident, through train, air flight not involving a motor vehicle, it would not be covered under the Motor Vehicles Act. Thus, the application of the general principle under the common law of loss and gain for the computation of compensation under this Act must correlate to this type of injury or death, viz., accidental. If the words "pecuniary advantage" from whatever source are to be interpreted to mean any form of death under this Act, it would dilute all possible benefits conferred on the claimant and would be contrary to the spirit of the law. If the "pecuniary advantage" resulting from death means pecuniary advantage coming under all forms of death then it will include all the assets moveable, immovable, shares, bank accounts, cash and every amount receivable under any contract. In other words, all heritable assets including what is willed by the deceased etc. This would obliterate both, all possible conferment of economic security to the

claimant by the deceased and the intentions of the legislature. By such an interpretation, the tortfeasor in spite of his wrongful act or negligence, which contributes to the death, would have in many cases no liability or meagre liability. In our considered opinion, the general principle of loss and gain takes colour of this statute, viz., the gain has to be interpreted which is as a result of the accidental death and the loss on account of the accidental death. Thus, under the present Act, whatever pecuniary advantage is received by the claimant, from whatever source, would only mean which comes to the claimant on account of the accidental death and not other forms of death. The constitution of the Motor Accident Claims Tribunal itself under Section 110 is, as the section states:

"... for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, ...".

33. Thus, it would not include that which the claimant receives on account of other forms of deaths, which he would have received even apart from accidental death. Thus, such pecuniary advantage would have no corelation to the accidental death for which compensation is computed. Any amount received or receivable not only on account of the accidental death but that which would have come to the claimant even otherwise, could not be construed to be the "pecuniary advantage", liable for deduction (emphasis supplied). However, where the employer insures his employee, as against injury or death arising out of an accident, any amount received out of such insurance on the happening of such incident may be an amount liable for deduction. However, our legislature has taken note of such contingency through the proviso of Section 95. Under it the liability of the insurer is excluded in respect of injury or death, arising out of and in the course of employment of an employee."

34. This is based on the principle that the claimant for the happening of the same incidence may not gain twice from

two sources. This, it is excluded thus, either through the wisdom of the legislature or through the principle of loss and gain through deduction not to give gain to the claimant twice arising from the same transaction, viz., the same accident. It is significant to record here in both the sources, viz., either under the Motor Vehicles Act or from the employer, the compensation receivable by the claimant is either statutory or through the security of the employer securing for his employee but in both cases he receives the amount without his contribution. How thus an amount earned out of one's labour or contribution towards one's wealth, savings, etc. either for himself or for his family which such person knows under the law has to go to his heirs after his death either by succession or under a Will could be said to be the "pecuniary gain" only on account of one's accidental death. This, of course, is a pecuniary gain but how this is equitable or could be balanced out of the amount to be received as compensation under the Motor Vehicles Act. There is no corelation between the two amounts. Not even remotely. How can an amount of loss and gain of one contract be made applicable to the loss and gain of another contract. Similarly, how an amount receivable under a statute has any corelation with an amount earned by an individual. Principle of loss and gain has to be on the same plane within the same sphere, of course, subject to the contract to the contrary or any provisions of law."

6. In para 33 of the report, the Supreme Court clarified that it would not include the pecuniary advantage which the Claimant receives on account of other forms of death. In other words, any pecuniary advantage received by the legal representatives which had no co-relation with the accidental death, was not to be deducted from the pecuniary loss suffered by the Claimants. (emphasis supplied).

7. Similarly, in **Patricia Jean Mahajan** (supra), the Supreme Court while not deducting the sum received on account of family pension and social security had in its mind that these payments had no co-relation between the compensation payable on account

of accidental death and death on account of illness or otherwise. The Supreme Court emphasized that the principle of balancing between losses and gains must have some co-relation with the accidental death by reason of which alone the Claimant had received the amounts. Paras 34 and 36 of the report are extracted hereunder:

> "34. Shri P.P. Rao, learned counsel appearing for the claimants submitted that the scope of the provisions relating to award of compensation under the Motor Vehicles Act is wider as compared to the provisions of the Fatal Accidents Acts. It is further indicated that Gobald case is a case under the Fatal Accidents Acts. For the above contention he has relied upon the observation made in Rebello case. It has also been submitted that only such benefits, which accrued to the claimants by reason of death, occurred due to an accident and not otherwise, can be deducted. Apart from drawing a distinction between the scope of provisions of the two Acts, namely, the Motor Vehicles Act and the Fatal Accidents Act, this Court in Helen Rebello case accepted the argument that the amount of insurance policies would be payable to the insured, the death may be accidental or otherwise, and even where the death may not occur the amount will be payable on its maturity. The insured chooses to have insurance policy and he keeps on paying the premium for the same, during all the time till maturity or his death. It has been held that such a pecuniary benefit by reason of death would not be such as may be deductible from the amount of compensation.
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> 36. We are in full agreement with the observations made in the case of Helen Rebello that principle of balancing between losses and gains, by reason of death, to arrive at the amount of compensation is a general rule, but what is more important is that such receipts by the claimants must have some correlation with the accidental death by reason of which alone the claimants have received the

> amounts. We do not think it would be necessary for us to go into the question of distinction made between the provisions of the Fatal Accidents Act and the Motor Vehicles Act. (emphasis supplied). According to the decisions referred to in the earlier part of this judgment, it is clear that the amount on account of social security as may have been received must have a nexus or relation with the accidental injury or death, so far to be deductible from the amount of compensation. There must be some correlation between the amount received and the accidental death or it may be in the same sphere, absence (sic) the amount received shall not be deducted from the amount of compensation. Thus, the amount received on account of insurance policy of the deceased cannot be deducted from the amount of compensation though no doubt the receipt of the insurance amount is accelerated due to premature death of the insured. So far as other items in respect of which learned counsel for the Insurance Company has vehemently urged, for example some allowance paid to the children, and Mrs Patricia Mahajan under the social security system, no correlation of those receipts with the accidental death has been shown much less established. Apart from the fact that contribution comes from different sources for constituting the fund out of which payment on account of social security system is made, one of the constituents of the fund is tax which is deducted from income for the purpose. We feel that the High Court has rightly disallowed any deduction on account of receipts under the insurance policy and other receipts under the social security system which the claimant would have also otherwise been entitled to receive irrespective of accidental death of Dr Mahajan. If the proposition "receipts from whatever source" is interpreted so widely that it may cover all the receipts, which may come into the hands of the claimants, in view of the mere death of the victim, it would only defeat the purpose of the Act providing for just compensation on account of accidental death. Such gains, maybe on account of savings or other investment etc. made by the deceased, would not go to

the benefit of the wrongdoer and the claimant should not be left worse off, if he had never taken an insurance policy or had not made investments for future returns."

8. Thus, on the basis of the ratio in **Helen C. Rebello** (supra) and **Patricia Jean Mahajan** (supra), it can be safely concluded that only those amounts which are payable to the Claimant/ Claimants only by reason of death or injury in an accident are liable to be deducted.

9. Turning to the facts of the instant case. It is no where the Appellant's case that the deceased's widow got an employment on account of accidental death. The learned counsel for the Claimants placed on record a copy of the office Memorandum No.14014/6/94-Estt (D), dated 09.10.1998 issued by the Govt. of India which provides for an appointment on compassionate ground to a dependent family members of Govt. servant dying in harness or who has retired on medical grounds. In the circumstances, the appointment of Smt. Charanjeet Kaur had no relation with the accidental death."

10. The judgment in Bhakra Beas Management is thus not attracted to the facts of the present case. Rather, the earlier judgments in Gobald Motor Service, Helen C. Rebello and Patricia Jean Mahajan are binding precedent.

11. Therefore, the amount of salary received by the First Respondent cannot be deducted from the compensation payable to the legal representatives.

12. As far as deduction of income tax from the deceased's salary is concerned, the case is squarely covered by **Sarla Verma (Smt.) & Ors. v. Delhi Transport Corporation & Anr.,** (2009) 6 SCC 121. The deceased was getting a salary of Rs. 20,083/- per month i.e. Rs. 2,40,996/ - per annum. There was liability of income tax of about Rs. 8,000/- on the said income. The loss of dependency thus comes to Rs. 31,80,395/ - (20,083/- x 12 - Rs. 8,000/- (income tax) + 30% x 3/4 x 14) as against award of Rs. 33,73,994/-.

13. There is no other ground of challenge.

14. The total compensation thus comes to Rs. 33,60,395/- as against

an award of Rs. 35,53,994/- made by the Claims Tribunal, which shall carry interest @ 7.5% per annum from the date of filing of the Petition till its payment.

15. The excess amount of Rs. 1,93,599/- along with the proportionate interest and the interest accrued, if any, during the pendency of the Appeal shall be refunded to the Appellant Insurance Company. Rest of the amount shall be disbursed/held in fixed deposit in the name of the Claimants in terms of the order passed by the Claims Tribunal.

16. The statutory deposit of Rs. 25,000/- shall be refunded to the Appellant Insurance Company.

17. The Appeal is allowed in above terms.

18. Pending Applications also stand disposed of.

ILR (2013) I DELHI 384
O.M.P.

UNITECH LIMITED ....PETITIONER

VERSUS

HOUSING AND URBAN DEVELOPMENT CORPORATION ....RESPONDENT

(S. MURALIDHAR, J.)

O.M.P. NO. : 3/2001 & 391/2001 DATE OF DECISION: 27.09.2012

Arbitration and Conciliation Act, 1996—Section 34 of the ('Act') is to an Award dated 10 August 2001 passed by the learned Arbitrator in the dispute between the Housing and Urban Development Corporation ('HUDCO') and Unitech Limited ('Unitech') arising out of a contract entered into between them for construction of civil works of HUDCO Bazar, Plot No.

25, Bhikaji Cama Place, New Delhi (since named as August Kranti Bhawan). To the extent that the learned Arbitrator rejected Unitech's Claim 3 (g) for escalation/ compensation, Unitech has filed OMP No. 3 of 2001. To the extent Unitech's claims have been allowed, HUDCO has filed OMP No. 391 of 2001—Section 28 (3) of the Act mandates that the Arbitrator has to decide the disputes in terms of the contract. As explained by the Supreme Court in *New India Civil Erectors (P) Ltd. v. Oil and Natural Gas Corporation* (1997) 11 SCC 75, "the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it"—While discussing Additional Claim 5A, the learned Arbitrator noted the there was delay in grant of permissions for purchase of steel, delay in handing over complete and clear site, delay in issuing of working drawings, revisions and instructions, delay in approval of samples, directions and clarifications, delay in making payments (mobilization advance and interim bills), failure to make payment of full escalation and the effect of stay order. On an examination of the evidence, the learned Arbitrator concluded that both the parties were equally responsible for delay in completion of the project and prolongation of the contract—The question that therefore arose for decision was whether HUDCO was liable to compensate Unitech for the delay, notwithstanding that there are prohibitory clauses in the GCC which read as "Clause 55.0 Possession of Site—However, a perusal of the impugned Award shows that there is no reference to Unitech having urged that any of the prohibitory clauses was opposed to Sections 23 and 28 of the CA. Whereas while discussing Additional clauses was opposed to Sections 23 and 28 of the CA. Whereas while discussing Additional Claim 3 (g) the learned Arbitrator referred to Clause 7 and Amendment No. 3 thereto and while discussing Claim No. 6 he referred to Clause 20.1, while discussing

Additional Claims 5A, 6A and A7 he did not discuss any of the other prohibitory clauses. Clause 57.2 specifically states that "the Contractor shall not be entitled to claim any compensation or overrum charges whatsoever for any extension granted." Further Clause 55.1 also clearly states that if there is delay in making available any area of work, the Contractor shall not be entitled to claim any compensation when EOT is granted as a result thereof—There was no justification for the learned Arbitrator not to have even noticed the said clauses. If the leaned Arbitrator had after noticing the said clauses, interpreted them one way or the other, it might be possible for Unitech to argue that the Court should not interfere with such conclusion only because another view is possible. However, where the said prohibitory clauses are not even noticed by the learned Arbitrator the impugned Award becomes vulnerable to invalidity on the ground that it is contrary to the clauses of the contract—In the case on hand, the question of applicability of the amended Section 28 of the CA does not arise. Admittedly, the contract was completed long prior to 8th January 1997. Clause 66 of the GCC does not prescribe a period shorter than that provided under law of limitation for making a claim. Clause 66.3 states that any claim which is not notified in two consecutive monthly statements for two consecutive months "shall be deemed to have been waived and extinguished." In other words it extinguishes the right to make a claim. In light of the law explained in Pandit Construction Company, the said clause was perhaps not opposed to Section 28 of the CA. In any event, the fact remains the true purport of the prohibitory clauses with reference to the Additional Claims 5A, 6A and A7 was not considered by the learned Arbitrator—The next major objection to the impugned Award is to the grant of interest. Under Claim 6 the learned Arbitrator has awarded pre-reference and *pendente lite* interest and under

Additional Claims 3 (a) and 3 (b) he has granted future interest—The prohibition on the payment of interest under the above clause is not only as regards "earnest money, security deposit, interim or final bills" but "any other payments due under the contract" as well—Additional Claim 3 (f) pertained the claim of Unitech. After calculating the actual quantity of *Malba* the learned Arbitrator assessed that Rs. 64 per cum was reasonable given the prevalent conditions and computed the amount payable to Unitech at Rs. 5,81,133 as against the claimed amount of Rs. 34,81,600. This Court is unable to discern any patent illegality in the decision of the learned Arbitrator as regards additional Claim 3 (f)—The objection by Unitech to rejection of its Claim 3 (g) is without merit. The learned Arbitrator has given cogent reasons why in his view the Amendment 3 to Clauses 7 does in fact restrict the total escalation payable to only plus or minus 10%. This Court finds no error in the analysis or the reasoning of he learned Arbitrator for rejecting Claim 3 (g)—In conclusion, the impugned Award dated 10th August 2001 in respect of Additional Claims 5A, 6A and A7 as well as Additional Claims 3 (a) and 3 (b) is hereby set aside. Under Claim 3 (fourth reference) it is clarified that actual encashment amount of the BG or of Rs. 28 lakhs whichever is lesser should be refunded to Unitech. The award of pre-reference and *pendente lite* interest under Claim 6 is set aside. In all other respects, the impugned Award is upheld.

Important Issue Involved: Section 28 (3) of the Act mandates that the Arbitrator has to decide the disputes in terms of the contract. The arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. Where the prohibitory clauses are not even noticed by the learned Arbitrator the impugned Award becomes vulnerable to invalidity on the ground that it is contrary to the clauses of the contract.

[Ch Sh]

APPEARANCES:

FOR THE PETITIONER : Mr. Vishal Malhotra, Advocate.

FOR THE RESPONDENT : Mr. Anurag Kumar, Advocate.

CASES REFERRED TO;

1. *Sayeed Ahmed and Company vs. State of Uttar Pradesh* (2009) 12 SCC 26.
2. *S.K. Jain vs. State of Haryana* (2009) 4 SCC 357.
3. *M/s. A.S. Sachdeva & Sons vs. Delhi Development Authority* [order dated 6th October 2009 in CS (OS) No. 73 of 1996].
4. *DSA Engineers (Bombay) vs. Housing & Urban Development* (HUDCO) 2009 (1) R.A.J. 276 (Del).
5. *Tehri Hydro Development Corporation Ltd. vs. Lanco Consturction Ltd.* 2007 (3) ArbLR 194 (Delhi).
6. *Pandit Construction Company vs. Delhi Development Authority* 2007 (3) Arb.LR 205 (Delhi).
7. *Union of India vs. Suchita Steels (India)* 2006 (1) Arb.LR 83 (Delhi) (DB).
8. *Union of India vs. R.C. Singhal* 2006 (Suppl) Arb.LR 274 (Delhi).
9. *Union of India vs. Pam Development Pvt. Ltd.* 2005 (3) Arb.LR 548 (Cal).
10. *D.S.A. Engineers (Bombay) vs. Housing & Urban Development Corporation* (HUDCO) 2004 (74) DRJ 331.
11. *T.P. George vs. State of Kerala* 2001 (1) Arb.LR 490 (SC).
12. *Union of India vs. Royal Construction* 2001 (Suppl) Arb.LR 488 (Calcutta) (DB).
13. *National Insurance Co. Ltd. vs. Sujir Ganesh Nayak & Co.* 1997 (3) SCR 202.
14. *New India Civil Erectors (P) Ltd. vs. Oil and Natural Gas Corporation* (1997) 11 SCC 75.

15. *Assistant Excise Commissioner vs. Issac Peter* (1994) 4 SCC 104.

16. *Secretary, Irrigation Department, Govt. of Orissa vs. G.C. Roy* (1991) Supp. 3 SCR 417.

17. *General Assurance Society Ltd. vs. Chandumull Jain* AIR 1966 SC 1644.

18. *Central Bank of India Ltd., Amritsar vs. Hartford Fire Insurance Co. Ltd.* AIR 1965 SC 1288.

RESULT: Disposed of.

S. MURALIDHAR, J.

1. The challenge in these petitions under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 10th August 2001 passed by the learned Arbitrator in the dispute between the Housing and Urban Development Corporation ('HUDCO') and Unitech Limited ('Unitech') arising out of a contract entered into between them for construction of civil works of HUDCO Bazar, Plot No. 25, Bhikaji Cama Place, New Delhi (since named as August Kranti Bhawan). To the extent that the learned Arbitrator rejected Unitech's Claim 3 (g) for escalation/ compensation, Unitech has filed OMP No. 3 of 2001. To the extent Unitech's claims have been allowed, HUDCO has filed OMP No. 391 of 2001.

2. The date of the start of work was 17th December 1990. The stipulated date of completion was 16th September 1992, 21 months after the date of commencement. The arbitration clause (Clause 91) of the general conditions of contract ('GCC') was superseded by a supplementary agreement dated 14th November 1994 in terms of which the disputes were agreed to be referred to a sole Arbitrator instead of two Arbitrators as originally agreed to. Unitech's claims were referred to the sole Arbitrator in four stages along with the counter-claims of HUDCO.

3. HUDCO contends that the impugned Award to the extent it granted Unitech Rs. 24,27,270 under Additional Claim 5A towards extra expenditure on site establishment, Rs. 5,37,785 under Additional Claim 6A towards extra expenditure on insurance for extended period and Rs. 3,64,717 against Additional Claim A7 for extra expenditure on bank guarantee ('BG') for extension beyond stipulated period was contrary to Clause 66 of the GCC in terms of which the Contractor has to notify the

Employer (HUDCO) in writing in advance where the Contractor intends to make a claim for any extra work or expense. HUDCO also contends that the Award in the sum of Rs. 2 lakhs by way of interest on 'the mobilization advance of Rs. 10 lakhs not paid' under Additional Claim 3 (a) and in the sum of Rs. 25,000 towards interest on excess recovery of mobilization advance and security deposit under Additional Claim 3 (b) was hit by the prohibitory Clause 20.1 and Clause 66 of the GCC. Likewise, the award of a sum of Rs. 5,81,133 under Additional Claim 3 (f) for removal of malba is also assailed by HUDCO. HUDCO is also aggrieved by the rejection of its entitlement to levy liquidated damages ('LD') in terms of Clause 61 of the GCC. In awarding a sum of Rs. 28 lakhs in favour of Unitech towards BG, the learned Arbitrator is alleged to have overlooked the fact that HUDCO encashed the BG in the sum of Rs. 26.35 lakhs. It is further submitted that award of interest under Claim 6 (fourth reference) was also hit by the prohibitory Clause 20.1 of the GCC read with Section 31 (7) (a) of the Act.

4. In reply, Unitech submits that appreciation of facts and evidence, interpretation and construction of the clauses of the contract, are matters within the jurisdiction of the learned Arbitrator and not open to appeal or review by the Court under Section 34 of the Act. According to Unitech, the bar under Clause 20.1 of the GCC on the grant of interest applies only to the officials of HUDCO and not to the learned Arbitrator. In any event, the dispute concerning the interest was referred to the Arbitrator for adjudication. It was within his jurisdiction to construe the said clause and decide the issue of interest. Secondly, it is submitted that the award of compensation was barred by Clause 55 of the GCC. According to Unitech the prohibition thereunder was only to the grant of compensation on account of the failure of HUDCO to discharge its obligation of providing site in time whereas Unitech's claim for compensation was on account of the breach of contract by HUDCO and the failure to perform its other reciprocal obligations. Unitech further submits that Clause 57.1 prohibits the claim for compensation on account of extension of time ('EOT'), only if EOT was granted due to force majeure, suspension of work by owner, damage caused by fire etc. and not due to time overrun/delay in execution of the work due to breach of the contract by HUDCO. It is further contended that Clauses 20, 55, 57 and 66 of the GCC are void under Section 23 of the Indian Contract Act, 1872 ('CA') as they are opposed to public policy. Otherwise Unitech would be left remediless and

Sections 55 and 73 of the CA would be rendered redundant. Reliance is placed on the decisions of this Court in **Tehri Hydro Development Corporation Ltd. v. Lanco Consturction Ltd.** 2007 (3) ArbLR 194 (Delhi), **Union of India v. Suchita Steels (India)** 2006 (1) Arb.LR 83 (Delhi) (DB), **Union of India v. Pam Development Pvt. Ltd.** 2005 (3) Arb.LR 548 (Cal), **Union of India v. R.C. Singhal** 2006 (Suppl) Arb.LR 274 (Delhi), **T.P. George v. State of Kerala** 2001 (1) Arb.LR 490 (SC), **Union of India v. Royal Construction** 2001 (Suppl) Arb.LR 488 (Calcutta) (DB), **Pandit Construction Company v. Delhi Development Authority** 2007 (3) Arb.LR 205 (Delhi) and **M/s. A.S. Sachdeva & Sons v. Delhi Development Authority** [order dated 6th October 2009 in CS (OS) No. 73 of 1996].

5. In support of its plea that the learned Arbitrator had wrongly rejected Additional Claim 3 (g), Unitech refers to Amendment No. 3 to Clause 7 and submits that it nowhere provides that escalation beyond 10% could not under any circumstance be provided and that it had to be read with Clause 3 of the special conditions of the contract ('SCC') which stipulates that the work should be completed in 21 months. Moreover, HUDCO itself paid escalation up to March 1994 when the time limit was breached. Therefore, 10% limit was applicable only within the stipulated period.

6. The above submissions require examination in the background of the settled law concerning the scope of the powers of the Court to interfere with an Award under Section 34 of the Act. Section 28 (3) of the Act mandates that the Arbitrator has to decide the disputes in terms of the contract. As explained by the Supreme Court in **New India Civil Erectors (P) Ltd. v. Oil and Natural Gas Corporation** (1997) 11 SCC 75, "the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it."

7. While discussing Additional Claim 5A, the learned Arbitrator noted that there was delay in grant of permissions for purchase of steel, delay in handing over complete and clear site, delay in issuing of working drawings, revisions and instructions, delay in approval of samples, directions and clarifications, delay in making payments (mobilization advance and interim bills), failure to make payment of full escalation and the effect of stay order. On an examination of the evidence, the learned Arbitrator concluded that both the parties were equally responsible for delay in completion of the project and prolongation of the contract.

8. The question that therefore arose for decision was whether HUDCO was liable to compensate Unitech for the delay, notwithstanding that there are prohibitory clauses in the GCC which read as under:

"Clause 55.0 Possession of Site:

55.1 The owner will make available to the Contractor the site or the respective work fronts to enable the Contractor to commence and proceed with the execution of works in accordance with the agreed programme. If there is delay in making available any area of work, the owner shall on the recommendation of the Architect and the Consultant grant reasonable extension of time for the completion of work. The Contractor shall not be entitled to claim any compensation, whatsoever on this account.

Clause 57.0: Extension of Time:

57.1 If the works are delayed by force majeure, suspension of work by the Owner, serious loss or damage by fire, ordering of altered, additional or substituted work or other special circumstances other than through the default of the Contractor, as would fairly entitle the Contractor to an extension of time and which in the discretion of the Owner is beyond the control of Architects and the Contractor then upon the happening of any such event causing delay, the Contractor shall within 10 days of the happening of event give notice thereof in writing to the Engineer, stating the cause and the anticipated period of delay, then in any such event. Managing Director on the recommendations of the Architect and the Consultant may give a fair and reasonable extension of time for the completion of work.

57.2: Such extension shall be communicated to the Contractor by the Engineer in writing. The Contractor shall not be entitled to claim any compensation or over-run charges whatsoever for any extension granted.

Clause 66.0: Claims:

66.1: The Contractor shall send to the Chief Special Projects/ Consultants/Engineer/Architect once every month as account giving particulars, as full and detailed as possible of all claims for

any additional payment to which the Contractor may consider himself entitled and of all extra or additional work ordered in writing and which he has executed during the preceding month.

66.2: No claim for payment for any extra work or expense will be considered which has not been included in such particulars. The Owner may consider payment for any such work or expense where admissible under the terms of the contract, if the Contractor has at the earliest practicable opportunity notified the Employer in writing that he intends to make a claim for such work and expense and it is certified by the Consultant in consultation with the Architects that such payment was due.

66.3: Any claim which is not notified in two consecutive monthly statements for two consecutive months shall be deemed to have been waived and extinguished."

9. However, a perusal of the impugned Award shows that there is no reference to Unitech having urged that any of the prohibitory clauses was opposed to Sections 23 and 28 of the CA. Whereas while discussing Additional Claim 3 (g) the learned Arbitrator referred to Clause 7 and Amendment No. 3 thereto and while discussing Claim No. 6 he referred to Clause 20.1, while discussing Additional Claims 5A, 6A and A7 he did not discuss any of the other prohibitory clauses. Clause 57.2 specifically states that "the Contractor shall not be entitled to claim any compensation or overrun charges whatsoever for any extension granted." Further Clause 55.1 also clearly states that if there is delay in making available any area of work, the Contractor shall not be entitled to clam any compensation when EOT is granted as a result thereof.

10. There was no justification for the learned Arbitrator not to have even noticed the said clauses. If the learned Arbitrator had after noticing the said clauses, interpreted them one way or the other, it might be possible for Unitech to argue that the Court should not interfere with such conclusion only because another view is possible. However, where the said prohibitory clauses are not even noticed by the learned Arbitrator the impugned Award becomes vulnerable to invalidity on the ground that it is contrary to the clauses of the contract.

11. In **Pandit Construction Company,** the Court was examining clauses that extinguished the right of a party to prefer a claim if it was

not made within a period that was far shorter than the normal period available under the law of limitation. After referring to the decision of the Supreme Court in **National Insurance Co. Ltd. v. Sujir Ganesh Nayak & Co.** 1997 (3) SCR 202, it was held that a clause in the contract that restricted the right of a party to seek legal redress would be hit by Section 28 of the CA. In the same decision it was noticed that "there could be agreements which do not seek to curtail the time for enforcement of the right but which provides for the forfeiture or waiver of the right itself if no action is commenced within the period stipulated by the agreement. Such a clause in the agreement would not fall within the mischief of Section 28 of the Contract Act. To put it differently, curtailment of the period of limitation is not permissible in view of Section 28 but extinction of the right itself unless exercised within a specified time is permissible and can be enforced." It was further noticed that by virtue of the amendment to Section 28 of the CA, Clause (b) was introduced which stated that an agreement which extinguished the right of a party thereto or discharged any party thereto from any liability under or in respect of any contract on the expiry of a specified period as to restrict such party from enforcing his rights, would be in restraint of legal proceedings and therefore void. However, the said amendment was brought into effect from 8th January 1997. It did not apply to a case where the entire work was completed prior thereto.

12. In the case on hand, the question of applicability of the amended Section 28 of the CA does not arise. Admittedly, the contract was completed long prior to 8th January 1997. Clause 66 of the GCC does not prescribe a period shorter than that provided under the law of limitation for making a claim. Clause 66.3 states that any claim which is not notified in two consecutive monthly statements for two consecutive months "shall be deemed to have been waived and extinguished." In other words it extinguishes the right to make a claim. In light of the law explained in **Pandit Construction Company,** the said clause was perhaps not opposed to Section 28 of the CA. In any event, the fact remains that true purport of the prohibitory clauses with reference to the Additional Claims 5A, 6A and A7 was not considered by the learned Arbitrator.

13. In **S.K. Jain v. State of Haryana** (2009) 4 SCC 357 the Supreme Court considered whether a clause in an agreement which required the Claimant to deposit before the arbitral Tribunal 7% of the total claim made as a precondition to the claim being considered was

opposed to public policy. The Supreme Court referred to its earlier decision in **Assistant Excise Commissioner v. Issac Peter** (1994) 4 SCC 104 and negatived the plea of the Claimant. In Issac Peter it was observed that the doctrine of fairness which was developed in the administrative law cannot be "invoked to amend, alter or vary the express terms of the contract between the parties." It was categorically stated that "in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State." After referring to the decisions in **Central Bank of India Ltd., Amritsar v. Hartford Fire Insurance Co. Ltd.** AIR 1965 SC 1288, **General Assurance Society Ltd. v. Chandumull Jain** AIR 1966 SC 1644, the Supreme Court in **S.K. Jain v. State of Haryana** held that "in interpreting documents relating to a contract of insurance, the duty of the Court is to interpret the words in which the contract is expressed by the parties, because it is not for the Court to make a new contract, however, reasonable, if the parties have not made it themselves."

14. The plea of Unitech, urged for the first time in reply to the petition under Section 34 of the Act, that the above prohibitory clauses are opposed to public policy and contrary to Sections 23 and 28 of the CA, is inconsistent with the law explained in **Issac Peter and S.K. Jain**. In any event the impugned Award fails to notice, much less consider the effect of, the prohibitory clauses of the contract. Consequently, this Court upholds the objection of HUDCO to the impugned Award in respect of Additional Claims 5A, 6A and A7.

15. The next major objection to the impugned Award is to the grant of interest. Under Claim 6 the learned Arbitrator has awarded pre-reference and *pendente lite* interest and under Additional Claims 3 (a) and 3 (b) he has granted future interest. Clause 20.1 of the GCC which prohibits the payment of interest reads as under:

> "20.1 No interest shall be payable on any money due to the Contractor against earnest money, security deposit, interim or final bills or any other payments due under this contract."

16. The prohibition on the payment of interest under the above clause is not only as regards "earnest money, security deposit, interim or

final bills" but "any other payments due under the contract" as well. This very clause was interpreted in **D.S.A. Engineers (Bombay) v. Housing & Urban Development Corporation** (HUDCO) 2004 (74) DRJ 331. After referring to the decision in **Secretary, Irrigation Department, Govt. of Orissa v. G.C. Roy** (1991) Supp. 3 SCR 417, the learned Single Judge of this Court held that there was a complete prohibition on the arbitral Tribunal awarding interest on any sum. The said decision was upheld by the Division Bench in **DSA Engineers (Bombay) v. Housing & Urban Development (HUDCO)** 2009 (1) R.A.J. 276 (Del). A reference was made to Section 31 (7) (a) of the Act which opens with the words "unless otherwise agreed by the parties."

17. On this aspect, reference may also be made to the decision of the Supreme Court in **Sayeed Ahmed and Company v. State of Uttar Pradesh** (2009) 12 SCC 26 which discussed the purport of Section 31 (7) of the Act. It was observed:

> "13.....Having regard to sub-section (7) of Section 31 of the Act, the difference between pre-reference period and pendente lite period has disappeared insofar as award of interest by the arbitrator. The said section recognises only two periods and makes the following provisions:
>
> (a) In regard to the period between the date on which the cause of action arose and the date on which the award is made (pre-reference period plus pendente lite), the Arbitral Tribunal may award interest at such rate as it deems reasonable, for the whole or any part of the period, **unless otherwise agreed by the parties.**
>
> (b) For the period from the date of award to the date of payment the interest shall be 18% per annum if no specific order is made in regard to interest. The arbitrator may however award interest at a different rate for the period between the date of award and date of payment." (emphasis supplied)

18. Resultantly, the impugned Award to the extent it grants Unitech pre-reference and pendente lite interest under Claim No. 6 cannot be sustained in law. Equally the award of interest under Additional Claims 3 (a) and 3 (b) on non-payment of mobilization advance and on the excess sum recovered was impermissible. Therefore, the impugned Award

in respect of Claim 6 and Additional Claims 3 (a) and 3 (b) cannot be sustained in law and is hereby set aside.

19. Additional Claim 3 (f) pertained to removal of malba. The learned Arbitrator has given detailed reasons for not accepting the claim of Unitech. After calculating the actual quantity of malba, the learned Arbitrator assessed that Rs. 64 per cum was reasonable given the prevalent conditions and computed the amount payable to Unitech at Rs. 5,81,133 as against the claimed amount of Rs. 34,81,600. This Court is unable to discern any patent illegality in the decision of the learned Arbitrator as regards Additional Claim 3 (f).

20. On the issue of LD, the learned Arbitrator has under Claim 1 (fourth reference) given a declaratory Award stating that since EOT was granted on 26th April 1999 long after the date of completion, the HUDCO could not have withheld the amount to the tune of Rs. 55 lakhs from running accounts bill on account of LD. The learned Arbitrator has in the impugned Award recorded the date of completion as 31st January 1998. Therefore, LD should have if at all been levied within a reasonable period thereafter. A lapse of nearly 15 months after the date of completion for levy of LD cannot be considered reasonable. Also the mere mention of Clause 61 in the letter of HUDCO indicated only its intention to levy LD. No show cause notice was issued to Unitech before levy of LD. This Court finds no ground to interfere with the declaratory Award under Claim No. 1 (fourth reference).

21. Under Claim No. 3 (fourth reference), the learned Arbitrator has held that the two BGs, one for a sum of Rs. 26 lakhs and the second for Rs. 2 lakhs furnished by Unitech towards retention money were refundable. The case of HUDCO avers in ground 'I' that the actual amount encashed under the BGs was Rs. 26.35 lakhs. This has not been specifically denied by Unitech in its reply. Consequently, the Award in respect of Claim 3 (fourth reference) is held to refer to the actual amount encashed by HUDCO under the two BGs which would be refundable to Unitech.

22. The objection by Unitech to rejection of its Claim 3 (g) is without merit. The learned Arbitrator has given cogent reasons why in his view the Amendment 3 to Clause 7 does in fact restrict the total escalation payable to only plus or minus 10%. This Court finds no error in the analysis or the reasoning of the learned Arbitrator for rejecting

Claim 3 (g).

23. In conclusion, the impugned Award dated 10th August 2001 in respect of Additional Claims 5A, 6A and A7 as well as Additional Claims 3 (a) and 3 (b) is hereby set aside. Under Claim 3 (fourth reference) it is clarified that actual encashment amount of the BG or of Rs. 28 lakhs whichever is lesser should be refunded to Unitech. The award of pre-reference and pendente lite interest under Claim 6 is set aside. In all other respects, the impugned Award is upheld.

24. OMP No. 3 of 2001 filed by Unitech is dismissed and 2001 filed by HUDCO is disposed of in the above terms, but in the circumstances, with no order as to costs.

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AMINA BI KASKAR DECD. THR LRS. ....APPELLANT

VERSUS

UNION OF INDIA & ORS. ....RESPONDENT

(BADAR DURREZ AHMED & SIDDHARTH MRIDUL, JJ.)

LPA NO. : 656/2011 &
CM NO. : 15077/2011 &
LPA NO. : 657/2011 &
CM NO. : 15079/2011

DATE OF DECISION: 27.09.2012

Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976—Section 12(4)—The competent authority under SAFEMA passed an order dated 14.07.1998 for forfeiture of several properties under Section 7 of SAFEMA—The common appeal filed on behalf of the appellants herein before the said Tribunal was filed on 20.10.1998. It is obvious that the

appeal was beyond the period of 60 days from the passing of the order dated 14.07.1998 by the competent authority. We may point out, at this stage, that the appellants had admitted in their said appeal before the Tribunal that the order dated 14.07.1998 was served upon them on 29/30th July, 1998—A condonation of delay application was also filed along with the said appeal before the said Tribunal —The Tribunal took up the application for condonation of delay and disposed of the same by its order dated 26.10.1998—By an order of the same date, the said application had been dismissed—Thereafter, both the appellants filed an application for review of the said order dated 26.10.1998, whereby the condonation of delay application was rejected and the appeal was held to be barred by limitation—The said review application was disposed of by an order dated 10.02.1999 by holding that proper service had been effected and that there were no grounds for reviewing the order dated 26.10.1998—he review petition was dismissed—The only issue that arises for consideration is whether the Appellate Tribunal for Forfeited Properties had not committed an error in law in dismissing the appellants common appeal filed purportedly under Section 12(4) of 'SAFEMA' on the ground that the said appeal was beyond the time prescribed under the said provision—Hence the present Appeal. Held: There is no provision for review in SAFEMA—Therefore, the Tribunal ought not to have even entertained the review petition—It is a well settled principle that the power of review is the creature of statute and unless and until the statute provides for a review, any authority, other than a Court of plenary jurisdiction, such as a High Court, would not have ant inherent power of review—If any authority is needed for this purpose, the decision of the Supreme Court in the case of *Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya, Sitapur* (O.P) & Ors: (1987) 4 SCC 525 would be sufficient—An order

purportedly passed in exercise of a review jurisdiction, which an authority does not have, would be a nullity—This is also clearly established in the said decision of the Supreme Court—Consequently, all arguments which were considered and raised and disposed of by the review order dated 10.02.1999 would be of no consequence—The review petition was not maintainable and the review order dated 10.02.1999 was also a nullity.

At this juncture itself, we would like to point out that there is no provision for review in SAFEMA. Therefore, the Tribunal, in our view, ought not to have even entertained the review petition. It is a well settled principle that the power of review is the creature of statute and unless and until the statute provides for a review, any authority, other than a Court of plenary jurisdiction, such as a High Court, would not have any inherent power of review. If any authority is needed for this purpose, the decision of the Supreme Court in the case of **Kuntesh Gupta v. Management Of Hindu Kanya Mahavidyalaya, Sitapur (U.P) &Ors:**(1987) 4 SCC 525 would be sufficient. An order purportedly passed in exercise of a review jurisdiction, which an authority does not have, would be a nullity. This is also clearly established in the said decision of the Supreme Court. Consequently, all arguments which were considered and raised and disposed of by the review order dated 10.02.1999, in our view, would be of no consequence. The review petition was not maintainable and the review order dated 10.02.1999 was also a nullity. We may point out that it is in this review application that arguments had been raised with regard to the service of the order on an agent of the appellants, namely, their lawyer/ advocate. In our view, we need not go into all those arguments because they were raised only at the stage of the purported review application filed on behalf of the appellants which they were not entitled to do because there was no provision for review in SAFEMA. **(Para 6)**

As per Section 12 (4) of SAFEMA, an appeal under

Section 12 (4) of SAFEMA has to be filed within 45 days from the date on which the order is served on the person aggrieved—The proviso extends that period by enabling the Tribunal to entertain an appeal even after the period of 45 days but restricts it to the period of 60 days—The stipulation is clear and categorical that the Tribunal cannot entertain any appeal after 60 days from the date on which the order is served on the aggrieved person—The question of the appellant being prevented by a sufficient cause in not filing the appeal within the initial period of 45 days can be looked into only for the balance period of 15 days after 45 days, that is, up to the 60th day—Section 12(4) simply provides that the order must be served on the aggrieved person—The manner in which the order is to be served is set out in Section 22—It not only orders and notices that may be made or issued under the said Act—Appellants themselves had admitted in their appeal that they had been served with the order dated 14.07.1998 passed by the competent authority on 29/30th July, 1988. That is the starting point of limitation. The appeals were filed on 20.10.1998, which is beyond 60 days from 30th July 1998—In these circumstances, the Tribunal was left with no power to entertain the appeal—The review application as also the order dated 10.02.1999 cannot be looked into for any purposes in these proceedings—The appeals are dismissed.

Section 12(4) of SAFEMA reads as under:-

"12. **Constitution of appellate tribunal.-**

(1) xxxx xxxx xxxx xxxx

(2) xxxx xxxx xxxx xxxx

(3) xxxx xxxx xxxx xxxx

(4) Any person aggrieved by an order of the competent

authority made under section 7, sub-section (1) of section 9 or section 10, may, within forty-five days from the date on which the order is served on him, prefer an appeal to the Appellate Tribunal:

Provided that the Appellate Tribunal may entertain any appeal after the said period of forty-five days, but not after sixty days, from the date aforesaid if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time."

It is clear that an appeal under Section 12(4) of SAFEMA has to be filed within 45 days from the date on which the order is served on the person aggrieved. The proviso extends that period by enabling the Tribunal to entertain an appeal even after the period of 45 days but restricts it to the period of 60 days. The stipulation is clear and categorical that the Tribunal cannot entertain any appeal after 60 days from the date on which the order is served on the aggrieved person. The question of the appellant being prevented by a sufficient cause in not filing the appeal within the initial period of 45 days can be looked into only for the balance period of 15 days after 45 days, that is, up to the 60th day. **(Para 8)**

We may point out that the learned counsel for the appellants sought to bring out a distinction between the service of notice and order as provided in Section 22 and service of an order as indicated in Section 12(4) of SAFEMA. We are unable to agree with the said submission of the learned counsel for the appellants. Section 12(4) simply provides that the order must be served on the aggrieved person. The manner in which the order is to be served is set out in Section 22. It not only includes the orders passed under Sections 7, 9(1) or 10 but also other orders and notices that may be made or issued under the said Act. Section 22 of SAFEMA reads as under:

"22. **Service of notices and orders.** - Any notice or order issued or made under this Act shall be servedù

(a) by tendering the notice or order or sending it by registered post to the person for whom it is intended or to his agent;

(b) if the notice or order cannot be served in the manner provided in clause (a), by affixing it on a conspicuous place in the property in relation to which the notice or order is issued or made, or on some conspicuous part of the premises in which the person for whom it is intended is known to have last resided or carried on business or personally worked for gain."

(Para 9)

Anyhow, we need not go into this aspect of the matter at all inasmuch as the appellants themselves had admitted in their appeal that they had been served with the order dated 14.07.1998 passed by the competent authority on 29/30th July, 1998. That is the starting point of limitation. The appeals were filed on 20.10.1998, which is beyond 60 days from 30th July 1998. In these circumstances, the Tribunal was left with no power to entertain the appeal. We have already indicated that the Tribunal had no jurisdiction to entertain the review petition and / or to pass any order thereon other than dismissal of the same for non-maintainability. The review application as also the order dated 10.02.1999 cannot be looked into for any purposes in these proceedings. **(Para 10)**

Important Issue Involved: Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976—Section 12(4)—There is no provision for review in SAFEMA—Therefore, the Tribunal ought not to have even entertained the review petition—An order purportedly passed in exercise of a review jurisdiction, which an authority does not have, would be a nullity—The question of the appellant being prevented by a sufficient cause in not filing the appeal within the initial period of 45 days can be looked into only for the balance period of 15 days after 45 days, that is, up to the 60th day.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Bahar U. Barqi Advocate.

FOR THE RESPONDENT : Mr. Jatan Singh with Mr. Tushar Singh, Advocates.

CASE REFERRED TO:

1. *Kuntesh Gupta* vs. *Management Of Hindu Kanya Mahavidyalaya, Sitapur (U.P) &Ors:*(1987) 4 SCC 525.

RESULT: Appeal dismissed.

BADAR DURREZ AHMED, J. (ORAL)

1. These appeals have been filed against the common judgment passed by a learned Single Judge of this Court in WP(C) 1426/1999 and WP(C) 1439/1999 on 14.07.2011.

2. The only issue that arises for consideration is whether the Appellate Tribunal for Forfeited Properties (hereinafter referred to as 'the Tribunal') had not committed an error in law in dismissing the appellants' common appeal filed purportedly under Section 12(4) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 [hereinafter referred to as 'SAFEMA'] on the ground that the said appeal was beyond the time prescribed under the said provision.

3. Some facts would be necessary to decide these appeals. The competent authority under SAFEMA passed an order dated 14.07.1998 for forfeiture of several properties under Section 7 of SAFEMA. The common appeal filed on behalf of the appellants herein before the said Tribunal was filed on 20.10.1998. It is obvious that the appeal was beyond the period of 60 days from the passing of the order dated 14.07.1998 by the competent authority. We may point out, at this stage, that the appellants had admitted in their said appeal before the Tribunal that the order dated 14.07.1998 was served upon them on 29/30th July, 1998. This admission has clearly been made in paragraph 3 as well as paragraph 8 of the appeal. The clear admission was to the following effect:

"that the said order dated 14.07.1998 was received by the appellant sometime around 29-30th of July, 1998".

A condonation of delay application was also filed along with the said appeal before the said Tribunal. Paragraph 4 of the said condonation of delay application reads as under:

> "That the impugned order dated 14.7.1998, was served on the appellant on 29/30th July, 1998, and the appellant should have preferred an appeal within 45 days therefrom. The appellants are illiterate and pardanashini widows and the appellant no.1 has the duty of bringing up four minor children and an ailing aged mother who is appellant no.2 in addition to other social obligations."

4. The Tribunal took up the application for condonation of delay and disposed of the same by its order dated 26.10.1998. By an order of the same date, the said application had been dismissed in the following manner:

> "3. The order dated 14.7.1998 was served on the appellants on 29/30th July 1998, whereas the order dated 14.10.1998 was served on the appellants on 17.10.1998. Hence the appeal so far as the order dated 14.7.1998 is concerned, was filed with delay on 20.10.1998. The appellant, therefore, filed his application for condonation of delay in presenting the appeal against the order dated 14.7.1998.
>
> 4. xxxx xxxx xxxx xxxx
>
> 5. The copy of the order dated 14.7.1998 was served on the appellants on 29/30th July, 1998 and the appeal was presented on after 20th October 1998 on the 81st day after the service of LPA 656/2011& 657/2011 Page 3 of 9 the order. Under Sec. 12(4) of SAFEMA, an appeal against an order under Sec.7 or sub-section (1) of Sec.9 or Sec.10 has to be preferred within 45 days from the date on which the order is served on the appellant. As per the proviso to sub-section 4, the Tribunal may entertain an appeal after the expiry of the period of 45 days, but not after 60 days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time. Admittedly, the appeal was presented beyond the period of 60 days. This Tribunal had earlier held by an order dated 1st April 1997 in F.P.A. No.3 of 1997 in Smt. Pallavi Haribhai Tandel vs. Competent Authority, Ahmadabad, reported in ITR 226 (1997) page 1 that the Tribunal has no power to entertain any application for condonation of delay, if the appeal preferred beyond 60 days from the date or the receipt of the order under appeal. Following the decision, we hold that the appeal having been filed beyond 60 days after receipt of the order under appeal, is barred by limitation and this Tribunal has no power to condone delay beyond the period of 60 days prescribed under the Act."

5. Thereafter, both the appellants filed an application for review of the said order dated 26.10.1998, whereby the condonation of delay application was rejected and the appeal was held to be barred by limitation. The said review application was disposed of by an order dated 10.02.1999 by holding that proper service had been effected and that there were no grounds for reviewing the order dated 26.10.1998. The review petition was dismissed.

6. At this juncture itself, we would like to point out that there is no provision for review in SAFEMA. Therefore, the Tribunal, in our view, ought not to have even entertained the review petition. It is a well settled principle that the power of review is the creature of statute and unless and until the statute provides for a review, any authority, other than a Court of plenary jurisdiction, such as a High Court, would not have any inherent power of review. If any authority is needed for this purpose, the decision of the Supreme Court in the case of **Kuntesh Gupta v. Management Of Hindu Kanya Mahavidyalaya, Sitapur (U.P) &Ors:**(1987) 4 SCC 525 would be sufficient. An order purportedly passed in exercise of a review jurisdiction, which an authority does not have, would be a nullity. This is also clearly established in the said decision of the Supreme Court. Consequently, all arguments which were considered and raised and disposed of by the review order dated 10.02.1999, in our view, would be of no consequence. The review petition was not maintainable and the review order dated 10.02.1999 was also a nullity. We may point out that it is in this review application that arguments had been raised with regard to the service of the order on an agent of the appellants, namely, their lawyer/ advocate. In our view, we need not go into all those arguments because they were raised only at the stage of the purported review application filed on behalf of the appellants which they were not entitled to do because there was no provision for review in SAFEMA.

7. Unfortunately, the learned Single Judge also went into great detail on the aspect of as to whether service on the advocate was sufficient service within the meaning of Section 22 of SAFEMA. We feel that the entire discussion on that aspect of the matter was unnecessary. This was so because the appellants had clearly admitted in their appeal that the order dated 14.07.198 had been served on them on 29/30th July, 1998. It is on this basis that they had filed the appeal and it is on this basis that they had sought condonation of delay.

8. Section 12(4) of SAFEMA reads as under:-

"12. **Constitution of appellate tribunal.-**

(1) xxxx xxxx xxxx xxxx

(2) xxxx xxxx xxxx xxxx

(3) xxxx xxxx xxxx xxxx

(4) Any person aggrieved by an order of the competent authority made under section 7, sub-section (1) of section 9 or section 10, may, within forty-five days from the date on which the order is served on him, prefer an appeal to the Appellate Tribunal:

Provided that the Appellate Tribunal may entertain any appeal after the said period of forty-five days, but not after sixty days, from the date aforesaid if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time."

It is clear that an appeal under Section 12(4) of SAFEMA has to be filed within 45 days from the date on which the order is served on the person aggrieved. The proviso extends that period by enabling the Tribunal to entertain an appeal even after the period of 45 days but restricts it to the period of 60 days. The stipulation is clear and categorical that the Tribunal cannot entertain any appeal after 60 days from the date on which the order is served on the aggrieved person. The question of the appellant being prevented by a sufficient cause in not filing the appeal within the initial period of 45 days can be looked into only for the balance period of 15 days after 45 days, that is, up to the 60th day.

9. We may point out that the learned counsel for the appellants sought to bring out a distinction between the service of notice and order as provided in Section 22 and service of an order as indicated in Section

12(4) of SAFEMA. We are unable to agree with the said submission of the learned counsel for the appellants. Section 12(4) simply provides that the order must be served on the aggrieved person. The manner in which the order is to be served is set out in Section 22. It not only includes the orders passed under Sections 7, 9(1) or 10 but also other orders and notices that may be made or issued under the said Act. Section 22 of SAFEMA reads as under:

"22. **Service of notices and orders.** û Any notice or order issued or made under this Act shall be servedù

(a) by tendering the notice or order or sending it by registered post to the person for whom it is intended or to his agent;

(b) if the notice or order cannot be served in the manner provided in clause (a), by affixing it on a conspicuous place in the property in relation to which the notice or order is issued or made, or on some conspicuous part of the premises in which the person for whom it is intended is known to have last resided or carried on business or personally worked for gain."

10. Anyhow, we need not go into this aspect of the matter at all inasmuch as the appellants themselves had admitted in their appeal that they had been served with the order dated 14.07.1998 passed by the competent authority on 29/30th July, 1998. That is the starting point of limitation. The appeals were filed on 20.10.1998, which is beyond 60 days from 30th July 1998. In these circumstances, the Tribunal was left with no power to entertain the appeal. We have already indicated that the Tribunal had no jurisdiction to entertain the review petition and / or to pass any order thereon other than dismissal of the same for non-maintainability. The review application as also the order dated 10.02.1999 cannot be looked into for any purposes in these proceedings.

11. Although the learned Single Judge has arrived at the conclusion that the appeals were barred by time on different set of reasons, we feel that the impugned order does not warrant any interference inasmuch as we agree with the conclusion for the reasons indicated above.

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

ILR (2013) I DELHI 409
CS (OS)

DAVENDER KUMAR SHARMA ....PLAINTIFF

VERSUS

MOHINDER SINGH & ORS. ....DEFENDANTS

(V.K. JAIN, J.)

CS (OS) NO. : 65/2012 DATE OF DECISION: 11.10.2012

Specific Relief Act, 1963—Section 14—Plaintiff entered into agreement to sell and Memorandum of Understanding with defendants, owner of suit property—As per agreement, defendants agreed to sell ground floor of suit property to plaintiff—On receiving possession of ground floor, plaintiff was to construct four storey building on it—It was further agreed between parties that ground floor and third floor of building would go to share of plaintiff, whereas first and second floors would go to share of defendant no. 1 & 2 and defendants no. 3 to 10 were to get amount of Rs. 95 lacs—In furtherance of agreement, plaintiff paid Rs. 66,16,666/- directly or through defendant no. 11 to defendants no. 1 to 10—However, defendants no. 3 to 10 did not surrender their share in suit property and possession of property was not handed over to plaintiff—Accordingly, plaintiff filed suit, praying for specific performance of the agreement as well as MOU entered into between parties, along with other reliefs. Held: Specific performance of an agreement cannot be allowed if an agreement is vague and incomplete, requires consensus, decisions or further agreement on several minute details—The performance of the obligations of a developer/builder in a collaboration agreement, cannot be compared to the statutory liability of a landlord to reconstruct and deliver a shop premises to a tenant under a Rent Control legislation, which is enforceable under the statutory provisions of the special law—A contract which involves performance of continuous duty which the Court cannot supervise, cannot be allowed to be specifically performed.

Since the only reliefs claimed in the present suit are decree for specific performance of the agreement to sell dated 14.03.2011 and injunction, restraining them from alienating, selling or parting with possession of the suit property and damages have not been claimed, there is no escape from the conclusion that the suit as framed is not maintainable. The specific performance of the agreement is barred under Section 14 of the Specific Relief Act and since specific performance cannot be granted, there can be no question of granting an injunction restraining the defendants from creating third party interest in the property subject-matter of the agreement. **(Para 7)**

Important Issue Involved: Specific performance of an agreement cannot be allowed if an agreement is vague and incomplete, requires consensus, decisions or further agreement on several minute details. The performance of the obligations of developer/builder in a collaboration agreement cannot be compared to the statutory liability of a landlord to reconstruct and deliver a shop premises to a tenant under a rent control legislation, which is enforceable under statutory provisions of the special law. A contract which involves performance of continuous duty which the Court cannot supervise cannot be allowed to be specifically performed.

[Sh Ka]

APPEARANCES:

FOR THE PLAINTIFF : Proxy Counsel.

FOR THE DEFENDANTS : Mr. Sunil Sabharwal, Advocate for

Ds-1 to 10.

RESULT: Suit dismissed.

V.K. JAIN, J. (ORAL)

1. The facts of this case have been set out in my order 16.07.2012, which inter alia, reads as under:-

> "The case of the plaintiff in nutshell is that vide agreement to sell dated 14.03.2011 and a Memorandum of Understanding of even date, defendants No. 1 to 10, who are the owners of Property No. MPL No. WZ-14-C, built on plot Ahata No. 40, measuring 200 sq. yards, out of Khasra No. 217, 218, 219 & 220, Manohar Park, Delhi, agreed that the ground floor of the aforesaid property would be sold by them to the plaintiff for a total sale consideration of Rs 95 lakh. It was further agreed that on receiving possession of the ground floor of the aforesaid property, the plaintiff would demolish the same and construct a four-storey building on it. The ground floor and the third floor of that building were to come to the share of the plaintiff, whereas, the first and second floor were to come to the share of defendants No. 1 and 2. Defendants No. 3 to 10 were to get the amount of Rs 95 lakh. It is an admitted position that a sum of Rs 66,16,666/- was paid by the plaintiff either directly or through defendant No. 11 to defendants No. 1 to 10. However, neither defendants No. 3 to 10 have surrendered their share in the suit property in favour of defendants No. 1 and 2 nor has the possession of the property been given to the plaintiff. The plaintiff has accordingly claimed the following reliefs in this suit:-
>
> a) pass a decree for specific performance of the Agreement to Sell dated 14.03.2011 in favour of the plaintiff and against defendants 1 to 10 directing defendants 1 to 10 to execute Sale Deed of the Ground floor and had over its vacant physical possession of the suit property bearing MPL-No. WZ-14-C, built on plot ahata No. 40 measuring 200 yds., situated in Manohar Park, out of Khasra No. 217, 218, 219 & 220 area of village Basai Darapur, Delhi in favour of the plaintiff/or his nominated person on receipt of the balance sale consideration, and on the failure of the defendants-1 to 10, the above acts/functions may be got done by the Hon'ble Court through the Registrar of Hon'ble Court;
>
> b) direct defendants 1 to 10 to perform their parts of the MOU dated 14.03.2011 and by getting the building plan of the four storeyed with stilt parking building from the MCD and to be constructed by the plaintiff, the defendants 1 to 10 (especially defendant Nos. 1 and 2) to execute sale deed of the third floor with roof/terrace rights and hand over its physical possession of the suit property bearing MPL No. WZ-14-C, built on plot ahata No. 40 measuring 200 yds., situated in Manohar Park, out of khasra No. 217, 218, 219 & 220 area of village Basai Darapur, Delhi in favour the plaintiff/or his nominated person-defendant No. 11 Sh. Ishwar Chand Bansal, and on the failure of the defendants 1 to 10, the above acts/functions may be got done by the Hon'ble Court through the Registrar of the Hon'ble Court;
>
> c) pass a decree in favour of the plaintiff and against the defendants 1 to 10 for permanent injunction restraining the defendants 1 to 10 from alienating, selling, creating third party interest or parting with possession of the suit property, bearing MPL No. WZ-14-C, built on plot ahata No. 40 measuring 200 yds., situated in Manohar Park, out of khasra No. 217, 218, 219 & 220 area of village Basai Darapur, Delhi."
>
> The case of the plaintiff is that the balance sale consideration was to be paid at the time of execution of the sale deed and prior to that defendants No. 3 to 10 had to surrender their share in the suit property in favour of defendants No. 1 and 2, in order to enable them to execute the sale deed in his favour. The case of the contesting defendants, on the other hand, is that the whole of the payment of Rs 95 lakh was to be made within 120 days from the date of the agreement."

2. In **Vinod Seth v. Devinder Bajaj & Anr.** 2010 (6) SCALE 241, the plaintiff had set up an oral agreement between the parties and the oral terms alleged by him were as follows:-

> "a) The defendants will apply to the DDA for conversion of the above property from leasehold to freehold and within 2-3 months the defendants will handover vacant physical possession of the

above property to the plaintiff.

b) The plaintiff will reconstruct the above property from his own money/funds with three storeys i.e. ground floor, first floor and second floor.

c) Out of the said reconstructed three storeyed building, the plaintiff shall be entitled to own and possess the ground floor; and the first and second floors will be owned and possessed by the defendants.

d) Besides bearing the expenses of construction and furnishing etc. of the proposed three storeyed building, the plaintiff shall also pay a sum of Rs. 3,71,000/- to the defendants at the time of handing over possession of the above house for reconstruction.

e) Out of the agreed consideration of Rs.3,71,000/-, a sum of Rs.51,000/- was paid to the defendants in cash and the remaining consideration of Rs.3,20,000/- was to be paid to the defendants at the time of handing over possession of the above house for reconstruction. In token of the same a Receipt for Rs.51,000/- was duly executed by defendant No.1.

f) On getting conversion of the above property from leasehold to freehold, the above agreement/proposed collaboration of the property bearing No. A-1/365, Paschim Vihar, New Delhi and the above terms and conditions were to be reduced into writing vide an appropriate Memorandum Of Understanding to be duly executed by the parties i.e. the builder and the owners of the above property.

It was also alleged by him that he had paid a sum of Rs 51,000/- to respondent No. 1 who had also executed a receipt in his favour. Alleging failure of the respondents to comply with the agreement, he filed a suit for specific performance of the collaboration agreement.

No application for interim relief was filed in that case. The learned Single Judge of this Court directed the plaintiff to file an affidavit/undertaking to the Court to the effect that in the event of his not succeeding in the suit, he will pay a sum of Rs 25 lakh by way of damages to the defendants. The intra-court appeal against that order having been dismissed by the Division Bench of this Court, the matter was taken by the plaintiff

to Supreme Court by way of Special Appeal. The Court, while disposing of the appeal, *inter alia*, observed and held as under:-

"8.1) It is doubtful whether the collaboration agreement, as alleged by the appellant, is specifically enforceable, having regard to the prohibition contained in section 14(1) (b) and (d) of the Specific Relief Act, 1963. The agreement propounded by the appellant is not an usual agreement for sale/transfer, where the contract is enforceable and if the defendant fails to comply with the decree for specific performance, the court can have the contract performed by appointing a person to execute the deed of sale/transfer under Order XXI Rule 32(5) of the Code of Civil Procedure ('Code' for short). The agreement alleged by the appellant is termed by him as a commercial collaboration agreement for development of a residential property of the respondents. Under the alleged agreement, the obligations of the respondents are limited, that is, to apply to DDA for conversion of the property from leasehold to freehold, to submit the construction plan to the concerned authority for sanction, and to deliver vacant possession of the suit property to the appellant for development. But the appellant/plaintiff has several obligations to perform when the property is delivered, that is, to demolish the existing building, to construct a three-storeyed building within one year in accordance with the agreed plan, deliver the first and second floors to the respondents and also pay a token cash consideration of Rs.3,71,000/-. The performance of these obligations by appellant is dependant upon his personal qualifications and volition. If the court should decree the suit as prayed by the appellant (the detailed prayer is extracted in para 3 above) and direct specific performance of the "collaboration agreement" by respondents, it will not be practical or possible for the court to ensure that the appellant will perform his part of the obligations, that is demolish the existing structure, construct a three-storeyed building as per the agreed specifications within one year, and deliver free of cost, the two upper floors to the respondents. Certain other questions also will arise for consideration. What will happen if DDA refuses to convert the property from leasehold to freehold? What will happen if the construction plan is not sanctioned in the manner said to have

been agreed between the parties and the respondents are not agreeable for any other plans of construction? Who will decide the specifications and who will ensure the quality of the construction by the appellant? The alleged agreement being vague and incomplete, require consensus, decisions or further agreement on several minute details. It would also involve performance of a continuous duty by the appellant which the court will not be able to supervise. The performance of the obligations of a developer/builder under a collaboration agreement cannot be compared to the statutory liability of a landlord to reconstruct and deliver a shop premises to a tenant under a rent control legislation, which is enforceable under the statutory provisions of the special law. A collaboration agreement of the nature alleged by the appellant is not one that could be specifically enforced. Further, as the appellant has not made an alternative prayer for compensation for breach, there is also a bar in regard to award of any compensation under section 21 of the Specific Relief Act."

3. While dismissing IA No. 404/2012 filed by the plaintiff under Order 39 Rules 1 & 2 CPC and allowing IA No. 8907/2012 filed by the defendants 1 to 10 under Order 39 Rule 4 of CPC this Court, inter alia, held as under:-

"5. In the case before this Court, the case of the plaintiff is that under the agreement, he has to construct a four-storey building, after demolishing the existing construction and out of the four floors to be constructed by him, ground and third floor have to come to his share, whereas the first and the second floor have to go to defendants No. 1 and 2. There is no agreement between the parties as regards the specifications of the proposed construction on the suit property. The agreement does not say as to what would happen if the plan, agreed between the parties, is not sanctioned or in the event a plan for construction of floors on the suit property is not sanctioned by the Municipal Corporation/DDA, as the case may be. The agreement is silent as to what happens if the parties do not agree on the specifications of the proposed construction. No mechanism has been agreed between the parties for joint supervision and quality control during construction. There is no agreement that the specifications of

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

4. An appeal was preferred by the plaintiff against the order dated 16.07.2012. Dismissing the appeal, the Division Bench, *inter alia*, held as under:-

"9. We find ourselves in agreement with the aforesaid reasoning adopted by the learned Single Judge. We may also note that the MOU is not an agreement which is enforceable, but only an agreement to agree, whereunder respondent nos.3 to 10 had agreed to, in future, agree to transfer their share in the property in favour of respondent nos.1 and 2. An agreement to enter into an agreement in future, cannot be enforced, much less specifically enforced.

10. Learned counsel for the appellant argues that the specifications could be as prescribed by the CPWD. That is not the issue in hand. This submission itself demonstrates that the parties had not agreed between themselves in respect of a very material and pertinent aspect. In any event, it is not possible for the Court to

supervise, on a continuous basis, the construction on the property in question, particularly when the specifications have not been clearly set out. The Court cannot compel the respondent nos.3 to 10 to transfer their share in the property in favour of respondent nos.1 and 2.

11. The next submission of learned counsel for the appellant is that, atleast, the agreement in respect of the ground floor can be enforced, and the respondents can be directed to transfer the ground floor of the property to the appellant for a consideration of Rs.95 lacs.

12. In our view, there is no merit in this submission either. The agreement is not only in respect of the ground floor, but also in respect of the other floors. Whereas the appellant was to get the ground and third floor, respondent nos.1 and 2 were to get the first and second floor, when constructed. The agreement and the MOU form part of the same transaction. They cannot be bifurcated. It cannot be stated that the third floor, which constitutes nearly half of the property agreed to be acquired by the appellant, constitutes a small fraction of the property. It cannot also be said that the amount of Rs.95 lacs forms the only consideration for transfer of the ground floor premises. The appellant also had the obligation to construct the upper floors so that they would become available to the respondents.

13. Consequently, the decision in **Gurdial Kaur (D) by LRs v. Piara Singh (D) by Lrs,** AIR 2008 SC 2019 as relied upon by the appellant, would have no application. Moreover, under the transaction, the rights of the respondents inter se were also required to be settled. The appellant cannot contend that only its rights should be partially settled leaving the respondents, particularly respondent nos.1 and 2 in the lurch.

14. For all the aforesaid reasons, we find no infirmity in the impugned order and dismiss the present appeal."

5. Issues in this case were framed on 8.10.2012, and the matter was listed for arguments on the maintainability of the suit. The arguments have accordingly been heard today.

6. Section 14 of Specific Relief Act, to the extent it is relevant,

reads as under:-

"14. **Contracts not specifically enforceable.-** (1) The following contracts cannot be specifically enforced, namely:—

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise."

7. Since the only reliefs claimed in the present suit are decree for specific performance of the agreement to sell dated 14.03.2011 and injunction, restraining them from alienating, selling or parting with possession of the suit property and damages have not been claimed, there is no escape from the conclusion that the suit as framed is not maintainable. The specific performance of the agreement is barred under Section 14 of the Specific Relief Act and since specific performance cannot be granted, there can be no question of granting an injunction restraining the defendants from creating third party interest in the property subject-matter of the agreement.

8. As regards the amount, paid by the plaintiffs to defendants No. 1 to 10, admittedly, in compliance of the order dated 16.07.2012, defendants No. 1 to 10 have deposited an FDR comprising the principal amount paid by the plaintiff along with interest on that amount at the rate of 12% per annum, in the name of Registrar General of this Court. The principal amount paid by the plaintiff to the defendants was Rs 66,16,666/-. The interest worked out on that amount by the defendants is Rs. 8,97,552/-. The learned counsel for the defendants states that the amount of the FDR deposited in this Court includes interest at the rate of 12% per annum from the date the amount was paid to defendants 1 to 10 in three instalments, till the date the FDR was deposited in the Court. He further states that he has no objection if the amount of the FDR of Rs 75,14,200/- along with interest which has accrued on that amount is released by the Registry to the plaintiffs. Hence, while dismissing the suit, it has directed that the amount of the FDR deposited by the defendants be released to the plaintiff along with interest which has accrued on that amount.

9. If the aforesaid amount is not withdrawn by the plaintiff within three months, from today, it would be returned to the defendants and in that event, the plaintiff would have liberty to take such action as is open to him in law for recovery of the amount paid by him to the defendants.

Decree sheet be drawn accordingly.

ILR (2013) I DELHI 419
FAO

MADHU & ORS. ....APPELLANTS

VERSUS

KULDEEP & ORS. ....RESPONDENTS

(G.P. MITTAL, J.)

FAO NO. : 425/2000 DATE OF DECISION: 18.10.2012

Motor Vehicles Act, 1988—Section 67, Indian Evidence Act on question of liability of pay compensation, the tribunal relied upon testimony of RW1 who simply stated that the report Ex.R1 was obtained by the insurance company from Cuttack Transport Authority and as per the said report the driving licence of the offending driver was fake- held even if Ex.R1 is assumed to be a public, document, it ought to have been proved by summoning a witness from the transport authority in terms with Section 67 of the Evidence Act and in the absence of formal proof, it could not be said that the offending driver did not hold valid driving licence and accordingly insurance company cannot avoid liability.

Even if, it is assumed that Ex.R-1 is a public document, it was required to be proved in accordance with the provisions

of Indian Evidence Act. No witness was summoned from the Transport Authority, Cuttack to prove report Ex.R-1. Nobody identified signature of the concerned officer on Ex.R-1. RW-1 H.C. Mahajan simply stated that the report Ex.R-1 was obtained from the Cuttack Transport Authority by the Respondent Insurance Company. This was not sufficient to prove the report. **(Para 9)**

Section 67 of the Indian Evidence Act, 1872 (the Evidence Act) lays down the mode of proof of a document, which is extracted hereunder:-

> "67. Proof of signature and handwriting of person alleged to have signed or written document produced -
>
> If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his hand writing." **(Para 10)**

Thus, any document including a public document has to be proved as provided under Section 67 of the Evidence Act. **(Para 11)**

Thus, the report Ex.R-1 alleged to be issued by the Transport Authority, Cuttack could not be admitted into evidence unless signatures thereon is proved by examining a witness. **(Para 14)**

[Gi Ka]

APPEARANCES:

FOR THE APPELLANTS : Mr. J.S. Kanwar, Advocate.

FOR THE RESPONDENTS : Mr. Pankaj Seth, Advocate for R-3.

CASES REFERRED TO:

1. *State (Delhi Administration)* vs. *Brij Mohan,* 27 (1985) DLT 322.

2. *C.H. Shah* vs. *S.S. Malpathak & Ors.,* AIR 1973 Bom. 14.

3. *East India Trading Co.* vs. *Badat & Co.,* AIR 1959 Bom. 414.

RESULT: Appeal allowed in above terms.

G.P. MITTAL, J. (ORAL)

1. The Appellants who are the legal representatives of deceased Tara Chand impugn a judgment dated 14.07.2000 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby a compensation of Rs. 1,76,056/- was awarded in favour of the Appellants and the owner and the driver were made liable to pay the compensation. The Insurance Company was exonerated on the ground that the willful breach of the policy on the part of insured was proved as the driver possessed a fake licence.

2. The Appellants dispute the findings on quantum of compensation as also on the liability.

3. In the absence of any Appeal by the owner, driver or the Insurance Company, the finding on negligence has attained finality.

4. During evidence, it was established that the deceased was working as a Conductor in DTC and was getting a salary of Rs. 1783/- including cycle allowance and washing allowance of Rs.60/-. Deceased Tara Chand was in permanent employment of a Public Sector Undertaking and was aged 32 years at the time of the accident. The Appellants were entitled to an addition of 50% towards future prospects in the income.

5. There were five dependents including the deceased's parents who died during the pendency of the Appeal. Even if, father of Tara Chand was not dependent there were four other dependents and thus deduction of one-fourth was required to be made as against one-third made by the Claims Tribunal. The loss of dependency thus comes to Rs.3,72,168/- (1723/- + 50% x 3/4 x 12 x 16).

6. Keeping in view the fact that this accident took place in the year 1990, I would make a provision of Rs.15,000/- towards loss of love and affection and Rs.5,000/- each towards loss to estate, loss of consortium and funeral expenses. The overall compensation thus comes to Rs.4,02,168/

- as against award of Rs. 1,76,056/- awarded by the Claims Tribunal.

LIABILITY

7. On liability, the Claims Tribunal referred to the testimony of RW-1 H.C. Mahajan who produced the report Ex.R-1 from the office of Regional Transport Authority Cuttack to hold that the driving licence No.K/5724/CTK/82 possessed by the driver was fake as the said licence had not been issued by the said Transport Authority.

8. Learned counsel for the Appellant urges that the report Ex.R-1 was not legally proved and thus, the same could not be taken into account by the Claims Tribunal.

9. Even if, it is assumed that Ex.R-1 is a public document, it was required to be proved in accordance with the provisions of Indian Evidence Act. No witness was summoned from the Transport Authority, Cuttack to prove report Ex.R-1. Nobody identified signature of the concerned officer on Ex.R-1. RW-1 H.C. Mahajan simply stated that the report Ex.R-1 was obtained from the Cuttack Transport Authority by the Respondent Insurance Company. This was not sufficient to prove the report.

10. Section 67 of the Indian Evidence Act, 1872 (the Evidence Act) lays down the mode of proof of a document, which is extracted hereunder:-

> **"67. Proof of signature and handwriting of person alleged to have signed or written document produced -**
>
> If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his hand writing."

11. Thus, any document including a public document has to be proved as provided under Section 67 of the Evidence Act.

12. The question of proof of a Sanction Order signed by the Sanctioning Authority i.e. Secretary (Medical) Delhi Administration came up before a learned Single Judge of this Court in **State (Delhi Administration) v. Brij Mohan,** 27 (1985) DLT 322 where it was held as under:-

"(8) Section 61 of the Evidence Act lays down that the contents of a document may be proved either by primary or by secondary evidence. Section 62 thereof defines primary evidence as meaning the document itself produced for the inspection of the court. In other words, the primary documentary evidence of a transaction (evidenced by writing) is the document itself which should be produced in original to prove the terms of the contract/ transaction, if it exists and is obtainable. Since the original sanction was admittedly placed on record by the prosecution, the requirements of this provision stood satisfied and the question of any secondary evidence for proving the contents of the sanction as such did not arise. Primary evidence in the context of oral evidence, however, means an oral account of the original evidence i.e. of a person who saw what happened and gives an account of it recorded by the court. That question does not appear to have arisen in the instant case because the matter was still at the stage of proof of the consent accorded by the Secretary (Medical). Since Sections 61 to 66 of the Evidence Act deal with the mode of proving the contents of the documents, either by primary evidence or by secondary evidence, I need not dwell upon the same in view of the original document having been placed on the record.

(9) Then comes the most important question viz. the genuineness of a document produced in evidence i.e. is a document what it purports to be and this is dealt with in Sections 67 to 73 of the Evidence Act. Section 67 refers to documents other than documents required by law to be attested. It simply requires that the signature of the person alleged to have signed a document (i.e. the executant) must be proved by evidence that the signature purporting to that of the executant is in his handwriting. Further it requires that if the body of the document purports to be in the hand-writing of someone, it must be proved to be in the hand-writing of that person. However, Section 67 does not in terms prescribe any particular mode of proof and any recognised mode of proof which satisfies the Judge will do. Thus, the execution/ authorship of a document may be proved by direct evidence i e. by the writer or a person who saw the document written and signed or by circumstantial evidence which may be of various kinds, for example, by an expert or by the opinion of a non-

expert who is acquainted with the hand-writing in any of the ways mentioned in Explanation to Section 47 or even by comparison etc. (See Sections 45, 47, 73 & 90 of the Evidence Act)....."

13. The question of proof of a public document came up before Bombay High Court in **C.H. Shah v. S.S. Malpathak & Ors.,** AIR 1973 Bom. 14, where it was held as under:-

"4..... In all cases of secondary evidence under Section 65 read with Section 63 of the Evidence Act when a copy or an oral account of a document is admitted as secondary evidence, the execution of the original is not required to be proved but if the original itself is sought to be tendered it must be duly proved and there is no reason for applying a different rule to public documents. Secondly, in the case of a certified copy, before a presumption of its genuineness can be raised under Section 79, as laid down by the Supreme Court in Bhinka's case already referred to above it must be shown that the certified copy was executed substantially in the form and in the manner provided by law. There would, therefore, be a check or safeguard in so far as the officer certifying it in the manner required by law would have to satisfy himself in regard to the authenticity of the original and in regard to the accuracy of the copy which he certifies to be a true copy thereof. On the other hand if the original of a public document is to be admitted in evidence without proof of its genuineness, there would be no check whatever either by way of scrutiny or examination of that document by an officer or by the Court. The third and perhaps the most important reason, for not accepting Mr.Shah's argument on the point which I am now considering is that neither Section 67 nor Section 68 of the Evidence Act which lay down that the signature and the handwriting on a document must be duly proved do not make any exception in the case of public documents. In view of the provisions of the said section all documents whatever be their nature must be therefore be proved in the manner provided by Section 45, 47 or 73 of the Evidence Act.....

5. The only question which remains for consideration is whether a presumption of the genuineness of the original of a public

document should be drawn by reason of Illustration (e) to Section 114 of the Evidence Act to the effect that official acts have been regularly performed. It is no doubt true that it has been held by a Division Bench of this Court in the case of **East India Trading Co. v. Badat & Co.,** AIR 1959 Bom. 414 that Section 114 of the Evidence Act is wide enough to permit the Court to raise a presumption not only with regard to oral evidence, but also with regard to documentary evidence. It may be mentioned that the decision of the Division Bench in the said case was reversed on appeal by the Supreme Court by a majority AIR 1964 SC 538, but in the judgment of the majority the Supreme Court has not referred to the point mentioned above. Apart from the undesirability of taking a view which would let in any and every document tendered by Government in suits to which it is a party without proof of genuineness, in my opinion, no presumption under Section 114 can be drawn in view of the mandatory and unqualified term of Sections 67 and 68 of the Evidence Act. Section 114 which to put it in popular language, merely empowers the Court to use its commonsense, cannot be used to contravene an express provision of the Act itself. I, therefore, hold that if the original of a public document is sought to be tendered in evidence, it must be proved in the manner required by law....."

14. Thus, the report Ex.R-1 alleged to be issued by the Transport Authority, Cuttack could not be admitted into evidence unless signatures thereon is proved by examining a witness.

15. Thus, it cannot be said that the driver of the offending vehicle did not possess a valid driving licence at the time of the accident or that the insured was guilty of breach of the terms of policy. Respondent No.3 M/s. New India Assurance Company Ltd. cannot avoid its liability to indemnify the insured.

16. In view of above discussion, the compensation stands enhanced by Rs. 2,26,112/- which shall carry interest @ 7.5% per annum from the date of filing of the Petition till its payment.

17. Respondent No.3 is directed to deposit the enhanced compensation along with interest with the Claims Tribunal within six weeks.

18. This accident took place 22 years back. Appellants No.2 and 3 must have attained majority. The compensation awarded shall enure for the benefit of Appellant No.1.

19. Fifty percent of the compensation shall be held in fixed deposit for a period of two years. Rest shall be released on deposit.

20. The Appeal is allowed in above terms.

21. Pending Applications also stand disposed of.

ILR (2013) I DELHI 426
WP (C)

SHUMANA SEN ….PETITIONER

VERSUS

COMMISSIONER OF INCOME TAX XIV & ORS. ….RESPONDENTS

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

W.P. (C) : 4022/2012, DATE OF DECISION: 19.10.2012
CM NO. : 18436-8438/2012

The Income Tax Act, 1961—Section 142(1), 147 and 148—In respect of Assessment year (AY) 2005-06, Assessing Officer (AO) issued notice on ground that income chargeable to tax for AY 2005-06 has escaped assessment and called upon petitioner to deliver return of income—Petitioner filed return of income and sought reasons from AO for issuance of impugned notice of reassessment—AO provided reasons and on same day also issued a notice seeking information in connection with petitioner's assessment—Petitioner filed objections questioning jurisdiction of AO to reopen assessment—Till date of filing writ petition,

objections were not disposed of and hence, petitioner filed present writ petition—Plea taken, reassessment proceedings commenced are malafide and without jurisdiction—Per contra plea taken, reasons recorded do make out a prima facie case of escapement of income and therefore notice cannot be said to be without jurisdiction—Held—Ground on which assessment has been reopened is that petitioner did not disclose expenditure incurred by her in her foreign travels during relevant previous year—AO has formed a prima facie of tentative belief that there was escapement of income as a result of failure of petitioner to furnish fully and truly all primary and material facts relating to her assessment—In absence of any document or evidence filed alongwith her return of income explaining expenditure incurred by her on her foreign travels during relevant year, AO was justified in invoking first proviso to Section 147 and coming to prima facie belief there was escapement of income on account of assessee's failure to satisfy requirements of explanation below section 147—Notice issued under section 148 of Act for assessment year 2005-06 was within jurisdiction of AO—AO directed to dispose of objections filed by petitioner within a reasonable time, if not already disposed.

Important Issue Involved: The source of the complaint or the tax evasion petition is not relevant; it is the substance of the contents of the tax evasion petition which has to be examined for the purpose of ascertaining whether therefrom a prima facie belief could have been formed by the AO that income chargeable to tax has escaped assessment.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Jayant K. Mehta, Mr. Sukant Vikram and Mr. Abhinav Sharma Advocates.

FOR THE RESPONDENTS : Mr. Kamal Sawhney Sr. Standing Counsel.

RESULT: Petition dismissed.

R.V. EASWAR, J.

1. The petitioner seeks to challenge the validity of the reassessment proceedings in this writ petition, commenced under Section 148 of the Income Tax Act, 1961 by issue of a notice under that section on 28.3.2012. A prayer is also made for quashing of all consequent proceedings.

2. The petitioner is an officer of the Indian Revenue Service of the 1987 batch. She is assessed to income tax. In respect of the assessment year 2005-06, the Assessing Officer, who is the respondent No.3 in the writ petition, issued notice under Section 148 of the Act on 28.3.2012 on the ground that income chargeable to tax for the assessment year 2005-06 has escaped assessment and called upon the petitioner to deliver the return of income. Pursuant thereto the petitioner would appear to have filed the return of income and on 2.4.2012 sought reasons from the Assessing Officer for the issuance of the impugned notice of reassessment. The reasons were not provided and therefore on 24.4.2012 another request was made in writing to furnish the reasons. On 30.4.2012, the respondent No.3 provided the reasons recorded under Section 148(2) to the petitioner and on the same day also issued a notice under Section 142(1) seeking information in connection with the petitioner's assessment. On receipt of the reasons recorded for reopening the assessment, the petitioner filed her objections on 4.5.2012 questioning the jurisdiction of the respondent No.3 to reopen the assessment. It also appears that the petitioner challenged the reopening of the assessment on the ground that the notice was issued at the behest of respondent No.4 who, according to the petitioner, bore enmity towards the petitioner on account of certain matters arising out of their career with the IRS. Till the date of filing the writ petition, the objections have not been disposed of by the respondent No.3 and hence the present writ petition.

3. The main grievance projected on behalf of the petitioner, as stated earlier, is that the assessment was reopened at the behest of respondent No.4 who bore ill will and enmity towards the petitioner on

account of certain developments which had allegedly taken place in their career in the IRS and that the Assessing Officer did not apply his mind to the allegations made in the "tax evasion petition" filed by respondent No.4 with the Assessing Officer. It is contended that respondent No.4, who is also a senior IRS officer, was in a position to influence the Assessing Officer and also the Commissioner of Income Tax having jurisdiction over the petitioner's assessment and that the assessment was reopened on the basis of wild and baseless allegations made in the tax evasion petition. Our attention was drawn to several pages of correspondence and other documents as well as to proceedings in courts in an attempt to show that the respondent No.4 bore a grudge against the petitioner, as a result of which he was using his position in the IRS to harass and embarrass the petitioner. It is therefore, contended that the reassessment proceedings commenced by the issue of notice dated 28.3.2012 under Section 148 are malafide and certainly without jurisdiction. These contentions are stoutly resisted by the ld. standing counsel on behalf of the income tax department. He has produced the relevant official record in support of his contention that the reasons recorded do make out a prima facie case of escapement of income and therefore, the notice cannot be said to be without jurisdiction. He further contends that at this stage, the focus should not be as to whether the reassessment proceedings were commenced with any malafide or oblique motive and that the pertinent issue to be examined would only be whether there was "reason to believe" that income chargeable to tax had escaped assessment. He contends that the Assessing Officer had "reason to believe" that income chargeable to tax has escaped assessment as would be evident from the recorded reasons.

4. We have examined the contentions and the facts in the light of the record placed before us. The reasons recorded for reopening the assessment are annexed to the writ petition as annexure P7 and they are as below :

"ITO, Ward-40(4), New Delhi
Reasons recorded for initiating Assessment proceedings
Under section 147/148 of Income Tax Act, 1961
in the case of Smt. Sumana Sen, PAN AMQPS5036G,
Assessment years 2005-2006, 2006-2007, 2007-2008 & 2008-2009 27/03/2012

This office received a copy of D.O. letter from Sh. S. K. Srivastava, CIT (OSD), Delhi addressed to CIT, Delhi-XIV, New Delhi disclosing details of concealment of income and resultant evasion of tax of huge amount during the period 2003-2004 onwards and upto F.Y. 2007-2008 by Mrs. Sumana Sen, IRS currently working in the rank of JCIT in the department. It also contains details of expenditure incurred on foreign travels by Mrs. Sumana sen alongwith her family stated to be in excess of Rs. 3 crores. Reliance was also placed on the copy of an affidavit sworn by Mrs. Sumana Sen and filed before Hon'ble Delhi High Court in Writ Petition (C) no.1373 of 2011 wherein she admitted to have traveled abroad with her family several times during that period. The said affidavit was enclosed alongwith the D.O. letter of Sh. S. K. Srivastava.

The said TEP alleged that the assessee received gratification by way of expenditure incurred on her foreign travels alongwith her family by M/s. NDTV Ltd. during the period under consideration in lieu of favors granted by her to M/s. NDTV Ltd. as it's assessing officer being ACIT, Circle-13(1), New Delhi. As per the TEP the estimated value of such gratification and corresponding expenditure involve in the region of about Rs.3-5 crores.

The Addl. CIT, Range-40, New Delhi vide his letter dated 02/12/2011 forwarded to TEP and letter of CIT, Delhi-XIV, New Delhi in the case of Mrs. Sumana Sen an existing assessee in this charge to take necessary action as per applicable law.

The complainant being an IRS officer of 1987 batch and holding the rank of Commissioner of Income Tax subsequently also provided a copy of the letter dated 17/10/2011 written by Mrs. Sumana Sen to the Chairperson, Complaint Committee on Sexual Harassment, New Delhi wherein also Mrs. Sumana Sen has admitted that she had travelled abroad several times at the time of her husband's employment with M/s. NDTV Ltd. before, during the after her stint in Circle-13(1), New Delhi.

Pursuant to the receipt of the copy of the TEP, the matter was independently examined in exercise of independent quasi-judicial discretion by the understigned. It was found that the

Returns of Income of Mrs. Sumana Sen an existing assessee in this office for the relevant period i.e. A.Y. 2004-2005, 2005-2006, 2006-2007, 2007-2008 & 2008-2008(sic) relevant for F.Y. 2003-2004, 2004-2005, 2005-2006, 2006-2007 & 2007-2008 does not disclose in any manner whatsoever the details and other particulars of her foreign travelling and the expenditure incurred on that including the source thereof, the quantum thereof, the status of that amount of money and taxability of the same. In view of the fact that the particulars pertaining to the expenditure incurred on foreign travels has been admitted before Hon'ble Delhi High Court and also before the departmental authorities, prima-facie, a case of non-disclosure of information about expenditure incurred by the assessee in the returns of income stands made out which prima-facie appears to have escaped the incidence of tax because of non-disclosure and non-inclusion in the taxable income of the assessee.

The assessee in the affidavit filed before Hon'ble Delhi High Court and in her letter dated 17.10.2011 before Departmental Authorities has claimed stated that the expenditure involved on her foreign travels was part of yearly vacation abroad with family of the salary package of Sh. Abhisar Sharma, her spouse, from the employer of Sh. Abhisar Sharma i.e. M/s. NDTV Ltd. It was further stated by the assessee that similar perquisites were given by M/s. NDTV Ltd. from time to time to other employees of that company as well as part of their salary package.

The copy of employment contract of Sh. Abhisar Sharma with M/s. NDTV Ltd. or any other document is not available on file to corroborate the claim of source of expenditure on foreign travel. Nor is there any documentary evidence available to show inclusion of the expenditure involved on her foreign travels in taxable income of her spouse namely Sh. Abhisar Sharma who is an existing assessee in charge of ACIT, Circle-48(1), New Delhi.

The expenditure on foreign travel of assessee, if it is a part of salary package of Sh. Abhisar Sharma received/ receivable from M/s, NDTV Ltd. is taxable perquisite U/s. 17 of the Income Tax Act, 1961. Upto A.Y. 2007-2008 it was required to be

disclosed in return of income and form no.16 issued by the employer. These particulars were also required to be furnished in form no.12BA issued by the employer to the employee. This was to be furnished by the employer with his/ her return of income alongwith form no.16 and in addition to the form no.16. The provisions of Rule 26(2)(b) is being relied upon.

The assessee while claiming that the expenditure incurred by her on her foreign travels alongwith her family was part of the salary package of her Spouse Sh. Abhisar Sharma has not made any mention of the above referred to statutory documents which are mandatorily to be submitted by the concerned assessee nor has included any of these documents either with the affidavit filed by her before Hon'ble Delhi High Court nor with official letter dated 17/10/2011. In view of the above facts there is admitted position about expenditure incurred on foreign travels of the assessee and her family during the period F.Y. 2003-2004 to F.Y. 2007-2008. The source of expenditure incurred by the assessee on her foreign travels during the above mentioned period required to be verified to ascertain the correct and full tax payable by the assessee on her taxable income.

In view of the facts and circumstances stated hereinabove and the material available on the record of this office, I have reasons to believe that income far in excess of the limit prescribed in law and much more than the limit of Rs.One lakh prescribed in section 149(1)(b) of the Income Tax Act, 1961 has escaped assessment during A.Y. 2005-2006, 2006-2007, 2007-2008 & 2008-2009 and to bring the escaped income to tax, re-assessment proceedings are required to be initiated for A.Y. 2005-2006, 2006-2007, 2007-2008 & 2008-2009 U/s 147 of the Income Tax Act, 1961 and notice U/s 148 is to be issued well within the limitation period.

It is further highlighted that the complainant in his Tax Evasion Petition has alleged evasion of tax and concealment of income during the period October, 2003 to October, 2007 which is material for A.Y. 2004-2005, 2005-2006, 2006-2007, 2007-2008 & 2008-2009. Out of this the A.Y. 2004-2005 is no longer open for re-opening in terms of provision U/s 149 of the Income Tax

Act, 1961 but the remaining four years are capable of being re-opened U/s. 147 and where notice can be issued U/s 148 of the Income Tax Act, 1961 to bring the income escaped from tax to tax. It is therefore proposed that all these four assessment years may be re-opened together for proper and effective inquiry in the matter and the statutory approval for the same is solicited from Addl. CIT, Range-40, New Delhi.

In view of the facts and circumstances stated hereinabove, the necessary approval of Addl. CIT, Range-40, New Delhi is being solicited in terms of statutory requirement of section 147 of the Income Tax Act, 1961 and other enabling provisions of law to assume jurisdiction U/s 147 and issue notice u/s 148 in terms of requirements of section 149 of Income Tax Act, 1961 for A.Y. 2005-2006, 2006-2007, 2007-2008 & 2008-2009 relevant for F.Y. 2004-2005, 2005-2006, 2006-2007 & 2007-2008 in the case of Smt. Sumana Sen PAN AMQPS5036G.

(Indu Bala Saini)
Income Tax Officer,
Ward-40(4), New Delhi"

It is well-settled that the reasons recorded under Section 148(2) should be based on credible material which should have a live link or nexus with the belief that there was escapement of income. At the stage of recording the reasons and issuing notice under Section 148, it is only a prima facie belief or tentative opinion that needs to be formed by the Assessing Officer. He is not at that stage required to make an assessment or record firm or final conclusions. The belief should however be held in good faith and objectively; it cannot be a mere pretence. The material on the basis of which the Assessing Officer forms the belief should not be mere gossip or rumour. It should not be a bare suspicion. The relevancy of the reasons is justiciable; their adequacy or sufficiency is not. This position is so well settled that it hardly needs citing of any authority. A notice under Section 148 disturbs the finality of an assessment and therefore all jurisdictional conditions have to be strictly complied with. Any lapse would result in the unlawful assumption of jurisdiction which cannot be cured. Erroneous or unlawful assumption of jurisdiction produces the only result, namely, that the reassessment proceedings would be struck down as invalid.

5. Applying the above test to the reasons recorded by the Assessing Officer in the present case, it is difficult to say that the Assessing Officer erroneously assumed jurisdiction to reopen the petitioner's assessment. The source of the complaint or the tax evasion petition is not relevant; it is the substance of the contents of the tax evasion petition which has to be examined for the purpose of ascertaining whether therefrom a prima facie belief could have been formed by the Assessing Officer that income chargeable to tax had escaped assessment. The ground on which the assessment has been reopened, as seen from the reasons recorded, is that the petitioner did not disclose the expenditure incurred by her in her foreign travels during the relevant previous year. The reasons recorded refer to the fact that the copy of the employment contract of the petitioner's husband who was employed with NDTV Ltd., or any other document was not available on record to establish the claim of the petitioner that the salary package of Abhisar Sharma, her husband, included foreign travels for him and his family. The reasons also refer to the fact that no documentary evidence was available to show the inclusion of the expenditure involved in the foreign travels in the taxable income of the petitioner's husband, who was also assessed to tax by the ACIT, Circle 48(1), New Delhi. It is also seen from the reasons recorded that no documents were submitted along with the petitioner's return of income to show that the expenditure incurred on foreign travels along with her family was part of the salary package of her spouse Abhisar Sharma. These facts have been relied upon by the Assessing Officer to form a prima facie or tentative belief that there was escapement of income as a result of the failure of the petitioner to furnish fully and truly all primary and material facts relating to her assessment. We are concerned with the assessment year 2005-06 and the notice under Section 148 was issued on 28.3.2012 after a period of 4 years from the end of the assessment year. This is therefore a case to which the first proviso to Section 147 is attracted. The Assessing Officer had to therefore demonstrate in the reasons recorded that the escapement of income was the result of the failure of the assessee to furnish fully and truly all material facts relating to her assessment. This condition is satisfied in the present case, as the above narration of the reasons recorded would show. There cannot be any dispute that it is the duty of the assessee to explain the expenditure incurred on her foreign travels. That would be a primary or material fact relating to her assessment, which the petitioner was under a duty to disclose, having regard to Explanation 1 to Section 147. In the absence

of any document or evidence filed along with her return of income explaining the expenditure incurred by her on her foreign travels during the relevant previous year, the Assessing Officer was justified in invoking the first proviso to Section 147 and in coming to the prima facie belief that there was escapement of income on account of the assessee's failure to satisfy the requirements of Explanation 1 below Section 147.

6. In the circumstances, we are not inclined to accept the submissions of the petitioner. We accordingly hold that the notice issued on 28.3.2012 under Section 148 of the Act for the assessment year 2005-06 was within the jurisdiction of the Assessing Officer. The Assessing Officer is directed to dispose of the objections filed by the petitioner within a reasonable time and at any rate not later than 30th November, 2012, if not already disposed of.

7. We refrain from expressing any opinion on the various allegations and counter allegations which were exchanged between the petitioner and respondent No.4 in other proceedings. In coming to our decision we have kept in view only the material before the Assessing Officer on the basis of which he recorded reasons and issued notice under Section 148.

The writ petition and the C.M. Nos.8436-8438/2012 are accordingly dismissed. No costs.

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FAO

JASWINDER SINGH ....APPELLANT

VERSUS

MRIGENDRA PRITAM VIKRAM SINGH STEINER & ORS. ....RESPONDENTS

(SANJAY KISHAN KAUL, RAJIV SAHAI ENDLAW & RAJIV SHAKDHER, JJ.)

FAO NO. : 684/2010 & CM NO. : 21681/2010
LPA NO. : 879/2010 & CM NO. : 22171/2010
LPA NO. : 19/2011 & CM NO. : 352/2011

DATE OF DECISION: 19.10.2012

Delhi High Court Act, 1966, Letters Patent Clause 10—Letter Patent Appeal—Question in reference was as to whether an order passed by Hon'ble Single Judge in exercise of Ordinary original Civil Jurisdiction, which is not appealable under the Code of civil Procedure can be impugned under Section 10(1) Delhi High Court Act, 1966 or under Clause 10 of Letters Patent Held, in case such a non-appealable order passed by the Hon'ble Single Judge meets the test of a "judgment" that besides matters of moment of affects vital and valuable rights of parties and which works serious injustice to the parties as per the parameters laid down by the Hon'ble supreme Court in the case of *Shah Babulal Khimji vs Jayaben D. Kania* an appeal to the Division Bench would lie exclusively under Section 10 of the Delhi High Court Act, 1966 and not under clause 10 of the Letters Patent.

We, thus, conclude by laying down the following principle of law:

In case of an order passed by the learned Single Judge in exercise of ordinary original civil jurisdiction in case of a non-appealable order under Section 104 read with Order 43 of the said Code which meets the test of a "judgement" that decides matters of moment or affects vital and valuable rights of parties and which works serious injustice to the parties concerned as per the parameters laid down in ***Shah Babulal Khimji*** *case (supra) by the Supreme Court, an appeal to the Division Bench would exclusively lie under Section 10 of the said Act and not under Clause 10 of the Letters Patent.* **(Para 39)**

[Gi Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. A.S. Chandoik, ASG Amicus Curiae with Ms. Manmeet Arora, Advocate.

FOR THE RESPONDENTS : None.

CASES REFERRED TO:

1. *C.S. Agarwal & Ors.* vs. *State & Ors.* 2011 VII AD (Delhi) 265.
2. *Jindal Exports* vs. *Furest Day Lawson* AIR 2010 Del 135.
3. *Jyotika Kumar* vs. *Anil Soni* 156 (2009) DLT 685.
4. *Sahil Singh* vs. *Harpreet Singh* 118 (2005) DLT 350.
5. *Crocodile* vs. *Lacoste* 2008 (100) DRJ 547.
6. *Magotteaux Industries Pvtl Ltd. & Ors.* vs. *AIA Engineering Ltd.* 155 (2008) DLT 73.
7. *R.K. Sharma* vs. *Ashok Nagar Welfare Association* AIR 2001 Del 272.
8. *Jindal Exports Ltd.* vs. *Furest Day Lawson* 1999 (51) DRJ 170.
9. *Abdul Hamid* vs. *Charanjit* 60 (1995) DLT 847.
10. *Jawahar Engineering Co.* vs. *Jawahar* AIR 1984 Delhi 129.

11. *Jugal Kishore Paliwal* vs. *S. Satjit Singh* (1984) 1 SCC 358.
12. *Shah Babulal Khimji* vs. *Jayaben D. Kania* (1981) 4 SCC 8.
13. *Shanta Sabharwal* vs. *Sushila Sabharwal & Ors.* AIR 1979 Delhi 153.
14. *Public Trustee* vs. *Rajeshwar Tyagi,* ILR (1973) 1 Delhi 29.
15. *University of Delhi* vs. *Hafiz Mohd.* 1972 AIR Del 102.
16. *Union of India* vs. *A.S. Dhupia* AIR 1970 Delhi 108.
17. *Central Bank of India* vs. *Gokal Chand,* AIR 1967 SC 799.
18. *Aswini Kumar Ghosh* vs. *Arabinda Bose* (1953) 4 SCR 1.
19. *State of Bombay* vs. *Narottamdas Jethabhai,* AIR 1951 SC 69.

RESULT: Reference answered.

SANJAY KISHAN KAUL, J.

1. The interplay of the jurisdictions to be exercised under Letters Patent and as the First Appellate Court while dealing with non-appealable orders passed by the learned Single Judge in exercise of ordinary original civil jurisdiction has given rise to the present reference. The question, thus, which arises for consideration is:

> *"If an order is passed by the learned single Judge in exercise of Ordinary Original Civil Jurisdiction which is not appealable under Section 104 (1) read with Order 43 (1) of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'said Code') whether the remedy would be under Section 10 (1) of the Delhi High Court Act, 1966 (hereinafter referred to as the 'said Act') or under Clause 10 of the Letters Patent?"*

2. The occasion to make this reference arose on account of the fact that at various times pronouncements of this Court have treated it as an "either" or "or" situation while entertaining an appeal, i.e., an appeal would be maintainable from a non-appealable order provided it satisfies certain tests and such an appeal may arise under one or the other of the

aforesaid provisions and, thus, the matter was never examined further. A Division Bench of this Court posed this question and subsequently analyzed it while making the reference vide order dated 17.4.2012 so that the controversy could be put at rest and a consistent practice is followed. This also became necessary in a sense for assisting in, both, the administration of justice and court management as the Chief Justice of the High Court is the Master of the Roster and as per allocation of roster, normally, the letters patent jurisdiction is exercised by a different Bench than the Bench exercising jurisdiction under First Appealable Orders from Original Side [FAO (OS)].

3. The Delhi High Court was constituted under the said Act. It being one of the newer High Courts, it had the benefit of being constituted under a legislation of the Indian Parliament. In terms of Section 5 (1) of the said Act, the Delhi High Court has been conferred with all such original, appellate and other jurisdiction, as under the law in force immediately before being exercised in respect of the territories by the High Court of Punjab. However, the Punjab High Court did not have any ordinary original civil jurisdiction. Therefore, Section 5 (2) of the said Act which begins with a non obstante clause conferred an additional ordinary original civil jurisdiction in every suit the value of which exceeded Rs. 25,000.00, on the Delhi High Court. This limit has been subsequently revised and stands at Rs. 20.00 lakh now. Section 5 of the said Act reads as under:

> **"5. Jurisdiction of High Court of Delhi** - (1) The High Court of Delhi shall have, in respect of the territories for the time being included in the Union territory of Delhi, all such original, appellate and other jurisdiction as, under the law in force immediately before the appointed day, is exercisable in respect of the territories by the High Court of Punjab.
>
> (2) Notwithstanding anything contained in any law for the time being in force, the High Court of Delhi shall also have in respect of the said territories ordinary original civil jurisdiction in every suit the value of which exceeds rupees twenty lakhs..

4. Section 9 of the said Act makes the law in force in respect of form of writs and other processes used, issued or awarded by the High Court of Punjab to apply to Delhi with necessary modifications.

5. Section 10 (1) of the said Act, ordinary original civil jurisdiction having been conferred in terms of Section 5 (2) of the said Act, provides for an appeal to lie before a Division Bench of the Delhi High Court from an order of the learned Single Judge of this Court. In terms of Section 10 (2) of the said Act, which is 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. Section 10 of the said Act reads as under:

> **"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."

6. In terms of Section 16 of the said Act, all proceedings pending in subordinate courts in relation to any civil suit referred to as per sub-section (2) of Section 5 of the said Act was to stand transferred to the High Court of Delhi.

7. The effect of the aforesaid provisions in a nutshell, thus, is that the appellate jurisdiction is conferred on the Division Bench qua appealable orders in view of provisions of Section 5 (2) read with Section 10 (1) of the said Act. The question, thus, would be whether even non-appealable orders under the said Code can be appealed against if they satisfy certain tests which have been set out hereinafter and whether such an appeal would lie under sub-section (1) of Section 10 of the said Act.

8. Simultaneously insofar as powers of the Single Judges or the Division Benches qua matters other than ordinary original civil jurisdiction are concerned, Section 5 (1) read with Section 10 (2) of the said Act would make the law enforceable in the High Court of Punjab to apply as was prevalent immediately prior to the said Act coming into force.

9. Now coming to the issue of exercise of letter patent - **Where does the expression 'Letters Patent' originate from?**

Meaning & Origin of Letters Patent:

10. The term 'letters patent' is derived from the Latin term 'literae patentes' meaning 'open letters'. Primarily, a letters patent would denote a public grant from the sovereign to a subject, conferring the right to land, a franchise, a title, liberty, or some other endowment.[1] These were letters addressed by the sovereign 'to all whom these presents shall come,' reciting a grant of some dignity, office, franchise, or other privilege that has been given by the sovereign to the patentee.'[2] The historical perspective of this is available in the National Archives of the United Kingdom, which is a Government Department and an Executive Agency of the Ministry of Justice. It sets out that 'Letters Patent' were letters issued 'open' or 'patent' expressing the sovereign's will on a variety of matters of public interest, sealed with the sovereign's great seal pendent. The patent rolls record the issue of letters patent from the reign of King John. The entries on the rolls are of a very diverse nature referring to the royal prerogative, revenue, the differential negotiations with foreign princes and states, letters of protection, of credence and of safe-conduct and the appointments and powers of ambassadors. There are also grants and confirmations of liberties, offices, privileges, lands and wardships, both to public bodies and to private individuals, charters of incorporation and so on. Letters patent are stated to have been much reduced in the course of the 19th and 20th centuries, as the kinds of instruments produced thereby became obsolete or their administration passed to other bodies. The use of great seals was much restricted, often replaced by alternative devices.

Evolution of the system of Courts in India: Post 1600:

11. In reference to the development of the courts system in India during British times, their origin is in the ancient English Statues and Charters granted by the sovereign of England to the East India Company, which was established by the Charter of Queen Elizabeth I in 1600. The Company was established for purposes of trading only. But by that Charter, it was also empowered to make laws for the good governance of the Company, its employees, officers, etc. and for the better advancement and continuance of trading and to impose punishments and fines in enforcement of those laws[3].

12. The Company, however, gradually established factories and acquired territories in India and for the protection of its territories and for further acquisition, it was empowered to raise an army, make war and peace and exercise governmental functions. It subsequently obtained the grant of Diwani of Bengal, Bihar and Orissa from the Emperor Shah Alam in 1765. The British Crown, however, did not all at once and directly assume the sovereign powers, but as between the Crown and the Company, it was distinctly agreed by an Act of 1813 that the possession and Government of British territories was being continued by the Company without prejudice to the undoubted sovereignty of the Crown. It is this sovereignty, which was reiterated by the Government of India Act, 1833 and that is why the Company remained in possession of territories .in trust for His Majesty."

13. It is with the growth of the East India Company that it became necessary to establish Courts of Justice within the territories under the control of the Company. The Letters Patent of 1726 granted by King George I recited that the Company by strict and equal distribution of justice, very much encouraged not only the British subjects but subjects of princes and natives to resort to and settle the disputes both in civil causes and criminal matters. These Letters Patent established and constituted three several Courts of record known as 'Mayor's Court' (consisting of a Mayor and nine (9) Aldermen) in Fort William in Bengal, in Madras and in Bombay. The right of appeal was to the Governor General in Council. These Letters Patent of 1726 were surrendered by the East India Company to King George II and the Company obtained fresh Letters Patent in 1753 by which the Mayor's Courts were limited in their civil jurisdiction to suits between persons not natives and suits between natives were directed not to be entertained by them unless by consent of the parties.

Rise of Chartered & Non-Chartered High Courts:

14. On the East India Company securing the Dewani of Bengal, Bihar and Orissa in 1765, it set up courts of civil and criminal jurisdiction for the Mofussil. The Moffusil Dewani Adalat was established for administration of civil justice, with a right of appeal to the Sadar Dewani Adalat, Calcutta. These Courts were not the King's Courts but were the Company's Courts established by the Company on the authority derived from the Mogul Emperor. This had nothing to do with the Mayor's Court or its successors.

15. In 1773 came the Regulating Act, the object of which was to impose control over the Company and its servants both in England and in India. It provided for the appointment of the Governor General and Council in Bengal and empowered the Crown by Charter to erect and establish a Supreme Court at Fort William with full power and authority to exercise and perform all civil, criminal, admiralty and ecclesiastical jurisdictions in the Presidency towns. Pursuant to this Act, King George III issued a Charter establishing a Court of Record called the 'Supreme Court of Judicature at Fort William in Bengal' dated 26th March, 1774. The clauses of the Charter show that the jurisdiction of the Supreme Court extended throughout the Presidency towns. The Supreme Court was, thus, a Crown's Court. Subsequently, the Supreme Courts at Madras and Bombay were established by King George II on 26th December 1800 and 8th December 1823 respectively.

16. The result of the aforesaid was that while the then Supreme Courts exercised jurisdiction in the Presidency towns, the then Sadar Courts exercised jurisdiction in the Moffusils.

17. It is after the Sepoy Mutiny of 1857 that the British Crown took over the territories and the Government of British India from the Company by the Government of India Act, 1858 and, thus, India came to be governed directly by and in the name of the Crown. In 1861, the Indian High Courts Act was passed by the British Parliament which authorized Her Majesty Queen Victoria by Letters Patent to erect and establish High Courts in the three presidencies which were to .have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same presidency abolished under this Act at the time of abolition of such last mentioned Courts.. Thus, the Supreme Courts and the Courts of Sadar Dewani Adalat and Sadar Nizamat (Faujdari) Adalat were abolished. It is in exercise of powers under the Indian High Courts Act, 1861 that the Letters Patent of 1862 was issued establishing the High Courts in the three Presidency towns of Calcutta, Bombay and Madras. In 1865, the Indian High Courts Act was amended so as to authorize the the Governor General in Council to alter the local limits of jurisdiction of High Courts and to exercise jurisdiction beyond the limits of the Presidency. This is so far as the Presidency towns are concerned.

18. Now coming to the provinces of Punjab and Delhi, it is by an Act by the Governor General of India in Council (Act No.Xxiii of 1865)

that the then Chief Court of Punjab was established and the Provinces of Punjab and Delhi were subject to its jurisdiction. This position continued till the Letters Patent constituting the High Court of Judicature at Lahore dated 21st March 1919 was issued by which the High Court at Lahore was established for the provinces of Punjab and Delhi. The Punjab High Court after 1947, continued to be governed by this Letters Patent and the Union Territory of Delhi continued to be within the jurisdiction of the Punjab High Court. Clause 9 of the Letters Patent conferred extraordinary original civil jurisdiction on the High Court.

19. What is the distinction between the Original Civil Jurisdiction conferred in the Presidency towns and the Lahore High Court? The significant difference is that on the establishment of the Chartered High Court in the Presidency towns there were two kinds of original jurisdiction which were transferred to it — (i) as was being exercised by the Supreme Court in the Presidency towns; (ii) as was being exercised by the Sadar Courts. On the other hand when the Non-Chartered High Courts were established by different Letters Patent including the Lahore High Court it was the second one only which was transferred. The Supreme Courts established in the Presidency towns prior to the establishment of the Chartered High Courts were exercising the ordinary civil jurisdiction in the territories of the Presidency towns while in the Mofussil, the principal Courts of original jurisdiction were the District Courts. It may be added here that on the other hand establishment of City Civil Courts in the Presidency towns, the lower pecuniary jurisdiction from the ordinary civil jurisdiction of the Chartered High Courts came to be vested in those city civil courts.

20. The aforesaid is the reason why there is a difference in the wording of the Letters Patent qua the three Presidency towns, which are almost identical, while on the other hand there are the Letters Patent of the Courts like the Lahore High Court.

21. There is an interesting discussion on this issue in a Division Bench Judgement of this Court in **Shanta Sabharwal Vs. Sushila Sabharwal & Ors.** AIR 1979 Delhi 153, in the opinion rendered by Mr. Justice V.S. Deshpande (Retd.), the then Chief Justice which in turn is based on a Constitution Bench judgement of the Supreme Court in **Aswini Kumar Ghosh Vs. Arabinda Bose** (1953) 4 SCR 1 by the then Chief Justice of India, Mr. Justice M. Patanjali Sastri. The relevant portion is reproduced hereinunder:

"5. After having given earnest consideration to the submission, we find that (1) the decision of the Supreme Court does not change the legal position existing at the time the Full Bench decision was given, (2) additional reasons are found to support those on which the Full Bench decision rested, and (3) even otherwise reference to a larger Bench would not be expedient.

(1) The decision of the Supreme Court in **Shanti Kumar's** case (AIR 1974 SC 1719) does not define the meaning of the word .Judgement. as used in cl.(15) of the Bombay and cl.(10) of the Delhi Letters Patent. It only reaffirms the proposition already established in **Central Bank of India v. Gokal Chand,** AIR 1967 SC 799, that it is only an order which affects the rights and liabilities of parties which can be called a judgement. The uncertainty exists because of the difficulty in drawing the line between an order which is merely procedural and an order which affects any rights and liabilities of the parties. This has been the situation from before the Full Bench judgement as also thereafter and is likely to continue even after the Supreme Court decision.

(2) The view that the maintainability of an appeal against an order of a single Judge of this Court acting in ordinary original jurisdiction is governed by the Code of Civil Procedure and not by the Letters Patent is supported by additional reasons which were not mentioned in the Full Bench decision.

(A) In the **Public Trustee v. Rajeshwar Tyagi,** ILR (1973) 1 Delhi 29. (AIR 1972 Delhi 362), a Division Bench of this Court to which one of us (V.S. Deshpande, J. as he then was) was a party, pointed out the following distinction, namely (i) when a judgement is delivered by a single Judge exercising the jurisdiction inherited from the Punjab High Court under S. 5(1) of the Delhi High Court Act then the appeal against it lies under cl.(10) of the Letters Patent; and (ii) on the other hand, when a single Judge delivers a judgement in exercise of the ordinary original civil jurisdiction obtained by this Court from the Subordinate Court under S. 5(2) of the Delhi High Court Act, then the appeal lies under S. 10(1) of the Act. This position is undisputed. The question that arises is whether the meaning of the word .Judgement. in Section 10(1) of the Delhi High Court Act is the same as that in cl.(10) of the Letters Patent.

(B) As pointed out in **Aswini Kumar Ghosh v. Arabinda Bose,** (1953) SCR 1 : AIR 1952 SC 369), by Sastri, C.J. from page 6 onwards, there is a historical distinction between original jurisdiction exercised by two groups of High Courts in India. This corresponds to the jurisdiction exercised by the Courts preceding these two groups of High Courts. The then Supreme Courts exercised jurisdiction in the Presidency Towns and the then Sudder Courts exercise jurisdiction the Mofussil. When the Supreme Courts and Sudder Courts were abolished on the one hand their two different kinds of original jurisdiction were transferred to what may be called the Non-Chartered High Courts by different Letters Patent which were substantially different from the Letters Patent of the Chartered High Courts. The former Supreme Courts themselves exercised ordinary civil jurisdiction in the Presidency Towns. In the Mofussil, however, the principal Courts of original jurisdiction were the District Courts. The Chartered High Courts succeeding the Supreme Courts in the Presidency Towns obtained an ordinary original civil jurisdiction till then exercised by the Supreme Courts. This continued till city Civil Courts were established in the Presidency Towns taking away the lower pecuniary jurisdiction from the ordinary civil jurisdiction of these Chartered High Courts in the Presidency Towns. A challenge to the validity of the Bombay City Civil Courts Act was negatived by the Supreme Court in the **State of Bombay v. Narottamdas Jethabhai,** AIR 1951 SC 69. It is significant to note that the ordinary civil jurisdiction was possessed by the Supreme Courts and the Chartered High Courts from the very beginning. Later, a part of it was transferred to the City Civil Courts which corresponded to the District Courts in the Mofussil."

Amicus Curiae Plea:

22. We may note that Mr. A.S. Chandhiok, learned ASG appointed as Amicus Curiae in this matter, emphasised this distinction between the Letters Patent issued qua the Chartered High Courts and the Non-Chartered High Courts. This distinction is premised on the existence of the ordinary civil jurisdiction being always possessed by the Supreme Court and thereafter by the Chartered High Courts from the very inception. Thus, the High Courts established outside the Presidency towns inherited only

the appellate jurisdiction of the Sadar Courts while the principal Courts of original jurisdiction continued to be the District Courts. This is the reason why the Letters Patent of the Chartered High Courts containing clauses 11 & 12 prescribed the local limits of ordinary original civil jurisdiction (clause 11) and conferring the said ordinary original civil jurisdiction on the Chartered Courts (clause 12). There are no corresponding provisions in the Letters Patent of the other High Courts to these clauses. Clause 13 refers to the Extraordinary Original Civil Jurisdiction of the High Courts which was exercised when the suits were transferred from District Courts to the High Courts while clause 15 refers to powers conferred of appeal on the High Courts over the decision of a Judge of the High Court. These appeals under Clause 15 came from two different jurisdictions - (i) ordinary original civil jurisdiction which existed from the inception of the Chartered High Courts inherited from the then Supreme Courts, and (ii) the extraordinary original civil jurisdiction which is not really an original jurisdiction. Thus, in the case Non-Chartered High Courts when a suit was transferred from a subordinate Court to a Non-Chartered High Court such a High Court could try the suit in its original civil jurisdiction."

23. It was the submission of the learned ASG that the Letters Patent of other High Courts did not give any ordinary original civil jurisdiction to these Courts because none was inherited from the Sadar Courts. The extraordinary civil jurisdiction was possessed by the Non-Chartered High Courts because every High Court had the power to transfer to itself a suit from a subordinate court within its territorial jurisdiction.

24. It was, thus, the submission of the learned ASG that clause 10 of the Letters Patent as applicable to Delhi can be invoked before the Division Bench only from such of the decisions of the learned Single Judge which were given in the suits transferred from the subordinate courts in case of Non-Chartered High Courts as the question of any appeal under the said provisions from High Courts did not possess ordinary original civil jurisdiction. This is stated to be so despite the fact that clause 10 of the Letters Patent of the Non-Chartered High Courts including the High Court of Lahore was phrased in the same language as clause 15 of the Letters Patent of the Chartered High Courts.

25. It would be appropriate to notice at this stage that a Full Bench of this Court in **C.S. Agarwal & Ors. Vs. State & Ors.** 2011 VII AD (Delhi) 265 while dealing with the issue of maintainability of LPA in

respect of writ orders passed in quashing proceedings/criminal proceedings has discussed the scope of Section 5 read with Section 10 of the said Act. After extracting the provisions it opined as under:

> "6. In addition to the appeals that can be filed under Section 10 of the DHC Act, three more categories of appeals lie to this Court. Thus the following four categories constitute appellate jurisdiction of the Delhi High Court:
>
> a. Firstly, appeals under Section 10 of the DHC Act but they are limited only to those judgments referable to Section 5(2) thereof.
>
> b. Secondly, appeals under the Code of Civil Procedure.
>
> c. Thirdly, appeals under different statutes, which itself provides for an appeal.
>
> d. Fourthly, appeals under Clause 10 of the Letters Patent."

26. To complete the narration we reproduce clause 10 of the Letters Patent which reads as follows:

> "10. Appeals to the High Court from Judges of the Court - And we do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the Superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of Superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant of Section 108 of the Government of India Act, made on or after the first day of February, one thousand nine hundred and twenty-nine in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court

subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or Successors in our or their Privy Council, as hereinafter provided."

27. Learned ASG sought to make appropriate distinction between exercise of ordinary original civil jurisdiction and extraordinary civil jurisdiction that the appeal under Section 10 (1) of the said Act would lie from an order passed in exercise of the ordinary original civil jurisdiction while clause 10 of the Letters Patent would apply in case of exercise of extraordinary original civil jurisdiction by the writ court.

28. The question as to the maintainability of appeals from orders passed by a learned Judge exercising ordinary original civil jurisdiction which are not appealable under Order 43 Rule 1 of the said Code has been examined by the Supreme Court in **Shah Babulal Khimji Vs. Jayaben D. Kania** (1981) 4 SCC 8. An appeal was held to be maintainable if the order was within the meaning of .judgement.. If the order purports to decide valuable rights of parties and what are called the orders of the moment, an appeal was held to be maintainable if it is not categorized in the nature of an order which is appealable under Order 43 Rule 1 of the said Code. The expression .judgement. has been held to be capable of taking three different characters. It may be a final judgement, it may be a preliminary judgement or it may be an intermediary or interlocutory judgement. The third category are cases which possess characteristics and trappings of finality and may have direct and immediate effect rather than an indirect or remote one. It is against such orders also that an appeal has been held to be maintainable while discussing the scope of clause 15 of the Letters Patent of the Chartered High Courts as the case emanated from the Bombay High Court. As noticed aforesaid that clause 10 of the Letters Patent of Lahore as applicable to Delhi is distinct on view of the absence of any ordinary original civil jurisdiction in the High Court Judicature at Lahore, not being a Presidency town.

29. The divergent view emanating in this Court including the observations of the Supreme Court has been discussed in the order of reference dated 17.4.2012 as under:-

"The subsequent pronouncements referred to the earlier Full Bench decisions in **University of Delhi Vs. Hafiz Mohd.** 1972 AIR

Del 102 and **Union of India Vs. A.S. Dhupia** AIR 1970 Delhi 108 to hold that they were no more good law in view of the judgement in **Shah Babulal Khimji** case (supra). The said judgement was held to have been impliedly over-ruled in **Jawahar Engineering Co. Vs. Jawahar** AIR 1984 Delhi 129. The Supreme Court in **Jugal Kishore Paliwal Vs. S. Satjit Singh** (1984) 1 SCC 358 expressly over-ruled the Full Bench decision of the Delhi High Court in **University of Delhi Vs. Hafiz Mohd.** case (supra).

The Division Bench of this Court in **Abdul Hamid Vs. Charanjit** 60 (1995) DLT 847, however, held that the appeal against an order passed by the learned single Judge on the Original Side was maintainable under Clause 10 of the Letters Patent of the Court. This according to the learned ASG was the beginning of divergence on this aspect. Similarly in **Jindal Exports Ltd. Vs. Furest Day Lawson** 1999 (51) DRJ 170 a Division Bench held that an LPA would be maintainable against an order passed under the Arbitration Act, 1940 in view of Clause 10 of the Letters Patent. The subsequent Division Bench judgement in **R.K. Sharma Vs. Ashok Nagar Welfare Association** AIR 2001 Del 272 inter-changeably used the expression of Clause 10 of the Letters Patent and Section 10(1) of the said Act to say that the appeal would be maintainable in view of these two provisions read together. The same is the reasoning in **Sahil Singh Vs. Harpreet Singh** 118 (2005) DLT 350, **Crocodile Vs. Lacoste** 2008 (100) DRJ 547 and **Magotteaux Industries Pvt. Ltd. & Ors. Vs. AIA Engineering Ltd.** 155 (2008) DLT 73.

In **Jyotika Kumar Vs. Anil Soni** 156 (2009) DLT 685 an appeal against an order dismissing an application under Order 7 Rule 11 of the said Code has been held to be maintainable in view of **Shah Babulal Khimji** case (supra) and in relation to the Arbitration Act, the matter has been examined in **Jindal Exports Vs. Furest Day Lawson** AIR 2010 Del 135."

Conclusion:

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.

32. The establishment of the ordinary original civil jurisdiction in the Delhi High Court is a sequitur to the statutory provisions of the said

Act. It is in terms of Section 5 (2) of the said Act that ordinary original civil jurisdiction was conferred on the Delhi High Court for suits exceeding Rs.25,000.00 (now the limit is Rs.20.00 lakh). When such ordinary original civil jurisdiction is, thus, exercised by a learned Single Judge of this Court, the appeal is provided for under Section 10 (1) of the said Act. Sub-Section (2) of Section 10 of the said Act has been made subject to the provisions of sub-section (1), and provides that 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 would apply in relation to the High Court of Delhi.

33. It is in respect of the aforesaid prevalent legal position that consequences of the Supreme Court judgement in **Shah Babulal Khimji** case (supra) have to be examined. The apex court examined the issue whether any appeal can arise from exercise of ordinary original civil jurisdiction by the learned Single Judge if it is not an appealable order under Section 104 read with Order 43 Rule 1 of the said Code. The judgement in **Shah Babulal Khimji** case (supra) thereafter proceeded to discuss the nature of judgements and orders which may flow from the pen of the learned Single Judge while exercising ordinary original civil jurisdiction. It is in this context that the labels of final judgement, preliminary judgement and an intermediary or interlocutory judgement were given. The final judgement was one by which the suit or action brought by the plaintiff is dismissed or decreed in part or full. On the other hand, a preliminary judgement is said to have two forms, i.e., where a suit may be dismissed on preliminary objections raised by the opposite party or the preliminary objections are decided in a manner where the view taken would result in non-termination of the suit and the suit is to be tried on merits but the rejection of the preliminary objections adversely affects a valuable right inasmuch as it defers the right to get the suit terminated on a preliminary ground. Lastly, intermediary or interlocutory judgements are of the nature which may not be an interlocutory order within the meaning of Order 43 Rule 1 of the said Code but possess the characteristics and trappings of finality and is treated as a judgement. Of course here a reference has been made to the definition of a 'judgement' within the meaning of Letters patent so as to be appealable to a larger Bench.

34. An important aspect is that the aforesaid discussion takes place in the context of Clause 15 of the Letters Patent of the Bombay High

Court. As explained aforesaid there is a distinction between Clause 15 of the Letters Patent of the Bombay High Court and Clause 10 of the Letters Patent as applicable to Delhi inasmuch as the Lahore High Court never enjoyed the original jurisdiction, only the appellate jurisdiction having been conferred on it from the Sadar Courts upon its establishment.

35. We are of the view that principles enunciated in Shah Babulal Khimji case (supra) as to what would constitute an appealable judgement/ order must equally apply to Section 10 of the said Act so that if an order, which is not an appealable order under the said Code, but otherwise satisfies the tests as laid down in Shah Babulal Khimji case (supra), in other words effects vital and valuable rights or, is an order which, decides matters of moment; the remedy of appeal to the Division Bench would equally be available.

36. In **Shanta Sabharwal** case (supra) the Division Bench of this Court while placing reliance on the judgement of the Supreme Court in Aswini Kumar case (supra) referred to the distinction drawn between the powers conferred under Section 5 (1) and Section 5 (2) of the said Act. In this behalf the judgement in **Public Trustee** case (supra) of a Division Bench of this Court was relied upon which observed that when a judgement is delivered by a Single Judge exercising the jurisdiction inherited from the Punjab High Court under Section 5 (1) of the said Act then the appeal against it lies under Clause 10 of the Letters Patent and on the other hand, when a Single Judge delivers a judgement in exercise of the ordinary original civil jurisdiction obtained by this Court from the Subordinate Court under Section 5 (2) of the said Act, then the appeal lies under Section 10 (1) of the said Act. Thereafter it proceeded to refer to the meaning of the word .judgement. under Section 10 (1) of the said Act and Clause 10 of the Letters Patent and emphasised the historical distinction between the original jurisdiction exercised by the two groups of High Courts, i.e., the Chartered High Courts and the Non-Chartered High Courts.

37. Learned Amicus Curiae rightly pointed out, as referred to in the order of reference, that in view of judgement in **Shah Babulal Khimji** case (supra) the earlier judgements on maintainability of the appeal from non-appealable orders was held not to be good law [**Jawahar Engineering Co.** case (supra) and the Supreme Court in **Jugal Kishore Paliwal** case (supra) expressly over-ruled the Full Bench decision of the **Delhi High Court in University of Delhi Vs. Hafiz Mohd.** case (supra)]. However,

in **Abdul Hamid** case (supra) an appeal against the order passed by the learned Single Judge on the original side was held maintainable under Clause 10 of the Letters patent which was the beginning of the divergence on this aspect and some subsequent judgements inter-changeably used the expression of Clause 10 of the Letters Patent in Section 10 (1) of the said Act to conclude that the appeal would like under one provision or the other losing significance of the distinction between the Letters patent of the Chartered High Courts like Bombay as compared to the Non-Chartered High Court of Lahore.

38. It is only in the recent judgement in **C.S. Aggarwal** case (supra) while examining the maintainability of the LPA in respect of writ orders passed in quashing proceedings/criminal proceedings that a Full Bench of this Court through the then Acting Chief Justice (Arjan K. Sikri, J.) has emphasised the four kinds of appellate jurisdiction being exercised in the Delhi High Court as set out in para 25 above. The first category has been stated to be appeals under Section 10 (1) of the said Act limited to judgements referable to Section 5 (2) thereof while the second one are appeals under the said Code. The third and fourth are the appeals under different statutes and Clause 10 of the Letters Patent respectively.

39. We, thus, conclude by laying down the following principle of law:

> *In case of an order passed by the learned Single Judge in exercise of ordinary original civil jurisdiction in case of a non-appealable order under Section 104 read with Order 43 of the said Code which meets the test of a "judgement" that decides matters of moment or affects vital and valuable rights of parties and which works serious injustice to the parties concerned as per the parameters laid down in* ***Shah Babulal Khimji*** *case (supra) by the Supreme Court, an appeal to the Division Bench would exclusively lie under Section 10 of the said Act and not under Clause 10 of the Letters Patent.*

40. The reference is answered accordingly.

41. The matter be now placed before the Division Bench as per roster for directions on 16.1.2013.